"The Person and Rights Theory in American and Canadian Law"

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Introduction:

This working paper will attempt to draw together various decisions of the superior courts in the United States and Canada to show some of the operative conceptions of either personhood or rights. While many theories of rights abound even those theorists who endorse a "rights based" system now express concerns about the effect such views have or might have upon civil society: particularly with respect to what has been widely identified as a problem of "fragmentation." As will be set out in the paper, most criticisms of what might be called the main liberal theories centre on the dangers posed to persons and commnities by atomistic or "unencumbered" notions of the individual.

What is clear is that notions of "unencumbered selves" cannot apply in a blanket fashion to the law since it is, in some respects, a moral system and is therefore concerned with "oughts" that *by definition* restrict the exercise of self-willing in certain areas.

Under the rule of law, then, the self is bound to be encumbered. The question is: on what basis is "free choice" to be restricted? That question, the "which" and "when" of rights turns on the prior question of what we decide the moral nature of persons is. Whether our initial view of personhood is relational (or not) will colour how even the questions are raised on various matters. Our moral vision of persons in relation - - of community, will be key both to what we conceive a right to be and how we will make decisions for or against a relational conception of personhood or rights.

This paper is divided in two parts. Part A. examines current conceptions of the person and rights by way of selected quotations from key American and Canadian legal decisions and scholars. Part B. focuses on important "background questions" of how the courts approach constitutional questions themselves. It makes a difference, for example, whether philosophy, tradition or religion are considered relevant to the questions the courts set themselves. Similarly it is also of importance how the court views moral questions in terms of "social consensus" and/or "majoritarianism."

Readers are asked to note that necessary space limitations on a working paper of this sort has resulted in less time being spent putting these legal quotations in the factual context than would normally accompany a more sustained legal analysis.

A. The Person and Rights Theory:

It has been observed by one theorist that the very foundation of a rights based jurisprudence is individualistic.[1] The core of the notion of individual rights has been described by the same author as based on the idea:

> that each person possesses a kind of sovereignty over his life and that such sovereignty entails that he be accorded a zone of protected activity within which he is to be free from encroachment from others. Since the nation-state has developed into the encroacher par excellence, there is a natural tendency to conceive of basic rights primarily as rights against the state.[2]

The seeds of unencumbered individualism may be seen in the early decision of the United States Supreme Court in *Olmstead*, where Justice Brandeis' notion of "the most important of rights" and what kind of community it furthers, stands in contrast to Michael Sandel's notion of a properly "constitutive community":

> The makers of our Constitution undertook to secure conditions favourable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men.[3]

This would also seem to be the principle at work in such dicta as that in the famous "mystery passage" in *Planned Parenthood v. Casey*:

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State[4]

In the decision that struck down Canada's law restricting abortion, two passages will serve to show the view of the person that animated the interpretation of the Section 7 right to "security of the person." In the judgment of then Chief Justice Dickson:

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[1] Loren E. Lomasky *Persons Rights and the Moral Community* (New York: Oxford, 1987) p.11. Lomasky suggests that the language of rights leads to an unnecessary polarization and rigidity. He asks: "what would be lost by replacing the question whether P has *a moral right* to X with the question of whether it is *morally right* that P have X?" He then observes that "the language of what is morally right covers more ground than that of moral rights; that is one reason why it is constricting to phrase disputes in terms of the latter (at 8, emphasis in original).

[2] ibid.

[3] *Olmstead v. United States*, 277 U.S. 438 at 478 (1928) (dissenting opinion).

[4] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 at 851 (1992).

> Forcing a woman by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria *unrelated to her own priorities and aspirations*, is a profound interference with a woman's body and thus a violation of security of the person.[5]

For another majority judge, individual autonomy was characterized in these terms:

> The Charter is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her own values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The Charter reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control. *Thus, the rights guaranteed in the Charter erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass.* The role of the courts is to map out, piece by piece, the parameters of the fence.[6]

This conception of the respect for human dignity and the right to liberty of the individual leads to a recognition that:

> ...the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.[7]

Various problems with these approaches have been noted. Amongst the clearest critiques has been that of Michael Sandel. The claim that the right is prior to the good derives much of its force, according to Sandel "from a certain conception of the person." The self, so the reasoning goes, has a maximized freedom because the self (which Sandel refers to as the "unencumbered self") is "prior to its purposes and ends." Sandel, however, raises an important query about this view of the right being prior to the good and its affect on the community:

> What is denied to the unencumbered self is the possibility of membership in any community bound by moral ties antecedent to choice; he cannot belong to any community where the

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[5] *R. v. Morgentaler* (1988) 44 D.L.R. (4th) 385 at 402 (S.C.C.) per Dickson C.J.C., emphasis added.

[6] ibid. 485 per Wilson J., emphasis added.

[7] ibid. 486. In her reasons, Wilson J. cited a string of American authorities and was the only judge to cite with approval the gestational framework of *Roe v. Wade* 410 U.S. 113 (1973). The decision in *Morgentaler* is discussed in some detail by Professor Mary Ann Glendon who notes that the question of abortion is dealt with by the Canadian judges in a much narrower way than by their American counterparts in *Roe*. She notes how Dickson C.J.C. held that it was "neither necessary nor wise" to explore whether the Canadian Charter provided a basis for broad-ranging American-style rights of privacy and individual autonomy. The Canadian justices struck down the *Criminal Code* provision governing abortion because of the way it operated not because there was a "right to abortion" *per se*. See: *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991) at p. 165.

> self itself could be at stake. Such a community would engage the identity as well as the interests of the participants, and so implicate its members in a citizenship more thoroughgoing than the unencumbered self can know. More than a cooperative arrangement, community in this second, stronger sense describes a mode of self-understanding, a shared way of life that partly defines the identity of the participants. We might call it community in the constitutive sense....The liberal attempt to construe all obligation in terms of duties universally owed or obligations voluntarily incurred makes it difficult to account for a wide range of moral and political ties that we commonly recognize. It fails to capture those loyalties and responsibilities whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are - as history, as citizens of this republic.
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> Loyalties such as these can be more than values I happen to have, and to hold, at a certain distance. The moral responsibilities they entail may go beyond the obligations I voluntarily incur and the "natural duties" I owe to human beings as such. Those who share a common life informed by moral ties such as these may be aid to comprise a community in the constitutive sense. The meaning of their membership cannot be redescribed in wholly voluntarist or contractarian terms without loss.[8]

In Canada a few cases that touch on religion have recognized the restriction on autonomy that comes with religious membership and upheld the rights of religious communities to, say, insist on compliance with Church marriage norms in a Catholic school setting.[9] This is an example of the courts' upholding the legislature's recognition of a community (and religious) "value" above that of the autonomous will of an individual. It was not relevant that the teacher had changed her mind about the meaning of marriage (surely a subset of "the meaning of the universe") when the Catholic Church had not.[10]

Freedom of association, religion and conscience often overlap with questions about autonomy and privacy of the person. This area is fraught with conflicts many of which will be difficult to resolve without giving priority to either personal or associational rights or by viewing the person as necessarily embedded in a relational context.[11] It is this type of question that is at the root of

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[8] Michael J. Sandel, "Freedom of Conscience or Freedom of Choice?" in Terry Eastland ed. *Religious Liberty in the Supreme Court* (Grand Rapids: Eerdmans, 1993) p. 483 at p.p. 485 - 486.

[9] *Caldwell* v. *Stuart* [1984] 2 S.C.R. 603; (1985) 15 D.L.R. (4th) 1 (S.C.C.) The Court upheld the Church's ability to terminate the employment of a teacher who married a divorced man in a civil ceremony. Human Rights challenge on the basis of "marital status discrimination" dismissed.

[10] Similarly, in *Wisconsin v. Yoder* 406 U.S. 205 (1972) the majority reasons of Chief Justice Burger respectfully dealt with the special religious nature and concerns of the Amish community and found that a compulsory education law which was neutral on its face but which posed a "real threat of undermining the Amish community and religious practice..." should not operate with respect to the Amish and the children of their community would not be required to attend school beyond the eighth grade.

[11] Consider, for example, the difference that a relational view of the person makes to the issues of euthanasia and assisted-suicide (which are discussed more fully below). The least restrictive euthanasia regime in Europe (the

contemporary theoretical concerns regarding individual autonomy versus constitutive communities. As Laurence Tribe has noted:

> If the state is to be prevented from intruding too deeply into either individual conscience or the autonomy of intimate religious communities and associations, one pattern for constitutional doctrine is greater deference to the claims of religion. But where a policy of deference proves indeterminate because of internal conflict among individuals and groups (to whom shall one defer?), and even where the pattern of deference seems unambiguous but is fraught with the perils of religious inquisition to ascertain sincerity, at least some of the doctrinal difficulties may be more readily resolved from the broader perspective provided by the rights to which religious autonomy contributes but which it does not exhaust - the rights of privacy and personhood...[12]

Yet in dealing with the significance and substance of rights of personhood, Tribe cannot establish a basis for what he recognizes as necessary: "...a substantive vision of the needs of human personality."[13] This has been identified as a weakness with other leading theorists as well.[14]Contemporary pluralism requires the resolution of conflicts between the individual and mediating institutions such as the family and religion. Articulation of a more principled pluralism would require a richer understanding of the relationship between persons and these institutions than has been (or, perhaps, can be) provided by liberal theorists operating out of the kind of individualistic approaches set out above[15].

It would be an error to view the courts' decisions as presenting a coherent vision of the person or rights themselves. Just when a particular decision would seem to support an attenuated notion of the person or community by asserting, for example, that the father of a child ought to have no say at all in the abortion decision[16], or that a full-term infant partially emerged from the birth canal is

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Netherlands) has Europe's least developed hospice care. Around every hospice death-bed is an acknowledged matrix of persons in relationship and that is very much a part of the self-understanding of palliative care workers.

[12] Laurence H. Tribe, *American Constitutional Law* (Mineola: Foundation Press, 2nd ed. 1988) 1301.

[13] ibid. 1305.

[14] See, for example, Robert P. George *Making Men Moral* (Oxford: Clarendon, 1993), p.p. 83 - 109 (critique of Ronald Dworkin) and p.p. 129 - 160 (critique of John Rawls and David Richards); Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: C.U.P., 1982) (critique of John Rawls); a useful overview of contemporary theorists may be found in Robert H. Bork's *The Tempting of America*, (New York: Free Press, 1990), p.p. 187 - 240. See also Richard Stith's detailed critique of Dworkin's "inviolabilty" notion, below note #23, since it provides some central concerns with Dworkin's work generally. See also Gerard V. Bradley "Life's Dominion: A Review Essay" 69 Notre Dame L.Rev. 329 (1993).

[15] Here one excludes the kind of reasoning in *Caldwell* which correctly refused to subordinate the importance of shared religious convictions to the wishes of a rebellious adherent. The *Caldwell* decision was from the early 1980's. It remains to be seen how it will fare in light of the more recent decisions referred to herein.

[16] *Tremblay v. Daigle* (1989) 62 D.L.R. (4th) 634 (S.C.C.).

not a "human being" or a "person" for the purposes of the *Criminal Code* provisions governing criminal negligence[17], other decisions emerge that do *not* endorse a narrow view.

Thus, both the Supreme Courts of Canada and the U.S. upheld the proscriptions on "assisted-suicide" (*Rodriguez* and *Glucksberg* and *Vacco* decisions)[18] thereby, *in result*, subordinating individual choices to other ends in a crucial area of the law. The assertion of a moral principle ("intrinsic value of human life") in *Rodriguez* was not the approach taken by the various judgments in the two U.S. Supreme Court decisions.[19]

Though the high courts of both countries dealt with the same issue (the licitness of "assisted suicide") the approaches taken show interesting differences. When the foundations of the two positions are reviewed, however, it is likely that the differences are more superficial than they might at first appear. The concurring opinions in *Glucksberg*, and *Vacco* turned primarily on concerns about lack of safeguards to ensure that physician-assisted suicide would, in fact, be voluntary more than on any assertion that assisted-suicide or euthanasia were wrong *per se*. The Canadian court's majority opinion, opted to restrict "assisted suicide" because it posed a threat to the "intrinsic value" and "inviolability" of life itself. When both decisions are read closely there are clear indications that the ice upon which respect for life rests is thin indeed. Both courts had narrow majorities and, ironically, the majority opinions of both focused more on a respect for voluntarism (fear that people's true wishes may not be fulfilled if "assisted suicide" is allowed) than a respect for life itself (that it is a wrong to deliberately intend the death of another and act towards this end).

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[17] *R. v. Sullivan and Lemay* (1991) 55 B.C.L.R. (2d) 1 (S.C.C.).

[18] *Rodriguez v. British Columbia* (A.G.) (1993) 107 D.L.R. (4th) 342: *Washington, et al., Petitioners v. Harold Glucksberg et al.* No. 96-110, 1997 U.S. Lexis 4039, June 26, 1997; *Dennis C. Vacco, Attorney General Of New York, Et Al.,Petitioners V. Timothy E. Quill Et Al.* No. 95-1858 Supreme Court Of The United States, 1997 U.S. Lexis 4038, June 26, 1997.

[19] With reference to the scope of the *Casey* right, Chief Justice Rehnquist's decision contained a list of prior cases at Note #19 of *Glucksberg* as follows:

> n19 See *Moore v. East Cleveland*, 431 U. S. 494, 503 (1977) ("The Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition") (emphasis added); *Griswold v. Connecticut*, 381 U. S. 479, 485-486 (1965)[contraception] (intrusions into the "sacred precincts of marital bedrooms" offend rights "older than the Bill of Rights"); id., at 495-496 (Goldberg, J., concurring) (the law in question "disrupted the traditional relation of the family--a relation as old and as fundamental as our entire civilization"); *Loving v. Virginia*, 388 U. S. 1, 12 (1967) [anti-miscegenation laws] ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness"); *Turner v. Safley*, 482 U. S. 78, 95 (1987) ("The decision to marry is a fundamental right"); *Roe v. Wade*, 410 U. S. 113, 140 (1973) (stating that at the Founding and throughout the 19th century, "a woman enjoyed a substantially broader right to terminate a pregnancy"); *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942) [sterilization of felons] ("Marriage and procreation are fundamental"); *Pierce v. Society of Sisters*, 268 U. S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U. S. 390, 399 (1923) [non-public education in a language other than English] (liberty includes "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men").

Chief Justice Lamer began his dissenting reasons in *Rodriguez* by noting that the Charter "...has established the essentially secular nature of Canadian society and the central place of freedom of conscience in the operation of our institutions." [20] He was not convinced that the "slippery slope" concerns expressed by the Crown should be accorded any weight and would have allowed a "constitutional exemption" to allow assistance in suicide for those who need assistance and are terminally ill. He did not give any reason why, if autonomous choice is the basis for allowing assistance in suicide, it should (or even could) be restricted to the terminally ill. Recall that in the Netherlands cases of anorexia and depression have both been found to fit within the "safeguards" that are currently in place[21]

The majority reasons of Sopinka J. appeared to subordinate autonomous will to other factors as follows:

> I find more merit in the argument that security of the person, by its nature, cannot encompass a right to take action that will end one's life as security of the person is intrinsically concerned with the well-being of the living person. This argument focuses on the generally held and deeply rooted belief in our society that human life is sacred and inviolable (which terms I use in the non-religious sense described by Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (New York: Knopf, 1993), to mean that human life is seen to have a deep intrinsic value of its own)....at the very least, no new consensus has emerged in society opposing the right of the state to regulate the involvement of others in exercising power over individuals ending their lives.[22]

If the reference to "no new consensus" does not by itself cause concern about what is meant by "inviolability", a recent article examining what Ronald Dworkin means by the term certainly should.[23]

One final approach to persons and contemporary rights debates may be of interest. In a recent Supreme Court of Canada decision, it was held that "native property rights" are *entirely* communal in character.[24] This last decision raises some interesting questions in terms of the person and rights theory.

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[20] see note # 18, above, at 366.

[21] John Keown ed. *Euthanasia Examined* (Cambridge: C.U.P., 1995), p. 279 (depression sufficient).

[22] op cit. p. 389. A few pages later on, having cited legislative history and policy in several countries and noting the "crucial" difference between active and passive euthanasia as well as intentional termination and (though he does not use this term) "double-effect", Sopinka and a narrow majority of the court upheld the impugned provisions.

[23] Richard Stith "On Death and Dworkin: A Critique of his Theory of Inviolability" 56 Maryland L.Rev. 289 (1997). Stith argues that Dworkin's theory of inviolability is "dangerous, mistaken and unnecessary" (382). " Dworkin's notion would allow the active killing of dependent, demented people even if they are happy and asking to live" (327). Stith notes that Dworkin "overlooks the attitude called respect...[which] cannot be converted into value" (383).

Canadian society is now in the process of examining what makes "first nations" unique and what aspects of their culture need to or can be preserved. Most people seem to assume that native culture/communities/values ought to be preserved and that the communal nature of their societies is a good. But if preservation of ethnic and communal distinctives is a good for natives, why is it not also a good for those in the mixed communities of ordinary citizens or those groups of citizens who have joined around a particular set of deeply held affirmations (either ethnic, religious or otherwise)? Will the law encourage these "natural rights" or communities the way it has recognized a "natural right" to native lands? Will it encourage a notion of pluralism that gives a place for public support (and funding) of religious endeavors within a pluralistic culture? Canada may be in a position to embark upon this line of development before its neighbour to the south. This is due to the different histories of the two countries and the fact that Canada has no "establishment clause" in its constitution and has not, therefore, developed the jurisprudential baggage that would likely hamstring American courts.

Part B. Some Background Issues in Dealing with Constitutional Questions.

Since the "patriation" of the *Canadian Charter of Rights and Freedoms* in 1982 the courts have applied a variety of constitutional remedies to strike down legislation, read-in or sever language in enactments that in their opinion is in breach of the *Charter*. Section 1 of the *Charter* is its limiting provision and provides that the only limitation on the enumerated rights and freedoms are "...reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." [25]

Since 1982 the courts have had to deal with a wide ranging list of cases many of which give an insight into how the judges view the "person" and "rights" generally. In the cases about to be reviewed, it is clear that there is no consistently applied approaches and that restrictions allowed in one area (obscenity, assisted-suicide or "same-sex" benefits) will not be allowed in other areas (abortion, criminal negligence for death of a late-term foetus). In each case had the approach taken with respect to, say, abortion, been applied to assisted-suicide, the decision could well have gone the other way. Narrow rulings (five judges to four) on cases of wide-spread import (*Rodriguez* [26]on

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[24] *Delgamuukw v. British Columbia*, Supreme Court of Canada, File No.: 23799, December 11, 1997. as stated by Chief Justice Lamer: "A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests".

[25] The *Charter of Rights and Freedoms* protections include the following key provisions "*Fundamental Freedoms*" (Section 2) which include "freedom of conscience and religion", "freedom of thought, belief and opinion including freedom of the press....", "freedom of peaceful assembly" and "freedom of association". "*Legal Rights*" (Section 7) which states: "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." "*Equality Rights*" (Section 15) which states: "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." Section 15(2) allows expressly for affirmative action programs.

assisted-suicide and *Egan* on "same-sex" spousal status) and the radically divergent approaches of majority and minority reasons, show the extent to which there is no longer consensus as to how rights or personhood should be approached.[27] What is clear from the limiting language itself, however, is that the judges have an extremely wide latitude to evaluate all laws using a reasonable basis that can be argued to demonstrably comport with the twin hinges of "freedom" and "democracy."

In Canada's first case dealing with Sunday closing legislation, Chief Justice Dickson, speaking for the court, stated that it is important to recall that:

> the Charter was not enacted in a vacuum, and must therefore...be placed in its proper linguistic, philosophic and historical contexts.[28]

An analysis of the philosophical and historical framework of rights has not occurred in all cases - - even where one might have thought it indicated. The desire to place the courts' analysis in a larger context has recently been seen to include, in appropriate cases, *religious* principles as well as philosophical. In *Egan*, the first Charter case before the Supreme Court of Canada to deal with whether a "same-sex" relationship should be considered a "spousal" relationship, Justice La Forest noted that:

> ... marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate *raison d'etre* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate....In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.[29]

The references here to history, philosophy, religious tradition, nature, biology and social realities are in rather striking contrast to the lack of such analysis in many other *Charter* cases.

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[26] *Rodriguez*, Note #18, above, (*Criminal Code* prohibition on assisted-suicide a reasonable limit); *Egan et al. v. Canada* (1995) 124 D.L.R. (4th) 609 (finding "sexual orientation" to be "analogous" to the enumerated provisions in Section 15 of the *Charter* but refusing to strike down or amend a heterosexual definition of "spouse" in Federal benefits legislation) .

[27] Professor Mary Ann Glendon has set out in some detail that the Canadian Supreme Court justices in *Morgentaler* [1988] 1 S.C.R. 30 dealt with the question of abortion in a much narrower way than their American counterparts in *Roe v. Wade* 410 U.S. 113 (1973). She notes how then Chief Justice Dickson held that it was "neither necessary nor wise" to explore whether the Canadian Charter provided for a basis for broad-ranging American-style rights of privacy and individual autonomy. The Canadian justices struck down the Criminal Code provision governing abortion because of the way it operated not because there was a "right to abortion" per se. See: *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991), p. 165.

[28] *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295, 18 D.L. R. (4th) 321.

[29] *Egan v. Canada* (1995) 124 D.L.R. (4th) 609 at 625. La Forest J. and three other judges expressly noted that it is open to legislators to make distinctions between traditional marriages and common-law marriages.

The "traditional marriage" has also been the subject of commentary in the United States where a liberal theorist and advisor to the Clinton government has noted the need to allow for a degree of "functional traditionalism" and that:

> ...we must resist the easy relativism of the proposition that different family structures represent nothing more than "alternative life-styles" [or are]....purely private matters not appropriate for public discussion and response. After all, the consequences of family failure affect society at large...Whenever institutions and practices have such pervasive consequences, society has the right to scrutinise them and, where possible, to reshape them in light of its collective goals.[30]

We might ask: if effect on society at large is the litmus test for social "scrutiny" (and though it is not clear what precisely Galston means by "scrutinise" and "reshape" this must mean legislative responses), what matters could be properly exempt and on what basis does one decide what is "in" and "out" for the purposes of judicial review? If abortion were examined on the basis of a wide-spread analysis of its effects on society instead of a narrow bodily autonomy or "privacy" or "liberty" basis, could it be considered "private" and exempt? And what of many other issues?

The British Columbia legislature in July of 1997 amended its *Family Relations Act* to change the definition of "spouse" to include "same-sex" couples but did so without even a minimum evaluation of the effects such a change could have on society.[31]

On any case dealing with a philosophical point, the judges of the court seem confused as to how to approach the issue. In strikingly inconsistent decisions within a relatively brief time-frame, the court will say, as it did in the case of *Tremblay v. Daigle,* (dealing with whether the Quebec *Charter* provision saying "every human being has a right to life" provided protection for a third trimester infant *en ventre sa mère*) that matters of philosophy and "metaphysics" are not for the courts to delve
into and will leave what they have termed "philosophical questions" to the legislature then, in another, will have recourse to Aristotle, John Stuart Mill or even C.E.M. Joad- - philosophers all- - before making its own decision[32].

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[30] William A. Galston, *Liberal Purposes: Goods Virtues and Diversity in the Liberal State* (Cambridge: C.U.P., 1991) at p.285,

[31] The provincial government officials refused to meet with a very broad inter-faith coalition that had issued a Joint Statement affirming the sacredness of heterosexual marriage. With no external consultation the changes whistled through the legislature in less than 14 hours of debate.

[32] *Tremblay*, above, note #16 , at 650. On occasion, reliance upon, then doubt about, "philosophy" may appear in the same decision or even the same judgment. In one decision, a reference (with approval) to Aristotle's belief that "reasoned capacity for choice was central to the issue of moral culpability" was soon followed by a statement that "...a court is in no position to make determinations on questions of morality." *R. v. Chaulk* [1991] 2 W.W.R. 385 at 461, 474 (S.C.C.) per McLachlin J. In *Rodriguez*, above, Lamer C.J.C. in his dissenting judgment opined that the court should answer the question of the constitutionality of assisted-suicide "...without reference to the philosophical and theological considerations fueling the debate on the morality of suicide or euthanasia" (D.L.R. at 366). This approach is at stark variance with other passages cited which hold the view that the *Charter* must be placed in its proper linguistic, historical,

There are many examples of this insecurity or incoherence in dealing with morality and law. The Supreme Court of Canada has upheld the *Criminal Code* definition of obscenity in the face of a *Charter* challenge on the basis of the "freedom of expression." In doing so the court was at pains to attempt to base the restriction on pornography on the "harm" it does even though it could not establish a clear causal connection between the existence of pornography and harm arising from it. The court did not, as has happened in an American decision, focus on concepts such as "corruption" or "debasement" which lead to "anti-social behaviour."[33]
The court could not avoid the fact that such a restriction depends upon a moral basis yet in its manner of reasoning it undercuts any valid ground for moral evaluation by saying that it must be found in the *Charter* itself. This is a nonsensical approach because the *Charter* is an open ended document that states its rights in outline and in the broadest of terms. Whether the breach or limitation is demonstrably justified in a free and democratic society is an *external* analysis, involving matters not to be found in the *Charter* itself.

It can be observed in the passages from the *Butler* decision which follow, therefore, that by seeking to avoid a particular moral framework the court cannot erect any moral framework and ultimately ends up creating an entirely circular approach that makes moral articulation impossible. Mr. Justice Sopinka, in giving the majority judgement of the court[34] stated (at p.476) that it is no longer an appropriate objective of law "...to advance a particular conception of morality" because:

> ...this particular objective is no longer defensible in view of the *Charter*. *To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community,* is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract. D. Dyzenhaus, "Obscenity and the Charter: Autonomy and Equality" (1991), 1 C.R. (4th) 367 at p. 270, refers to this as "legal moralism," of a majority deciding what values should inform individual lives and then coercively imposing those values on minorities. The prevention of "dirt for dirt's sake" is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*.
>
> *On the other hand, I cannot agree with the suggestion of the appellant that Parliament does not have the right to legislate on the basis of some fundamental conception of morality* for the

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philosophical and religious context if it is to be properly interpreted. The court appears enmeshed in a functional "metaphobia" if such a term can properly be coined so as to reflect an undue fear of metaphysics.

[33] In *Paris Adult Theatre I v. Slaton* 413 U.S. 49, 63 (1973) the US Supreme Court upheld a ban on commercial showing of a hard-core film because "...public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behaviour." Is this analysis properly limited only to *public* displays? Corruption and debasement are of the person and are not, surely, simply wrongs because they hurt others. A host of programs now deal with behaviours that are recognized as addictive. Sex "addiction" is one of these. At what point does a "freedom to corrupt the self" become entirely self defeating and the state have a legitimate role in limiting the *occasions* for demonstrably destructive practices? Legally operated opium dens are a thing of the past. Should "red-light" areas go the same way as the legalized sale and open use of opium once their corrupting influences have been generally noted? Just because one shys away from being prudish does not mean one should also eschew prudence.

[34] Mr. Justice Sopinka spoke for himself and six other judges. The minority reasons of Gonthier J. agreed with those parts of Sopinka's judgment here referred to. On the analysis being discussed, therefore, the nine judges of the Supreme Court of Canada were unanimous.

> purposes of safeguarding the values which are integral to a free and democratic society. *As Dyzenhaus writes (at p. 376), "Moral disapprobation is recognized as an appropriate response when it has its basis in Charter values".*
>
> As the respondent and many of the intervenors have pointed out, much of the criminal law is based on moral conceptions of right and wrong and the mere fact that a law is grounded in morality does not automatically render it illegitimate. [35]

Justice Sopinka then recognized that moral corruption and harm to society are inextricably linked. But if it is "moral corruption of a certain kind" that "leads to the detrimental effect on society," [36] and Parliament has the right to legislate "on the basis of some fundamental conception of morality" then it is simply *not possible* to avoid "*a* particular conception of morality": the very thing that Justice Sopinka said at the outset was "no longer appropriate".

This is a good recent example of what may be termed the epistemological insecurity (or incoherence) of modern justice. It is interesting to note that, ultimately, the definition of obscenity based on "a community standards test" was found to be acceptable under the *Charter*. But what is a community standards test but the coercive imposition of the majority wishes over those of the individual? And this was another thing Justice Sopinka (and the whole court) said was *not* permissible.

The views of the community, therefore, could form the basis of constitutionally acceptable law, despite the limits on individual autonomy in the area of obscenity. But "harm" here was inferred not proven and any "moral" concerns were expressly rejected as a valid basis for the law.

But "community standards" on other matters have been deemed irrelevant. In the November 1993 Report of the Commission on New Reproductive Technologies, entitled *Proceed With Care,* the Commissioner's had to come to a decision on the issue of whether lesbians should have access to donor insemination. The Commissioners knew that the majority of Canadians did not believe that lesbians should have access to artificial donor insemination. At issue was, therefore, whether populism, the results of polls, or the desires of the majority are satisfactory ways of determining over time what is "right" and "wrong" in society? The Commission majority wrote that:

> As we made clear in Part One of this report, the Commission believes that society's approach to new reproductive technologies should be governed by the social values of Canadians. *We are also aware, however, of the difference between social values and individual opinions. We believe that social values held by Canadians are reflected in the Canadian Charter of Rights and Freedoms, and the prohibitions on discrimination it contains must be our guide in this matter*.[37]

Here the Charter principle of discrimination (and therefore equality) was seen to "trump" majority wishes and the Report of the majority of Commissioners recommended permitting lesbian access to donor insemination on equality grounds.

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[35] *R. v. Butler* (1992) 89 D.L.R (4th) 449 at 476 -477 emphasis added.

[36] ibid. 477.

[37] *Proceed With Care*, Report of The Royal Commission on New Reproductive Technologies (Ottawa: Canadian Communications Group, 1993), at p. 456, (emphasis added).

So, for the Supreme Court of Canada, the wishes of Canadians are important (affirmed as "consensus", rejected as "majoritarianism") for determining whether we should allow assisted-suicide or obscenity to be constitutionally permissible criminal acts (*Rodriguez*, *Butler*), but irrelevant for the definition of who is a "human being" (in the *Tremblay v. Daigle* case) or whether abortion restrictions are valid (*Morgentaler*). For the Royal Commissioners, the wishes of Canadians have to be based on the "Charter values" which, in their interpretation, can be contrary, indeed inimical, to the wishes of the majority.

The type of analysis the judges now embark upon is this: since they have generally eschewed moral considerations and majoritarianism, they must somehow determine what "social values" govern and whether a non-majoritarian "consensus" has emerged in society (because majoritarian focus, like moral principles, have been rejected in name - - though both have been used in the "community standards" or "intrinsic value of life" aspects in *Butler* and *Rodriguez*). If one is confused by all this, it is with good reason. Constitutional cases increasingly resemble games of chance more than debates of principle. No one can say with any confidence whether a matter will be struck down, read-in, left to the legislature or avoided entirely using any number of legal techniques. Lest anyone say that this is how law has always been, I think that the inconsistent approaches of similar cases makes the current situation different from the always difficult task of predicting legal outcomes.

As George Grant, the Canadian philosopher, put it in one of his last published essays:

> *When society puts power into the hands of the courts, they had better be educated...The more the justices quote philosophy or religious tradition the less they give the sense they understand what they are dealing with.* [Footnote] Another long article would be required to spell out the causes in legal and general education which lead to the jurisprudential shallowness among the judges. As much as abortion, this question goes to the very roots of modernity.)[38]

It is worth noting for discussion purposes how recently it was that a senior judge, could write about the necessity of a relationship between law morality and religion:

> The severance of the three ideas - of law from morality, and of religion from law - belongs very distinctly to the later stages of mental progress.
> This severance has gone a great way. Many people now think that religion and law have nothing in common. The law, they say, governs our dealings with our fellows: whereas religion concerns our dealings with God. Likewise they hold that law has nothing to do with morality. It lays down rigid rules which must be obeyed without questioning whether they are right or wrong. Its function is to keep order, not to do justice.
> The severance has, I think, gone much too far. Although religion, law and morals can be separated, they are nevertheless still very much dependent on each other. Without religion there can be no morality: and without morality there can be no law.[39]

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[38] George Grant "The Triumph of the Will" in Ian Gentles, ed. *A Time to Choose Life: Women, Abortion and Human Rights* (Stoddart: Toronto, 1990), p. 9 at p. 18, emphasis added.

[39] Sir Alfred Denning, *The Changing Law* (London: Stevens & Sons Ltd., 1953), p. 99.

Michael Polanyi has expressed powerfully how important it is for citizens (particularly those in key decision-making positions such as politics and law) to learn, preserve and develop the central principles which define a society:

> ...the adherents of a great tradition are largely unaware of their own premises, which lie deeply embedded in the unconscious foundations of practice...if the citizens are dedicated to certain transcendent obligations and particularly to such general ideals as truth, justice, charity, and these are embodied in the tradition of the community to which allegiance is maintained, a great many issues between citizens, and all to some extent, can be left-and are necessarily left- for the individual consciences to decide. The moment, however a community ceases to be dedicated through its members to transcendent ideals, it can continue to exist undisrupted only by submission to a single centre of unlimited secular power.[40]

If there is any good aspect to the increasing visibility of epistemological insecurity it is that it provides opportunities for those who believe there *are* foundations for morality and "personhood" to make their arguments clear and convincing. Part of the task ahead is how best to express these concepts to those who are concerned about individualism, fragmentation and the increasing incoherence of contemporary juridical and philosophical theories.

David Walsh has argued recently that any attempt to save true liberalism must focus to some extent on the longings within liberalism itself and to attempt to assist what he calls the growth of the liberal soul:

> We live in an irretrievably pluralist social context and while it is possible that we might return to a greater degree of cultural homogeneity, it is not at all probable. A way must be found of renewing and enlarging the public order from within that does not require us to jettison the liberal guarantee of autonomy or threaten those who might experience such a call to magnanimity as coercive. The public symbolism must remain intact, but its inner substance must undergo a spiritual enlargement. Somehow the expanded existential and philosophical horizons that have occurred through the catharsis of the modern world and the rediscovery of the depth of traditions must be infused into the liberal ethos without effecting a revolutionary change in the publicly authoritative form of order. What I am suggesting is a growth of the liberal soul....Liberal order is an achievement of justice that is snatched precariously from the jaws of a roaring chaos ever ready to overwhelm it.[41]

A necessary aspect of this language of engagement will be to allay liberal fears that to allow a public place for moral and religious discourse is to lay the groundwork for an illiberal theocracy. It will also be to spell out the relationship between the already acknowledged fundamentality of "rights and freedoms" and the grounding of moral principles and how they relate to the popular will in a democracy. Certainly a central component of any such strategy will be the development of an understanding of "personhood", "liberty", "privacy", "tolerance" and "pluralism" that overcomes the weaknesses inherent in atomistic individualism and vacuous assertions about *untrammelled* or *unencumbered* freedom being somehow the primary constitutive element of the human person. [42]

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[40] *Science, Faith and Society* (Chicago: Chicago Univ. Press, 1966), p. 76

[41] *The Growth of the Liberal Soul* (Columbia: Univ. of Missouri Press, 1997) at p.p. 313 and 320.

Each thing -
each stone, blossom, child-
is held in place.
Only we, in our arrogance,
push out beyond what we each belong to
for some empty freedom.[43]

Iain T. Benson
Bowen Island, B.C.
Canada

[42] The anticipated project to reclaim culture "from the language out" must struggle against the fantastic fragmentation of contemporary schooling: it would need to draw upon philosophy, social sciences, theology and law if it is to be successful. Jurisprudence is a long way behind theology in its understanding of the person: how sadly ironic, therefore, that it is a regnant judiciary that has the task of giving practical application to ontology in our time. If philosophy is the handmaiden of theology, then jurisprudence today is but the scullerymaid of philosophy in the guise of the Monarch.

[43] Rainer Maria Rilke, "Wenn etwas mir vom Fenster fällt" in *Rilke's Book of Hours* trans. Anita Barrow and Joanna Macy. (New York: Riverhead, 1996) ,p. 116.