MORGENTALER V. _BOROWSKI_: ABORTION, THE _CHARTER_ AND THE COURTS by F.L. Morton (Toronto: McClelland & Stewart, 1992)

Morgentaler v. *Borowski*, claims its author, is Canada's version of *Gideon's Trumpet*.[1] Like Anthony Lewis's tale of one man's battle for judicial rights in the U.S., *Morgentaler* v. *Borowski* tells both a human story and a legal story. It recounts the legal battles of Canada's two famous, and iconoclastic, abortion crusaders and, in so doing, examines the impact of the *Canadian Charter of Rights and Freedoms*[2] on the judicial process in Canada. Morton's book, like Lewis', animates the legal process and exposes the judicial underbelly of constitutional politics. The story Morton tells is an interesting one, and he tells it very well, if incompletely and not quite as impartially as he claims. He weaves facts (abortion legislation and various court proceedings and decisions) with personalities (Morgentaler and Borowski) and takes us from the 1969 abortion law, to the landmark Supreme Court decision which struck down that law, to the latest failed attempt by the Conservative government to draft new legislation. The book contains enough legal details and judicial principles to satisfy students of law and to serve as a useful book in constitutional law and politics courses; on the other hand, it is swift-paced and intriguing enough to keep the lay reader turning the pages.

Unlike *Gideon's Trumpet*, *Morgentaler* v. *Borowski* doesn't have the quintessential happy ending; there is no "good guy" who wins the good fight, for himself and for justice. Rather, Morton's book is about two men who use (manipulate?) the legal system to further their personal, moral and political agendas. The author doesn't present either man as hero *or* villain; instead the culprit is the *Charter*, the lawyers, and "rights talk," and the hero is a shadowy figure called "politics" who is often found lurking backstage.

Morton argues that the abortion saga reveals only too well the perils of the *Charter*-inspired legalization of politics which grants judges, especially Supreme Court justices, enormous power to influence public policy. Pro-choice groups "won" this one, says Morton, not because of the *Charter per se* but because the judges were on the pro-choice side: "...if the justices of the Supreme Court had been as fond of fetuses as they were of bilingualism, Joe Borowski would probably be on the lecture circuit and Henry Morgentaler out of business."[3] Yet in discussing the Morgentaler decision Morton makes it clear that only *one* judge – Bertha Wilson – offered an explicitly feminist position on abortion, and even she was willing to acknowledge "a legitimate state interest in protecting the life of the fetus/unborn child at some point."[4] To say that feminists "captured" the court is surely an exaggeration.

At times Morton overlooks certain salient facts. In discussing Chantal Daigle, a woman who appealed a series of injunctions obtained by her ex-lover to prevent her from having an abortion, Morton describes Daigle as a woman who agreed to become pregnant then

---

1. F.L. Morton, *Morgentaler v. Borowski: Abortion, the Charter and the Courts* (Toronto: McClelland & Stewart, 1992) at 11.
2. Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.
3. *Supra* note 1 at 305.
4. *Ibid.* at 232.

idly changed her mind about carrying the child to term: "There was only one reason for this abortion: Chantal Daigle no longer wanted to bear her child."[5] He argues that there were no extenuating circumstances. Yet Daigle told *Maclean's* magazine that her boyfriend, Jean-Guy Tremblay, was physically and verbally abusive.[6] Tremblay himself admitted to abusing Daigle, but explained that he did not hit her hard enough "to leave any marks".[7]

While Morton does paint the protagonists of the story with an impartial brush, his overall claim of objectivity is suspect. For instance, Morton writes in the concluding chapter that the pro-choice movement has had its view "enforced" by the courts. Few pro-choice advocates would agree as the decision did not create a right to abortion for Canadian women and in many respects abortion services are no more readily available than they were pre-Morgentaler. Indeed Morton himself makes this point.[8] Several provinces responded to the Morgentaler decision by setting up legal and financial barriers to access; for example, British Columbia, Alberta and New Brunswick used their health insurance programs to restrict abortion funding, and Nova Scotia wrote legislation banning the provision of abortion services via free-standing clinics. The Supreme Court decision has made no difference to women in P.E.I. where abortions are still not performed. Contrary to the author's assertion, it seems no one has really "won." Clearly the Morgentaler decision is not the last word on the subject. The quest for reproductive freedom has always been, and continues to be, a political issue, notwithstanding various attempts by politicians to depoliticize it.

The second *Charter* pitfall identified by the author is the political discourse it inspires. Morton claims that the *Charter* promotes "rights talk" (self-interested and adversarial discourse), which encourages "moralistic confrontation" and discourages political compromise.[9] This is a popular argument among political scientists these days and is rapidly becoming an untested assumption among *Charter* watchers. Such an assertion is in many ways untenable and unfair. It is untenable because the disadvantaged groups which supposedly benefit from the *Charter* are among the earliest and most vociferous critics of rights discourse, which pits decontextualized individuals against each other. The assertion is unfair because it blames the victims; those who do not have a political voice are accused of political irresponsibility when they appeal to the courts.

Feminism is identified by Morton as one of the chief proponents (and users) of "rights talk". But the central tenets of feminism — the personal is political, no one has made it till we've all made it and every woman has the right to name her own experience — are the antithesis of selfish, atomistic "rights talk." Indeed, feminist legal scholars are critical of legal doctrine and processes, including rights discourse, to the extent that many are

5. *Ibid.* at 278.
6. D. Jenish "Abortion on Trial" *Maclean's* (31 July 1989) at 15.
7. Tremblay's remark is quoted in Janine Brodie, Shelley Gavigan and Jane Jenson, *The Politics of Abortion* (Toronto: Oxford University Press, 1992) at 93.
8. Morton, *supra* note 1 at 274.
9. *Ibid.* at 311-12.

wary of using litigation to achieve gender equality.[10] To accuse feminism of jumping on the "rights talk" bandwagon is to miss the point completely.

Morton refers to the defeat of Bill C-43 as a perfect example of the tendency of "rights talk" to prevent political compromise: "In the end, the pro-choice and pro-life extremes united to defeat a compromise abortion policy that had the support of the political middle."[11] The political middle must be very small indeed. Morton devotes a mere three pages to the Bill and neglects to mention that it was criticized by a wide variety of women's groups, and condemned by the Canadian Medical Association! Indeed, after Bill C-43 was passed by the House of Commons many doctors announced their intention to stop performing the procedure because they feared criminal prosecution under the new law. Perhaps a politically and legally sound consensus would have had the support of the "political middle" but Bill C-43 certainly did not. For a more complete description of reaction to this piece of legislation, readers should refer to Janine Brodie, et al., *The Politics of Abortion*.[12]

Finally, Morton accuses "rights talk" of eroding the social and political fabric.[13] Such an assertion assumes the fabric is strong and is woven so as to fully include all peoples. But women are still struggling for political, social and economic equality and the social and political fabric has many gaping holes. The law can be used to help re-weave the cloth by, among other things, forcing political leaders to examine, and perhaps mend, the tears and rips. The Morgentaler decision put the abortion ball in the political court, and that the result has been messy, inconsistent, divisive and controversial illustrates the extent to which women's reproductive roles and choices are still (politically) defined and articulated by men.

Linda Trimble
Assistant Professor,
Political Science
Department,
University of Alberta

10. See Sharene Razak, *Canadian Feminism and the Law* (Toronto: Second Story Press, 1991).
11. Morton, *supra* note 1 at 313.
12. *Supra* note 7.
13. Morton, *supra* note 1 at 312.