Obstructed Gynecology: Inaccess to Reproductive Health Care for Incarcerated Women as a Violation of Section 7 of the *Charter*

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ABSTRACT

Substandard prison health care in Canada has long been the subject of research, debate, and policy analysis. For nearly forty years, Senator Kim Pate and her associates have uncovered myriad human rights abuses occurring inside Canadian prisons and have urged governments to take action. The extent to which this substandard health care specifically impacts the reproductive freedom of incarcerated women has yet to be the subject of meaningful academic consideration. It has been argued by many that the conditions of Canadian prisons engage the *Charter of Rights and Freedoms*. This paper, in its limited scope, conceives of reproductive freedom as encapsulated by the section 7 *Charter* right to life, liberty, and security of the person. It is a novel analysis of how each of these three constitutional rights might be engaged by the current state of reproductive health care in prison.

Keywords: Prison Law; Incarcerated Women; Reproductive Health Care; Reproductive Justice; *Charter of Rights and Freedoms*; Section 7; Life, Liberty, and Security of the Person.

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I. INTRODUCTION

Thirty-five years ago, the Supreme Court of Canada ("SCC") decided *R v Morgentaler*.[1] In this landmark decision, the *Criminal Code* provisions that prevented women from accessing safe and timely abortion were deemed to violate their section 7 *Charter* right to security of the person. This was generally lauded as a deeply progressive item of jurisprudence, indispensable to gender equality in Canada. Morgentaler himself said in the wake of the decision, "[f]inally, we have freedom of reproduction in this country."[2]

With great respect to the late Dr. Morgentaler, the path to true freedom of reproduction is unfortunately not so direct. Three and a half decades after the decision, a great many women still face significant impediments to reproductive freedom in Canada. For one thing, this freedom encompasses much more than the ability to terminate a pregnancy. It includes the right to maintain bodily autonomy; the right to choose whether and when to have children, and how many children to have; and the right to parent one's children in safe and sustainable communities.[3] These are not rights currently enjoyed by all Canadians.

Reproductive freedom is a privilege. It flows from access to education, community resources, and health care.[4] Where these are not available, the reproductive freedoms identified above are hindered. Reproductive injustice thus pervades low-income, racialized, and otherwise marginalized communities, and is compounded by the overcriminalization and overincarceration of individuals from these communities.[5] The specific focus of this paper is the impact of incarceration on the reproductive freedom of Canadian women.[6]

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1 *R v Morgentaler*, [1988] 1 SCR 30, 37 CCC (3d) 449 [*Morgentaler*].

2 CBC News, "Abortion rights activist Dr. Henry Morgentaler dies at 90" (29 May 2013), online: *CBC News* <www.cbc.ca/news/canada/abortion-rights-activist-dr-henry-morgentaler-dies-at-90-1.1321542> [perma.cc/6YYZ-ECNP].

3 "Reproductive Justice" (2022) online: *Sister Song* <www.sistersong.net/reproductive-justice> [perma.cc/J2RY-E7BD].

4 *Ibid.*

5 Canada, Department of Justice, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses* (Ottawa: DOJ, last modified 9 April 2020) (Reports and Publications: Research and Statistics Division); Jean-Denis David & Megan Mitchell, "Contacts with the Police and the Over-Representation of Indigenous Peoples in The Canadian Criminal Justice System" (2021) 63:2 Can J Crim & Corr 23.

6 The author uses "women" and "female" throughout the paper to refer to individuals who have or could become pregnant, while acknowledging that not all these individuals may identify as female or as women.

As the SCC asserted in *Sauvé v Canada*, prisoners are not "temporary outcasts from our system of rights and democracy."[7] The *Charter of Rights and Freedoms* applies to the incarcerated as much as the non-incarcerated. Despite any attitudes to the contrary, imprisonment as a form of punishment is not meant to extend beyond separation from society to include human rights abuses.[8] While "reproductive freedom" has not yet been specifically identified as a constitutional right in Canada, the right to life, liberty, and security of the person under section 7 of the *Charter* is well-established.[9]

Life, liberty, and security of the person have generally been interpreted as three distinct rights, any one of which can ground a section 7 claim. This paper argues that the reproductive health care currently received by incarcerated women is demonstrably substandard and engages all three rights in section 7. The right to life is engaged where inaccess to health care in prison leads to an increased risk of death for incarcerated mothers and their children. The right to liberty is engaged where this inaccess eliminates women's freedom to make informed health care decisions and where there is limited access to timely abortion. Finally, the right to security of the person is engaged, having regard to both physical and psychological security. Inaccess to health care is associated with adverse physical health outcomes for Canadian prisoners in general, with specific impacts on the reproductive health of female prisoners. With regard to psychological security, the state conduct infringes on incarcerated women's psychological integrity in at least three ways: by delaying health care treatment, by failing to provide access to mental health resources and trauma therapy following pregnancy loss, and by removing children from their mothers following birth.

To be constitutionally permissible, section 7 deprivations must also be causally connected to state conduct and accord with principles of fundamental justice. If these are made out, the burden shifts to the government to justify the infringement pursuant to section 1 of the *Charter*.[10] The state conduct subject to section 7 analysis here is the failure of Correctional Services Canada ("CSC") to provide incarcerated women with proper reproductive health care.

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7 *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at paras 40, 47.

8 Canada, Parliament, Senate, Standing Committee on Human Rights, *Report on the Human Rights of Federally Sentenced Persons*, 42nd Parl, 1st Sess (June 2021) (Chair: Salma Ataullahjan) at 56 [Senate Report].

9 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7 [*Charter*].

10 *Ibid*, s 1.

Part II of this paper canvasses the current state of reproductive health care in Canada. Part III then assesses the potential section 7 infringements associated with this substandard health care, the extent to which they are causally connected to state conduct, the relevant principle(s) of fundamental justice, and the potential justifications by CSC under section 1.

II. REPRODUCTIVE HEALTH CARE IN CANADA'S PRISONS

Section 86 of the *Corrections and Conditional Release Act* stipulates that CSC shall provide every inmate with "essential health care" and "reasonable access to non-essential health care," both of which must "conform to professionally accepted standards."[11] Notwithstanding this, the overall health of incarcerated persons in Canada is much poorer than that of the general population.[12] This can be partially attributed to social determinants of poor health such as adverse life events, substance abuse, family disorganization, and socioeconomic status, all of which are associated with criminality and incarceration.[13] However, any propensity for poor health is likely to be aggravated by substandard health care in the prison environment. All incarcerated individuals receive health care far below the national standard both during incarceration and following release back into the community.[14] In 2020 and 2021, health care complaints represented the second most common category of complaints by offenders to the Office of the Correctional Investigator;[15] from 2014 to 2020 they were number one.[16] Specific complaints include excessively long

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11 *Corrections and Conditional Release Act*, SC 1992, c 20, s 86 [*CCRA*].

12 Fiona Kouyoumdjian et al, "Health Status of Prisoners in Canada: Narrative Review" (2016) 62:3 Can Fam Physician 215 [Prisoner Health Status]; Adam Miller, "Prison Health Care Inequality" (2013) 185:6 Can Med Assoc J 249 [Miller].

13 *Ibid*.

14 Prisoner Health Status, *supra* note 12; Miller, *supra* note 12; Jessica Liauw et al, "The Unmet Contraceptive Need of Incarcerated Women in Ontario" (2016) 38:9 J Obstet Gynaecol Can 820 [Unmet Contraceptive Need].

15 Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *2021 Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety and Emergency Preparedness, 2023).

16 Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *2015 Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety and Emergency Preparedness, 2016); Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *2016 Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety and Emergency Preparedness, 2017); Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *2017 Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety and Emergency Preparedness, 2018); Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *2018*

wait times or outright failure to receive treatment, complications following medical procedures, and poor bedside manner.[17]

Reproductive health care for incarcerated women is a severely under-researched area.[18] Martha Paynter and others' 2020 meta-analysis of sexual and reproductive health outcomes among incarcerated women uncovered only 15 studies from between 1994 and 2020.[19] From what research has been done, it is clear that incarcerated women in Canada receive substandard reproductive health care in virtually every way. Incarcerated women have poorer access to contraception than non-incarcerated women and thus have higher rates of unintended pregnancy both while incarcerated and while in the community.[20] Prenatal care for women who are pregnant while incarcerated is also lacking. Alison Carter Ramirez and others found that compared to general population pregnancies, women with prison pregnancies had a significantly lower chance of receiving any of the following: a first-trimester doctor's visit, eight or more total doctor's visits during pregnancy (the number recommended by the World Health Organization),[21] and ultrasonography in their first trimester.[22] Another 2020 study by Carter Ramirez and others found that women with prison pregnancies were at greater risk than women in the general population of adverse birth outcomes such as premature birth,[23] which is associated with

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Corrections and Conditional Release Statistical Overview (Ottawa: Public Safety and Emergency Preparedness, 2019); Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *2019 Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety and Emergency Preparedness, 2020); Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *2020 Corrections and Conditional Release Statistical Overview* (Ottawa: Public Safety and Emergency Preparedness, 2022).

17 Miller, *supra* note 12.

18 Fiona Kouyoumdjian et al, "Research on the Health of People Who Experience Detention or Incarceration in Canada: A Scoping Review" (2015) 15:1 BMC Public Health 419.

19 Martha Paynter et al, "Sexual and Reproductive Health Outcomes among Incarcerated Women in Canada: A Scoping Review" (2020) Can J Nurs Res 1.

20 Unmet Contraceptive Need, *supra* note 14.

21 "WHO Recommendations on Antenatal Care for a Positive Pregnancy Experience" (28 November 2016), online: *World Health Organization* <www.who.int/publications/i/item/9789241549912> [perma.cc/JL6A-Y8UT] [World Health Organization].

22 Alison Carter Ramirez et al, "Quality of Antenatal Care for Women Who Experience Imprisonment in Ontario, Canada" (2020) 3:8 JAMA.

23 Alison Carter Ramirez et al, "Infant and Maternal Outcomes for Women Who Experience Imprisonment in Ontario, Canada: A Retrospective Cohort Study" (2020) 42:4 J Obstet Gynecol Can 462 [Infant and Maternal Outcomes].

infant mortality,[24] birth defects,[25] and postpartum depression.[26] The rate of premature birth among women who became pregnant before or during incarceration was 2.7 and 2.1 times higher, respectively, than in the general population.[27] Women in prison also experience higher rates of HIV and other sexually transmitted infections,[28] and of abnormal and overdue Pap tests.[29]

Qualitative studies, news reports, and other sources further illustrate the nature and extent of the problem. In a qualitative study by Jessica Liauw and others, women in prison reported having to wait months to see a physician despite multiple requests, a sense that their requests were not taken seriously by the correctional officers through whom these requests were submitted, and limited access to essential services such as contraception, IUD follow-up appointments, pregnancy tests, and abortions.[30] These women often became pregnant without meaning to and remained so because they did not know they were pregnant or did not receive an appointment until it was too late to terminate the pregnancy.[31] Women who carried pregnancies to term and gave birth in prison were often separated from their children following birth, a process described by the women in Liauw et al.'s study as "horrific."[32] Women who experienced pregnancy loss in prison described an absence of medical and emotional support, including inaccess to sanitary pads while experiencing miscarriage and inaccess to therapy or counselling afterward.[33]

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24 "Preterm birth" (19 February 2018), online: *World Health Organization* <www.who.int/news-room/fact-sheets/detail/preterm-birth> [perma.cc/WPY9-TXCE].

25 Hannah C Glass et al, "Outcomes for Extremely Premature Infants" (2015) 120:6 Anesth Analg 1337.

26 Juliana Arantes Figueiredo de Paula Eduardo et al, "Preterm Birth as a Risk Factor for Postpartum Depression: A Systematic Review and Meta-Analysis" (2019) 259:1 J Affect Disord 392.

27 Infant and Maternal Outcomes, *supra* note 23.

28 Jonathan D Besney et al, "Addressing Women's Unmet Health Care Needs in a Canadian Remand Center: Catalyst for Improved Health?" (2018) 24:3 J Correct Health Care 276.

29 Infant and Maternal Outcomes, *supra* note 23; "Pap" tests check for the presence of human papilloma virus (HPV), several strains of which are predeterminants of cervical cancer.

30 Jessica Liauw et al, "Reproductive Healthcare in Prison: A Qualitative Study of Women's Experiences and Perspectives in Ontario, Canada" (2021) 16:5 PLOS [Reproductive Healthcare].

31 *Ibid.*

32 *Ibid* at 10.

33 *Ibid* at 9.

Incarcerated women in the Liauw study described a general unsympathetic attitude of prison officials, leading to a belief "that correctional officers did not consider them as deserving of good health care as members of the general population."[34] Media reports of pregnant women's prison experiences reveal a similar sentiment of indifference. One woman in an Ottawa jail described being ignored by prison officials for ten to fifteen minutes while miscarrying in her cell.[35] Another gave birth in her cell without a doctor present as prison officials thought she was in "false labour"; her son was born breech and died before the age of two due to respiratory problems.[36] According to Liauw et al., this lack of reproductive safety and dignity in the prison environment tended, unsurprisingly, to negatively influence these women's attitudes toward pregnancy and motherhood.[37] Personal essay anthologies like Gordana Eljdupovic and Rebecca Jaremko Bromwich's *Incarcerated Mothers: Oppression and Resistance* capture the intimate individual experiences of women at the intersection of motherhood, incarceration, and social marginalization.[38] These women describe social stigmatization, "otherness," and a general sense that, to use the editors' words, the society in which they live has deemed them "unworthy of investment."[39] Of particular note are the experiences of Indigenous women, who represent Canada's fastest-growing prison population,[40] and for whom motherhood often wields deep cultural significance.[41]

In 2022, the Canadian Minister of Health stated that "reproductive rights are fundamental rights,"[42] such that "[t]he Government of Canada

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34 *Ibid* at 6.

35 Joe Lofaro, "Prisoner's miscarriage in jail cell raises questions about health care, critics say" (3 February 2017), online: *Ottawa Citizen* <ottawacitizen.com/news/local-news/prisoners-miscarriage-in-jail-cell-raises-questions-about-health-care-critics-say> [perma.cc/E4XA-GUEX].

36 "Inmate's rights allegedly violated in jailhouse birth" (10 October 2012), online: *CBC News* <www.cbc.ca/news/canada/ottawa/inmate-s-rights-allegedly-violated-in-jailhouse-birth-1.1142465> [perma.cc/PCH8-96JP].

37 Reproductive Healthcare, *supra* note 30.

38 Gordana Eljdupovic & Rebecca Jaremko Bromwich, eds, *Incarcerated Mothers: Oppression and Resistance* (Bradford, ON: Demeter Press, 2013) [Eljdupovic & Bromwich].

39 *Ibid* at 6.

40 Canada, Department of Justice, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses* (Reports and Publications: Research and Statistics Division) (Ottawa: DOJ, 2020).

41 Kim Anderson, *A Recognition of Being: Reconstructing Native Womanhood* (Toronto: Sumac Press, 2016); Shirley Bear, "Equality Among Women" in William Herbert New, ed, *Canadian Literature* (Vancouver: University of British Columbia, 1990).

42 Health Canada, "Government of Canada Strengthens Access to Sexual and

firmly believes that everyone should have access to safe and consistent sexual and reproductive health services."[43] This statement has yet to be reflected in jurisprudence or in any attempt to improve reproductive health care services in prison.

Indeed, reproductive rights are fundamental rights. This paper specifically envisions CSC's failure to provide and oversee reproductive health care services which conform to the statutorily prescribed standard as engaging section 7 of the *Charter*. What follows is a discussion of how this failure and its resultant deprivations may constitute an affront to incarcerated women's established rights to life, liberty, and security of the person.

III. SECTION 7

A. Life

The constitutional right to life is engaged where state action imposes death or an increased risk of death on a person, either directly or indirectly.[44] The SCC was clear in *Chaoulli v Quebec*[45] and *Canada v PHS Community Services Society*[46] that the deprivation of lifesaving medical care engages the right to life under section 7. In *Chaoulli*, the legislative prohibition on private health insurance violated the right to life where it deprived individuals of timely health care, potentially resulting in death. The Court concluded that "prohibiting health insurance that would permit ordinary Canadians to access health care, in circumstances where the government is failing to deliver health care in a reasonable manner, thereby increasing the risk of complications and death, interferes with life [...] as protected by s. 7."[47]

Following the reasoning from *Sauvé*, "ordinary Canadians" includes those serving terms of imprisonment. It is clear that the government is failing to deliver health care to these Canadians in a reasonable manner. In *Chaoulli*, it was the excessive wait times for treatment that were deemed "unreasonable." Indeed, "excessive wait times" was among the most-cited prisoner health care complaints in the studies above, with some individuals

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Reproductive Health Services for Youth" (24 August 2022), online: *Government of Canada* <www.canada.ca/en/health-canada/news/2022/08/government-of-canada-strengthens-access-to-sexual-and-reproductive-health-services-for-youth.html>.

43 *Ibid.*

44 *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 62 [*Carter*].

45 *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 153 [*Chaoulli*].

46 *Canada (Attorney General) v PHS Community Services Society*, 2005 SCC 35 at para 91.

47 *Chaoulli*, *supra* note 45 at para 124.

waiting years for treatment.[48] Just as the claimants in *Chaoulli* were statutorily barred from accessing more timely health care than was available under the universal health care regime, incarcerated individuals are limited to the health care provided by CSC. As above, where this health care is inadequate, the risk of complications and death is increased.

Under the existing jurisprudence, the argument that the right to life is being infringed is perhaps strongest with regard to prison health care in general. However, women have unique health care needs that engage the right to life. The specific paucity of gynecological and reproductive health care in Canada's prisons thus creates distinct challenges that may not be sufficiently addressed by a "general" improvement of prison health care. According to the United Nations, of which Canada is a member state, "[w]omen's sexual and reproductive health is related to multiple human rights, including the right to life,"[49] and violations of these rights include "denial of access to services that only women require" and "poor quality services."[50]

Incarcerated women have indeed described such denial and poor quality of female-specific services. Specifically, they describe inordinately long wait times or outright failure to receive potentially lifesaving procedures such as Pap tests and HPV/HIV screenings.[51] Their children are more likely than the children of non-incarcerated women to die from improper natal care and/or premature birth.[52] These increased risks of death are the result of CSC's failure to provide reproductive health care in a reasonable (i.e., timely) manner and thus engage the same right to life violated in *Chaoulli*.

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48 Miller, *supra* note 12.

49 "Sexual and reproductive health and rights: OHCHR and women's human rights and gender equality" (last modified 2023), online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/en/women/sexual-and-reproductive-health-and-rights> [perma.cc/UP6V-UWB2]; see also Committee on Economic, Social and Cultural Rights, *General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UNESC, UN Doc E/C.12/GC/22, and United Nations General Assembly, *Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms*, 2006, UN Doc A/61/338.

50 *Ibid.*

51 Reproductive Healthcare, *supra* note 30.

52 Infant and Maternal Outcomes, *supra* note 23.

B. Liberty

The right to liberty under section 7 protects "the right to make fundamental personal choices free from state interference."[53] In *Morgentaler*, the SCC described such choices as those "intimately affecting [the individual's] private life,"[54] a sentiment echoed in *Carter* and *Rodriguez v British Columbia*.[55] In *Carter*, the section 7 liberty interest was infringed where the state action interfered with the individual's "ability to make decisions concerning their bodily integrity and medical care."[56] Autonomy in medical decision-making has long been recognized under Canadian law.[57]

A unifying thread of section 7 jurisprudence is that the liberty interest protects freedom of choice. In the health care context, the freedom to make choices concerning one's medical care can only be meaningfully realized where there is reliable access to proper medical care. In *Chaoulli* the Court went so far as to identify accessible health care as one of the "hallmarks of Canadian identity."[58] As discussed above, health care received by prisoners, when and if it is received, is not reliable, proper, or accessible. As a result, it is not conducive to freedom of choice. Incarcerated individuals are not freely choosing to wait years to receive medical treatment or to forego routine preventative measures such as Pap tests; they are being forced to do so because CSC provides no alternative. The state action—or, more appropriately, inaction—is interfering with prisoners' ability to make decisions concerning their bodily integrity and medical care, and the section 7 liberty interest is engaged.

The freedom of choice which underpins the section 7 liberty interest is even more robust in the context of incarcerated women's reproductive freedom. Incarcerated women describe a lack of access to contraception, pregnancy tests, and abortion.[59] This engages the same section 7 interest from *Morgentaler*, where the criminal prohibition on abortion care was found to impede the liberty of pregnant women.[60] Forcing women to carry unwanted pregnancies to term by criminalizing abortion represented a significant infringement on autonomy and bodily integrity and was deemed

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53 *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 54 [*Blencoe*].

54 *Morgentaler, supra* note 1 at 37.

55 *Carter, supra* note 44; *Rodriguez v British Columbia*, [1993] 3 SCR 519, 107 DLR (4th) 342 [*Rodriguez*].

56 *Carter, ibid* at para 66.

57 *Ibid*; *Rodriguez, supra* note 55; *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at paras 39, 100; see also *R v Parker*, 188 DLR (4th) 385, 146 CCC (3d) 193.

58 *Chaoulli, supra* note 45 at para 16.

59 Reproductive Healthcare, *supra* note 30.

60 *Morgentaler, supra* note 1.

unconstitutional. So too, it follows, is forcing incarcerated women to carry unwanted pregnancies to term by failing to ensure proper abortion access and care. Unwanted prison pregnancies that are not prevented, identified, and terminated pose a significant threat to incarcerated women's liberty interests.

While freedom of choice is ever-invoked in the abortion context, reproductive freedom is about more than the choice to terminate a pregnancy. As with health care in general, it requires the ability to make free and informed decisions regarding natal care and childrearing. In *B(R) v Children's Aid Society*, the Court stated that "[t]he right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent."[61] While the unborn have no independent legal rights under section 7 or elsewhere,[62] prenatal care is nevertheless fundamental to the unborn child's development.[63] As such, it is part of the pregnant woman's liberty interest to make informed medical decisions regarding her child's development while pregnant as much as following childbirth. The ability of incarcerated women to make important medical decisions about their pregnancies is substantially undermined by the substandard quality and efficacy of reproductive health care in prison. This inaccess to care undermines the freedom of choice protected by section 7, and the liberty interest is engaged.

C. Security of the person

Broadly, security of the person encompasses "personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity."[64] It is engaged by many of the same phenomena which ground the liberty interest.

Incarcerated women experience significant obstructions to personal autonomy and dignity. Consider, for example, the lack of access to sanitary pads during miscarriage,[65] or the sub-human treatment by prison officials

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61 *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 317, 122 DLR (4th).

62 See *R v Drummond*, 112 CCC (3d) 481, 3CR(5th) 380; see also *Dobson (Litigation Guardian of) v Dobson*, [1999] 2 SCR 753, 174 DLR (4th) 1.

63 World Health Organization, *supra* note 21; Therese Dowswell et al, "Alternative versus standard packages of antenatal care for low-risk pregnancy" (2015) Cochrane Database Syst Rev.

64 *Rodriguez, supra* note 55.

65 Reproductive Health Care, *supra* note 30.

discussed above.[66] These would engage the right to security of the person and its underlying principles in a broad sense.

More specifically, the section 7 right to security of the person protects both physical and psychological security.[67] Poor health care that results in physical suffering and ill health clearly engages the physical security interest.[68] This would include the pain of experiencing miscarriage and childbirth without proper medical attention. The delay in receiving abortion care also engages the physical aspect of security of the person, just as it did in *Morgentaler*.[69]

The right to psychological security is also engaged in several ways. In *Chaoulli*, the ban on private insurance engaged psychological security of the person insofar as being forced to wait for medical treatments caused psychological suffering in the form of anxiety and depression.[70] Delay in treatment, and lack of certainty as to whether or when one would receive treatment, engaged the psychological security interest as much as the physical one. With regard to abortion care specifically, the Court in *Morgentaler* found that "[n]ot only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress."[71] In the study by Liauw et al., one woman "was begging and begging, like she's done requests, she's seen a doctor, she's already planned to go for an abortion. They were putting it off and putting it off, until like, almost at the point that she couldn't get one."[72]

The psychological distress associated with pregnancy loss is also profound. Miscarriage is a physically and psychologically traumatic experience significantly associated with anxiety, depression, and PTSD.[73] Despite this, incarcerated women who experience pregnancy loss do not receive mental health support following miscarriage.[74] This is unsurprising, given what is known about the accessibility of mental health resources in

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66 *Ibid.*

67 *Carter, supra* note 44; *Chaoulli, supra* note 45 at para 118.

68 See Adelina Iftene, "Employing Older Prisoner Empirical Data to Test a Novel s. 7 Charter Claim" (2017) 40:2 Dal LJ 497 [Iftene].

69 *Morgentaler, supra* note 1 at 59, 37.

70 *Chaoulli, supra* note 45 at paras 116-17.

71 *Morgentaler, supra* note 1 at 56.

72 Reproductive Healthcare, *supra* note 30 at 6-7.

73 Jessica Farren et al, "Posttraumatic stress, anxiety and depression following miscarriage and ectopic pregnancy: a multicenter, prospective, cohort study" (2019) 222:4 AJOG 367; Jessica Farren et al, "The psychological impact of early pregnancy loss" (2018) 24:6 Hum Reprod Update 731.

74 Reproductive Healthcare, *supra* note 30.

the carceral context,[75] but that does not render it immune from scrutiny pursuant to the psychological security interest in section 7.

Finally, the psychological security interest of incarcerated women is engaged when the state removes children from parental custody following birth. As another woman in the Liauw study articulated, "[i]t's the first thing that runs through every woman's mind in jail is, they're gonna take my baby away from me."[76] In Eljdupovic and Bromwich's anthology, Patricia Block writes: "The day at the hospital when I had to kiss my baby goodbye was the most helpless, miserable, and empty experience of my life."[77]

For state-induced affronts to psychological integrity to engage section 7, they "need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety."[78] As noted above, inaccess to necessary health care, such as abortion, is likely to cause significant psychological distress. The psychological outcomes associated with pregnancy loss may also rise to the level of psychiatric illness—namely, depression, anxiety, and post-traumatic stress disorder. Finally, being separated from one's child was the very example given by the SCC in *New Brunswick v G(J)* of an interference with psychological integrity sufficient to engage the section 7 psychological security interest.[79] In *Blencoe*, the SCC specifically stated that "the prospect of losing guardianship of one's children"[80] would engage psychological security insofar as it represents a fundamental personal choice that ought to be constitutionally shielded from state interference.

D. Causal connection

The *Charter* does not apply to all of society's misconduct but to "all matters within the authority of Parliament"[81] and to the common law.[82] It only protects individuals from affronts to life, liberty, and security of the person inflicted by the state. To this end, there must be a "sufficient causal

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75 Miller, *supra* note 12; Iftene, *supra* note 68.

76 Reproductive Healthcare, *supra* note 30.

77 Eljdupovic & Bromwich, *supra* note 38 at 1; see also "Babies born in jail belong with moms, B.C. court says," (6 December 2016), online: *CBC News* <www.cbc.ca/news/canada/british-columbia/babies-born-in-jail-belong-with-moms-b-c-court-says-1.2466516> [perma.cc/R8FX-5XEN].

78 *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, 177 DLR (4th) 124.

79 *Ibid.*

80 *Blencoe, supra* note 53 at para 83.

81 *Charter, supra* note 9, s 32(1).

82 *RWDSU, Local 580 v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174.

connection" between the state conduct and the infringement or deprivation.[83] This "does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities."[84]

The criminal law, of course, is squarely under the authority of Parliament.[85] Accordingly, the *Corrections and Conditional Release Act* is subject to *Charter* scrutiny, as are the actions and decisions of prison officials that flow from its authority. State action to which the *Charter* applies for the purposes of section 7 thus includes the negligent treatment by CSC of incarcerated women with regard to their reproductive health. As mentioned, the differences between the reproductive outcomes of incarcerated women and non-incarcerated women can only be partially accounted for by social factors that are also predeterminants of incarceration. Qualitative studies, news reports, and reports about prison health care generally suggest that institutional factors also play a role. It is thus, logically, more likely than not that the state conduct is at least one cause of the affronts to incarcerated women's life, liberty, and security of the person.

In *Bedford*, the Court considered whether the causal connection was negated by the claimants' personal choices and/or the activity of non-state third parties.[86] In *R v Malmo-Levine*, for example, while the state action was causally connected to the deprivation under section 7, the claimant's personal choice to consume and possess marijuana negated this connection.[87] In *Bedford*, Canada argued that it was not the laws prohibiting activity related to prostitution which were the cause of the section 7 deprivation, but rather the activity of pimps and "johns" who exploited and abused the claimants.[88]

The causal connection between the state action and the section 7 deprivations suffered by incarcerated women is not negated by these women's personal choices. It may be argued that the "choice" to break the criminal law is implicated here; however, as mentioned, incarceration as punishment is not intended to include deprivations beyond the deprivation of liberty associated with imprisonment, which is protected by section 1. It is not the imprisonment of women that is the subject of this paper; it is the

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83 *Blencoe*, *supra* note 53; *Canada (Attorney General) v Bedford*, 2013 SCC 72 [*Bedford*].

84 *Bedford*, *ibid.*

85 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(27), reprinted in RSC 1985, Appendix II, No 5.

86 *Bedford*, *supra* note 83.

87 *R v Malmo-Levine; R v Caine*, 2003 SCC 74 [*Malmo-Levine*].

88 *Bedford*, *supra* note 83.

deprivations associated with substandard reproductive health care in the carceral environment. There are also no third parties whose actions would negate the causal connection here. In *Bedford*, the Court held that "[t]he violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence."[89] In the same way, the social determinants of health that are associated with incarceration do not negate the role of CSC in making incarcerated women more vulnerable to poor health and other section 7 violations.

E. Principles of fundamental justice

The language of section 7 specifically denotes the right not to be deprived of life, liberty, and security of the person "except in accordance with the principles of fundamental justice."[90] As such, where the state-induced deprivation accords with the principles of fundamental justice, there is no section 7 violation. Because the *Charter* provides no guidance as to what constitutes a "principle of fundamental justice," the analysis is borne out by jurisprudence. The Court has articulated that principles of fundamental justice are "principles that underlie our notions of justice and fair process,"[91] "to be found in the basic tenets of our legal system."[92] They are not free-standing rights but tools for measuring whether a section 7 deprivation can be justified by the state.

Incarceration is a prima facie deprivation of the section 7 right to liberty but is (ostensibly) justified where it is done so in accordance with principles of fundamental justice. In *R v Hebert*, for example, the state could not deprive an individual of liberty in a manner that violated his right to remain silent, fundamental as this right is to justice and fair process in the legal system.[93] In *Bedford*, certain provisions which criminalized sex work were deemed unconstitutional where they deprived sex workers of their section 7 rights in a manner 1) unconnected to a legitimate state objective (i.e., arbitrarily), 2) capturing mischief outside said objective (i.e., overly broadly), or 3) extending beyond the means necessary to achieve the objective (i.e., grossly disproportionately).[94]

If it is accepted that incarcerated women are being deprived of their section 7 right to life, liberty, and security of the person and that this deprivation is causally connected to the negligence of CSC, the next inquiry

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89 *Ibid* at para 89.

90 *Charter, supra* note 9, s 7, emphasis added.

91 *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 19 [*Charkaoui*].

92 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536 at paras 31, 64 [*Motor Vehicle Reference*]; *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 23.

93 *R v Hebert*, [1990] 2 SCR 151, 57 CCC (3d) 1.

94 *Bedford, supra* note 83.

is whether the deprivation is in accordance with principles of fundamental justice. Whether a principle of fundamental justice is engaged is a fact-specific inquiry. Here, because it is state conduct rather than a specific legislative provision that is the cause of the deprivation, it is difficult to identify a legitimate government objective in respect of which the deprivation is arbitrary, overbroad, or grossly disproportionate. It may be reasonable to conclude that section 7 deprivations resulting from prison conditions are implicitly associated with the government's objective to punish and deter criminal behaviour. In the author's view, the substandard reproductive health care received by incarcerated women is indeed an additional punishment. However, it is one which exceeds the government's legitimate authority to punish, thus engaging the principle of gross disproportionality. As in *Bedford*:

> The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. [...] The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.[95]

There is at least some societal consensus that imprisonment is a proportional punishment for serious criminal offences. The same is not true for inaccess to health care, reproductive and otherwise. As the SCC said as early as *Solosky v The Queen*, "a person confined to prison maintains all of his civil rights, other than those expressly or impliedly taken away from him by law."[96] There is no law that expressly or impliedly rescinds the rights of prisoners to life, liberty, and security of the person as they pertain to health care and reproductive justice. In fact, the law affirmatively states that prisoners are to receive health care that conforms to professionally accepted standards.[97]

The gross disproportionality analysis focuses on harm to the individual and whether this harm is disproportionate to the purpose of the impugned conduct.[98] The harms suffered by incarcerated women, described in Part I, are sufficiently serious to engage section 7 and are not in sync with the objective of incarceration as punishment. They amount to reproductive injustice as punishment, which falls outside the accepted definition of punishment in our free and democratic society.

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95 *Ibid* at para 120.
96 *Solosky v The Queen*, [1980] 1 SCR 821 at 823, 105 DLR (3d) 745.
97 CCRA, *supra* note 11, s 86.
98 *Bedford, supra* note 83.

F. Section 1

A law that violates section 7 in a manner not in accordance with the principles of fundamental justice can still be saved under section 1 of the *Charter*, which disclaims that its rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[99] Limits on *Charter* rights will be so demonstrably justified where the government can show that the right has been limited pursuant to a pressing and substantial objective, that the state conduct causing the infringement is rationally connected to this objective, and that the infringement impairs the right in question as little as possible to achieve this objective.[100] In *R v Keegstra*, for example, the SCC found that the *Criminal Code* provisions against hate speech violated the section 2(b) *Charter* right to freedom of expression, but the violation was saved under section 1.[101] Limiting hate speech was deemed a sufficiently pressing social objective, having regard to evidence of historic and continuing racial tensions and hateful conduct in Canada. The Court noted that decisions under section 1 are ultimately determined by "the court's judgment, based on an understanding of the values our society is built on and the interests at stake in the particular case."[102]

As the Court noted in *Charkaoui*, the rights protected by section 7 "are not easily overridden by competing social interests."[103] The state must demonstrate that there is a significant public good being served that outweighs the severity of the section 7 violation.[104] In *Keegstra*, the Court was convinced that the social benefit of outlawing hate speech overrode the constitutional right to freedom of expression in that particular case.

Presumably, CSC does not purport that there is a substantial and overriding public benefit to limiting incarcerated women's access to reproductive health care. As Dalhousie law professor Adelina Iftene notes in her 2017 article, where the source of the deprivation is state conduct rather than specific legislation, "[i]t is difficult to predict what arguments CSC would advance to justify their policies, or how successful these arguments would be."[105] Perhaps CSC would argue that substandard health care is part and parcel of incarceration, and suggest that women not commit crime if they are unprepared to serve time. Of course, as discussed above

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99 *Charter*, *supra* note 9, s 1.

100 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

101 *R v Keegstra*, [1990] 3 SCR 697, 61 CCC (3d) 1.

102 *Ibid.*

103 *Charkaoui*, *supra* note 91 at para 66. See also *Carter*, *supra* note 44 at para 95 and *Motor Vehicle Reference*, *supra* note 92 at 518.

104 *Carter*, *supra* note 44 at para 95.

105 Iftene, *supra* note 68 at 539.

and in the Senate report on the rights of prisoners, "[s]eparation from society is the penalty. Any action that further interferes or infringes liberty interests is either not allowed; or, is permitted, through legislation and policy."[106] In the author's view, short of explicit legislation which permits CSC to deprive women of reproductive health care pursuant to a legitimate objective—whether it be punishment or something else—there is no legal justification for CSC's negligence. If such an Atwoodesque policy did exist, it would certainly be the subject of significant public outcry and *Charter* challenges under both section 7 and section 15. Unlike in *Keegstra*, the only objective to which such legislation could be rationally connected would offend the most basic social attitudes about gender equality in Canada. It would also be unlikely to be minimally impairing, fundamental as reproductive justice is to bodily autonomy, personal dignity, and freedom of choice.

IV. Conclusion

While the idea that Parliament would ever royally assent a law that explicitly deprives women of their reproductive rights may seem absurdly dystopian, the fact is that CSC is presently depriving incarcerated women of their reproductive freedom pursuant to its own prerogatives, unclear as those are. These deprivations engage all three human rights protected by section 7 of the *Charter*, do not accord with principles of fundamental justice, and cannot be justified by the government under section 1.

This paper began with the assertion that "reproductive justice" has not been explicitly recognized by courts in Canada. Indeed, that is evidenced by my necessarily piecemeal approach to reproductive rights at law for incarcerated women. It is my hope that future jurisprudence will recognize the principles and arguments I have identified here and ultimately seek to enforce more effective mechanisms for ensuring the protection of women's reproductive freedom both inside and outside the prison walls.

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106 Senate Report, *supra* note 8 at 56.