Bill C-510 and the Dilemma of Difference: Assessing the Role of Anti-Violence Legislation in the Woman-Protective Anti-Abortion Movement

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Recently, some in the anti-abortion movement have begun to assert that abortion harms women and access to abortion should be restricted or prohibited to protect women’s rights. This paper suggests that woman-protective anti-abortion ("WPA") arguments could become more recognizable in Canada if other kinds of woman-protective legislation are adopted. In particular, this paper focuses on private member’s Bill C-510, an Act to Prevent Coercion of Pregnant Women to Abort (Roxanne’s Law). This paper suggests that Bill C-510 is problematic because its differential treatment of women reinforces historical stereotypes of motherhood and female vulnerability, the same stereotypes upon which the WPA relies. By reinforcing these same stereotypes, Bill C-510 creates a climate in which WPA restrictions on access to abortion appear more reasonable. The paper concludes by suggesting that the existing aggravated circumstances sentencing sections in the Criminal Code already provide judges with discretionary powers to deal with offences like coerced abortion.
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# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>I. History of the Anti-Abortion Movements: From ‘Pro-Life’ to ‘Pro-Woman’</td>
<td>6</td>
</tr>
<tr>
<td>‘Pro-Life’ vs. ‘Pro-Choice’: History of the Competing Rights Abortion Debate</td>
<td>7</td>
</tr>
<tr>
<td>The Emergence of the Woman-Protective Anti-Abortion Argument</td>
<td>22</td>
</tr>
<tr>
<td>II. Bill C-510</td>
<td>34</td>
</tr>
<tr>
<td>Bill C-510: An Act to Prevent Coercion of Pregnant Women to Abort (Roxanne’s Law)</td>
<td>38</td>
</tr>
<tr>
<td>Other Constitutional Issues: Concerns of a ‘Pro-Life’ Motive</td>
<td>42</td>
</tr>
<tr>
<td>Bill C-510 and Protecting Women’s s. 7 Decision-making Rights</td>
<td>48</td>
</tr>
<tr>
<td>III. Dealing with the Differential Treatment of Women in Law</td>
<td>54</td>
</tr>
<tr>
<td>Constitutional Treatment of the ‘Dilemma of Difference’: Guaranteeing Equality in Differential Treatment</td>
<td>57</td>
</tr>
<tr>
<td>IV. Bill C-510 and the Woman-Protective Anti-Abortion Movement: Creating a Climate of ‘Protection’</td>
<td>76</td>
</tr>
<tr>
<td>Creating the ‘Abortion Trauma’: Bill C-510’s Reproduction of the Mother Stereotype</td>
<td>77</td>
</tr>
<tr>
<td>Denying Women’s Capacity: Bill C-510’s Reproduction of Capacity Based Gender Stereotypes</td>
<td>91</td>
</tr>
<tr>
<td>V. Confronting the Feminist Dilemma of Difference: An Alternative Legal Strategy</td>
<td>111</td>
</tr>
<tr>
<td>Conclusion</td>
<td>122</td>
</tr>
<tr>
<td>Bibliography</td>
<td>124</td>
</tr>
</tbody>
</table>
Introduction

The status of abortion has been the subject of philosophical and religious debate for at least 5000 years.¹ Most Canadians are familiar with both sides of the debate: ‘pro-life’ efforts have generally advocated for the abolition or restriction of abortion to protect the ‘life’ of the fetus and ‘pro-choice’ efforts have generally advocated for access to abortion to protect women’s rights to autonomy and health. More recently, however, the traditional ‘pro-life’ arguments have been increasingly ignored in Canada and in the United States in large part because of the ‘pro-life’ movement’s failure to respond to women’s rights concerns.² In response, some in the anti-abortion movement have begun to shift their anti-abortion advocacy efforts; instead of arguing exclusively for the fetal ‘right to life,’ these abortion opponents also assert that abortion harms women and access to abortion should be restricted or prohibited to protect women’s rights. Anti-abortion groups in both Canada and the United States have begun incorporating these woman-protective anti-abortion (‘WPA’) claims into their anti-abortion platforms. In the United States, this advocacy has seen some political success. In South Dakota, WPA arguments were the basis for abortion bans tabled in both 2006³ and 2008.⁴ These bans were only

² Reva Siegel, “Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart” (2007-2008) 117 Yale L.J. 1694 at 1715 [Siegel, “Dignity”]. Siegel suggests that the American ‘pro-life’ anti-abortion movement became increasingly unable to persuade a significant portion of the population that it was sensitive to women’s rights claims. Evidence discussed below suggests that one can make similar claims about the Canadian experience.
³ U.S., H.B. 1215, An Act to establish certain legislative findings, to reinstate the prohibition against certain acts causing the termination of an unborn human life, to prescribe a penalty therefore, and to provide for the implementation of such provisions under certain circumstances, 2006, 81st Sess., S.Dak., 2006 (repealed 2006).
⁴ U.S., H.B. 1293, An Act to refer to a vote of the people a bill to regulate the performance of certain
narrowly defeated in referendum. Similarly, in the 2007 case *Gonzales v. Carhart*, the Supreme Court of the United States upheld a state ban on a particular kind of abortion in part on WPA grounds.

In Canada, we have not experienced the same influx of WPA arguments in law. There are no examples of woman-protective abortion bans like those tabled in South Dakota, nor have we had judicial recognition of the WPA argument like that in *Carhart*. This is likely in part due to the de-politicization of abortion in Canada; in the United States, abortion remains a highly partisan issue that is included in many politicians’ platforms and thus remains an active area for lobbying and reform. The federal criminal powers in Canada have also meant that the only entry point for criminal abortion legislation is at the federal level; unlike the United States, provinces cannot legislate criminal laws on abortion.

Some might also suggest that the WPA has not entered Canadian law because the claims are too radical and too scientifically questionable to be taken seriously in

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8 See generally *Carhart*, supra note 6.

9 Raymond Tatalovich, *The Politics of Abortion in the United States and Canada* (Armonk, N.Y.: M.E. Sharpe, 1997) at 144. See the remainder of that chapter for discussions about the possible reasons that abortion is politicized in the Untied States, but not in Canada.

10 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(27), reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution, 1867*].
Canada’s more moderate political climate. However, this paper suggests that WPA arguments could become more socially and politically recognized if other kinds of woman-protective legislation are adopted in Canadian law. In particular, this paper considers how recent anti-violence-against-pregnant-women initiatives may be creating a climate in which WPA arguments are more sympathetic. When this legislation is considered in the context of the more draconian initiatives like those in the United States, similarities emerge in the underlying rationale behind the violence-against-pregnant women initiatives and WPA claims – mainly, the glorification of motherhood and the undermining of women’s capacity for judgment. By paying attention to these similarities, we can see how even legislation that does not purport to regulate abortion can help create a climate that is more favourable to restrictions on access to abortion because it reinforces the kinds of stereotypes about women that ground more restrictive regimes.

This paper focuses on private member’s Bill C-510,\textsuperscript{11} an \textit{Act to Prevent Coercion of Pregnant Women to Abort (Roxanne’s Law)}, as an example of anti-violence-against-pregnant-women legislation that may contribute to a legal climate in which WPA claims are more recognizable. The Bill’s first reading in parliament was on April 14, 2010. Unlike the WPA laws in the United States, Bill C-510 does not purport to protect women from all abortions; instead, it purports to protect pregnant women from coerced abortion. Using Bill C-510 as an example, I develop a framework for considering the way in which seemingly positive laws like Bill C-510 help create a political and legal climate in which WPA claims are cognizable. Drawing from longstanding feminist arguments about the problems with laws that impose differential treatment upon women, I suggest that Bill C-

\textsuperscript{11} Bill C-510, \textit{An Act to amend the Criminal Code (coercion)}, 3\textsuperscript{rd} Sess., 40\textsuperscript{th} Parl., 2010 (first reading 14 April 2010).
510 is problematic because its ‘protection’ of women reinforces historical ‘stereotypes of difference;’ mainly, stereotypes of motherhood and female vulnerability. These are stereotypes that have historically been used to limit women’s autonomy and, more recently under the WPA movement, to limit women’s access to abortion. By reinforcing the same stereotypes upon which the WPA relies, Bill C-510 therefore creates a climate in which WPA restrictions on access to abortion seem more reasonable. Only by seriously considering the way in which Bill C-510’s differential treatment of women operates in the context of gender stereotyping can we understand the way in which laws like Bill C-510 create a climate in which WPA claims are possible.

The paper is divided as follows. Chapter I of the paper provides a history of the anti-abortion movement, including the recent rise in WPA arguments. Chapter II introduces the text of Bill C-510, the questionable ‘woman-protective’ anti-violence initiative. Constitutional problems such as vagueness and the use of fetal-rights language have been the focus of critics thus far. If these problems were removed, however, the Bill might appear woman-positive: Bill C-510 purports to protect one aspect of a decision of fundamental importance that is protected by s. 7 of the Charter, mainly, the right to decide to continue or terminate a pregnancy.

Chapter III places the Bill’s ‘protections’ within the broader feminist debate of

12 Jeannie Suk has also done work on the WPA and the role that feminism’s historical focus on women’s bodies as traumatized has played in creating a climate where WPA claims are legally recognizable. See generally Jeannie Suk, “The Trajectory of Trauma: Bodies and Minds of Abortion Discourse” (2010) 110 Colum. L. Rev. 1193. This paper makes a different claim: instead of suggesting that feminism is responsible for the receptivity of the WPA, I suggest in this paper that woman-protective initiatives like Bill C-510 that support the stereotypes upon which the WPA relies increase the legal receptivity of the WPA claim. Thus, I do not suggest that feminism is to blame, but that problematic laws that appropriate the feminist ‘woman-protective’ claim but in fact reinforce gender stereotyping are to be scrutinized for creating space for the WPA in Canada.

the ‘dilemma of difference.’ Feminists have long recognized that laws that address women’s unique concerns through differential treatment can be problematic if those laws reinforce stereotypes of difference. I first consider how our Charter requires us to ensure that differential treatment of women be applied in a manner that guarantees women’s equality rights; in particular, s. 28 requires that all Charter rights be guaranteed in a gender equal manner.\footnote{Charter, supra note 13 at s. 28.} I then use the example of the case \textit{R v. Lavallee}\footnote{R. v. Lavallee, [1990] 1 S.C.R. 852, 67 Man. R. (2d) 1 [Lavallee cited to S.C.R.].} and the feminist analyses of the aftermath of the decision to provide a framework for determining when woman-protective laws fail this standard; in other words, when the differential treatment of women violates women’s equality rights.

In Chapter IV, I apply this framework to Bill C-510 by considering how the Bill’s ‘protections’ are framed to reinforce traditional gender stereotypes about women: specifically, stereotypes about women’s maternal nature and women’s incapacities. By reinforcing these stereotypes in the context of abortion, I suggest Bill C-510 creates a climate in which WPA claims seem more reasonable: Bill C-510 reinforces the idea that pregnant women are ‘mothers’ who are traumatized by abortion and that pregnant women have decreased capacity with respect to reproduction decision-making. These ideas create space for WPA arguments that women need state ‘protection’ from the abortion decision.

Chapter V concludes the paper by considering how governments can provide gender-specific protections to pregnant women without creating a climate of support for WPA claims. It seems clear from abortion advocates’ commentary and the work done in this paper that Bill C-510 is not a ‘woman-positive’ Bill; however, lawmakers may in the
future wish to develop permissible means of protecting pregnant women from violence. I suggest that current *Criminal Code* provisions that consider aggravating factors in sentencing already provide judges with the discretion to account for offences that involve coercive reproductive control of women. By locating protections of pregnant women within the aggravating sentencing sections of the *Criminal Code*, we focus criminal attention on the discriminatory motives of crimes against women, rather than focusing on pregnant women’s ‘differences’ that require special protection.

I. History of the Anti-Abortion Movements: From ‘Pro-Life’ to ‘Pro-Woman’

The following section considers the history of the anti-abortion movement in Canada and the United States. This ranges from early ‘pro-life’ fetal protection anti-abortion arguments to ‘woman-protective’ anti-abortion (“WPA”) arguments that are becoming more prominent today. The purpose of this section is to trace the origins of WPA arguments and illustrate how they have been used to limit women’s access to abortion. The remainder of the paper considers how the recent anti-violence-against-woman Bill C-510\(^\text{16}\) fits within this emerging WPA movement: by supporting the same stereotypes that have historically been used by the WPA to limit women’s reproductive freedom, Bill C-510 contributes to a legal climate in which WPA arguments resonate.

\(^{16}\) Bill C-510, *supra* note 11.
‘Pro-Life’ vs. ‘Pro-Choice’: History of the Competing Rights Abortion Debate

The abortion debate that most people are familiar with is a competing rights debate: ‘pro-life’ groups argue that the fetus is a human with a right to life and that abortion is wrong because it results in the death of the fetus. ‘Pro-choice’ groups argue that women’s rights to autonomy and self-determination include a right to access abortion.17 Thus, in the traditional abortion debate, fetal rights against abortion are balanced against women’s rights to abortion. The following section illustrates how this competing rights debate emerged, beginning with fetal ‘right to life’ claims within the Catholic Church. Eventually, a competing claim about women’s interest in abortion emerged. Abortion was recognized by both women and the public as an important tool in women’s reproductive control and, thus, in their emancipation. It is within this framework that the ‘pro-life’ and ‘pro-choice’ movements mobilized, solidifying the competing rights abortion debate that most people are familiar with today.

An Ancient Debate: Early Abortion Regulation

Perhaps surprisingly, the ‘right-to-life’ argument that abortion at all stages of pregnancy is murder is a relatively new idea developed in the middle of the nineteenth century. The fetus has most often been the focus of debates surrounding abortion, but the characterization of the fetus and justifications for its protection has varied.18 The

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17 In this paper, I use the terms ‘pro-life’ and ‘pro-choice’ to describe the social movements with those names. These terms are products of political framing by each movement; therefore, I do not use these terms as descriptions of legal arguments opposing or supporting access to abortion. My use of these terms is limited to describing the social movements from which they developed.

18 Some feminists have also objected to abortion on women’s rights grounds and well as fetal-rights claims.
Pythagoreans of ancient Greece held that abortion was problematic because the fetus was the ‘moral equivalent’ of the child that it would become.\(^{19}\) Aristotle believed that abortions were permissible if performed before the fetus had ‘life’ in order to prevent certain social problems, such as poverty.\(^{20}\) Within the Roman Empire, however, the practice of abortion has been suggested to have been widespread. The regulation of abortion within the Roman Empire was based on property rights, reflecting the belief that the potential child was the property of the parents, particularly the father.\(^{21}\) The varying treatment of abortion and the legal and moral status of the fetus illustrates that there was little consensus in ancient times about abortion. Interestingly, the treatment of the fetus as a human with a right to life at all stages during pregnancy is largely absent among these early teachings.

Some suggest that it was not until the advent of Christianity and the rise of the Catholic Church that the regulation of abortion in terms of fetal ‘right to life’ arguments began to take form.\(^{22}\) Within Ecclesiastical law, there was a general belief that the fetus became ‘alive’ when it became a ‘formed embryo’ and gained a human soul. Eventually, there was some consensus that the fetus gained a soul at the stage of ‘quickening,’ the


\(^{20}\) Tom Campbell, “Abortion Law Reform in Canada,” 42 Sask. L. Rev. 221 at 222, citing *Politica* ii 6, 1265.

\(^{21}\) Tom Campbell, *ibid.* at 222.

point at which the pregnant woman first feels fetal movement.\textsuperscript{23} This usually occurs between the fourth and fifth month of pregnancy.\textsuperscript{24} Thus, what we would now consider first trimester abortions were likely permissible under Catholic moral theology and canon law.\textsuperscript{25} This Christian view of abortion was eventually incorporated into English common law.\textsuperscript{26}

Up until the 19\textsuperscript{th} century, therefore, under the common law it was legal for women in Canada to have abortions prior to quickening.\textsuperscript{27} It was not until the early nineteenth century that legislation was enacted in some parts of Canada that explicitly prohibited the practice of abortion.\textsuperscript{28} The legislation prohibited abortion both before and after quickening, but different penalties applied.\textsuperscript{29} By the 1850’s, the quickening distinction had been dropped in most jurisdictions, and abortion at any stage of pregnancy was a single offence with a maximum penalty of life imprisonment.\textsuperscript{30} Historian James C. Mohr suggests that the abandonment of the quickening distinction

\begin{footnotesize}
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\item Mohr, supra note 1 at 3.
\item Mohr, supra note 1 at 3.
\item Luker, supra note 19 at 13.
\item Ibid.
\item In 1803, the Lord Ellenbourough’s Act (43 Geo. III Ch.58.) was introduced in England that criminalized abortion. Some jurisdictions in Canada followed Britain’s lead, with both New Brunswick (in 1810) and Prince Edward Island (in 1836) enacting duplicate legislation. No other Canadian provinces enacted abortion legislation at this time, so the common law quickening distinction still applied (Backhouse, ibid. at 64-65).
\item Those who procured abortions after quickening faced the death penalty, whereas those who procured abortions prior to quickening faced a fine, imprisonment, whipping or exile (Backhouse, ibid. at 65).
\item Backhouse, ibid. at 70-71: In Britain, the quickening distinction was dropped in 1837 under the Offences Against the Person Act (7 Will. IV & I Vict., Ch. 85). In 1841, Upper Canada followed Britain’s lead with a Canadian Offences Against the Person Act, which made abortion at any time in the pregnancy a single offence. New Brunswick also eliminated the quickening distinction in 1842, and in 1859, the Upper Canada Act was extended to Lower Canada. The offence for this new abortion offence was life imprisonment, rather than the prior capital punishment for abortion after quickening and two years imprisonment for abortion before quickening. Only Newfoundland adopted the English amendment, with its more lenient punishment. P.E.I.’s statute remained unchanged, continuing to make the quickening distinction.
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was at least in part due to an increasing commitment to scientific medicine. At the time, physicians began suggesting that pregnancy was a continuous process of development, making the quickening distinction arbitrary. Consequently, by the 1850’s ‘fetal life’ had become protected at all stages of pregnancy by criminal law. By 1892, laws criminalizing abortion were codified in the federal *Criminal Code*. This absolute prohibition on abortion remained substantially unchanged until the *Criminal Code* amendments of 1969.

**Health and Life Exceptions: the Case of ‘Lawful’ Abortion, 1892-1940**

By the time the 1892 *Criminal Code* of Canada was adopted, the quickening distinction had been erased and abortion was illegal at all stages of pregnancy. During this time, however, there was also growing alarm among some in the medical and legal communities that there was no exception for abortions performed to protect the pregnant woman’s health or life. At the beginning of the twentieth century, therefore, a pushback against fetal protection laws emerged in the name of protecting women’s interests in health and life. The culmination of these efforts would result in the 1969 amendments to the *Criminal Code* and, eventually, the striking down of the abortion provisions in 1988. During this time, abortion was transformed from a problem of fetal rights to an issue of women’s reproductive freedom and emancipation. It was within this environment that the modern abortion debate was shaped into a competition between fetal right-to-life

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33 Campbell, *supra* note 20 at 224.
claims and women’s right-to-choice claims.

Although the 1892 *Criminal Code* abortion provisions provided no explicit defence for performing an abortion, the use of the term ‘unlawful’ implied that there might be situations in which abortion could be ‘lawful.’ Section 272 and section 273 of the 1892 *Criminal Code* established that the ‘unlawful’ administration of drugs or ‘unlawful’ use of an instrument to procure an abortion at any time in pregnancy was a criminal offence.\(^{34}\) Which abortions would be ‘lawful,’ however, remained unclear. In 1909, a Superior Court judge in *Re. McCready* stated that abortions conducted to save the life of a pregnant woman were likely ‘lawful,’ but this was noted *obiter dictum* and thus did not have any precedential power.\(^{35}\) Despite the lack of a clear indication of what constituted a ‘lawful’ abortion, medical journals at the time were replete with references to lawful therapeutic abortions, indicating that there was widespread belief within the medical community that physicians could legally perform abortions when they deemed them medically necessary.\(^{36}\) There was no clear consensus, however, on what those

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\(^{34}\) *Criminal Code, 1892, supra* note 32, s. 272 & s. 273.


\(^{36}\) For example, Backhouse, *supra* note 27 at 115-117, identified several medical journal articles from the late 1800’s that illustrate the ‘therapeutic abortions’ were accepted as a legitimate medical procedure. For example, in an 1881 *Canada Lancet* article, at a time when abortion had been criminalized at all stages in pregnancy for both those performing abortion and the pregnant women receiving them, there appeared an article titled “Induction of Abortion as a Therapeutic Measure” ((1881) 13 Canada Lancet 342 [“Induction”, Canada Lancet]. The article listed situations where abortion would be ‘lawful’, including situations where it was necessary to save the life of the pregnant woman or when the fetus was unlikely to survive the birth. (above, “Induction”, Canada Lancet at 343). In 1899, another *Canada Lancet* article noted, ”In any any [sic] disease of a woman which is aggravated to so great a degree, because of pregnancy, as to endanger her life, and which cannot be remedied so that she may live after labour, induced abortion should be considered in her interest” (W.C. Bowers, “Justifiable Artificial Abortion and Induced Premature Labour” (1899) 32 Canada Lancet 113). The legality of these therapeutic abortions is even discussed in the medical journals; physicians were advised that to ensure the legality of the abortion procedure, physicians should never perform a therapeutic abortion without consulting two or more other physicians or, sometimes, without making a legal declaration to the public prosecutor as to the legal reason for providing the abortion (above, “Induction”, Canada Lancet at 343). These articles seem to suggest that physicians at the turn of the century were staunchly opposed to abortions when women used it as a means of controlling fertility, but were willing to perform abortions for reasons that they deemed acceptable (i.e.
situations were.

A common-law defence to abortions conducted to save the health or life of a pregnant woman was adopted in Britain in the 1938 test case *Rex v. Bourne*. This defence spread to other common-law jurisdictions like Canada. With the consent of her parents and for no fee, Dr. Bourne performed an abortion on a 14 year-old girl who had been violently raped by four men. Dr. Bourne reported the abortion to authorities, making *Bourne* a test case for the ‘lawful’ abortion defence. In the case, Justice Macnaughten advised the jury that there was a good faith exception to save the life of the pregnant woman in the case of abortion. From this case emerged what became known as the ‘*Bourne* defence’ for abortion; it was a common-law defence to criminal abortion charges in situations where the pregnant woman’s life (or health, depending on the interpretation) was endangered by the pregnancy. Although arising out of a British case, this common-law defence to criminal abortion spread to other jurisdictions, including Canada. Thus, abortion was likely ‘lawful’ at common-law in Canada during the mid-twentieth century if it was done to protect the health or life of the pregnant woman. Although the *Bourne* defence may appear to have loosened the restrictions on abortion in Canada, evidence would suggest that *Bourne* simply reflected the reality of the practice of therapeutic abortion in Canada at the time; even before the *Bourne* decision, physicians felt they had

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the power to perform abortions when they deemed them medically necessary. The Bourne defence and common medical thought, women’s interests in abortion were increasingly being recognized.

The Rise of Women’s Rights: 1940-1973

Even though the Courts in England had confirmed a common-law defence to abortion in situations to save a woman’s life in the Bourne decision, Canada still lacked a statutory defence. In addition, in 1953, the abortion provisions of the Canadian Criminal Code were amended to remove the word ‘unlawfully,’ making Bourne’s ‘lawful’ abortion defence questionable. Thus, women’s ability to obtain an abortion in Canada still depended on the discretion of physicians and legal ambiguity. If no physician was willing to provide an abortion, women in Canada had to resort to illegal abortions.

Despite the ongoing incidence of illegal abortion in the early 20th century, the call for reform did not come until much later, leaving a long period of silence on the question of abortion. It was not until the late 1950’s that agitation for reform emerged. In Canada, some suggest that the catalyst for change was a 1959 Chatelaine article by Joan

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39 See supra note 36 for discussion regarding medical journals from the late 1800’s that illustrate that ‘therapeutic abortions’ physicians felt they had the authority to perform abortions when ‘medically necessary’.

40 Campbell, supra note 20 at 229.

41 See Luker, supra note 19 at 41, where she suggests that the 19th century struggle by physicians to have abortion criminalized and only permitted when physicians believed they were necessary had transformed abortion into a medical issue over which physicians exercised absolute control. This helps explain why such a long period of time lapsed in the early twentieth century without calls for abortion reform. Physicians were the only ones viewed as capable of making objective decisions regarding abortion and, consequently, it was difficult during this time to raise non-medical arguments (like those on economic, social or feminist grounds) against the criminal laws. Women were identified as interested parties whose interests competed with the interests of the fetus, and therefore, women’s demands for more control over their reproductive decision-making was viewed with suspicion. The decision-making was considered safer in the hands of physicians who could more ‘objectively’ determine if abortion was medically necessary.
Finnigan, in which she referred to Canada’s abortion laws as “the world’s harshest” and claimed that they forced "desperate women to seek help from a vicious back-room racket that often deals in death." Finnigan also referred to reforms that were occurring in Britain and the United States and called for similar reforms in Canada. A high maternal mortality rate due to clandestine abortion, advances in medicine that made therapeutic abortion less dangerous, women’s increasing emancipation and a decline in the popularity of religion all contributed to a change in public sentiment toward abortion. In addition, the 1962 Thalidomide scare drew public criticism for a law that did not allow for abortion on eugenic grounds, such as in the case of birth defects caused by the drug.

Not soon after Britain amended its abortion laws to include legal exceptions to the abortion prohibition, the Canadian government responded with its own attempts to amend abortion law. Most of these early attempts were similar in character to the British amendments, seeking to make abortion legal in situations of birth defects, when a woman or her family’s health and wellbeing were threatened, and in cases of sexual assault.

It was not until 1969, however, that amendments to the Criminal Code abortion provisions were successful in Canada. These amendments were far more restrictive than their British counterparts. The amended abortion provision was Section 251 of the

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42 Joan Finnigan, “Should Canada Change its Abortion Law?” Chatelaine 32:8 (August 1959) 17. Scholars suggest that this article was the catalyst for change. See for example Campbell, supra note 20 at 224.


44 Tatalovich, supra note 9 at 32.

45 In 1967 in Britain, abortion laws were amended under the Abortion Act 1967, making abortion legal where “there was a substantial risk the child would be born seriously handicapped” and also “enabled doctors to take into consideration the pregnant woman’s environment, and the effect of the additional pregnancy on the health of the existing children of her family” (Simms, supra note 43 at 118).

46 Tatalovich, supra note 9 at 32.
Criminal Code and remains unchanged today.  

Section 251 (now s. 287) made it a criminal offence to procure an abortion unless, in the opinion of a therapeutic abortion committee, a pregnant woman’s health or life was threatened by the pregnancy. These therapeutic abortions could only be performed in an accredited and approved hospital.  

Thus, the major thrust of the abortion law reform was to include an exception for situations in which a pregnant woman’s life or health was endangered by the pregnancy and to create hospital boards to make these decisions. Because life and health were not defined in the new s. 251 provision and the power to decide was still left in the hands of physicians, this Criminal Code amendment did little more than make the common-law Bourne defence a statutory defence. The parliamentary debates surrounding the 1969 reforms confirm that these amendments were meant to restrict rather than liberalize abortion access. At the time of the amendment, Justice Minister Turner noted, “The Bill has rejected the eugenic, sociological, or criminal offense reasons…[A]bortion is to be performed only where the health or life of the mother is in danger.” Thus, abortion was to be permitted in Canada only on narrow health and life related grounds. The amendments statutorily recognized a limited aspect of women’s interest in abortion and identified the situation in which women’s interests trumped fetal interests, thus legislating the competing woman vs. fetus framework. However, the situations in which

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49 Ibid.


51 House of Commons Debates (Hansard), (6 May 1969) at 8397 (John Turner) [Hansard, Turner].
women’s interests in abortion would prevail were largely undefined and practically very restrictive.

The 1969 amendments to the Criminal Code failed to satisfy anyone. Traditional anti-abortion advocates were deeply unhappy with amendments that provided a legal exception to abortion and, in their opinion, failed to adequately protect the fetus. At the same time, women’s right-to-abortion rhetoric began to take shape. Agitation for more liberal abortion laws was amplified following the landmark 1973 case in the United States, Roe v. Wade, in which the Supreme Court of the United States recognized women’s constitutional interests in abortion based in women’s constitutional right to privacy. The Court found,

[T]he right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant.

The Court in Roe v. Wade balanced the rights of women and the fetus according to the trimester of pregnancy in which the abortion was being sought. During the first trimester, the Court found that a woman’s right to privacy guaranteed her right to terminate a pregnancy. During the second trimester when abortion becomes a more complicated medical procedure, the state may regulate abortion “to the extent that the regulation reasonably relates to the preservation and protection of maternal health.” In the third trimester, when the fetus was considered to become ‘viable’ (capable of living outside of

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53 Ibid. at 47.
54 Ibid. at 52.
55 Ibid.
the womb), the state interest in protecting fetal life became compelling enough to outweigh women’s right to privacy. Thus, the Court in *Roe v. Wade* determined that the privacy and health interests of women and the state interest in protecting fetal life are both compelling and *competing* interests. Which interest prevails was found to depend on the stage of pregnancy.

It was following this decision that the abortion debate emerged as a battle between what became known as ‘pro-life’ and ‘pro-choice’ groups in both Canada and the United States. Kathy Rudy suggests that soon after *Roe v. Wade*, ‘right to life’ anti-abortion groups began to organize and lobby with a vengeance. At the same time, a countervailing force was needed to respond to the ‘pro-life’ movement. The ‘pro-choice’ movement emerged as a means of organizing women’s rights advocates into various levels of activism.56 With *Roe v. Wade*, therefore, the women’s rights vs. fetal rights framework was becoming more firmly entrenched on both the public and legal stage.

*Morgentaler and Beyond: Abortion Jurisprudence in Canada and the United States from 1976 to 2010*

During the same time that *Roe v. Wade* was being argued in the United States, the ‘pro-life’ and ‘pro-choice’ movements were emerging in Canada as well. Beginning in 1970, women’s groups began to call for the repeal of s. 251 of the *Criminal Code* that restricted women’s access to legal abortion to health and life grounds. These women’s groups sought to have abortion made a private matter between a woman and her doctor,

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not a matter of discretion for slow and unreliable hospital committees. On the other side of the debate, ‘pro-life’ groups in Canada argued that the ‘right to life’ of the fetus ought to take precedence over women’s right to autonomy. Thus, ‘pro-choice’ and ‘pro-life’ groups began to mobilize in Canada, imbedding the woman vs. fetus dichotomy within emerging rights rhetoric. The debate was framed as a contest between women’s right to choose and the fetal right to life.

To illustrate the safety of clinic abortions and thus the futility of the hospital committee structure, Montreal doctor Henry Morgentaler publicized the fact that he had successfully performed over 5000 abortions at his Montreal clinic. The charges laid against Dr. Morgentaler eventually led to the first challenge to the s. 251 Criminal Code abortion laws in the 1976 Supreme Court Case Morgentaler v. The Queen (hereinafter, Morgentaler (1976)). The majority of the Court focused their attention on the use of the defence of necessity in the situation of abortion, eventually finding that the accused, Dr. Morgentaler, could not use the defence to justify the abortions he performed outside of the s. 251 regime. Perhaps more interestingly, however, the Court distinguishes the issues in Morgentaler (1976) from those considered by the American Supreme Court in Roe v. Wade just three years earlier. Unlike in Roe v. Wade, the Supreme Court of Canada found that,

It has not been called upon to decide, or even to enter, the loud and

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59 McLaren & McLaren, supra note 57 at 137.
continuous public debate on abortion which has been going on in this country…The values we must accept for the purposes of this appeal are those expressed by Parliament which holds the view that the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion.\textsuperscript{61}

The Court thus accepted the criminalization of abortion as a legitimate exercise of the federal government’s criminal power; the Court found that the government could use criminal law to protect fetal interests at the expense of women’s personal aspirations and needs. In \textit{Morgentaler} (1976), a woman’s interest in abortion was not considered capable of overriding parliamentary government powers to protect the fetus.

The Court’s failure to seriously consider women’s rights is likely in part due to \textit{Morgentaler} (1976) being a pre-\textit{Charter} case;\textsuperscript{62} unlike women in the United States, women in Canada did not have constitutionally entrenched rights to privacy and autonomy that might prevail over the government’s interest in protecting the fetus. Following the adoption of the \textit{Charter of Rights and Freedoms} in 1982 that granted women such constitutional rights,\textsuperscript{63} however, Dr. Morgentaler again challenged the s. 251 abortion provisions of the \textit{Criminal Code}. This time, he was successful. In \textit{R v. Morgentaler} (hereinafter \textit{Morgentaler} (1988)),\textsuperscript{64} the Supreme Court of Canada found that the ‘Therapeutic Abortion Committee’ system put in place to protect the interests of the fetus unnecessarily violated the rights of women guaranteed in the newly adopted \textit{Charter}. The decision at the Supreme Court was split 5 to 2, with four different opinions

\textsuperscript{61} \textit{Ibid.} at 40, Dickson J.

\textsuperscript{62} \textit{Morgentaler} (1976), supra note 60 at 14, Laskin C.J.C., dissenting on different grounds. He notes that “In a situation such as exists in Canada, where there is an exclusive national federal criminal law power and no constitutionally entrenched Bill of Rights, I am unable to agree that we would be warranted in dividing the normal gestation period into zones of interest, one or more to be protected against state interference and another or others not.”

\textsuperscript{63} \textit{Charter}, supra note 13.

\textsuperscript{64} \textit{Morgentaler} (1988), supra note 47.
being delivered. The majority of the court found that s. 251 of the *Criminal Code* violated women’s s. 7 right to security of person, and in Wilson J.’s concurring opinion, women’s s. 7 liberty rights. The majority found that these s. 7 violations did not accord with the principles of fundamental justice and could not be saved under s. 1 of the *Charter*. McIntyre and La Forest JJ. dissented, finding that s. 251 did not violate women’s s. 7 security of person rights.

Although the justices’ opinions were split, every justice (including the dissenters) clearly stated that the protection of fetal interests is a valid governmental objective and that abortion regulation generally involves a balancing of this objective with women’s interests. Dickson C.J.C. notes in his s. 1 analysis,

> I think the protection of the interests of pregnant women is a valid governmental objective, where life and health can be jeopardized by criminal sanctions. Like Beetz and Wilson JJ., I agree that the protection of foetal interests by Parliament is also a valid governmental objective. It follows that balancing these interests, with the lives and health of women a major factor, is clearly an important governmental objective.\(^{65}\)

Thus, Dickson C.J.C. believed that the fetal protection purpose of the *Criminal Code* provisions represented a legitimate exercise of criminal powers, but that the provisions were unconstitutional because they did not adequately protect women’s interests.

In the most progressive opinion delivered, Wilson J. confirms Dickson’s C.J.C.’s legal finding, noting,

> In my view, the primary objective of the impugned legislation must be seen as the protection of the foetus. It undoubtedly has other ancillary objectives, such as the protection of the life and health of pregnant women, but I believe that the main objective advanced to justify the restriction on the pregnant woman’s s. 7 right is the protection of the

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\(^{65}\) *Morgentaler* (1988), *supra* note 47 at para. 56, Dickson C.J.C.
foetus. I think this is a perfectly valid legislative objective.\textsuperscript{66}

Wilson J. goes on to find that despite the validity of this objective, the government did not choose a framework that adequately protected women’s rights to liberty and security of person. McIntyre and LaForest JJ. dissented, disagreeing that women’s rights were not adequately protected by s.251 of the \textit{Criminal Code}, but agreed with Wilson J.’s finding that the protection of the fetus through abortion regulation is a legitimate government objective that would involve balancing women’s interests. Thus, in what is still the leading case on the right to abortion in Canada, the court unanimously declared that abortion regulations require balancing women’s rights and fetal rights, which are presumably compelling and competing interests. The women’s rights vs. fetal rights framework has consequently become solidified in Canadian law.

On 3 November 1989, immediately following the \textit{Morgentaler} (1988) decision, the government attempted to re-criminalize abortion through the introduction of Bill C-43.\textsuperscript{67} Bill C-43 would have made abortion a criminal offence unless performed by a physician who believed the women’s health or life was endangered. Thus, the Bill attempted to replace the hospital committee structure under s. 251 of the \textit{Criminal Code} with individual physicians. ‘Health’ included a woman’s “physical, mental, and psychological health.”\textsuperscript{68} The House of Commons passed Bill C-43 in a free vote (140 to 131). A free vote then went to the Senate, where the Bill was defeated due to an

\textsuperscript{66} \textit{Ibid.} at para. 256, Wilson J.

\textsuperscript{67} Bill C-43, \textit{An Act respecting abortion}, 2\textsuperscript{nd} Sess., 34\textsuperscript{th} Parl., 1991 (first reading 3 November 1989, defeated third reading 31 January 1991).

unprecedented tie (43 votes for and 43 votes against).\(^{69}\) Since the defeat of Bill C-43, no other government has managed to get abortion legislation past a first reading, and since 1997, no government has even tried.\(^{70}\)

This review of the history of the ‘right to life’ anti-abortion movement is meant to illustrate how the traditional abortion debate developed into a competing rights framework, where both sides assume that abortion is against the interests of the fetus and in the interests of women. Following the ‘right to life’ movement of the nineteenth century, abortion legislation was framed in terms of protecting the interests of the fetus. The exceptions to these criminal prohibitions were provided to protect the interests of pregnant women; the most recent Criminal Code provisions on abortion criminalized abortion except in circumstances where abortion was necessary to protect the health and life of the pregnant woman. Women’s rights and fetal rights are assumed in law and in advocacy to be conflicting. As will be shown in the next section, however, some anti-abortion groups are now challenging this assumption. These groups are beginning to suggest that abortion is against both the interests of the fetus and women; access to abortion, these groups suggest, should be restricted to protect both the fetus and women. The emergence of this woman-protective anti-abortion argument is discussed below.

**The Emergence of the Woman-Protective Anti-Abortion Argument**

Recently in the United States and Canada, some in the anti-abortion movement

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\(^{70}\) Dunsmuir, supra note 38.
have begun to shift their focus from protecting the ‘life of the unborn’ to protecting women. The woman-protective anti-abortion (“WPA”) argument asserts that abortion is harmful to women and that abortion should be highly regulated or prohibited to protect women. This section discusses how the adoption of this WPA platform is a rhetorical strategy to gain the conflicted middle of the population who has sympathies for both fetal rights and women’s rights claims; in other words, the segment of the population that has sympathy for the ‘pro-life’ arguments, but are unwilling to support restrictions on access to abortion because of concerns about women’s autonomy. Although anti-abortion groups in both Canada and the United States have begun incorporating these WPA claims into their anti-abortion platforms, Canada has not experienced the same influx of WPA arguments in law as in the United States. The remainder of this paper following this section illustrates how the WPA is nonetheless infiltrating Canadian law through anti-violence-against-pregnant-women initiatives that reinforce the claims of the WPA and make space for more insidious WPA laws.

**Woman-Protective Anti-Abortion Argument in the United States**

Although the WPA argument has only recently been gaining political and legal ground, the argument that abortion is harmful to women is not a new one. Many nineteenth century feminists viewed the practice of abortion as harmful to women; in the late nineteenth century, many feminists decried abortion as one example of the exploitation of women and approved efforts to limit abortion’s availability.71 Feminist

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71 See for example, Mohr, supra note 1 at 113, and his discussions of feminist editorials and letters in the Revolution in 1869; see also, Derr et al., Prolife Feminism, supra note 18 and Derr, “Feminism”, supra
anti-abortion arguments continue to exist today in certain streams of feminist thought.\textsuperscript{72} Though long-standing, the anti-abortion feminist view that abortion is against women’s interests never seemed to gain significant public support. As illustrated above, the anti-abortion movement developed within a fetal-rights framework and the feminist movement emerged as the countervailing force. Up until recently, therefore, mainstream abortion arguments remained firmly entrenched in the competing rights framework of ‘pro-life’ vs. ‘pro-choice.’ The idea that abortion could be against women’s interests in addition to being against fetal interests never gained significant traction.

It was not until the traditional ‘pro-life’ fetal protectionist movement began to lose public support in the 1980’s and the 1990’s that WPA arguments began to be adopted by traditional ‘pro-lifers’ and, eventually, by some state legislatures and courts in the United States. Yale law professor Reva Siegel has done significant work on the evolution of the modern WPA movement in the United States.\textsuperscript{73} A survey of her findings with respect to the United States WPA movement is considered below, followed by an examination of the WPA’s infiltration into Canadian anti-abortion advocacy.

\textsuperscript{72} See for example Derr et al., \textit{Prolife Feminism}, supra note 18 and Derr, “Feminism”, \textit{supra} note 18. Today’s anti-abortion feminists argue that abortion hinders women’s advancement in society. These feminists argue that abortion is a male-oriented solution to unwanted pregnancy that undermines women’s fight for equality in society. They argue that a right to abortion validates the social inequalities that make abortion necessary and does little to further women’s equality. Anti-abortion feminists suggest that abortion rights arguments devalue women and the female identity by treating the male experience (i.e. non-pregnancy) as the norm and the ideal, instead of furthering the feminist goal of recognizing women’s equal value.

Efforts to adopt WPA arguments in the ‘pro-life’ movement were initially rejected in the 1980s in the United States. During this time, claims that abortion harmed women and ought to be abolished to protect women were viewed as misplaced; the anti-abortion movement remained staunchly ‘pro-life’ and fetal-focused, advocating only for the protection of the unborn.\(^7^4\) In the early 1980’s, Dr. Vincent Rue and his doctoral student Anne Speckhard were modeling what they believed to be a specific form of post-traumatic stress disorder that women who have abortions experience – a condition they labeled Post-Abortion Syndrome or “PAS.” In Dr. Rue’s view, “Guilt and abortion have virtually become synonymous. It is superfluous to ask whether patients experience guilt; it is axiomatic that they will.”\(^7^5\) However, his views were largely rejected by the ‘pro-life’ movement in the United States, who believed that the focus of their cause ought to remain on the interests of the fetus. Thus, the abortion debate remained firmly entrenched in the women’s rights vs. fetal rights framework. In 1987, an attempt was made to have WPA arguments recognized by the government and thus legitimized. An anti-abortion group asked the Surgeon General C. Everett Koop to make a finding that abortion posed a public health threat to women, hoping that Koop would model his findings on his successful public health antismoking campaign.\(^7^6\) But Koop, a strong opponent of abortion, refused to recognize abortion as a public health threat to women. Instead, Koop encouraged the anti-abortion movement to continue its focus on protecting ‘unborn life.’ He stated, “The pro-life movement had always focused – rightly, I thought – on the impact of abortion on the fetus…. They lost their bearings when they approached the

\(^{74}\) Siegel, “Rights Reasons”, supra note 73 at 1660.


\(^{76}\) Siegel, “Rights Reasons”, ibid. at 1662.
Thus, early attempts to incorporate woman-protective concerns into the anti-abortion platform failed in the United States; the proper focus of anti-abortion groups’ efforts was still seen as protection of ‘unborn life.’

In the early 1990’s, however, the American anti-abortion movement’s traditional focus on protecting the fetus began to lose ground. A series of events in the early 1990’s drew criticism from within the anti-abortion ranks; anti-abortion groups began to question the movement’s focus on the fetus alone. The rising power of women’s rights coupled with some very public abortion clinic bombings and clinic doctors’ murders had alienated much of the public from the traditional ‘pro-life’ cause. As Reva Siegel notes,

Polls registered the American public’s ambivalence and division about abortion and its recoil from clinic violence... The clinic murders provided an opening for members of the anti-abortion movement to question the violent – and gendered – presuppositions of the ‘rescue’ paradigm, and enhanced the legitimacy and strategic appeal of alternative, less confrontational modes of argument.

Thus, some members of the anti-abortion movement began to question the narrow focus of the movement on ‘rescuing’ the fetus. Anti-abortion groups’ concerns about the decreasing popularity of ‘pro-life’ claims were deepened with the 1992 election of Bill Clinton, a strong supporter of abortion rights, and the Supreme Court decision Planned Parenthood v. Casey which confirmed the validity of the Roe v. Wade right to abortion

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78 Siegel, “Rights Reasons”, supra note 73 at 1664.
79 Ibid. at 1667.
80 Planned Parenthood v. Casey, 505 U.S. 833 (1992), 112 S. Ct. 2791, 120 L. Ed. 2d 674, 60 U.S.L.W. 4795 [Casey].
grounded in the constitutional right to privacy.\footnote{Siegel, “Rights Reasons”, supra note 73 at 1665.}

Thus, by the 1990s, a change within some parts of the American anti-abortion movement was taking place. The WPA argument was a claim that had the potential to garner the support of those who believed in a fetal right to life, but who supported abortion rights because it was in women’s interests. Beginning in the 1990s, some anti-abortion groups began to develop arguments that sought to explain to ambivalent audiences why women would benefit from restrictions on abortion.\footnote{Siegel, “Rights Reasons”, supra note 73 at 1669.} By 2001, Jack Willke, head of the National Right to Life Committee had incorporated the WPA argument into the ‘pro-life’ campaign, writing,

\begin{quote}
However, increasingly, these [fetal-protection arguments] fell on deaf ears, for this did not address the new argument of women's rights…. We found that [three fourths or more of the people in the United States] felt that pro-life people were not compassionate to women and that we were only ‘fetus lovers’ who abandoned the mother after the birth…. After considerable research, we found that the answer to their ‘choice’ argument was a relatively straightforward one. We had to convince the public we were compassionate about women…. Thus was born the slogan ‘Love Them Both’\footnote{J.C. Wilke, “Life Issues Institute Is Celebrating Ten Years With a New Home,” Life Issues Connector (February 2001), online: Life Issues Connector <http://www.lifeissues.org/connector/01feb.html> at 1, 4.}
\end{quote}

Increasingly, people were falling into this conflicted middle segment of the population, with sympathies for claims regarding fetal life, but a stronger commitment to women’s rights to personal freedom and autonomy.\footnote{Tatalovich, supra note 9 at 150; see also Elizabeth Adell Cook, Ted G. Jelen & Clyde Wilcox. Between Two Absolutes: Public Opinion and the Politics of Abortion (Boulder, Colo.: Westview Press, 1992) at 191.} To garner the support of this conflicted group, some anti-abortion groups began to argue that abortion was against both women’s
and fetal interests. Anti-abortion groups had realized that they needed to avoid arguments that were premised in a competing rights framework like that of the historical ‘pro-life’ movement; instead, these anti-abortion groups recognized that they had to convince people that the best interests of women and the fetus do not conflict. Thus, a new branch of the anti-abortion movement emerged, fusing WPA arguments with the more traditional ‘pro-life’ mantras.

In the United States, WPA arguments have already been considered and, in some circumstances, embraced, by state legislatures and the Courts. Perhaps the most striking example of WPA legislation in the United States is the abortion bans tabled by South Dakota in 2006 and again in 2008.\textsuperscript{85} Prior to enacting the bans, South Dakota created a task force in 2005 to study the State’s interest in banning abortion; the result was a 72-page report.\textsuperscript{86} The \textit{South Dakota Report} raised many of the traditional ‘pro-life’ objections to abortion; however, over half of the \textit{South Dakota Report} (40/72 pages) focused on the State’s interest in prohibiting abortion to protect women. As a result of the \textit{South Dakota Report} and in direct challenge to \textit{Roe v. Wade}, the South Dakota legislature tabled a complete ban on abortion in 2006, and again in 2008.\textsuperscript{87} The bans were only narrowly defeated in successive referenda, largely because they did not provide adequate exceptions.\textsuperscript{88}

\begin{footnotesize}
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\item \textsuperscript{85} U.S., HB 1215, \textit{supra} note 3; U.S., HB 1293, \textit{supra} note 4.
\item \textsuperscript{87} U.S., HB 1215, \textit{supra} note 3; U.S., HB 1293, \textit{supra} note 4.
\item \textsuperscript{88} Merrick, \textit{supra} note 5; “Voting for Reproductive Freedom”, \textit{supra} note 5.
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Additionally, in the 2007 case *Gonzales v. Carhart*, the United States’ Supreme Court upheld a ban on ‘partial birth abortion,’ in part on WPA grounds. The ban would have prohibited "knowingly perform[ing] a partial-birth abortion . . . that is [not] necessary to save the life of a mother." Kennedy J. delivered the opinion of the majority of the Court. The court upheld the partial birth abortion ban in part to protect pregnant women from the mental harms the Court found to be associated with late term abortion. In her dissent in *Carhart*, Ginsburg, J., joined by Stevens, Souter, and Breyer, JJ., identified the problematic WPA underpinnings of the case. Despite Ginsburg J.’s warnings, however, the ban was upheld. Although the WPA reasoning in the case is brief, it has been reproduced and reapplied in subsequent United States cases to uphold more stringent informed consent laws that are in place to ‘protect’ women from the harms of abortion.

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89 *Carhart*, supra note 6.
91 *Carhart*, supra note 6 at para. 159, Kennedy J.: “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained…. Severe depression and loss of esteem can follow.” Though the Court denies finding any ‘reliable’ data on the phenomenon of abortion harming women psychologically, it was willing to accept anecdotally the claims of Sandra Cano (the “Mary Doe” of *Doe v. Bolton*) and 180 other women that abortion can severely damage women psychologically. The testimonies provided to the Court were the same testimonies upon which the *South Dakota Task Force* based its recommendation that South Dakota ban abortion to protect the interests of women: see *Carhart*, supra note 6 at para.159, reference to the Brief of Sandra Cano, the Former “Mary Doe” of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner.
92 *Carhart*, supra note 6 at para. 185, Ginsburg J. criticized the finding of the majority, suggesting that the protections of women from abortion, “reflects ancient notions about women’s place in the family and under the Constitution – ideas that have long since been discredited”. In particular, she criticizes the Court’s restriction of women’s access to abortion on the grounds of protecting the ‘bond of love the mother has for her child,’ which Ginsburg J. suggests imposes on women an identity of motherhood, denying women their ability to shape their own identities on their own terms.
Woman-Protective Anti-Abortion Argument in Canada

The ‘pro-life’ movement in Canada has experienced a shift similar to their United State’s counterparts. Research suggests that historically, the ‘pro-life’ lobby in Canada has mirrored the ‘pro-life’ lobby movement in the United States. Therefore, it is perhaps not surprising that fetal ‘right-to-life’ claims began to lose public support in the 1990’s and that the WPA argument has since emerged as a new branch of anti-abortion advocacy in Canada. As in the United States, clinic violence in Canada existed in the early 1990’s as a tactic of ‘pro-life’ extremists, but it occurred on a much smaller scale. The first incident occurred in 1992 with the bombing of Dr. Henry Morgentaler’s Toronto abortion clinic. In 1994, gynecologist Dr. Garson Romalis was shot through the window of his Vancouver home and seriously injured. Both episodes were condemned politically and publically, but it would appear that ‘pro-life’ tactics in Canada were generally less violent and more covert than in the United States. However, the incidence of clinic violence in both Canada and the United States resulted in concerns among some Canadian ‘pro-life’ groups about the narrow focus on protecting the fetus. For example, Kurt Gayle, a former co-ordinator of Operation Rescue in Ontario and a former employee of the Campaign Life Coalition (both ‘pro-life’ organizations), is clear in his doubts, noting in 1995 that with respect to clinic violence,

The pro-life movement, as a significant political force in Canada, is dying…. To continue to say that all abortion is murder and we want a law that protects all human beings from the moment of conception is a political position that won't fly in the Western world.

94 Tatalovich, supra note 9 at 143.
95 Ibid. at 141.
96 Ibid.
97 Joan Breckenridge, “The Last Gasp? Death threats, physical attacks, covert harassment: Some abortion
The clinic violence of the early 1990’s followed the 1988 Supreme Court of Canada decision in Morgentaler (1988),\(^98\) where the Court recognized that women’s s.7 Charter rights included a right to access abortion. Following Morgentaler (1988), all efforts to re-criminalize abortion on fetal-protective grounds had failed.\(^99\) Members of the Canadian anti-abortion movement thus began to recognize the failure of the ‘pro-life’ movement to modernize and adapt in a world where religious observance was declining and women’s rights were being increasingly recognized.

All of these events likely contributed to a shift in public support for abortion rights in the 1990s in Canada and also explains why abortion failed to re-surface as a campaign issue.\(^100\) Shifting views within the Canadian public about abortion made abortion an issue that politicians would no longer broach in Canada; ‘pro-life’ groups in Canada lost their ability to lobby for legislative changes on fetal protective grounds because political parties were unwilling to take a stance on abortion and risk losing voters. Research suggests that people who hold absolutist ‘pro-life’ views on abortion now represent a very small portion of Canadian society, so there is little political incentive for political parties to adopt a ‘pro-life’ agenda.\(^101\) Canadian ‘pro-life’ fetal-focused anti-abortion groups were therefore losing ground. In response, many anti-abortion groups in Canada have chosen to merge their traditional fetal right-to-life

\(^98\) Morgentaler (1988), supra note 47.
\(^99\) See previous section “Pro-life versus Pro-choice: History of the Competing Rights Abortion Debate” for discussions of the constitutional consideration of abortion in Canada and the unsuccessful attempts to re-criminalize abortion.
\(^100\) Tatalovich, supra note 9 at 147.
\(^101\) Ibid. at 149.
arguments with women-centric claims.\textsuperscript{102}

Unlike in the United States, the WPA has not yet emerged in Canadian law. WPA arguments, therefore, have thus far been limited to advocacy by anti-abortion groups such as Physicians for life, Nurses for Life, the de Veber Institute and The Signal Hill.\textsuperscript{103} The remaining Chapters of this paper illustrate the way in which the WPA is nonetheless infiltrating the Canadian legal arena through more subtle anti-violence-against-pregnant-women initiatives that are making space for more insidious WPA laws. This paper seeks to illustrate, therefore, that the WPA movement is just as much a threat to Canadian women’s reproductive rights as to their American counterparts.

\textit{The WPA Claim: Protecting Women from Abortion}

The WPA claim that has increasingly been adopted by anti-abortion groups in both Canada and the United States has two main arguments. The first argument is that abortion is physically and mentally harmful to women. The second argument is that significant numbers of women are coerced and pressured into abortions that they do not want. As Prof Reva Siegel notes in her work on the WPA movement in the United States, the WPA claims that abortion is a bad choice and/or no choice at all. By suggesting that many


\textsuperscript{103} \textit{Supra} note 102.
women are being forced to have abortions and the ones that do have abortions are gravely harmed by the procedure, the WPA movement argues that access to abortion should be restricted or prohibited to protect women. The following is a summary of the WPA claims gleaned from review of Canadian and American WPA advocacy,\textsuperscript{104} as well as legislative and judicial developments in the United States that have supported the WPA claim.\textsuperscript{105}

The first claim is that abortion harms women’s physical and mental health: i.e. that abortion is a bad choice. The claim is that abortion ought to be prohibited or restricted to protect women from these health harms. With respect to physical harms, the WPA suggests that abortion threatens women’s future reproductive capability and more general health. WPA advocates cite studies that suggest that abortion significantly increases women’s risk of future miscarriage, ectopic pregnancy, low future birth weights, infertility and even death. Perhaps more significant in the WPA claim, however, are the alleged mental health harms that are suggested to be caused by abortion. WPA arguments generally cite medical research that indicates that abortion increases women’s risk of depression and suicide. There has been significant work in the development of the concept of ‘post-traumatic abortion syndrome’ or ‘PAS’, a form of post-traumatic stress syndrome that is alleged to result from abortions. The suggestion is largely that these forms of psychological trauma are forms of bereavement or grief in having lost a child and being implicated in its death.

The second claim of the WPA is that a significant portion of women are tricked and coerced into having abortions: i.e. that abortion is not a choice. The WPA argument

\textsuperscript{104} Supra note 102.
\textsuperscript{105} South Dakota Report, supra note 86; Carhart, supra note 6.
suggests that access to abortion should be prohibited or restricted to protect women from having abortions they would not otherwise want were they properly informed. WPA claims first suggest that the non-disclosure of the mental and physical harms of abortion denies women their informed consent rights. Other WPA arguments suggest that it is problematic that women are not told the ‘true’ nature of the procedure; i.e. that abortion results in the ‘death’ of their already existing child. The suggestion is that women are consenting to a procedure whose nature and risks are not made clear, and women are thus being denied their autonomy and self-determination rights with respect to the abortion decision. Consequently, it is alleged that women are ‘tricked’ into having abortions. In addition, the WPA also suggests that women are subject to undue pressure to have abortions and that this also results in a denial of their decision-making rights. The WPA claims that women are subject to undue pressure from families, friends, intimate partners and society at large to have abortions against their own wishes. Thus, the WPA suggests that women are being coerced into having abortions that they do not want, and abortion ought to be prohibited or restricted to protect women from this denial of self-determination and liberty rights.

II. Bill C-510

Unlike in the United States, Canada has not yet seen woman-protective anti-abortion (‘WPA’) arguments in legislative initiatives\textsuperscript{106} or in judicial decision-making.\textsuperscript{107}

\textsuperscript{107} \textit{Carhart}, \textit{supra} note 6; \textit{Rounds}, \textit{supra} note 93.
However, in the past several years, two private members bills have been tabled in the Canadian parliament that have been accused of re-opening the abortion debate in Canada. Both Bill C-484, the *Unborn Victims of Crime Act,*\(^{108}\) and Bill C-510, *An Act to Prevent Coercion of Pregnant Women to Abort (Roxanne’s Law),*\(^{109}\) claimed to be about protecting pregnant women from violence and/or coercion. Despite their alleged anti-violence-against-women goals, both Bills were introduced by MP’s who are staunchly anti-abortion\(^{110}\) and both Bills enjoy major support from anti-abortion groups. Similarly, both Bills have been vehemently attacked by reproductive rights groups as creating fetal rights that will lead to the restriction of women’s access to abortion on fetal-rights grounds. In other words, both bills have thus far been supported or criticized for advancing traditional ‘pro-life’ claims.

In this paper, however, I hope to illustrate that these Bills are also problematic because they fit within the broader phenomenon of the WPA movement emerging in the United States and in Canada. When seemingly positive woman-protective legislation like Bill C-484 and Bill C-510 are considered in the context of more insidious WPA initiatives like those adopted in the United States, similarities emerge regarding the underlying rationale behind the initiatives – mainly, the glorification of motherhood and the


\(^{109}\) Bill C-510, *supra* note 11.

undermining of women’s capacity for judgment. By paying attention to these similarities, we can see how even legislation like Bill C-484 and Bill C-510 that does not purport to regulate abortion can help create a climate that is more favourable to restrictions on access to abortion on *woman-protective*, rather than fetal-protective, grounds.

Although I suggest in this paper that both Bill C-484 and Bill C-510 would contribute to a climate in which WPA laws are more acceptable, I focus on the more recent Bill C-510 to illustrate how woman-protective anti-violence laws in the context of abortion could increase legal receptivity of WPA laws in Canada. However, it is helpful to briefly introduce the content of Bill C-484 as an example of another potentially problematic woman-protective law. Bill C-484 was tabled in federal parliament in 2007. Its short title was the *Unborn Victims of Crime Act*\(^1\) and its intended effect was summarized as follows:

> This enactment amends the *Criminal Code* by making it an offense to injure, cause the death of or attempt to cause the death of a child before or during its birth while committing or attempting to commit an offense against the mother.\(^2\)

Bill C-484 was presented as a response to the problem of violence against pregnant women; it was intended to recognize the unique grief and loss that pregnant women and their families experience when an assault results in a lost pregnancy.\(^3\) By creating a separate offense for an assault that results in the ‘death’ of the unborn child, the Bill purported to prevent assaults on pregnant women by elevating the penalty faced by assailants. On its face, the Bill appeared to be a pro-woman, anti-violence measure.

\(^1\) Bill C-484, *supra* note 108.
\(^2\) *Ibid.* at ‘Summary.’
\(^3\) *House of Commons Debates (Hansard)*, No. 037 (13 December 2007) at 1514 (Ken Epp) [*Hansard, Epp*].
The motive of Bill C-484 was questionable, as judges already have sentencing discretion with respect to aggravated assault (i.e. assault that ‘wounds’ or ‘maims.’). Reproductive rights groups immediately attacked the Bill as creating fetal rights that could lead to restrictions to access to abortion; they pointed out that the offence under the new law was similar to the fetal homicide laws in the United States. The Society of Obstetricians and Gynecologists of Canada expressed its concern over the law, explaining, “This Bill can only be interpreted as giving the foetus in utero legal status at conception.... It begins the process of establishing (criminal) sanctions for doctors, nurses or others, including the pregnant woman herself, whose actions might affect those ‘new rights.’” Concerned groups therefore attacked the Bill as supporting traditional ‘pro-life’ fetal rights.

Supporters of the Bill, however, argued that the Bill was an important initiative in recognizing the grief and loss experienced by pregnant women and their families when an assault results in the loss of a pregnancy. In the first reading of the Bill, MP Ken Epp noted, “We are dealing with vicious criminal attacks against pregnant women and we are dealing specifically with addressing the issue of grief for the families who are left behind.” Thus, the Bill was meant to both protect women from violence and provide retribution for those women and their families when a violent assault resulted in a lost pregnancy.

Despite supporters’ insistence that the Bill was about protecting women and not

114 Criminal Code, 1985, supra note 47 at s.268.
116 Hansard, Epp, supra note 113 at 1514.
about creating fetal rights, the Bill did not gain significant support. This is likely because MPs were hesitant about choosing sides in what was increasingly becoming an abortion debate. The Bill died with the dissolution of parliament in September 2008. However, another bill similar to Bill C-484 could be tabled in the future. I suggest that like Bill C-510 that is the focus of the remainder of the paper, Bill C-484 reinforces certain gender stereotypes about women and creates space for WPA claims in Canadian law. Discussions regarding the way in which Bill C-484 supports the WPA cause is beyond the scope of this paper, but I invite women’s rights advocates to apply the framework developed in this paper to future laws like Bill C-484 to expose their WPA underpinnings and develop a more acceptable means of protecting pregnant women from violence. The purpose of this paper is after all to provide women’s rights advocates with a framework for identifying and remedying WPA foundational laws, which includes ‘woman-protective’ laws like Bill C-484.

**Bill C-510: An Act to Prevent Coercion of Pregnant Women to Abort (Roxanne’s Law)**

The short-title of Bill C-510 is An Act to Prevent Coercion of Pregnant Women to Abort (Roxanne’s Law). Its first reading was on April 14, 2010. The Bill is named after Roxanne Fernando, who was murdered by her boyfriend and his friend in 2007. Her boyfriend and his friend were eventually convicted of first and second-degree murder.

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117 Bill C-510, *supra* note 11.

Roxanne was pregnant at the time of her murder, and MP Rod Bruinooge suggests that she was murdered because she refused to have an abortion. Although there is reason to doubt this claim about the motive, Mr. Bruinooge claims he has created this Bill because of Roxanne’s story.

The Bill would amend the uttering threats portion of the Criminal Code and make it a separate offence to coerce a pregnant woman to have an abortion. Bill C-510, therefore, purports to be about protecting pregnant women from violence and coercion with respect to their decision to continue a pregnancy. Those found guilty under the new offence would face imprisonment for a maximum of five years. The Bill C-510 amendment is reproduced in full below:

**BILL C-510**

An Act to amend the Criminal Code (coercion)

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119 The motive of the murder, and thus the rational for Bill C-510, has been questioned. The Abortion Rights Coalition of Canada reports that the murderer himself, his lawyer, and the Crown prosecutor all agree that abortion was not part of the motive (Abortion Rights Coalition of Canada/Coalition pour la droit à l’avortement au Canada, Media - Press Release, “Pro-Choice Group Calls for Law Banning Coerced Childbirth,” (19 April 2010), online: ARCC-CDAC <http://www.arcc-cdac.ca/media.html> at 2 [ARCC, “Bill C-510 Press Release”]. Additionally, in a voir dire of the Roxanne Fernando murder trial regarding the admissibility of the accuseds’ confessions, the Court noted, “The murder was apparently motivated by Plourde’s irritation and panic that Ms. Fernando, who was carrying his baby, was insistent on having a relationship with him” ([R. v. Toruno, 2009 MBQB 334 at para.3, Joyal A.C.J [Toruno]]) This is a different motive than that identified by Bruinooge as the basis for this Bill. See also the press covering the trial that reported that the pregnancy was not considered a factor in the murders: “Pregnant woman’s killers get life,” supra note 118; “Replay: Life sentences handed down to Fernando killers,” supra note 118.


121 Bill C-510, supra note 11.
Whereas Roxanne Fernando was a Winnipeg woman whose boyfriend attempted to coerce her to abort their unborn child and subsequently murdered her for refusing to do so;

Whereas many pregnant women have been coerced to have an abortion and have suffered grievous physical, emotional and psychological harm as a result;

Whereas the Supreme Court of Canada recognized in *Dobson v. Dobson* that “pregnancy represents not only the hope of future generations but also the continuation of the species. It is difficult to imagine a human condition that is more important to society”;

And whereas Parliament wishes to ensure pregnant women are able to continue pregnancy free of coercion;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

1. This Act may be cited as *An Act to Prevent Coercion of Pregnant Women to Abort (Roxanne’s Law)*.

CRIMINAL CODE

2. The *Criminal Code* is amended by adding the following after section 264.1:

264.2 (1) Everyone who coerces a female person to procure or attempt to procure an abortion for herself is guilty of

   (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or

   (b) an offence punishable on summary conviction and liable to imprisonment for a term no exceeding eighteen months,

(2) Everyone who attempts to coerce a female person to procure an abortion for herself is guilty of

   (a) an indictable offence and liable to imprisonment for a term not exceeding two years; or

   (b) an offence punishable on summary conviction and liable to
imprisonment for a term not exceeding six months.

(3) The following definitions apply in this section

“abortion” means the act of using or prescribing any instrument, medicine, drug or any other substance, device or means with the intent to terminate the clinically diagnosable pregnancy of a female person with knowledge that the termination by those means will with reasonable likelihood cause the death of the child. Such use, prescription or means is not an abortion if done with the intent to save the life or preserve the health of the child or terminate an ectopic pregnancy.

“coercion”, in respect of an abortion, means conduct that, directly or indirectly, causes a female person to consent to an abortion that she would otherwise have refused. A person coerces an abortion if he or she knows of or suspects the pregnancy of a female person and engages, or conspires with another to engage in, conduct that is intentionally and purposely aimed at directing the female person who has not chosen to have an abortion to have an abortion, including but not limited to the following conduct:

(a) committing, attempting to commit, or threatening to commit physical harm to the female person, the child or another person;

(b) committing, attempting to commit or threatening to commit any act prohibited by any provincial or federal law;

(c) denying or removing, or making a threat to deny or remove, financial support or housing from a person who is financially dependent on the person engaging in the conduct; and

(d) attempting to compel by pressure or intimidation including argumentative and rancorous badgering or importunity;

but does not include speech that is protected by the Canadian Charter of Rights and Freedoms.

“course of conduct”, for the purposes of the definition “threat”, means a pattern of conduct that consists of a series of two or more separate acts evidencing a continuity of purpose.

“threat”, for the purposes of paragraph (c) of the definition “coercion”, means one or more statements, or a course of conduct, by an individual that would cause a reasonable person to believe that the individual is likely to act in accordance with the statements or as implied by the course of conduct, but does not include speech that is protected by the Canadian Charter of Rights and Freedoms or any generalized statement regarding a lawful pregnancy option.
(4) This section does not apply in the case of a physician who attempts to convince a pregnant female person to have a medical intervention that results, or may result, in the death of the child when, in the physician’s best medical judgment, that medical intervention is necessary to avoid a serious threat to the female person’s physical health.

(5) Any provision of this section that is held by a court of law to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless the court has determined that the provision is utterly invalid or unenforceable, in which case the provision shall be deemed to be severable from this section and shall not affect the application of the other provisions of this section or the application of the provision to other persons not similarly situated or to other, dissimilar circumstances.

Other Constitutional Issues: Concerns of a ‘Pro-Life’ Motive

Bill C-510 is vulnerable to a variety of challenges. Most challenges of the Bill thus far have come from abortion rights groups who claim that Bill C-510 is a ‘pro-life’ Bill in disguise and seeks to restrict women’s access to abortion in order to protect the ‘life’ of the fetus.122 Ultimately, I also seek to illustrate how Bill C-510 has anti-abortion implications; my focus will be on illustrating how the Bill reinforces familiar stereotypes about women that in turn create space for WPA claims. However, it is worth first outlining some of the other objections to Bill C-510 to illustrate how abortion rights advocacy in Canada remains entrenched in the ‘pro-life’ vs. ‘pro-choice’ framework that has traditionally dominated the abortion debate.123 In this section I therefore outline the fetal-rights concerns regarding Bill C-510 to recognize their legitimacy, but also to show how the focus of critiques of Bill C-510 thus far have failed to seriously consider the way

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123 See Chapter I for the history of the ‘pro-choice’ vs. ‘pro-life’ movements.
in which the anti-abortion movement is shifting from a fetal focus to a woman-protective focus. I suggest that even if the traditional ‘pro-life’ elements of Bill C-510 were eliminated, it would still be highly problematic from a woman’s rights perspective because of its WPA implications. By paying attention to the similarities between Bill C-510 and more insidious WPA initiatives in the United States, we can see how even legislation that does not purport to regulate abortion on fetal rights grounds can help create a climate that is more favourable to restrictions on access to abortion because it reinforces the kinds of stereotypes about women that ground more directly restrictive WPA regimes. In this way, even those Bills that do not employ the traditional fetal rights arguments can create space for anti-abortion claims. The goal of this paper is to illustrate that focusing exclusively on the ‘pro-life’ aspects of initiatives might serve to hide the problematic role that those initiatives may play in creating space for WPA laws in Canada.

Perhaps the most prominent criticism of Bill C-510 thus far is the claim that it implicitly creates fetal rights that could eventually be used to limit women’s access to abortion. Immediately after Bill C-510 was introduced in parliament, women’s rights groups attacked the ‘pro-life’ character of the Bill. First, women’s rights groups questioned the motives of a Bill that criminalizes actions that are already criminal. As the Abortion Rights Coalition of Canada (“ARCC”) noted, the Bill is redundant because the threats and illegal acts identified under the Bill are already illegal under the Criminal Code. ARCC suggests that the redundancy of the Bill indicates that it must have alternative motives, mainly the restriction of access to abortion through the establishment
of fetal rights. Pregnant women, like everyone in Canada, are already protected from coercion, physical violence and murder under the existing Criminal Code provisions criminalizing extortion, uttering threats, assault and murder. In response to critics, MP Rod Bruinooge who introduced the Bill suggested that the Bill is needed to raise public awareness about this specific form of violence against women and signal to the public that this specific type of behaviour is unacceptable. However, the woman-protective purpose of the Bill is questionable considering it purports to protect women from actions that are already illegal.

In their claim that Bill C-510 is a ‘pro-life’ Bill in disguise, ARCC goes on to point out that Bill C-510 employs fetal rights language and thus carries a risk of creating fetal rights. As ARCC states,

Not only was [Bill C-510] introduced by an anti-choice MP, it is strongly supported by anti-choice activists, and refers to a fetus as a “child.” This bill is an attempt to reintroduce the notion of fetal rights through indirect means, by presenting abortion as a social harm to be criminalized.”

Thus, women’s rights groups have taken issue with the Bill’s use of the term ‘child’ and ‘unborn child’ as it appears intermittently throughout the Bill. By referring to the fetus as a child, women’s rights groups fear that the fetus may gain human-like rights (such as

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125 Criminal Code, 1985, supra note 47 at s. 346.
126 Ibid. at s. 264.1.
127 Ibid. at s. 265.
128 Ibid. at s. 229.
129 See, for example, Bruinooge, “Bill C-510 Press Release”, supra note 120 at 8:04 min., where he compares Bill C-510 to laws that raise awareness about the dangers of driving with a cell-phone. He suggests dangerous driving is already illegal, but that the public needs to be made aware about what actions represent dangerous driving. Similarly, Bruinooge argues that coercion and violence are already illegal, but Bill C-510 is needed to raise awareness that coercing a pregnant woman to have an abortion is a form of illegal coercion and violence.
131 See for example how abortion is defined in Bill C-510 as employing means that the person knows will “cause the death of the child” (Bill C-510, supra note 11 at s. 264.2(3)).
a right to life contained in s. 7 of the Charter)\textsuperscript{132} that could be used to limit women’s ability to legally terminate a pregnancy. Thus, the Bill has been criticized as an indirect means of limiting women’s access to abortion on ‘pro-life’ grounds. Women’s rights groups might suggest therefore that Bill C-510 is constitutionally problematic because limiting women’s access to abortion on fetal-rights grounds interferes with a woman’s s.7 security of person and liberty rights, as recognized by the Supreme Court in Morgentaler (1988).\textsuperscript{133}

In addition to fetal-rights criticisms, abortion rights groups have also expressed concern that Bill C-510 is too vague and may have a chilling effect on the provision of abortion services. Under Canadian constitutional law, a law must not be so vague that citizens, law enforcement officers and judges cannot discern what is illegal behaviour.\textsuperscript{134} As ARCC noted in their press release regarding Bill C-510, the vagueness of Bill C-510 could result in abortion providers, counselors, parents, etc. being unsure about what constitutes ‘coercion’ under the Bill and therefore what constitutes illegal behaviour. This could result in a reluctance of these persons to provide advice and counseling on abortion, which could in turn create additional barriers for women seeking abortion services.\textsuperscript{135} For an example of this vagueness, coercion under the Bill includes “conduct that is intentionally and purposely aimed at directing the female person who has not

\textsuperscript{132} Charter, supra note 13 at s. 7.

\textsuperscript{133} Morgentaler (1988), supra note 47. See also the following section “Bill C-510 and protecting women’s s.7 decision-making rights” for discussion regarding the Court’s treatment of the decision to terminate a pregnancy as a decision of fundamental importance protected by s. 7 of the Charter.

\textsuperscript{134} The Supreme Court of Canada has declared that incarcerating persons based on laws that are too vague represents a denial of a person’s liberty in a manner that is not in accordance with the principles of fundamental justice and thus in violation of s.7 of the Charter (Charter, supra note 13 at s. 7). The Supreme Court has found that a law must not be so vague that citizens, a law enforcement officers and judges cannot discern what is illegal behaviour (Canadian Foundation for Children, Youth and the Law v. Canada (A.G.), 2004 SCC 4, [2004] 1 S.C.R. 76, 234 D.L.R. (4th) 257 at para. 16, McLachlin C.J.C. [Canadian Foundation for Children, cited to S.C.R.]).

\textsuperscript{135} ARCC, “Bill C-510 Press Release”, supra note 119 at 2.
chosen to have an abortion.” Arguably, this definition might make culpable any conduct that has the intention of convincing a woman to have an abortion she might not otherwise have. The concern of abortion rights groups is, therefore, that advice provided by abortion providers and others about the safety of abortion procedures or benefits might be seen as ‘directing’ women to have an abortion, as this type of information might be seen as influential in persuading a woman who previously did not want an abortion to have an abortion. Convincing someone to do something is different than coercing someone to do something, but the distinction between convincing and coercing is not made clear in the language of the Bill, and could place abortion providers and others in a situation of legal confusion. Thus, under Bill C-510, any discussions about the positive aspects of abortion with a pregnant woman who has decided not to have an abortion are open to coercion accusations; this would open up culpability to abortion providers, counselors, and parents, friends and partners who provide such information.

It is similarly unclear whether persons will be culpable under Bill C-510 if they do not intend to coerce a pregnant woman into having an abortion but their arguments have that effect. In other words, it is unclear what the legal status will be of persons who simply wish to persuade a woman to have an abortion, but whose arguments have the effect of causing the woman to have an abortion against her will. The proposed amendments, therefore, do not specify the mens rea required: is it intent to coerce or will inadvertent coercion be enough to establish culpability. This contributes to the uncertainty of those interacting with pregnant women and illustrates the vagueness of Bill C-510. Because of these uncertainties and others like them, the law as it stands under Bill

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136 Bill C-510, supra note 11 at s. 264.2(3).
C-510 might be too vague for persons to be sure whether their actions cross the line into ‘coercion.’ Bill C-510 could thus represent an unconstitutional infringement of persons’ s. 7 rights that is not in accordance with the principles of fundamental justice.\textsuperscript{137} The consequences of this vagueness could be a negative chilling effect on abortion providers, parents, partners and others in discussing the abortion choice with pregnant women; Bill C-510, therefore, could create an additional barrier to women’s ability to access abortion.

The challenges brought against Bill C-510 thus far are based within the traditional ‘pro-life’ vs. ‘pro-choice’ framework: abortion rights groups have opposed Bill C-510 on the basis that it is a ‘pro-life’ Bill in disguise. This paper does not mean to refute this claim; Bill C-510 was introduced by the chair of the ‘pro-life’ caucus and enjoys significant support of anti-abortion groups. However, the above discussion is meant to illustrate that criticisms of the Bill thus far have failed to consider the role that Bill C-510 might play in the broader phenomenon of the WPA movement. Even if the vagueness problems of Bill C-510 were eliminated and the fetal-rights language removed, I suggest that the Bill still creates space for WPA claims that could lead to a restriction of women’s access to abortion on WPA grounds. Focusing solely on the ‘pro-life’ character of the Bill is therefore insufficient. Instead, Bill C-510 must be analysed in the context of the WPA laws developing in the United States. When scrutinized in the WPA context, it becomes clear that both Bill C-510 and the WPA movement rely on gender stereotypes that glorify motherhood and undermine women’s capacity for judgment. By paying attention to these similarities, we can see how even legislation that does not purport to regulate abortion on fetal-rights grounds can help create a climate that is more favourable

\textsuperscript{137} Canadian Foundation for Children, supra note 134.
to WPA restrictions to access to abortion. This paper therefore seeks to break from the traditional ‘pro-choice’ vs. ‘pro-life’ framework in which the abortion debate has traditionally been considered and illustrate the value of examining the relationship between woman-protective anti-violence initiatives and WPA laws.

**Bill C-510 and Protecting Women’s s. 7 Decision-making Rights**

Absent the ‘pro-life’ concerns of abortion rights advocates discussed above, Bill C-510 appears to be a woman-positive initiative. Specifically, Bill C-510 purports to protect one aspect of a decision of fundamental importance: the right to decide to continue or terminate a pregnancy. This section considers why this is a constitutionally recognized right under s.7 of the *Charter*\(^{138}\) and the available evidence that this right requires protection. Understood from this perspective, Bill C-510 might appear to be a woman-positive initiative that protects women’s s. 7 rights. If Bill C-510’s drafters were to eliminate the fetal-rights language and vagueness problems with the Bill, therefore, it might appear that this Bill is unproblematic from an abortion-rights perspective. As will be illustrated in Chapter III, Bill C-510’s purported ‘protection’ of women’s s. 7 liberty rights may in fact result in the erosion of women’s reproductive rights because of the Bill’s role in supporting the emerging WPA movement. However, with the vagueness/fetal rights problems fixed and without the WPA analysis employed in this paper, Bill C-510 appears at first to have a good, woman-positive goal.

The decision to terminate or not to terminate a pregnancy has been recognized as

\(^{138}\) *Charter*, supra note 13 at s. 7.
a decision of fundamental importance protected under s. 7 of the Charter. Section 7 of
the Charter guarantees the following:

7. Everyone has 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.\textsuperscript{139}

In Morgentaler (1988),\textsuperscript{140} the Supreme Court found that women’s s.7 rights guaranteed in
the newly adopted Charter outweighed the state interest in protecting the fetus as
facilitated under the s. 251 Criminal Code scheme that permitted abortions only in certain
circumstances. In her minority decision in the case, Wilson J. suggested that “the right to
liberty contained in s. 7 guarantees to every individual a degree of personal autonomy
over important decisions intimately affecting their private lives” and that the decision to
terminate a pregnancy is included in this s. 7 liberty interest.\textsuperscript{141} In her reasoning, Wilson
J. noted,

[The decision of a woman to terminate her pregnancy] is one that will
have profound psychological, economic and social consequences for the
pregnant woman. The circumstances giving rise to it can be complex and
varied and there may be, and usually are, powerful considerations
militating in opposite directions. It is a decision that deeply reflects the
way the woman thinks about herself and her relationship to others and to
society at large. It is not just a medical decision; it is a profound social
and ethical one as well.\textsuperscript{142}

Thus, Wilson J. identified the decision to terminate a pregnancy as a decision of such
fundamental importance that it implicates women’s s. 7 liberty rights. Bill C-510 purports
to protect one side of this very important decision; specifically, pregnant women’s right to

\textsuperscript{139} Charter, supra note 13 at s. 7.
\textsuperscript{140} Morgentaler (1988), supra note 47.
\textsuperscript{141} Ibid. at para. 240 - 241, Wilson J.
\textsuperscript{142} Ibid. at para. 241, Wilson J.
decide to continue a pregnancy and not have an abortion. This decision to continue a pregnancy is included within the decision articulated by Wilson J. in Morgentaler (1988): both the decision to terminate a pregnancy and to continue it are aspects of the ‘abortion’ decision. The problems associated with Bill C-510 protecting only part of this decision are discussed in Chapter IV.

Though Wilson J.’s s. 7 analysis was only a minority judgment, there is now a fair amount of agreement within the Supreme Court that the right to make decisions of fundamental importance is a s. 7 right and that this right includes the right to decide to continue or terminate a pregnancy. In the case B.(R.) v. Children's Aid Society of Metropolitan Toronto, four members of the Supreme Court endorsed Wilson J.’s view that s. 7 liberty includes a right to make fundamental personal decisions without state interference. In B.(R.), the appellant parents were Jehovah’s witnesses who, for religious reasons, refused to consent to blood transfusions for their child. In considering whether the s. 7 liberty rights of the parents extended to making fundamental decisions for a child, the court determined that s. 7 includes a right to a degree of personal autonomy to shape one’s own life, and therefore includes a right to make decisions that are of “fundamental personal importance.” Thus, four members of the Court found that the s. 7 liberty interest extended to the right to personal autonomy to make certain types of important personal decisions.

In the later case Godbout v. Longueuil (City), La Forest reiterated his position,

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144 Ibid. at para. 80.
speaking for two other members of the Court. In *Godbout*, the question before the Court was whether an employment contract that stipulated that an employee had to live within a city’s boundaries violated a person’s s. 7 liberty rights by interfering with the choice of where to live. La Forest J. determined that the decision of where to live was a decision of fundamental personal importance. In his decision, La Forest J. noted,

[T]he right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference.... [T]he autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.\(^{146}\)

Thus, in *Godbout*, La Forest J. further articulated the types of decisions that are protected under the s. 7 liberty right. Those protected decisions are ones that are ‘fundamentally or inherently personal’: ones that implicate what it means to be independent. It is difficult to imagine a choice of more fundamental importance than the choice to terminate or continue a pregnancy. As explained by Wilson J. in *Morgentaler* (1988), such a decision has a profound impact on a woman’s life, relationships, and identity.\(^{147}\) Because of the huge impact that a pregnancy has on the direction of a woman’s life, the decision to terminate or not to terminate necessarily implicates what it means for a woman to enjoy a sense of dignity as an independent individual who is in control of the direction of her life.

In the 2000 Supreme Court case *Blencoe v. British Columbia*,\(^ {148}\) the Supreme Court addressed *obiter dictum* this question of whether the decision to continue or terminate a

\(^{146}\) *Godbout*, supra note 145 at para. 66, La Forest J., speaking for L’Heureux-Dubé J. and McLachlin J.

\(^{147}\) *Morgentaler* (1988), supra note 47 at para. 241, Wilson J.

pregnancy is included in the s. 7 liberty right articulated in B.(R.) and in Godbout. The Court in Blencoe was predominantly concerned with the question of whether state-caused delay in proceedings could constitute a violation of the s. 7 right to security of person. In the majority’s analysis of the s. 7 security of person right, the Court notes,

Few interests are as compelling as, and basic to individual autonomy than, a woman’s choice to terminate her pregnancy, an individual’s decision to terminate his or her life, the right to raise one’s children, and the ability of sexual assault victims to seek therapy without fear of their private records being disclosed. Such interests are indeed basic to individual dignity.\textsuperscript{149}

Though this comment is obiter and made with respect to the s. 7 security of person right and not the s. 7 liberty right, it illustrates how the decision to terminate or not to terminate a pregnancy is conceptualized by the Court. Because of the profound impact the ‘abortion decision’ has on women’s lives, identities and sense of dignity, it is likely that today’s Supreme Court would endorse Wilson J.’s reasons in Morgentaler (1988)\textsuperscript{150} and find that the decision to terminate or continue a pregnancy is a decision of fundamental personal importance protected by women’s s. 7 liberty rights. It is part of this fundamental decision that Bill C-510 purports to protect: through criminal law, Bill C-510 would make it a separate offence to interfere in a woman’s decision to continue her pregnancy.

Scientific studies affirm the reality of coerced abortion, particularly in the context of intimate partner violence. These studies seem to provide evidence that laws like Bill C-510 may be needed to protect women’s s.7 rights to choose to continue a pregnancy. In an American study, 74% of respondents who had reported intimate partner violence also

\textsuperscript{149} Blencoe, supra note 148 at para. 86, Bastarach J.

\textsuperscript{150} Morgentaler (1988), supra note 47 at para. 241, Wilson J.
experienced reproductive control by their violent partners.\textsuperscript{151} This included control and abuse during pregnancy and efforts to influence the pregnancy outcome, which included incidences of both coerced abortion and coerced childbirth.\textsuperscript{152} Bill C-510, therefore, appears to recognize this problem of coerced abortion and addresses it by establishing additional protections for women’s decision-making rights; mainly, protections of women’s decision to continue a pregnancy. Despite its seemingly woman-positive appearance, however, there are several features of Bill C-510 that are problematic, especially in the context of the emerging WPA movement. These problematic aspects of Bill C-510 are the focus of the remainder of this paper. The Bill’s focus on protecting women from \textit{abortion} and not from coercive reproductive control or intimate partner violence more generally reinforces traditional stereotypes about women as mothers and as incapable decision-makers. In the context of the WPA, abortion legislation that reinforces these particular stereotypes creates a climate in which WPA claims become more legally recognizable. Without the feminist analysis employed in this paper, however, it seems at first glance that the drafters of this Bill have simply chosen to protect one aspect of a decision of fundamental importance to women which, as some scientific evidence would suggest, needs protecting. On its face, therefore, the Bill appears to be a woman-positive initiative.

\textsuperscript{152} \textit{Ibid.} at 1739.
III. Dealing with the Differential Treatment of Women in Law

The above section is meant to illustrate how Bill C-510 at first appears to be a woman-positive initiative (fetal-rights and vagueness issues aside). Bill C-510 purports to protect one aspect of a decision of fundamental importance: specifically, it protects women’s right to decide to continue a pregnancy. For years, however, feminists have cautioned against laws like Bill C-510 that mandate special treatment for women; in the case of Bill C-510, this special treatment of women is in the form of special criminal laws protecting women from being coerced into having a particular medical procedure. Martha Minow suggests that by highlighting a specific group’s need for protection, one risks reiterating the significance of their difference and, often, their perceived inferiority by the dominant group. Minow describes this ‘dilemma of difference’ as follows:

[B]y taking another person's difference into account in awarding goods or distributing burdens, you risk reiterating the significance of that difference and, potentially, its stigma and stereotyping consequences. But if you do not take another person's difference into account - in a world that has made that difference matter - you may also recreate and reestablish both the difference and its negative implications.153

Minow suggests that a dilemma for feminist arguments generally is that women have to seemingly argue for both equality and sameness with men, while at the same time criticizing the use of men as the norm; women have to simultaneously argue that they want to be equal with men, but that the male standard is insufficient to accommodate women’s needs.154 A simple illustration of this dilemma is the case of maternity benefits: ignoring the needs of women to take time off to have children is to ignore women’s

154 Ibid. at 62.
differences and unique needs and hinder their equal participation in the workplace. To recognize women’s differences, however, and provide maternity benefits is to reinforce negative ideas about women as ‘different’ and therefore inferior to men in the workplace.\textsuperscript{155}

In the case of Bill C-510, drafters claim to address the unique problem of reproductive control directed toward pregnant women; they claim that the unique problem of coerced abortion requires the government to put in place special protections for pregnant women. At the same time, however, by pointing out pregnant women’s need for special treatment, Bill C-510 reinforces stereotypes about pregnant women’s differences by giving those stereotypes the power of law. In particular, Bill C-510’s differential treatment of pregnant women reinforces the same stereotypes about women’s ‘differences’ that ground WPA claims: mainly, stereotypes about women’s identities as mothers and incapable decision-makers that support calls for ‘protecting’ women from abortion. Bill C-510’s differential treatment of women reinforces these stereotypes and thus creates a climate in which WPA claims are more recognizable. The dilemma of difference thus emerges: to protect pregnant women from reproductive control, we risk reinforcing stereotypes about women that can lead to a restriction of their reproductive autonomy. To not protect pregnant women is to ignore the fact that some women experience a unique form of violence in the form of reproductive control.

The following two sections consider how the dilemma of difference might be understood in the context of the Charter guarantees of equality and what sort of framework we might develop for identifying those laws that apply differential treatment

\textsuperscript{155} Martha Minow, \textit{Making All the Difference: Inclusion, Exclusion, and American Law} (Ithaca, N.Y.: Cornell University Press, 1990) at 21 [Minow, \textit{Making All the Difference}].
in a manner that reinforces gender stereotypes of difference. First, I illustrate how early in Charter jurisprudence in *Andrews v. Law Society of British Columbia*,156 the Supreme Court recognized that in some situations, differences must be acknowledged to ensure equal treatment and protect individuals’ s. 15 Charter equality rights.157 However, I also suggest that the structure of the Charter and jurisprudence surrounding Charter equality guarantees requires us to ensure that this accommodation of differences is formulated in a manner that does not reinforce the stereotypes of difference that Minow warns against. The second section considers a framework for identifying the sorts of differential treatment that reinforce stereotypes of difference. Using the example of *R v. Lavallee*158 and feminist critiques of the aftermath, I suggest that considering the historical context in which differential treatment will operate helps us identify the initiatives that will reinforce the stereotypes of difference that have historically been used to limit women’s equality. The remainder of the paper applies this framework to Bill C-510 to illustrate the way in which the differential treatment of women under the Bill reinforces stereotypes about women that creates a climate that is more favourable to restrictions on access to abortion on WPA grounds.

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157 The Supreme Court has recognized “that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality” (*Andrews, ibid.* at para. 26, McIntyre J., dissenting on different grounds). The Court thus recognized that differential treatment of group’s with unique needs might be required to guarantee those groups’ their s.15 equality rights.

158 *Lavallee*, supra note 15.
Constitutional Treatment of the ‘Dilemma of Difference’: Guaranteeing Equality in Differential Treatment

In *Andrews*, the Supreme Court recognized that differential treatment could enhance equality in some situations.\(^{159}\) As discussed above, however, Minow warns that this differential treatment will only enhance equality if it does not reinforce stereotypes about that group’s differences. Bill C-510 seeks to protect women from coerced abortion, a problem that is unique to women. However, we must ensure that this differential treatment does not reinforce stereotypes about women’s differences. The structure of the equality guarantees in the *Charter* and the Court’s treatment of them guarantees a similar thing: s. 15 and s. 28 of the *Charter* require us to ensure that the ‘protection’ of women’s s. 7 rights does not reinforce gender stereotypes. This requires that all protections of women that constitute differential treatment must be done in a manner that enhances women’s equality with men.

The source of this gender equality guarantee is the two gender equality provisions in the *Charter*, s. 15(1) and s. 28:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.\(^{160}\)

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.\(^{161}\)

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\(^{159}\) *Andrews*, supra note 156 at para. 26, McIntyre J., dissenting on different grounds.

\(^{160}\) *Charter*, supra note 13 at s. 15.

\(^{161}\) *Ibid.* at s. 28.
An analysis of the jurisprudence and commentary surrounding these two equality guarantees reveals that gender equality is a broad overarching principle that should colour all rights analysis. The Supreme Court of Canada first recognized the overarching function of the equality guarantees in the inaugural s. 15 equality case Andrews. Writing for the majority with respect to the s. 15 part of the decision, McIntyre J. wrote, “The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the Charter.” Thus, early in Charter rights’ interpretation, the Court recognized the important influence the equality guarantee should have on other rights guaranteed in the Charter. The Supreme Court has since reiterated that all the rights contained in the Charter should be considered in interpreting single rights. In R v. Lyons, the Court considered whether the Criminal Code provision that permits a court to order a ‘sentence of indeterminate detention’ for dangerous offenders violated an accused's s. 7 liberty rights in a manner that was not in accordance with the principles of fundamental justice. Before addressing the issues in the case, La Forest J. (speaking for the majority) noted that all Charter rights should be considered in understanding the value structure of the Charter as a whole and in interpreting the content of individual rights. He wrote,

[T]he rights and freedoms protected by the Charter are not insular and discrete. Rather, the Charter protects a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada. [Citations omitted.]

162 Andrews, supra note 156.
163 Ibid. at para. 52, McIntyre J.
165 Ibid. at para. 21, La Forest J.
166 Ibid. at para. 21, La Forest J.
Thus, the Court has recognized that all the rights in the Charter support and strengthen each other; they should be considered as a whole in interpreting the complex set of values the Charter is meant to protect. Therefore, the gender equality guarantees contained in s. 15 and s. 28 ought to be included in our interpretation of Charter rights and the scope of such rights. I suggest this also applies to the interpretation of government protections of rights; in other words, protections of s. 7 decision-making rights as provided under Bill C-510 should be scrutinized from a gender equality perspective to ensure that the ‘protection’ accords with the Charter commitment to gender equality.

In addition to the jurisprudence discussed above that indicates the equality guarantees ought to serve as an overarching value in government action, the structure and language of the Charter itself demands that gender equality be considered an interpretive tool in the analysis of government action. The inclusion of s. 28 in the Charter’s ‘General’ section and the inclusion of the phrase “notwithstanding anything in this Charter” in s. 28’s wording indicates that gender equality should be applied as an interpretive lens to the analysis of any Charter rights analysis. Unlike s. 15 of the Charter that is included with other substantive rights, s. 28 is listed under the ‘General’ section of the Charter alongside other general interpretive rules. It appears, therefore, that s. 28 is a general interpretive guarantee rather than a right in itself. For example, it is included in the same ‘general’ section as s. 25 that demands that the Charter not be interpreted in a manner that abrogates or derogates from Aboriginal rights.¹⁶⁷ Section 25 requires Courts to turn their minds to the status of Aboriginal rights in their interpretation of the Charter. Similarly, immediately preceding s. 28 is s. 27 of the Charter that puts

¹⁶⁷ Charter, supra note 13 at s. 25.
similar interpretive constraints on other rights, guaranteeing, “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”\footnote{Charter, supra note 13 at s. 27.} Because of s. 28’s inclusion in this ‘general’ interpretive section of the \textit{Charter}, s. 28 should be approached as an interpretive provision;\footnote{Sharpe and Roach briefly refers to s. 28 as one of a “number of interpretive provisions,” supporting the idea that s. 28 demands that gender equality be considered a guiding principle in the interpretation and enforcement of Charter rights (Robert J. Sharpe & Kent Roach, \textit{The Charter of Rights and Freedoms}, 3d ed. (Toronto: Irwin Law Inc., 2005) at 46).} gender equality, therefore, should be an overarching concern to be considered in the interpretation of \textit{Charter} rights and laws that implicate those rights. Section 28 seems to oblige us to examine laws like Bill C-510 that ‘protect’ women’s interests through a lens of gender equality to ensure that such protection accords with the fundamental \textit{Charter} principles of gender equality.

In addition to s. 28’s inclusion in the ‘general’ interpretive section of the \textit{Charter}, the inclusion of the phrase “notwithstanding anything in this \textit{Charter}”\footnote{Charter, supra note 13 at s. 28.} in the s. 28 gender equality guarantee also indicates that gender equality is a fundamental value that ought to colour \textit{Charter} interpretation. According to Peter Hogg and documents recording the drafting process of the \textit{Charter}, the ‘notwithstanding’ portion of s. 28 exempts s. 28 from the s. 33 legislative override provision in the \textit{Charter}.\footnote{Peter Hogg, \textit{Constitutional Law of Canada}, 4th ed. (Toronto: Carswell, 1997) at 1281.} Section 28’s exclusion from the s. 33 override provision indicates that gender equality is of such fundamental importance that legislatures will not be permitted to use the s. 33 override clause to override the s. 28 gender equality guarantee. This additional protection of gender equality in the \textit{Charter} is further evidence that gender equality is a value integral

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\item \footnote{Charter, supra note 13 at s. 27.}
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\item \footnote{Charter, supra note 13 at s. 28.}
\item \footnote{Peter Hogg, \textit{Constitutional Law of Canada}, 4th ed. (Toronto: Carswell, 1997) at 1281.}
\end{itemize}
to Charter rights analysis and should be considered in interpretations of Charter rights and any government action taken to protect those rights.

The above discussion is meant to illustrate how the equality guarantees in the Charter and the Court’s treatment of them indicate that ‘protections’ of women’s s. 7 rights should be administered in a manner that does not undermine women’s equality with men. The Court’s treatment of the s. 15 and s. 28 gender equality guarantees indicates that gender equality is an overarching principle in rights analysis. This requires that all ‘protections’ of women that constitute differential treatment with men must be provided in a manner that enhances women’s equality with men. This is to accord with both Minow’s analysis and the Supreme Court of Canada’s analysis in Andrews: in order for differential treatment to enhance the equality of women, the differential treatment should not reinforce stereotypes of difference that could undermine that women’s equality with men. Only if the accommodation of a women’s differences is administered in a manner that does not reinforce historical stereotypes about that group’s differences will the positive effects be realized; in the case of Bill C-510, therefore, only if the protection of pregnant women’s s. 7 decision-making rights is provided in a manner that does not reinforce negative stereotypes about women will that protection be permissible. As the remainder of the paper will illustrate, analyzing Bill C-510’s ‘protection’ from this gender equality perspective shows the way in which this ‘protection’ reinforces historical stereotypes about women. Although reinforcing these stereotypes is in itself problematic, reinforcing these stereotypes in the context of abortion creates space for WPA claims that could eventually be used to limit women’s access to abortion. In the context of the WPA initiatives in the United States, Bill C-510’s glorification of motherhood and the
undermining of women’s capacity for judgment can in fact help create a climate that is more favourable to restrictions on access to abortion on WPA grounds. By reinforcing stereotypes about women that can lead to restrictions in women’s autonomy and reproductive decision-making, the differential treatment of women under Bill C-510 is not the kind conceptualized under Andrews. Instead, the protection is the more insidious kind identified by Minow: the kind that reinforces stereotypes of difference in women and contributes to a climate in which it appears that women’s reproductive rights can be justifiably limited.

R v. Lavallee: A Feminist Framework for Analyzing Differential Treatment

The above section illustrated how the Charter’s equality guarantees require that initiatives that treat women differently must do so in a manner that does not reinforce gender stereotypes. I now turn to developing a framework for determining when an initiative violates this rule. In other words, developing a means of determining whether a law that treats women differently reinforces stereotypes of difference and thus violates the Charter’s gender equality guarantees. This framework can be developed using the example of the case of R v. Lavallee172 and the feminist analysis of the aftermath of the case. In Lavallee, the Supreme Court allowed the admission of ‘battered woman syndrome’ (“BWS”) expert evidence to explain the actions of women who had murdered their abusive partners. This evidentiary rule treated battered women differently in order to afford battered women equal access to the defence of self-defence. Feminist’s criticized the Lavallee evidentiary rule because it reinforced stereotypes of difference

172 Lavallee, supra note 15.
with respect to battered women. To illustrate the way in which the *Lavallee* rule was problematic, feminists considered how the differential treatment of battered women would operate in a world where historical gender stereotypes about battered women persist. In *Lavallee*, feminists first warned that differential treatment of battered women that centered on an image of battered women as *victims* reinforced the idea that battered women lacked legal capacity to act and required paternalistic protection. Second, feminists warned that adoption of BWS evidence in the courts would serve to reinforce stereotypes of the ‘ideal’ battered woman as victimized, excluding those women who did not fit the victim stereotype from access to the defence of self-defence.\(^{173}\) These critiques provide a framework for determining whether an initiative that treats women as ‘different’ will inadvertently reinforce stereotypes of difference and thus be constitutionally problematic. The framework developed in the *Lavallee* analysis below is applied to Bill C-510 in Chapter IV to illustrate how the ‘protection’ afforded women under Bill C-510 reinforces stereotypes about women as mothers and incapable decision-makers. Because these are the same stereotypes upon which WPA arguments rely, reinforcing these stereotypes in the context of abortion creates a climate in which WPA claims are more legally recognizable. By reinforcing these gender stereotypes of difference in the context of abortion, therefore, Bill C-510 creates legal space for more insidious WPA claims.

In *Lavallee*, Angelique Lyn Lavallee was charged with murdering her common-

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law husband Kevin Rust. Lavallee admitted to shooting Rust in the back of the head while he was leaving the bedroom; thus, it was not disputed that Lavallee killed Rust. What was debated in the case was whether Lavallee could lead expert evidence of past abuse in support of her self-defence claim. Lavallee had experienced years of abuse at the hands of Rust. Lavallee told the police that immediately prior to the shooting, Rust had told her “either you kill me or I’ll get you” and had given her the gun. Lavallee, therefore, claimed she had killed Rust in self-defence, believing at the time that the only way to preserve her life was to kill him as he was leaving the room.

Under s. 34(2)(a) of the Criminal Code, a person is justified in using self-defence to repel an assault that is meant to cause grievous bodily harm or death. There are two conditions to using such a defence: first, self-defence can only be used as a defence if the person exercising the self-defence is “under reasonable apprehension of death or grievous bodily harm from the violence.” Courts have interpreted this to mean that the threat to the accused must be imminent. Because Lavallee shot Rust in the back of the head as he was leaving the room, it was contested whether the killing could be understood as self-defence to a threat that was imminent. A second aspect of the self-defence defence is that the accused must believe “on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.” This section of the Criminal Code is meant to ensure that those claiming self-defence believed they had no alternative course of action; in Lavallee’s case, this was contested because after Rust left the room, Lavallee

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174 Lavallee, supra note 15.
175 Ibid. at para. 3.
176 Ibid. at para. 2-10.
177 Criminal Code, 1985, supra note 47 at s. 34(2)(a).
178 Shaffer, supra note 173 at 3.
179 Criminal Code, 1985, supra note 47 at s. 34(2)(b).
could have left the house or called the police as an alternative means of preserving her safety.

To address these problematic aspects of Lavallee’s self-defence argument, the defence counsel called a psychiatrist as an expert witness on BWS. The expert witness testified that Lavallee exhibited a pattern of behaviour consistent with BWS and this could help explain to the jury why Lavallee believed that the danger presented by Rust was imminent and why Lavallee felt she had no other option but to shoot Rust. The Court noted that expert testimony on BWS relating to the cyclical nature of abuse and the ability of the accused to predict when and how severe a violent episode could help juries evaluate whether the accused had in fact believed that she was facing an *imminent* life-threatening situation.\(^{180}\) The court also noted that expert testimony on BWS relating to ‘learned helplessness’ and ‘traumatic bonding’ between an abused woman and her abusive partner could help explain to juries why a battered woman might believe that leaving was not an option; it would help explain how a battered woman might reasonably believe that violent force was the only way she could save her life.\(^{181}\) BWS expert evidence, therefore, was permitted in Court to illustrate to the jury how a woman’s history of abuse might explain why actions that seem to constitute murder were in fact reasonable actions of self-defence.

The decision to include expert evidence of BWS in *Lavallee* was seen as a victory by some feminists and as problematic by others. As Martha Shaffer notes, “While feminist responses to *Lavallee* were generally favourable, many feminists saw the judicial recognition of the battered woman syndrome as a double edged sword.”\(^{182}\) Shaffer notes

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\(^{180}\) *Lavallee*, supra note 15 at para. 40 - 52.

\(^{181}\) *Ibid.* at para. 53 - 60.

\(^{182}\) Shaffer, *supra* note 173 at 6.
that many feminists saw it as a victory in re-defining the defence of self-defence so that it included women’s experiences and explained why women did not kill in self-defence in the same manner as men. The suggestion by feminists was that the current law of self-defence was based on a male standard and only recognized the forms of violence in which men typically engage, which are predominantly ones of confrontation like the bar room brawl.\textsuperscript{183} This conception of violence does not make room for situations of repeated abuse like the experiences of battered women. Feminists suggested, therefore, that current self-defence laws appeared ‘neutral’, but in fact excluded women’s experiences because the ‘neutral’ standard was based on a male norm. The decision in \textit{Lavallee} was an attempt to incorporate women’s experiences into self-defence law by allowing the introduction of special evidence into battered women self-defence trials: in other words, the Courts allowed evidence of battered women’s ‘differences’ (i.e. different experiences with violence) to provide women with equal access to the criminal defence of self-defence. By acknowledging battered women’s different experiences, the Court hoped that juries would begin to apply the same legal standards to women as men with respect to the defence of self-defence.

However, some feminists predicted that this differential treatment of battered women could reinforce stereotypes of difference. They expressed concerns that highlighting battered women’s different experiences would result in juries or judges treating battered women as inferior.\textsuperscript{184} In particular, feminists were concerned that BWS evidence reinforced historical stereotypes about women as passive victims, a stereotype that has historically been used as justifications for ‘patriarchal protectionism’ and unequal

\textsuperscript{183} Shaffer, \textit{supra} note 173 at 7.
\textsuperscript{184} Schneider, \textit{supra} note 173 at 214.
Thus, feminists feared that the differences highlighted in BWS expert testimonies reinforced stereotypes about women as passive, sick, and victimized, the same stereotypes that have historically been used to limit women’s autonomy. Critics suggested it was not the differential treatment that was problematic, but rather the framing of the differential treatment in a manner that resonated with historical stereotypes about women. This is the same fear that Minow expresses in her discussions of the ‘dilemma of difference:’ taking a person’s difference into account may be necessary to achieve equality, but the differential treatment must be framed in a manner that does not reinforce the significance of that group’s difference and thus reinforce the stigma and stereotyping consequences. Differential treatment may be required to achieve equality, but that differential treatment must be provided in a manner that does not reinforce stereotypes that have historically subordinated that group. Therefore, the framework for evaluating the permissibility of differential treatment seems to be this: to understand whether differential treatment will reinforce stereotypes of difference, we must consider what stereotypes have historically limited that group’s equality and whether those stereotypes are reinforced by the differential treatment.

It is instructive to consider how feminists identified the way in which BWS evidence was framed to reinforce historical stereotypes of women’s differences. In the aftermath of Lavallee, feminists focused on the way in which women have historically been portrayed as passive victims and that this has been used to limit their capacity to act. A central aspect of BWS expert evidence is explaining how a battered woman’s

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185 Schneider, supra note 173 at 214.
186 Ibid.
victimization and ‘learned helplessness’ explain how a battered woman might have been reasonable in believing she could not leave and needed to employ deadly force to preserve her life. Historically, stereotypes of women as victimized and mistreated have been used to limit women’s claims for equal treatment. Feminists warned these same stereotypes might be applied to battered women precisely because they correspond to stereotypes of women that non-battered people already hold. As Schneider notes, “Battered woman syndrome does not mean, but can be heard as reinforcing stereotypes of women as passive, sick, powerless and victimized” (emphasis added). Because of a historical pattern of stereotyping women as weak and requiring paternalistic protection, feminists suggested that an evidentiary policy that created space for these stereotypes would likely reinforce them. People bring their pre-existing notions about women to the interpretation of BWS evidence, and because women have historically been stereotyped as victimized and lacking capacity, it should not be surprising that these stereotypes might appear in people’s interpretation of evidence that makes victimization central to its claim. Although the introduction of BWS expert evidence was intended to explain how women’s different experiences required juries to apply equal legal standards, framing the differential treatment in a way that resonated with historical stereotypes about women resulted in BWS evidence reinforcing stereotypes of women’s inequality.

In the 1991 case R v. Eagles following Lavallee, Shaffer suggests that these feminist fears surrounding BWS may have materialized. She thus provided this case as proof that BWS evidence’s differential treatment was reinforcing historical stereotypes

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188 Schneider, supra note 173 at 214.
189 Ibid.
about battered women rather than guaranteeing women equal access to self-defence law. In the case, Ms. Eagles was charged with uttering threats to her separated and long-time abusive husband. The judge in the case accepted BWS as evidence that Ms. Eagles lacked the *mens rea* to commit the offence. With respect to Ms. Eagles, therefore, the judge found,

> She was powerless. Even while separated from her husband, he was significantly impacting, if not controlling her life. In the result, I am not satisfied that she was in the position of making or exercising any real choice.\(^{191}\)

The justice’s comments, therefore, appear to adopt the image of a battered woman as a virtual slave, incapable of acting autonomously. BWS in this case was not used as it was intended in *Lavallee* to explain how a battered woman’s actions that appear vicious were actually reasonable; on the contrary, BWS was used to illustrate how a battered woman was not a legally competent actor and ought to be relieved of criminal responsibility on the basis of her incompetency.\(^{192}\) BWS was used as an *excuse*, not a *justification*, for a battered woman’s actions.\(^{193}\) Although the differential treatment was intended to illustrate how Ms. Eagles’ actions were reasonable under self-defence law, it appeared that BWS evidence provided a means for juries to deny Ms. Eagles’ legal capacity. The effect of the BWS evidentiary rule in *R v. Lavallee*, therefore, was not the protection of battered women from unfair convictions, but the denial of women’s legal capacity. We can infer that this occurred because the differential treatment was framed in a manner that resonated with stereotypes that have historically been used to limit women’s legal capacity; mainly,

\(^{191}\) Eagles, *supra* note 190 at 5.

\(^{192}\) Shaffer, *supra* note 173 at 24.

\(^{193}\) Schneider, *supra* note 173 at 215.
stereotypes about women as passive victims. Minow’s fears are therefore realized in *Eagles*: the differential treatment of Ms. Eagles did not provide her with equal access to the law, but instead reinforced historical stereotypes of difference. It is because BWS evidence was framed in a manner that resonated with a stereotype that has historically limited women’s autonomy that this resulted: thus, a framework for determining the acceptability of differential treatment appears to be considering whether the differential treatment reinforces historical stereotypes of difference.

Feminists critiquing BWS evidence also feared that the differential treatment of battered women would reinforce the stereotype of the ‘authentic’ battered woman as that of a victim, which could result in the exclusion of women who do not fit this classic ‘victim’ stereotype from using the battered women self-defence doctrine. \(^{194}\) By defining battered women’s differences in stereotypical terms, BWS evidence served to reinforce historical stereotypes about what kind of woman is ‘battered’ and what kind of woman is not. By making helplessness a defining trait of BWS, the Court in *Lavallee* risked supporting the already existing stereotype that women who did not behave submissively would not fit within the ‘damsel in distress’ image and thus would not be viewed as capable of being a true ‘battered woman’. \(^{195}\) For example, women who are involved in criminal activity, have a history of substance abuse, or have a history of violence, might not fit within the traditional ‘innocent female victim’ stereotype that people already recognize as needing protection. \(^{196}\) These women, therefore, might be excluded from using the battered woman self-defence doctrine. BWS expert testimony recreates women as the

\(^{194}\) Shaffer, *supra* note 173 at 19.
\(^{195}\) Ibid. at 13.
\(^{196}\) Ibid. at 25.
innocent victims of their circumstances; therefore, women who do not behave as innocent victims are excluded from the ‘battered woman’ category and thus unfairly excluded from using the defence of self-defence. By making images of victimization central to the BWS claim, therefore, it again appears that the Court failed to consider the way that victimization imagery has historically been used against women who do not fit the victim stereotype. By creating differential treatment without considering the way in which that treatment might reinforce stereotypes that have historically been used against women, the BWS evidentiary rule again failed to advance battered women’s equality.

Judicial evidence suggests that feminists’ predictions about the perpetuation of the ‘innocent battered woman’ stereotype have likely come true. Schneider notes that judicial opinions indicate that lawyers tend to focus primarily on the victimized and passive characteristics of the accused in their submission of BWS evidence rather than focusing on illustrating how a battered women’s circumstances explained why the homicide was a reasonable choice to preserve her life.¹⁹⁷ Thus, it appears that there is a persisting belief that judges and juries will be more sympathetic to the battered women who is the ideal ‘damsel in distress’: a woman who is innocent, passive and incapable of escaping. By appealing to these stereotypes, lawyers either intentionally or unintentionally appeal to the historical stereotypes about women as innocent victims to convince a jury to accept BWS expert evidence, likely because these stereotypes resonate with juries’ already existing views of women. In either case, it seems that BWS self-defence doctrine emerging from Lavallee has reinforced historical stereotypes about women’s incapacity and inferiority.

Similarly, Shaffer suggests that the absence of BWS self-defence arguments in

¹⁹⁷ Schneider, supra note 173 at 198.
cases of women who do not fit the victim image is also evidence that the BWS expert evidence rule reinforces historical stereotypes of battered women at the expense of those battered women who do not fit into such stereotypes. For example, in the cases of R v. Whitten\textsuperscript{198} and R v. Bennett,\textsuperscript{199} the introduction of BWS evidence would have been immensely helpful in explaining how the accused women’s actions were examples reasonable self-defence, not murder.\textsuperscript{200} However, the women in those cases had histories of substance abuse, histories of previous violence perpetrated against their deceased abusive partner and/or histories of psychiatric illness. The characteristics of these women may explain why they entered guilty pleas rather than plead self-defence with BWS evidence; these women’s character did not fit the ‘damsel in distress’ stereotype and thus may have made it difficult for a jury to believe that they were ‘genuine’ battered women capable of taking reasonable action in self-defence.\textsuperscript{201} By failing to consider the way in which the differential treatment of battered women under the BWS evidentiary rule might resonate with historical stereotypes of battered women, the Court in Lavallee appears to have inadvertently reinforced battered women’s inequality. By failing to consider how the differential treatment of women may function in a world where gender stereotypes persist, the Court appears to have permitted BWS evidence to be presented in a manner that coincides with dominant stereotypes about battered women: mainly, that only women who are innocent, victimized and incapacitated (i.e. unlike the accuseds in Whitten and Bennett) are to be excused from responsibility for their actions.

The above discussion illustrates how examining the differential treatment of

\textsuperscript{200} Shaffer, supra note 173 at 26 -31.
\textsuperscript{201} Ibid. at 28.
women in the context of historical stereotyping can help illustrate the way in which that treatment might reinforce stereotypes of difference. The example of Lavallee, therefore, provides a framework for analyzing woman-protective laws like Bill C-510. In the case of BWS evidence, differential treatment that made victimization central to its claim risked reinforcing historical stereotypes that women are incapacitated victims requiring paternalistic protection. Women who do not fit this stereotype risk being excluded from the law’s protection. Considering the history of discrimination against battered women, it should not have been surprising that using an evidentiary rule whose defining trait is helplessness might serve to reinforce traditional capacity-based stereotypes about battered women. As Schneider notes, the goal of including BWS expert testimony was to illustrate to juries and judges how battered women’s different experiences explained why battered women ought to be treated with the same legal standards as everyone else. Feminists’ were concerned, however, that explaining battered women’s experiences as different would reinforce the historical idea that battered women are different and therefore inferior.202 By failing to recognize this history of undermining women’s equality through victimization language and ‘difference’, the Court in Lavallee inadvertently created a rule that reinforced those traditional stereotypes to battered women and further denied women equality with men.

Supporters of the Lavallee decision might suggest that the examples used to illustrate the problems with Lavallee’s evidentiary rule are simply examples of cases where the jury was instructed incorrectly or the judge interpreted the BWS evidentiary rule incorrectly. In other words, supporters of Lavallee might suggest that there is nothing

202 Schneider, supra note 173 at 214.
problematic about the evidentiary rule itself; instead, it is the faulty interpretation of the rule that has been problematic. These critics might suggest that faulty interpretations of the law are an issue for appellate courts to address in the individual cases in which they occur; they should not be the concern of lawmakers like the legislature and the Court. Lawmakers, these critics would say, cannot be held responsible for the misapplications of clear and coherent laws by juries, judges, lawyers and the public.

I agree that the cases in which the Lavallee rule is misinterpreted are open to appeal on the grounds of misapplication of the Lavallee rule. These appeals might be successful and may provide remedies to accused women who experienced a gender discriminatory interpretation of the law. However, the evidentiary rule in Lavallee has deeper problems than misapplication. Laws that treat women as ‘different’ but are developed blind to the stereotypes that have time and again denied women equality are not problematic because people might misapply them. They are problematic because they ignore the reality of the women they purport to protect; in a world that has made gender matter, laws that impose differential treatment on women must consider how that differential treatment fits within the broader history of gender ‘difference’ and gender discrimination. To create an evidentiary rule whose defining trait is victimization is to create misinterpretation in a world that has historically denied women equality through her victimization.

This final point is the crux of the feminist arguments against Lavallee; to provide differential treatment of women in a manner that reinforces stereotypes that have historically been used to limit women’s equality is not just irresponsible law making, but it is gender discrimination. By not taking into consideration the gender unequal reality in
which a differential treatment law will operate, that law can *perpetuate and support* gender-discrimination. The cases discussed as examples of the *Lavallee* rule gone wrong are not just examples of misapplication of law (though they are, in addition, misapplications of law); they are examples of the law’s continued failure to consider the realities of women. Laws that treat women differently not only risk reiterating the significance of difference, but also risk recreating the stigma and stereotyping associated with that difference. Therefore, gender-specific laws that treat women differently to advance women’s equality with men must be developed in a manner that acknowledges the dangers that differential treatment might have. Laws that fall victim to this danger fail to guarantee women’s protection in a gender-equal manner and thus violate s. 28 of the *Charter*.

The following section applies the differential-treatment framework developed in the *Lavallee* discussion above to Bill C-510. As will be illustrated, the differential treatment of women under Bill C-510 reinforces stereotypes that have historically been used to limit women’s autonomy, and more specifically, to limit women’s reproductive decision-making rights under WPA laws. When Bill C-510 is considered in the context of more draconian WPA initiatives operating in the United States, we notice similarities in the differential treatment of women under these two regimes— in particular the glorification of motherhood and the undermining of women’s capacity for judgment. By reinforcing these stereotypes in the context of abortion, therefore, Bill C-510 supports the same stereotypes that the WPA movement uses to justify restrictive abortion laws and thus Bill C-510 creates space for WPA claims.

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IV. Bill C-510 and the Woman-Protective Anti-Abortion Movement: Creating a Climate of ‘Protection’

As has been discussed thus far, Bill C-510 purports to protect one aspect of a decision of fundamental importance protected by s. 7 of the Charter - women’s right to decide to continue or terminate a pregnancy. The following section applies the framework developed in the Lavallee analysis discussed above to illustrate how the differential treatment of women under Bill C-510’s ‘protection’ in fact reinforces the same historical stereotypes of difference that support WPA arguments. The purpose of this chapter is to illustrate how Bill C-510 and WPA claims rely on the same underlying rational in their ‘protections’ of women – mainly, the glorification of motherhood and the undermining of women’s capacity for judgment. Because Bill C-510 reinforces these stereotypes about women’s roles as mothers and their lack of capacity, Bill C-510 helps create a climate in which restrictions on access to abortion on WPA grounds appear more reasonable. By reinforcing the same stereotypes, Bill C-510 creates legal space for more directly restrictive regimes.

Bill C-510’s differential treatment of women reinforces two historical stereotypes of difference: 1) stereotypes of pregnant women as mothers; and 2) stereotypes of pregnant women as lacking capacity with respect to their reproduction. By reinforcing these stereotypes in the context of abortion, Bill C-510 appears to reinforce the same stereotypes of difference relied upon in the WPA: 1) stereotypes of pregnant women as mothers who need protection from the ‘abortion trauma’ of killing their ‘child’; and 2) stereotypes of pregnant women as incapable decision-makers with respect to the ‘abortion decision.’ This paper suggests, therefore, that Bill C-510 is not only problematic because
of the ‘fetal rights’ issues already identified by abortion rights advocates, but also because its differential treatment of women reinforces the same historical stereotypes of difference that have been used to limit women’s access to abortion on WPA grounds in the United States. By reinforcing these same stereotypes, therefore, Bill C-510 is contributing to a legal climate in which WPA claims are more cognizable; the WPA claim becomes more acceptable if laws already exist that support the idea that women are mothers who are incapable of protecting themselves from the ‘trauma’ that abortion inflicts.

Creating the ‘Abortion Trauma’: Bill C-510’s Reproduction of the Mother Stereotype

The ‘abortion trauma’ claim has become prominent in the WPA movement. These claims have gained recognition not through valid scientific evidence, but instead through reliance on familiar stereotypes about women’s ‘maternal nature.’ The structure of Bill C-510’s ‘protection’ of pregnant women reinforces claims about women’s maternal nature in the context of abortion by reinforcing the idea of abortion harm. By reinforcing the same stereotypes about pregnant women in the context of abortion as the WPA, Bill C-510’s ‘protection’ of women creates legal space for WPA claims regarding the need to ‘protect’ women from abortion.

‘Abortion Trauma’ Claim within the WPA

As noted in the Chapter I, a central element to the WPA claim is that women are psychologically harmed by abortion. However, the scientific and medical communities
have continually asserted that there is a lack of evidence to show that abortion negatively affects women’s mental health.\textsuperscript{204} A recent review of studies on the psychological consequences of abortion found that the highest quality studies found that there were few, if any, differences between women who had abortions and those that did not. Conversely, studies with highly flawed methodology found negative mental health consequences were associated with abortion.\textsuperscript{205} The review concluded by saying that the introduction of so-called ‘informed consent’ laws that provide information on these alleged mental risks is unwarranted. As the authors put it: “If the goal is to help women, we are obligated to base program and policy recommendations on the best science, rather than using science to advance political agenda.”\textsuperscript{206} The implication of the study is clear: WPA claims about the harms women experience are not motivated by genuine scientific beliefs that women need protection, but are politically motivated by those wishing to see abortion restricted.

In 2008, the American Psychological Association (“APA”) also conducted a review of the research that had been conducted thus far on the relationship between abortion and mental health. The APA found that the majority of published literature suffered from often severe methodological problems. A review of the higher quality studies revealed “no evidence sufficient to support the claim that an observed association between abortion history and mental health was caused by the abortion per se, as opposed to other factors.”\textsuperscript{207} Thus, the APA concluded that the link between abortion and adverse

\textsuperscript{205} Vignetta E. Charles \textit{et al.}, “Abortion and long-term mental health outcomes: a systematic review of the evidence” (2008) 78:6 Contraception 436 at 448-449.
\textsuperscript{206} Ibid. at 449.
mental health effects is highly questionable and that most studies indicating that such a link exists are severely methodologically flawed and not acceptable by modern scientific standards.

Despite suggestions from those in the medical and scientific community that abortion does not harm women’s mental health, WPA arguments have continued to spread. New legislation continues to be tabled and upheld by the Courts in the United States that limits women’s access to abortion on WPA grounds.\(^{208}\) and Canadian anti-abortion groups continue to incorporate more woman-protective claims into what were traditionally ‘pro-life’ platforms.\(^{209}\) The continued spread of the WPA argument in spite of conflicting scientific evidence indicates that there is something attractive about the WPA claim that is not dependant on scientific merit; one scholar suggests, “[F]or the public – who are often conflicted about abortion but clearly sympathetic to the anxieties and complexities surrounding unintended pregnancy – the ‘abortion hurts women’ message may possess a certain seductive quality.”\(^{210}\) It appears that there is something about the WPA claim that resonates with people and operates independent of scientific evidence of ‘harm.’

One explanation for the appeal of the WPA claim that abortion harms women is that it relies on traditional gender stereotypes with which the public is familiar. In WPA advocacy, ‘abortion harm’ has been overtly recognized as equivalent to the harm mothers

\(^{208}\) In Rounds, supra note 93 at 734, the appeals Court quotes the Supreme Court’s finding in Carhart that abortion can psychologically injure women and that informed consent regimes ought to be used to protect women from these mental harms. See also “Laws, Lies and the Abortion Debate”, supra note 93.

\(^{209}\) See, for example, Physicians for Life, supra note 102; Ring-Cassidy & Gentles, supra note 102; and The Signal Hill, supra note 102.

experience when they lose an existing child. Not surprisingly, framing abortion harm in this manner resonates strongly with people: it plays to both the historical stereotypes of women as mothers and caregivers and the irrefutable claim that the death of a child is a tragedy. By creating ‘abortion trauma’ within the realm of motherhood, the WPA capitalizes on a trauma that people are familiar with: that experienced by a mother when her child dies or, worse yet, when she is implicated in her child’s death. Thus, the claims of abortion trauma have been presented in a manner that encourages people to interpret them through familiar stereotypes; it encourages people to view pregnant women as mothers.

Professor Reva Siegel has done significant work on uncovering the stereotyping operating within the WPA movement.211 In her analysis, Siegel largely depends upon the example of the South Dakota Report. As discussed in Chapter I, the South Dakota Report is perhaps the most striking example of WPA arguments in the United States.212 In 2005, South Dakota created a task force to study the State’s interest in banning abortion; the result was a 72-page report. The South Dakota Report raised many of the traditional ‘pro-life’ objections to abortion; however, over half of the South Dakota Report (40/72 pages) focused on the State’s interest in prohibiting abortion to protect women. Siegel uses the South Dakota Report to illustrate how the abortion trauma claim relies on traditional mother stereotypes. She suggests that because United States laws’ that rely on the WPA arguments perpetuate gender stereotypes, those laws violate women’s equal protection rights under the American Constitution’s fourteenth amendment.213 In this paper, I use

211 Siegel, “New Politics”, supra note 73.
212 Siegel & Blustain, “Mommy Dearest?”, supra note 73 at 22.
213 See generally Siegel, “New Politics”, supra note 73.
Siegel’s stereotyping analysis to suggest that framing the ‘abortion trauma’ claim in traditional stereotyping language makes the WPA claims familiar. By framing ‘abortion trauma’ as such, the WPA movement is able to garner public support without valid scientific evidence.

In identifying the source of the stereotyping upon which abortion trauma claims rely, Siegel suggests that the WPA argument re-invokes the separate spheres tradition that has historically been used to limit women’s autonomy.214 This tradition relies on the idea that men are naturally destined to dominate the public sphere and women are naturally destined to dominate the private family sphere. Men are stereotyped as the natural providers for the family, whereas women are stereotyped as the natural caregivers. Women’s roles, therefore, are largely reduced to motherhood under the separate spheres tradition. Siegel draws on evidence from the *South Dakota Report* to illustrate how the WPA arguments play on traditional mother-child ‘care giving’ language to support its claims surrounding ‘abortion trauma’. For example, the *South Dakota Report* suggests, “[I]t is simply unrealistic to expect that a pregnant mother is capable of being involved in the termination of the life of her own child without risk of suffering significant psychological trauma and distress.”215 Similarly, the *South Dakota Report* claims that no woman properly informed that her fetus is a child could ever choose abortion, as it is too far “outside the normal conduct of a mother to implicate herself in the killing of her own child.”216

Framing abortion trauma in this manner, the *South Dakota Report* suggests that

214 Siegel, “New Politics”, *supra* note 73 at 1006.
abortion trauma is an inevitable consequence of abortion because it violates a woman’s nature as a mother; to deny that abortion trauma exists is to deny nature. Because this form of harm suffered by mothers resonates with people who are familiar with the traditional image of women as nurturing caregivers of children, the abortion trauma claim seems plausible. By reinforcing stereotypes of women as mothers and caregivers and invoking images of a mother’s grief over a lost child, the South Dakota Report need only rely on the public’s unexamined assumptions about ‘nature’ to support its claims. Scientific studies documenting abortion trauma become ancillary and unimportant. It is thus not difficult to understand how claims of ‘abortion trauma’ interpreted in the context of historical stereotypes about women’s maternal and nurturing ‘nature’ could lead people to believe that many pregnant women, as mothers, experience a mother-child loss as a result of abortion and therefore need to be ‘protected’ from abortion generally.

The arguments and data employed by the South Dakota Task Force are extreme; the claim that all pregnant women experience abortion trauma because all pregnant women are mothers is less prevalent among Canadian WPA advocacy. In the more moderate Canadian WPA advocacy, however, WPA claims also rely on traditional gender role stereotypes about women to advance their abortion trauma claims. For example, in one Canadian WPA article, WPA advocates note, “a growing body of literature suggests that grief and a sense of bereavement after induced abortion are more common, more intense and more prolonged than is generally suspected.”217 They go on to suggest that even if only a small percentage of the 80,000 abortions performed annually in Canada

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result in these harms, that we still face a significant ‘community health problem.’ This claim is much less radical than that employed by the *South Dakota Report*. But considering our history of stereotyping women as mothers, it is not difficult to see how these claims of ‘bereavement’ and ‘grief’ help create an image of abortion harm as equivalent to that of a lost child. As another example, the de Veber Institute based in Toronto published a book called *Women’s Health After Abortion*. The book notes that the *grief* many women allegedly experience after abortion is a form of ‘suppressed mourning’.

Recognizing that people will apply their stereotyped views of women as ‘naturally’ maternal caregivers, this book creates an image of ‘abortion trauma’ with the realm of motherhood and the loss of a living child. Because of women’s ‘natural’ maternal instincts, it becomes unexceptionable that women might experience grief after abortion considering they have just chosen to violate their natural role as mother and caregiver.

The de Veber book *Women’s Health After Abortion* goes on to suggest that the effect of post-abortion ‘trauma’ can lead to difficulties in bonding with later-born children and can even lead to abuse of later children. The implication of these ‘trauma’ claims is clear; people are encouraged to associate pregnant women with motherhood, and ‘abortion trauma’ with loss of a child. The book suggests that women who have abortions are more likely to have strained relationships with their children because “children are a constant reminder of the abortion experience and the lost child. Such reminders bring up feelings of guilt and shame.”

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218 de Veber et al., “Bereavement”, *supra* note 217 at 94.
219 Ring-Cassidy & Gentles, *supra* note 102.
220 For example, *ibid.* at 217.
222 *Ibid.* at 228
abortion) is suggested to affect women’s other mother-child relationships. The authors suggest that women’s choice of abortion signifies women’s failure as caregivers, and their guilt can negatively impact relationships with their already existing or future children. Framing abortion trauma as such, WPA advocates encourage us to apply stereotypes that we are already familiar with; mainly, stereotypes of women as mothers and caregivers, maternal and nurturing. Applying this familiar stereotype, ‘abortion trauma’ is transformed into a familiar and recognizable form of grief.

‘Abortion Trauma’ and Bill C-510: Re-creating the Mother Stereotype

The above discussion is meant to illustrate how the concept of ‘abortion trauma’ employed in WPA arguments resonates with people because of historical stereotypes about women’s natural maternal nature. I now turn to consider what implications this has for Bill C-510. In Chapter III, I suggested that the case of R v. Lavallee and the feminist critique of the aftermath provide us with a framework for determining how an initiative that treats women differently will operate in reality; I suggested that we should only recognize women’s differences if the differential treatment does not reinforce historical stereotypes of difference that have been used in the past to deny women equality. In the following section, I apply this framework to Bill C-510, and illustrate how Bill C-510’s ‘protection’ of women reinforces the same historical stereotypes as the WPA movement. In particular, both Bill C-510 and the WPA reinforce ideas about pregnant women as mothers who experience ‘trauma’ when they lose a child through abortion. As illustrated above, the WPA relies on this stereotype to advance its claim that women require ‘protection’ from abortion. By reinforcing the same stereotype of difference and thus the
same concept of ‘abortion trauma’, Bill C-510 creates a climate in which WPA claims are recognizable. By recognizing ‘abortion trauma’ within the ambit of coerced abortion and wanted pregnancy, Bill C-510 reinforces ideas about abortion trauma in other situations and thus creates room for WPA ‘protections.’

Bill C-510 claims to be about protecting pregnant women’s decision making rights; in doing so, Bill C-510 claims to be protecting women from the harms they will suffer when their decision to continue a pregnancy is taken away from them. The ‘harm’ from which women need to be protected is identified in the pre-amble of the text of Bill C-510:

Whereas many pregnant women have been coerced to have an abortion and have suffered grievous physical, emotional and psychological harm as a result

In explaining the nature of this physical, emotional and psychological harm, Mr. Bruinooge focuses on his motives for creating the Bill: the story of Roxanne Fernando for which the Bill is named. As mentioned in Chapter II, Roxanne Fernando was murdered by her boyfriend and his friend in 2007, and it is this story that Mr. Bruinooge claims prompted the creation of this Bill. In the press release of Bill C-510, Mr. Bruinooge recounts Roxanne’s story, noting that,

Roxanne’s final moments are very disturbing and not easy to repeat, but I like to think about how her dreams of having a baby were the most important things to her and even under intense coercion, Roxanne chose life…. Roxanne stood up for her unborn child, put her own life at risk,

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223 Bill C-510, supra note 11 at preamble.
224 As mentioned in previous sections, the motive of the murder, and thus the rational for Bill C-510, has been questioned. See ARCC, “Bill C-510 Press Release”, supra note 119 at 2; Toruno, supra note 119 at para. 3; “Pregnant woman’s killers get life”, supra note 118; “Replay: Life sentences handed down to Fernando killers”, supra note 118.
and that will not be forgotten.225

In his press release, therefore, Mr. Bruinooge relies on traditional stereotypes about women’s maternal nature to illustrate the harm experienced by women who are coerced to have abortions. He portrays Roxanne Fernando, the namesake of the Bill, as maternal and nurturing. He suggests that she viewed having children as the ultimate goal in life and that she was willing to risk her own life to protect her ‘child.’ Mr. Bruinooge wished to portray Roxanne as the ideal ‘mother’ and thus frame the harm suffered as the loss of ‘child’. In this way, he likely hoped to magnify the harm that was inflicted on Roxanne. Framing abortion trauma as such, Bill C-510, like WPA claims, reinforces stereotypes that are already familiar, such as stereotypes of women as mothers and caregivers, maternal and nurturing. Applying this familiar stereotype, the trauma experienced by pregnant women who are coerced to have an abortion is transformed into a familiar and recognizable form of grief.

There is, of course, a difference between the context evoked by Bill C-510 and the general WPA movement. There is an element of truth in Bill C-510’s description of the trauma experienced by pregnant women who are coerced to have an abortion. Methodologically sound studies confirm that some women with wanted pregnancies suffer from severe negative mental health consequences when they lose a wanted pregnancy that is equated to the loss of a child. These studies were largely conducted with respect to women terminating a wanted pregnancy because of fetal abnormality. According to a literature review of these studies conducted by the American Psychological Association, studies suggest that,

225 Bruinooge, “Bill C-510 Press Release”, supra note 120 at 1:49 min. & 3:30 min.
[T]erminating a wanted pregnancy, especially late in pregnancy, can be associated with negative psychological experiences comparable to those experienced by women who miscarry a wanted pregnancy or experience a stillbirth or death of a newborn.  

The loss experienced by pregnant women who lose a wanted pregnancy has been paralleled in scientific studies to a grief or bereavement experienced by mothers who lose a child. Critics of this paper might suggest that it is the woman who experiences this connection with her ‘unborn child’ that the Bill seeks to protect.

As has been discussed thus far, however, we cannot view this differential treatment of a particular subset of women without considering the manner in which this differential treatment might reinforce historical stereotypes about all women. Bill C-510’s ‘protection’ of certain pregnant women from abortion ‘trauma’ could reinforce historical gender stereotypes about women as mothers and create space for more general claims about ‘abortion harm’. Even if Bill C-510 is intended to protect a narrow subset of women who genuinely experience a mother-child loss through coerced abortion, by making this particular conception of ‘abortion trauma’ central to the differential treatment, we risk reinforcing the idea that all pregnant women are mothers. By identifying pregnant women as requiring special protection from this particular form of ‘harm’ that results from some women’s mother-child connection with the fetus, we risk reinforcing ideas that all pregnant women are mothers with this connection to the fetus. The stereotype of women as maternal and nurturing is a very familiar and deeply embedded stereotype that has historically been used to define women’s identities. Viewing Bill C-510’s differential treatment of women in the context of historical stereotypes of difference that have in the

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226 APA Report, supra note 207 at 90.  
227 See Chapter III.
past limited women’s equality, it seems clear that Bill C-510 risks reinforcing a stereotype that all pregnant women are mothers and, consequently, experience trauma from abortion. By supporting this difference stereotype of pregnant-women-as-mothers who experience trauma from their abortion, Bill C-510 risks reinforcing the same mother stereotype upon which the WPA relies, thus creating a climate in which WPA claims are more recognizable.

Bill C-510, therefore, is drafted in a way that encourages us to view pregnant women coerced into having an abortion as experiencing the trauma a mother experiences in losing a child. In other words, the differential treatment is drafted in a way that reinforces ideas about pregnant women as mothers. By framing the harm of coerced abortion as such, Bill C-510 frames the legal consideration of the trauma in the same way: prosecutions will be framed to resonate with juries’ stereotypical notions of women’s maternity and ‘natural’ care giving character to illustrate exactly how badly women were harmed when they were coerced to have an abortion. Even if prosecutors do not intend to frame the trauma as such, it will likely be heard this way because the harm resonates with stereotypes that have historically been applied to women: mainly, stereotypes of women as maternal and nurturing in nature. By framing the differential treatment of pregnant women in this manner, Bill C-510 gains public acceptability. At the same time, however, Bill C-510 reinforces ideas about ‘abortion trauma’ upon which the WPA claims rely. By focusing its claim around ideas of pregnant women as mothers who lose a child when they have an abortion, Bill C-510 creates space for more insidious WPA restrictions on women’s access to abortion.

In addition, Bill C-510’s focus on protecting women from coerced abortion but not
coerced *childbirth* also adopts stereotypes about women’s roles as mothers and supports the ‘abortion trauma’ claim of the WPA movement. In aiming to protect women from one type of harm, the government necessarily accepts ideas about the harm that women will *not* be protected from: mainly, the harm of coerced childbirth. The State’s failure to protect women from coerced childbirth reinforces the idea that it is *abortion* that is traumatic for women, not coerced reproductive control. By recognizing the harm of coerced abortion as the disruption of the mother-child bond, the state downplays or denies the harm experienced by women coerced into childbirth. By failing to protect women from both coerced abortion and coerced childbirth, the State reinforces the idea that there is something especially traumatic about *abortion* that requires special protection. I suggest that this risks significantly increasing the public’s receptivity of WPA claims that women generally need more ‘protections’ from abortion. By providing protection to only those women facing coerced abortion, Bill C-510 again reinforces the historical stereotypes about women’s maternal role: it reinforces the idea that pregnant women are only harmed by coercive actions that violate their ‘maternal nature,’ such as coerced abortions. Pregnant women are not similarly harmed through coerced childbirth because it does not violate women’s motherhood. Forcing someone to continue a pregnancy is not viewed as similarly harmful. Thus, Bill C-510’s focus on coerced abortion alone reinforces stereotyped roles of women as mothers.

The press surrounding the Bill’s release and the rhetoric used by the MP who introduced the Bill confirms this analysis. For example, in his press release of Bill C-510, MP Rod Bruinooge emphasizes “a compassionate society like Canada cannot turn a blind eye to the injustices pregnant women face when their freedom to continue their pregnancy
is taken away from them.”[228] Few would argue with the content of Mr. Bruinooge’s comment: coercing a pregnant woman to have an abortion is not something that should be tolerated in a ‘compassionate society like Canada’. What is troubling, however, is the implication that compassionate societies like Canada need not be concerned about the injustices pregnant women face when their freedom to terminate a pregnancy is taken away from them. Considering that the harm of coerced abortion is framed as the loss of child, it should perhaps not be surprising that women who are coerced into keeping a pregnancy are not included in the Bill’s protective sphere. Coerced childbirth, unlike coerced abortion, does not violate the mother-child relationship; on the contrary, coerced childbirth supports women’s maternal and care giving nature. Women’s liberties might be infringed if someone coerces them to continue a pregnancy, but the harms women experience from this are not so great as to warrant a separate Criminal Code protection.

The above discussion is meant to illustrate that Bill C-510’s differential treatment of pregnant women reinforces historical stereotypes of difference about women as mothers whose maternal instincts are paramount and whose mother-child connection is overpowering. Despite the fact that some women might identify the trauma of coerced abortion as that associated with the murder of their child, this is not the experience of all. However, the differential treatment of women under Bill C-510 reinforces the idea that all pregnant women are mothers who need protection from the trauma caused by the death of their child. Similarly, Bill C-510 does not provide protection to women who are coerced into continuing their pregnancy, further reinforcing the stereotype that pregnant women are mothers and that coerced reproductive control is only harmful when it violates

pregnant women’s maternal connection with their child. Pregnant women who are coerced into continuing their pregnancy are not similarly harmed because their natural role as mothers is not violated.

Under Minow’s analysis, therefore, Bill C-510 appears to have fallen victim to the ‘dilemma of difference.’ In the process of reinforcing historical stereotypes about women as mothers who suffer from ‘abortion trauma,’ Bill C-510 also creates space for WPA claims that rely upon the same ideas of ‘abortion trauma’ and pregnant women’s ‘motherhood’. Under Bill C-510, there is a serious risk that it will be interpreted in a manner that will reinforce stereotypes about women’s identity as mothers and, consequently, reinforce ideas about ‘abortion trauma’ experienced by these ‘mothers.’ By supporting ideas about pregnant women as mothers who experience trauma when coerced to have abortions, we simultaneously risk creating a climate that supports additional calls for ‘protecting’ women from abortion trauma. These incremental ‘protections’ of women can lead to more insidious WPA initiatives that are premised on the idea that abortion harms women. Although Bill C-510 claims to be protecting coerced pregnant ‘mothers,’ its differential treatment of pregnant women reinforces historical stereotypes of difference that could eventually support more restrictive WPA initiatives.

**Denying Women’s Capacity: Bill C-510’s Reproduction of Capacity Based Gender Stereotypes**

In addition to reinforcing stereotypes about pregnant women as mothers, Bill C-510’s differential treatment of women also reinforces historical stereotypes about women’s diminished capacity. This also contributes to a legal climate in which WPA
claims appear more reasonable. By suggesting that there is something ‘different’ about the abortion decision that requires separate protection, Bill C-510 reinforces stereotypes about women as incapable decision-makers with respect to the ‘abortion decision.’ These concerns are compounded by Bill C-510’s creation of new forms of ‘coercion’ not similarly recognized in the Criminal Code as ‘coercive;’ protecting pregnant women from behaviour that is not traditionally viewed as coercive reinforces stereotypes about women’s decreased decision-making capacity in the abortion context. Reinforcing the idea that pregnant women’s decision-making needs special ‘protections’ contributes to a climate where WPA claims about generally ‘protecting’ pregnant women from the ‘abortion decision’ become more recognizable.

Women’s Decreased Decision-making Capabilities in the WPA

Before considering how the differential treatment of women under Bill C-510 reinforces stereotypes about pregnant women’s decreased decision-making capacity, I first explore the operation of this same stereotype within the WPA movement. As mentioned in Chapter I, a central claim of the WPA is that abortion harms women. However, this claim alone has not been enough to justify the restriction of women’s access to abortion. Illustrating that abortion harms women only creates a need to inform women of the risks of abortion; it does not require the State to restrict a woman’s access to a medical procedure whose risks she can agree to undertake. In Canada, women’s s. 7 liberty rights include a right to make decisions of fundamental importance; whether those decisions yield positive or negative results is up to women themselves. In other words, granting people the right to autonomy includes granting people the right to make
mistakes. Thus, illustrating that abortion can cause ‘abortion trauma’ in women is not enough to justify restricting women’s access to abortion. Thus, another central element of the WPA is illustrating how women’s decision-making capacity with respect to abortion is somehow compromised; this compromised capacity makes pregnant women particularly susceptible to coercion and trickery with respect to abortion. It is only when people are convinced that women lack the capacity to make this decision for themselves that WPA claims can successfully limit women’s access to abortion for ‘protection’ reasons.

Like the research done regarding the concept of ‘abortion trauma’, the scientific and medical communities have continually found that women are not coerced or tricked into abortions to a significant degree that warrants special state protection of the ‘abortion decision.’ In one study examining intimate partner violence that manifested in reproductive control over women, women reported being coerced to have abortions, but others equally reported being forced to continue a pregnancy that they wished to terminate. Women in the study also reported being forced to become pregnant through birth control sabotage and forced unprotected sex. Thus, the coercion problem identified by WPA advocates is misleading: coercion to have abortions might occur, but it is indicative of larger problems of intimate partner violence and reproductive control over women. Coerced abortions, therefore, are not evidence of women’s lack of capacity with respect to abortion decision-making, but largely stem from situations of intimate partner violence. Because abortion clinics already screen for coercion and violence,

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229 Moore et al., supra note 151 at 1741.
230 Ibid. at 1739-1741.
the WPA’s claims that additional protections are needed to ‘protect’ women from coercion and trickery are not scientifically supported.

Despite a lack of scientific evidence that women are coerced and tricked in significant numbers, WPA arguments that women need protection from abortion through restricted access continue to spread. Like the ‘abortion trauma’ concept, the resilience of this argument indicates that the WPA’s coercion and trickery claims have been framed in a manner that resonates with historical stereotypes about women and is not dependant on reliable scientific data. The image of women as incapacitated victims is not a new image for the public. These ‘protection’ arguments resonate with the much older ‘separate spheres tradition’ treatment of women, where women were viewed as caregivers requiring paternalistic protection from men. In addition, the incapacitated-victim stereotype is particularly recognizable in the context of the very public anti-violence-against-women movement of recent years, where women’s victimization and disempowerment at the hands of men has been used as rhetorical strategy for demanding state protection from intimate partner violence.233 By employing language and arguments that fit with historical gender stereotypes with which the public is familiar, the WPA employs an identifiable image of women as incapable decision-makers who require state protection.

Once again, Professor Reva Siegel has done considerable work on the gender stereotyping operating within the WPA, including consideration of the manner in which

233 See for example Suk, supra note 12, examining the relationship between the violence-against-women movement and the receptivity of the WPA in the United States. In her paper, Suk discusses the way in which feminism’s historical focus on women’s bodies as traumatized has created a climate where WPA claims are legally recognizable. See also Chapter III for the discussion on Lavallee and the role that disempowerment language played in the violence-against-women evidentiary rule adopted in that case.
capacity-based gender stereotypes operate within the WPA to justify the limitation of women’s autonomy with respect to abortion. Siegel uses the *South Dakota Report*\(^\text{234}\) to illustrate how United States laws’ that rely on the WPA arguments perpetuate gender stereotypes and violate women’s equal protection rights under the American Constitution’s fourteenth amendment.\(^\text{235}\) In this paper, I use Siegel’s stereotyping analysis to suggest that framing women’s reproductive decision-making in vulnerability language makes the WPA coercion and trickery claims familiar and more reasonable. By framing the abortion decision as such, the WPA movement is able to garner public support without valid scientific evidence; the WPA’s claims resonate with a stereotype of women that people are familiar with and thus make people more willing to accept otherwise questionable ‘protections’ of women’s decision-making rights.

In her analysis of the capacity based stereotyping operating within WPA initiatives like the *South Dakota Report*, Siegel notes that the WPA claims tend to use informed consent language that appears to treat women as self-governing agents capable of making decisions with respect to continuing a pregnancy; the WPA then appeals to gender stereotypes to illustrate how these self-governing agents are being tricked or coerced into having abortions they do not want.\(^\text{236}\) In other words, the WPA claims appear at first to be women-positive and then appeal to gender stereotypes about women’s capacity to illustrate how women are incapable decision-makers with respect to abortion. Referencing the *South Dakota Report*, Siegel identifies the stereotype of the woman ‘hysteric’ operating to deny that women can exercise agency with respect to the abortion decision;

\(^{234}\) See generally *South Dakota Report*, *supra* note 86.

\(^{235}\) See generally Siegel, “New Politics”, *supra* note 73.

\(^{236}\) *Ibid.* at 1031.
she notes that the legislature in South Dakota portrayed pregnant women as “generally confused, emotionally dependant, and unable to act.”

Thus, as Siegel notes, the WPA argument operating in South Dakota “grounds its case against abortion in a picture of women as lacking sufficient knowledge, capacity for cognitive and moral judgment, and independence of will to be entrusted with responsibility for making decisions about the future course of their lives.”

The South Dakota example is a radical one. For example, the South Dakota Report accepted evidence that the ‘overwhelming majority’ of the 1,940 women providing testimony for the South Dakota Report were pressured, coerced or tricked into having abortions. In this claim, there is a clear invocation of archaic gender stereotypes of women as emotional, hysterical and lacking rationality, needing paternalistic male protection in their decision-making. These are the same stereotypes that feminists warned against in cases like Lavallee that admitted ‘battered woman syndrome’ (‘BWS’) evidence discussed in Chapter III; BWS was identified as problematic because it resonated with historical stereotypes regarding women’s incapacity. Siegel suggests that the WPA relies on these same historical stereotypes of women’s incapacity. However, the South Dakota Report’s claims were extreme: they seemed to suggest that almost all pregnant women who have abortions are incapable decision-makers and are victims of coercion or misrepresentation, a radical claim that has not been adopted by WPA advocates outside of the conservative American States.

238 Ibid. at 1035.
239 South Dakota Report, supra note 86 at 21.
240 Schneider, supra note 173 at 197.
The WPA arguments employed by Canadian anti-abortion groups are less explicit in their stereotyping of pregnant women as incapacitated. However, close examination of the less radical WPA claims in Canada reveal that gender stereotyping still operates; the WPA claims in Canada also appeal to traditional gender stereotypes about women’s capacity to argue that women’s access to abortion should be restricted for their own protection. The way in which the WPA arguments are framed to resonate with this stereotypical view of pregnant women, however, is subtler. One argument employed in Canadian WPA advocacy is that women who experience childhood abuse or intimate partner abuse are more likely to have abortions; the suggestion is that because of the abuse, these women are too emotional, confused and ‘damaged’ to be trusted with their own decisions. In other words, their history of abuse explains why they are more likely than non-abused women to ‘choose’ a medical procedure that will harm them. In their book Women’s Health After Abortion, the Canadian de Veber institute writes that women who suffer childhood abuse are more likely to have abortions; the book notes, “If the literature on abortion and abuse is accurate, of the 1,300,000 women in the U.S. who abort yearly, 25 per cent have a background of abuse.” By placing women who have abortions in the ‘abuse’ framework, the WPA in Canada creates an image of pregnant women as the disempowered victim and encourages people to support her ‘rescue’. As mentioned in the discussions in Chapter III surrounding the case Lavallee, stereotypes of women as victimized and mistreated have historically been used to limit women’s claims for equal treatment. Feminists noted in the Lavallee critiques that arguments that make victimization central to their claim could be heard as reinforcing stereotypes of women as

241 Ring-Cassidy & Gentles, supra note 102 at 203.
passive, victimized and powerless.\textsuperscript{242} The WPA capitalizes on this, reinforcing the stereotypical view that women are vulnerable and incapacitated by creating parallels between women’s abuse and their likelihood of having an abortion. By framing the abortion decision within the abuse framework, the WPA is able to place its ‘protection’ of women alongside other anti-violence-against-women initiatives.

Indicating that childhood or intimate partner violence is responsible for some abortions does not, however, explain why abortion access ought to be restricted to women who have not experienced abuse and are therefore not similarly ‘damaged’. The WPA movement in Canada also addresses the situation of these women by suggesting that even when women think that they are capable of choosing abortion, the mental health effects of abortion suggest that women are not actually \textit{choosing} abortion. The harms and regret anti-abortion groups claim women experience following abortion is evidence that women must be subject to some outside pressure or trickery that is causing them undergo a procedure that inflicts such mental harm. For example, the Canadian de Veber institute found that, based on new research, women who have abortions are 41\% more likely to score as ‘high-risk’ for clinical depression than women who had not had abortions.\textsuperscript{243} The de Veber institute also suggests that women who have abortions are significantly more likely to engage in self-harming behaviour, including substance abuse,\textsuperscript{244} smoking,\textsuperscript{245} eating disorders,\textsuperscript{246} and sexual dysfunction.\textsuperscript{247} Lastly, citing a Finnish study, the de Veber institute suggests that researchers have established that suicide rates are six times higher

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\textsuperscript{242} Schneider, \textit{supra} note 173 at 214.
\textsuperscript{243} Ring-Cassidy \& Gentles, \textit{supra} note 102 at 190.
\textsuperscript{244} \textit{Ibid.} at 198.
\textsuperscript{245} \textit{Ibid.} at 200.
\textsuperscript{246} \textit{Ibid.} at 200.
\textsuperscript{247} \textit{Ibid.} at 203.
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among women who have abortions compared with women who follow through with childbirth.\textsuperscript{248}

The WPA literature thus claims that abortion is harming women and yet points out that women keep ‘choosing’ abortion. The implication of this is that women are not making the decisions they would otherwise make if they were acting autonomously. As discussed above, rights to autonomy have always allowed people to have the liberty to make the \textit{wrong} choice. However, the WPA goes further than suggesting that women are making the \textit{wrong} choice in abortion; the grief, regret and mental anguish that many women allegedly experience with respect to abortion is suggested to be evidence that women are not making a choice at all. In other words, the WPA uses evidence of mental harm to show that women are being pressured against their own wishes; mainly, pressured against their ‘maternal nature.’ Evidence of ‘abortion trauma’ is used, therefore, to illustrate how women’s reproduction decision-making capabilities are questionable; women’s capacities to make decisions about abortion are somehow limited, either by their confusion, emotions or outside pressures. Framing the abortion decision in this way resonates with traditional stereotypes about women as emotional, confused and incapable of making rational choice.

The WPA argument, therefore, capitalizes on historical stereotypes of women as emotional and men as rational. Portraying women in stereotypical terms portrays even women who are not subject to coercion and trickery at the hands of abusive partners as incapable decision-makers. The mental anguish that these seemingly autonomous women experience is used as evidence that women cannot behave rationally with respect to the

\textsuperscript{248} Ring-Cassidy \& Gentles, \textit{supra} note 102 at 193.
abortion decision; the State, presumably, needs to ‘protect’ women from their emotions, their confusion, and the harms that flow from their ‘choice.’ The alleged ‘harms’ women suffer are used to illustrate the incapacity and decision-making difficulties women experience when it comes to abortion. By creating an image of women as emotional and victimized, rather than rational and capable, the WPA reinforces familiar stereotypes of women and justifies their ‘protection’ in stereotypical terms. By appealing to gender stereotypes of women’s incapacity that people are familiar with, the WPA is able to frame its protection as a ‘rescue’. The stereotype of women as incapable decision-makers, therefore, lies at the epicenter of even the more moderate WPA claims; to suggest that the alleged harms of abortion require restriction or prohibition of abortion is to suggest that women are not capable of making a rational decision with respect to abortion.

Without illustrating the way in which pregnant women are incapable decision-makers, there are no grounds for the WPA movement to justify limiting all women’s access to abortion; instead, there is simply a call for considering whether women ought to be informed of alleged risks or a call for increased protections for the minority of women who are vulnerable to intimate partner violence. To illustrate women’s decreased decision-making abilities with respect to the abortion decision, the WPA appeals to traditional gender stereotypes of women as irrational, emotional victims requiring paternalistic protection from the State. Like the mother stereotype, this is a stereotype that is deeply embedded in women’s history and resonates strongly with the public. It has its roots in the separate sphere’s tradition, where it was the man’s responsibility to protect his wife and children who lacked the capacity to act for themselves. By placing pregnant women within this historical image of victimization, the WPA frames its argument in a manner that
reinforces the idea that pregnant women need to be ‘rescued’ from their own reproductive decision-making.

*Women’s Decreased Decision-making Capabilities and Bill C-510: Re-creating Capacity Based Stereotypes*

The above discussion is meant to illustrate how WPA arguments regarding pregnant women’s decreased decision-making abilities resonates with people because of historical stereotypes about women’s vulnerability and incapacity. I now turn to consider what implications this has for Bill C-510. In Chapter III, I suggested that the case of *R v. Lavallee* and the feminist critique of the aftermath provide us with a framework for determining how differential treatment of women operates. The lesson for lawmakers was that women’s differences should only be recognized if the differential treatment does not reinforce historical stereotypes of difference that have been used in the past to deny women equality. This framework can be applied to Bill C-510 to illustrate how Bill C-510’s ‘protection’ is problematic; Bill C-510 reinforces the same historical stereotypes as the WPA movement and thus makes space for WPA arguments that can be used to limit women’s reproductive rights to access abortion. Both the WPA movement and Bill C-510 apply differential treatment to the ‘abortion decision’ and reinforce the idea that pregnant women’s capacity to make reproductive decisions is ‘different’ and therefore inferior. By reinforcing this stereotype, Bill C-510 creates a climate in which WPA claims regarding pregnant women’s decreased capacity seem more reasonable and appealing.

Bill C-510 claims to be about protecting pregnant women from *coerced* abortions.
Some might suggest that unlike the WPA, Bill C-510 appears to treat women as self-governing agents; it seeks to protect women’s s. 7 liberty and autonomy rights by enhancing their decision-making capabilities. In particular, the Bill seems to be particularly concerned with empowering women in abusive intimate relationships. As has been discussed in previous chapters, the namesake of the Bill is Roxanne Fernando and it is the story of her murder that Mr. Bruinooge suggests motivated the creation of the Bill.249 Thus, Bill C-510 seems to protect the women that scientific studies suggest are most likely to experience coerced reproductive control; i.e. protect women in abusive relationships. As mentioned above, studies have shown that women in abusive relationships are sometimes subjected to coerced abortions (in addition to more general reproductive control)250 and therefore Bill C-510 appears to be a narrow, focused law meant to protect those women who actually need protection. Unlike the WPA, therefore, Bill C-510’s protection appears to target those women who are genuinely disempowered victims.

As has been discussed thus far, however, we cannot view differential treatment of a particular subset of women without considering the manner in which that differential treatment might reinforce historical stereotypes about all women.251 Even if Bill C-510 is intended to protect a narrow subset of women who are genuinely denied their autonomy through violence and coercion, by earmarking special protection for the ‘abortion decision,’ we risk reinforcing the idea that the ‘abortion decision’ is special and that all abortion decisions should be treated differently. In particular, by dedicating a separate

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249 As mentioned in previous sections, the motive of the murder, and thus the rational for Bill C-510, has been questioned. See ARCC, “Bill C-510 Press Release”, supra note 119 at 2; Toruno, supra note 119 at para. 3; “Pregnant woman’s killers get life”, supra note 118; “Replay: Life sentences handed down to Fernando killers”, supra note 118.

250 Moore et al., supra note 151 at 1741.

251 See Chapter III.
protective provision protecting pregnant women from acts that are already illegal serves to identify the abortion decision as ‘different;’ it makes a statement about women’s particular vulnerability in this context. Abortion rights groups have already criticized Bill C-510 for its apparent redundancy; the Bill re-criminalizes acts that are already illegal under the *Criminal Code* like extortion, uttering threats, assault and murder. Abortion rights groups have used this as evidence that the Bill has ulterior motives: mainly the restriction of women’s access to abortion on ‘pro-life’ fetal rights grounds. Although this is one fear, I also suggest this duplication of offences also implies that there is something unique about women’s decision-making with respect to abortion that requires public attention. It identifies the ‘abortion decision’ as different and women making that decision as requiring special protection and a special provision that the rest of the public does not need.

Considering this ‘differential treatment’ in the context of Minow’s dilemma of difference and the WPA, we see that Bill C-510’s differential treatment of pregnant women making the ‘abortion decision’ emphasizes the differences of pregnant women’s decision-making capabilities with respect to abortion and reinforces historical images of pregnant women requiring paternalistic protections at the expense of their autonomy. This in turn reinforces the stereotypes upon which the WPA relies, including the claim that women’s capacity to make decisions is diminished in the abortion context and that pregnant women therefore need special state ‘protection’ from coercion and trickery. Although Bill C-510 may seek to protect only those women who are genuinely

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disempowered by intimate partner violence, its unique protection of reproduction
decision-making reinforces the idea that pregnant women generally lack capacity. When
combined with concepts of ‘abortion trauma’ discussed above, it is not difficult to see
how these kinds of capacity based stereotypes can translate into more insidious WPA
protections. By identifying pregnant women as requiring separate protection in addition
to the protections already offered by the Criminal Code, we risk creating an image of all
pregnant women as disempowered, confused and lacking capacity in a way that ‘normal’
citizens are not, creating a climate in which WPA claims regarding state protection from
abortion appear more reasonable.

This effect is multiplied by the content of the Bill itself. Examining the definition
of ‘coercion’ under Bill C-510, what abortion advocates have said about the redundancy
of the Bill is not entirely true: the Bill does appear to recriminalize some actions that are
already illegal, but it also appears that the Bill identifies novel ‘coercive’ behaviour that
is not otherwise illegal in the Criminal Code. By identifying new forms of ‘coercion’ that
pregnant women require protection from, the image of pregnant women as having
decreased capacity to make decisions is reinforced. Just as protecting women from acts
that are already illegal reinforces stereotypes of pregnant women’s incapacity, so to does
protecting women from behaviour that is not otherwise considered coercive. By
providing pregnant women with protection from behaviour that is not otherwise
considered coercive, Bill C-510 reinforces the stereotype that pregnant women faced with
the abortion decision are particularly weak and incapacitated as compared to non-
pregnant persons. In other words, Bill C-510 indicates that women need protection from
behaviour that ‘normal’ people would not experience as coercive. It indicates that
pregnant women are unable to resist pressures and forms of persuasion that we otherwise accept and even value as an important part of a person’s decision-making process.

For example, Bill C-510 would make it an offence to engage in conduct “that is intentionally and purposely aimed at directing the female person who has not chosen to have an abortion to have an abortion.”\textsuperscript{257} Constitutional vagueness problems aside, this statement seems to indicate that pregnant women not only need protection from the types of coercion that \textit{all} citizens need protection from, but, additionally, from more nuanced forms of argument. Nowhere else in the \textit{Criminal Code} are persons protected from these forms of persuasion; nowhere else are actions meant to persuade someone of a choice understood as ‘coercive’. To the contrary, we might suggest that these actions \textit{enhance} a person’s decision-making process, providing the decision-maker with information on all aspects of a decision. Bill C-510, however, seems to indicate that there is something ‘different’ about pregnant women that make them particularly vulnerable to experiencing regular forms of persuasion as coercive. The differential treatment of women through enhanced ‘protections’ of women’s decision-making reinforces ideas about pregnant women’s vulnerability and confusion with respect to pregnancy. Strikingly, it is this same image of women employed by WPA advocates to restrict women’s access to abortion. Under the WPA, pregnant women are similarly portrayed as emotional, confused and vulnerable to being coerced by what is otherwise considered persuasive argument: the WPA used this image of pregnant women to justify restrictions on abortion access to ‘protect’ women from making the choice they did not want to make. By supporting this same image and the same stereotypes of pregnant women’s decreased decision-making

\textsuperscript{257} Bill C-510, \textit{supra} note 11 at s. 264.2(3).
capacity with respect to abortion, Bill C-510 is contributing to a climate where WPA claims appear more recognizable and rational.

Bill C-510 also appears to criminalize another new form of ‘coercion:’ coercion under Bill C-510 includes denying financial support or threatening to deny financial support to a woman who is financially dependant upon that person. I suggest that this is a new form of coercion not considered elsewhere in the Criminal Code. There are various sources of a legal duty to support, including in family law statutes, and under the Criminal Code. Under these statutes, certain persons are legally required to provide support, but these legal duties are generally limited to children under the age of 16, children still in school, or persons who by reason of detention, age, illness, mental illness or similar causes are unable to provide themselves with the necessities of life. For these persons, denying financial support is an offence but only because it is a violation of a legal duty, not because it is coercive.

Extortion is also an offence under the Criminal Code and some might suggest that the denial of financial support as described in Bill C-510 could amount to this form of illegal coercive behaviour. If this were so, Bill C-510 would not appear to create a new form of coercion, but merely replicate the protections that all citizens enjoy. Under s. 346 of the Criminal Code, a person commits extortion if, with the intent to obtain anything, he induces anyone to do something that person would not otherwise do through threats, accusations, menaces or violence. The extortion provision appears at first to make it criminal to threaten to remove financial support if a woman refuses to have an abortion,

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258 Family Law Act, R.S.O. 1990, c. F.3, s. 31 & s. 32.
259 Criminal Code, 1985, supra note 47 at s. 251 (1).
260 Ibid. at s. 346 (1).
as this amounts to threatening someone to do something they would not otherwise do. However, threats only amount to extortion if they are made “with the intent to obtain anything.” I suggest that because no ‘thing’ is exchanged when coercing a woman to have an abortion, denial of financial support would more likely be considered a symbol of the person’s lack of support for a decision rather than extortion. The exception for this might be in situations where the future father of the fetus is the person coercing a pregnant woman to have an abortion; because fathers have a financial obligation to support their children, one could plausibly argue that the future father ‘obtains’ freedom from financial support obligations if he coerces a pregnant woman to have an abortion. In these circumstances, it may be that the future father of the fetus would be guilty of extortion. However, for all others, I suggest that there is no ‘thing’ exchanged when financial support is denied and thus such behaviour cannot be understood as extortive.

The Supreme Court of Canada’s discussion of the Criminal Code extortion provisions in R v. Davis indicates that it is likely the case that denying a pregnant woman financial support is not ‘coercive’ and illegal extortion. In Davis, the accused had held himself out to be a photographer with connections to a modeling agency. He persuaded the complainants to let him photograph them nude or semi-nude. The accused then threatened to send the photographs to their parents unless the complainants performed sexual favours on the accused. The Supreme Court in Davis considered whether sexual favours were included in the phrase “intent to obtain anything” or

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261 Criminal Code, 1985, supra note 47 at s. 346 (1).
262 Family Law Act, supra note 258 at s. 31.
whether ‘anything’ was limited to pecuniary or property items. The Court interpreted the word ‘anything’ broadly, finding that it included sexual favours. Lamer C.J.C., speaking for the whole Court, noted,

I also find that an interpretation of "anything" that includes sexual favours is suggested by the purpose and nature of the offence of extortion. Extortion criminalizes intimidation and interference with freedom of choice. It punishes those who, through threats, accusations, menaces, or violence induce or attempt to induce their victims into doing anything or causing anything to be done. When threats are coupled with demands, there is an inducement to accede to the demands. This interferes with the victim's freedom of choice, as the victim may be coerced into doing something he or she would otherwise have chosen not to do. Given this purpose, I find it difficult to accept the appellant's contention that "anything" should be limited to things of a proprietary or pecuniary nature.264 [Emphasis added, citations omitted.]

Rather than finding that ‘anything’ was limited to property or pecuniary items as might be suggested by the extortion provision’s property history and its inclusion in a property section of the Criminal Code, the Court in Davis instead focused on the purpose of the extortion provision. The Court found that the purpose was protecting people’s freedom of choice and protecting persons from being coerced into doing things they would not otherwise do. The Court found that this included coercion to perform sexual favours. However, I suggest that the finding in Davis should not be read so broadly as to criminalize the withdrawal of financial support by someone who does not support another person’s particular life decisions. Threatening to withdraw support unless a particular person makes a particular life decision would not be interpreted as intending to obtain something. There is no exchange of things, pecuniary or otherwise. There is nothing obtained in the transaction by the threatening parties. A threat to remove financial

264 Davis, supra note 263 at para. 45-46, Lamer C.J.C.
support might simply be representative of the threatening person’s lack of support for the decision.

To illustrate the way in which removing financial support from a pregnant woman refusing to have an abortion would likely not be ‘extortion’ as conceptualized in R v. Davis, consider the following example. Imagine the parents of a grown child refuse to continue to support the grown child unless he or she becomes a doctor. Imagine that the latter wants to become an artist instead. It is highly unlikely that the parents’ withdrawal of financial support in this scenario would amount to extortion. The grown child’s parents have not threatened to deny financial support to gain a ‘thing’ in the sense considered by the extortion provision and the Court in Davis. Instead, parents are free to support or not support a decision as an exercise of their own autonomy. Whether the child is financially dependent on the parents is irrelevant, as parent’s duty to financially support their children ceases once children reach 18 or finish their full time education.265 A grown child is treated as capable of making life decisions according to his or her own life plans and the parents’ lack of support for a child’s decision, physically represented through a lack of financial support, should not be considered extortion. Instead, it represents both the parents and child’s exercise of autonomy.

I suggest that the above scenario illustrates what is problematic with Bill C-510’s different conceptions of ‘coercion’ with respect to abortion. The Criminal Code holds that in other life decisions (like choosing a career), citizens are to be treated as autonomous individuals who are capable of withstanding ‘normal’ forms of persuasion. These forms of persuasion are considered an important part of the decision-making

265 Family Law Act, supra note 258 at s. 31.
process for autonomous individuals. Bill C-510, however, indicates that the abortion decision is somehow different; it suggests that pregnant women making a decision to continue a pregnancy can be coerced by actions and behaviour that is merely persuasive for ‘normal’ citizens. By identifying pregnant women as such, Bill C-510 makes a statement not only about women’s decision to continue a pregnancy, but pregnant women’s capacity generally. With respect to abortion, Bill C-510’s differential treatment of the abortion decision reinforces stereotypes about pregnant women’s decreased capacity to make reproductive decisions. This stereotype of pregnant women as emotional, confused and vulnerable directly supports WPA claims that pregnant women lack capacity with respect to abortion decision-making; combined with concepts of ‘abortion trauma’ discussed above, Bill C-510 makes space for WPA claims that pregnant women need further protections of their abortion decision-making on the grounds that they lack the capacity and autonomy that other ‘normal’ citizens have.

I hope to have illustrated that to create a ‘woman-protective’ law in the context of abortion and ignore the WPA implications is to ignore the gendered reality of the world we live in. To conform to our constitutional principles of equality, the protection of the s. 7 right to make decisions of fundamental importance must be done in a manner that respects principles of gender equality guaranteed by both s. 28 and s. 15 of the Charter. Bill C-510 seeks to protect women from one aspect of violence against women, a problem that is unique to women. However, the differential treatment afforded by Bill C-510 reinforces historical stereotypes of difference that have been used in the United States to limit women’s access to abortion on WPA grounds. Bill C-510 and WPA arguments rely on the same underlying rational in their ‘protections’ of women – mainly, the glorification
of motherhood and the undermining of women’s capacity for judgment. By recognizing these similarities, we can see how even legislation like Bill C-510 that does not purport to regulate abortion can contribute to climate in which more direct restrictions to women’s access to abortion appears more reasonable.

V. Confronting the Feminist Dilemma of Difference: An Alternative Legal Strategy

This paper has thus far focused on illustrating what is problematic about Bill C-510. Bill C-510’s differential treatment of pregnant women reinforces the same gender stereotypes upon which the WPA relies and therefore creates a climate in which WPA restrictions on access to abortion seem more reasonable. This concern amplifies the more traditional ‘pro-choice’ criticisms of Bill C-510, including the Bill’s use of fetal-rights terminology, vague language, and support the Bill enjoys from ‘pro-life’ groups. All of this is evidence that Bill C-510 is not a good law for women.

Despite the problematic aspects of Bill C-510, it does purport to address a problem of serious concern; specifically, the problem of coercive reproductive control of women by others. Pregnant women deserve protection from this kind of violence, but the protections offered by Bill C-510 have been illustrated as highly problematic. The dilemma emerges: how do we protect women without harming women? I close by considering how governments might develop protections for vulnerable women that do not reinforce gender stereotypes and create space for WPA restrictions on access to

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266 See Chapter II.
abortion. I suggest that the sentencing provisions of the *Criminal Code* dealing with ‘aggravating circumstances’ are already sufficient to address the problem of coercive reproductive control that is the focus of Bill C-510.

The dilemma presented by pregnant women vulnerable to coercive reproductive control fits within the ambit of Martha Minow’s ‘dilemma of difference’, discussed at length in this paper. Bill C-510 identifies pregnant women who have chosen to continue their pregnancy as requiring special protection from coercion. In other words, Bill C-510 has identified pregnant women’s ‘difference’. As this paper has illustrated thus far, Bill C-510’s differential treatment of women in the context of abortion reinforces historical stereotypes of women in accordance with the separate sphere’s tradition; mainly, that women are maternal, nurturing and require paternalistic protection. It is this character of Bill C-510 that has made space for WPA claims. However, rejecting Bill C-510’s protection and failing to consider an alternative protective law would ignore the different experiences of pregnant women. To pretend that pregnant women do not experience reproductive control as a unique form of violence is to apply a ‘neutral’ standard to our understanding of violence. In other words, ignoring pregnant women’s differences reinforces the idea that the only legitimate forms of violence are those that men typically experience: i.e. forms of violence that are predominantly ones of confrontation like the bar room brawl.267 This fails to recognize the unique forms intimate partner violence that women experience like incidents of coercive reproductive control. By ignoring women’s unique experiences with violence, we are unable to address serious problems like coercive reproductive control at the hands of violent partners, which affects women

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It may at first appear that the solution to the dilemma is to develop woman-protective laws within the traditional trauma and coercion frameworks in a manner that is more cognizant of the historical stereotypes. In other words, draft a law like Bill C-510 that is clearer in its ‘protections’. For example, the fetal rights terminology and vague language could be removed to ameliorate the fetal-rights concerns of the Bill. In addition, the Bill could clarify that the harm experienced by women coerced into abortion is subjective to each woman and ‘abortion trauma’ is not a harm universally experienced by women because of women’s ‘maternal’ nature. The protection could also be broadened to protect women from all coerced reproductive control instead of just coerced abortion; this would indicate that there is nothing unique about abortion or about the abortion decision from which women require protection. Finally, the provision could remove the new forms of coercion that are not similarly recognized in the other coercion provisions of the Criminal Code, such as the reference to coercion through the exercise of financial control. This would help alleviate concerns about the law reinforcing ideas about pregnant women having decreased capacity with respect to reproductive decision-making.

Even if these measures were undertaken, however, I suggest that such a ‘protective’ law would still be insufficient. Even if the ‘protections’ consciously rejected historical stereotypes about women’s maternity and vulnerability, a law that identifies coerced reproductive control as a form of violence that pregnant women need special

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268 It is beyond the scope of this paper to consider the dynamics of violence in same-sex relationships. For the purposes of this paper, the problem of coerced reproductive control is considered within the context of heterosexual relationships.
protection from risks reinforcing stereotypes about women’s motherhood and vulnerability. Clarifying the law still accepts that the issue of reproductive control is an issue of trauma and coercion. As long as ‘protections’ of pregnant women are framed as protections from unique trauma and coercion, we will always risk reinforcing stereotypes of women’s unique maternal nature and their unique vulnerability.

Instead, I suggest that we must question the manner in which we frame the problem to understand how to develop an appropriate solution. In other words, we must question whether coerced reproductive control is best understood as a problem of coercion and trauma and whether the solution to the problem is best understood as a ‘protection’ from this coercion and trauma. Minow suggests that the means of dealing with the ‘dilemma of difference’ is to break out of the assumption of neutrality and take the perspective of the person considered ‘different.’ To Minow, then, the solution to the feminist dilemma is adoption of an alternative perspective; it is to recognize that neutrality is a falsity. Minow encourages us to question the very categories we have created. She notes that in taking the perspective of the person considered different, “You may find that the categories you take for granted do not well serve features you had not focused upon in the past.” Applying Minow’s ‘perspective’, we should ask ourselves why protections have been created within these trauma and coercion frameworks and whether that is in itself problematic. I suggest that we take for granted that coerced abortion is an issue of trauma and coercion because we subconsciously subscribe to historical stereotypes of pregnant women as victimized mothers.

Taking the perspective of the pregnant women who are the focus of protective

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270 Ibid. at 72.
laws such as Bill C-510, Bill C-484 and others, another picture emerges. As discussed in earlier chapters, the studies done on coerced abortion have illustrated that coerced abortion occurs within the broader ambit of coercive reproductive control in violent intimate partner relationships. In an American study, 74% of respondents who had reported intimate partner violence also experienced reproductive control by their violent partners. This reproductive control ranged from inflicting control and abuse during the pregnancy to influencing the pregnancy outcome, which included both incidences of coerced abortion and coerced childbirth.271 Thus, the issue of coerced abortion exists as an element of violence in intimate relationships.

Coerced abortion, therefore, is more properly understood within the ambit of violence against women and, in particular, violence in intimate relationships. Treating coerced abortion as such changes our perspective of the experiences of pregnant women who are faced with coerced abortion. The harm experienced is not just a lost pregnancy, but the harm experienced by those subject to violence and control in a gender differentiated relationship.272 As has been long recognized, gender based violence is a form of gender discrimination against women.273 Pregnant women in abusive relationships experiencing coercive reproductive control, including coerced abortion, are targeted because they are women. This gender discrimination element should shape the way we treat the crime of coerced reproductive control, which includes coerced abortion.

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271 Moore et al., supra note 151 at 1739-1741.
272 As noted above, it is beyond the scope of this paper to consider the dynamics of violence in same-sex relationships. For the purposes of this paper, the problem of coerced abortion is considered within the context of heterosexual relationships.
I suggest, therefore, that coerced abortion is better conceptualized within the
gender based violence framework and, more specifically, as a manifestation of gender
discrimination within intimate relationships. The protections we create for women who
are victims of such gender-based violence should similarly reflect this reality. Rather
than locating protections within the trauma and coercion framework like Bill C-510,
therefore, I suggest that protections would be more appropriate in the section of the
Criminal Code that recognizes the role that discrimination plays as an aggravating factor
in violence. In other words, protections of pregnant women from coerced reproductive
control is not appropriate in the ‘uttering threats’ portion of the Criminal Code as
suggested in Bill C-510. To place the protection of pregnant women in that section
applies a ‘neutral’ standard to the violence; it assumes that the ‘coercion’ is like other
forms of coercion. This fails to recognize that coerced reproductive control is more
properly understood as an element of intimate partner violence and a form of gender
discrimination. Coerced abortion, therefore, is more properly understood under
provisions of the Criminal Code that recognize that discrimination can be an aggravating
factor in violence.

Because coerced reproductive control is better understood as a form of violence
motivated by gender discrimination, I suggest that protections for pregnant women would
be more appropriate in the aggravated-violence sentencing provisions of the Criminal
Code:

718.2 A court that imposes a sentence shall also take into consideration
the following principles:

(a) a sentence should be increased or reduced to account for any relevant
aggravating or mitigating circumstances relating to the offence or the
offender, and, without limiting the generality of the foregoing,
(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender’s spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence

There are several ways that coerced reproductive control could be addressed under this provision as it stands or under an amended version of this provision. The suggestions in this paper are not exhaustive but simply illustrative of the type of initiative that would recognize the problem of reproductive control of women without reinforcing the stigma associated with that differential treatment.

First, I would suggest that judges already have discretion to increase the sentence of an offender under s. 217.2(a)(ii) if there is evidence that the offence (of uttering threats, extortion, violence, murder, etc.) was committed against the offender’s spouse or common law partner. This provision came into force in September 1996 and was part of a number of initiatives meant to improve the criminal justice system’s ability to

274 Criminal Code, 1985, supra note 47 at s. 718.2(a).
275 Ibid. at s. 718.2(a)(i).
respond to the problem of family violence.276 Because scientific studies have shown that reproductive control, including coerced abortion, are elements of intimate partner violence,277 judges have discretion under s. 217.2(a)(ii) to increase the sentencing of an offender who exerts reproductive control over his partner as an element of intimate partner violence. Judges also have discretion under s. 217(a)(iii) in situations of reproductive control by persons in a position of authority or trust with respect to the victim, which would capture situations of reproductive control by persons other than an intimate partner, like an abusive parent.

In addition, judges also have discretion under s. 718.2(a)(i) to increase the sentence if there is evidence that the offence (of violence, murder, etc.) was motivated by bias, prejudice or hate based on sex. In *Brooks v. Canada Safeway Ltd.*,278 the Supreme Court of Canada recognized that discrimination based on pregnancy should be considered sex discrimination. In *Brooks*, the Supreme Court found that an insurance policy that excluded pregnant women from coverage during a certain period during and following their pregnancy constituted sex discrimination. Speaking for the majority, Dickson C.J.C. stated,

> [H]ow could pregnancy discrimination be anything other than sex discrimination? The disfavoured treatment accorded Mrs. Brooks, Mrs. Allen and Mrs. Dixon flowed entirely from their state of pregnancy, a condition unique to woman. They were pregnant because of their sex. Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant.279

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277 See generally, Moore *et al.*, supra note 151.
279 *Ibid.* at para. 38, Dickson C.J.C.
Under *Brooks*, therefore, discrimination on the basis of pregnancy is sex discrimination. Similarly, violence that is perpetrated against a woman because she is pregnant could similarly be understood as violence motivated by sex discrimination. If pregnancy was the motivating factor, sex was a motivating factor, as only women can become pregnant. Thus, judges appear to have discretion under s. 718.2(a)(i)\(^\text{280}\) to find that an offence (violence, murder, etc.) that was motivated by a woman’s pregnancy was motivated by sex discrimination and thus an aggravated offence.

I suggest, therefore, that judges already have discretion under s. 217.2(a) to increase the sentencing for offences (like violence, murder, etc.) that involve coercive reproductive control of women. If an addition to the *Criminal Code* was to be made to specifically recognize the unique situation of coerced reproductive control, I would suggest that adding “pregnancy” or “sex (including pregnancy)” to section s. 718.2(a)(i) as another ground of discrimination would also be a permissible means of recognizing the unique problem of coerced reproductive control. Adding “pregnancy” as a grounds of discrimination would recognize that an offence motivated by a pregnancy is discriminatory and thus of a more serious nature. Although this would recognize the ‘difference’ of pregnancy, the difference does not reinforce or create space for stereotypes about pregnant women needing extra *protection*. Pregnancy, in this scenario, is not the difference; instead, this provision would recognize that in committing the offence the accused viewed pregnancy as different. In other words, adding ‘pregnancy’ would pull pregnancy into the realm of other grounds of discrimination and recognize

that what is different about situations of reproductive control is not the pregnant woman, but the offender’s discriminatory views about women. Thus, this alternative protection would focus not on pregnant women’s differences (like their unique ‘trauma’ and decreased capacity) but on the accused’s discriminatory attitudes towards women. This protection recognizes that the crime was of a more serious nature because it was motivated by gender discrimination, not because it harmed women in a unique way or because pregnant women are vulnerable and need special protection. This form of protection also has the benefit of protecting women from all forms of reproductive control, including coerced pregnancy and coerced childbirth. This is a more complete portrayal of the problem of coerced reproductive control than the narrow protection offered by Bill C-510.

Some might suggest that the government already attempted to adopt these forms of protection when it introduced Bill C-543 in 2007. Bill C-543 was intended to replace the more controversial Bill C-484. Like Bill C-484, Bill C-543 died on the order paper with the dissolution of parliament in September 2007, but it is possible that another Bill like it could be introduced in the future to deal with the problem of violence-against-pregnant-women. Bill C-543 would have amended s. 718.2(a) of the Criminal Code, the aggravating circumstances in sentencing provision (discussed above). It would have amended it by adding a separate pregnancy section altogether:

281 Bill C-543, An Act to amend the Criminal Code (abuse of pregnant women), 2nd Session, 29th Parliament, 2008 (first reading 14 May 2008). Abortion Rights Coalition of Canada (“ARCC”) has also addressed the value of Bill C-543, finding that Bill C-543 is a better alternative to Bill C-484, though perhaps still not ideal (Joyce Arthur, “Bill C-543 Far Better Than Bill C-484” Abortion Rights Coalition of Canada/Coalition pour la droit à l’avortement au Canada (2 August 2008), online: ARCC/CDAC <http://www.arcc-cdac.ca/action/bill-c543.htm>).

282 See Chapter II for a description of Bill C-484.
718.2 A court that imposes a sentence shall also take into consideration the following principles:

....

(iii.2) evidence that the offender, in committing the offence, abused a person who he or she knew, or ought to have known, was pregnant,\(^{283}\) (emphasis in original)

Although this might seem like the same protection afforded in the other examples discussed above, I suggest that Bill C-543 suffers from the same problems as Bill C-510 and Bill C-484: it identifies pregnant women as requiring special protection, rather than recognizing that the problem with coercive reproductive control lies with the offender and gender discrimination. Under Bill C-543, simply knowing that someone is pregnant while committing an offence could lead to aggravated sentencing. This again reinforces the idea that there is something different about pregnant women that requires society’s special attention. This is different from adding pregnancy to the list of grounds of discrimination; in this latter scenario, we recognize that those who exercise coercive reproductive control over pregnant women should be the focus of additional criminal attention because of their discriminatory motives. By framing protections in terms of discrimination and intimate partner violence, we focus criminal attention on the discriminatory motives of crimes against women, rather than focusing on pregnant women’s ‘differences’ that require special protection.

\(^{283}\) Bill C-543, *supra* note 281.
Conclusion

Women’s rights advocates must identify and oppose laws that create a climate in which the burgeoning woman-protective anti-abortion (“WPA”) movement may become legally and socially cognizable. Although Bill C-510 at first appears to protect women’s s. 7 decision-making rights, its differential treatment of women reinforces the same gender stereotypes upon which the WPA claims rely. First, Bill C-510 reinforces the idea that pregnant women are ‘mothers’ who are traumatized by abortion. Even if Bill C-510 is intended to protect a narrow subset of women who genuinely experience a mother-child loss through coerced abortion, by making the idea of ‘abortion trauma’ central to the differential treatment and by failing to protect women from coerced childbirth, Bill C-510 reinforces the idea that all pregnant women are mothers who experience a mother-child connection with the fetus and are gravely harmed by abortion. Second, Bill C-510 reinforces the historical view that pregnant women have decreased capacity with respect to reproductive decision-making and therefore need state ‘protection’ from the ‘abortion decision.’ By creating special protection for only the ‘abortion decision’ and identifying new forms of coercion that only pregnant women need special protection from, Bill C-510 reinforces the idea that the ‘abortion decision’ is special and that all pregnant women making the ‘abortion decision’ should be treated differently.

By reinforcing these stereotypes in the context of abortion, Bill C-510 makes the WPA ‘protection’ claims more recognizable and appear more reasonable. By paying attention to the similarities between the differential treatment afforded by anti-violence-against-pregnant-women laws and WPA initiatives, we can see how even legislation like Bill C-484 and Bill C-510 that does not purport to regulate abortion can help create a
climate that is more favourable to restrictions on access to abortion on woman-protective, rather than fetal protective, grounds. In order to recognize these similarities, we must consider whether the differential treatment of women under these initiatives reinforces historical stereotypes that have been used to deny women gender equality in the past. If these are the same stereotypes upon which the WPA relies, the initiative risks creating space for those WPA regimes.

The final Chapter of this paper sought to illustrate the way in which women’s rights advocates might develop laws that actually protect women’s interests without creating space for WPA ‘protective’ claims. To provide real protections, we must question the assumptions we have made about the issue; in the case of Bill C-510, I questioned assumptions about coerced abortion being treated as a problem of coercion and trauma rather than an aspect of intimate partner violence and gender discrimination. Laws that recognize coerced abortion as an element of coerced reproductive control and a form of gender discrimination are more likely to help women without subjecting them to stereotyping. This perspective helps focus the criminal attention on the accused and his or her discriminatory motives, rather than highlighting pregnant women’s ‘differences.’
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