On the Puzzling Death of the Sanctity-of-Life Argument

Abstract: The passage of time influences the content of the law and therefore also the validity of legal arguments. This is true even for charter-arguments, despite the widely held view that constitutional law is made to last. In this paper, I investigate the reason why the sanctity-of life argument against physician assisted suicide lost its validity between the Supreme Court decision in *Rodriguez v. British Columbia* in 1993 and *Carter v. Canada* in 2015. I suggest that a rhetorical approach to argument evaluation is the best basis for a satisfying explanation.

Keywords: Constitutional Law, Charter Interpretation, Argument Validity, Time, Universal Audience, Waluchow, Living Tree Constitutionalism, Common-Law Constitutionalism

Time is an important factor in the evaluation of arguments with premises whose truth or acceptability can change.[1] For these arguments, *when* an argument is used might well make a difference in whether we should say that it is a *good* argument. It should come as no surprise that one kind of argument that falls under this principle are arguments about what the law requires (from now on: legal arguments). As I will argue at greater length below, this is because the law is not static. It is created and developed primarily through the authoritative decisions of officials:

[1] I will here say that if, in 2005, I make the argument: "Jon and Sue are married, so they will see each other often.", and Jon and Sue get divorced in 2009 and you make the argument: "Jon and Sue are married, so they will be happy to see each other." in 2011, then we have used two arguments with the same premise, and the truth of the premise has changed. I am aware that it is also possible to say: The premise you used in 2005 was not fully represented in the formulation "Jon and Sue are married" – really the premise would be more fully represented by saying: "Right now, John and Sue are married." – and with the time-code, this premise is not the same as the premise represented by the formulation "Jon and Sue are married" that was uttered in 2011. Which of the two ways to talk about the phenomenon I am interested in here is more appropriate is an interesting question that would, unfortunately, lead us too far afield. I think that it is possible to make the argument in this paper even if I change my language to reflect the second view. But trying to do so would make the paper unwieldy and overly complicated.

What the law *is* changes over time by authoritative decision, and so the validity[2] of arguments about what the law *requires* changes over time too.[3]

It might seem that the validity of arguments about what a *constitutional charter* requires (from now on: charter arguments) should not be as time-sensitive. Constitutions, including charters of rights, are built to last – the requirements to amend them are intentionally made so onerous that amendments seldom happen. And yet, there are cases where the validity of charter arguments apparently changed without any amendment being involved; cases in which courts treat a charter argument as valid at one point in time only to reject it at another. One such example is the treatment of the sanctity-of-life argument in two prominent Canadian cases about the constitutionality of the Canadian prohibition of assisted suicide, *Rodriguez v. British Columbia* (1993) and *Carter v. Canada* (2015).

In this paper, I will use the example of the sanctity-of-life argument's fate in order to examine the various ways in which the passage of time can influence the validity of charter arguments. I will argue that the sanctity-of-life argument did not lose its validity in the way that is most familiar for legal arguments: through changes in the positive law, explicitly and authoritatively made by officials. Even if we approach constitutional law as developed by the common-law method, no explanation of the sanctity-of-life argument's loss in validity emerges. The answer, I will argue, can only be found if we assume that the Canadian Charter's meaning is not determined only through directly applicable, valid legal sources. Instead, I argue that Waluchow's idea that the charter's meaning also depends on the community's constitutional

[2] I will here use "valid" in a broad and intentionally vague sense to indicate the goodness or cogency of an argument. A valid argument is an argument that *should* convince its addressee. I do not commit to any specific theory of what constitutes validity in this sense.

[3] It is an issue of contention whether only the decisions of officials can change the law over time or whether the law also allows for other ways in which it can change. This makes the way in which the passing of time can have an influence on the validity of legal arguments a complicated and sometimes puzzling issue. More on this below.

morality can explain the change in the validity of the sanctity-of-life argument (Waluchow, 2007). This idea, I argue, translates into the claim that charter arguments are evaluated not only through the strictly regulated methods of legal reasoning, but also through a typically rhetorical method of argument evaluation: the use of an idealized audience, in this case Waluchow's constitutional community. I will claim that between 1993 and 2015, this idealized audience had gone through a gradual but important change, stripping the sanctity-of-life argument of its validity with the passing of time.

This argument will lead me to the identification of another layer in the time-dependency of charter arguments.[4] Because the method of charter-interpretation is authoritatively determined by courts and may be changed by them over time, the *degree* to and *ways* in which charter-arguments are time dependent can *also* change with time. This leads to a two-layered time-dependency of charter arguments: If the Canadian Supreme Court (SCC)'s treatment of the *Rodriguez* precedent in *Carter* was not mistaken, then time may have an influence on the validity of charter arguments not only through the explicit, authoritative decisions of officials to change the law. Additionally, the decision in *Carter* might have set a precedent for decision-making that is less constrained by the content of directly applicable legal sources and more sensitive to such factors as the community's constitutional morality. Thereby, it might have changed and increased the ways in which charter arguments are time-dependent.

[4] I think that my claims about charter arguments are probably also applicable to legal arguments in a common-law context in general, but arguing this would lead us too far afield in this paper.

1 What Happened to the Sanctity-of-Life argument?

In *Carter v Canada* (2015)[5], the SCC declared that the prohibition of physician assisted death (PAD) through section 241(b)[6] and section 14[7] of the criminal code was unconstitutional. The SCC had decided whether prohibiting PAD was constitutional once before, in 1993. Then, in *Rodriguez v. British Columbia*[8], the court decided to uphold section 241(b).[9]

The opinion describing the reasoning behind the majority's decision in *Rodriguez* was written by Justice Sopinka. He argued for the importance of the state's objective to protect the vulnerable from making use of PAD in "a moment of weakness" (protection-of-the-vulnerable-argument) and of its objective to protect life as a value in itself (sanctity-of-life argument). He recognized that section 241(b) infringed on the autonomy and security of the person (protected by section 7 of the Canadian Charter of Rights and Freedoms).[10] He also accepted that the prohibition of PAD resulted in the unequal treatment of those too ill to commit suicide alone since unassisted suicide had been decriminalized in 1972 (infringing on section 15, guaranteeing equality before the law).[11] However, he argued that the two objectives were important enough to justify the infringements.[12]

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[5] *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331

[6] "**241.** Every one who (*a*) counsels a person to commit suicide, or (*b*) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years." (*Criminal Code*, R.S.C. 1985, c. C-46, s. 241 [*Criminal Code*].)

[7] **14** No person is entitled to consent to have death inflicted on them, and such consent does not affect the criminal responsibility of any person who inflicts death on the person who gave consent. (*Criminal Code*, R.S.C. 1985, c. C-46, s. 14 [*Criminal Code*].

[8] *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519.

[9] Section 14 was not under consideration.

[10] "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." (*Charter of Rights and Freedoms,* s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.)

[11] "15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (…)." (Charter of Rights and Freedoms, s 15, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.)

[12] He interpreted the right to life, which was also part of section 7, as a call to protect life as a value in itself. The infringement of section 7 could be saved under section 7 itself. The infringement of section 15 could be saved under the limitations clause of section 1 of the Charter: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in

Nineteen years later, in 2012, the Supreme Court of British Columbia, British Columbia's highest trial court, ruled section 241(b) unconstitutional in a new case. It did so even though the new case was extremely similar to *Rodriguez*: In both cases, section 241(b) was claimed to infringe on the section 7 and section 15 rights of the claimants who were women affected by diseases that would first render them helpless and then lead to a slow, painful death.[13] But the decision was overturned by the Court of Appeal for British Columbia, mainly on the basis that the trial court had not respected the precedent set in *Rodriguez*, by which it was bound. This was not surprising: Lower courts, like the Supreme Court of British Columbia, are obligated to follow the decisions of higher courts, like the SCC, according to the doctrine of precedent. If a lower court's case shares the facts of a past case (a precedent) decided by a higher court, then the lower court has to follow the precedent decision. This is so unless it can show that there is an important factual difference between the two cases that makes it possible to decide the new case differently from the precedent case (*distinguish* it) without indirectly declaring the precedent decision mistaken. There did not seem to be any important factual difference between *Rodriguez* and the new case.

Nonetheless, when the decision was appealed again to the SCC, a unified SCC declared in *Carter v Canada* that the precedent it had set in *Rodriguez* 22 years earlier could be distinguished. Consequently, the SCC decided that 241(b) was unconstitutional. What was more, the SCC also declared that the Supreme Court of British Columbia had been right to revisit the issue. Constitutional *stare decisis*[14], so the SCC, "is not a straightjacket that condemns the law to stasis" (*Carter v Canada* p. 361). Trial courts may reconsider constitutional SCC-precedents if the

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a free and democratic society." (Charter of Rights and Freedoms, s 1, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.)

[13] In *Rodriguez*, the claimants also alleged that section 12, prohibiting cruel and unusual punishment, was infringed, but this claim was swiftly dismissed by the court.

[14] The requirement to follow or distinguish applicable precedent. See section 3.1 for a more detailed explanation of *stare decisis.*

constitutional law or the available evidence had changed so much that the "parameters of the debate" were fundamentally shifted. For the SCC, this was the case with respect to 241(b). Since *Rodrigues,* there had been changes in the method of the adjudication of the central section of the Canadian Charter of rights in the *Rodriguez* case, section 7, and in the available evidence about the possibility to protect vulnerable people from being "induced to commit suicide at a moment of weakness" (*Carter v Canada*).

Section 7, protecting the right to life, liberty and the security of the person, allowed infringements on these rights if they were "in accordance with the principles of fundamental justice". In 1993, this was interpreted to require that a) the objective behind the statute was sufficiently important and b) the statute was capable of achieving this objective. By 2015 there were additional conditions. Now, the statute had to achieve the state's objective without also adversely affecting cases to which this objective did not apply (it could not be overbroad), and the infringement on rights could not be disproportionate to the importance of the objective. And, the SCC declared, 241(b) *was* overbroad: it did not only prohibit PAD for those who might use it in a moment of weakness, but also for those who wanted to end their life out of a well-reasoned resolve. Further, the *Rodriguez*-court had been unconvinced that it was possible to protect the vulnerable while at the same time allowing the resolved to access PAD. In 2015, newly available evidence from other jurisdictions showed that this could be achieved. The SCC concluded that the trial court had the right to re-visit the issue and that the precedent set by *Rodriguez* did not need to be followed, and therefore that 241(b) was now unconstitutional.

The SCC's reasoning showed that Sopinka's worry about the possibility that people might be induced to commit suicide in moments of weakness was now answered. But what had happened to the sanctity-of-life argument? This argument, according to which the sanctity of life as a value

in itself was legally important enough that the state was allowed to protect it through criminal law, and therefore also through section 241(b), had played a central role in Sopinka's opinion. But when Canada, the defendant, used the argument in *Carter* and claimed that the objective of 241(b) was also the protection of life, the SCC gave the argument short shrift. In its opinion, the court dismissed Sopinka's use of the sanctity-of-life argument, claiming that: "His remarks about the "preservation of life" in Rodriguez are best understood as a reference to an animating social value rather than as a description of the specific object of the prohibition." (*Carter v Canada*, p. 372/73)[15] Further, the court argued:

> Justice Sopinka refers to the preservation of life when discussing the objectives of s. 241(b) (pp. 590, 614). However, he later clarifies this comment, stating that "[s]ection 241(b) has as its purpose the protection of the vulnerable who might be induced in moments of weakness to commit suicide" (p. 595). Sopinka J. then goes on to note that this purpose is "grounded in the state interest in protecting life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken" (*Carter v Canada*, p. 372)

However, the *Carter*-court completely omitted that Sopinka, *after* his clarification of p. 595 and after having given a long, approving summary of the importance of the sanctity of life and the wrongness of suicide, stated rather unambiguously:

> This prohibition is supported, in part, on the basis that allowing the state to kill will cheapen the value of human life and thus the state will serve in a sense as a role model for individuals in society. The prohibition against assisted suicide serves a similar purpose. In upholding the respect for life, it may discourage those who consider that life is unbearable at a particular moment, or who perceive themselves to be a burden upon others, from committing suicide. To permit a physician to lawfully participate in taking life would send a signal that there are circumstances in which the state approves of suicide. (*Rodriguez v British Columbia* p. 608) [Emphasis mine.]

[15] Hereby the SCC showed that it took the reasoning laid out in earlier precedent opinions as an important part of the precedent set by its former self – it did not reject the need to deal with the arguments presented in *Rodriguez'* majority opinion, but instead acted as though the sanctity-of-life argument had not really been made.

Later, having accepted that the prohibition of assisted suicide infringed on section 15 and conducting a section 1 review[16] to determine whether the infringement was justified, Sopinka became even clearer in a section that the *Carter*-court acknowledged only by page number:

> There is no halfway measure that could be relied upon with assurance to fully achieve the legislation's purpose; first, because the purpose extends to the protection of the life of the terminally ill. Part of this purpose, as I have explained above, is to discourage the terminally ill from choosing death over life. Secondly, even if the latter consideration can be stripped from the legislative purpose, we have no assurance that the exception can be made to limit the taking of life to those who are terminally ill and genuinely desire death. (*Rodriguez v. British Columbia* p. 614).

This, I think, shows that at least in 1993, the sanctity-of-life-argument had been authoritatively acknowledged as a valid legal argument which determined part of the objective of 241(b).[17] In 2015, the SCC denied this validity. It could have done so by declaring the treatment of the sanctity-of-life argument in 1993 a mistake – the SCC has the ability to *overrule* itself, declare its own precedents mistaken wholly or in part, and null and void for the purposes of later decisions. But it did not. Instead, it treated the argument as if it was *already* invalid and in no need of consideration (see also Chan & Somerville, 2016; Keown, 2018).

However, as Keown (2018) shows, the status of the sanctity-of-life argument was important for *Carter*'s outcome. The evaluation of a law under section 7, in 2015 as in 1993, involved weighing the importance of the law's objective against the law's infringement on Charter rights. By ignoring Sopinka's endorsement of the argument as valid, the *Carter*-court could also ignore that the protection of life had been authoritatively acknowledged as an important objective of 241(b). If, by contrast, section 241(b)'s objective had been understood to protect life, then

[16] "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." (Charter of Rights and Freedoms, s 1, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.)

[17] This was acknowledged even by critics of *Rodriguez* when that decision was made. Weinrib (1994), for example, argued that Sopinka had been wrong to hold a general societal value (the sanctity of life) over the well-being of individuals.

241(b) would not have been overbroad: It was *meant* to discourage even the terminally ill from choosing suicide (compare Keown, 2018, p. 165ff.) For similar reasons, the SCC could not have declared 241(b)'s infringement of section 15[18] unjustifiable after the protection-of-the-vulnerable argument had been defeated: The defense of 241(b) under section 1[19] that referred to the sanctity-of-life argument (see quote above) would still have had force. But instead of taking the sanctity-of-life argument head on and openly declaring that it had changed its mind about the argument or that the argument was too weak to win on its own, the court acted as though it was already invalid.

Given the general acclaim of *Carter v Canada*, I will assume that it was not wrongly decided (in that it at least would have had to be an overruling),[20] but merely disingenuously formulated where the court denied the importance of the sanctity-of-life argument in *Rodriguez*.[21] But in order to make this assumption, I have to ask and answer the question of what happened to the sanctity-of-life argument. Is there a way to make sense of it losing its validity in the 22 years that passed between *Rodriguez* and *Carter*?

2. The Transience of Validity in Legal and Charter Argumentation

The validity of legal arguments depends on the point in time at which they are used. In some respects, this is simply a consequence of them being *legal* rather than, for example, moral

[18] "15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (…)." (Charter of Rights and Freedoms, s 15, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.)

[19] "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." (Charter of Rights and Freedoms, s 1, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.)

[20] It is also possible that *Carter v. Canada* was an instance of what Eisenberg calls "inconsistent exceptions", distinguishing in a way that is clearly inconsistent with the precedent's meaning and spirit. This is a form of hidden overruling that courts sometimes practice in order to avoid the (potentially negative) attention that comes with overruling, or when they do not have the power to overrule. But given that this is not recognized as a legitimate way to deal with precedent, I will here also assume, charitably, that this is not what happened. (Eisenberg, 1988, p. 136)

[21] The decision was generally positively received, with considerably fewer critics than supporters (see, e.g. O'Brien, 2016; Palmer, 2015; Steele, 2018).

arguments. A distinction widely used in work on legal reasoning is that between arguments purporting to present first order moral/political reasons and arguments purporting to present authoritative reasons provided by valid legal sources such as for example statutes enacted by legislators or precedents created by common-law judges.[22] Generally, using either type of argument to support a legal conclusion can be legitimate.[23] However, arguments relying on valid legal sources take priority, and the degree to which the use of a moral/political argument is acceptable depends on the availability and method of interpretation of such sources (see, e.g. Schauer, 2012, p. 61 ff.).[24] Generally, good legal arguments make use of valid legal sources as

[22] See, e.g. MacCormick's distinction between pure practical argumentation and institutional argumentation (MacCormick, 1995), or Eisenberg's distinction between reasoning based on social propositions and reasoning based on doctrinal propositions (Eisenberg, 1988). For this paper, I choose to assume that an argument always *purports* to present a reason, but may sometimes be so bad that it fails to do so.

[23] Most legal theorists, perhaps with the exception of exclusive legal positivists (see, e.g. Raz, 1979), accept that the law sometimes does not provide a determinate answer, and that it then needs to be supplemented with first order moral and political considerations. For a famous formulation of this thought, see Hart's distinction between the core and the penumbra of rules (Hart, 1961). Hart explains that all rules will be obviously applicable or obviously inapplicable to many cases, simply because these cases do or do not fall under the categories specified in these rules. But there will always be cases for which it is not entirely clear whether they do fall under these categories – they fall into the penumbra of the rule. With respect to these cases, the rule is then unclear, and the judge needs to make a decision based on other considerations.

[24] The relationship between arguments presenting first order moral/political reasons and arguments presenting reasons provided by valid, authoritative legal sources is a topic of ongoing, intense debate, because it is directly connected to the relationship between law and morality. The disagreements about this relationship all revolve in one way or the other around a central disagreement about whether and to what degree the moral acceptability of a norm impacts the norm's relationship to the law (e.g. whether it can be a valid part of the law, whether the morally better way of understanding it is also the legal way of understanding it etc.). The discussion continues to see extreme positions, like exclusive legal positivism according to which all and only what has been duly enacted as law is law, no matter its moral merit, and according to which morality has impact neither on the validity nor on the interpretation of legal sources (see, e.g. Raz, 1985). On the other extreme end of the spectrum is natural law theory, according to which both the validity and the correct interpretation of legal sources depend on moral merit (see, e.g. Finnis, 2011). There are also more tempered positions. One example is Dworkin's position. He argues that the law commits itself to certain moral principles (though not to all of them) via their inclusion as necessary justificatory elements for statutes, precedents etc. These principles have to be treated as equally or sometimes more important than explicitly enacted legal norms. Questions of legal interpretation should be answered by weighing both the fit of a proposed meaning with what other authoritatively enacted legal sources say and the moral justifiability of that proposed meaning in the context of the law as a whole. This gives morality import into the law without denying that the law is created and formed by legal officials (See, e.g. Dworkin, 1986). Another example is Waluchow's inclusive legal positivism, according to which enacted legal norms may include references to moral norms, which get integrated into the law via these references and then need to be included into the interpretation of the meaning of those enacted legal norms (see, e.g. Waluchow, 1994). All these positions, in spite of their vast differences, have two things in common: First, no author claims that enacted legal norms, if they are immoral, should always be obeyed (natural law theorists say this because those norms are not really law, positivists say this because the fact that something is law does not, in their view, mean that it should necessarily be obeyed). Second, and more important for this paper, no author rejects the

premises, and this means that they can gain or lose validity over time. To illustrate this, take the following legal argument:[25]

P1 (Legal norm)	241. Every one who (*a*) counsels a person to commit suicide, or (*b*) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.[26]
P2 (Case)	Tom provided Susan with a full bottle of potent sleeping pills after she informed him that she was planning to commit suicide and asked him for a full bottle of potent sleeping pills for this purpose.
C	Therefore, Tom is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Let us, for convenience sake, rely on the classic account of argument validity according to which an argument is valid if its premises are acceptable (or true), relevant for the conclusion and together strong enough to provide sufficient support for the conclusion.[27] It is then easy to show that to evaluate the above argument, we need to know *when* it was used.

First, whether P1 is acceptable depends on whether there is a valid legal norm with the content of P1. Legal norms are regularly enacted and repealed. Therefore, this will change over time; section 241(b) was valid before 2015, but not after. Second, whether P1 and P2 are relevant depends on whether providing someone with a bottle of potent sleeping pills in the described circumstances counts as "aiding and abetting". Again, given that the definition of legal terms can

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view that the main vehicle by which the law is developed is through the authoritative, promulgated decision of legal officials (judges who make precedents, legislators who make statutes etc.), and that it is important for other legal officials to take the resulting promulgated legal sources seriously and, in general, follow them as they are promulgated. This is so because none of these scholars reject the importance of the rule-of-law ideal, the idea that people should be governed by the law, and not by powerful individuals (no matter how morally well-meaning) and that people should be able to predict how the law will deal with them by accessing legal sources. This second common commitment allows me to assume that the law generally changes via the decisions of officials and along certain norms about how valid legal norms are established by officials.

[25] I have modelled this argument after MacCormick's *legal syllogism*, as he describes it in (MacCormick, 2005 chapter 4).

[26] *Criminal Code*, R.S.C. 1985, c. C-46, s. 241 [*Criminal Code*].

[27] This very simple, but useful, approach is used both in argumentation textbooks and academic works, for example, by Govier (1988); Johnson (2000); Johnson and Blair (1983).

and is regularly authoritatively changed both by legislators and through judges engaged in common-law adjudication and interpretation, this is also bound to change over time. Third, whether P1 and P2 are sufficient depends, for example, on whether the case described in P2 falls under any authoritatively acknowledged exceptions to the rule expressed in P1. Exceptions to legal norms are also regularly enacted and repealed either through statutes or through common-law precedents, and so this, too, changes over time. In sum, the validity of a legal argument is a fleeting thing and *when* an argument is used makes a big difference to whether it is valid.

This is no reason for concern. The changeability of the law is necessary to allow for effective government and – in democratic countries – the ongoing self-determination of the population. Making a legal argument means making an argument about what follows from the available authoritative reasons, whose existence depends (at the very least to a great degree) on the actions of the relevant authorities over time.[28] Therefore, it is to be expected that if the law is changed by the relevant authorities, the status of (some) legal arguments changes. If the law remains the same, so does the status of the legal arguments. All this should be uncontroversial when it comes to run-of-the mill criminal and civil law.

Constitutional law seems to be at least potentially another matter. Constitutions are supposed to form a stable basis for the law of the country and enshrine its fundamental legal framework. Most constitutions are purposefully made extremely hard to amend.[29] This protection from change usually also extends to charters and bills of rights. The argument for this entrenchment

[28] Of course, if the available legal reasons change too rapidly and if the validity of legal arguments is too fleeting, problems arise because the subjects of the law lose the ability to form reliable expectations about the way in which they will be treated by the state. For this reason, the rule-of-law ideal requires that the law as a whole is stable. See, e.g., the inclusion of "stability" in Fuller's famous list of rule-of-law requirements (Fuller, 1964). But this requirement is fulfilled already if legal change does not outpace the ability of the law's subjects to adjust to it.

[29] The Canadian constitution, for example, can be amended only if both the House of Commons and the Senate, as well as at least two thirds of the provincial legislative assemblies, representing at least 50 percent of Canada's population, adopt resolutions to this end. (see, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 38-49.)

is that the rights listed there are meant to protect individuals from the tyranny of the majority,[30] making it necessary to prohibit the majority from circumventing them through easy amendments. At first sight, this seems to suggest that time should play less of a role when it comes to constitutional arguments. The validity of charter arguments should be much less fleeting than the validity of other legal arguments. For example, the validity of an argument about the constitutionality of section 241(b) should not change unless the relevant sections of the Canadian Charter were amended. This would mean that if the SCC makes a decision about 241(b)'s validity, the precedent set by this decision should either stand forever or fall only with a constitutional amendment. At most, it might be possible that such a decision turns out to be a horrible mistake of constitutional interpretation, making it necessary to overrule it. But what happened in *Carter*, where 241(b)'s validity changed because the *constitutional law* had changed over time, should be impossible. As a rule with very few exceptions, constitutional precedent should stand the test of time.

However, the idea that constitutional law should change as little as possible over time has been criticized. Perhaps the most prominent worry is the "dead hand of the past" objection.[31] According to this argument, it is deeply problematic that the generation that founded the constitution should get to govern all following generations with its moral understanding of what the most basic rights are. Why should one generation's grasp of morality be more authoritative than another's? According to this argument, constitutional law should at least be somewhat adaptable to the moral progress one generation makes over another. In other words: Constitutions should change with time because the moral understanding of the people they govern does.

[30] The tyranny-of-the-majority problem was made famous by Mill, who argued that even in a democratic government, tyranny is still possible because uncaring majorities can enact laws that oppress unloved minorities without having to worry that they will also be adversely affected by these laws (Mill, 2007).
[31] See, e.g. the especially powerful formulation that Waldron gives this argument in Waldron (1993, 2004).

In fact, in many countries the constitutional law undergoes significant change, even without constitutional amendments. This is so because the *written* constitution does not make up the entirety of constitutional law. While some parts of the written constitution are very specific and clear, others – especially charter rights – are extremely broad and vague. Take, for example, section 7 of the Canadian Charter, which reads as follows:[32]

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[33]

This text by itself gives very little indication as to which actions by the state would infringe the right, or what it would mean for such an infringement to be in accordance with the principles of fundamental justice. Of course, in all its vagueness, the section regulates some cases determinately: If Canada decided to kill a random citizen for the prime minister's amusement, that would directly and unambiguously infringe on section 7. But other questions are much harder to answer. Whether Section 241(b)'s infringement on section 7 can be justified, for example, is much less clear.

Because of such broad, vague passages, we cannot naively assume that what the written constitution *means* is simply given by its text.[34] The text must be interpreted. How that should be done is the subject of continuous discussion in the literature – textualists, originalists, those advocating a moral reading of the constitution and common-law constitutionalists all disagree.[35] However, their arguments are *normative* arguments about the method of interpretation that the

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[32] The rather extreme changes in the way that section 7 is interpreted and used by the SCC have been documented in Hogg (2012).

[33] *Charter of Rights and Freedoms,* s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[34] Supporters of textualism, the theory of constitutional interpretation that suggests that the meaning of constitutional rights should be determined according to the straight-forward meaning of the language these rights are written down in, do not pretend as if there is no need to argue for their theory (see, e.g. Scalia, 1997).

[35] For an account of the nature of textualism see (Nelson, 2005), for originalism see (Farber, 1989). Dworkin (1996, 2006) has developed the moral reading approach to constitutional interpretation. I will discuss common-law constitutionalism in detail below.

courts *should* adopt. It is important to see that, as a matter of fact, courts adopt their own rules of interpretation and treat this adoption as authoritative.[36] Time therefore not only has an impact on the *content* of constitutional law but also – at least potentially – on the rules regarding the *methods* through which constitutional law is interpreted. A good example is the SCC's authoritative declaration in *Carter* that trial courts will, under certain circumstances, be allowed to question supreme court precedents; a rule for legal interpretation by trial courts that, at least according to commentators, was a new invention in Canadian constitutional law (Newman, 2018). Both the rules of constitutional interpretation and the authoritative determinations of constitutional meaning that result from such interpretation are part of the constitutional law.

In many countries, the changeability of this broader constitutional law is a simple fact.[37] However, Canadian constitutional law stands out because it contains an intentionally made commitment to its own changeability. This commitment is called the "living tree doctrine", after a famous passage in the case *Edwards v Attorney General,* engaging the predecessor of the current Canadian Constitution: "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits."[38] The doctrine was re-affirmed for the modern Canadian Charter for example in *Re B.C. Motor Vehicle Act:*[39] "If the newly planted 'living tree' which is the Charter is to have the possibility of growth and adjustment over time, care must be

[36] This has been pointed out, explicitly, by Fallon (2008)

[37]For example, the constitution of the United States did not contain anything that forbade racist discrimination for a long time. However, a number of landmark decisions, most prominent among them *Brown v. Board of Education,* created a situation in which thankfully a constitutional right against discrimination on racist grounds is a deeply enshrined (though not necessarily practically realized) constitutional right (*Brown v. Board of Education*, 347 U.S. 483 (1954)). Strauss (2010) gives a detailed description of the legal history leading up to *Brown*.

[38] *Edwards v Attorney General* [1930] A.C. 124, 1929 UKPC 86.

[39] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 It was also re-affirmed in: *Que V. Blaike* [1979] 2S.C.R. 1016, 1029; *B.C. v Canada Trust Co*. [1980] 2 S.C.R. 466, 478; *Law Society of Upper Canada v. Shapinker* [1984] 1 S.C.R. 357, 365.

taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth."[40]

The Canadian Constitution is, then, authoritatively determined to be a *changing* constitution, and the importance of time is written right into it. This implies that the validity of charter arguments can also change, just like the validity of regular legal arguments. Does this explain the death of the sanctity-of-life argument? On first sight such an explanation seems easily available. One way in which the validity of regular legal arguments changes is through the workings of the common-law: the making, distinguishing, expanding and overruling of precedents. The SCC in *Carter* presents itself as reasoning according to the common-law method when it claims to *distinguish Rodriguez*. In addition, Waluchow, Canada's leading common-law constitutionalist, does not only classify the Canadian Charter as a common-law charter, but uses the living-tree idea as a main starting point for the development of his theory (Waluchow, 2007, p. 183).

3. Time, Common-Law Reasoning and the Sanctity-of-Life Argument

Common-law-constitutionalism is a normative theory of constitutional interpretation resulting from the attempt to take seriously both arguments for stable constitutions and arguments against them (see, e.g. Strauss, 2010; Waluchow, 2005, 2007). Waluchow claims that the idea of a common-law constitution does away with the problematic assumption that one generation can determine which moral rights exist for the entire life of a country while maintaining the protection of minorities. Instead, adopting a common-law approach to constitutional interpretation means that

[40] It might be interesting to know that until this case, section 7 had been interpreted very narrowly as merely requiring the deprivation of life, liberty and security of the person to be in accordance with *procedural* justice. This had been the framer's expressed intention. *Re Bc Motor Vehicle Act* changed this, requiring the deprivation to *also* be in accordance with substantial justice. (see Hogg, 2012)

vague rights are read as modest pre-commitments to malleable ideals whose exact meaning changes according to a country's deeply held moral commitments (Waluchow, 2007). Therefore, his theory seems promising when it comes to an explanation for the death of the sanctity-of-life argument in *Carter.* Waluchow proposes two tools for constitutional adjudication, which he regards as interrelated. First, he suggests developing constitutional law via the common law method. Second, he offers the idea of a community's constitutional morality (CCM).[41] I will first investigate whether the disappearance of the sanctity-of-life argument's validity can be explained as a result of the common-law method. Then I will turn to CCM.

3.1 Common-Law Method of Constitutional Interpretation

On first sight, it might seem that adopting the common-law method with respect to some area of law may make the time-dependence of legal arguments somehow more significant than in areas in which the law is mainly developed through legislative activity, and that changes in the validity of legal arguments might therefore be easier to explain. After all, the common law is developed through the constantly ongoing judicial activity of deciding cases, which gives it a kind of fluidity. However, this does not mean that the *way* in which the validity of legal arguments in the common-law context depends on the point in time at which they are made is different. Just as above, the main way in which a legal argument's validity changes is when the relevant legal sources change because of the explicit decisions of authoritative officials. To bring this point home, it is worthwhile to give a short recapitulation of how the common-law works:

As I already mentioned in the introduction, according to the doctrine of *stare decisis*, judges have to decide new cases consistently with the treatment of past cases, the precedents (Lamond, 2007;

[41] The introduction of CCM is supposed to alleviate the worry that allowing the meaning of the constitution to change gives judges too much power, a worry that causes problems, e.g. for Dworkin's famous moral reading approach to constitutional interpretation (see, e.g. Dworkin, 1996), an approach that Waluchow has otherwise much in common with. More on this in footnote 53.

Schauer, 2012 chapter 3). Precedents are usually documented in precedent opinions. The opinion describes the facts of the case, explains the argument on which the decision is based, and documents the decision. The *ratio decidendi* determines those facts that justify the precedent decision. Even though the *ratio* is often thought of as a rule, it does not necessarily appear in the form of a clearly demarcated rule in the opinion. Often, the *ratio* can only be determined by reading the arguments presented in the opinion.[42]

If a judge hears a case that has all the facts listed in a precedent's *ratio*, then the precedent applies and she must either follow it by repeating the precedent decision, or *distinguish*. A judge may distinguish if her case contains a fact that speaks against making the precedent decision and that was not part of the precedent. In this case, she may decline to follow because both the precedent decision and her new decision can be correct at the same time. Sometimes, a judge will apply a precedent even though her case lacks some of the precedent's facts. Then she sets a new, extended precedent (Lamond, 2007, 2014; Schauer, 2012 chapter 3). The more cases regarding the same issue accumulate, the clearer it becomes which decisions are required given various combinations of fact until a common-law rule emerges. These rules are often documented in prominent precedent opinions, where they may take the form of conditionals, tests, definitions or authoritatively stipulated interpretations, etc. Because they remain subject to distinguishing and extending, common-law rules always remain flexible both in content and in formulation (Schauer, 2012 chapter 3).[43]

Some courts have the authority to overrule precedents. Overruling takes place if a court decides a case differently than the applicable precedent even though there are no legally relevant

[42] See, e.g. Duxbury (2008 chapter 3) for the various difficulties in determining the *ratio decidendi* from precedent opinions.

[43] Lamond has argued that for this reason, it is wrong to think of precedents as establishing rules in the same way that statutes do (Lamond, 2005).

factual differences. Instead, the court declares the precedent null and void under the justification that the precedent was deeply wrongly decided, or that following it would have enormous negative consequences. Even courts who have the authority to overrule do so rarely, and the burden of justification for overruling is very high. Most often, precedents that get overruled have already been weakened through continuous distinguishing, or the common-law around the precedent has developed such that the precedent is incoherent or even inconsistent with it (see, e.g. Eisenberg, 1988, p. 136).

In spite of these avenues for change, common-law reasoning with its respect for precedent is conservative at its core. As Perelman and Olbrechts-Tyteca (1969, pp. 104ff, 107) point out, the whole idea of respecting precedent is one permeated with the value of *inertia,* the idea that change needs justification, staying the same does not. Once a common-law rule has been established, distinguishing and extending slows down and most cases are simply decided by following. Because overruling is so rare, most change happens through small steps of distinguishing or extending. And even if a precedent is overruled and a new beginning made, this has usually been a long time coming.

In addition, it should have become clear that the common-law method of reasoning is strictly regulated by rules. Arguments by precedent can be formalized in argument schemes, and so can arguments meant to determine whether to extend a precedent.[44] In each case, premises that refer to specific, valid legal sources stand in the center of the argument. Consequently, the validity of common-law legal arguments is time-dependent in the same way as the validity of other legal arguments; generally it changes over time as the set of available valid legal sources changes and

[44] See, e.g. Walton (2010), d'Almeida and Michelon (2017) and Stevens (2018). There have also recently been sophisticated attempts at formalizing reasoning by precedent outside of argumentation theory. See, e.g. (Horty & Bench-Capon, 2012).

stays the same if the legal sources stay the same. In the end, time impacts the validity of legal arguments in common-law contexts in the same way as it does in other contexts: through changes in the available valid legal sources made explicitly by authoritative officials.

This is also true when it comes to common-law method in constitutional adjudication. Common law constitutionalism advocates that judges develop the meaning of vague constitutional provisions by engaging in common-law reasoning (Strauss, 2010; Waluchow, 2007). The idea is that the possibility to distinguish and occasionally overrule will make the constitutional law flexible enough to adapt to technological, political and moral progress. As a result, so it is hoped, the common-law constitution can escape the problem of the dead hand of the past. At the same time, the doctrine of *stare decisis*, combined with a respect for the content of the precedent opinions as authoritative determinants of the way the precedent case is to be understood, ensures stability, avoiding the danger of the tyranny of the majority (Waluchow, 2007, p. 203 ff.). This is so because a common-law constitution adapts to changes in public morality, but only where these changes influence the kinds of reasons judges will take into account when distinguishing or extending a precedent. Presumably, overruling will occur only if the change in public morality is persistent enough to chip away at a precedent over long periods of time. In other words: We can expect that common-law reasoning allows time to influence the validity of charter arguments like the sanctity-of-life argument, but primarily via its influence on the available valid legal sources of the constitutional common-law.

3.2 Can the Change from Carter to Rodriguez be explained as an Outcome of the Common-Law Method?

At first sight, *Carter v Canada* presents itself as a common-law decision that changes the ruling from *Rodriguez* solely on the basis of explicit prior changes in the positive law. In her analysis,

the common-law constitutionalist O'Brien, making use of Waluchow's theory, follows the SCC's representation of its own decision closely, arguing that it was firmly grounded in available legal sources (O'Brien, 2016).[45] O'Brien argues that the basis for distinguishing Rodriguez was the changes in a) the available evidence about the possibility of finding procedures that will protect the vulnerable from being induced to use PAD in moments of weakness and b) the way section 7 of the Canadian Charter of Rights and Freedoms was interpreted. (O'Brien, 2016, p. 196 ff.).

Of course, distinguishing *Rodriguez* in this way does not seem compatible with the common-law understanding of what is required for distinguishing. Generally, what needs to be preserved when a precedent is being distinguished is the connection of the precedent facts with the precedent decision.[46] There were no legally relevant factual differences between *Rodriguez* and *Carter*, so distinguishing should have been impossible. The changes in the way that section 7 was interpreted would have rather provided more grounds for *overruling* Rodriguez under the justification that the decision had become inconsistent with the surrounding law, which had developed in the usual, common-law way. Indeed, Newman (2018) strongly criticized the court's re-interpretation of *stare decisis.* According to him, allowing lower courts to re-open settled issues because of changes in the surrounding law or the available evidence was the destruction of *stare decisis*. But, as O'Brien points out, the changes in the interpretation of section 7 had taken place gradually, according to common-law principles of distinguishing and extending.[47] Furthermore, the change in the way that *stare decisis* was to be interpreted was also supported by precedent, in

[45] O'Brien develops Waluchow's idea of the community's constitutional morality (CCM) further and presents the changes in the law that she describes as evidence of changes in CCM. However, she does not argue that these changes go beyond the changes that the SCC cites and that I discuss here. I think, therefore, that she believes that the move from *Rodriguez* to *Carter* can be explained with the method of common-law reasoning guided by CCM, as described in section 5.1 below.

[46] Waluchow is aware of this and integrates it into his common-law theory (see Waluchow, 2007, p. 200).

[47] They had, for example, been prepared in cases such as R. *v.* Heywood, [1994] 3 S.C.R. and R. *v.* Malmo-Levine; R. *v*. Caine, [2003] 3 S.C.R. 571, 2003 SCC.

this case *Bedford v Canada* (O'Brien, 2016, pp. 193-196).[48] As I remarked above, courts influence not only the content of the law through their decisions, but also the rules that determine the method by which they do so.[49] Therefore, even if the decision stretched the rules of common-law reasoning, arguably the court's decision was based on changes in the law that had taken place through explicit, authoritative, official decisions and in the normal, common-law way: It is not entirely implausible to say that Sopinka's protection-of-the-vulnerable argument had lost its validity because the positive law had changed (though overruling Rodriguez might have been a less drastic move).

However, this does not explain the strange disappearance of the sanctity-of-life argument, and I do not think that a common-law explanation is available. The strongest reference to the case-law that the SCC could make in *Carter* did not show that there had been a change in the way the sanctity-of-life argument was regarded since *Rodriguez:* The court used *A.C. v. Manitoba* to support its assessment that the value of autonomy in medical decision-making had to be given great weight – even if "we may "instinctively recoil" from the decision to seek death because of our belief in the sanctity of human life." (*Carter v Canada* p. 360, citing *A.C. v Manitoba* p. 283) However, *A.C.* discussed the ability of young patients to reject treatment even though this may result in their deaths, and Sopinka had made a reasoned, explicit distinction between PAD (as an intentioned causing of death) and respecting a refusal of treatment in *Rodriguez*. (*Rodriguez v British Columbia* p. 598 ff.) Therefore *A.C.* could not serve to show that the sanctity-of-life argument had lost its validity, nor was it used in this way by the SCC.[50]

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[48] Canada (Attorney General) *v.* Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101

[49] The ability of courts to use legal arguments in order to influence what counts as good legal arguments is fascinating, but would lead us to far afield here.

[50] Indeed, while the SCC in *Carter* all but ignored the sanctity-of-life *argument*, it reaffirmed the law's commitment to the sanctity of life, treating it as if it was a value connected to the individual's right to control her life (*Carter*, p. 343/367).

The court did not pretend that there was a common-law justification for assuming that the sanctity-of-life argument was no longer valid. But the argument had to lose its validity somehow, for as I have shown above, the SCC could not have declared 241(b) unconstitutional[51] if it had been forced to treat the argument as valid when Canada, the defendant, made use of it (see Chan & Somerville, 2016; Keown, 2018). But if it did not lose its validity because of common-law changes in the available, valid legal sources, how did it then do so? Surely, the passing of time alone could not take the validity from the sanctity of life argument?

4 CCM, Idealized Audiences and the Fate of the Sanctity of Life Argument

In spite of the constraints that the doctrine of *stare decisis* places on judges, common-law reasoning affords judges important areas of discretion. If the common-law is young, issues arise for which no clear precedent is yet established. Often, judges can rely on precedents that address analogical issues and extend, but even then whether they should do this is at their discretion. Similarly, whether to distinguish is at the judge's discretion – even though, again, analogies to related issues may support a decision. Finally, even though precedents are usually weakened before they are eventually overruled, judges still have to exercise discretion when they make the decision. This is also the case when it comes to common-law constitutions, and the Canadian Constitution is very young.[52] SCC judges therefore may need to exercise discretion when deciding charter cases.

This point is important because most legal questions are somehow connected to morality, at least because they are typically questions about the consequences of people's actions.[53]

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[51] At least without overruling or arguing that it had already been a very weak argument in *Rodriguez* so that it needed the additional support from the protection-of-the-vulnerable argument and could not carry the weight of justifying S. 241 (b) by itself.

[52] It was adopted in 1982, in the Constitution Act.

[53] Many legal theorists and philosophers argue that the law is connected with morality in other ways too (see, e.g. Dworkin, 2013; Finnis, 2011). This way, I think, is one to which most legal theorists would agree, even those who reject other connections (like that morality influences the meaning of legal sources, or that deeply immoral laws are not legally valid).

Questions related to charter issues are especially important examples. After all, the rights guaranteed in a charter are typically broadly worded, legally endorsed moral or political rights many of which are assumed to exist independently of the law. Charter cases that are difficult enough to reach a country's highest court often involve the claim that the rights-interpretation on which the state has operated is flawed. It should be no surprise that the arguments presented to the court typically include first order moral/political arguments about the meaning of the (assumed) natural rights on which the charter right is based, or that they mirror such arguments. For example, the main arguments presented in both *Rodriguez* and *Carter* overlapped significantly with the main arguments for and against PAD that were and still are presented in the philosophical literature about euthanasia and PAD, including the sanctity-of-life argument, which is also an important religious argument.

One possible explanation for the treatment of the sanctity-of-life argument by the court is then that the moral views of the judges sitting on the court changed over time, influencing the way they interpreted charter-norms and thereby the way would react to charter arguments.[54] Depending

[54] I thank my reviewer for bringing to my attention that I should say that this explanation is not without support. Dworkin (e.g. 1996, 2006) proposes a moral reading approach to constitutional interpretation according to which judges should (and, he thinks, do) determine the meaning of vague constitutional passages through an interpretive process that combines considerations of *fit* and *justification.* (Dworkin's theory of constitutional interpretation is continuous with his theory of legal interpretation in general (see, e.g. Dworkin, 1986).) Having determined which interpretations of a constitutional norm would fit reasonably well with established positive law broadly construed, judges determine which interpretation among the ones that fit would represent the law as a whole in its best light, that is, as based on the best moral principles (justification). (Throughout his writings, Dworkin seems to change how strict the requirement of *fit* is – that is, how well an interpretation of a norm has to fit available legal sources such as past decision described in precedent opinions. I have therefore chosen the vague expression "reasonable fit". (see Raz, 1985 for an account of the change Dworkin makes to the importance given to fit, and the consequences of this change.)) Dworkin allows judges to declare some individual decisions etc. that cannot be brought into a coherent whole guided by moral principles *mistakes* with which their interpretation does not *need* to fit. He claims that especially the norms found in charters or bills of rights should be understood as fixing only very broad moral principles. This suggests that the judge's (honest) opinion about the "correct" moral reading of these norms has a considerable impact on the way they will be used to make decisions about individual cases concerning more specific questions about the constitutionality of positive legal norms. Dworkin (1996, p. 2) explains that his theory of constitutional interpretation makes sense of the fact that supreme court judges in the US can so easily be distinguished into conservative and liberal judges, aiming at making conservative or liberal decisions. Unlike some, who might think that this is reason to criticize the behavior of these judges, Dworkin integrates it in his theory.

on how great the influence of judges' views on morality are on their evaluation of charter arguments (i.e. how strongly constrained they nonetheless are by other factors) time would then be seen as, to some degree, influencing the validity of charter arguments via the personal uptake these arguments have with judges as holders of moral opinions.[55] I do not think that this is a very flattering interpretation of what happened in *Carter v Canada*.[56] But it is certainly possible, maybe even plausible if we consider that the only judge from the *Rodriguez* court, still sitting on the court in *Carter*, was justice McLachlin who wrote a very strongly dissenting opinion in *Rodriguez*. Still, I think an alternative explanation can be supported.

4.1 The Idea of the Community's Constitutional Morality as a Rhetorical Method of Argument-Evaluation

That judges should have too much discretion in evaluating charter arguments, with too little to constrain them, is the source of considerable worry among constitutional scholars (see, e.g. Waldron, 1993). The fear is that a group of unelected judges might be given the power to determine the meaning of a country's most basic legal rights according to their own moral beliefs.

Waluchow introduces the idea of CCM as a way to ameliorate this worry (Waluchow, 2007, p. 219).[57] He argues that judges should use their discretion to realize not their own morality, but another, special kind of morality. They should aim to realize those moral ideas that a community, such as the Canadian citizenry, is authentically committed to. After all, the least a citizen can expect is that her rights are respected under that interpretation of those rights to which

[55] See, e.g. Biggar (2004)

[56] I thinks so because I am, to some degree, convinced by arguments made by Waldron (2004) and Raz (1979) about the importance of the predictability of the law and the importance of respect for the citizenry's right to self-determination.

[57] This is the main difference between Dworkin and Waluchow. In Dworkinian terms, it can be summarized like this: Where Dworkin asks judges to make decisions where the law is unclear according to what they think will make the law appear in its best light, Waluchow asks them to make these decisions according to what they think the people of a country will think will make the law appear in its best light.

her sovereign (in democratic countries this is the citizenry) is committed. These moral ideas that the citizenry is committed to can be identified by collecting the moral opinions that the citizenry has expressed through legislation, international treatises, life choices, the outcome of polls etc. These opinions are then subjected to a process of reflective equilibrium and tested for internal coherence and consistency, making it possible to distinguish deeply held convictions from *mere* opinions, unsupported or even contrary to other moral commitments.[58] The deeply held convictions make up the community's morality. A subset of them constitute the community's *constitutional* morality (CCM), namely those that have somehow found entrance into the law, for example because they feature in legislation, have been endorsed in international contracts, or are the underlying principles of legal decisions (Waluchow, 2007, p. 224 ff.). According to Waluchow, if judges use their discretion guided by CCM, then the community's authentic moral commitments will gain continuous entrance into the common-law development of the constitutional law, allowing it to adapt to the moral and political progress of the community.[59] Waluchow further specifies how he imagines judges to reason with CCM. He suggests that judges should take a Razian *detached point of view*, namely the point of view of the constitutional community, when they evaluate charter arguments (Waluchow, 2015, p. 37 ff.) Raz argues that reasoners can assess arguments in three different ways: They can determine whether they themselves accept them, whether someone else in fact accepts them, and whether they would accept them *if they had someone else's point of view*.[60]

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[58] Rawls' concept of the reflective equilibrium describes a state of balance in which one's individual normative intuitions and opinions have been brought into harmony with the broad moral principles one accepts. It is reached through a process of comparing individual opinions and judgements with the broad principles and adjusting both. (Rawls, 1971)

[59] O'Brien extends Waluchow's argument and demonstrates that communities – like the citizenry of Canada – can be seen as collective actors with sets of moral commitments (O'Brien, 2016).

[60] The third option is distinct from the second and may in fact create different results. Waluchow cites Raz' own example to illustrate: "Imagine an orthodox, but relatively ill-in formed Jew who asks the advice of his friend who is Catholic but an expert in Rabbinical law. 'What should I do?' he asks, clearly meaning what should I do according to

Applied to the Canadian SCC, what Waluchow suggests is then that when SCC judges have to use discretion in the evaluation of charter arguments, they should do so in three steps. First, they should determine the current, authentic moral commitments of the community of Canadian citizens which are somehow connected to the law. Second, they should construct a point of view which accepts all these commitments. Third, they should determine whether, from this perspective, the charter argument under consideration is valid.

An argumentation theorist might be able to recognize this as the distinctly rhetorical method of evaluating an argument by asking whether an idealized audience would accept it. The most famous use of an idealized audience is the *universal audience*, introduced by Perelman and Olbrechts-Tyteca (Perelman & Olbrechts-Tyteca, 1969 chapter 7). Perelman and Olbrechts-Tyteca, developing a rhetorical theory of argument which bases argument evaluation on the ability to gain the adherence of an audience, had to answer the objection that by their standards, any argument would be a good argument if the audience was just foolish enough. Their solution was the distinction between particular audiences, whose idiosyncratic failings may influence whether they can be persuaded by an argument, and the universal audience, free from such idiosyncratic failings. The adherence of the universal audience is a less relativistic measurement for argument-goodness: The valid argument (in the terminology adopted for this paper) is the argument that can garner the adherence of the universal audience.

The idea of the universal audience has received many interpretations, but the one most relevant here is one given by Crosswhite and Tindale (Crosswhite, 1996; Tindale, 1999, 2015). Both Crosswhite and Tindale place special emphasis on Perelman's idea that the universal

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my religion, not yours. The friend tells him that he should do so and so. The point is that both know that this is not what the friend thinks that he really ought to do. The friend is simply stating how things are from the Jewish Orthodox point of view."(Raz, 1979, p. 156; Waluchow, 2015, p. 40)

audience is derived from particular audiences, either by removing deficits in the ability to reason or by expanding them to include more and more members (Crosswhite, 1996, pp. 145, 150; Tindale, 2015, p. 62).[61] This means that according to their interpretation, the universal audience changes over time because the particular audiences available to the reasoner for deriving it change over time.[62] In addition, because the universal audience is the outcome of a reasoner's attempt at purifying a particular audience, it is a construct of the reasoner who uses it to evaluate an argument and the reasoner, too, will undergo changes as time marches on. (Crosswhite, 1996, p. 148 ff.; Perelman & Olbrechts-Tyteca, 1969, p. 33; Tindale, 2015, p. 62). As such, the universal audience is changeable – it changes as the particular audiences from which it is derived change, and as the reasoner who derives it changes. What stays constant is only the reasoner's attempt to reach a universal evaluation of the argument by considering it from the point of view of the idealized version of the available particular audience(s) (Tindale, 1999, p. 89), the universal audience she uses for this is itself transitory.

Waluchow's constitutional community is less than a fully universalized audience, because Waluchow wants to include even moral commitments that are known to be grievous mistakes, as long as they are authentic moral commitments of the community.[63] But the method of argument evaluation through the use of a universal audience and Waluchow's method of argument evaluation through the point of view that accepts CCM are otherwise parallel. Waluchow advises judges engaged in judicial review to take a particular audience, in our case the Canadian citizenry,

[61] I thank my reviewer for pointing out that the method of reflective equilibrium might have an important role to play in the process of expanding an audience like this.

[62] It would be possible to object here that a *perfect* application of a *perfect* method of derivation of a universal audience from a particular audience would always yield the same universal audience (for example because the perfect method of derivation would include the expansion of the particular audience over time), but such an objection is uninteresting: any arguer who tries to use the method of the universal audience is situated in time and does not have access to *all* particular audiences throughout time.

[63] His example here are the racist commitments during South Africa's apartheid (Waluchow, 2007, p. 227).

and idealize it by reducing it to a coherent set of moral commitments. Charter arguments and claims are then evaluated from the so created idealized audience's point of view. A charter argument is valid if Waluchow's idealized audience, the constitutional community, would accept it.

Waluchow's version of charter-reasoning is then distinctly rhetorical and therefore much more fluid and less restrictive than traditional common-law reasoning. The way an idealized audience would evaluate an argument is time-dependent because of its relationship to the particular audiences it is based on and to the reasoner who constructs it. That Waluchow's idealized audience is constructed on the basis of the constitutional community means that not only changes explicitly made by authoritative officials influence the validity of a charter argument. In addition, Waluchow interprets CCM as holistically interconnected. Judges should use their discretion to make the developments of law on a specific issue appear in its best light as seen from the point of view of CCM as a whole (Waluchow, 2015, p. 41 ff.). [64] By contrast, in common-law reasoning, singular, relevant, valid legal sources have special weight and discretion sets in only where they do not provide determinate answers. As a result, where argument evaluation according to the common-law method is restricted and rule-guided, argument evaluation according to the idealized audience of the constitutional community is fluid and holistic.[65] Because Waluchow's idealized audience, like the universal audience, changes over time, from its point of view, the validity of charter arguments does not change only with changes in specific legal sources. Rather, it can change through general developments in the constitutional community's moral commitments over time.

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[64] This is one of the closest points between Dworkin and Waluchow. (Dworkin, 1986). For the relationship that Waluchow sees between his and Dworkin's theory, see (Waluchow, 2015). The main difference seems to me that where Dworkin allows a judge's own moral commitments to play a significant role, Waluchow attempts to remove the judge's commitments from the equation and replace them with the constitutional community's.

[65] This does not mean that from the constitutional community's point of view, specific legal sources will not have any weight – after all, such values as predictability and clarity of the law will likely be deeply embedded in that audience's point of view.

4.2 The Sanctity-of-Life Argument from the Point of View of the Idealized Constitutional Community

Waluchow acknowledges that determining how a constitutional community would react to a certain argument involves a great deal of interpretative and practical reasoning (Waluchow, 2015, p. 43). It is therefore not possible to say for certain whether a judge has done so correctly in a given case. Similar difficulties also face me as I attempt to determine whether the assessment of the sanctity-of-life argument from the point of view of the Canadian constitutional community might have changed between 1993 and 2015. In her analysis of the SCC's *Carter*-judgement (summarized above), O'Brien presents a convincing case that CCM changed with respect to the protection-of-the-vulnerable argument by relying on common-law developments in the constitutional law. I cannot present as convincing a case here. Instead, I have to rely on evidence for much broader changes in the idealized audience of the constitutional community. My argument is that since this idealized audience changes over time, so does the validity of charter arguments – at least when they are being evaluated using the method of CCM. I think that the sanctity-of-life argument lost its validity between 1993 and 2015 because of changes in the idealized audience with whose help it can be evaluated. *Rodriguez* was decided in the middle of a shift in the community's constitutional morality.[66] Sopinka, in 1993, could still have justifiably believed that the constitutional community would have accepted the sanctity-of-life argument.[67] By contrast, I do not think that the court in 2015 would have had a stable basis on which to think that the sanctity-

[66] The idea that *Rodriguez* was decided in the midst of changing moralities, and even became a catalysator of this change, is not mine. Both Chambers (2011) and Martel (2001) point this out in connection with *Rodriguez*. Sopinka's decision was harshly criticized because it favored community values over the harm caused by them to individuals. See. e.g. Weinrib (1994)

[67] The narrowness of the 5 to 4 decision for which he wrote the majority opinion shows that things were not entirely clear even then. McLachlin already all but ignored the sanctity-of-life argument in the dissent she wrote for *Rodriguez*. (*Rodriguez,* 616 ff.).

of-life argument would have been accepted by the constitutional community any more.[68] I offer two reasons for this assessment.

First, there was a change in the assessment of whether the law should enforce morality beyond the prevention of harm to individuals. Canadian case-law showed a move away from the idea that the law could restrict individual actions that were against common mores. Instead, whether behavior should be regulated was more and more determined by whether it could harm anyone. This change was already underway when the *Rodriguez* decision was made, but by 2015 (potential) harm to individuals had gained a preferred place. The movement can, for example, be seen in a line of cases on the interpretation of the term "obscenity" in Canadian law.[69] Before 1992, the standard for obscenity had been the community standard of tolerance test. [70] According to this test, material with explicit sexual content was obscene if either the community would not tolerate others being subjected to it *or* if the material was likely to harm someone. In 1992, in *R v. Butler*,[71] the SCC blended the harm prong and the community tolerance prong of the test, giving harm the greater weight. *Little Sisters Book and Art Emporium v Canada* (2000),[72] not only gave even further emphasis to the harm aspect of the test; in addition, *Little Sisters* grappled with the criticism that a community-standards test was majoritarian and would favor the majority's opinion at the expense of the free expression rights of minorities. Finally, in *R v. Labaye* (2005), the court decided a case

[68] In other words: Neither *Rodriguez* nor *Carter* have to be read as a mistaken decision. This, I think, is another advantage of Waluchow's reading over Dworkin's reading.
[69] The majority of these cases were concerned with the interpretation of section 163 of the Canadian criminal code: "For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene." (*Criminal Code* R.S., 1985, c. C-46, s. 163; 1993, c. 46, s. 1. [Criminal Code]) My summary here is based on a private email exchange with Waluchow.
[70] See, e.g. Towne Cinema Theatres Ltd. *v.* The Queen, [1985] 1 S.C.R. 494
[71] R. *v.* Butler, [1992] 1 S.C.R. 452
[72] Little Sisters Book and Art Emporium *v.* Canada (Minister of Justice), [2000] 2 S.C.R. 1120

about a related concept to obscenity, indecency.[73] This case saw a scathing critique of the community-standards aspect of the test and a determinate favoring of a harm-based test.

There is great temporal proximity between *Butler,* which in this line of cases made the first definite move towards favoring individual harm over the community's ideas of decency, and *Rodriguez*. This proximity shows that the constitutional community's view on the legal enforceability of values other than the avoidance of harm had begun to shift when Sopinka evaluated the sanctity-of-life argument, which relies on the value of preserving human life in itself, independent of individual harm. However, at that point it was not clear how far reaching the shift would be, or how durable. Protecting community mores was still an important goal of the law. Sopinka could still interpret the section 7 protection of life as a mandate to the state to protect life as a value in itself, and he did.[74]

As the line of cases illustrates, however, by 2015, harm had become more important as a determinant for the justifiability of constraining laws in the eyes of the constitutional community. Concomitantly, the idea that non-harm based values (like decency in the case of the obscenity cases) could be the basis for restricting individuals had less traction. The sanctity-of-life argument's main premise, that the state had a mandate to protect life itself, might still have been supported by the relevant precedent, because it had been endorsed in Rodriguez and not been challenged in subsequent case-law. But from the point of view of the idealized audience of the constitutional community this premise had lost plausibility because it was not connected to harm to individuals.

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[73] R. *v.* Labaye, [2005] 3 S.C.R. 728, 2005 SCC 80

[74] "The appellant seeks a remedy which would assure her some control over the time and manner of her death. While she supports her claim on the a ground that her liberty and security of the person interests are engaged, a consideration of these interests cannot be divorced from the sanctity of life, which is one of the three Charter values protected by s. 7." (*Rodriguez,* p. 584)

The assessment that this premise lost plausibility is also supported by more general changes in the Canadian citizenry, on which the constitutional community is based. Some authors have argued that the endorsement of the sanctity-of-life argument in *Rodriguez* was heavily influenced by the generally Christian worldview that, in 1993, was still dominant (Chambers, 2011; Steele, 2018). Even though Sopinka distanced himself from the idea that the sanctity of life needed to be a Christian value, the argument is closely connected to Christian thought and both Steele (2018) and Chambers (2011) provide impressive evidence that the groups and institutions who submitted sanctity-of-life arguments to the court were predominantly religious.[75] In addition, Sopinka supported his endorsement of the sanctity-of-life argument with explicitly Waluchownian reasoning:

> "To the extent that there is a consensus, it is that human life must be respected, and we must be careful not to undermine the institutions that protect it. This consensus finds legal expression in our legal system which prohibits capital punishment. This prohibition is supported, in part, on the basis that allowing the state to kill will cheapen the value of human life and thus the state will serve in a sense as a role model for individuals in society." (*Rodriguez v British Columbia*, p. 608)

However, the affinity to Christian religiosity that Sopinka could rely on in his assessment of the sanctity-of-life argument had waned by 2015, further depriving the argument of support. According to Steele, the Canadian citizenry had shifted away from religiosity, and adopted a more secular outlook on life and death in general (Steele, 2018, p. 76). She argues that corresponding to this change, the *Carter*-SCC did not continue Sopinka's way of adopting Christian ideas and presenting them as translatable into secular values. Instead, *Carter* took a distinctly non-religious approach to the PAD discussion (Steele, 2018).[76] I think that also gives us reason to believe that

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[75]See Biggar (2004)

[76] Steele points out that even where the *Carter* opinion cites and asserts the sanctity of life as a value of Canadian law, it bypasses the "sanctity"-part and instead concentrates on another interpretation: "The Court did not use this notion of life religiously, but instead recognized, much like the interveners who favoured physician-assisted dying, that there exists a profound respect for human life, which includes respecting the decisions one may make regarding the end of his or her life. In this light, the Court's use of sanctity of life is not to suggest that life is sacred, nor a gift

the sanctity-of-life argument had been weakened from the constitutional community's point of view. The religiously-influenced framing that Sopinka was able to assume for the constitutional community in 1993 had lost its prevalence, weakening the fit of the sanctity-of-life argument with the overall moral framework from which this idealized audience would evaluate arguments.

5 A New Layer of Time Dependency for Charter Arguments

This might be reason enough to think that unlike the common-law method, the rhetorical method via the constitutional community can give some explanation why the SCC no longer considered the sanctity-of-life argument valid in 2015. The adherence that could be expected from the idealized audience of the constitutional community for the sanctity-of-life argument had diminished between 1993 and 2015.

However, even if this interpretation is correct, the SCC does not seem to be treating the Canadian constitution as a common law constitution when it dismisses the sanctity-of-life argument. For as I explained above, Waluchow introduces CCM as guidance for the use of discretion where the positive law does not provide definite constraint. But according to the analysis in this paper, *Rodriguez* did provide constraint. Therefore, the use of CCM can justify the SCC's treatment of the sanctity-of-life argument only if we accept that the SCC attributed enough importance to interpreting Charter rights in harmony with the constitutional community's contemporary moral commitments to outweigh the constraint of common-law reasoning, at least with respect to the partial justification for the *Rodriguez* decision that the sanctity-of-life argument offered. The sanctity-of-life argument's validity did not change over time because specific positive legal sources changed. Rather, its acceptability to the idealized audience of the constitutional

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from a transcendental figure, but instead something that one is rightfully permitted to *experience* rather than *endure*. As expressed by the Court, one has the "right to life", not a "duty to live"." (Steele, 2018, p. 65)

community changed as that audience continuously developed its moral outlook. Time influenced it not in the expected way in which it influences the validity of all legal arguments, but instead via the development of the idealized audience and, by extension, via the development of the particular audience from which it was derived, the Canadian citizenry. Under this interpretation, the SCC made the decision to measure the sanctity-of-life argument's validity by the rhetorical method of audience adherence rather than by the common-law method (or at least to give this adherence more weight than the result of common-law reasoning) and thereby to adopt an extended understanding of the influence that the passing of time has on the validity of charter arguments. Now, I have already mentioned that courts do not only develop the content of the constitutional law, but also the method of constitutional interpretation when they make their decisions. We might then think that the SCC changed the method of constitutional interpretation to give more weight to changes in CCM than was originally envisioned by Waluchow when he proposed to treat the Canadian constitution as a common-law constitution. However, we should not be naïve as to the implications of such a change: Treating the Canadian constitution as a common-law constitution preserves the idea that the validity of constitutional arguments that have already been authoritatively evaluated is influenced by time via changes in the available relevant valid legal sources made explicitly by authoritative officials. However, treating the Canadian constitution as so sensitive to changes in CCM that they can replace changes in the available relevant valid legal sources means adding a new dimension to the time-dependency of charter arguments.

Biggar, N. (2004). *Aiming to kill: The ethics of suicide and euthanasia*. Cleveland: Pilgrim Press.
Chambers, S. (2011). *Of stewardship, suffering and the "slippery slope": A Vattimian analysis of the sanctity of life ethos in Canada (1972–2005).* (Ph.D.), University of Ottowa,
Chan, B., & Somerville, M. (2016). Converting the 'right to life' to the 'right to physician-assisted suicide and euthanasia': an analysis of Carter v Canada (Attorney General), Supreme Court of Canada. *Medical law review, 24*(2), 143-175. doi:10.1093/medlaw/fww005

Crosswhite, J. (1996). *The rhetoric of reason: writing and the attractions of argument*. Wisconsin: University of Wisconsin Press.
d'Almeida, L. D., & Michelon, C. (2017). The Structure of Arguments by Analogy in Law. *Argumentation, 31*(2), 359-393. doi:10.1007/s10503-016-9409-3
Duxbury, N. (2008). *The nature and authority of precedent*. Cambridge: Cambridge University Press.
Dworkin, R. (1986). *Law's empire*. Cambridge, Mass: Belknap Press.
Dworkin, R. (1996). *Freedom's law: The moral reading of the American constitution*. Oxford: Oxford University Press.
Dworkin, R. (2006). *Justice in robes*. Cambirdge: Harvard University Press.
Dworkin, R. (2013). *Justice for Hedgehogs*. Cambrige, MA: The Belknap Press of Harvard University Press.
Eisenberg, M. (1988). *The Nature of the Common Law*. Cambridge, Massachusetts: Harvard University Press.
Fallon, R. (2008). Constitutional precedent viewed through the lens of Hartian positivst jurisprudence. *North Carolina Law Review, 86*.
Farber, D. A. (1989). The Originalism Debate: A Guide for the Perplexed. *Ohio State Law Journal, 49*(4), 1085.
Finnis, J. (2011). *Natural law and natural rights* (2nd ed.). New York, Oxford: Oxford University Press.
Fuller, L. L. (1964). *The morality of law* (Vol. 1963). New Haven: Yale University Press.
Govier, T. (1988). *A practical study of argument* (2nd -- ed.). Belmont, Calif: Wadsworth Pub. Co.
Hart, H. L. A. (1961). *The concept of law*. Oxford: Clarendon Press.
Hogg, P. (2012). The brilliant career of section 7 of the charter. *The Supreme Court Law Review: Osgoode's annual constitutional cases conference, 58*.
Horty, J. F., & Bench-Capon, T. J. M. (2012). A factor-based definition of precedential constraint. *Artificial Intelligence and Law, 20*(2), 181-214. doi:10.1007/s10506-012-9125-8
Johnson, R. H. (2000). *Manifest rationality: A pragmatic theory of argument*. Mahwah, New Jersey: Lawrence Erlbaum Associates Publishers.
Johnson, R. H., & Blair, J. A. (1983). *Logical self-defense* (2nd -- ed.). Toronto, ON: McGraw-Hill.
Keown, J. (2018). Carter: A Stain on Canadian Jurisprudence? In D. Ross (Ed.), *Assisted Death: Legal, Social and Ethical Issues after Carter* (pp. 1-35). Toronto, Canada: LexisNexis.
Lamond, G. (2005). Do precedents create rules? *Legal Theory, 11*(1), 1-26. doi:10.1017/S1352325205050019
Lamond, G. (2007). Precedent. *Philosophy Compass, 2*(5), 699-711. doi:10.1111/j.1747-9991.2007.00092.x
Lamond, G. (2014). Analogical Reasoning in the Common Law. *Oxford Journal of Legal Studies, 34*(3), 567-588. doi:10.1093/ojls/gqu014
MacCormick, N. (1995). Argumentation and interpretation in law. *Argumentation, 9*(3), 467-480. doi:10.1007/BF00733152
MacCormick, N. (2005). *Rhetoric and the rule of law: a theory of legal reasoning*. Oxford: Oxford University Press.
Martel, J. (2001). Examining the Foreseeable: Assisted Suicide as a Herald of Changing Moralities. *Social & Legal Studies, 10*(2), 147-170. doi:10.1177/a017399
Mill, J. S. (2007). *On liberty*. New York: Penguin Classics.

Nelson, C. (2005). What Is Textualism? *Virginia Law Review, 91*(2), 347-418.
Newman, D. (2018). *Carter* and the unsettling of *Stare Decisis*. In D. Ross (Ed.), *Assisted Death: Legal Social and Ethical Issues after Carter*. Toronto, Canada: LexisNexis.
O'Brien, M. (2016). *Charter Review and A Community's Constitutional Morality.* (Ph.D.), McMaster University,
Palmer, S. (2015). "The choice is cruel": assisted suicide and Charter rights in Canada. *Cambridge Law Journal, 74*(2), 191. doi:10.1017/S0008197315000471
Perelman, C. m., & Olbrechts-Tyteca, L. (1969). *The new rhetoric: a treatise on argumentation*. Notre Dame: University of Notre Dame Press.
Rawls, J. (1971). *A theory of justice*. Cambridge, Mass: Belknap Press of Harvard University Press.
Raz, J. (1979). *The authority of law: essays on law and morality*. Oxford: Clarendon Press.
Raz, J. (1985). Authority, Law and Morality. *The Monist, 68*(3), 295-324.
Scalia, A. (1997). *A matter of interpretation: federal courts and the law: an essay*. Princeton, New Jersey: Princeton University Press.
Schauer, F. (2012). *Thinking like a lawyer: a new introduction to legal reasoning*. Cambridge, Mass.: Harvard University Press.
Steele, C. (2018). *Carter v. Canada: Non-Religion in the Context of Physician Assisted Dying.* (Master of Arts), University of Ottowa,
Stevens, K. (2018). Reasoning by precedent - between rules and analogies. *Legal Theory*, 1-39. doi:10.1017/S1352325218000113
Strauss, D. (2010). *The Living Constitution*. New York, Oxford: Oxford University Press.
Tindale, C. W. (1999). *Acts of Arguing: A rhetorical modal of argument*. Albany: State University of New York Press.
Tindale, C. W. (2015). *The philosophy of argument and audience reception*. Cambridge, United Kingdom: Cambridge University Press.
Waldron, J. (1993). A Right-Based Critique of Constitutional Rights. *Oxford Journal of Legal Studies, 13*(1), 18-51. doi:10.1093/ojls/13.1.18
Waldron, J. (2004). *Law and Disagreement*. Oxford: Oxford University Press.
Walton, D. (2010). Similarity, precedent and argument from analogy. *Artificial Intelligence and Law, 18*(3), 217-246. doi:10.1007/s10506-010-9102-z
Waluchow, W. (1994). *Inclusive Legal Positivism*. Oxford: Claredon Press.
Waluchow, W. (2005). Constitutions as Living Trees: An Idiot Defends. *The Canadian Journal of Law and Jurisprudence, 18*(2), 207-247. doi:10.1017/S0841820900003994
Waluchow, W. (2007). *A common law theory of judicial review*. New York, NY: Cambridge University Press.
Waluchow, W. (2015). Constitutional rights and the possibility of detached constructive interpretation. *Problema, 9*, 23-52.
Weinrib, L. E. (1994). The Body and the Body Politic: Assisted Suicide under the "Canadian Charter of Rights and Freedoms". *Mcgill Law Journal, 39*(3), 618.

Legal Sources Cited

B.C. v Canada Trust Co. [1980] 2 S.C.R. 466, 478
Brown v. Board of Education, 347 U.S. 483 (1954)
Canada (Attorney General) *v.* Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101

Carter v. Canada (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331
Edwards v Attorney General [1930] A.C. 124, 1929 UKPC 86.
Law Society of Upper Canada v. Shapinker [1984] 1 S.C.R. 357, 365.
Little Sisters Book and Art Emporium *v.* Canada (Minister of Justice), [2000] 2 S.C.R. 1120
Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486
Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519.
R. *v.* Butler, [1992] 1 S.C.R. 452
R. *v.* Heywood, [1994] 3 S.C.R.
R. *v*. Labaye, [2005] 3 S.C.R. 728, 2005 SCC 80
R. *v.* Malmo-Levine; R. *v*. Caine, [2003] 3 S.C.R. 571, 2003 SCC.
Towne Cinema Theatres Ltd. *v.* The Queen, [1985] 1 S.C.R. 494
Que V. Blaike [1979] 2S.C.R. 1016, 1029
Criminal Code, R.S.C. 1985, c. C-46, s. 241 [*Criminal Code*]
Charter of Rights and Freedoms, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11