

**A JUDEO-CHRISTIAN ACCOUNT OF HUMAN DIGNITY  
IN CANADIAN LAW AND PUBLIC POLICY**

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“The morality of the 21<sup>st</sup> century will depend on how we respond to this simple but profound question: Does every human life have equal moral value simply and merely because it is human? Answer yes, and we have a chance of achieving universal human rights. Answer no, and it means that we are merely another animal in the forest.”

- Wesley J. Smith, “The Way I See It” # 127 on Starbucks coffee cups

## **Abstract**

Understanding human dignity is integral to protecting human rights. An examination of Canada's Supreme Court decisions and Canadian public policy debates reveals that human dignity is being defined synonymously with individual autonomy and equality. This narrow understanding has serious implications for people who are not able to assert their autonomy. To understand the philosophical ideas behind these decisions, this thesis examines classical, modern, and postmodern accounts of human dignity and concludes that they fall short in providing an objective grounding for dignity that is truly human. It then looks to the Judeo-Christian account of human dignity to provide a transcendent foundation for human dignity. With this account, persons are rational *and* physical, relational, inviolable, and teleological – a hopeful contrast to the prevailing contemporary accounts. This thesis then defends the place of this religious perspective in our secular country.

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## Introduction

“It was early in the evening on a hot summer's day when the call came in; the call that would change our lives and shatter our dreams forever.”<sup>1</sup> With these words Yehudis Brown begins to describe the accident that changed the lives of herself, her family, and most of all, her daughter Chasya. “It was a mistake. An accident. Our little daughter choked and had a cardiac arrest as a result. It took 25 minutes to start up her heart again, but by then it was too late. The horrific damage had been done.”<sup>2</sup> Chasya is now in a persistent vegetative state and the doctors do not think she will ever wake up again.

How can one even begin to sympathize with this family? Yehudis explains “Some things are just too painful, too incomprehensible for the average human mind to handle. Unless they are forced to stare the harsh reality in the face, that is.”<sup>3</sup> In the midst of this tragedy, how did this family move on? Was the answer found in ending Chasya’s life as painlessly as possible, as the doctors recommended? Yehudis’ Jewish faith comforted her with the realization that her daughter’s life did not lose its worth or value as a result of her vegetative state. She explains her reason for upholding Chasya’s life:

They've tried to convince me, tried to help me see the light. And each time that I stand before them, struggling to make them understand the value of a human life as I see it, to understand that what makes a human being so precious to God is not only his capacity to *do*, but also to simply to *be*, to *exist*, I meet with a dead end....

We won't be stopping life support any time soon, Doctor. And when the time comes for our daughter to rejoin her creator near the Heavenly Throne, we'll be comforted to know that she's fulfilled her job on this earth in the best possible way. You can't make us take that away from her.<sup>4</sup>

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<sup>1</sup> Yehudis Brown, “The Value of Chasya’s Life,” *Aish.com*, [http://www.aish.com/societyWork/society/The\\_Value\\_of\\_Chasyas\\_Life.asp](http://www.aish.com/societyWork/society/The_Value_of_Chasyas_Life.asp).

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

This story of Chasya’s life goes to the heart of fundamental life issues that have been grappled with as long as death has been in this world. Unfortunately, even though Yehudis is right when she explains that somebody who has not gone through a situation like her family has will never be able to understand it, legal and political decisions pertaining to these issues must still be made. These decisions are often made by judges and politicians who have never experienced a tragedy like this family has. But they have a responsibility to promote justice and human dignity nevertheless. How are these decisions made? How do we, as Canadian – and indeed all of human - society, define what is truly in keeping with the value and dignity of human life? This thesis will attempt to address these questions by analyzing how our contemporary legal and public policy discourse defines human dignity. It will then examine the philosophical roots of these perspectives before introducing a Biblical account of human dignity and explaining how the Judeo-Christian faith provides an understanding of human worth that addresses the serious shortcomings of the contemporary perspectives.

Defining and applying human dignity in a political context is by no means an easy task. At root are difficult philosophical questions which go to the heart of what it means to be human. So easily discussions of human dignity turn into self-indulgence and self-glorification. In an age where science is king and technology is the key to happiness, our Western world still looks for a cheap way to find dignity. Leon Kass remarked “As Aldous Huxley prophetically warned us, in his dystopian novel *Brave New World*, the unbridled yet well-meaning pursuit of the mastery of human nature and human troubles through technology can issue in a world peopled by creatures of human shape but of shrunken humanity....”<sup>5</sup> One look through a newspaper today will show us that, in spite of all of the technological advances in the twentieth century, indignity is pervasive. Child exploitation, bullying,

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<sup>5</sup> Leon Kass, “Defending Human Dignity” Bradley Lecture at the American Enterprise Institute (Feb 5 2007), 8.



prostitution, self-mutilation, extreme poverty, and drug addictions are common. Never mind the genocide, ethnic cleansing, apartheid, abortion, and violence that has intensified rather than diminished. These issues are all worthy of examination. However, this thesis will focus only on those issues pertaining to human dignity in the context of Canadian constitutional law and public policy. Abortion, physician suicide, and new reproductive technologies will be the focus of this thesis, not because there are not other important political issues surrounding human dignity, but because it is these issues which have been precedent-setting in our legal and public policy decisions about human dignity.

### **Everybody Wants Dignity**

Words can pack a punch. Advertisers, political spin-doctors, and even Supreme Court judges know this well and take full advantage of the power of words. Dignity is a prime example. Because dignity seems to be such a favourable word it is being used, and exploited, for purposes as far-ranging as from the title of Hillary Duff's latest pop album to the push for the legalization of physician assisted suicide. The concept of human dignity has given rise to an intellectual battle, with great stakes. Increasingly, the idea that all humans stand above other creatures in worth is being challenged. Why are we any more privileged than animals? Why should the unborn, the disabled, or the senile be given moral consideration equal to that of autonomous persons? Are all humans persons? If not, what classifications scheme should be employed to legally or politically determine who qualifies as a person? Understanding what human dignity really is, and to whom it belongs, will go a long way in addressing these difficult questions.

In his article “In Defense of Human Exceptionalism,” Wesley J. Smith explains how it has become a widespread and concerted movement among many disciplines of academia to wage war against the view that humans have intrinsic and unique worth. He highlights four fronts where this is occurring:

- “Personhood Theory” in bioethics claims that granting humans unique moral status based simply on being human is “speciesism,” and hence membership in the moral community should be based on being a “person”—for example, possessing certain cognitive capacities (whether animal, human, space alien, or machine), such as being self-aware over time.
- The animal rights/liberation movement also seeks to knock us off the pedestal in the cause of elevating animals to equal moral worth with people. Thus, many liberationists urge that we base a being’s value on “painience,” that is, the capacity to experience pain. Since cows feels pain just as humans do, bovines are people too, and hence ranching cattle is as evil as slavery.
- Radical environmentalists and deep ecologists claim humans are a vermin species afflicting the living Gaia and that our population should be cut drastically so that earth can return to an Eden-like state.
- Meanwhile, the philosophical materialists proclaim that humans are merely so much meat on the hoof and, indeed, that species distinctions are fictional given our many shared genes with animals and all life having evolved out of the same primordial soup. This means, as novelist and journalist John Darnton put it in the *San Francisco Chronicle* in 2005, ‘We are all of us, dogs and barnacles, pigeons and crabgrass, the same in the eyes of nature, equally remarkable and equally dispensable.’<sup>6</sup>

Despite these challenges, the concept of human dignity is being given political and legal recognition like never before. We live in an age where human rights are paramount and these rights are being grounded by the foundation of human dignity. After all, how can we claim that our rights are inalienable if we cannot explain why we possess rights? This explains why Canada’s Supreme Court has emphasized that the Charter of Rights and Freedoms is “inextricably bound” to “concepts of human dignity”<sup>7</sup> and why the Preamble to

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<sup>6</sup> Wesley J. Smith, “In Defense of Human Exceptionalism,” *First Things: on the Square*. July 5, 2007, <http://www.firstthings.com/onthesquare/?p=790>.

<sup>7</sup> Lorne Sossin, “The “Supremacy of God”, Human Dignity and the *Charter of Rights and Freedoms*,” *University of New Brunswick Law Journal* 52, (2003): 227-228, quoting the discussion of human dignity in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 76.

the United Nations Charter states that we are determined “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person...”<sup>8</sup>

### **The Etymology of Sanctity and Dignity**

It is important to make clear from the onset of this examination that most Jewish, Christian, and Muslim accounts of human value rely on the concept of the sanctity of human life rather than human dignity. “The sanctity of human life” is a common credo among Protestants and Roman Catholics when referring to the inviolability of human life at all stages. This is because human dignity is often associated with a humanistic worldview which ascribes value apart from any transcendence. In contrast, sanctity comes from the Latin word *sanctus* which means sacred and inviolable. It refers to being set apart for a special task, which is more in keeping with the Jewish and Christian doctrine of the *Imago Dei* – how God made man in His image and set him apart from the rest of creation to have dominion over it.<sup>9</sup>

Roman Catholic theologian James F. Keenan explains the etymological roots of sanctity. After providing a few dictionary definitions he summarizes the results: “These definitions suggest that sanctity is a quality which is revered as somehow touched by divinity and therefore untouchable for humans: sanctity is that which the divinity protects from violability.”<sup>10</sup> Leon Kass defines sanctity by saying that “it would mean that life is *in itself* something holy or sacred, transcendent, set apart – like God himself.” He adds that a common etymological theme of sanctity is that “To say that sacredness is something that can be conferred or ascribed –or removed – by solely human agreement or decision is to miss the

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<sup>8</sup> United Nations, *Charter of the United Nations*, <http://www.un.org/aboutun/charter/>.

<sup>9</sup> Genesis 1, New International Version (NIV). All further quotes from the Bible will also be from the NIV.

<sup>10</sup> James F. Keenan “The Concept of Sanctity of Life and Its Use in Contemporary Bioethical Discussion” in *Sanctity of Life and Human Dignity*, Kurt Bayertz, ed. (Dordrecht: Kluwer Academic Publishers, 1996), 3.

point entirely.”<sup>11</sup> In short, a common religious perspective is that sanctity points to a worthiness that comes from God and is consequently objective and inviolable.

In contrast to sanctity, human dignity has often been ascribed to a form of worth that can be removed as a result of individual aptitude, skill, or autonomy. Originally the term dignity comes from the Latin *dignitas*, “denoting the idea of intrinsic worth and connoting, within Roman society, elevated status in political or social terms.”<sup>12</sup> This account of dignity attributes worth to a person’s status or position within society rather than something that is possessed equally by every person. It is also subjective in nature and can change depending on a changing society.

Understandings of dignity have changed immensely over time. In our Western society today, dignity is overused and consequently has been trivialized. The *Merriam-Webster* Dictionary simply defines dignity as “the quality or state of being worthy, honored, or esteemed....”<sup>13</sup> Compare this definition with the one from Webster’s 1828 dictionary which defined dignity this way:

1. True honor; nobleness or elevation of mind, consisting in a high sense of propriety, truth and justice, with an abhorrence of mean and sinful actions; opposed to meanness. In this sense, we speak of the dignity of mind, and dignity of sentiments. This dignity is based on moral rectitude; all vice is incompatible with true dignity of mind. The man who deliberately injures another, whether male or female, has no true dignity of soul.
2. Elevation; honorable place or rank of elevation; degree of excellence, either in estimation, or in the order of nature. Man is superior in dignity to brutes.<sup>14</sup>

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<sup>11</sup> Leon Kass, *Life, Liberty and the Defense of Dignity: The Challenge for Bioethics* (San Francisco: Encounter Books, 2002), 235.

<sup>12</sup> Lorraine E. Weinrib, “Human Dignity as a Rights-Protecting Principle,” *National Journal of Constitutional Law* 17 (2005): 327.

<sup>13</sup> *Merriam-Webster Online Dictionary*, s.v. “Dignity.” <http://www.merriam-webster.com/dictionary/dignity>.

<sup>14</sup> *Noah Webster 1828 American Dictionary of the English Language*, s.v. “Dignity.” <http://1828.mshaffer.com/d/search/word,dignity>.

These very different definitions point to a battle that is being waged over the very nature of human dignity. If human dignity is being used as a foundation for universal human rights, clearly it must have more meaning than the contemporary *Merriam-Webster* definition. Indeed, a brief examination of human rights discourse will reveal that dignity is often understood to apply to humans regardless of their place in society or their level of honour. Human dignity is acknowledged most in response to aiding those people who are starving, diseased, and being discriminated against, rather than being applied to the affluent and privileged. The 1828 definition which mentions that “Man is superior in dignity to brutes” is still in keeping with how human dignity is understood by many in our world today. Dignity is ascribed to humanity in general rather than a select few humans. After all, how would *dignitas* be able to ground human rights? But our Western world does not want to tie human dignity to the sanctity of human life because it has freed itself from its religious roots already in the Enlightenment. Furthermore, as has already been noted, there is a growing movement to take the human out of human dignity and instead apply dignity only to autonomous individuals. This gives our postmodern world the freedom to deny dignity to some humans while giving it to some non-humans. We are in the midst of a battle over definitions with much at stake. Differing views of what gives humans worth results in very different decisions about issues as diverse as health care for those with disabilities, to abortion, to our response to dying.

The etymological battle over dignity is being waged in Canada as well. Close examination of Canada’s law and public policy reveals that there is great confusion when it comes to defining what human dignity is and who possesses it. The first two chapters of this thesis will look in depth at how our Supreme Court and public policy stakeholders have

defined dignity as synonymous with individual autonomy and equality and will detail the negative implications of this treatment. In the third chapter this thesis will trace back this popular account of human dignity through philosophical history. Beginning with the classical Greek philosophers, continuing to Immanuel Kant as the primary modern account, and moving on to Peter Singer as an example of a contemporary postmodern account, this chapter will explain the philosophical roots of common interpretations of human dignity. The fourth chapter will explain how the Judeo-Christian faith grounds human dignity in a transcendent source – the Biblical doctrines of the *Imago Dei* and the Incarnation of Jesus Christ. These doctrines give meaning to the term “person” as a “someone who” rather than an individual defined by their capacities. This results in an account of human dignity that is physical *and* rational, relational, inviolable, and teleological – indeed an account that is truly human. It will also apply this Judeo-Christian account to Canadian law and public policy to explain how it addresses many of the problems that have resulted from the prevailing accounts already introduced in this thesis. Chapter Five will address the common complaint that a religious perspective like this should have no place in a secular legal and public policy discourse. It will explain how this account of human dignity has a rightful place in our law and politics (especially when the term “secular” is properly defined) and how it is in keeping with, and even grounds, our Western values of freedom and equality. Through all of this I will attempt to communicate a message of hope – genuinely *human* dignity is something that can be philosophically defended even in a world where it is being challenged more than ever before.

# Chapter 1

## Human Dignity in Canadian Constitutional Law

### Introduction

Human dignity is a foundational concept in Canadian constitutional law. The Supreme Court of Canada<sup>15</sup> has said multiple times that the *Charter of Rights and Freedoms* is “inextricably bound” to “concepts of human dignity.”<sup>16</sup> This is the case despite the fact that the word dignity is not even mentioned in our Charter.<sup>17</sup> Canada’s Supreme Court Chief Justice Beverly McLachlin attempted to address this paradox in her speech given at the Lord Cooke Lecture in New Zealand in 2005. She declared that “what is going on is the idea that there exist fundamental norms of justice so basic that they form part of the legal structure of governance and must be upheld by the courts, whether or not they find expression in constitutional texts.”<sup>18</sup> Not only is the concept of human dignity one of those unwritten constitutional principles, its dominance in Canadian case law in the past two decades suggests that it is one of the most central principles.

Given the priority that our Court has given to this concept it is a sad irony that it has reduced human dignity to simply an affirmation of individual autonomy and human equality.<sup>19</sup> As a result, the inviolable worth of human life has been smothered under self-

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<sup>15</sup> Hereafter “the Court.”

<sup>16</sup> Sossin, 227-228, quoting the discussion of human dignity in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 76.

<sup>17</sup> It is worth noting that the Conservative Party attempted to include the words “dignity and worth of the human person” in the Preamble of the Charter (immediately following “the supremacy of God”) when it was being drafted. This would be in keeping with the similar language in the Canadian Bill of Rights. Weinrib explains that the “defeat of this amendment cannot be understood to amount to a rejection of the concept of human dignity as outlined in this paper, because the formulation defeated included a mix of references some which are consistent with and others that are inconsistent with concepts of human dignity.” “Human Dignity as a Rights-Protecting Principle,” 325.

<sup>18</sup> Beverly McLachlin, “Unwritten Constitutional Principles: What is Going On?” Lord Cooke Lecture (Wellington, NZ, 2005), 2. <http://www.fact.on.ca/judiciary/NewZeal.pdf>.

<sup>19</sup> This will be explained in reference to the Section 7 cases of *R v. Morgentaler* [1988] 1 S.C.R. 30 and *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

serving demands for individual freedom and choice. By adhering to an account of dignity that is synonymous with autonomy and equality, the Court is increasingly marginalizing all individuals and groups who are not capable of living autonomous lives to a sufficient degree. The unborn, disabled, and elderly are the first to be discriminated against and treated as second-class citizens (if that) because of their dependence on others. And in removing the objective foundation from under human dignity, the Court has weakened the philosophical basis for all human rights because rights are absolute only if human dignity is truly human (both objectively and exclusively).<sup>20</sup> The subjective interpretation also means that dignity is defined according to the interests of those invoking the concept for their cause. It has become both a goal for society and at the same time its meaning is determined by society. Consequently it empties the concept of any meaning and begs the question why the Court would emphasize the concept as being integral to all Charter interpretation.

This chapter will analyze the role of human dignity in Canadian law, especially in Sections 7 and 15 Charter decisions, and will also explain the implications of the Court's interpretation of dignity. This exposition of the contemporary use of dignity, combined with the next chapter on its use in public policy, will reveal the need to re-examine the religious and philosophical accounts of this ubiquitous concept in an effort to keep Canada from heading down the tracks towards an inevitable train-wreck. After all, the cargo on this train is not merely intellectual baggage; it is the protection of human life and the promotion of human flourishing. Can there be a more valid reason to rethink the dangerous direction that our Supreme Court is taking us?

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<sup>20</sup> This will be explained in reference to the precedent-setting Section 15 case of *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.



## Worthy Origins

With more people being killed by warfare in the twentieth century than all of the centuries prior to it combined, there is little doubt that we have emerged from the bloodiest stain in the history of Western civilization. Perhaps it is not surprising, therefore, that it was in the midst of the atrocities witnessed over the past 100 years that the concept of human dignity began to gain legal recognition. Christopher McCrudden, professor of human rights law at Oxford, notes that “It was not until the first half of the twentieth century that dignity begins to enter legal, and particularly constitutional and international legal discourse, in any sustained way.”<sup>21</sup> Although there are examples of dignity being used to challenge laws prior to this (such as the abolition of slavery), McCrudden explains that “In these contexts, however, the legal use of dignity was operating in the private sphere in relation to the activities of private parties..., or operating in the context of legal responses to quite specific problems such as reining in the aristocracy, abolishing slavery, or improving employment conditions.”<sup>22</sup> The first countries to incorporate explicit recognition of human dignity into their laws were Mexico (1917), Weimer Germany (1919), Finland (1919), Portugal (1933), Ireland (1937), and Cuba (1940). McCrudden explains that there is a combination of Enlightenment, Catholic, republican, and socialist accounts of dignity which led to these developments.<sup>23</sup>

Our *Canadian Charter of Rights and Freedoms* was drafted in an age when the atrocities of World War II were still in the recent memories of many Canadians. Weinrib explains that “Respect for human dignity has become a cornerstone of the post WWII

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<sup>21</sup> Christopher McCrudden, “Human Dignity,” *University of Oxford Faculty of Law Legal Studies Research Paper Series*, (April 2006): 9, <http://ssrn.com/abstract=899687>.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid, 10.

(“postwar”) rights revolution.” She goes on to say that “In the aftermath of the war, Hannah Arendt [the Jewish-German political theorist] called for protection of human dignity to repudiate the tragedy unleashed at mid-century by totalitarian dictatorships with imperialist agendas that inflicted unprecedented suffering and death on millions of people.”<sup>24</sup> As a result, human dignity became an “organizing principle” or “cornerstone” upon which many constitutional documents were built. From our Canadian perspective, the Charter was added to our constitution in 1982 and it also reflects this dignity-centered framework of rights.

### **Dignity and the Supreme Court of Canada**

Few concepts function as peculiarly in Canadian conditional law as human dignity. On the one hand, there is no shortage of praise and reverence bestowed on this concept by the Supreme Court of Canada and many legal experts. The Court has even said that “the values and principles essential to a free and democratic society” include “respect for the inherent dignity of the human person, commitment to social justice and equality.”<sup>25</sup> On the other hand, the Court has also labelled human dignity a “notoriously elusive concept.”<sup>26</sup> Furthermore, the way that dignity has been equated with the principles of autonomy and equality have led to protests that dignity is a useless concept (since simply speaking of autonomy or equality is sufficient) and should not be used because it carries moral and religious baggage which is not welcome.<sup>27</sup> Despite its elusiveness and the controversy surrounding it, the relationship between human dignity and the rights and freedoms of the

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<sup>24</sup> Weinrib, “Human Dignity as a Rights-Protecting Principle,” 326.

<sup>25</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103, at 136.

<sup>26</sup> *Egan v. Canada* [1995] 2 S.C.R. 513, per L’Heureaux-Dube, J. at para. 40.

<sup>27</sup> This argument will be explained in more detail later in this chapter.

Canadian Charter has been explored by the Court in more than 80 decisions.<sup>28</sup> Why does human dignity seem to play such an important role in Canadian constitutional law? What does it really mean? Which account of human dignity is being applied to the decisions? To answer these questions, this chapter will examine the Supreme Court decisions themselves and analyze what the judges have said about dignity.

### ***Dignity as Autonomy in R. v. Morgentaler and Rodriguez v. British Columbia***

Section 7 of the Charter states that “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.”<sup>29</sup> The first and perhaps most significant case which set the precedent for the concept of dignity as it relates to Section 7 is the ruling of *R. v.*

*Morgentaler*.<sup>30</sup> In 1988 the Supreme Court of Canada chose to hear the case brought forward by doctors Henry Morgentaler, Leslie Frank Smoling, and Robert Scott who argued that Canada’s abortion law (found in Section 251 of the Criminal Code), which required the approval of a Therapeutic Abortion Committee for a woman to have an abortion, was unconstitutional because it infringed on a woman’s section 2(a), 7, and 15 freedoms. The seven-judge Court was composed of Chief Justice Dickson, and Justices Beetz, Estey, McIntyre, Lamer, Wilson, and La Forest. They produced a long and divided ruling which struck down s. 251 and has had a profound impact on abortion in Canada as the Canadian Parliament has been unable and unwilling to pass abortion legislation since then.

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<sup>28</sup> Dierk Ullrich, “Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of German,” *Global Jurist Frontiers* 3, Issue 1 (2003): 31.

<sup>29</sup> Department of Justice Canada, *Canadian Charter of Rights and Freedoms*, <http://laws.justice.gc.ca/en/charter/>.

<sup>30</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

It is helpful to note that the Court split four ways (with La Forest and McIntyre dissenting) and that there were some judges who relied heavily on their understanding of human dignity to reach their conclusion whereas others did not even mention it. It is noteworthy that those judges that speak about dignity often appealed to individual autonomy and the importance of allowing women to be able to make decisions about their lives without interference. Already in Dickson and Lamer's ruling the principle of autonomy is the primary reason why s. 251 was deemed to be unconstitutional. Their view that "forcing a woman" to go through with her pregnancy "unless she meets certain criteria unrelated to her own priorities and aspirations is a profound interference with a woman's body...."<sup>31</sup> emphasizes the level of importance that these justices put on autonomy – even to the point of autonomy being a trump card against any restrictions or responsibilities enforced on individual choice.

The emphasis on autonomy is a critical development in understanding dignity because it shifts the focus of who possesses rights from human beings in general to those humans that show a greater degree of autonomy and can make choices about their own lives. In the *Morgentaler* ruling, Dickson, Lamer, Beetz, Estey, and Wilson all believed that the principle of autonomy only applied to the woman seeking the abortion and not the unborn child she carried. No mention was made that women are almost never forced to engage in the procreative act which naturally leads to pregnancy and thereby already had a choice about whether they wished to be in that state. The right to free-sex without responsibility was assumed. As a result, the judges limited their consideration to the aspirations of the women. Not even the classical liberal principle of harm was applied to the unborn. Chief Justice Dickson admitted that the Crown argued that s. 251 protects not only the health of the woman but also the interests of the foetus. But he responded by declaring that "In my view, it

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<sup>31</sup> Ibid, 32-33.

is unnecessary for the purpose of deciding this appeal to evaluate or assess “foetal rights” as an independent constitutional value...”<sup>32</sup> Whether intentionally or not, with these few words the Chief Justice set a precedent which restricted the benefits of the Charter to born humans. This is in keeping with the importance bestowed on autonomy and the ability to make choices as a precondition for legal recognition.

How does this discussion of autonomy apply to dignity? The answer is most clear in Justice Wilson’s solo reasons for siding with the majority to strike down the law. Wilson argues that “The Charter and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity.”<sup>33</sup> She goes on to explain what she means by human dignity when she quotes professor Neil MacCormick from the University of Edinburgh:

To be able to decide what to do and how to do it, to carry out one’s own decisions and accept their consequences, seems to me essential to one’s self-respect as a human being, and essential to the possibility of that contentment. Such self-respect and contentment are in my judgment fundamental goods for human beings, the worth of life itself being one condition of having or striving for them. If a person were deliberately denied the opportunity of self-respect and that contentment, he would suffer deprivation of his essential humanity.<sup>34</sup>

Wilson provides her own explanation of dignity when she posits that “The idea of human dignity finds expression in almost every right and freedom guaranteed in the Charter. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate....the right to choose....”<sup>35</sup> Dignity for Wilson is all about choice because it is tied to autonomy. She goes so far to conclude that

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<sup>32</sup> Ibid, 74.

<sup>33</sup> Ibid, 164.

<sup>34</sup> Ibid, 164.

<sup>35</sup> Ibid, 166.

“Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state.”<sup>36</sup>

Wilson employs a definition of dignity which agrees with her account of individual liberty and then relies on this definition to explain what she feels the Charter expresses. All of this is done without defending her belief that dignity is constituted by autonomy. It is striking how much the Supreme Court relies on equating dignity with autonomy without defining it until the 1999 case of *Law v. Canada*.<sup>37</sup> With her logic, Wilson is able to conclude that free access to abortion is a right. “The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman’s struggle to assert her dignity and worth as a human being.”<sup>38</sup> Later she writes that preventing free access to abortion means that “She is truly being treated as a means – a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect?”<sup>39</sup>

This is an important quote and worth remembering for the philosophical discussion of dignity that begins in Chapter 3. The language she uses bears a striking resemblance to Enlightenment philosopher Immanuel Kant’s moral philosophy. Kant came up with the famous categorical imperative which demands that everybody be treated always as an end and never as a means because we are autonomous individuals capable of creating universal moral law. What is worth noting already in this chapter is that Kant attempted to objectively ground human dignity with his moral philosophy. Although the Canadian Supreme Court

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<sup>36</sup> Ibid.

<sup>37</sup> This definition will be provided and discussed in detail later in this chapter.

<sup>38</sup> Ibid, 172. It is interesting to note that it was only Justice Wilson who went so far as to demand that abortion be a right, despite the common misconception that the Supreme Court itself made that conclusion.

<sup>39</sup> Ibid, 173.

borrowed heavily from Kant, it ignores Kant's emphasis on objectivity. This allows the court to speak of dignity subjectively – which is essential for it to justify its decision in *Morgentaler*. This subjectivity is especially apparent in the cases that will be discussed further in this chapter, but it already comes through in Wilson's claim that women have a right to abortion simply because it is in keeping with their interests (without justifying why their choice trumps the right to life of a foetus).

Speaking on behalf of himself and Justice La Forest, Justice McIntyre challenges Wilson (and to a lesser degree the rest of the Court) by stating that “courts must not, in the guise of interpretation, postulate rights and freedoms which do not have a firm and a reasonably identifiable base in the Charter.”<sup>40</sup> Wilson's redefinition of dignity to justify her decision is one example of what they are challenging. They make the point that all laws “have the potential for interference with individual priorities and aspirations. In fact, the very purpose of most legislation is to cause such interference. It is only when such legislation goes beyond interfering with priorities and aspirations, and abridges rights, that courts may intervene.”<sup>41</sup> La Forest and McIntyre opine that the “proposition that women enjoy a constitutional right to have an abortion is devoid of support in the language of s. 7 of the Charter or any other section.”<sup>42</sup> They believe it is Parliament's role to deal with controversial public policy decisions and it has already done this with the issue of abortion.<sup>43</sup>

The *Morgentaler* case is important because the Court's use of the concept of autonomy to restrict dignity to those who demonstrate an ability to make choices has set a precedent for future cases relating to the value of life. A prime example is the case of

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<sup>40</sup> Ibid, 136.

<sup>41</sup> Ibid, 142.

<sup>42</sup> Ibid, 143.

<sup>43</sup> Ibid, 158.

*Rodriguez v. British Columbia* in which the appellant Sue Rodriguez, a 42 year old woman who suffered from amyotrophic lateral sclerosis (Lou Gehrig's disease) resulting in a rapid deterioration of her health, requested that a physician be allowed to assist her in ending her life when she chose. Section 241(b) of the Criminal Code prohibits anybody from helping somebody else to commit suicide. Rodriguez went to court to challenge this law by declaring that it violates her sections 7, 12, and 15 rights of the Charter. In a narrow 5-4 decision, the Supreme Court of Canada dismissed Rodriguez's appeal, stating that the liberty and security of the person's interests cannot be separated from the third value in s. 7 which is the sanctity of human life. The Court split with five justices united as the majority (La Forest, Sopinka, Gonthier, Iacobucci, and Major) and the remaining four divided into three groups of dissenters (Lamer C.J., L'Heureux-Dubé, Cory, and McLachlin).

The *Rodriguez* case is very useful for analyzing the Court's understanding of the concept of human dignity because the majority uses the principle of the sanctity of human life to trump human dignity (understood as autonomy subsequent to *R. v. Morgentaler*), even though many people would view these as synonymous principles. Understanding how and why these principles are seen as competing by the Court will help to clear up the confusion.

For both the majority and the minority, the concept of dignity in *Rodriguez* maintains the same connection to the philosophy of autonomy that was present in the *Morgentaler* ruling. It comes as no surprise, therefore, that *Morgentaler* is cited numerous times by the Court. Speaking for the majority, Sopinka stated:

In my view, then, the judgments of this Court in *Morgentaler* can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress.... There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human



dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.<sup>44</sup>

The dissents of both McLachlin and Cory shared this view of dignity. For example, Cory argued that “State prohibitions that would force a dreadful, painful death on a rational but incapacitated terminally ill patient are an affront to human dignity.”<sup>45</sup>

The fact that the Court narrowly ruled that *Rodriguez* should not be granted a physician assisted suicide means that it realized that this principle of dignity as autonomy should not trump all other considerations. Rather, it must work together with the other values in s.7 including life and the security of the person. None of these three values trumps the others. “All must be taken into account in determining the content of the principles of fundamental justice and there is no basis for imposing a greater burden on the propounder of one value as against that imposed on another.”<sup>46</sup> The majority ruled that the value of the sanctity of life cannot be subordinated by the choice for death, even if that choice is an exercise of liberty. Choice is not an absolute principle.

To understand how it came to this ruling, it is important to analyze its use of the concept of the sanctity of life. Justice Sopinka begins his explanation of the sanctity of human life by arguing that security of the person cannot include a right to end one’s life “as security of the person is intrinsically concerned with the well-being of the living person.”<sup>47</sup> In essence, he is questioning whether it really is possible to have a right to die with dignity since rights are meant to uphold life rather than to end it. He explains that “This argument focuses on the generally held and deeply rooted belief in our society that human life is sacred or

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<sup>44</sup> *Rodriguez v. British Columbia*, supra 3 at para. 136.

<sup>45</sup> *Ibid*, at para. 231.

<sup>46</sup> *Rodriguez v. British Columbia*. No page or paragraph number is available from the decision provided by the Supreme Court of Canada’s website. The previous two citations were able to include the paragraph number through another source.

<sup>47</sup> *Ibid*.

inviolable (which terms I use in the non-religious sense described by [Ronald] Dworkin... to mean that human life is seen to have a deep intrinsic value of its own).”<sup>48</sup> Regardless of the circumstances, suicide is a choice for death over life. The values of liberty and security of the person must work alongside the value of life of the person making the choice, rather than undermining it.

The reason why I had earlier mentioned that this case is confusing is that Sopinka usurps the concept of human dignity (understood as autonomy) by means of the concept of human sanctity. Human dignity and the sanctity of human life are made to be polar opposites; the former being understood by the Court as a licence to end one’s life and the latter understood by the majority of the Court as an intrinsic value which cannot be legally usurped by choice. It is clear that Sopinka believes that the sanctity of human life refers to intrinsic worthiness when he asks “As members of a society based upon respect for the intrinsic value of human life and on the inherent dignity of every human being, can we incorporate within the Constitution which embodies our most fundamental values a right to terminate one’s own life in any circumstances?”<sup>49</sup> The problem is that the Court had already agreed to the appellant’s use of the concept of dignity as autonomy in *R. v. Morgentaler* as well as in the majority’s acceptance of Rodriguez’s argument that her disease robbed her dignity.<sup>50</sup> How can dignity be inherent if it can be lost as a result of sickness or how one feels about themselves? So the Court needs to look elsewhere to ground its belief that human life cannot be marginalized as a result of a choice to end it. It looks for an objective rather than a

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<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> David Brown, ““Human Dignity,” Human Rights, and the End of Life: The North Wind Blowing from Canada” (Houston: *University of St. Thomas Conference on Suffering and Hope*, Nov. 10-13, 2005), 10, [www.stthom.edu/Public/getFile.asp?File\\_Content\\_ID=23](http://www.stthom.edu/Public/getFile.asp?File_Content_ID=23), referring to *Rodriguez v. British Columbia* at paragraph 137.

subjective grounding for human life. This may be the reason why it refers to the intrinsic value of life as the sanctity of life rather than the dignity of life. This is important because it reveals how the Court is attempting to dig itself out of the hole which it already dug itself into. In *Morgentaler* the Court chose to usurp (unborn) life with choice, but now that it wants to put restrictions on choice it can no longer use the language of dignity because they already defined dignity as autonomy.

It is also noteworthy that even though the Court is indebted to Kant for its definition of autonomy, Kant himself would disagree with how the Court interpreted dignity in a way that would allow it to be lost as a result of a terminal illness. Treating all people as ends in themselves means that everybody must be treated with dignity. This dignity is not subjective, even when we ourselves would prefer to treat our own dignity as a means rather than an end. Kant provides the example of somebody who wants to commit suicide to relieve his suffering. It would be wrong for someone to take their own life as a means to stop their suffering because they would not be treating their life as an end in itself.<sup>51</sup> Dying with dignity would mean not using our lives as a means to achieve the end of less pain. Rather it would mean bravely living even under the difficulty of an impending death. Once again, Kant would take issue with the way that the Court agreed with Rodriguez that her disease robbed her dignity. And he would disagree even more strongly with the minority of the Court which thought that this justified a state-endorsed suicide.

The majority's decision to appeal to the sanctity of life to deny physician assisted suicide is also confusing because the principle of sanctity is never used elsewhere by the

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<sup>51</sup> Immanuel Kant, *Grounding for the Metaphysics of Morals* (Indianapolis: Hackett Publishing Company, 1993), 36.

Court in this way.<sup>52</sup> This principle is conspicuously absent in other cases, with *Morgentaler* being the prime example, where the Court would rather view dignity simply as autonomy and therefore not have to deal with the complications of considering the value of life itself. For example, if intrinsic dignity (what they refer to as sanctity) was applied to *Morgentaler*, would the Court not have to consider the value of the foetus because it also is human life? By restricting itself to autonomy they skirt the issue altogether. Since the Court has used the language of sanctity only in regard to *Rodriguez*, and at the same time has been speaking about human dignity more and more, it begs the question: What protection remains for intrinsic human worth in Canadian Constitutional law?

### ***Dignity as Equality in Law v. Canada***

The 1999 *Law v. Canada* decision was a big ruling for the Supreme Court of Canada, not because of the actual ruling on the case brought to the Court, but because of how the Court decided this was a good time to “clarify” the equality provisions of the Charter. The Court was made up of Chief Justice Lamer and Justices L’Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie. The case involved a 30-year-old widow, without dependents, who did not receive survivor’s benefits under the Canada Pension Plan because she was under the threshold age of 35. She challenged this age restriction by arguing that it violated her s.15 equality rights on the basis of age. The Supreme Court unanimously dismissed her case. But instead of us being left with a short

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<sup>52</sup> In *Ontario v. Canadian Pacific Ltd* [1995] 2 S.C.R. 1031, p. 55, there is a quote from the Law Reform Commission’s *Crimes Against the Environment* which states that “Among these values fundamental to the purposes and protections of criminal law are the *sanctity of life*, the *inviolability and integrity of persons*, and the *protection of human life and health*.” It then draws a connection between the environment and the well-being of human life. Apart from *Rodriguez*, it is the only decision from the Court that explicitly refers to the sanctity of life (along with *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 which quotes the same reference).

ruling that was doomed to be filed in the dusty corners of the court archives, the Court took the opportunity to “clarify” the purpose of s.15 as a result of differences of opinion over the years preceding the case.<sup>53</sup>

It is within the context of this explanation that the concept of human dignity has played a pivotal role and opened up the door to confusion for future equality cases. Almost immediately the Court set out that its explanation was not intended to be a “fixed and limited formula” but rather a “purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach.”<sup>54</sup> Apparently human dignity was the key to establishing this purposive approach. This is set forth by the Court already in paragraph 5 of the decision, under the title “Purpose.”:

In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.<sup>55</sup>

With this new interpretation of s. 15, this section is no longer just about ensuring equality. It now is also about protecting human dignity. After explaining this, the Court has the duty to provide the factors which demonstrate whether somebody’s dignity was violated or demeaned. The list they provide (which they acknowledge is not closed) includes “Pre-existing disadvantages, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue.”<sup>56</sup>

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<sup>53</sup> *Law v. Canada*, two paragraphs before paragraph 1 of the decision.

<sup>54</sup> *Ibid*, at para. 1.

<sup>55</sup> *Ibid*, at para. 4.

<sup>56</sup> *Ibid*, at para. 9(A).

By stating its reliance on human dignity, the Court realized that it needs to define what it means by this concept. This is the first and only time in the Court's history that it attempts explicitly to do this.<sup>57</sup> Iacobucci, speaking for the Court provided this definition:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.<sup>58</sup>

The above quote indicates that the principle of autonomy remains in the definition of human dignity. That is what is meant in the comments about dignity being harmed or enhanced according to the effect of treatment on an individual's "needs, capacities, or merits." The focus is on how someone *feels* when confronted with a law. Autonomy is applied to equality by making the individual's feelings the standard of reference in determining whether equality has been infringed. The law now revolves around the subjective feelings of the individual rather than the objective reality of the situation. Dignity is no longer something that can be measured by providing equal treatment or ensuring that discrimination does not occur. Instead it has everything to do with how a person legitimately feels about themselves within the context of the law. Once again, individual choice becomes the standard of who is worthy of Charter recognition. But what happens to those who are not able to express how they feel about treatment? There are many people who rely on others to

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<sup>57</sup> Although the definition of dignity was inferred by justices in the *Morgentaler* ruling, the Court never attempted to provide a formal definition.

<sup>58</sup> *Law v. Canada*, at para. 53.

look out for their interests. Everybody goes through stages in their lives when they rely on others to care for them. With this equality reinterpretation, the Court is once again restricting its vision of Charter rights to those who make choices for themselves.

Who is to say whether a person's feelings are legitimate when the Court has already declared that the very nature of dignity is subjective? Is it legitimate when the Court says it is legitimate? Is it a consensus of cultural elites who determine which practices should be considered illegitimate? Lon L. Fuller's seminal work *The Morality of Law*,<sup>59</sup> written in response to the advance of legal positivism in the 1960's, lays out eight natural law principles<sup>60</sup> which he argues are essential for the survival of legislation. Two of these principles are that laws must be understandable and that those under the law must have the ability to actually live according to the law. The Court's redefinition of equality rights to revolve around subjective feelings of a person appears to contravene both of these principles. How is it possible for citizens to be lawful when their actions are found to be just or unjust depending, not on any objective reality, but on how others happen to feel about their actions at a specific time?

How serious is the Court about all of this dignity talk for s. 15 analysis? Apparently it is very serious. Justice Iacobucci specifically says that "The equality guarantee in s. 15(1) of the Charter must be understood and applied in light of the above understanding of its purpose."<sup>61</sup>

In their *Lex View Commentary* on this case, Iain Benson and Brad Miller point out that the crux of the error in the Court's judgment comes down to its interpretation of dignity.

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<sup>59</sup> Lon. L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969).

<sup>60</sup> When Fuller speaks of natural law, he is referring to this in a procedural rather than substantial sense. It has nothing to do with the content of the law (e.g. murder is wrong) but everything to do with how laws must be made and applied.

<sup>61</sup> *Law v. Canada* at para. 54.

Iacobucci is willing to evaluate s. 15 cases in light of this definition of dignity which he believes is in keeping with the “historical origins of the concepts enshrined in the Charter.” But as Benson and Miller emphasize, “the historical origins” of dignity in our laws “is radically different from the repackaged “dignity” which underlies the Court’s judgment.”<sup>62</sup> As will be argued later in this thesis, the Court’s definition of dignity in *Law*, as well as *Morgentaler* and *Rodriguez*, may show resemblance to *some* of the accounts of dignity through history, but that is a far cry from it being true to the “historical origins” of dignity in law. The origins of dignity as it is commonly used in Western society today are very diverse and even contradictory. Furthermore, defining dignity subjectively does not ring true to the belief of inherent human worth that is a basis for the Charter itself. How can rights be absolute if our dignity is subjective?

Given that the Court has placed such an enormous emphasis on the interpretation of human dignity for all future s. 15 cases, it is imperative to understand what this means. One important development under *Law v. Canada* is that s. 15 now has a double purpose of preventing any violation of human dignity and promoting equal recognition, respect, and consideration of all persons in Canadian society.<sup>63</sup> This is a rather enormous addition to the Charter’s interpretation. As Dierk Ullrich points out in his essay “Concurrent Visions: Human Dignity in Canada and Germany,” “As inextricably connected human dignity and equality now seem to be, this relation had not even been expressly acknowledged in *Andrews*, the Court’s first decision under s. 15(1) of the Charter.”<sup>64</sup> But that does not mean that it came out of nowhere. Ullrich quotes several major s. 15 cases which show a hint of

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<sup>62</sup> Iain Benson and Brad Miller, “Are Dignity and Equality Matters of “Feelings?”” *Centre for Cultural Renewal: Lex View Commentary 28.0 (1999)* <http://www.culturalrenewal.ca/lex/lex-28.htm>.

<sup>63</sup> As evidenced by the quote above, taken from *Law v Canada* at para. 51.

<sup>64</sup> Ullrich, “Concurring Visions,” 63.



this kind of language. Included in these is L'Heureux-Dubé's dissent in *Egan* where she said that "Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend their fundamental human dignity."<sup>65</sup> Ullrich explains that there were also signs of employing this use of dignity in *McKinney v. University of Guelph*, and *Miron v. Trudel*.<sup>66</sup> With *Law*, apparently the Court has united in its choice to go along with L'Heureux-Dubé's reasoning.

With both section 7 and 15 of the Charter now relying on the concept of human dignity, the concept becomes all the more important. That is why the Court devoted a lengthy paragraph to defining it. But already at the beginning of that paragraph it stated that "There can be different conceptions of what human dignity means."<sup>67</sup> The Court has chosen to use a vague term and to define it in a very subjective manner resulting in a large amount of uncertainty about how it will be interpreted in the future. It has given itself freedom to not be bound to any specific definition but rather to interpret the law according to the situation at hand. As a result, it is bound to lead to disagreement among the Justices about how it should be interpreted. As Ullrich points out, "Perhaps not surprisingly, the consensus seems to evaporate relatively quickly when it comes to testing the commitment to human dignity in the concrete setting of a discrimination claim."<sup>68</sup> He shows how this was already evident in *McKinney* (1990), where La Forest and L'Heureux-Dubé completely disagreed on its use.

Just as the *Morgentaler* ruling set a major precedent for defining dignity as autonomy, the *Law* decision likewise set a precedent for also equating dignity with equality. The more

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<sup>65</sup> Ibid, 65, quoting *Egan v. Canada* [1995] 2 S.C.R. 513 at 543.

<sup>66</sup> Ibid, 65.

<sup>67</sup> *Law v. Canada* at para. 53.

<sup>68</sup> Ullrich, "Concurring Visions," 65.

recent 2002 decision of *Gosselin v. Quebec*<sup>69</sup> illustrates that *Law v. Canada* was indeed a ground-breaking case for equality rights in Canadian constitutional law and that dignity has become the pillar around which equality law is being built. In coming to its ruling in *Gosselin*, the Court referred to dignity a whopping 119 times in its decision. The majority concluded that “An examination of the four contextual factors set out in *Law* does not support a finding of discrimination and denial of human dignity.”<sup>70</sup> The point is simply that the Court’s attempt to redefine equality in *Law* was successful. The repeated references to dignity in *Goesselin* testify to the central place of dignity as the new substance of s.15 analysis.

### **Implications of Equating Dignity with Autonomy and Equality**

From these cases it is readily apparent that the Court has chosen to interpret human dignity as an evocation for individual autonomy and at the same time to give it political weight by making it synonymous with equality. This may allow the Court to justify its more controversial decisions (relating to abortion, physician assisted suicide, and homosexual rights) but it is loaded with problems and internal contradictions.

Beginning with the Court’s reliance on autonomy in *Morgentaler*, *Rodriguez* and subsequent cases, there are many problems associated with its interpretation. When dignity is tied to autonomy, individuals who do not demonstrate autonomy are no longer seen as having dignity, at least to the same extent as others. Recall that in *Rodriguez*, the majority of the Court agreed with Sue Rodriguez’s claim that her disease was taking away her dignity.<sup>71</sup>

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<sup>69</sup> *Gosselin v. Quebec (Attorney General)* [2002] 4 S.C.R. 429, 2002 SCC 84.

<sup>70</sup> *Ibid*, 5.

<sup>71</sup> *Rodriguez v. British Columbia* at paragraph 137. See also David Brown’s extended discussion on this in ““Human Dignity,” Human Rights, and the End of Life,” 10.

Also recall Wilson's comments in the *Morgentaler* decision where she spoke of dignity as being respected for the choices that one makes. When dignity is seen as something that is not intrinsic to humanity but is instead a function of our choice-making, it is not just those with disabilities who risk being treated as though they do not have dignity. Neither is this only about the rights of the unborn. All humans are unable to make autonomous choices in their early years of life and many die in a similar way. It is no surprise that it is exactly these groups that are the first to be denied their right to life through abortion, infanticide, mercy killing, and euthanasia. At some point(s) in our lives every human is not autonomous and risks having their very life subjected to the choice of somebody else's convenience. British philosopher Derek Parfit goes so far as to say that even sleep or temporary unconsciousness results in someone ceasing to be a person!<sup>72</sup> And all of this is being done in the name of dignity. This is a remarkable contrast from the post-WWII context in which the concept of dignity was used to fight the crimes of genocide and murder. Now it is being used to favour the select group of humans who have power over the vulnerable because they can make choices as they see fit.

One example of this exploitation of the vulnerable is evident in the case of Robert and Tracy Latimer. In 1993 Saskatchewan farmer Robert Latimer killed his 12 year old daughter Tracy in the name of "mercy killing."<sup>73</sup> Because she was severely handicapped he did not think her life should continue so he put her in the cab of his pick-up truck and piped carbon monoxide from the exhaust into the cab and watched her die. There was no question that he was responsible for killing her. However, because he made the case that it was an act of

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<sup>72</sup> Robert Spaemann, *Persons: The Difference Between 'Someone' and 'Something,'* trans. Oliver O'Donovan (Oxford: Oxford University Press: 1996), 3 citing Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1985).

<sup>73</sup> BBC News, "Despatches," *BBC News*, Dec 2, 1997. <http://news.bbc.co.uk/2/hi/despaches/36224.stm>.

mercy, he was only found guilty of second degree murder (thought it was clearly premeditated) and given only a two-year sentence (of which only one would be spent in prison). Eventually his sentence was appealed and he received the minimum ten year sentence. Because it is minimum security he is able to complete apprenticeships in prison and still manages his farm. Apparently disabled people like Tracy are not protected by the law to the same extent as fully autonomous people because they do not demonstrate the same degree of autonomy as others. Understood this way, human dignity is not really for humans – it is dignity for autonomous agents.

In *Rodriguez*, the majority of the Court recognized that there must be a value in human life that goes beyond autonomy because autonomy can be used to end life itself. This value must be intrinsic because if it were simply some extrinsic property or characteristic (such as a physical feature), our society is in a lot of trouble. How do we decide which characteristics we will value? When these are lost as a result of disabilities or age, how do we treat those with less value? The liberal principle of equality is on shaky ground as long as there is no recognition of intrinsic value. But by granting that there is sanctity of human life, the Court has also begged the questions: Why do we have this intrinsic value and should it not apply to all humanity, regardless of age or ability?

The majority in *Rodriguez* wanted to emphasize that it understands sanctity in a non-religious manner. This is somewhat obscure as sanctity means “to be set apart” or “made holy” which generally points to a higher authority (i.e. God) who has set us apart from the rest of Creation (i.e. to be stewards of the earth and to reflect God’s image).<sup>74</sup> In choosing to adopt a non-religious interpretation of a concept that is clearly religious in origin, the Court is only asking to be barraged with questions; the leading question being whether something can

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<sup>74</sup> As described in the Biblical account of Creation in Genesis 1.

even be sanctified if it is only humans who sanctify it. If sanctity is not to be understood in a religious sense, then why bother using the word at all? Why not just say that the right to life cannot be used to take life?

It seems that the Court is using the principle of sanctity because it realizes that it will gain power from the connotations of the word, even if they have to deny its religious grounding. This is similar to what they are doing with the concept of human dignity. As Chapters Four and Five of this thesis will explain, human dignity is strongly rooted in the Judeo-Christian doctrines of the *Imago Dei* and the *Incarnation*. In his article “The Use of Religious Concepts in a Post-Religious Age: Canada’s Continuing Edwardianism,” Iain Benson explains that “Like literature at the hands of the Edwardian novelists, law and medicine still needed the “metaphors” of religion to give a kind of meaning or substance to their decisions – however hollowed out that substance had become.”<sup>75</sup> Alongside the reference to the sanctity of life in *Rodriguez*, Benson refers to the “Montreal Swinger’s Case”<sup>76</sup> and its rejection of morality as a guiding principle for law. These illustrate his argument that “The comforting language and terms from the age of religions are still employed until we are satisfied that we no longer need them and then we can unveil the new without its old trappings.”<sup>77</sup> If this is true, it is only time till the sanctity protection is rejected.

Given the way that dignity is being defined, it will not take long for the concept to be understood as useless since other concepts such as autonomy can easily replace it. Indeed,

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<sup>75</sup> Iain Benson, “The Use of Religious Concepts in a Post-Religious Age: Canada’s Continuing Edwardianism” Centre for Cultural Renewal: *CentreArticle 125*, (Sept 25, 2006) [www.culturalrenewal.ca](http://www.culturalrenewal.ca).

<sup>76</sup> This was actually two separate cases (*R. v. Kouri* and *R. v. Labaye*) which both dealt with the legality of promiscuous “swingers” clubs in Montreal. The Court ruled that these clubs are not harmful to Canadian society and as such should not be criminal.

<sup>77</sup> *Ibid.*

this is already being advocated strongly. In a short editorial in the *British Medical Journal*, Ruth Macklin, a professor of medical ethics makes this case:

Why, then, do so many articles and reports appeal to human dignity, as if it means something over and above respect for persons or for their autonomy? A possible explanation is the many religious sources that refer to human dignity, especially but not exclusively in Roman Catholic writings. However, this religious source cannot explain how and why dignity has crept into the secular literature in medical ethics. Nor can the prominence of the concept in human rights documents, since only a small portion of the literature in medical ethics addresses the links between health and human rights.

Although the aetiology may remain a mystery, the diagnosis is clear. Dignity is a useless concept in medical ethics and can be eliminated without any loss of content.<sup>78</sup>

How long will it take till this argument wins in the legal realm? The language of dignity and sanctity may carry a limited amount of power for the time being, but the more it gets used, the more it is being weakened. The problem is not that dignity itself is a useless concept. The problem is that the Court has emptied it of its philosophical and moral foundation and used it for its own purpose so that it can easily become useless.

As has already been explained in the introduction to this chapter and has been demonstrated by what the Court thus far has said about dignity, there is little agreement about what the concept even means. Although in *Law* the Court has laid out a single definition in the context of equality rights, it was simply trying to posit a workable consensus which has by no means been affirmed by time or by anything outside of the Court (let alone the judges themselves). Peter McCrudden, Professor of Human Rights Law at Oxford, makes a good point in his critique of how courts around the world, such as Britain, are being influenced by our Supreme Court's use of dignity. His condemnation of this is well articulated:

My response, put briefly, is that the use of "dignity" does *not* provide a universalistic, principled basis for judicial decision-making in the human rights context. There is little common understanding of what dignity requires across

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<sup>78</sup> Ruth Macklin, "Dignity is a Useless Concept" *British Medical Journal* 327 (2003): 1419-1420.

jurisdictions. The meaning of dignity is therefore highly context specific, varying significantly from jurisdiction to jurisdiction and (often) over time within particular jurisdictions. Indeed, instead, of providing a basis for principled decision-making, dignity seems open to significant judicial manipulation, increasing rather than decreasing judicial discretion, and that is one of its significant attractions to both judges and litigators alike. Dignity often provides a convenient cover for the adoption of interpretations of human right guarantees that appear to be intentionally, not just coincidentally, highly contingent on local circumstances.<sup>79</sup>

To back up his critique of the way that human dignity is being inappropriately used by courts, McCrudden provides a taxonomy of human dignity and then demonstrates how it is being used very differently from one country to the other. For example, there is the understanding of dignity as a basis for rights, or of dignity itself as a right (which is again divided among those who see it as a positive right and a negative right against the state), or even of dignity as a basis for limiting rights (such as outlawing dwarf-throwing in France and Germany).<sup>80</sup> McCrudden's argument is that because of all of these differing accounts of dignity, it is understandable that there will be a lot of variation in how different judges and courts interpret dignity in their context. He provides a number of examples to show just how much separate legal jurisdictions interpret dignity differently. In regard to whom dignity is attributed to, he writes that in Israel it applies both to the living and the dead. Although the foetus has no protection of dignity in the United States (or Canada), it is given that protection in Germany. McCrudden even quotes a source which claims that in Hungary dignity is applied to non-humans as well, in some cases.<sup>81</sup>

Beyond the disagreement over its meaning, the problem with the attempt by the Court in *Law* to equate human dignity with equality makes it so subjective that it can be invoked any time a person *feels* that they are not being treated with dignity. The definition is so broad

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<sup>79</sup> McCrudden, "Human Dignity," 21.

<sup>80</sup> *Ibid*, 22-24.

<sup>81</sup> *Ibid*, 28.

and far-reaching that it risks becoming meaningless or manipulated. This is reflected by Justices Arbour and LeBel in their dissent in *Lavoie v. Canada* when Arbour wrote that “we might legitimately take the fact that he or she had launched a s. 15(1) Charter challenge, by itself, as sufficient evidence that the claimant felt his or her dignity had been adversely affected by the law.”<sup>82</sup> As McCrudden pointed out, dignity, as defined by the Court, is a concept that lends itself to manipulation rather than achieving principled decisions. The Court admits that the concept is vague and yet attaches great legal significance to it as if its meaning is clear. As the rest of this thesis will make more than clear, our secular world is far from united on its understanding of dignity. Yet, by attaching such significance to the concept, the Court is able to read its own meaning into dignity and therefore use it as a means to achieve a decision that is in keeping with its own account, rather than an account that is objectively known and concrete. The Court then has the authority to determine what is meant by societal principles (if such things exist) and use those principles to give the vague concept of dignity meaning. It is a vicious circle in which dignity becomes simply a tool to give judges discretion to interpret cases according to principles that it believes society has (or should have).

The problem with the Court’s definition is shared by opposite sides of the jurisprudence theoretical spectrum. Emily Grabham, a professor at Kent University and an advocate for homosexual rights is an example of opposition to the Court’s direction in *Law*. In an article devoted to the case, she provides many reasons why human dignity is a very weak and poor concept for protecting equality. She states:

current representations of social inequality in terms of systemic and interlocking discrimination undermine the potency of such an inherently individualistic concept. ‘Human dignity’, furthermore, has no coherent internal dynamic: it is analogous to

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<sup>82</sup> Ullrich, “Concurring Visions,” 68, quoting *Lavoie v Canada* [2002] SCC 23 at para 81.



the ‘empty’ concept of equality identified by Peter Westen being fundamentally a ‘shell concept’ open to diverse, but usually majoritarian interpretations that do not challenge the status quo.<sup>83</sup>

As an example, Grabham points to Gonthier’s dissent in *M v. H* where he used what Grabham calls “a narrow, individualistic reading of human dignity to avoid addressing the inequalities resulting from the failure of the Family Law Act to address same-sex relationships.”<sup>84</sup>

Grabham also criticizes the “individualistic” reading of human dignity by the Court, something which she believes has led to “a number of problematic statements” that result from losing sight of the “social context in which any analysis of discrimination should be conducted.”<sup>85</sup> She concludes this point by writing that “it appears that continued reliance in the section 15 test upon concepts such as ‘human dignity’ and ‘individual dignity’ can serve to reinforce the oppressive norms which the Canadian concept of substantive equality has, so far, attempted to subvert.”<sup>86</sup>

This critique of human dignity is very surprising, as it demonstrates that there are already strong divisions within the progressive camp of Charter interpretation about how dignity can be used. On the one hand, it is relied on to reach decisions such as removing restrictions on abortion in *Morgentaler*. On the other hand, this individualism has dangers which are picked up on by two very different groups; those promoting a progressivist interpretation of equality rights (such as Grabham), and those who fit into a communitarian or social conservative perspective (who are against the individualism *and* the broad understanding of equality).

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<sup>83</sup> Emily Grabham, “Law v Canada: New Directions for Equality Under the Canadian Charter?” *Oxford Journal of Legal Studies* 22, No. 4 (2002): 654.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*, 655.

<sup>86</sup> *Ibid.*

Moving beyond the theoretical, understanding human dignity in a subjective rather than objective manner once again challenges the important value of dignity being intrinsic and inalienable. What happens when somebody does not care how they are treated (i.e. a willing participant in types of illegal pornography), or no longer even wants to live (assisted suicide/euthanasia)? Since it is their autonomous choice that defines their dignity, there is no reason why society has an obligation to promote their s. 15 interests. It would be interesting to see how the Court would rule on *Rodriguez* if *Law* had already been in place. It could be argued that not allowing Rodriguez an assisted suicide would be a denial of her s. 15 right to equality because it demeans her dignity in a manner that other individuals do not face because they are capable of committing suicide themselves. Although this argument was advanced in *Rodriguez*, it would be given all the more credence in light of the *Law* ruling that protecting dignity is the function of equality rights.

## **Conclusion**

Although the concept of human dignity has been relied on to provide a normative foundation for human rights, the disagreement and subjectivity underlying it continues to lead to contradictions and controversy within Canadian constitutional law. The problem is that the Court continues to rely heavily on it, despite the very different ways that it is being interpreted. Beginning with *Morgentaler*, the Court decided that dignity (and legal consideration) belonged to autonomous individuals. As such, it gutted the human from human dignity and shifted back towards the ancient Roman definition of *dignitas* as privilege for the nobles. Defining dignity like this will not be able to ground universal human rights because it is subjective (who defines what gives or takes away dignity?) and does not apply

to many humans. With *Law v. Canada*, the Court has defined human dignity in a very subjective manner and made it an integral part of s. 15, resulting in an enormous burden being placed on the shoulders of such an obscure concept. This subjective nature also means that it has become a legal concept that can be used by almost any individual for any cause. By placing such a burden on an already weak concept, the Court has set all the conditions that are necessary for the demise of dignity as a valuable and necessary legal concept. In addition, it has opened the “concept” of dignity up to manipulation as judges can evoke the “concept” by reading in their own meaning and consequently achieving their own outcome. What is needed is a philosophically grounded explanation of a dignity that is truly human and can also provide an objective moral fabric for the Charter in a way that is applicable to our secular nation.

## Chapter Two

### *Assisted Human Reproductive Technologies: A Case Study on Human Dignity in Canadian Public Policy*

#### **Introduction**

Canada's legal realm may be infatuated with the concept of human dignity, but is there any evidence that this concept is also being applied in Canadian public policy? If so, is it functioning in the same way that the Supreme Court has applied it - limiting it to a subjective guarantee for autonomy and equality? There is no uniform body of information, such as court decisions, to analyze what role this concept is playing in our policy making process. Policy experts explain that discourse exists on many levels and comes from many (often competing) disciplines and groups. It can be found in everything from the anarchy of blogs to official records from Parliament's Hansard. The breadth of this discourse is much too vast to be summarized in a single thesis. As a result, this chapter will focus on the increasingly significant policy issue of assisted human reproductive technologies as a case study for analyzing the role that human dignity fulfills in Canada's public policy discourse. More specifically, I will examine the discourse from the Parliament-appointed Royal Commission on New Reproductive technologies as well as representative discourse from the scientific, legal and ethical disciplines (who function as stakeholders in this policy debate).

This chapter will demonstrate that on their own, each of the stakeholder disciplines struggles with a limited perspective that fails to uphold the uniqueness and intrinsic value of *human* life. The limited perspective of each discipline means that an interdisciplinary<sup>87</sup>

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<sup>87</sup> Interdisciplinary discourse involves looking past traditional boundaries between disciplines and benefitting from the knowledge gained by integrating two or more disciplines. It must be distinguished from

approach is essential if human dignity is to be applied to Canadian public policy. This chapter will also explain how the Royal Commission, which was open to public participation, has provided a good example of how to ensure that each discipline conforms to principles or values which the public identifies as important but which these disciplines would otherwise have little regard for. Just as was evident in Chapter One's examination of Canadian constitutional law, Canadian public policy discourse reveals that not only is there great confusion about what human dignity means and to whom it applies, an account of dignity is being advanced which is not truly human (i.e. it also privileges autonomous individuals) and which promotes individualism at the expense of community responsibility.

New reproductive technologies are the focus of this chapter for two main reasons. The first reason is that Canada, in its 2004 *Assisted Human Reproduction Act*, has recently struggled with adopting legislation to regulate these technologies. But this does not mean that the issue is settled. These technologies are changing daily and the government and courts are forced to keep up with these changes. This will be an issue that Canadian policy makers will have to watch for many years to come. Second, experimentation on human beings and the social experimentation relating to the human reproductive system go to the heart of difficult issues surrounding human dignity. At what point does human life deserve full protection under the law? What are we doing to the human race when we attempt to play God and conquer nature? The repercussions are significant. C.S. Lewis understood this already in his work *The Abolition of Man*. "Human nature will be the last part of Nature to surrender to man. The battle will then be won. We shall have 'taken the thread of life out of the hand of

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transdisciplinarity which involves stepping outside of the disciplines (possibly even breaking them down) to create a new meta-discipline with its own meta-language, resulting in a holistic understanding of the issue/facts.

Clotho' and be henceforth free to make our species whatever we wish it to be. The battle will indeed be won. But who, precisely, will have won it?"<sup>88</sup>

### **The Royal Commission on New Reproductive Technologies: Forcing Interdisciplinarity**

The past two decades have seen a number of attempts to deal in an official manner with the emerging technologies surrounding human reproduction and experimentation on humans. And there is good reason for this. Scientific research has been making stunning discoveries ranging from the first successful in vitro fertilization in 1978 to the cloning of Dolly the sheep in 1997 and the advancements in stem cell research that are in the news almost daily now. But the scientific method is empirical and does not possess the answers to questions about which technologies should and should not be pursued. These technologies must be analyzed from the perspectives of other disciplines, most notably ethics and the law. But are consultations with the stakeholder disciplines enough to reach a consensus about which technologies should be made legal or illegal? Time has demonstrated that the disciplines possess very limited, and often competing, guidelines for decision making which have resulted in little progress and many clashes. In the midst of all of this, foundational principles (such as the inviolability of human life) are only paid lip service to or are neglected altogether.

In 1989 the federal government appointed the Royal Commission on New Reproductive Technologies,<sup>89</sup> which released its final report in 1993. The federal government gave the Royal Commission the mandate to “inquire into and report on current and potential medical and scientific developments related to new reproductive technologies, considering in

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<sup>88</sup> C.S. Lewis, *The Abolition of Man* (San Francisco: Harper Collins, 1944), 59.

<sup>89</sup> Hereafter Royal Commission.

particular their social, ethical, health, research, legal and economic implications and the public interest....”<sup>90</sup> Fulfilling this mandate requires an interdisciplinary analysis and opportunity for participation from the public. The Royal Commission analyzed reproductive technologies from a broad perspective (incorporating public priorities as well) rather than limiting their inquiry to the scientific, legal, or ethical perspectives. Throughout the Final Report, constant reference is made to the interest of society, in an effort to remind the reader that the commission has fulfilled its calling to consult with experts and every-day citizens alike.

In the *Summary & Highlights* of the Final Report, the Royal Commission explains that its recommendations were reached as a result of three considerations. The first is ethical principles; the second is “Canadian values as expressed to us in our consultations and through our surveys....” and the third is a “conviction that decisions about offering medical procedures should be evidence based.”<sup>91</sup> The second of these considerations suggests once again that the Royal Commission attempted to benefit from the expertise of many disciplines alongside the public in general. Its discussion seems to be built on consensus building and seeking common denominators from a number of disciplines and from a cross-section of Canadian society.

But how exactly did the commission decide which principles should be used to assess the reproductive technologies? The Final Report details how the Royal Commission reached its guiding principles. It mentions that it considered two approaches, the first being to rely on

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<sup>90</sup> Royal Commission on New Reproductive Technologies, *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies*, vol. 1 (Ottawa: Minister and Government Services Canada, 1993), 2.

<sup>91</sup> Royal Commission on New Reproductive Technologies, *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies, Summary and Highlights* (Ottawa: Minister and Government Services Canada, 1993), 4-5.

one overarching ethical theory (such as natural law or utilitarianism) and the second being to pull together an ethical consensus and reflect that consensus in its eight guiding principles. It rejected the first approach, with one reason being that overarching ethical theories often are premised on the “understanding of human nature that sees people as individuals first and foremost, protecting their own interests against the encroachment of others. Yet human beings are connected to one another in families, communities, and social bonds of all sorts.”<sup>92</sup> The second option of adopting eight principles was chosen because “This approach seeks to prevent adversarial situations whenever possible; yet the guiding principles are in place to act as a sort of bottom line of social justice when all else fails.”<sup>93</sup>

As a result of its consultations and after considering a variety of ethical systems for making decisions, the Royal Commission chose to adopt the concept of “care” as the standard for eight ethical guidelines. It explains how it reached its decision to use care as a standard to measure all reproductive technologies against. Note the importance of dignity (understood more broadly than autonomy) at the end of the quote.

Although there are differences of emphasis among the ethical thinkers from whose work we have drawn, the ethic of care holds, broadly speaking, that moral reasoning is not solely, or even primarily, a matter of finding rules to arbitrate between conflicting interests. Rather, moral wisdom and sensitivity consists, in the first instance, in focussing on how our interests are often interdependent. And moral reasoning involves trying to find creative solutions that can remove or reduce conflict, rather than simply subordinating one person’s interests to another. The priority, therefore, is on helping human relationships to flourish by seeking to foster the dignity of the individual and the welfare of the community.<sup>94</sup>

In this quote, human dignity is directed towards the flourishing of human relationships and listed as the top priority alongside the welfare of the community. Unlike the Supreme Court’s

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<sup>92</sup> Royal Commission, *Final Report* vol. 1, 18. This suggests that the Royal Commission already had an idea of which guiding principles it wanted.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*, 52.



reasoning that we have examined in the first chapter, individual autonomy is not used as a trump card over the interests of the community.

The Commission notes that “We thought it was more useful to focus on what these [traditional ethical] theories have in common, including a commitment to a moral point of view.”<sup>95</sup> They believe that each of the theories includes a moral perspective that promotes equal respect for persons: “From a moral point of view, all people matter in and of themselves.” Once again, we can see the influence of Kant’s moral philosophy. They later add that going in this direction “requires sympathetic attention to people’s interests and circumstances, understanding how things look from their perspective, and taking account of their well-being. The ethic of care resonates with the moral point of view common to all ethical theories.”<sup>96</sup> Through the concept of care, the Royal Commission thinks it can best promote unity and agreement from competing stakeholders. This is because the ethic of care is employed by a wide variety of groups. The Commission explains that it has drawn its understanding of care from many different contexts including secular mainstream ethics, religion, and feminist theory.<sup>97</sup>

Understanding how and why the Royal Commission employed the concept of care is crucial. As this chapter will explain, disciplines on their own show little consideration for some principles which the public value greatly because these principles give meaning to life. Care is one example, but this approach can apply to the Judeo-Christian account of dignity as well.<sup>98</sup>

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<sup>95</sup> Ibid, 51.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> The Judeo-Christian account will be explained in-depth in Chapter Four.

Flowing from the ethic of care comes eight guiding principles. Like the Supreme Court's fascination with autonomy, the Royal Commission also lists autonomy as its first guiding principle. It qualifies this by stating that "Individual autonomy does not include the freedom to harm others, to use force to coerce them, or to undermine social stability."<sup>99</sup> This is followed by the guideline of equality, which is also in keeping with the way that the Supreme Court has made dignity synonymous with autonomy and equality. But the Royal Commission departs from this narrow reading of care beginning with the third principle which is "respect for human life and dignity." They describe this by saying that

All forms of human life (and indeed tissue in general) should be treated with sensitivity and respect, not callousness or indifference. Although the law does not treat zygotes, embryos, and fetuses as persons, they are connected to the community by virtue of their origins (having been generated by members of the community) and their possible future (their potential to become members of the community).<sup>100</sup>

The Royal Commission realized that when Canadians demand that humans be treated with dignity, it goes beyond simply having the freedom to make choices about our own lives. It requires an attitude of respect and responsibility towards human life itself, and not only those lives which exercise individual choice.

Along the same lines as respecting human dignity, the fourth principle of the Royal Commission is protection for the vulnerable. This goes further than ensuring informed consent. It states that "In the case of power imbalance where one party is open to exploitation, this should be given special consideration. This can arise from socioeconomic status, membership in a minority group, or disability, and society has a responsibility [to] safeguard individuals who are vulnerable."<sup>101</sup> The remaining ethical principles include the non-commercialization of reproduction, the appropriate use of resources (recognizing that

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<sup>99</sup> Ibid, 53.

<sup>100</sup> Ibid, 55.

<sup>101</sup> Royal Commission, *Summary and Highlights*, 8.

public resources are limited), accountability, and balancing individual and collective interests. It is this last point which differs so starkly from the perspective of the legal discipline (as will be demonstrated later in this chapter). The Royal Commission emphasized that individual interests do not always trump the well-being of society, even in a liberal society like Canada. Framing this in the language of rights is not the most helpful way to deal with it. Rights often overlap and are associated with responsibilities which are essential for the rights to survive.<sup>102</sup> The Royal Commission states that rights “can be understood only within a larger context of societal limitations and individual responsibilities.”<sup>103</sup>

The concept of care can apply equally to each discipline that engages with the issues of reproductive technologies. The Royal Commission used this concept as a benchmark, a means to force the disciplines to explain how their discourse furthers the ethic of care to society. This allowed the Royal Commission to get around the difficulty that is usually posed with interdisciplinarity – that each discipline wants to set the agenda with the issues that it believes ought to be used as standards and goals. By using the concept of care as a policy benchmark, the Royal Commission forced disciplines as diverse as law and the research sciences to shift their mode of discourse to a language that is communicable to, and in the interest of, general society. This reveals that the problems associated with getting disciplines to work together do not mean that the disciplines cannot be forced to change their perspective if they have an interest in being part of the policy process. It also shifts the power balance from small groups of experts towards the priorities of society in general.<sup>104</sup> Granted, there are no set of values which every member of society will be supportive of. The point is that there seems to be a general consensus of values that citizens hold to (such as the Golden Rule,

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<sup>102</sup> *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies*, 61.

<sup>103</sup> *Ibid*, 61.

<sup>104</sup> This will be made clearer after the following discussion of each of the disciplines’ priorities.

fairness, and truth) and want to see reflected in how governments manage their lives. At the same time, demanding a benchmark promotes interdisciplinarity because it requires that each discipline shift their mode of discourse so that individuals outside of their disciplines can understand them. When each of the disciplines does this, not only can the public understand the discipline, but each discipline can better understand the other stakeholder disciplines and hopefully benefit from this increased understanding.

The need for establishing a benchmark independently of the disciplines becomes all the more apparent after examining the guidelines of each of the disciplines themselves. This is especially true if the concept of human dignity is going to be applied across the board in Canada's public policies. The benchmark of care also serves as a critique of the argument that morality should not be legislated. The Royal Commission recognized that the moral principle of care needed to be legislated to protect those things that give meaning and worth to human life.

### **The Stakeholder Disciplines**

#### ***The Sciences (Including Research Science, Medicine, and Biotechnology)***

The scientific disciplines noted above have been responsible for many of the technological breakthroughs in the past few decades which are giving individuals the choices that they now have when it comes to reproductive technologies. For example, in vitro fertilization (IVF) is making it possible for previously infertile couples to be able to have their own children. And pre-implantation genetic diagnosis (PGD) is providing the option for parents to pick and choose which embryo they want to carry to term based on the genetic make-up of the embryo. The reasons why the sciences have pursued these developments are numerous, including financial gain, the desire to conquer natural boundaries which have

limited science, and altruistic motives such as fighting disease and helping families to have children.

But what guides these disciplines as they make decisions about what research should be pursued and where the research money should be spent? Even with altruistic motives, should free rein be given to pursue anything that is medically possible? There was no comprehensive law regulating reproductive technologies, such as cloning, prior to Canada passing legislation restricting specific technologies with its *Assisted Reproductive Technologies Act* in 2004.<sup>105</sup> This legislation banned human cloning, payment for surrogacy, sex selection, and creating human life for the purpose of experimentation, among other things.<sup>106</sup> The need for legislation became all the more evident with increasing public awareness of the importance of setting down some restrictions to prevent Frankensteinian technologies from being developed in Canada. For example, the public was forced to consider the possibility of human cloning as a result of the news that the Raelian cult in Quebec claimed to have cloned a human in 2002.<sup>107</sup> But legislation on its own is not enough, since new scientific discoveries are made daily, resulting in gaps in legislation. Furthermore, it is impossible for the law to anticipate what direction research will lead.<sup>108</sup>

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<sup>105</sup> Since the Royal Commission's completion, there have been four attempts by the federal government to introduce legislation (C-47, C-247, C-13, and C-6) to address the issues brought forward by the Royal Commission and the subsequent scientific developments. After previous attempts died on the order paper, in 2004 Bill C-6 (a reincarnation of C-13) received Royal Assent, so that Canada now has a comprehensive law to deal with these technologies.

<sup>106</sup> Monique Hebert, Nancy Miller Chenier, and Sonya Norris, "Legislative Summary: Bill C-6 Assisted Human Reproduction Act" (Ottawa: *Library of Parliament*, 2004), [http://www.parl.gc.ca/common/bills\\_ls.asp?Parl=37&Ses=3&ls=c6](http://www.parl.gc.ca/common/bills_ls.asp?Parl=37&Ses=3&ls=c6).

<sup>107</sup> CTV News, "Raelian Group Claims Birth of First Human Clone," December 27, 2002, [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1040959662794\\_13///?hub=TopStories](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1040959662794_13///?hub=TopStories).

<sup>108</sup> In an effort to stay up to speed with the technologies, part of the recent law included a mandate for a new regulatory agency (the Assisted Human Reproduction Agency), which was launched in 2007 and has a staff to monitor the corporations and organizations that are working with reproductive technologies. This comprehensive response is a huge undertaking by the Canadian government and it is limited to scientific research on reproductive technologies (which are only just emerging in the public consciousness).

It is helpful to look at some of the guidelines which do exist within the research sciences to examine what role dignity plays. In Canada, the Canadian Institutes of Health Research (CIHR), together with the Natural Sciences and Engineering Research Council (NSERC) and the Social Sciences and Humanities Research Council (SSHRC) have developed a joint policy on experimentation involving humans.<sup>109</sup> In this tri-council policy statement, human dignity is given central acknowledgment. Prior to listing the ethical guidelines, the policy includes a section entitled “A Moral Imperative: Respect for Human Dignity.” This section explains what it means by respect for human dignity. “First, it translates into the familiar moral imperative of respect for human dignity. It is unacceptable to treat persons solely as means (mere objects or things), because doing so fails to respect their intrinsic human dignity and thus impoverishes all of humanity. Second, it translates into the requirement that the welfare and integrity of the individual remain paramount in human research.”<sup>110</sup> In essence, respecting dignity for these agencies means treating humans as an end in themselves and never as a means to an end. This language of treating humans as an end in themselves is similar to the way that Justice Wilson defined dignity in *R. v. Morgentaler*, as explained in Chapter One.

Looking specifically at the content of the ethical guidelines reveals that “respect for human dignity” not only functions as the first guideline but also is the basis for each of the following guidelines. It states that “The cardinal principle of modern research ethics, as discussed above, is respect for human dignity. This principle aspires to protect the multiple and interdependent interests of the person—from bodily to psychological to cultural

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<sup>109</sup> Government of Canada - Interagency Advisory Panel on Research Ethics, “Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans,”

<http://www.pre.ethics.gc.ca/english/policystatement/policystatement.cfm>.

<sup>110</sup> Ibid.

integrity.” Respect for free and informed consent is the second guideline, and this reveals that the agencies are continuing with the recent trend of tying human dignity to the principle of autonomy. It means that individuals should be able to make their own decisions freely. This is followed by the requirement for respect for vulnerable persons. This guideline explains that “Respect for human dignity entails high ethical obligations toward vulnerable persons—to those whose diminished competence and/or decision making capacity make them vulnerable.” It is interesting that these agencies recognize that human dignity does not apply only to those who demonstrate autonomy. It also applies to those in society who are vulnerable and easily exploited. “Children, institutionalized persons or others who are vulnerable are entitled, on grounds of human dignity, caring, solidarity and fairness, to special protection against abuse, exploitation or discrimination.” This explains why the policy later details special requirements for aboriginal peoples and women.

Although this protection for the vulnerable is commendable, it begs the question of why these agencies believe that everybody has dignity. On the one hand it seems to support the belief that dignity belongs to humans. But at the same time it does not explain why only born humans should qualify as having the full benefits of being treated with dignity. This discrepancy is apparent in section 9.4 of the policy which deals with embryonic research. After explaining that it is basing its policy on the recommendations of the Royal Commission (which is another reminder of the importance of the Royal Commission’s guidelines and findings) it states its policy that embryos may not be created specifically for research purposes. Furthermore, they require that “Research involving human embryos takes place only during the first 14 days after their formation by combination of the gametes.”<sup>111</sup> This again begs the question why they are willing to give moral consideration to embryos

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<sup>111</sup> Ibid, Section 9.4(d)

after 14 days and not prior. In another context, it might also raise the question as to why there is no discussion of the glaring discrepancy with Canada's laws which permit abortion during the entire duration of a pregnancy. It is difficult not to see the 14 day limit as arbitrary.

Although the tri-council policy statement does not emphasize reason and autonomy to the degree that the Supreme Court has (and thereby deny consideration for the unborn), it fails to answer the important question of why humanity should be treated with dignity and to whom this applies. Rather it seems to be echoing the prevalent moral standards of our pluralist country while ignoring the need to base these standards on anything concrete. Lip service is paid to the concept of dignity without providing the necessary grounding to sustain it or even explain what it really means in the context of the research sciences.

The remaining guidelines include respect for privacy and confidentiality, respect for justice and inclusiveness, balancing harms and benefits, minimizing harm, and maximizing benefits. This emphasis on countering harm is indicative of the strong connection that this policy maintains to classic liberal ethics. The harm principle may not be the only criterion for research, but it maintains a central place.

It is commendable that this tri-council policy statement employs a much broader ethical perspective on research involving humans, with dignity playing the central role. But it is important to keep in mind that the policy is limited in its jurisdiction. There are scientists who go about their research unrestrained because it is being done privately rather than through a university or similar public institution. Many scientists are becoming more brazen in their demand to do away with restraint and let research follow its own course. A recent *Washington Post* article provides the extreme example of James Watson who had won a Nobel Prize for his research on the structure of DNA. Watson is cited in the article for stating



that “it would be great” to use genetic selection to eliminate ugly women and that it should be acceptable for women to do a genetic test of their unborn child so that they could abort it if the DNA reveals that he or she is a homosexual.<sup>112</sup> This no holds barred mentality is gaining ground in the political circles as well. The same *Post* article sites John Kerry for having promised in the last Presidential election to “tear down every wall” that restricts medical research.<sup>113</sup>

Back in Canada, Timothy Caulfield, the Research Director of the Health Law Institute at the University of Alberta, advocates for a much more unrestricted view of how these technologies should be regulated. In an article in *The Lancet* in July of 2004, shortly after Canada officially passed its reproductive technology legislation, Caulfield wrote disapprovingly of our country’s decision to criminalize therapeutic cloning. He suggests that the regulations may even infringe the right of research scientists to freedom of expression, as guaranteed in the *Charter of Rights and Freedoms*.<sup>114</sup> His point is that science must be given freedom to pursue its ends, even if members of society have a problem with it. He writes that “The mere fact that an area of research appears to offend a particular social convention or world view is, in general, not enough to justify government interference with that research activity.”<sup>115</sup> If we live in a free society, that freedom should apply just as equally to the sciences, even if their successes may make the public uncomfortable.

Caulfield and many other scientists acknowledge that some limits are acceptable but that we must be very careful to not impinge on scientific freedom and consequently stifle progress. He argues that banning a specific technology or field of research is a policy

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<sup>112</sup> Assuming that there is a genetic cause for homosexuality.

<sup>113</sup> Michael Gerson, “The Eugenics Temptation,” *The Washington Post*, Oct. 24, 2007, sec A19.

<sup>114</sup> Timothy Caulfield, “Scientific Freedom and Research Cloning: Can a Ban Be Justified?,” *The Lancet* 364, (July 10, 2004) <http://www.biostrategy.gc.ca/CMFiles/caulfield249MHG-8232005-6634.pdf>, 124.

<sup>115</sup> *Ibid*, 125.

instrument that goes far beyond what is necessary, especially considering the fact that public opinion changes on issues as more research is done. Many objections to these technologies are morally based. Caulfield and many in the research sciences have little use for these objections, as they are imposed from outside the discipline. For example, Caulfield believes that the principal objection to cloning tends to come from those who believe in the moral value of the foetus, something which he believes should not be allowed to trump all other voices at the table in a pluralist country like Canada. He explains that

In countries with a homogeneous religious perspective that is an accepted part of the political system, a faith-based approach to science policy may, at least from a national perspective, be tolerable. But in liberal democracies that have embraced a more pluralistic view of society, such an approach is untenable—particularly when viewed through the lens of scientific freedom.<sup>116</sup>

At the bottom of Caulfield's argument (and many other scientists) is that since our society does not officially hold to any absolute moral convictions about the value of unborn life, it is unjust to restrict the research sciences from performing cloning of embryos for therapeutic purposes. This can be applied to other issues involving restrictions on research as well.

It is common to hear the argument that pure science is "value neutral" and is able to make decisions strictly through analytical reason. In an article entitled "Human Dignity as a Criterion for Science Policy", Caulfield and Audrey Chapman lash out against the way that ethicists use the language of dignity and impose it on the sciences. They claim that the problem is not with dignity itself. Instead, the problem is that dignity is a vague concept and used as a trump card on important scientific progress. "This lack of clarity has the potential to hurt policymaking and, in the long run, degrade the possible substantive value of the

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<sup>116</sup> Ibid.

principle of human dignity.”<sup>117</sup> That sounds very supportive of human dignity but begs the question of what they really mean by dignity and how it is human.

How is it possible to achieve a consensus between the research sciences and other disciplines such as bioethics? If there is no consensus among the disciplines on what dignity means, how is interdisciplinarity going to be possible? Caulfield and Chapman believe that dignity can be constructive to interdisciplinarity as long as “dignity [is] used as a facilitator of policy debate, instead of a ‘door closer.’” They further explain that “This means the concept of human dignity should not be used as a slogan or as part of a mere assertion of harm. It also means that when human dignity is used as a grounding for science policy...as much specificity as possible should be provided.”<sup>118</sup> Although they are just as guilty of using a definition of dignity as a slogan that agrees with their objectives, they make the good point that for interdisciplinarity to be possible, each discipline must account for what exactly it means when it speaks about human dignity. Unfortunately, it has already been made clear that the natural, medical, and social sciences have no unified position on this, and the policies they do put forward reveal glaring inconsistencies about the very nature of human dignity and to whom it belongs.

### ***The Legal Discipline: The Law Reform Commission’s Paper on Human Experimentation***

The legal discipline has an even more limited account of dignity than the research sciences when it comes to looking at reproductive technologies and establishing guidelines. Since the Law Reform Commission<sup>119</sup> was formed by an Act of Parliament to review

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<sup>117</sup> Timothy Caulfield and Audrey Chapman, “Human Dignity as a Criterion for Science Policy”, *PLoS Medicine* 2(8), e244, (2005): 101.

<sup>118</sup> *Ibid.*

<sup>119</sup> Hereafter Law Commission.

Canada's laws from a legal perspective, studying its reports will provide a limited indication of where the legal discipline stands on these issues.<sup>120</sup> In 1989 the Law Commission released its Working Paper 61 with the title of *Biomedical Experimentation Involving Human Subjects*. As a result of its ethical and legal analysis, this paper encouraged the pursuit of scientific progress through experimentation, while also proposing bans and limits on a number of activities which contravened the Law Commission's ethical guidelines. The Report provides many examples of how the Law Commission is as zealous in promoting scientific research as the research sciences. For example, it acknowledges that some people may have religious, philosophical, or ethical arguments against experimentation. But it is quick to dismiss this with its view that in most cases the ends of the research justify the means. "In our opinion the problem does not lie in the *legitimacy* of experimentation as such, but in its *legality*. Once we make the basic assumption that human experimentation is useful and desirable, the next step is to ask ourselves, keeping in mind all the social values and constraints imposed by the legal system, under what conditions it can be considered to be legal."<sup>121</sup> Already here a parallel is visible between the Commission's account of dignity and the way that the Supreme Court has tied dignity to autonomy. Dignity is understood as purely a legal concept and no explanation has been provided to distinguish it from autonomy.

The Law Commission acknowledges that choosing not to ban all research outright means that regulations are required. It correctly states that "The difficulty lies in the search for effective controls and that development of legal and ethical standards that reflect what our

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<sup>120</sup> I acknowledge that the legal discipline is very diverse and the findings of the Law Commission cannot be understood as representative of the views of the entire discipline. Furthermore, Chapter One has already revealed how the perspective of the Supreme Court alone has changed greatly over the past two decades. A Law Commission report from 1989 will not necessarily continue to represent the legal discipline today. Having said that, this report can provide a helpful indication of how the legal community tends to deal with the subject of human worth. In my research I have not come across any indication that it has changed its view since then.

<sup>121</sup> Law Reform Commission of Canada, *Biomedical Experimentation Involving Human Subjects: Working Paper 61*, (Ottawa: Law Reform Commission of Canada, 1989), 23.

society considers morally acceptable.”<sup>122</sup> Which principles and guidelines will the Commission look at to make its recommendations about which technologies and research should be regulated or banned? Although the preceding quote seems to indicate that the Law Commission is attempting to look beyond the legal discipline, its guidelines reflect the reality that societal values and ethics are only peripheral concerns. It looks to the *Belmont Report* of the National Commission for the Protection of Human Subjects of Biomedical Research in the United States for its guidelines and states that “The Commission fully supports these three principles and considers them basic to the reforms it proposes.”<sup>123</sup>

The first of these three principles is “respect for the dignity and autonomy of human beings.” What does the Commission mean by this?

Suffice it to say that the legally recognized principle of the dignity of the human being prohibits degrading or humiliating experiments or tests. By virtue of their personal autonomy, legally competent persons are absolutely free to make decisions concerning their own bodies, and in particular to agree to participate in an experiment. Respect for this autonomy presupposes free, informed consent and protective measures for those whose decision-making ability is affected by age or mental capacity. There can be no question of permitting experimentation on human beings without their consent or that of a person whom the law has empowered to give consent.<sup>124</sup>

That is all that the Law Commission provides to explain what it means by dignity. Apparently it is inextricably bound to the principle of autonomy and the necessity for individuals to consent to any experimentation on them. No mention is made about any sort of intrinsic value of humanity. This view is evident in all of the recommendations from the Law Commission. Research hinges on the consent of the freely choosing individual. Free choice is elevated as the supreme ethical consideration.

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<sup>122</sup> Ibid, 2.

<sup>123</sup> Ibid, 3.

<sup>124</sup> Ibid.

Autonomy is not enough. The Law Commission adds a second principle of beneficence and argues that “it is also necessary to protect the subject from danger or harm which might result from participation in an experiment.”<sup>125</sup> Encouraging choice does not mean that the marketing principle of “buyer-beware” applies to experimentation and possible harm to individuals. There may be a level of harm or risk that makes experimentation unacceptable. Furthermore, those doing the research must make every effort to reduce any harmful effects of experimentation. The final principle that the Law Commission employs is vaguely labelled justice, “which requires that the risks and benefits of experimentation be fairly distributed among various social groups.”<sup>126</sup> Looking at the three principles of dignity/autonomy, beneficence, and distributive justice reveals that the Law Commission employs a very limited conception of ethics as it relates to regulation of experimentation on humans. There is no discussion of other principles which many members of society would want to be considered, such as the need to balance individual and collective interests or protection for the vulnerable.

The Law Commission applies its guiding principles through a number of recommendations. Although most of its recommendations flow naturally from these principles, things become less clear when the subject in question is not somebody who is considered truly autonomous, such as persons with mental disabilities, children, or the unborn. In Chapter Three of the paper, the Law Commission looks at these cases in detail. Its limited guidelines lead to the recommendation that experimentation also be allowed (under strict conditions) on these groups, provided that steps be taken to reduce risk.<sup>127</sup> It gives

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<sup>125</sup> Ibid, 3.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid, 39-54.

greater freedom to research because there are fewer hurdles to cross for experimentation to be considered ethical and legal.

Unfortunately, there is no discussion of individual rights versus societal interests in the Law Commission paper because it has subscribed largely to the liberal perspective of law that everything is permissible as long as it does not cause harm. Even the concept of harm is vague and largely open to the interpretation of judges. In regard to reproductive technologies, but also other technologies which relate to the value of human life (such as euthanasia and abortion), the legal and scientific disciplines have focussed on rights and autonomy at the expense of obligations and community.

Increasingly, the academic community is beginning to wake up to the widespread effects of this individualistic focus. In her book *Rights Talk: The Impoverishment of Political Discourse*,<sup>128</sup> Mary Ann Glendon explains the devastating impact that this has had on the United States. When individuals in society become fixated on their rights being upheld in isolation from others, there is little understanding of their corresponding responsibilities. As a result of this and other factors, society may become increasingly atomized and individualized.<sup>129</sup> Rights are seen as absolute, so once a claim for a particular right is made, the assumption is that no further discussion is necessary. Glendon reveals the problematic consequences of this approach:

Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground. In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations. In its relentless individualism, it fosters a climate that is

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<sup>128</sup> May Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Toronto: Maxwell Macmillan Canada. 1991).

<sup>129</sup> *Ibid*, 14.

inhospitable to society's losers, and that systematically disadvantages caretakers and dependents, young and old.<sup>130</sup>

Relying on reason and autonomy alone as foundations for dignity has implications that go beyond the problem of individualism. These emphases go against the everyday experiences of our lives which testify to the fact that our humanity is much more than simply our faculty for reason and our ability to be a law unto ourselves.<sup>131</sup> Both the disciplines of the sciences and the law are guilty of promoting this destructive dualism. Like the Supreme Court of Canada's decisions about dignity, individual choice and equality trump all other factors because these concepts are legally measurable. The law, when divorced from morality, has no use for considering broader issues of what makes life truly dignified.

### ***Ethics and Bio-Ethics***

One may expect that the disciplines of ethics and bioethics operate according to very different guidelines than the sciences and law. Surely they embrace guidelines on reproductive technologies and human experimentation that are much more in line with the prevalent belief that dignity is inherent to humanity. This may indeed be true with some bioethicists, but the problem is that there is no regulative body of bioethicists, no universal standard of what makes bioethics ethical and consequently bioethicists are just as scattered on the subject of human dignity as any other "expert."

There is no doubt that there has been a substantial increase in the consultation of ethicists on matters like reproductive technologies. That bioethics has sprung up as a discipline in and of itself is a testimony to this. But as Leon Kass asks, "The rise of

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<sup>130</sup> Ibid, 14.

<sup>131</sup> Chapter 4 of this thesis will provide more detail about the importance of relationships and living in accordance with our *telos*.



professional bioethics may have been good for bioethicists, but how good has it been for ethics?”<sup>132</sup> Kass, who chaired the President’s Council on Bioethics from 2002-2005, argues that much of the work done in bioethics is really meta-ethical:

It seeks to analyze and clarify moral argumentation; to establish or criticize grounds for justifying our decision; to lay down rules and guidelines, principles and procedures, for addressing ethical dilemmas; and, in some cases, to construct comprehensive theories of conduct centering around fundamental norms, called “autonomy” or “utility” or “duty” or “equality” or “beneficence.”<sup>133</sup>

Just as American philosophy has become increasingly analytic, ethics is following the same course. With this hyper-rationalist perspective “The supreme focus of moral concern is not *human beings* as needy and aspiring, embodied souls (or enlivened bodies) enmeshed in formative relations with other human beings, but ‘*personhood*,’ – the independent rational will or the conscious subject.” He adds that “Personhood becomes the touchstone of our dignity because it is the ground of our autonomy. Reason finds reasons to defend the citadel of rationality alone.”<sup>134</sup> What Kass is getting at is that the way that the ethics discipline has been engaging with issues such as reproductive technologies has been overly theoretical, which has the consequence of ignoring the aspects of life that give meaning to human life (such as relationships, love, wonder, and beauty). Dignity is understood as autonomy simply because reason alone is the grounding for ethical consideration. There is no thought given to the importance of relationships or the “social institutions and communal mores that nurture the growth of self-determining adults and that guide their every choice and deed.”<sup>135</sup>

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<sup>132</sup> Kass, *Life, Liberty and the Defense of Dignity: The Challenge for Bioethics*, 57.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid, 61. Talk of personhood (as opposed to persons) is increasing in part due to the utilitarian philosophy of Princeton ethicist Peter Singer. His philosophy will be explained further in Chapter Four as he is a good example of a postmodern account of dignity that logically results from ascribing dignity to aptitude rather than being human.

<sup>135</sup> Ibid, 64.

Canadian ethicist Dr. Margaret Somerville explores this problem further in her argument that language must be declarative, not constitutive, of ethics. Her point is that “we don’t create ethics through the language we use; rather, ethics already exists in some external source, whether God or natural morality, or as an intrinsic part of human nature, and language is the tool we use to articulate it.”<sup>136</sup> As an example, she points to how human rights are often misunderstood. Human rights “pre-exist their enactment in declarations, charters, and constitutions – those instruments are but one way, although an important one, of articulating them.”<sup>137</sup> In essence, Somerville is willing to look deeper than the language and modes of justice that disciplines like to create for themselves. As a result, she is able to consider aspects of what it means to be human which others (including most “bioethicists”) ignore.

Somerville stands out from most ethicists also in regards to providing an account of human dignity which is much more in keeping with what it means to be human. She has been an outspoken academic on assisted human reproductive technologies as well as the closely related issues of physician assisted suicide and euthanasia. Somerville needs to be given credit for attempting to look beyond the limited perspectives and norms of the contemporary ethics discipline. How does her effort to achieve a broader, interdisciplinary perspective affect her conclusions about reproductive technologies? She introduces three possible worldviews which can be used as a “basis for a new societal-cultural paradigm.”<sup>138</sup> The first worldview she labels the “pure science” view. “This profoundly biological view of human life is a gene-machine approach. It seeks meaning in human life mainly or only through

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<sup>136</sup> Margaret Somerville, *The Ethical Imagination: Journeys of the Human Spirit* (Toronto: House of Anansi Press Inc., 2006), 87.

<sup>137</sup> Ibid.

<sup>138</sup> Margaret Somerville, *The Ethical Canary: Science, Society and the Human Spirit* (New York: Penguin Group, 2000), 17.

science and similarly seeks to exercise control through science.”<sup>139</sup> The second worldview she labels as the “pure mystery” view. This worldview is anti-science and “adopts an intense sanctity-of-life stance....Often this view is derived from fundamentalist religious beliefs. It seeks meaning, and likewise control, through religion.”<sup>140</sup> In contrast to these two positions, Somerville holds to the third worldview which she calls the “science-spirit” view, which “seeks a structure to hold both science and the human spirit.”<sup>141</sup> It is often a religious perspective but can also be held independently of religion. Like the “pure mystery” worldview, it holds that there is more to a person than his or her biology. “It also involves a sense of mystery...of which we have a sense through our intuitions, especially our moral intuitions, and accepts that we should respect this mystery.”<sup>142</sup> The pure science community finds this appalling because it is the sort of language they would expect to hear from the pure mystery camp. It challenges the hard-fought belief that science is strictly “value-neutral.”

In her 2006 book *The Ethical Imagination: Journeys of the Human Spirit*, Somerville further develops her language of ethics and argues for recognition of what she calls the “secular-sacred.” She goes to lengths to explain the need for an ethics that is secular (not absent of religion but open to participation from a variety of worldviews) but that is also sacred. By sacred she means something which “must have some kind of authenticity apart from utility, personal preference, or a desire that it be such....”<sup>143</sup> For those who are religious, the authenticity of the sacred comes from God. But for those who are not religious, it “can be found in the essence of being human – the search for morality, exercising the power to become fully oneself, undertaking the search for meaning in life. The authentically sacred

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<sup>139</sup> Ibid.

<sup>140</sup> Ibid, 19.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid, 19-20.

<sup>143</sup> Somerville, *The Ethical Imagination*, 54.

might also be experienced, and as a result identified, in a sense of wonder and awe.”<sup>144</sup> This understanding of the “science-spirit” and the “secular-sacred” is very important for Somerville’s ethics because it provides an overlap upon which meaningful discourse can be built. As such, her recognition of the sacred – of what it means to be human – is a refreshing contrast to the limited inquiry that is so evident in many academic disciplines (especially the sciences and law). Only through her openness to the sacred can discourse begin to give room to all aspects of what it means to be human, not simply our preferences or ability to chose.

Somerville’s “secular-sacred” view also has implications on policy issues which relate to the value of human life, such as cloning and abortion. This is made clearer in her discussion on abortion. Although the law has paved the way for open access to abortion because of its assertion of a woman’s right to make autonomous decisions regarding her body, and although the sciences have made it a relatively simple procedure for a women to undergo an abortion (even by swallowing a “morning-after pill”), she does not condone abortion on demand. Somerville points to the statistic that in 1998 Quebec hospitals and clinics terminated 41 of every 100 pregnancies, twice the rate as twenty years before this. This leads Somerville to ask “What does this tell us about our society’s views of the ethics and transmission of human life?...What does respect for human embryos or fetuses require that we do not do?”<sup>145</sup> Doing ethics means that we are forced to look beyond what we are able to do (i.e. through biotechnology or medicine) and beyond what the law allows us to do to find out what is truly the right thing to do. This requires, according to Somerville, “a sense of the human spirit” because “The values communicated to future generations about matters such as abortion – which are really values about respect for life itself, its transmission and, in

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<sup>144</sup> Ibid, 55.

<sup>145</sup> Somerville, *The Ethical Canary*, 24.

the context of the new genetics, its inherent integrity – must also come from families, communities and society.”<sup>146</sup>

But what does it actually mean for humans to have worth? Who qualifies as a human? What does dignity really mean? Somerville believes the answer to this can be found through two questions which she applies to the issue of cloning: “Does human cloning contravene respect for human life? And would carrying out such cloning damage our sense of the human spirit...”<sup>147</sup> Somerville explains the need for these questions by writing that “This religion of humanity [human dignity] is almost certainly the non-negotiable minimum without which we cannot form a viable human society – or at least not one in which most of us would think it is worthwhile living.” Bringing this back to cloning she adds that “It requires that we have respect for each individual human life and, I propose, for human life itself and its transmission. Human cloning challenges us on all three bases.”<sup>148</sup>

Somerville distinguishes between intrinsic and extrinsic dignity and she acknowledges that these two understandings will result in very different conclusions about issues like cloning.<sup>149</sup> Intrinsic dignity refers to a dignity that is achieved simply by being human. It is objective because it does not depend on what others may think of someone. The person has value regardless of whether they possess qualities which others may revere or value. Extrinsic dignity is dignity that is attributed by and dependent on the attitudes or actions of other people, which means that it is contingent because different people may have different standards about what it means for someone to demonstrate that they have dignity. In the discussion on abortion, which was raised earlier in this chapter, it is clear that Somerville

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<sup>146</sup> Ibid, 36.

<sup>147</sup> Ibid, 62.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid, 77-78.

believes that dignity is intrinsic and that is why unborn children should be worthy of moral consideration. Even from a biological perspective there is little disputing that human embryos have or acquire the physical, psychological, and emotional qualities of humans as well. This understanding is reinforced by the growing, if not fully understood, evidence provided by scientific research on contributions made by genetic factors to each of these dimensions of humanity.

Another factor that Somerville emphasizes is the need to respect individual uniqueness. “It is an amazing thought that for every person who has ever lived (genetically identical sibs aside), there has never in the past been anyone genetically identical to that person and never will be in the future unless that person is cloned.” She ties this in with dignity by saying that “This genetic uniqueness is also important in relation to upholding the societal value of respect for persons: It helps to prevent us from regarding individuals as replaceable commodities and losing respect for people, in general, for doing so.”<sup>150</sup>

By looking for a shared ethic and being open to the sacred, Somerville is a lone ranger in secular academia when it comes to human dignity. Her philosophy has made her the subject of immense criticism because it leads her to conclusions which are not politically correct. There is reason to question the grounding for her reliance on the sacred and what exactly gives meaning and worth to the sacred, but her understanding of its importance is notable and very much needed among the academic discourse on human dignity. It begins to put the “human” back in the concept of human dignity by recognizing wonder, awe,

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<sup>150</sup> Ibid.

longings, relationships, and so many other facets of our embodied existence that are integral to what it means to be a person.<sup>151</sup>

### **Amidst All of the Discourse, What Has Become of Human Dignity?**

Disciplines are engaged in a perpetual battle for the privilege of being heard at the policy table. Unfortunately the cacophony of discourse easily distracts from the important issues at hand. As Leon Kass states in his article “Defending Human Dignity,” “Neither the familiar principles of contemporary bioethics – respect for persons, beneficence (or “non-maleficence”), and justice – nor the habitual concerns for safety, efficacy, autonomy, and equal access will enable us to assess the true promise and peril of the biotechnology revolution.”<sup>152</sup> As a society we are dealing with something much more profound than these concepts can adequately deal with. Kass goes on to say that “At stake are the kind of human being and the sort of society we will be creating in the coming age of biotechnology. At stake are the dignity of the human being - including the dignity or worth of human activity, human relationships, and human society – and the nature of human flourishing.”<sup>153</sup> The over-reliance on theory, rationality, and discourse to study reproductive technologies has resulted in recommendations that lack consideration for these matters which give meaning to our lives as embodied human beings.

Reproductive technologies are about change, and our country has had to make decisions about whether we will embrace this change. We will only be able to make good decisions if we have an accurate understanding of humanity itself. Kass argues that “In order

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<sup>151</sup> This discussion, especially with the context of understanding the meaning of a person, will be expanded on in Chapter Four.

<sup>152</sup> Leon Kass, “Defending Human Dignity”, 7.

<sup>153</sup> Ibid.

to know whether change is progress rather than degradation, we need a standard of the *undegraded* and the admirable.”<sup>154</sup> By and large the disciplines on their own refuse to consider these metaphysical questions. Even the discipline of bioethics has lost perspective on this (apart from some individual bioethicists like Margaret Somerville). It appears that the only times when public policy makes room for these questions is when the government looks beyond the experts in the scientific, legal, and ethical disciplines and also asks citizens what matters to them. This is why the Royal Commission was able to make recommendations based on guidelines that reflect an understanding of dignity which is much closer to what we experience in real life than the disciplines that were examined in this chapter have accounted for.

It makes sense that these disciplines have difficulty incorporating their expertise with the matters of real life. It takes great effort to become an expert in any given field and this leaves little time or energy for other things. This is another good reason why interdisciplinarity must be encouraged. It is a realistic means to benefit from the strengths and knowledge of the stakeholder disciplines. When disciplines are compartmentalized and society looks to each respective discipline for more than it is able to provide, the disciplines become weakened and broken down because they are simply unable to carry the load that they are being given. We cannot throw religion and community responsibility out of the window and expect the disciplines to pick up the slack. There are consequences to our societal choices.

The first chapter of this thesis concluded that the state of affairs with Canada’s constitutional law and its treatment of human dignity give rise to the need for a philosophical articulation of human dignity which looks beyond autonomy and equality. Similarly, this

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<sup>154</sup> Ibid, 8.



chapter has demonstrated that Canada's public policy discourse is in disarray with its treatment of human dignity as it relates to the issue of reproductive technologies. The attempts that disciplines make at grounding dignity are inconsistent at best and hazardous to human life at worst. Once more, what is needed is an understanding of how human dignity really is human and how this can be reflected in policy discourse. To quote Kass once more:

The account of human dignity we badly need in bioethics goes beyond the said dignity of "persons" to embrace the worthiness of embodied human life, and therewith of our natural desires and passions, our natural origins and attachments, our sentiments and repugnances, our loves and longings. What we need is a defense of the dignity of what Tolstoy called "real life," life as ordinarily lived, everyday life in its concreteness.<sup>155</sup>

But despite the discipline's limited perspectives on human dignity, much can be learned from past attempts that were made in the public policy process to be representative of a variety of opinions and expertise. In regards to reproductive technologies and human dignity, the Royal Commission on New Reproductive Technologies provides a clue to how to enforce principles such as care on diverse disciplines and groups. If it can be demonstrated later in this thesis that there exists an account of human dignity that can benefit Canadian law and public policy, the same method that the Royal Commission employed with the concept of care could be applied to the concept of human dignity. This will ensure that our laws reflect the reality of our lives even if the disciplines would rather ignore or undermine this.

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<sup>155</sup> Ibid, 19.

### **Chapter 3**

## **Classical, Modern, and Postmodern Philosophical Accounts of Human Dignity**

### **Introduction**

Abortion, physician assisted suicide, cloning, and the other issues discussed in Chapters One and Two are not simply legal and political controversies of our day. Along with similar issues in the past, such as slavery, infanticide, and the subjugation of women, they go to the heart of what defines us as humans and what is in keeping with human flourishing. The analysis provided in the first two chapters reveals that our country is in a state of confusion about what constitutes human dignity. This has resulted in an over-emphasis on autonomy, and consequently detrimental implications on many humans who do not exemplify autonomy to the degree that others may. Troubles in the application of a concept often point to problems or misunderstandings with the nature of the concept itself. As Leon Kass states, “In order to know whether change is progress rather than degradation, we need a standard of the undegraded and the admirable. We need to understand the nature and dignity of human flourishing in order to recognize both the true promise of self-improvement and the hazards of self-degradation....”<sup>156</sup> Applying this to our Canadian situation, what is needed is a philosophical analysis of human dignity itself. Where does our secular understanding of inviolable human rights come from and how is dignity grounded? If we can discover a philosophically strong account of dignity which addresses the problems brought forward in the first two chapters, we can then apply it to the current issues in the hope of bringing some resolve.

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<sup>156</sup> Leon Kass, “Defending Human Dignity,” 8.

The question of what, if anything, makes humans dignified has been grappled with, to varying degrees, throughout the ages. This chapter will examine the prevailing philosophical accounts of human dignity, beginning with a brief look at the Classical philosophers of Antiquity and their emphasis on reason that is not grounded in autonomy, moving forward to modernity and Immanuel Kant's ground-breaking categorical imperative, and finishing with the contemporary postmodern account of Peter Singer. In response to each of these accounts, this chapter will assess their respective strengths and weaknesses, working towards an account of human dignity that is able to ground what Kass called "real life."

### **A Classical Account of Human Dignity**

Our contemporary understanding of human dignity is primarily derived from both Kant's moral philosophy and the influence of the Judeo-Christian doctrine of man. Having said this, the Classical philosophers (especially Socrates, Plato, and Aristotle) have left a distinguished legacy in Western civilization, including their emphasis on human reason as the sole grounding for worth and dignity. Western philosophy is indebted to their contribution towards subjects as great as the nature of justice and how an ideal state should be ordered. There is no doubt that their regard of human worth has also had an influence through the ages. These philosophers came from a society which yearned for dignity. But this dignity was not something that everybody possessed equally because of their human nature. Rather it was something achieved through outstanding and virtuous character.

Understanding dignity as denoting excellence in character is clearly exemplified among the ancient Greeks who elevated heroism and virtue as the chief end of man. "Supreme was the virtue of courage: the willingness to face death in battle, armed only with

your own prowess, going forth against an equally worth opponent – think Achilles against Hector – who, like you, sought a victory not only against his adversary but, as it were, over death itself.”<sup>157</sup> This glorification of heroic strength of character was replaced, during the time of Plato, with the elevation of wisdom as the chief end of man: “the new hero is not the glorious warrior but the man singularly devoted to wisdom, living close to death not on the field of battle but by a single-minded quest for knowledge eternal.”<sup>158</sup> Dignity became associated with the power of reason, not the power of the body. This was in keeping with Plato’s dualism between the body and the soul (mind) which elevated the faculties of the mind far beyond anything physical.

To understand why the Greek philosophers emphasized wisdom and reason as foundational to dignity, it is valuable to examine what they mean by reason. Glenn Hughes argues that our Western conception of human dignity “originated as, and remains, an inescapably spiritual conception, and the equality of human dignity is perforce a spiritual equality.”<sup>159</sup> He bases this on his claim that Kant’s use of the word “reverence” comes from a combination of Christian teaching about being made “in the image of God” and Classical Greek philosophy, “with its conception of the human as a rational being, a being whose reason (*nous*) consists in participation in the divine Reason (*Nous*) that orders and governs the cosmos...”.<sup>160</sup> For the Greeks, reason is not grounded in autonomy but in participation with Reason, that is, reality itself. Truth is objective and reason is the means to discover this

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<sup>157</sup> Kass, “Defending Human Dignity,” 16.

<sup>158</sup> *Ibid.*

<sup>159</sup> Glenn Hughes, “Eric Voegelin’s Defense of Human Dignity” in Charles R. Embry and Barry Cooper, ed. *Philosophy, Literature, and Politics: Essays Honoring Ellis Sandoz* (Columbia, Missouri: University of Missouri Press, 2005), 76.

<sup>160</sup> *Ibid.*, 75.

truth. This understanding of reason is somewhat foreign in our postmodern world, where reason is merely a tool to help us make choices based on our subjective preferences.

Hughes' argument for the spiritual understanding of human dignity for the ancient Greeks is expanded by the philosopher Eric Voegelin. Voegelin stands out from other philosophers because he argues that the Greek conception of human dignity is grounded in a belief of reason that is comparable with common understandings of the Judeo Christian doctrine of the *Imago Dei*.<sup>161</sup> Although some well-known Christian thinkers such as Aquinas and Augustine have defended elements of harmony between Jerusalem and Athens, Voegelin takes it a step further by arguing that they are completely unified in their account of human dignity (although he argues that the Christian account is fuller and richer).

How is Voegelin able to defend this radical thesis? How can the dignified reason of the Classical philosophers be considered spiritual and even be compared with the Judeo-Christian doctrine of the *Imago Dei*? A major principle for his defence is the Platonic concept of *metaxy* (the in-between). Voegelin believes that human consciousness involves an encounter between ourselves and the divine. Hughes explains Voegelin's thoughts on this. "The "participatory illumination" of human consciousness...is a gift of luminous self-presence and disclosure of meaning structured by the desire to know; and the divine reality that is the ultimate concern of that desire is always immediately present to consciousness as its ground, inspiration, ordering force, and deepest identity."<sup>162</sup>

For Voegelin, this *metaxy* means that humans actively participate in communion with the divine. We do not have to search for divine revelation in far-off and unknowable places.

Through our consciousness, we have *immediate* interaction with the divine. Hughes explains

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<sup>161</sup> The Judeo-Christian doctrine of the *Imago Dei* (the image of God in man) will be discussed in depth in Chapter Four.

<sup>162</sup> *Ibid*, 82.

that Voegelin adopts this concept from Plato “to keep permanently in view the truth that a human being exists “in the form and in the image of God,” not in the manner of some sort of extrinsic reflection of the divine, but rather through immediate participation and responsive communion.”<sup>163</sup> Quoting Plato, Voegelin writes ““The whole realm of the spiritual (*daimonion*) is halfway indeed between (*metaxy*) god and man.” (*Symposium* 202a). Thus, the In-Between – the *metaxy* – is not an empty space between the poles of the tensions but the “realm of the spiritual” ...”<sup>164</sup>

By arguing that through our consciousness we receive revelation, Voegelin is able to find many examples of how Greek philosophy is in keeping with this conception of what it means to be made in the image of God. He refers to Socrates in the *Phaedo* who showed that “right philosophizing is the practice of death...that will let the psyche, in death, arrive at its divine, immortal, and wise status in truth.”<sup>165</sup> He also quotes the *Nicomachean Ethics* where Aristotle wrote “Such a life, however, is more than merely human; it cannot be lived by man qua man but only by virtue of the divine (*theion*) that is in him...If then the Nous is divine compared with man, so is the noetic life divine compared with human life.”<sup>166</sup>

It is in his essay “The Gospel and Culture” that Voegelin most clearly articulates his understanding of the unity of reason and revelation as they relate to human dignity. In this essay, he explains that even asking questions is indicative of the *metaxy* because “in the act of questioning, man’s experience of his tension (*taxis*) toward the divine ground breaks forth in the word of inquiry as a prayer for the Word of the answer.”<sup>167</sup> According to Voegelin, by

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<sup>163</sup> Ibid, 83.

<sup>164</sup> Eric Voegelin, “Reason: The Classic Experience” from Ellis Sandoz, ed. *The Collected Works of Eric Voegelin: Volume 12, Published Essays 1966-1985* (Baton Rouge: Louisiana State University Press, 1990), 279.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid., quoting Aristotle, *Nicomachean Ethics* 1177b27ff.

<sup>167</sup> Eric Voegelin, “Gospel and Culture” from Ellis Sandoz, ed. *The Collected Works of Eric Voegelin: Volume 12, Published Essays 1966-1985* (Baton Rouge: Louisiana State University Press, 1990), 175.

asking the right questions we draw closer to God and therefore also come closer to understanding the reason for our existence.

How does one attune themselves to the “divine ground of being?” One important quality that Voegelin insists on is to have an “open soul.” By this, Voegelin means using human reason in a manner that is in keeping with the divine reality. Hughes explains that “The achieved dignity of the open soul is indeed located, as Kant emphasized, in the rational exercise of freedom; what Voegelin makes clear is that this exercise will be warped or misguided...unless it is nourished by an awareness of itself as a gift of participation in transcendent reason and freedom.”<sup>168</sup> Voegelin saw it as the philosopher’s duty to recognize corruption in society and to propose insightful solutions. The growth of one’s soul is instrumental to accomplishing this. How is this done? Through encounters with the best that human history has thought and said. This, he believes, can be found in the classics, the great philosophical works, which expand our mental horizons and allow us to discover truth and possess discernment.<sup>169</sup>

What Voegelin and Hughes teach us with these points is that the ancient Greeks elevated the supremacy of reason to spiritual heights. As such, it is through the exercise of reason that humans demonstrate dignity. Reason is what elevates us towards the ultimate reality. This infatuation with reason is not the same as the emphasis on autonomy exemplified by the Supreme Court and the legal and scientific disciplines. The contemporary reliance on autonomy as constituting human dignity points to the use of reason to accomplish one’s own objectives. It is about asserting a perspective. This does not rely on any objective grounding like the Classical philosophers demand. The Classical view of dignity demanded

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<sup>168</sup> Hughes, “Eric Voegelin’s Defense of Human Dignity,” 84.

<sup>169</sup> Ibid, 81.

that reason conform to the way things really are – the objective reality of universal principles. The contemporary use of reason is subjective and directed towards our own “values.”

One might assume that the Classical philosophers are thus advocating an egalitarian view of dignity since nearly all humans are capable of reason. But that is not the case. Granted, Plato’s philosophy is egalitarian in that he believes that women should be educated just like men and that women could very well become philosopher-kings. But that does not mean that dignity was truly human. For Socrates, Plato, and Aristotle, wisdom was held by the Few. Most people were ignorant and followed their passions rather than their mind. This comes out clearly in Plato’s *Republic*. In this book, which outlines Plato’s conception of a truly just city, there is no basic human dignity. In Plato’s analogy of the Cave, he makes the case that most people are not even aware of reality – we merely content ourselves with the shadows on the wall of the cave.<sup>170</sup> Only the philosophers have realized that the shadows are not the things themselves, and have left the cave to discover the way things really are. Philosophers have found freedom and have the courage to face the light which exposes the shadows for what they are. Likewise, most of humanity does not possess dignity because we have not contemplated the higher things. That is why Plato believes that the best ruler for a society is that of the philosopher-king. He or she alone is superior in wisdom and is fit to rule. Consequently, he or she alone has dignity.<sup>171</sup>

Although the classical recognition of the Few has been abandoned for centuries, its emphasis on reason as essential for dignity has served as a backbone of Western philosophy since then. Although this was most evident in modernity, it continues to be true today. This is understandable, as reason is one of the most recognizable differences between humans and

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<sup>170</sup> Plato, *Republic*, trans. Francis MacDonald Cornford (New York: Oxford University Press, 1967), 227ff.

<sup>171</sup> *Ibid.*, 178-179.



animals and is also closely associated with autonomy which has long been associated with dignity. This thesis has already critiqued this view that reason and autonomy constitute dignity<sup>172</sup> so no further discussion of that is necessary here. The Greeks may have over-emphasized reason's relationship to dignity, but they force us to acknowledge that any reputable account of dignity must pay credence to the role of reason in constituting dignity.

### **Immanuel Kant: Modern Father of Human Dignity**

Although the Classical era's emphasis on reason continues to influence contemporary understandings of human dignity, it is modernity that most shaped our present-day views of this concept. Kurt Bayertz explains that "Parallel to the emergence of the portrait as an independent artistic genre within the field of painting and the autobiography as a new literary genre, a comprehensive series of writings on the *dignitas hominis* by Petrarca, Giannozzo Manetti and Pico della Mirandola grew to the dimensions of an independent literary genre."<sup>173</sup> Of course the Renaissance did not give birth to the idea of human dignity. It was indebted to the influences of both the Ancient Greek and Roman concept of dignity as special standing or social status and the Christian theological doctrine of the *Imago Dei*. The Renaissance wanted to remove itself from theology of the Middle Ages. "The *dignitas* literature sprang from the polemic against Medieval ideology of the Earth as a vale of tears."<sup>174</sup>

Modernity did not radically depart from the Christian anthropology. Bayertz explains that they essentially covered up (not replaced) the theological doctrine. "Dignity is thus no

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<sup>172</sup> See Chapter 1 (the weaknesses of the Supreme Court's reliance on reason and autonomy) and Chapter 2 (the legal discipline's contribution to public policy).

<sup>173</sup> Kurt Bayertz "Human Dignity: Philosophical Origin and Scientific Erosion of an Idea" from Kurt Bayertz, ed, *Sanctity of Life and Human Dignity* (Dordrecht: Kluwer Academic Publishers, 1996), 73.

<sup>174</sup> *Ibid*, 74.

longer comprehended as reflection, falling upon the human being from the transcendental world, but as the epitome of everything the human being represents within this world.”<sup>175</sup>

Modernity turned the focus on dignity from God to man. The Biblical elevation of humanity above the rest of creation was retained but its purpose (to serve the Creator in humility) was replaced with serving humanity itself. Autonomy became the focal point of dignity. Bayertz spells this out:

The three fundamental components of the concept of human dignity – rationality, perfectibility, and autonomy – lend it a previous inconceivable level of self-determination. To put it succinctly: with the concept of human dignity in its specifically Modern interpretation, the human being defines its own essence as subjectivity. Neither God, nor Fate, nor Nature tells the human being what to think or what to do. The human being is its own master. To put it pointedly, the human being is no longer just an image of God, but has become a kind of God itself, capable of thinking and deciding rationally, of shaping its environment and itself, and, ultimately, of creating its own values and norms. The only difference to the Gods is human mortality – and the fact that human greatness and dignity are not simply given, but set.<sup>176</sup>

Modern philosophy has changed the West like no other age in the history of philosophy. The great philosophers of modernity have shaped Western politics and society and continue to have a heavy influence, despite the successes of postmodernity. Immanuel Kant stands out as one of the most brilliant philosophers of modernity, with his analytical exposition of nearly every philosophical stream. His work on human dignity has perhaps had the greatest influence of all philosophers on this concept as it is understood in present-day Canadian law and politics. As such, it is worthy of a detailed analysis.

In his *Grounding for the Metaphysics of Morals* (hereafter *Grounding*) Immanuel Kant lays out a reasoned argument for all people to submit themselves to a self-legislated universal law. This law is built on the premise that all humans are to be treated as ends in

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<sup>175</sup> Ibid.

<sup>176</sup> Ibid, 77.

themselves because they are autonomous and free and thereby possess dignity. From his concept of dignity, Kant builds a moral system which has shaped the world's understanding of human rights perhaps more than any other thinker since the Enlightenment. This part of the chapter will examine Kant's *Grounding* in detail to better understand how he is able to substantiate his conception of human dignity and the implications of this moral theory on reason, law, morality, and freedom.

When reading the *Grounding*, it becomes very clear that Kant is not interested in developing a moral philosophy that is based on experience (*a posteriori*). This is because “every other precept which is founded on principles of mere experience... can indeed be called a practical rule, but never a moral law.”<sup>177</sup> Kant wants to formulate a moral law because it “must carry with it absolute necessity.”<sup>178</sup> Without the morals being developed *a priori*, laws are subject to speculation and there is no reason why everybody must live according to them. Kant believes that it is only in pure philosophy (hence the metaphysics) that moral laws are both pure and genuine.<sup>179</sup> The purpose of the *Grounding* is to develop a pure *a priori* grounding for moral law which carries with it absolute necessity.

Formulating the pure moral law requires three steps in reasoning. These three steps correspond to the three sections in Kant's *Grounding*: transition from the ordinary rational knowledge of morality to the philosophical, transition from the popular moral philosophy to a metaphysics of morals, and the final step from a metaphysics of morals to a critique of pure practical reason.<sup>180</sup>

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<sup>177</sup> Kant, *Grounding for the Metaphysics of Morals*, 2-3.

<sup>178</sup> *Ibid.*, 2.

<sup>179</sup> *Ibid.*, 3.

<sup>180</sup> *Ibid.*, 5.

In the first section, Kant emphasizes the importance of duty because he believes “just here does the worth of the character come out; this worth is moral and incomparably the highest of all, viz., that he is beneficent, not from inclination, but from duty.”<sup>181</sup> Acting out of duty is purely a matter of the will, and since Kant believes that the grounding for a metaphysics of morals must be *a priori*, it must be the will and not our feelings or experiences which we follow. Kant believes that an action only has moral worth as a result of the “maxim according to which the action is determined” and not the purpose or result of the action.<sup>182</sup> If we act strictly according to duty and not our own inclination, we are acting in respect to law.<sup>183</sup>

Kant concludes that the law that results from obeying this reasoning is the categorical imperative that “I should never act except in such a way that I can also will that my maxim should become a universal law.”<sup>184</sup> When we are faced with practical examples in life where we need to make ethical decisions, we can measure our possible courses of action against this categorical imperative to determine if the action is truly moral. The universality that comes with this imperative is in keeping with Kant’s demand to base his *Grounding* on pure reason. Although this universality has the benefit of making many ethical decisions less complex, it will also lead to actions that we will feel are extreme (such as allowing no exception on the law to not lie, even if it is done to uphold the life of another person). But Kant would reply to that objection by saying that we should not be making decisions based on how we feel about outcomes. Instead it should be by submitting our wills to the universal law that does not change according to the circumstances. The Canadian Supreme Court may be indirectly

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<sup>181</sup> Ibid, 11-12.

<sup>182</sup> Ibid, 12-13.

<sup>183</sup> Ibid, 13.

<sup>184</sup> Ibid, 14.

indebted to Kant's philosophy but Kant would never agree with the way that they use the Charter to come up with new definitions that radically change the way that the law functions. The *Law v. Canada* decision already outlined in Chapter One is one example of how the Court posited a new definition of dignity and then made it to be the stuff and substance of Section 15 itself. For Kant, the law does not change with the circumstances, or with the whim of those who interpret the law.

The categorical imperative has the implication that everybody is obligated to obey it and everybody is able to obey it. As Kant writes in the second section of the *Grounding* "The principles should not be made to depend on the particular nature of human reason, as speculative philosophy may permit and even sometimes finds necessary; but, rather, the principles should be derived from the universal concept of a rational being in general, since moral laws should hold for every rational being as such."<sup>185</sup> The egalitarian nature of this philosophy is a stark contrast to the Classical philosopher's belief that wisdom was only for the few. In the rest of the second section, Kant explains why this is based on an inherent dignity of all people, something that seems to blend Plato's superiority of reason with the Christian understanding of universal dignity.

The two ideas discussed thus far (the need for categorical imperatives and the equality of all persons) are brought into sharp focus when Kant asks whether there is something that "has in itself an absolute worth, something which as an end in itself could be a ground of determinate laws."<sup>186</sup> This is combined with the equality of all people since "in general every rational being, exists as an end in himself and not merely as a means to be

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<sup>185</sup> Ibid, 23.

<sup>186</sup> Ibid, 35.

arbitrarily used by this or that will.”<sup>187</sup> Since man has this absolute worth, as an end in himself, he is therefore able to be a ground for law itself. This means that we must treat humanity (including ourselves) always as an end and never simply a means.<sup>188</sup> Recall how Justice Wilson specifically cited this command to defend her view that women should have a right to abortion because anything less would be treating her as a means.<sup>189</sup> But where does this end? If a law goes against one’s aspirations does it become unconstitutional? Does everybody have a right to whatever they desire? Of course limits have to be set, but if autonomy alone is the standard it becomes very arbitrary for the Court to set limits where it chooses. Kant would not agree with this misuse of his categorical imperative. He recognizes that objective human dignity grounds objective universal moral law. This law does not change with the times or our aspirations.

Kant argues that since man has absolute worth, then he can also ground objective law. Through autonomy, all rational people are co-legislators of a universal law which is *by nature* in keeping with our reason. Kant believes that this, at last, is the foundation that has been missing for human dignity.

Kant wants to make it clear that humans have dignity. He describes dignity by saying “whatever is above all price, and therefore admits of no equivalent, has a dignity.”<sup>190</sup> He ties this with humanity by saying “morality and humanity, insofar as it is capable of morality, alone have dignity.”<sup>191</sup> But why is Kant able to make such a bold claim about humanity? Why do we have dignity? He answers this question by saying “It is nothing less than the share which such a disposition affords the rational being of legislating universal laws, so that

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<sup>187</sup> Ibid, 35.

<sup>188</sup> Ibid, 36.

<sup>189</sup> *R. v. Morgentaler*, 173.

<sup>190</sup> Kant, *Grounding for the Metaphysics of Morals*, 40.

<sup>191</sup> Ibid, 40-41.

he is fit to be a member in a possible kingdom of ends, for which his own nature has already determined him as an end in himself and therefore as a legislator in the kingdom of ends.”<sup>192</sup>

In summary, Kant’s reasoning is that only things that are an end in themselves can ground an objective law (i.e. a categorical imperative). Humans are an end in themselves. Therefore humans can ground objective law. Since we can ground objective law, we are legislators of a universal law. By legislating in this universal law, we have inherent dignity. The debatable point in Kant’s reasoning is that humans are ends in themselves. Is this a given? What proof does Kant provide to make this claim? Kant believes humans are an end in themselves because we possess reason. He writes that “rational beings are called persons inasmuch as their nature already marks them out as ends in themselves...Persons are, therefore, not merely subjective ends, whose existence as an effect of our actions has a value for us; but such beings are objective ends...”<sup>193</sup> Reason is ultimately what grounds Kant’s philosophy of the inherent dignity of all persons, whereby we are able to take part in the legislating universal law by being a law unto ourselves.

Freedom functions as an important aspect of Kant’s moral philosophy. Kant expert Susan M. Shell explains that freedom “is the ground of reason without which there would not be a moral law, while awareness of the moral law, or conscience, is the ground or reason for our recognizing that we are free.”<sup>194</sup> As such, freedom, or “pure spontaneity”<sup>195</sup> of reason is part of what distinguishes humans from everything else. Reason stands above understanding because it does not require sensibility. Rather, through its spontaneity it is able to distinguish

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<sup>192</sup> Ibid, 41.

<sup>193</sup> Ibid, 36.

<sup>194</sup> Susan M. Shell, “Kant on Human Dignity” in *In Defense of Human Dignity: Essays for Our Times*, ed. Robert P. Kraynak and Glenn Tinder (Notre Dame: University of Notre Dame Press, 2003), 55.

<sup>195</sup> Kant, *Grounding for the Metaphysics of Morals*, 53.

our experiences from understanding and can therefore stand in judgment over both.<sup>196</sup> This emphasis on freedom explains why the Supreme Court and Canadian constitutional law in general has relied so much on this philosophy of autonomy. It seems to work hand-in-hand with our reliance on the Charter (of *rights* and *freedoms*) as the culmination of law in Canada.

When reason and freedom are necessary conditions for dignity, Kant's moral philosophy becomes somewhat less egalitarian. Although he speaks about how it applies to all men, it is qualified by the need for man to be rational. Man is able to be a ground for universal law only because he is an end in himself. He is an end in himself because he is *rational*.<sup>197</sup> Obeying the categorical imperative does not simply mean obeying a law that has been universally legislated by others. It involves being part of that legislative process by rationally grounding law individually. The categorical imperative requires rational reflection of *individual* circumstances. It requires freedom. "The will is a kind of causality belonging to living beings insofar as they are rational; freedom would be the property of this causality that makes it effective independent of any alien causes."<sup>198</sup>

What does this mean for children who do not yet possess the mental faculties to take part in this universal legislation? What about the old and senile, who have "lost their mind?" Is Kant's philosophy merely a more generous account of Plato's belief in the supremacy of reason? Is it simply a transition from "the few" to "the many" but still with an end towards the superiority of reason? Nothing in Kant's *Grounding* suggests that the physical (not

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<sup>196</sup> As an aside, the importance of the spontaneity of freedom for Kant's moral philosophy goes against those who today argue for the dignity of artificial intelligence. Although sophisticated computers are able to show remarkable understanding, they are limited to what they are programmed for and will never be able to possess pure spontaneity. They lack the freedom that Kant would require to give a thing dignity.

<sup>197</sup> Ibid, 35.

<sup>198</sup> Ibid, 49.



simply the rational) is part of what gives man dignity. And since our dignity is what allows us to be legislators of universal law, only those with reason are to be given consideration under the categorical imperative. This suggests that those without reason can be used as means rather than ends, according to Kant's point of view. Having said that, it is important to distinguish Kant's definition of reason from Plato's. According to Shell, for Kant "reason's ideas are best understood not as objects of an immediate theoretical intuition of reality (as Platonism, according to Kant, wrongly maintains) but as foci...or reason's self-imposed, rule governed demands."<sup>199</sup> That may explain how Kant has a more humble view of reason. It has limits, beyond which only God is.

Kant's philosophy of morals has had such a profound impact on our Western world because it is in keeping with the Enlightenment ideals of science and technology that still hold a grip on our society today. The Enlightenment divorced the tie between man and religion by making man a master of the world through science. Kant's moral philosophy of human autonomy makes man a master of his own morality (although it requires subjection to the universal law through reason). Although Kant leaves room for God because of the finitude of reason, there does not seem to be much room for God in giving man any worth beyond what he himself achieves through his rational faculties. Even if his understanding of reason is different than Plato's there seems to be little, if any, room for those who are not *able* to subject themselves to the categorical imperative.

### **Critique of the Modern Foundation of Human Rights in General**

Kant's moral philosophy has a weakness that goes beyond those already mentioned. As will be outlined soon, he makes the faulty assumption that reason is sufficient to ensure

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<sup>199</sup> Shell, "Kant on Human Dignity," 61.

that individuals will recognize the dignity of others. Before examining this in more depth, it will be helpful to set the context by looking at a broader critique of modern human rights theory that still prevails to this day. This is important because a lot of the talk of human dignity in our twenty-first century world is built upon this weak foundation established in the modern era. Although Immanuel Kant is the modern father of human dignity, Kant was preceded by Thomas Hobbes whose contribution must be mentioned as well. In “The Right to Life and Human Dignity” Leon Kass explains the importance of Hobbes’ contribution to the modern doctrine of natural rights, which is closely connected to human dignity. He states that “Hobbes is arguably the founder of the modern doctrine of natural rights, proposing it in explicit opposition to his predecessors who gave primacy to virtue or duty or nobility or law or dignity.”<sup>200</sup>

In Hobbes’ *Leviathan*, after describing the natural condition of man (apart from law and society) as nasty, brutish, and short, he makes the case that human reason is the means to escape this natural state. Kass points out that the rules of reason “have as their foundation an acknowledgment of a prior and primary singular absolute natural right, the right of self-preservation.”<sup>201</sup> This is explicit in Hobbes’ own words: “The right of nature, which writers commonly call *jus naturale*, is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing any thing, which in his own judgment, and reason, he shall conceive to be the aptest means thereunto.”<sup>202</sup>

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<sup>200</sup> Leon Kass, “The Right to Life and Human Dignity” *The New Atlantis*: 27, <http://www.thenewatlantis.com/archive/16/TNA16-Kass.pdf>.

<sup>201</sup> Ibid.

<sup>202</sup> Ibid, 27, quoting Thomas Hobbes, *Leviathan*, Chapter 14.

What is striking about this quote is that Hobbes changes the meaning of *jus naturale* from “the naturally just” to “a liberty each man hath.” Kass explains that “The entire medieval and (ultimately) classical Greek tradition of natural right understood as natural justice is here abandoned; justice, for Hobbes, becomes in its content purely a matter of convention, defined by the positive law of one’s own country.”<sup>203</sup> This right of nature is the birthplace of the autonomy that is being advocated so strongly by our Supreme Court and the disciplines examined in Chapter Two. It is all about freedom to do whatever one feels is best to achieve their preferences. Kass states that “Modern selfish individualism begins here, with nature’s putative gift of this allegedly rightful liberty.”<sup>204</sup>

There is something deeper here than an interesting exposition of the origins of natural rights. By defining the natural right as a liberty, Hobbes’ next job is to define liberty. “By liberty, is understood, according to the proper signification of the word, the absence of external impediments: which impediments, may oft take away part of a man’s power to do what he would; but cannot hinder him from using the power left him, according as his judgment, and reason shall dictate to him.”<sup>205</sup> Kass makes the astute observation that “if a right is a liberty, and a liberty is merely a descriptive fact, then, paradoxically, what Hobbes calls right is not right but fact. Why and how, then, does the fact of natural liberty deserve the name of “right”?”<sup>206</sup> Kass draws this out further: “Without some moral or juridical authority, for example, God, how do any facts or conditions of nature acquire moral or juridical status?” Later he adds that “Rights, it turns out, are politically rather than ontologically

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<sup>203</sup> Ibid, 28

<sup>204</sup> Ibid, 26-28.

<sup>205</sup> Ibid, 28-29, quoting Thomas Hobbes, *Leviathan*, Chapter 14.

<sup>206</sup> Ibid, 29.

grounded, and their moral force is felt only when the liberties they assert to be rightful are denied by others.”<sup>207</sup>

This critique by Kass is important because it shows a serious weakness in the modern creation of rights solely through reason and autonomy. It goes to the heart of the confusion that exists in our present-day disagreement about the meaning and nature of human dignity. We have already seen how dignity is understood and interpreted very differently in different legal and political contexts and how this has given rise to complaints from the sciences that it is a useless concept that impinges their ability to research. This is testimony to the fact that human dignity is but another product of the Enlightenment creation of rights. As Kass pointed out, how can these Enlightenment concepts carry any moral or juridical status when they are not ground in a moral authority?

In his book *Human Rights Theories in Christian Perspective*, Dr. Paul Marshall comes to a similar conclusion as Kass in response to modern human rights theory. He quotes Robert Paul Wolff who responds to John Rawls’s book *A Theory of Justice*<sup>208</sup> by saying “Merely to reconstruct our convictions in the form of principles for which we could find no independent support whatsoever would leave us uncertain whether we had articulated our morals or our prejudices.”<sup>209</sup> He also quotes George Grant who states that

One may be glad that Rawls has inherited the noble belief in political equality, and the belief that ‘the free and rational person’ is ‘valuable’ in a way quite different from members of other species. But in an era such as ours, we cannot help hoping that he will tell us why it is so. His writing is typical of much modern liberal thought

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<sup>207</sup> Ibid, 31.

<sup>208</sup> Twentieth century philosopher John Rawls builds off of the major modern philosophers (including Kant) in his major work *A Theory of Justice*.

<sup>209</sup> Paul Marshall, *Human Rights Theories in Christian Perspective* (Toronto: Institute for Christian Studies, 1983), 7. quoting Robert Paul Wolff, *Understanding Rawls* (Princeton: Princeton University Press, 1977), 190-191.

in...[its] inability to state clearly what it is about human beings which make them worthy of high political respect.<sup>210</sup>

Dr. Paul Marshall adds his own thoughts which are worth quoting directly because they get at the heart of issue:

Similar criticisms can be levelled at most of the recent works on human rights theory that I have mentioned. There is in them little attempt at a grounding of rights in anything other than the wills of persons. They are all conventional, “if...then” arguments; if we believe in rights, in freedom and equality, and in the value of the person, then we must believe that our rights are thus and so. These works are also, in a sense, pragmatic, in that they begin with a view of a desirable society, and then adjust their theory of rights in order to fit such a society. But the “if’s” of the “if...then” are not justified. In them we are faced only with a call to restrict our actions in ways that we feel it is in our interest to restrict them.<sup>211</sup>

I witnessed this fundamental error with the modern account of natural rights when I attended a philosopher’s café in Lethbridge on the topic of human rights. The participants in the café seemed to be internally divided. On the one hand they challenged the actions of Western governments that go to other nations and impose their standards of human rights. On the other hand they were unable to answer why, if human rights are merely human conventions, can we not do with others as we will? Ultimately there was no answer to my questions about why human rights are objective and carry a moral authority that should stop somebody from violating someone else. Human dignity, when understood as a glorification of autonomy, will not be able to ground human rights in the way that they are being used throughout the world as a basis for objective and inviolable rights.

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<sup>210</sup> Marshall, 7 quoting George Grant, *English-Speaking Justice* (Sackville: Mount Allison University, 1974), 35.

<sup>211</sup> Marshall, *Human Rights Theories in Christian Perspective*, 8.

## Critique of Kant's Faith in Mutual Respect for Human Dignity

The general weakness with modern human rights theory is also visible with Kant, even though he attempted to build his moral philosophy upon a rational foundation that carried with it the *a priori* certainty that is required for a dignity that is truly intrinsic and inviolable. Pepita Haezrahi takes issue with Kant's moral philosophy because he says that it begs the question of why we should treat *others* as an end in themselves. He posits that there may be an assurance of our own dignity (based on our autonomy and submission to universal law) but that does not necessarily mean that others have the same freedom or capacity. Consequently, there is no necessity that others also have dignity.<sup>212</sup> Haezrahi breaks this down more concretely:

(a) The proposition "all men *qua men* are possessed of dignity" cannot be deduced from the concept (of human dignity) itself since universal validity in the distributive sense is not an essential qualification of the concept and therefore not implied in it. Hence, (b) the complex and synthetic concept "the objective universality of the dignity of man" is not a self-evident concept, i.e. immediately perceived by reason. Therefore, (c) the validity of the synthesis it performs is in need of proof. This proof, I submit, Kant's formalistic argument fails to supply.<sup>213</sup>

Haezrahi acknowledges that Kant did not see a need to provide this proof because he "did not think that any man, in his capacity of rational agent, would need to be convinced by what his own Reason would tell him most plainly should be but stop to reason."<sup>214</sup> Haezrahi argues that "The main difficulty for Kant lies in making men also act by the light of their reason. It never occurred to Kant that men could, on rational grounds, refuse to treat other men as ends."<sup>215</sup> Indeed we see the same faith coming from the way that the Supreme Court of

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<sup>212</sup> Pepita Haezrahi, "The Concept of Man as an End-In-Himself" in Robert Paul Wolff, ed. *Kant: A Collection of Critical Essays* (Notre Dame: University of Notre Dame Press, 1968), 292.

<sup>213</sup> *Ibid.*, 292-293.

<sup>214</sup> *Ibid.*, 293.

<sup>215</sup> *Ibid.*, 294.

Canada relies on an optimistic view of human reason – that it will always lead to a consideration of others through respect.

With the benefit of centuries of Western history since Kant, we can see that many do not consider the wellbeing of others, even when they are following their reason. Postmodern philosopher Hannah Arendt agrees with this and uses it as a basis to argue for a new guarantee of human dignity. In his essay about Arendt’s call for this new guarantee, Jeffrey C. Isaac provides some examples of how the Kantian guarantee of dignity has proven to be unrealistic. Looking back on the twentieth century he brings out Arendt’s point that “The plight of the refugees, and even more the sufferings of the victims of totalitarian genocide, make clear that the Rights of Man, supposedly inalienable, proved to be unenforceable... whenever people appeared who were no longer citizens of any sovereign state.”<sup>216</sup> Isaac adds that “They were deprived, in short, of their basic human dignity, of their ability to function as moral and political agents, enjoying security and freedom among their fellows....”<sup>217</sup> This is not just the actions of those nations that are unfamiliar with a categorical imperative:

The confidence in the republican nation-state as the repository of the rights of man had been undermined by the experience, for three decades, of the most civilized nations on earth destroying cultures and peoples in the name of their sovereignty and then ignoring the plight of the suffering in the name of concern with “their own.”... In such circumstances the Kantian ideal had revealed itself as narrow and parochial despite itself, its universalist convictions undermined by its commitment to the principle of national sovereignty, a principle that supported not peaceful cosmopolitanism and moral respect but imperial expansion, geopolitical intrigue, enormous violence, and, perhaps most troubling of all, a pervasive indifference to human suffering outside the confines of the nation.<sup>218</sup>

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<sup>216</sup> Jeffrey C. Isaac, “A New Guarantee on Earth: Hannah Arendt on Human Dignity and the Politics of Human Rights”, *The American Political Science Review* 90, no. 1 (1996): 63.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

Kant did not always base his view of inherent human dignity on man's ability to perform moral actions. Prior to his critical writings he relied simply upon a "universal participation of human beings in the rational...."<sup>219</sup> But Haezrahi thinks that Kant's newer grounding is faulty and even circular:

He presupposes the freedom of the human will as a necessary condition for the possibility, i.e. existence and reality of moral obligation and responsibility; and then attributes dignity to men because they have free wills, i.e. are morally responsible. Now a categorical judgment cannot be deduced from two hypothetical judgments. The objective reality of the dignity of man cannot be deduced from the hypothetical reality of freedom, much less can the universality of its application be so deduced. But nothing less than such objective reality is demanded by Kant for this concept.<sup>220</sup>

### **Peter Singer and the Postmodern Rejection/Deconstruction of Human Dignity**

The weak defence of human dignity from the Enlightenment is having its effects in the twenty-first century. Increasingly our secular society is questioning the unique worth of humanity and labelling the concept of human dignity "speciesism." Leading the charge is Peter Singer, a well-known ethicist from Princeton University. Singer has bravely followed the logical consequences of his postmodern philosophy of preference utilitarianism to its natural conclusion. He is the most recognizable advocate of preference utilitarianism which holds that an action is right if it is in accordance with an individual's preferences and desires.<sup>221</sup> As a result, right and wrong are subjective to the individual making the choice. In essence, it is a postmodern moral philosophy built around autonomy.

In her book, which she wrote specifically to refute Peter Singer's ethical theory, Susan Lufkin Krantz takes issue with the fact that ethicists like Singer have gained such

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<sup>219</sup> Haezrahi, "The Concept of Man as an End-In-Himself," 296.

<sup>220</sup> Ibid, 297.

<sup>221</sup> This will be explained in more detail shortly.



respect and credence despite the fact that his philosophy is entirely inconsistent with everyday life:

In his version of utilitarian ethics, he has drawn conclusions that no sane person will easily accept – a newborn human infant has no more value than a snail, for instance, and a brain-damaged human being may have no more value than a cabbage – but feeling themselves unqualified to criticize the principles upon which his conclusions are based, or to find errors in this reasoning, non-philosophers have assumed that he must have a point worth heeding.<sup>222</sup>

How does Singer defend his radical view of human worth? In many respects, it is simply a logical outflow of postmodernity's critique of modernity. If the religious foundation of the sanctity of human life was replaced by modernity's autonomy-based dignity, and if this autonomy-based dignity lacks moral authority (apart from pure reason) why should it be limited to traditional conceptions of persons? Since Kant's philosophy relied so heavily on autonomy (thus limiting its jurisdiction to autonomous individuals) there is no reason why postmodernity should not take it one step further and deconstruct the definition of persons so that it extends beyond the human species while also excluding some segments of the human population. Krantz explains Singer's position further: "Part of his strategy in arguing for this thesis is to show that human beings are not, in fact, unique. The boundaries of our species are unclear, he says, as we have seen and the traits we take to be peculiarly human are in fact shared with non-human species."<sup>223</sup> To get to this conclusion, Singer wants us to drop our human point of view in favour of the "point of view of the universe."<sup>224</sup>

Naturalistic theories have moral implications, and Singer is simply someone who is willing to embrace these implications. He realizes that his theory ultimately comes out of

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<sup>222</sup> Susan Lufkin Krantz, *Refuting Peter Singer's Ethical Theory: The Importance of Human Dignity* (Praeger Publishers: Westport, 2002), xiv.

<sup>223</sup> *Ibid.*, 14.

<sup>224</sup> Krantz is citing Peter Singer, "Sidgwick and Reflective Equilibrium," *Monist* 58, (1974): 511.

a perspective of the world that is the product of chance and ultimately has no *telos*. “If the universe has not been constructed in accordance with any plan, it has no meaning to be discovered. There is no value inherent in it, independently of the existence of sentient beings who prefer some states of affairs to others. Ethics is not part of the structure of the universe, in the way that atoms are.”<sup>225</sup>

How does Singer define persons and distinguish humans who have value from those who do not? He argues that there is a difference between animals which are sentient and animals that are persons. To be a person requires being rational, self-aware, and future-oriented. Those animals that do not demonstrate that they are rational, self-aware, and future oriented (which, for Singer, would include a new-born child) do not qualify as persons and can be treated accordingly. Singer believes there are non-human animals which should qualify for personhood and humans who should not qualify as persons.<sup>226</sup>

To understand how Singer applies his philosophy practically, it helps to understand his moral philosophy of preference utilitarianism. This theory “seeks as much as possible to produce states of affairs that accord with the preferences of all who are affected by a given action or its consequences.”<sup>227</sup> In his *Practical Ethics*, in the chapter entitled, “What’s Wrong With Killing?” “Singer tells us that preference utilitarianism defines as wrong any action that goes against the preference of any sentient being, except if the preference is outweighed by other contrary preferences.”<sup>228</sup>

This allows him to philosophically base his belief that killing is wrong (as it applies to

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<sup>225</sup> Krantz, 25 citing Peter Singer, *How Are We to Live? Ethics in an Age of Self-Interest* (New York: Prometheus Books, 1995), p. 188.

<sup>226</sup> Krantz, *Refuting Peter Singer’s Ethical Theory: The Importance of Human Dignity*, 31.

<sup>227</sup> *Ibid*, 28.

<sup>228</sup> *Ibid*, 27-28.

persons as he defines them). According to a preference utilitarian “taking the life of a person will normally be worse than taking the life of some other being, since persons are highly future-oriented in their preferences...In contrast, beings who cannot see themselves as entities with a future cannot have any preferences about their own future existence.”<sup>229</sup>

Krantz is one of many people who see both the detrimental implications of Singer’s philosophy as well as its internal weaknesses. She argues that ethics is grounded by our uniquely human concern for each other. “Expanding the circle” of ethical concern, in the way that Singer recommends, by abandoning our preference for our own kind is moral suicide.”<sup>230</sup> Responding to Singer’s argument that we need to drop our human perspective and replace it with a universal perspective, she states that “this would spell the death of ethics and of every human value...Mankind *is* at the center of human ethics, necessarily so. There is no Copernican revolution in the offing, as Singer foresees, for either humanity will retain its central position in the ethical universe, or else human ethics will come to an end and the values of the marketplace or some other horror will fill the vacuum.”<sup>231</sup>

This alarming discussion only reaffirms the need for something that objectively grounds human dignity. It makes sense for secular thinkers to turn to reason because we can see in things as basic as math and logic that reason can provide certainty. But even Singer agrees with the British philosopher, David Hume “that reason can perform no such function.”<sup>232</sup> Krantz elaborates:

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<sup>229</sup> Ibid, 29 quoting Peter Singer, *Practical Ethics* (Cambridge: Cambridge University Press, 1993), 94-95.

<sup>230</sup> Krantz, *Refuting Peter Singer’s Ethical Theory: The Importance of Human Dignity*, 16.

<sup>231</sup> Ibid, 15.

<sup>232</sup> Ibid, 26.

The egoist and the psychopath show us that reason is powerless to provide an objective source of moral value. The German philosopher Immanuel Kant (1724-1804), had thought that ethics could be generated out of purely rational considerations. His so-called categorical imperative...was an attempt to place preference or desire under the direction of reason; but if Hume and Singer are right, the attempt was doomed to fail. For preference and desire function entirely independently of reason, and if anything, reason is under their direction. But preference and desire are subjective; and so the source of moral value is subjective and non-rational, according to Singer.<sup>233</sup>

Since reason does not anchor human dignity, Singer is left with his philosophy of preference utilitarianism. Making moral decisions is simply the result of calculating interests, with a priority given to persons (employing his definition of persons). But as Krantz points out “Even with the utmost faith in this system, however, and given the ideal case where a clear majority of interests can be satisfied, what assures me that I have arrived at a morally right conclusion as distinct from merely the correct calculation of relevant factors?”<sup>234</sup> She goes on to challenge the implications of his ethical theory by stating that “it bids us consider the preferences of all sentient creatures, whether human or not, as if they were human preferences, and then declares the precedence traditionally granted the human to be morally illegitimate. In the end, rather than raising our level of concern for non-human animals, it lowers our regard for everything human.”<sup>235</sup>

Not all postmodern philosophy is opposed to human dignity to the extreme that Singer is. On the contrary, some postmoderns continue to uphold the language of human dignity because of their commitment to inalienable human rights and universal equality. Our Supreme Court and the *United Nations Declaration* are two good examples of this approach. But how is this intellectually justified? How do postmodern humanists defend their high regard for humanity from the attacks of Peter Singer? Michael Ignatieff has attempted to

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<sup>233</sup> Ibid, 27.

<sup>234</sup> Ibid, 40-41.

<sup>235</sup> Ibid, 81.

intellectually justify this paradoxical perspective in his lecture for the CBC Radio Massey lecture series *The Rights Revolution*. After a series of steps to find a grounding for human rights, Ignatieff concludes that universal equality is based on a “moral fiction.” David J. Klassen quotes him saying “it is this fiction, and our devotion to it, that enables us to be just. The entire legitimacy of public institutions depends on our being attentive to difference while treating all as equal. This is the gamble, the unique act of the imagination on which our society rests.”<sup>236</sup>

Ignatieff, along with our Supreme Court and many other leaders in the postmodern Western world choose to work with this “act of the imagination” and build a society around it because it is more favourable than the alternative of denying human dignity. The problem with this perspective is that some people may be willing to live with this illusion but others will not. How can those who believe in it still fight for it when others get tired of the illusion and decide it is time to promote their own superiority at the expense of the vulnerable? Some people will realize that they can take advantage of the situation by glorifying themselves and denying the worth of others. How can an “act of the imagination” legitimately stop this? Without a transcendent source of moral authority, there is nothing that can be done, apart from brute force.

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<sup>236</sup> David J. Klassen, “Rights Talk and God Talk: Religious Faith and Natural Rights” *Symposium at Newman Centre* (Montreal: McGill University: Sept 13-15, 2007), [www.davidklassen.net](http://www.davidklassen.net), 10-11 quoting Michael Ignatieff, *The Rights Revolution* (Toronto: House of Anansi, 2000), 139.

## Chapter 4 A Judeo-Christian Grounding for Human Dignity

### Introduction

Western accounts of human dignity have, to a large degree, flowed from the Biblical account of humanity's place in the world. Kurt Bayertz explains that the origins of the term human dignity "lie at least partly in the Christian idea of the *Imago Dei*....From this religious context, the idea of an inherent human dignity became part of Modern Philosophy and was reformulated in categories of secular reason."<sup>237</sup> Since the modern and postmodern accounts of human dignity give rise to significant shortcomings, it would be wise for our Western society to take a look back and re-examine the Biblical doctrine which originally grounded human dignity and which has been largely ignored outside of theological circles. Making this move is rather controversial within the context of our secular and pluralist society but Chapter Five will address the common objections and explain why a religious account should be a welcomed participant in this important discussion.

This chapter will examine the intelligibility of the Biblical case for human dignity, especially through its understanding of persons (exemplified in the doctrines of the *Imago Dei* and the Incarnation) and the corresponding themes of dignity being physical *and* rational, relational, inviolable, and teleological. These themes are by no means exhaustive in their description of the Judeo-Christian account of dignity. They have been chosen because they speak most pertinently to the limitations that arise from contemporary legal and political discourse relating to human dignity. A theological analysis would result in some very different themes which will more accurately describe how the Bible speaks about human worth. But the themes I have selected attempt to highlight the aspects of a Judeo-Christian

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<sup>237</sup> Bayertz, *Sanctity of Life and Human Dignity*, xiii-xiv.

account which can speak to, and be understood by, our secular nation. These themes provide the foundation for dignity that has been missing in the other accounts explained so far.

The Biblical analysis will begin in Genesis and explain how a Judeo-Christian account of the origin of humanity (being made in the image of God – *Imago Dei*) prescribes a dignity that still has meaning even after humanity turned away from God at the Fall into sin. It will also explain how the concept of persons came as a result of Christians trying to understand the Incarnation of Jesus Christ, and why this is crucial for an account of dignity that is truly human. Through this discussion of the *Imago Dei* and persons, this chapter will reveal the importance of everything that makes us human – including both our body and mind. It will also emphasize how relationships are integral for human dignity. In contrast to autonomy-centered dignity, this account reveals that we are made for relationships with God and each other, and that dignity comes by upholding these relationships through love rather than turning inwards (as previous accounts provided in this thesis tend). The theme of inviolability refers to how this dignity is possessed intrinsically by all humans, regardless of their physical or mental state, and consequently it may not be usurped or violated by others. Finally, the theme of teleology refers to the purpose and end of human dignity which can be understood by looking at our origins - the *Imago Dei*. It reveals that humanity has been given a high calling to image God. Unlike the subjective treatment of dignity in our courts, our *telos* is objective and does not change with the times.

It is through an understanding of our origins and divine mandate, as well as the Incarnation of Jesus Christ, that humanity can understand its value. But in doing so, the Bible paints a picture of dignity that in many ways humbles humanity more than it exalts us. This will be made evident especially in this chapter's description of the Fall into sin as described

in Genesis 3. Although even many Christians would rather not address the implications of the Fall, it is an indispensable part of understanding the true state of human dignity in the world. This humbling account rings true to the reality of degradation, violation, self-glorification, and abandonment that so many humans face. It points us to the dignified state that we once were and can recover, but admits the undignified state that results, to a large degree, from our demand for autonomy. Unlike most other accounts, even from the Christian tradition, this chapter will not attempt to ground dignity in human aptitude, autonomy, or ability. To understand dignity or sanctity solely by examining attributes of being human misses the point. Reason and autonomy are means to an end rather than the end in themselves. Most attempts at grounding dignity in these traits fail miserably because of their glaring idealism in the face of widespread indignity.

This emphasis on humility reveals a religious partiality that I will not attempt to cover up. Amidst all of the differences and denominations within Christianity, there is no way that I can speak of a single account of human dignity that could be representative of the Judeo-Christian religion. Christians will have very different understandings of how the Bible does, or does not, ground human dignity. But to detail these differences in depth is too vast a scope for a thesis of this nature. Although I make use of thinkers from a variety of Christian perspectives, I am most indebted to the Reformed tradition. Although in many ways similar to other Christian accounts, a Reformed perspective of human worth is strongly influenced by the Calvinist doctrine of total depravity which results in less of an emphasis on the attributes of humanity since every part of a person – and all creation - has become corrupt by turning away from God. Reason and skill, or any form of human aptitude, are no longer emphasized as what gives us worth because of the corrupted nature of these attributes.



Instead, this perspective considers humanity's worth in view of our relationship with God and God's goodness to humanity even after the Fall. This Reformed emphasis on depravity may be humbling, but it rings true to the undignified reality of life that every human experiences. A realistic account is necessary for providing illumination on the difficult legal and political controversies which Canada grapples with – such as violence, experimentation on humans, and dying.

Although I admit this Reformed influence, I believe that my analysis represents a minimum that almost all Judeo-Christian accounts will subscribe to. Some will take it much further because they have a more optimistic view of human nature and the human will.<sup>238</sup> But the themes of dignity that I will detail reveal that even the Reformed tradition, which emphasises our depravity, offers a wealth of reasons to value human life and at the same time address the problems associated with contemporary discussion of human dignity and human rights.

### **The Need for Transcendence**

It may seem like quite a step to move from the classical, modern, and postmodern philosophies of human dignity to an account grounded in religion. Chapter Five will answer some of the common objections to considering a religious perspective in a secular society. But one point which should be made prior to looking at the Judeo-Christian account in depth

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<sup>238</sup> For example, the Roman Catholic tradition will agree with the themes of dignity that this chapter proposes but will want to go beyond these themes and drop the emphasis on human finitude. Human aptitude and reason are embraced because there is not the same emphasis on the corruption of the human will and the resulting inclination towards autonomy rather than God. For example, Pope John Paul II's encyclical letter *Faith and Reason (Fides et Ratio)* emphasises the value of reason without explaining how reason has been affected by the Fall. He states that "the Church cannot but set great value upon reason's drive to attain goals which render people's lives ever more worthy." Following the tradition of Roman Catholic thinkers such as Aquinas, he believes that "There is thus no reason for competition of any kind between reason and faith..." Pope John Paul II, *Encyclical Letter Fides Et Ratio of the Supreme Pontiff John Paul II To the Bishops of the Catholic Church On the Relationship Between Faith and Reason* (Vatican, September 14, 1998), [www.vatican.va](http://www.vatican.va).

is the need to go beyond the physical and consider the transcendental. To get beyond the problems associated with the rationalist philosophies analyzed in Chapter Three, we need a transcendental vantage point – one made known through revelation. Ultimately it is spiritual, but not at all in the sense that Voegelin advocated. Unlike a revelation through reason, it is a revelation from God. As such, it has to be understood alongside the rest of the biblical revelation which also speaks of humanity’s depravity.

To speak of a worth that comes from outside of us is promising because it points to the long sought-after grounding that has been noticeably missing from classical, modern, and postmodern accounts of dignity. For without grounding, these philosophies are unable to provide an explanation for why individuals *ought* to look beyond themselves and recognize and uphold the dignity of others. Basic rights theory recognizes that entitlement (i.e. rights) comes from someone apart from ourselves. There is no way that something from within us can be a right. It would simply be a preference. Hence there is a necessary relational component to rights (between the rights-giver and the rights-possessor). John Warwick Montgomery states the importance of this simple point:

Thus, whether we consider the relational nature of rights as entitlements or analyze the necessary implications of interest theory, the conclusions are the same: human rights logically require an identification of human value and pose the question of “someone” –Someone!- who has “the right, authority or power” to give them. And the quest to define rights cannot be separated from the need to justify them.<sup>239</sup>

The need for transcendence was understood mechanically by Archimedes (287 BC – 212 BC) who made the famous assertion *δοξ μοι πα στω και ταν γαν κινάσω* (“Give me a place to stand and I will move the earth.”).<sup>240</sup> Others have understood the importance of transcendence philosophically. The idea of metaphysical forms served as a crucial element of

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<sup>239</sup> John Warwick Montgomery, *Human Rights and Human Dignity* (Edmonton: Canadian Institute for Law, Theology, and Public Policy, 1995) 79-80.

<sup>240</sup> *Ibid*, 109.

Plato's philosophy. Transcendence was largely disregarded during modernity when philosophers like Kant attempted to compose moral systems based only on reason rather than any metaphysical authority. However, Montgomery points out that even Rousseau acknowledged a need for transcendence:

In order to discover the rules of society best suited to nations, a superior intelligence beholding all the passions of men without experiencing any of them would be needed. This intelligence would have to be wholly unrelated to our nature, while knowing it through and through; its happiness would have to be independent of us, and yet ready to occupy itself with ours; and lastly, it would have in the march of time, to look forward to a distant glory, and, working in one century, to be able to enjoy in the next. It would take gods to give men laws.<sup>241</sup>

As the faith in reason waned and postmodernity was ushered in, there seemed to be a growing acknowledgement of human finitude. For example, the need for transcendence was also understood philosophically by Ludwig Wittgenstein in his *Tractatus Logico-Philosophicus* (written in 1918) where he wrote "The sense of the world must lie outside the world. . . . Ethics is transcendental."<sup>242</sup> Montgomery agrees with Wittgenstein on this point. He argues that "one's ethic always reflects one's stance in society; and an absolute ethical stance (inalienable human rights) would require an absolute vantage point, which is precisely what fallible and limited human beings lack." He adds that "An absolute ethic – if there were one – would have to be transcendental."

I will follow these thinkers' advice and turn to the Transcendent to look for a grounding for human dignity. I will then apply the insights from this Biblical examination to the *Morgentaler*, *Rodriguez* and *Law* court cases as well as the public policy discourse on new reproductive technologies.

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<sup>241</sup> Montgomery, 110. quoting Jean-Jacques Rousseau, *Contrat Social*, Book 2, Chapter 7.

<sup>242</sup> Montgomery, 108 quoting Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, paras, 6.41-6.421.

## **Examining the Biblical Account - Beginning in Genesis**

The best place to examine this perspective is to go to its source – the Bible. This book, which invokes the authority of being God’s Word to mankind, reveals that the point of human existence is to glorify God and have a personal relationship with Him. Worldly wisdom is called foolish and man is instructed to deny a self-serving life and to live in humble submission to God. Steeped in sin and misery, the only way to find lasting life is by “dying to ourselves” and “becoming alive in Christ.”<sup>243</sup> It may be somewhat surprising, then, that it is the most influential work in support of the inherent worth and dignity of human beings. In particular, the book of Genesis and the New Testament account of the Incarnation of Christ, provide an apologetic defence of human dignity that transcends time and continues to impact our world today.

In his book *The Beginning of Wisdom: Reading Genesis*, Leon R. Kass provides a philosophical commentary on the first book of the Bible in an attempt to explain to readers how it can be read in a way that results in meaningful and practical wisdom. Seeking wisdom from Scriptures is the expected norm from a Bible commentary written by a Jew or Christian who believes that “all Scripture is God-breathed and is useful for teaching, rebuking, correcting and training in righteousness.”<sup>244</sup> But Kass does not fall into that category. On the contrary, he approached Genesis as a secular professor, raised in a secular home, and without any previous commitment to the Christian or Jewish faith. Added to that, he is an expert in bioethics and even chaired the President’s Council of Bioethics from 2002-2005. After being convinced by his friend Robert Sacks to reconsider the first book of the Bible, Kass read it himself and subsequently became enamoured with the depths of wisdom found in Genesis.

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<sup>243</sup> This is reflected in Christ’s instructions to his disciples in Matthew 10:39: “Whoever finds his life will lose it, and whoever loses his life for my sake will find it.”

<sup>244</sup> 2 Timothy 3: 16

He wrote *The Beginning of Wisdom: Reading Genesis* to explain why he believes Genesis should be [re]considered even by the secular world. Because of his unique background, Kass will be helpful for this chapter since this thesis is meant to be applicable to our secular society. However, Kass's Biblical exegesis is limited as it does not reflect the underlying themes of human dignity that span through the entire Bible. As such, Kass's work will only serve as an introduction to the Judeo-Christian account.

What enabled Kass to look beyond the modern sciences and to discover the wisdom in the Bible? Essentially, he was willing to suspend judgment as he launched into an examination of its text to see what Genesis had to say to him. After becoming convinced of the merit of this venture, he challenges the reader simply to examine Genesis as he did and let the text itself strengthen or weaken their trust. He writes that although sceptics may not want to read Genesis because of the lack of evidence and pious readers might argue that it is only for believers, he proposes another option: "the attitude of thoughtful engagement, of suspended disbelief, eager to learn."<sup>245</sup> That sounds only reasonable, but in an age where "Science" has become king and secular society has little use for the Bible (other than critiquing it), it is much more necessary than one might think. As Kass mentions in the Introduction, "We are too enamored with our rights to take our bearings from what were once thought to be our duties."<sup>246</sup>

Perhaps the biggest reservation that secularists have with considering Genesis is that the book begins with the statement "In the beginning God created the heavens and the earth."<sup>247</sup> Since Darwin's book *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life*, attributing human origins to God

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<sup>245</sup> Leon R. Kass, *The Beginning of Wisdom: Reading Genesis* (New York: Free Press, 2003), 16.

<sup>246</sup> *Ibid.*, 7.

<sup>247</sup> Genesis 1:1

rather than to the evolutionary process, has been discredited and even ridiculed. But the naturalistic explanation of human origins has had significant implications on human dignity. Have another look at the title of Darwin's book and notice that even it points to the inequality that flows from naturalistic explanations of our anthropology. But even with matters as controversial as the origin of the world, Kass is able to give good reason to the sceptic that the account in Genesis can be trusted. If the modern trust in the superiority of science can be challenged by showing that it is unable to answer many of life's biggest questions, the sceptic may become all the more willing to hear other accounts of answers to these mysteries. One good example where Kass demonstrates this is his discussion about what Genesis has to say about our origins:

We may be disappointed in the text's lack of clarity, but we are at the same time grateful that the account leaves mysterious what cannot help but be mysterious. In this sense, at least, we believe that the text tells the truth: we already suspect that there is no way for us human beings to visualize clearly or to understand fully the awesome coming into being of the world. We begin to trust the text.<sup>248</sup>

Kass believes that when this method of philosophical exegesis is employed in the study of Genesis, trust will grow more and more. This chapter will now examine whether this applies specifically to what the Bible says about human dignity.

The first chapter of Genesis provides a clear and intelligible account of the creation of the universe, with its focus being on the origins of the world and man. The very first verse credits this creation to the work of God, whose eternal existence is provided as fact. It goes on to explain how God made light, sky, seas, vegetation, sun, moon, stars, birds, fish, other animals, and man in six days. Kass explains how the sequence of creation is very rational, understood though a process of separation and division. Summarizing what Leo Strauss said

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<sup>248</sup> Kass, *The Beginning of Wisdom: Reading Genesis*, 29.

about this sequence, Kass writes that “we have an *intelligible* account of a cosmic order based on noetic or intelligible principles, not mythic or sensible ones.”<sup>249</sup>

Understanding the intelligibility of creation is important because it allows us to understand why it was made this way. Clearly there is a hierarchical ordering, with man being made as the final act of creation, on the sixth day.<sup>250</sup> The uniqueness of mankind is evident from God’s description of us when He said “Let us make man in our image, in our likeness, and let them rule over the fish of the sea and the birds of the air, over the livestock, over all the earth, and over all the creatures that move along the ground.”<sup>251</sup> The Latin term for being made in God’s image is *Imago Dei*.

Being made in the image of God and being given a mandate to rule over the earth is what Genesis says sets us apart from the rest of creation. Clearly these two things are important to better understand our uniqueness. Furthermore, there is a strong connection between these two descriptors. As J.H. Wright stated in *Old Testament Ethics For the People of God*, “Human beings are made to be like God; human beings are made to rule over the rest of creation.”<sup>252</sup> He also makes the keen observation that trying to pin down what exactly about being human makes us in God’s image is futile. “God does not *give* to human being the image of God. Rather, it is a dimension of our very creations....The image of God is not so much something we *possess*, as *what we are*. To be human is to be the image of God.”<sup>253</sup> He later adds that “It is not an extra added on to our species: it is definitive of what it means to be human.”<sup>254</sup>

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<sup>249</sup> Ibid, 33.

<sup>250</sup> Ibid, 35.

<sup>251</sup> Genesis 1: 26.

<sup>252</sup> Christopher J.H. Wright, *Old Testament Ethics for the People of God* (Downers Grove Illinois: Intervarsity Press, 2004), 119.

<sup>253</sup> Ibid.

<sup>254</sup> Ibid.

Kass wants to get more particular and believes that the special place of man is intelligible. “Human beings really are different from and higher than the other animals; and only the human animal could be called god-like.”<sup>255</sup> He begins to back this up by examining what it means to be made in the image of God. The Hebrew word for image is *tselem* and it comes from the root meaning of chiselling or cutting off. Like a statute, an image is a likeness of something, though it is not the thing itself.<sup>256</sup> Throughout the book Kass repeatedly reminds readers that being made in the image of God is both exalting and humbling. Although an image points to God because of its resemblance and dependence, it most definitely is not God itself. This is important to note, especially if the *Imago Dei* is understood as a calling for humanity. Kass points to Genesis to explain how the Bible describes God:

In the course of recounting His creation, Genesis 1 introduces us to God’s *activities and powers*: (1) God speaks, commands, names, blesses, and hallows; (2) God makes, and makes freely; (3) God looks at and beholds the world; (4) God is concerned with the goodness or perfection of things; (5) God addresses solicitously other living creatures and provides for their sustenance.<sup>257</sup>

It is striking that these attributes are also common to us humans, regardless of what religion or beliefs we may have. For as long as people have recognized and advocated human dignity, it is these characteristics (making, speaking, contemplating, caring, and studying) which have been acknowledged to raise man above the other creatures to give us dignity. Kass goes to lengths to be clear that one need not even be a theist to recognize that these qualities differentiate humanity from the rest of creation. “This is not anthropocentric prejudice, but cosmological truth. And nothing we shall ever learn about *how* we came to be

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<sup>255</sup> Kass, *The Beginning of Wisdom: Reading Genesis*, 37.

<sup>256</sup> *Ibid*, 37.

<sup>257</sup> *Ibid*, 37-38.



this way could ever make it false.”<sup>258</sup> Wright takes this another step by detailing how God’s creation work is described in regal terms. “So the natural assumption, then, is that a creature made in the image of this God will reflect these same qualities in carrying out the mandate of delegated dominion.”<sup>259</sup> As will be expanded on later, imaging God is a calling, something that all humanity must live, rather than a specific attribute of being human.

Our being made in the image of God enables us to have dominion on this earth. While still in the Garden of Eden, Adam’s first job was to name the animals.<sup>260</sup> Naming denotes authority. But authority does not denote abuse. Wright explains that our calling to subdue and rule the earth have been used by critics to blame Christians for abusing the environment. But he argues that this accusation is misguided because “By far the dominant interpretation of these words in both Jewish and Christian tradition down through the centuries has been that they entail benevolent care for the rest of creation as entrusted into human custodianship.”<sup>261</sup> This interpretation makes sense, especially when the command to have dominion goes alongside the description of humans as creatures made in God’s image. The Bible shows God’s care for this world – including the plants and animals.<sup>262</sup> We are called to show this same care.

Thus far, the Creation account paints a powerful picture of human dignity. Humanity was the crown of creation and lived in an intimate relationship with God and with each other. Adam and Eve even knew their own nakedness without shame.<sup>263</sup> They were given a garden, filled with everything they needed, to care for and live in. Indeed, humanity in general was

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<sup>258</sup> Ibid, 38.

<sup>259</sup> Wright, *Old Testament Ethics for the People of God*, 121.

<sup>260</sup> Genesis 2:19-20.

<sup>261</sup> Wright, *Old Testament Ethics for the People of God*, 120.

<sup>262</sup> In Matthew 6:26 Jesus said “Look at the birds of the air; they do not sow or reap or store away in barns, and yet your heavenly Father feeds them. Are you not much more valuable than they?”

<sup>263</sup> Genesis 2:25 states that “The man and his wife were both naked, and they felt no shame.”

given the whole earth to look after and be responsible for. We were created with a dignity that was known and realized.

But that changed radically when Adam and Eve chose to disobey God and eat from the tree of the knowledge of good and evil, despite God’s warning that they would surely die.<sup>264</sup> The serpent tempted Eve to eat from this tree, claiming that she would not die but rather be made more like God. “God knows that when you eat of it your eyes will be opened, and you will be like God, knowing good and evil.”<sup>265</sup>

The serpent tempted man by promoting individual autonomy over service to God. The serpent’s claims about not dying and acquiring knowledge were meant to promote disobedience. Kass makes the thoughtful point that “Human reason, generally content to let its necessarily partial truths masquerade as truth entire, leads human freedom astray.”<sup>266</sup> Reason itself is not the problem. Rather it is reason directed wrongly – away from God. The book of Proverbs explains that reason, like every other part of life, must find its ultimate source in God, not human autonomy. The Teacher of Proverbs declares that “the fear of the LORD is the beginning of wisdom.”<sup>267</sup> As soon as Adam and Eve ate from the tree, their eyes become opened and in shame they realized their nakedness and tried to hide from God. Thus began mankind’s spiritual and physical death.

Through the subsequent curses, their eviction from the garden, and the beginning of death, Adam and Eve learned that discovering autonomy is not as desirable as they thought it would be. They had to trust their own intuition and experience to make choices. Kass points out that “It is precisely this natural and uninstructed human way that the Bible warns us

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<sup>264</sup> Genesis 2:17.

<sup>265</sup> Genesis 3: 5.

<sup>266</sup> Kass, *The Beginning of Wisdom: Reading Genesis*, 87.

<sup>267</sup> Proverbs 1:7, Psalm 111:10.

against by having God attempt to prevent man from attaining, or even pursuing, that freedom and its correlative, autonomous knowledge.”<sup>268</sup> As much as our contemporary society tries to sell self-directed autonomy as the culmination of human experience, our history reveals that it leads to misery.

The Fall did not bring an immediate physical death to Adam and Eve. They became temporal but they were still able to have children and therefore ensure the continued existence of humanity. Life is not something that we had a natural right for. The human race deserved death because God had promised death as a result of rebelling against Him. That means that our temporal lives are a gift from God. The same message is evident when Cain killed Abel but God allowed Cain’s life to be preserved and even protected.<sup>269</sup> It is also communicated in the sixth commandment which forbids murder. Indeed, the entire Bible consistently shows that life itself is a gift from God and that nobody, except to those authorities whom God entrusts the sword as an agent of God’s wrath,<sup>270</sup> is permitted to take away what God has given.<sup>271</sup> We are not portrayed as autonomous agents of our own destiny but as lowly rebels who may still live because of God’s kindness to us.

It is important to note that after the Fall into sin and turning away from God, mankind no longer imaged God as we once did. Instead we image ourselves. Genesis explains that after Abel’s death Adam and Eve had more children. First they received Seth, who would become the father of a faithful line of descendents that lead right to Abraham. But Genesis makes it clear that Seth was made in the image of his imperfect father Adam, not God. The

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<sup>268</sup> Kass, *The Beginning of Wisdom: Reading Genesis*, 64.

<sup>269</sup> See Genesis 4:8-15. In this passage Cain realizes that people who find him will want to kill him for what he did to Abel. But the LORD assured him that if anybody would kill him he would “suffer vengeance seven times over.” It then explains that the LORD put a mark on him so that “nobody who found him would kill him.”

<sup>270</sup> See Romans 13:1:7 which explains that everybody must submit to the governing authorities because God has established them.

<sup>271</sup> David McIlroy, *Christian Perspectives on Law: A Biblical View of Law and Justice* (Waynesboro, GA: Paternoster Press, 2004), 21.

image of God is not restored with a new life – the Fall had a lasting effect that would proceed through the generations. In Genesis 5, when a genealogy is provided, it explains that Adam was made in the image of God but that Seth was made in the image of Adam. The Fall ruined the relationship between God and humanity that we once had. Each successive generation imaged fallen humanity. This reality is attested to by many examples in the rest of Genesis, and the history of redemption as a whole, which detail the perpetual violence and depravity of life. The murder of Abel followed almost immediately after the Fall and it did not take long after that before the whole world becomes a hellish mess. Genesis 6 explains God’s reason for the universal flood. “The LORD saw how great man’s wickedness on the earth had become, and that every inclination of the thoughts of his heart was only evil all the time. The LORD was grieved that he had made man on the earth, and his heart was filled with pain.”<sup>272</sup>

The transition from generation to generation is necessary because, after living over nine centuries, Adam dies of natural causes (i.e. he was not murdered). The curse of the fall into sin (“you will surely die”<sup>273</sup>) is demonstrated physically. The curse of mortality is a slap in the face to humanity, who must recognize that they are not in control of their own autonomy when it comes to their very existence. The realization of the inevitability of death can cause either anger<sup>274</sup> or humility. The Biblical account seems to show that the line of Cain reverted to the former, and the line of Seth appeared to retain at least a degree of humility. It seems that we still see this contrast today, especially over issues such as physician assisted suicide. As a theological ethicist and a current member of the President’s Council on Bioethics, Gilbert Meilaender realizes that this conundrum with dying is an important matter that, sooner or later, almost everybody grapples with:

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<sup>272</sup> Genesis 6:5.

<sup>273</sup> Genesis 2:17.

<sup>274</sup> Kass, *The Beginning of Wisdom: Reading Genesis*, 154-155.

The approach of death may seem to mock our pretensions to autonomy; at the least, we are invited to wonder whether wisdom really consists in one last effort to assert that autonomy by taking control of the timing of our death. Contemplation of mortality reminds us that our identity has been secured through bodily ties - in nature, with those from whom we are descended; in history, with those whose lives have intertwined with ours. We are forced to ask whether the loss of these ties must necessarily mean the end of the person we are.<sup>275</sup>

While this realization of our finitude is a major challenge to humanity, it does have the ironic result of waking us up to how precious life is. Robert Spaemann writes that “Consciousness of finitude delivers life from inherent absurdity, and supplies the condition for finding it precious....Anticipation of the end penetrates life to its innermost core.”<sup>276</sup>

The many stories given in Genesis clearly show that God made man to live in reverence and awe of Him. Recognizing that we are only an image of God and not gods on our own (i.e. through autonomy), Kass writes that the “upright animal, his gaze uplifted and his heart filled with wonder and awe, begins to suspect that he may in fact stand tallest when he freely bows his head.”<sup>277</sup> Time and time again, the Bible provides examples of generations who do not learn from the past and pursue their own *telos* (ends) rather than live in the fear of the Lord. The first chapters of Genesis give the examples of Cain, Lamech, and eventually the whole world (save Noah and his family) who do not live in reverence of God nor his image and end up violating human life. Just before the world-wide flood, God told Noah “I am going to put an end to all people, for the earth is filled with violence because of them.”<sup>278</sup> Violence comes from the root word violate. Something can only be violated if it was made for a purpose, a *telos*. As a result of the Fall into sin, humanity became intent on violating human life. Instead of directing every life towards God, the world was consumed with

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<sup>275</sup> Gilbert Meilaender, *Body, Soul, and Bioethics* (Notre Dame: University of Notre Dame Press, 1995), 45.

<sup>276</sup> Spaemann, *Persons: The Difference Between ‘Someone’ and ‘Something,’* 121.

<sup>277</sup> Kass, *The Beginning of Wisdom: Reading Genesis*, 53.

<sup>278</sup> Genesis 6:13.

violence. The flood was God’s answer to the depravity on the earth. By starting over with just one family that is faithful to God, humanity was given one more opportunity to live God’s way rather than continuing down the road of autonomy that led them to the flood.

After God destroyed the world in the flood, it becomes apparent that the human race needed law to restrain our wickedness. God provides a covenant; a blessing and a law to Noah and his family. He allows man to eat anything as long there is no blood still in it. Then God commands that if man’s blood is shed, He will require the blood of the murderer in retribution. The reason goes back to the *Imago Dei*: “for in the image of God has God made man.”<sup>279</sup> This strong command against murder because humanity was made in God’s image is a foundation for the concept of the sanctity of human life.<sup>280</sup> It is important to note that this does not mean that all humanity at this point actually images God. As was explained already, the Fall into sin turned mankind away from God and towards ourselves – which means that we no longer reflected God. But this passage affirms that even though we made this destructive choice for autonomy, human life is still sacred because we were all once made in God’s image. God still sees us as different from the rest of creation. Referring to both this prohibition against murder and a later New Testament text which forbids cursing other people because they are made in the image of God<sup>281</sup> theologian J. Douma explains that “Apparently it makes no difference whether someone is *behaving* as the image of God; his

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<sup>279</sup> Genesis 9:6.

<sup>280</sup> This concept of life’s sacredness has become so firmly entrenched throughout the world that it is found in everything from criminal codes to the Hippocratic Oath. However, the term sanctity of life itself has largely been lost outside of theological circles even though the essence of the concept is very evident. As explained earlier, in the *Rodriguez* court case, the majority of the Supreme Court was only able to uphold its decision by relying on this concept, even though it has never been used by the Court in this way with any other case. Our contemporary culture relies on the principle of the sanctity of life while denying its source.

<sup>281</sup> James 3:9

unique status and special calling should be enough to keep us from attacking his life and from cursing him.”<sup>282</sup>

With the Noatic law, there is no doubt that God singles out mankind once again as sole possessors of inherent worth. The law applies to people, not animals.<sup>283</sup> Not only is man responsible for executing justice, he is also allowed to freely kill and eat animals. Kass also adds that “man is the only animal that *decides* how other animals *should* be treated.”<sup>284</sup> However, that does not mean that humans can treat animals as they wish. God restricts him to not eat meat with its blood still in it. Blood was the very source of life for animals and man and this restriction testifies that all life must still be respected.<sup>285</sup> Even if we may eat meat, that does not mean that animals may be degraded. The Noatic Law is in many ways a reminder of the original calling given to humanity – though this time it is made in light of the fallen condition of man. It teaches us that even in a world that has rejected God, humans still have a unique place in this world because of the way that we were made and the calling that we continue to have (to be image bearers and to care for this earth).

### ***The New Testament and the Concept of Persons***

Left in Genesis, we wonder how dignity can continue to mean anything as it is so often assaulted. But the curse and promise that God gives in Genesis 3 tells us that redemption, and a restoration of dignity, is coming. The Scriptural account of human dignity is only fully understood when the life of Jesus Christ is also brought into the picture. In Him,

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<sup>282</sup> J. Douma, *The Ten Commandments: Manual for the Christian Life*, trans. Nelson D. Kloosterman (Phillipsburg, NJ: P&R Publishing, 1996), 211.

<sup>283</sup> However, the law also specifies that if an animal is responsible for shedding man’s blood, it must also be killed.

<sup>284</sup> Kass, *The Beginning of Wisdom: Reading Genesis*, 177.

<sup>285</sup> *Ibid*, 178.

the seed of the woman (a symbolic term for mankind that finds its roots already in Genesis 3) conquers death and consequently restores dignity. The New Testament allows us better to understand what the *Imago Dei* was because it tells us how the image was restored through the work of Jesus Christ.<sup>286</sup> As will be explained, this has important implications on what it means to be a person. Understanding the Christian origin of the concept of persons is essential for understanding why humans have a dignity that goes far beyond the limited accounts presented in Chapter Three. It reveals a striking harmony with the concept of the *Imago Dei* and forms a foundation for understanding human dignity as relational, intrinsic, inviolable, and teleological.

It is the New Testament which clearly explains how the Genesis 3 promise of redemption<sup>287</sup> was fulfilled in the person of Jesus Christ. The New Testament calls Christ “the image of the invisible God, the firstborn over all creation.”<sup>288</sup> The Gospels explain how Christ came to this world with a very humble introduction. Born in an animal shelter, to a poor young couple in Bethlehem, Christ did not seem to exemplify dignity. But Scripture tells us that there was more than meets the eye. Jesus Christ was a human, but at the same time he was God. He was born of Mary but she conceived by the Holy Spirit – hence the virgin birth. Although he entered this world in a most lowly way, he was really the firstborn of all creation. The Gospel of John even states that through Jesus “all things were made; without him nothing was made that has been made.”<sup>289</sup>

That Christ would humble himself to take on our form distinctly applies to humanity rather than creation in general. He did not just come down and live among us, he became one

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<sup>286</sup> G.C. Berkouwer, *Man: The Image of God* (Grand Rapids: WM. B. Eerdmans Publishing Co., 1962), 87.

<sup>287</sup> This promise was pronounced by God in response to Adam and Eve’s decision to disobey God and serve themselves.

<sup>288</sup> Colossians 1:15.

<sup>289</sup> John 1:3.



of us and was “like his brothers in every way” except without sin.<sup>290</sup> After all, sin is about seeing oneself as Creator rather than creature, as autonomous rather than dependent on God. This cannot be the case with Christ as He is God. The book of Hebrews explains how Christ’s Incarnation was an answer to our mortality and death – the chief enemy of human life. “Since the children have flesh and blood, he too shared in their humanity so that by his death he might destroy him who holds the power of death - that is, the devil - and free those who all their lives were held in slavery by their fear of death.”<sup>291</sup> This does not seem very important to those whose lives revolve around themselves and who do not understand their own depravity. Because of our arrogance we need to be humbled before we recognize where we really stand.

The wonder of the Incarnation causes the writer of Hebrews to quote a part of the Hebrew Bible “What is man that you are mindful of him, the son of man that you care for him? You made him a little lower than the angels; you crowned him with glory and honor and put everything under his feet.”<sup>292</sup> This amazement reflects the reality that humanity is far from dignified in and of ourselves. We are not worthy of the gift of the Incarnation. The entire Biblical account of human dignity revolves not around humanity but God. Humans only have dignity because God made us in His image. Once we turned away from Him and no longer reflected Him, He still chose to bring salvation through Jesus Christ and His Incarnation. It is God’s favour alone that bestows dignity on humanity. It has nothing to do with human worthiness. It truly is grace that God looks so favourably on us even after we turned away from Him.

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<sup>290</sup> Hebrews 2:17.

<sup>291</sup> Hebrews 2: 14-15. The ultimate fulfillment of this is found in Christ’s promise to return again, at the fulfillment of time, and usher in a new heaven and earth where death will be no more.

<sup>292</sup> Psalm 8: 4-6.

### *Persons – Applying the Doctrine of the Incarnation to Human Dignity*

How does all of this New Testament theology apply to the philosophy of human dignity as our Western world understands it? It is crucial to understand this theology of creation, fall, and redemption to understand the Judeo-Christian account of human dignity. The first key to applying it to our contemporary situation can be found in the Judeo-Christian roots of the concept of persons. Gilbert Meilaender explains that the concept of persons (as distinct from being human) originally came from our understanding of Christ's Incarnation:

In our history this understanding of the person was most fully developed when Christians had to make sense of the claim that in Jesus of Nazareth both divine and human natures were joined in one person. Christians did not wish to say that there were really two persons (two sets of personal characteristics) in Christ; hence, they could not formulate his personal identity in terms of capacities or characteristics. They could speak of his person only as an individual with history, a "someone who." The personal is not just an example of the universal form; rather, the general characteristics exist in and through the individual persons. And we come to know such persons only by entering into their history, by personal engagement and commitment to them, not by measuring them against an ideal of health or personhood.<sup>293</sup>

This idea of a "someone who" is very important for understanding why a Judeo-Christian account of dignity is unique and valuable. But it must be explained in more depth before this value can be fully appreciated. As has already been explained in the philosophy of Peter Singer, there is a lot of confusion about persons in contemporary society. Who qualifies as a person? Meilaender is right in pointing out that "The language of persons, so important in developing and expanding our concept of human rights, has more recently been used to

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<sup>293</sup> Gilbert Meilaender "Terra es animate: On Having a Life" in Jean Bethke Elshtain and J. Timothy Cloyd, *Politics and the Human Body: Assault on Dignity* (Nashville: Vanderbilt University Press, 1995), 21.

restrict rather than expand the community of rights-bearers.”<sup>294</sup> Increasingly, persons are understood as free and autonomous agents (which may extend beyond the human species). But this is a deviation from the origins of this rich term.

As mentioned already, the concept of persons came as a result of Christians trying to understand Christ’s Incarnation. Meilaender, in his review of the book *The Difference Between “Someone” and “Something”* by notable German philosopher Robert Spaemann, writes that “in order to think philosophically about persons we must give attention to the history of Trinitarian and Christological dogmas as they developed in the early centuries of the Christian era.”<sup>295</sup> Looking specifically at the Incarnation of Christ, the church “needed a way to describe Jesus that did not turn him into a hybrid being: two natures simply glued together. The better alternative, which won the day, was to say that both natures of Jesus (divine and human, with their respective properties) are had by one person, the eternal divine Word of the Father.”<sup>296</sup> With this understanding of Jesus Christ as a person we can understand that His name does not refer to a specific nature (divine or human) but as “someone.” He is the one who took on human flesh, died on the cross, rose from the grave, ascended to heaven, and promises to return to earth. Meilaender, working off of Spaemann, explains the importance of this:

In short, it was Christians—trying to figure out how they ought to speak about Jesus and the God who had been revealed in Jesus—who first learned what it means to be a person. They learned to distinguish between what we have (our nature) and what we are (our person). And the consequences are incalculable. Were human beings simply members of their species, it might sometimes, Spaemann notes, make sense to sacrifice “this or that member to the interest of the species as a whole.” But, as persons, human beings are incommensurable. “That is why we prefer to speak of

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<sup>294</sup> Gilbert Meilaender “Looking for personality” a review of *The Difference Between “Someone” and “Something,”* by Robert Spaemann, *First Things* (October 2007): [http://www.firstthings.com/article.php3?id\\_article=6047](http://www.firstthings.com/article.php3?id_article=6047).

<sup>295</sup> Ibid.

<sup>296</sup> Ibid.

human ‘dignity’ (*Würde*) rather than human ‘value’ (*Wert*). The value of ten people may be more than that of one, but ten are no more than one in point of dignity.” Thus, persons are incomparably unique and of “incommensurable dignity.”<sup>297</sup>

So what really is a person? Meilaender makes it quite simple: “A person is someone who has a history, not something that has certain properties.”<sup>298</sup> All humans are persons, but the idea of a person is richer than simply being a member of a species. “Persons have that species-specific nature, but the singular individual who has it is more than a member of a species. Likewise, persons are not instances of a universal concept. They are members of a community in which each ‘occupies a unique and distinctive position entirely his or her own.’”<sup>299</sup> He goes on to explain that “There is a certain two-sidedness to persons, as is already evident in saying that persons *have* their nature or exist *in* their nature.”<sup>300</sup> We can understand this because we experience an “inner distance” from ourselves. “A stone falls from a building and is simply an object constrained by laws of nature. I fall from that same building and know myself as a falling object—which I both am and am distanced from.”<sup>301</sup> Meilaender explains that Spaemann is able to provide examples even from fairy tales of how we know the difference between who we are and what we are: “The prince who is changed into a frog and eventually back into a prince somehow—as a person—persists through these several transformations.”<sup>302</sup> In fact, it is quite telling that this type of transformation is rather

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<sup>297</sup> Ibid. I believe that almost every parent can attest to the truth of this idea of incommensurable dignity. Their child is not simply another human, even a human that they have a special attachment to. The child has a worth that cannot even be compared. One of my few memories of childhood is when I asked my father how valuable I was. I was amazed that he thought I was more valuable than a million dollars, or even a sky scraper! My young mind was in wonder at the thought that I could be more valuable than those things. And yet the older we get the more it simply becomes a given that another person is irreplaceable and more valuable than any *thing*.

<sup>298</sup> Ibid.

<sup>299</sup> Ibid.

<sup>300</sup> Ibid.

<sup>301</sup> Ibid.

<sup>302</sup> Ibid.

common among fairy tales (such as *Beauty and the Beast*) and yet children have no problem understanding *who* the characters really *are*.

What does this talk of fairy tales and falling rocks have to do with human dignity? Quite a lot. When we understand ourselves as persons – as a “someone who” we maintain an intrinsic dignity that does not get lost or minimized as a result of possessing less autonomy than others. There is no way that disease can rob us of who we are. The “someone who” continues on through whatever happens to their body or intellect. Every human being, from conception onwards, fit the requirement for being persons. They are unrepeatable beings with history. Some might immediately object that a young child is not capable of understanding the “inner distance” from themselves. But this is a misunderstanding of persons – an attempt to shift the discussion from persons to personhood (i.e. an attribute) which runs contrary to our everyday experiences. If someone were to ask you whether you were conceived, the answer would be obvious – of course you were (usually about nine months before you were born). It was not a “something” that was conceived and then became you upon birth or at some point between conception and birth. As Meileiander (reviewing Spaemann) rightly points out, the idea of a “potential” person is absurd because “Nothing that is not a person can develop into a person.”<sup>303</sup> Likewise, if one were to get into a severe accident and lose their mental capacities, it does not mean that they no longer exist. It is that *person* who is brain-dead. The person does not cease to exist when their mental capacities leave.

This account of persons is in keeping with the doctrine of the *Imago Dei*. All humans are more than just a member of another species that populate this earth. We are beings who have a relationship with the Creator of this world and a special mandate to reflect Him by righteous and holy living. We all are beings who have a common history which begins with

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<sup>303</sup> Ibid.

being made in the image of our Creator. We are also beings who chose to give that up and pursue our autonomy rather than reflect God in this world. And we are also all beings who have the possibility to return to God because of the Incarnation of Jesus Christ. Both the Hebrew Bible and the New Testament reveal that humans are able to possess the Holy Spirit and enter into a personal relationship with God. The concept of *unio mystica* refers to the wondrous reality of the Divine dwelling in man – conforming us to the image of God. The Bible describes Christians as being “in Christ” and having died and risen with Christ. Through this indwelling and through the life of Christ we are called a “new creation.” Numerous references are made in the New Testament to Christians (both corporately and individually) being the temple of God and of the Holy Spirit.<sup>304</sup> J. Douma explains the importance of this and the Genesis description of the *Imago Dei* when he says that “God desires to dwell within man and wants His power to radiate into this world through man.”<sup>305</sup> Once again, the theme of the *Imago Dei* comes through.

But what about those persons who do not believe in God? Since those who do not believe this do not fulfill their mandate to be image-bearers or temples of God, they do not have this same relationship with God. They are in the same state as all humans after the Fall into sin. Their refusal to live according to God’s way means that they forfeit a major part of that which makes us different than the rest of creation. But that does not mean that they no longer have a basic human dignity and that the sanctity of human life applies only to Christians. As has already been explained, the Bible makes it clear that all humans were made in God’s image and share the same calling in this regard. The earlier discussion of persons emphasizes that even if people no longer conform to God, they still are people who

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<sup>304</sup> 1 Corinthians 3:16 applies “the temple of God” to the congregation and 1 Corinthians 6:19 applies the “temple of the Holy Spirit” to Christians personally.

<sup>305</sup> J. Douma, *The Ten Commandments*, 51.

share the history of being made in God's image. Their very status as humans gives them dignity – even if they refuse to live the way they are called to. That is why the Noatic Law still referred to the *Imago Dei* as the basis for the law against murder, even after the Fall. From our human perspective, everybody is to be treated with equal worth because of our dignified origin and calling. We will never know where persons ultimately stand in relation to God. The only One who can ever know this is God Himself. He does not give us the authority to treat some humans as if they no longer have intrinsic worth.<sup>306</sup>

Understanding persons in the way described by Meilaender is much richer than how it is understood in our secular society. Peter Singer's redefinition of persons to exclude some humans and include animals is the most stark contrast to this definition. Increasingly our society is buying into the belief that persons possess autonomy whereas not all humans do. From Christ's Incarnation we learn that the concept of persons (as opposed to personhood) is not meant to limit the number of those who possess dignity. Rather it is to affirm the dignity of all because of who we are, as beings in relation to God, not because of what we can do.

Understanding ourselves as persons according to this Judeo-Christian account has significant implications on many related issues which have already been introduced through the discussions in the first three chapters of this thesis. More specifically, this account of human dignity recognizes the importance of our bodily existence (in contrast with the dualism that has plagued Western philosophy for so many centuries), the importance of personal relationships and interconnectedness (grounded in the Biblical command to love our neighbour as ourselves), the permanence and inviolability of dignity as a result of its intrinsic nature (in contrast with the ever-increasing claims of dignity being lost as a result of

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<sup>306</sup> However, as Genesis 9 and Romans 13 make clear, He does give authority to designated authority figures to use the sword to execute justice on His behalf. But this is a special calling and authority that does not apply to humanity in general.

decreasing autonomy), and also points to a *telos* which is able to provide objective direction to many of the issues that we all encounter in living and dying. This chapter will now look at each of these components of the Judeo-Christian account of human dignity and then draw out some ways in which they apply to the specific issues brought forward in Chapters One and Two.

### **The Physical and Rational Character of the Judeo-Christian Account of Dignity**

Our physical nature and intellect are important aspects of who we are as persons. But they are not all that we are. That the Judeo-Christian account of dignity is ultimately grounded in man's relationship with God (the Transcendent Being who alone fully knows who we are as persons) does not mean that human attributes have no role in constituting human dignity. The problem has been that attributes such as reason have been treated as an end in themselves. As has been made clear already, this has often resulted in dualistic tendencies which ascribe dignity to those humans that possess the attributes that are associated with dignity. But this weakness does not mean that the attributes serve no function. On the contrary, they can work hand-in-hand with the Judeo-Christian account of dignity as long as they are understood as a means towards the end rather than vice versa. Human reason and the human body play an important function in how humanity lives in relation to each other and how we also carry out our calling to have dominion over the earth.

The ancient Greek dismissal of all that was physical has influenced Western society in everything from the sciences to religion. The Greeks worshipped wisdom and reason at the expense of all that was physical. The human body was but an image of the form of what really was human. This dualism is even evident today. Just think of our society's views of



those who have “lost their mind” or people who have been reduced to a “vegetative” state. We seem to think that when the mind is not working, when autonomy is absent, then worth disappears. As explained in preceding chapters, this has led to a view of human dignity which does not dignify humanity but autonomy. We do not get our worth by our DNA but by the power we have through our choices. To restore a dignity which is truly human, there needs to be recognition of both the rational and the physical components of being human.

The Biblical account of our creation reveals that God made man “from the dust of the ground and breathed into his nostrils the breath of life, and the man became a living being.”<sup>307</sup> We are physical (from the earth) but also spiritual (from the breath of God). J. Douma relates how the Bible is able to uphold the importance of physical and rational capacities without reducing ourselves to only our capacities:

God equipped man with various capacities (understanding, will, a unique body) he needed to function as God’s image. So in these capacities we find the *conditions* for being the image of God. Without understanding, you cannot bring the world to full blossom; without understanding, you cannot praise God in a conscious, personal manner.... Nevertheless, those conditions for being the image of God are not the image of God itself.<sup>308</sup>

Gilbert Meilaender highlights the importance of our physical bodies in the writings of the early church fathers. For example, “In his *City of God* Saint Augustine describes the human being as *terra animata*, animated earth.”<sup>309</sup> Even before Augustine, Origen spoke of the *eidos* which was the “unchanging form of the body.” This allowed him to explain how the body could be resurrected despite the fact that it changes so much throughout life. Similar to

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<sup>307</sup> Genesis 2:7.

<sup>308</sup> J. Douma, *The Ten Commandments*, 51.

<sup>309</sup> Meilaender, “Terra es animate: On Having a Life,” 6, citing Saint Augustine, *De civitate Dei*, trans. Henry Bettenson (New York: Penguin Books, 1972), book 20, chapter 20.

Augustine's use of *terra animata*, for "Origen this *eidos* is not the soul; it is the bodily form united with the soul in this life and again in the resurrection."<sup>310</sup>

Meilaender understands that our physical nature is the mode through which we live in relation with others through history. When we apply the concept of persons discussed earlier in this chapter, we recognize that a being finds its place in history bodily. Regardless of how many cells make up our bodily existence, or how many of those cells have been broken down because of disease or disability, our beings retain dignity because we are incommensurable – unrepeatable beings with a history. That is why death is such a problem for those who understand themselves as simply autonomous beings. Rodriguez did not think that life was worth living because she was losing her autonomy. The Judeo-Christian account of persons disagrees with this response to illness because Rodriguez is more than her autonomy. Her person includes her body and she possesses incommensurable worth even without her autonomy.

The Judeo-Christian account of dignity is truly human because it includes all aspects of what it means to be human, including our body and our mind. Every part of us shares the same origin, mandate, and ability to live in relation with God. Reason can function as a valuable part of reflecting who God is to this world no less than the wonder of a well-functioning human body. But when one of these parts of being human is gone or cannot function normally, that does not take away our humanity, our intrinsic dignity, or our *telos*. If that were the case then nobody would have this dignity because we are all imperfect in so many ways. The point is to use the abilities that we have been given towards our *telos* rather than make them an end in themselves.

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<sup>310</sup> Ibid, 6-7.

The autonomy-centered philosophy of personhood (originating from Kant) is a denial of human dignity. Kass points out that “Precisely because it dualistically sets up the concept of “personhood” in *opposition* to nature and the body, it fails to do justice to the concrete reality of our embodied lives, lives of begetting and belonging no less than of willing and thinking.”<sup>311</sup> The point is that there is a lot more to being human than reason. “Precisely because “personhood” is distinct from our lives as embodied, rooted, connected, and aspiring beings, the dignity of rational choice pays no respect at all to the dignity we have through our loves and longings – central aspects of human life....”<sup>312</sup> The Judeo-Christian account of human dignity really is human. Every part of us, body, soul, heart, and mind, was made by God in God’s image and is part of who we are as persons.

### **The Relational Character of the Judeo-Christian Account of Dignity**

The implications of the relational aspects of the doctrines of the *Imago Dei* and the Incarnation are significant and meaningful. One of the most striking limitations of modern accounts of human dignity is its focus on individualism. How can any account of humanity’s place in this world neglect the importance of relationships? Ask anybody what gives their life meaning and there is no doubt that relationships with family, friends, and God will rank at the top of the list. The Judeo-Christian account of human dignity provides a foundation for care (think of the Royal Commission on New Reproductive Technologies in Chapter Two) because it is based on our relationship to the transcendent God and is also realized in our relationship with each other. The relationship between God and humanity provides a foundation for care (and consequently dignity) because it comes from outside of humanity

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<sup>311</sup> Kass, *Defending Human Dignity*, 18.

<sup>312</sup> *Ibid.*

(i.e. an Archimedean point). These relationships need to be explained in-depth to grasp the importance of this doctrine for the Canadian context.

Going back to Genesis 1, note how God said “Let *us* make man in *our* image...” The triune nature of God is reflected in humanity. Like God, who is a perfect relationship of Father, Son, and Holy Spirit, we were made to live in relationship with each other and with God. Christopher J.H. Wright explains that “the first fact about this ‘image of God’ that the text immediately notes is our sexuality, that complementary duality in unity, from which flows the rest of our social nature: marriage, parenthood, family, kinship and outwards in widening circles. So, human beings were created in relationship and for relationship.”<sup>313</sup>

American Protestant theologian Paul Ramsey offered a perspective of the *Imago Dei* which also emphasizes this relational component. “The image of God is rather to be understood as a relationship *within which* man sometimes stands, whenever like a mirror he obediently reflects God’s will in his life and actions... The *mirror* in itself is not the image; the mirror images; God’s image is in the mirror.”<sup>314</sup> This view is shared by Dutch theologian Klaas Schilder who also did not believe that the image of God is still present in fallen man. G.C. Berkouwer explains Schilder’s position by stating that “The image of God does not refer to a static, ontic state, but to man’s service, man’s fulfilling his calling. The image is expressed in a dynamic and close fellowship with the God and the Covenant.”<sup>315</sup>

Ultimately our worth comes through our relationship with God. To be in the image of God is to represent Him in life. As has already been explained, the Genesis account of Creation makes it clear that humanity was made for this. This is a great calling that applies to

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<sup>313</sup> Wright, *Old Testament Ethics for the People of God*, 214.

<sup>314</sup> Göran Collste, *Is Human Life Special? Religious and Philosophical Perspectives on the Principle of Human Dignity* (Bern: Peter Lang AG, 2002), 86. quoting Paul Ramsey, *Ethics at the Edges of Life: Medical and Legal Intersection* (New Haven: Yale University Press, 1978).

<sup>315</sup> Berkouwer, *Man: The Image of God*, 54.

every single human. Regardless of our autonomy, skills, or potential, all humans share in the high calling through their existence in history. As Berkouwer states, “This concept deals with man as he actually is, the non-autonomous and non-independent creature, unable to rely on himself alone; man, who can find and possess his riches and his glory precisely only in his dependence on and in his communion with God.”<sup>316</sup>

Of all descriptions of the *Imago Dei*, none express it more pertinently than that of the relationship between a father and a son. The theme of God as the heavenly Father and of us as His children runs through the entire Bible. For example, we are called to shine like stars in this world by being blameless and pure children of God.<sup>317</sup> Family is where most of us discover relationships in the most powerful way. After all, there is a genetic connection between parents and children which has a big impact on the lives of the children. Theologian and Reformer John Calvin pointed to this father-child relationship as a way to understand and explain the *Imago Dei*, also as it applies to humanity in an age where many have rejected God.<sup>318</sup> God made us as His children so it is only natural that we would be images of Him. Children resemble their parents. Unfortunately, children do not always maintain their relationship with their parents. They can rebel and leave home. Likewise, humanity rebelled against God and decided to pursue autonomy rather than live in relation with Him. Where does that leave us? The Bible reveals that life (i.e. eternal life) comes only when we live in relationship with God as our Father. The New Testament explains that those who are in Christ are adopted as children of God and consequently returned to that relationship in which

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<sup>316</sup> Ibid, 114.

<sup>317</sup> Philippians 2

<sup>318</sup> This discussion of the relationship between a father and children as exemplifying the *Imago Dei* is explained in the following article that is soon to be published: Jason P. Van Vliet “As a son to his father”: An Overlooked Aspect of the *Imago Dei* in Calvin,” in H.J. Selderhuis, ed. *Calvinus sacrorum literarum interpres*. (Göttingen: Vandenhoeck & Ruprecht, forthcoming).

we were created. But this requires faith in Christ. Those who do not have this do not live in this relationship with the Father and are warned that death is impending. But that does not mean that they lose their dignity. Like children who rebel against their parents, they may leave and live like they do not know their parents but that does not mean that they do not have that biological connection to them. Regardless of how the child may live, they still have a special place in the heart of their parents.

This relationship extends not just between us and God but between humans as well. Jesus explained that the first and greatest commandment is to love God with all our heart, soul, and mind but that the second commandment that goes along with this is to love our neighbour as our self.<sup>319</sup> After all “since God so loved us, we also ought to love one another.”<sup>320</sup> We reflect God’s image by loving – both God and our neighbour. The commandment to love is called the fulfillment of the law, the greatest commandment of all.<sup>321</sup> The greatest example of love is found in Christ Himself – that he was willing to die so that the world could have life. “Thus the restoration of the image is not a rehabilitation of separate individuals, who thereafter are joined to form a community. Our relation to others does not follow as a more or less important result of this restoration, but is in the divine intention essential to our being human.”<sup>322</sup>

The Judeo-Christian account of human dignity is grounded in the relationship between man and God and must be applied in our relations among humanity. This command to love everyone, even our enemies, is what sets Christianity apart from humanistic philosophies and religions, especially as it concerns human dignity. It explains why Christian

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<sup>319</sup> Matthew 22:36-40.

<sup>320</sup> 1 John 4:11.

<sup>321</sup> Romans 13:8.

<sup>322</sup> Berkouwer, *Man: The Image of God*, 180.

humanitarian agencies lead the way in bringing relief to those humans who suffer as a result of natural disasters, diseases, war, and other things that tear apart lives. The Christian account of dignity realizes that all humanity was made by God as the culmination of His creation. We all have the same calling to worship God and will all stand under judgment from God as well. Although this is a spiritual account of dignity it does not relegate those who do not believe in God to a position of inferiority. The love we are commanded to show has to apply to everybody. The calling is universal. It is truly human.

When this perspective of dignity is put into practice, its results are a refreshing contrast to the individualism and glorification of personal preference. Left to our self interest, there is little motivation to care for the marginalized in society. Love for the other, especially when the other is ugly, weak, helpless, or diseased, is but a secondary concern (if that) to our own interests. The Judeo-Christian calling to love one's neighbour as oneself demands that we regard the other alongside ourselves. It requires that we love the ugly, weak, helpless, and diseased *because* they are our neighbour. In the book *Works of Love*, Soren Kierkegaard contrasts the love of the beautiful with the love of the ugly. Love of the beautiful is love of the beloved and friend. "The beloved and the friend are the immediate and direct objects of immediate love, the choice of passion and of inclination. And what is *the ugly*? It is the *neighbour*, whom one shall love."<sup>323</sup> Autonomy chooses the love of the beautiful but denying autonomy and being obedient to the command to love directs one's love towards the ugly. Kierkegaard explains that the Biblical commandment to love can never become old or dulled.<sup>324</sup> The only thing that changes is the one who abides by it.

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<sup>323</sup> Soren Kierkegaard, *Works of Love*, Howard V. Hong and Edna H. Hong, ed, trans. (Princeton: Princeton University Press, 1995), 373.

<sup>324</sup> *Ibid*, 375.

The duty to love one's neighbour flows from the Christian understanding of the relationship between all individuals and God. Kierkegaard observes that "Christianity turns our attention completely away from the external, turns it inward, and makes every one of your relationships to other people into a God-relationship...."<sup>325</sup> It is this love of God, whom we are able to image, that has driven humans to love the ugly of society. A good example of this is Jean Vanier, the founder of the movement L'Arche which provides housing for the mentally and physically disabled. His newly-released book *Our Life Together: A Memoir In Letters* reveals that he understood the *ought* in the command to love one's neighbour. In it he explains why he thought it was a rather easy to decide to do the work he did. "Practically everything I did with L'Arche was intuitive, based on the sense that this is what should be done."<sup>326</sup> He describes how exactly this work for the other is transformational:

The way of the Gospel lived in L'Arche means living with the poor, creating community with them, listening to their cry and letting ourselves be transformed by them. This living with reveals very quickly the egoism, anguish and fears in us all. For the poor call us continually to go farther in our love and in the bonds that unite us. At the same time, their call and these bonds of friendship form and transform our hearts, encouraging us to give ourselves more fully and to live the Beatitudes of Jesus.<sup>327</sup>

This story, along with many stories from the Bible itself, reveals that dignity is upheld and affirmed through love of the other.

But what exactly is meant by love – a concept that is more than obscure in our eroticized, self-obsessed culture? The surprising answer that the Bible provides is that love is understood through law, specifically the Ten Commandments. These

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<sup>325</sup> Ibid, 376.

<sup>326</sup> Charles Lewis, "Heeding the Call" review of *Our Life Together: A Memoir in Letters*, by Jean Vanier, *National Post* (Nov 3, 2007): <http://www.canada.com/nationalpost/news/artslife/weekendpost/story.html?id=73a12ed7-b602-44ed-a6cb-e4e0a0802a97&p=1>.

<sup>327</sup> Ibid.



commandments define what loving entails. In fact, it is in the chapter of the New Testament which speaks about political authority that the Apostle Paul explains that love is the fulfilment of the law:

Let no debt remain outstanding, except the continuing debt to love one another, for he who loves his fellowman has fulfilled the law. The commandments, "Do not commit adultery," "Do not murder," "Do not steal," "Do not covet," and whatever other commandment there may be, are summed up in this one rule: "Love your neighbour as yourself." Love does no harm to its neighbour. Therefore love is the fulfilment of the law.<sup>328</sup>

It is important to grasp the connection that the Bible makes between the love of God, love of the other, and obedience of God's law. We love one another because God loves us. Because He values us, we treat others with value. We demonstrate this love of both God and our neighbour by obeying divine law. There is no doubt that many of the Ten Commandments are reflected, either exactly or vaguely, in criminal codes around this world. From the Biblical point of view, dignity is upheld through love, which is an act of obedience. This is a stark contrast from the contemporary point of view that dignity is upheld when individuals are free to make their own choices according to their own aspirations. Recall Supreme Court Justice Bertha Wilson's argument for free access to abortion with her words "The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being."<sup>329</sup> Keep in mind that when Wilson speaks of the right to reproduce, she means to terminate the life of the human that has already been produced – which is abortion, not reproduction. Chapter Five will address the questions about the political implications of associating divine law with a secular society.

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<sup>328</sup> Romans 13:8-10.

<sup>329</sup> *R. v. Morgentaler*, 172.

Secular Canadian ethicist Margaret Somerville also makes the connection between law (obligation), persons, and rights. She describes how she had been asked to speak at a conference in France on the topic of our right to health. She “proposed that we should start by talking about the universal obligation to respect every person. We should then recognize that one very important way to implement that respect is through the concept of human rights.”<sup>330</sup> She understands that we often have that backwards because we want the law to give us rights and end up putting too much emphasis on rights. This leads to individualism. The Judeo-Christian account of dignity puts rights talk in its place by first recognizing who we are in relation to God and each other. Responsibility and community are necessary if rights are to be upheld. Our Western fascination with individual rights, as evidenced in the examples of the first and second chapters of this thesis, lacks this necessary foundation.

### **The Inviolability of the Judeo-Christian Account of Human Dignity**

This thesis has already made it abundantly clear that the Christian understanding of the person means in part that our dignity cannot be lost or even diminished because of changes to our bodies or minds. Our dignity is intrinsic in the sense that as long as our being is present, our dignity remains. But, as has been explained in the analysis of the *Imago Dei*, this does not mean that the source of our dignity lies in us. On the contrary, it is a value that only comes from the One to whom we belong. Apart from God, we have no worth. But God has chosen to set us aside from the rest of creation and live in a special relationship with us. This is not just a relationship between God and a select few. It is meant to be a calling for every human. The Bible makes it clear that those who do not believe in God cannot claim ignorance. Whether we look to His revelation (i.e. the Bible) or encounter the truth in nature,

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<sup>330</sup> Somerville, *The Ethical Imagination*, 32.

none of us has an excuse to not know God's intention for human life. The book of Romans draws this out most vividly:

The wrath of God is being revealed from heaven against all the godlessness and wickedness of men who suppress the truth by their wickedness, since what may be known about God is plain to them, because God has made it plain to them. For since the creation of the world God's invisible qualities—his eternal power and divine nature—have been clearly seen, being understood from what has been made, so that men are without excuse. For although they knew God, they neither glorified him as God nor gave thanks to him, but their thinking became futile and their foolish hearts were darkened. Although they claimed to be wise, they became fools *and exchanged the glory of the immortal God for images made to look like mortal man and birds and animals and reptiles.*<sup>331</sup> [Emphasis added]

Since as humans we all share the same calling to love God and our neighbour it means that there are no humans who do not have intrinsic dignity. As long as we are human we possess the intrinsic dignity that God gave to all humanity. There is no higher calling than to know God and be known by Him. To treat some people as if they do not share this calling, as if they are not persons, is to deny their intrinsic God-given dignity. Natural causes such as a disease are unable to take away this dignity no less than other people can. The only one who can take away our worth is the One who gives it to us. Indeed, as the next section of this chapter will make clear, this dignity is not meant to be directed towards ourselves but towards God. When we choose to deny God and turn our wills towards ourselves, then God warns us that we will spend an eternity apart from Him. Since it has been established that our dignity comes from our relationship with God, then being cast away from God means that many will have a future without any dignity.

Thus anyone who attacks his fellow man, or curses him, violates the mysterious essence of man, not because man is *mikrotheos*, or demi-god, but because he is *man*. In all his relations and acts, he is never man-in-himself, but always man-in-relation, in relation to this history of God's deeds in creation, to this origin of an inalienable relation to his Creator.<sup>332</sup>

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<sup>331</sup> Romans 1:18-23.

<sup>332</sup> Berkouwer, *Man: The Image of God*, 59.

This is important because it applies equally to all humanity. Regardless of our religious beliefs or lack thereof, we all live in relation to God's ultimate plan of salvation. We are all made by God and consequently known by God. The Bible explains that God is sovereign over all creation and has a plan for everyone.<sup>333</sup> God's care even extends to the birds of the air and the lilies of the field. Jesus said "Look at the birds of the air; they do not sow or reap or store away in barns, and yet your heavenly Father feeds them. Are you not much more valuable than they?"<sup>334</sup> From our perspective, we may be inclined to write off some humans, especially when they do not display many of the characteristics that give life meaning. But the point of this Judeo-Christian account of dignity is that our preferential standards do not give or take away other people's real dignity. It comes from God and will remain inviolable regardless of the opinions of others. The question that remains is our response – do we submit or do we pursue our autonomy? Submitting means in part that we respect life even when it does not fit with our autonomous desires. Promoting assisted suicide or pointing to the benefits that could come from experimentation on human embryos may be in accordance with our own wishes, but they deny the dignity of human life itself.

### **The *Telos* of the Judeo-Christian Account of Human Dignity**

The Judeo-Christian account of human dignity includes a calling for all humanity to reflect God's image, since humans were created for this purpose. How is this done? Reformed theology points to three ways – knowledge, righteousness, and holiness. But Berkouwer emphasises that this triad was not meant to be exclusive, as if they alone summed

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<sup>333</sup> Romans 9 provides one example of a Biblical passage that speaks about God's sovereignty over humanity.

<sup>334</sup> Matthew 6:26

up what it means to live in relation with God.<sup>335</sup> This analysis of the restoration of the image helps us better to understand what constituted the image that we originally possessed.

Real human dignity is found in leaving the misery of human autonomy and living in the freedom that comes from being in Christ. “This witness regarding the image of God places man once again centrally in the works of God; in the center of God’s creation....”<sup>336</sup> We are in this place not because we have any special worth in ourselves. That has been explained a few times already in the discussion of what it means to be an image and in how we have used our lofty position to turn away from God and consequently from our source of life. That is why it is so important to understand how Christ’s Incarnation and payment for humanity is the culmination of human dignity. Humanity can be restored to a right relationship with God – if we live in accordance with the *telos* given to us already in Genesis.

Although all humanity has the intrinsic dignity of being human, simply being human is not what human dignity was meant to be directed towards. We are meant to use our humanity to live in relation with God and each other and to have dominion over creation. So what does it mean to live in relation to God? 1 John 3 explains that if we love God then we live our lives His way. It means that we pursue a right relationship – what the Bible calls righteousness. All humans possess a basic dignity, but not all humans fulfill the calling of what they are made for. Righteousness involves living in harmony with God’s way, as made clear in the Bible. Because of our fallen nature it is not something that we can achieve on our own. Rather it is only through being covered by Christ’s righteousness that we can be righteous. That is because He alone lived perfectly and then also paid the penalty for our depravity that we could not pay.

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<sup>335</sup>Berkouwer, *Man: The Image of God*, 88.

<sup>336</sup>Ibid, 118.

The *telos* of human life (to live in relation with God and glorify Him) provides external and objective criteria through which we can understand what dignity really is. Because the standard of dignity is objective, our dignity is also objective. As Leon Kass explains, when we contrast the virtue of one person with another, the comparison is only accidental. He gives the example of Mother Theresa and states that “We judge not that she is better than others (as we do in competitive sports) - though, in fact, it happens that she is – but rather she measures up to and even exceeds a high standard of dignified and excellent conduct.”<sup>337</sup> The proof he provides is that “courageous or generous deeds would still be courageous or generous deeds – equally dignified and equally honourable – even if everyone practiced them regularly.”<sup>338</sup>

Albert Mohler explains how the Judeo-Christian faith attributes this *telos* to all humanity:

According to the biblical revelation, human beings, like all of creation, were created in order to glorify God. But humans were created with a distinct and unique capacity to know, reverence, worship, and glorify the Creator. He made human beings, male and female, of his own good pleasure, in his own image, and to his own sovereign purpose. Thus, human beings are not mere biological artifacts, nor accidental forms of life. The special, purposeful, and direct creation of every human being in the image of God is central to the Christian worldview.<sup>339</sup>

To understand the dignity of humans who choose not to serve God, it may be helpful to look at Leon Kass’ distinction between a basic dignity of human being and the full dignity of being human (human flourishing).<sup>340</sup> Kass explains that the first category (human being) pertains to those issues which deal with life around its edges, beginning in the embryo and

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<sup>337</sup> Kass, *Defending Human Dignity*, 15.

<sup>338</sup> *Ibid.*

<sup>339</sup> Albert Mohler, “The Brave New World of Cloning: Part Two – The Cloning of Humans and Reproductive Revolution,” *albertmohler.com* (June 14, 2005):

[http://www.albertmohler.com/commentary\\_read.php?cdate=2005-06-14](http://www.albertmohler.com/commentary_read.php?cdate=2005-06-14).

<sup>340</sup> Kass, *Defending Human Dignity*, 4.

ending in a process of dying. The dignity of being human pertains more to what is in keeping with true human flourishing and how to keep human life human.<sup>341</sup> Naturally this involves the subject matter of the *Brave New World* and is discussed most commonly today within the context of reproductive technologies such as cloning and chimeras. It is understandable that Kass thinks that these two emphases on dignity should go hand in hand. It seems that some advocates only want to emphasize the one (i.e. anti-abortion) while forgetting the other (enriching life). Kass does not apply this spiritually to the distinction between those who serve God and those who do not, but there could be a case made for just that. The discussion in this chapter about the *Imago Dei* and persons speaks to how all humanity was made for a special relationship with God and a special purpose. Because of the *Imago Dei* and the Incarnation of Christ, all humanity has a basic dignity of human being. But, from a theological perspective, humanity has thrown the *Imago Dei* aside and pursued autonomy instead. In doing so we have turned away from the full dignity of *being* human, of human flourishing. Human flourishing would be living life in keeping with our *telos*, pursuing the end for which we were made.

**Applying this Judeo-Christian Account to *R. v. Morgentaler*, *Rodriguez v. British Columbia*, *Law v. Canada*, and Public Policy Discourse on Reproductive Technologies**

This thesis has already, in passing, applied aspects of the Judeo-Christian account of dignity to the issues and cases discussed in Chapters One and Two. The remainder of this chapter will do so more concretely. It will apply the doctrine of the *Imago Dei* and the concept of persons through the themes of human dignity being physical and rational, relational, inviolable, and teleological. Having said that, this treatment will be limited

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<sup>341</sup> Ibid, 9.

because each of the issues addressed requires a much more lengthy discussion than a thesis of this nature can permit (due to length constraints).

***R. v. Morgentaler***

Abortion is not a popular topic in Canada. That is understandable. Regardless of whether somebody is “pro-choice” or “pro-life” the topic is raised primarily out of necessity – either to defend it or oppose it. Why is there such a disdain for anything dealing with the “A-word”? Part of the answer can be found in the disturbing reality of the abortion procedure itself. Regardless of how pro-choice a person may be, the act of mutilating an infant and removing him or her piece by piece from the mother’s womb is not something that anybody wants to think about. This disdain for abortion may be part of the reason why the Supreme Court in the *Morgentaler* case skirted around the actual issue of abortion and focussed instead on the much less divisive issues of autonomy and open access to “health-care”.

As was explained in Chapter One, in *Morgentaler*, and many cases subsequent to it, the Supreme Court of Canada decided that restricting a woman’s choice was tantamount to robbing her of her dignity. Dignity was all about upholding autonomy – so if a woman wanted to end the life of her unborn child she should have the freedom to do so. This narrow interpretation of dignity stems from an understanding of persons as autonomous agents. The justices did recognize that there could be a point where the lives of the unborn should be protected by law, but they passed the responsibility of addressing that to Parliament, whose job it is to make laws.

If the Court would have ascribed to the Judeo-Christian account of dignity it would have resulted in a very different decision in the *Morgentaler* case. The Court would realize that freedom has limits, especially when it results in harm to another person. And that is



exactly what the unborn child is according to this account of dignity – a person. Since every person deserves equal protection under the law, the unborn must be protected from anybody (including their own mothers) who seeks to end their lives. Regardless of the vulnerability or stage of development of the person in question, the protection of the law applies to everybody equally. The inviolability of human life applies also to those humans who are not yet born.

Understanding a person as a “someone who...”, as Meilaender described persons earlier in this chapter, would include unborn humans as persons as well. Unborn children already have a story. They have a relationship with their mother, and in many cases their father and others as well. From a spiritual point of view, they also have a relationship with God. Psalm 139 describes God’s active role in the lives of unborn children. “For you created my inmost being; you knit me together in my mother's womb.... your eyes saw my unformed body. All the days ordained for me were written in your book before one of them came to be.”<sup>342</sup> The fact that unborn children rely on their mothers to survive makes them no less of a person than infants who also rely on their parents, sick people who rely on doctors, or elderly people who rely on help from family members or care aides. The mistake that our Court (and some of the disciplines engaged in the policy discussions on new reproductive technologies) makes is to judge worth based on capabilities. But who defines what abilities are required to achieve this moral recognition? Is it the survival of the strongest? Recognizing that the unborn are persons is consistent with a dignity that is truly human. Anything less automatically questions the dignity of many humans who do not measure up to the demands of an enlightened few. That is not human dignity. On the contrary it is the same philosophy that justifies genocide.

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<sup>342</sup> Psalm 139: 13, 16.

Where does this leave the woman who feels that she cannot have this child or care for it? Is there no consideration for her as a person with dignity? Like every other person under the law, pregnant women have responsibilities that must be upheld in order for our society to function. That is why there are laws which fine parents who leave their child unsupervised in locked vehicles in the heat of the day. It is also why Social Services will take away children from families where they are being neglected or abused. The Court was wrong in focussing only on the woman's aspirations and not on their responsibilities to promote the well-being of others and to pursue the common good. Almost all pregnancies result from a choice from the woman to engage in sex. The natural result of this choice is pregnancy. Justice Wilson is wrong when she said that a pregnant woman "is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect?"<sup>343</sup> A woman and a man who choose to have sex must take responsibility for the potential child that naturally results. It is important to emphasize that this responsibility is not the woman's alone – it belongs just as much to the father of the child. If a father neglects his responsibility to help the woman raise the child, the state must step in to ensure that he helps out.

Some women are unable to fulfill their responsibilities, or have difficulty doing so, due to the circumstances of living in a broken world. In these cases, society has to step in and provide assistance to these women and families. This would apply to both a woman who wants to keep her child and needs help doing so, and to those who want to give their child to another family who would love to adopt. Fortunately, in Canada as in many nations, the list of those who want to adopt a child is much longer than those who are willing to have their child adopted. In other words, there are many families who are willing to take on the

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<sup>343</sup> *R. v. Morgentaler*, 173.

responsibility of raising the child. Adoption does not destroy the life of a person. Many of us know people who have been adopted and we would have never known that they were not a natural family member. The theme of adoption also runs strongly through the Bible, as believers are called God's children through adoption. Christ alone is called the Son of God. We are called children of God through adoption, because God had mercy on us. Adoption is not something dishonourable – it is a gift.

If a pregnant woman would like to keep her child, there should also be societal support to help her with that choice as well. Unfortunately, most Canadians are reliant on the “nanny-state” to provide all the answers for our social woes. The state has a role to play, but it must be limited because anything more would be an interference of the responsibilities that members of society ought to provide for each other.<sup>344</sup> As was explained earlier in this chapter, the Judeo-Christian account of dignity provides an ethic of love – a reason why we *ought* to love our neighbour, even if our neighbour is not our friend. Returning responsibility to society will promote that ethic of love. Granted, this is no overnight solution. It took years for us to hand our responsibilities over to the state and it will take years to take them back. But without that vision, and by only looking to the government for answers, we can easily perpetuate the cycle that breeds indignity. After all, it is by spending time with others that we see them as persons. Government institutions easily miss this crucial point. A mechanized and impersonal solution to helping pregnant women may result in a cheque every month but it ignores their other needs as persons who are about to face scary changes to their lives. We,

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<sup>344</sup> State assistance will probably be necessary for many women, especially as it will take many years before Canadians return to a society of mutual responsibility. This assistance can come in a number of forms, including substantial tax breaks for every child born into a family and extended health benefits for single pregnant women and their children.

every one of us, needs to be part of the answer by fulfilling our responsibility towards our neighbour. In doing so we will be able to treat them with the dignity that they are worthy of.

Just as relationships are an integral aspect of human dignity, they also are an important part of the answer to abortion. Dr. Morgentaler justifies the over 100,000 abortions he has performed by saying that because these are unwanted pregnancies, these children (and society) are much better served by ending their lives before they are born. He even credits a declining crime rate to the legalization of abortion.<sup>345</sup> This self-centered logic is a factor in making our Western world to be the dysfunctional state that it is. We are so consumed with our own rights (i.e., an easy life) that we are even willing to end the lives of others to accommodate ourselves. The Judeo-Christian account of dignity instead emphasizes relationships demonstrated through love. Love is about putting others first, even if it means inconveniencing ourselves. The reality is that when we choose to love others and put our interests behind others we benefit ourselves. Ask any parent who has a disabled child. They will tell you that it may be difficult but it is also a rewarding and meaningful part of their lives that they would never regret. A study done on children who were born with extremely low birth weights (many of whom had disabilities) found that these children rank their quality of life about the same as children of the same age without disabilities.<sup>346</sup> And yet between 84 and 91 per cent of American parents who find that their children have Down's syndrome choose to abort their child. This statistic was even higher in Britain and is likely

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<sup>345</sup> Sam Solomon and Gillian Woodford, "The Morgentaler Decision Turns 20," *National Review of Medicine* 5 no. 1 (Jan. 15, 2008): [http://www.nationalreviewofmedicine.com/issue/interview/2008/5\\_interview\\_01.html](http://www.nationalreviewofmedicine.com/issue/interview/2008/5_interview_01.html).

<sup>346</sup> Skoto, Brian G. "Prenatally diagnosed Down syndrome: mothers who continued their pregnancies evaluate their health care providers" *American Journal of Obstetrics and Gynecology* 192, no.3 (2005): 670-676.

not that different in Canada.<sup>347</sup> Is this because of regard for the child or regard for ourselves? Where is the love? Where is the responsibility?

At the root of the abortion controversy is the problem that we naturally want to apply the inviolability of life and dignity only to ourselves and to those whom we have an interest in upholding. This is the same problem that has rendered much of the modern philosophy of human rights impractical and unrealistic. We want the state to uphold our choice – forgetting that there is no reason why we should be allowed to live when we get in the way of other people’s choices. If it is all about choice then there is no such thing as human dignity. It is dignity for the few, beginning with myself and extending to those who I want to have dignity. There is no way that this logic can uphold universal human rights. In contrast, when dignity is truly human dignity, when it is inviolable because of who we are as persons, then that dignity is real and does not depend on the choices of others.

### ***Rodriguez v. British Columbia***

At the heart of the *Rodriguez* court case is the question: What does it mean to die with dignity? The answer to this question is crucial to deciding whether physician assisted suicide is a compassionate response to suffering or giving up on a suffering person who needs help. Sue Rodriguez made it clear that she thought that dying with dignity meant an end to her suffering through death. Many people seemed to share this feeling. But legislators and courts need to go beyond feelings and understand what is really going on.

Our secular world fears death because it is an unknown. In response, a common thought is that controlling the timing of our death is one answer to controlling death itself. As a result, it is common to call euthanasia and physician assisted suicide “death with dignity.”

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<sup>347</sup> Susan W. Enouen, PE, “Down Syndrome and Abortion,” *Life Issues Connector*, April 2007, [www.lifeissues.org](http://www.lifeissues.org).

This flows logically from the way that the Court interpreted dignity in *Morgentaler* – dignity is all about choice and control over one’s life. But Chapter One has already demonstrated the logical inconsistency with this perspective of dignity. If removing choice and control (autonomy) is tantamount to removing dignity, than dignity is subjective and easily lost. Infants, the disabled, seniors, and even people who are sleeping have lost control over themselves. Another example is a prisoner of war in a concentrations camp – what dignity would they have if they lost the ability to make choices in accordance with their aspirations? If the Court is going to be consistent, it would have to conclude that these people have also lost their dignity. Yet this is contrary to reality. We recognize prisoners of war with medals of bravery and hold them in high esteem for what they went through. Rather than hoping that their lives be extinguished to preserve them further suffering, we rejoice when they persevere against all odds. Likewise we treat our grandparents with even greater care when they lose some of the functioning that makes it more difficult to look after themselves. We also applaud the disabled for their determination. In all of these situations, it is apparent that dignity is not about making a choice to give up. Rather, it is about facing life with courage, gentleness, kindness, decency, hope, determination, and faith in spite of the circumstances of life.<sup>348</sup>

In reality, there is little dignity evident in physician assisted suicide. There is no courage to brave the difficult life, no support from loved ones to be by their side through thick and thin, and no hope for a better future. “Death with dignity” is a politically-correct way of giving up on life and taking away the responsibility of others to care for those who are suffering.

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<sup>348</sup> Paul Chamberlain, *A Cautionary Tale on Death, Dignity & Physician Assisted Suicide* (Downers Grove, Illinois: Intervarsity Press, 2000), 73.

A glimmer of light shines in the *Rodriguez* court case. The Court realized that autonomy could not be a trump card over every other value in the charter. It had to be upheld alongside the principle of the sanctity of life. This means that the Court realized that there has to be limits to autonomy – even when the subject of the action is the person making the choice (i.e. with assisted suicide). The justices were willing to set a limit on autonomy because they realized that even disabled and sick people had inviolable worth or sanctity. As Chapter One explained, they refused to give credit to the Judeo-Christian faith for grounding this and instead were sure to mention that they meant this only in a secular way. By benefitting from the Judeo-Christian concept of dignity (though denying its source)<sup>349</sup> the Court was able to uphold dignity, at least to a limited extent. They recognized the dignity of human being, as opposed to the full dignity of *being* human. Rodriguez’s life was recognized as inviolable. But their concession that she had lost her dignity was a mistake. The dignity of being human means living in accordance with our purpose and *telos*. It means showing love to Sue Rodriguez by helping her rather than abandoning her.

I cannot claim to understand the pain that Rodriguez went through in the time leading up to her death. Her disease may very well have made her feel undignified but that is very different from not having dignity. She was still Sue Rodriguez – a person – and therefore she possessed inviolable dignity. The state is called to uphold life and never to end it.<sup>350</sup> To treat her with real dignity would be to prove to her that she has value by the way that she is treated. Combining this with the relational component of human dignity it would mean that

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<sup>349</sup> Refer back to the discussion of this in Chapter One in relation to Iain Benson’s article “The Use of Religious Concepts in a Post-Religious Age: Canada’s Continuing Edwardianism.”

<sup>350</sup> The death penalty is a related but separate issue. The major difference is that it involves a person who neglected their responsibility towards another by ending somebody else’s life. As a result, the death penalty for the offence could be seen as an explicit declaration of the *value* of life. Human life is so valuable that if it is taken, one forfeits their own right to life.

her fellow humans provide love and care for her. True compassion would mean helping those who are terminally ill to live rather than reaffirming to them that they have no value and that their lives are not worth living. When society concedes to the suicide requests of suffering people, we only further confirm to them that we do not care enough for them to be willing to look after them. A terminally ill person can live a dignified life no less than a healthy person.

This Judeo-Christian account of dignity does not mean that we make every effort to extend life as long as it is technologically possible. Just because human life itself is inviolable does not mean that we have to extend life at all costs, making life unbearable for those who are dying. A common problem in this debate is confusion between letting someone die and making someone die. The account of dignity presented in this chapter does not in any way suggest that we have to cling to life as if life itself is what matters. The most compassionate thing to do in some cases may be to let a loved one die. But that is very different from actively ending their life. With the increasing powers of technology come more responsibility to use it wisely. This applies just as much to whether we choose to use technology or to turn it off.

The same problem of a lack of responsibility applies to assisted suicide just as it does to abortion. However, this time the lack of responsibility is more general in scope and applies most directly to the family and community of the person who is dying. The Judeo-Christian emphasis on love and relationships fits well with the practice of palliative care. Palliative care involves physically, emotionally, and spiritually caring for dying people by alleviating suffering as much as possible. Dr. Margaret Cottle is a palliative care physician and a clinical care instructor at the University of British Columbia. In an interview on the topic of assisted suicide she makes the astute comment that



It's a real privilege, when someone is at a place where his or her body is not all that beautiful anymore and they don't have anything to contribute from a worldly standard, to be able to say, "It's not your job to feel significant; it's our job to impart that significance to you." There is something very healing for the person who receives that and also for the person who gives that.<sup>351</sup>

Dr. Cottle also noted that in studies done about the biggest fears that dying people have and the reason why they would want to die earlier, physical pain is a small concern. "Their big fears are fear of being a burden and fear of being abandoned. As a community, we need to realize that it may be a burden for one person or family to give care. But it doesn't have to be a burden if all of us get involved and help out."<sup>352</sup> That is exactly the point that policy makers and judges need to keep in mind. The root of the problem which is leading to a call for physician assisted suicide is not something that can be solved by getting rid of laws which keep people from committing suicide or receiving help in doing so. Looking to the law as an answer does not satisfy the thing that dying people need most – love and care. It is society's duty to provide this. The Judeo-Christian account of dignity provides the moral foundation to promote this ethic. The individualism of the contemporary accounts of dignity fails miserably because there is no moral reason why anybody *ought* to consider the dignity of others.

More state-funding is not the answer to upholding human dignity in this or any other context. It is when decisions are made based on money that dignity is denied rather than upheld. Palliative care costs money and results in even more hospital beds being filled. But that does not mean that euthanasia is a prudent solution to this costly problem. It is only when we look beyond the economics of human dignity that we begin to uphold it. This comes at a cost to ourselves: our time, our leisure, our aspirations, our wants, our finances. State funding tends to decrease our responsibility rather than increase it. The state may have

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<sup>351</sup> Frank Stirk "A Natural Death: An Interview With Dr. Margaret Cottle" *IMFC Review* (Spring/Summer 2006): 9, [www.imfcana.org](http://www.imfcana.org).

<sup>352</sup> *Ibid.*

to step in to look after those who no one else is looking after, but they should only do so because they *have* to, not because we would prefer them to.

### ***Law v. Canada***

The main weakness in *Law v. Canada* was that the Court defined dignity subjectively. The Court stated that we have equality and dignity only when we feel that we are being treated with equality and dignity. Our feelings become the subjective standard. The obvious problem with this is that our feelings do not necessarily correspond with reality. Just because I am hurt by how I am treated does not mean I am being treated unjustly.

The themes of human dignity outlined in this chapter speak to this problem. When human dignity is understood in the context of persons and the *Imago Dei*, the implications are that one's dignity does not change based on how one feels about the treatment they are receiving or the situation in life that they are in. This gives immense hope to so many humans who have to put up with extreme indignity due to war, persecution, or poor health. Objective dignity is grounded on the objective foundation of "Someone Who" gave that dignity. Circumstances cannot take that away. It is inviolable.

There is a need to legally defend individuals from suffering discrimination. But that defence must be based on measurable and determinable standards rather than feelings. Without these standards it is up to the discretion of the judges or politicians to make up their own standards about which feelings are justifiable or not. As mentioned earlier in the section on our *telos* and human dignity, the Judeo-Christian faith promotes equality because the same standard and *telos* applies to all humans. Just because some choose to conform and others do not does not make some less equal. It is the contemporary account of human dignity which is imposing inequality by denying the dignity of those who cannot demonstrate autonomy to a

degree that is satisfactory to the judges. Individuals like Tracy Latimer are not protected by the full extent of the law because they do not fit the present-day standards of personhood.

The fact that all humans are persons who stand in relation to God and to each other means that all humanity is equal. No person has the authority in and of him or herself to treat other persons as though they were not worthy of equal worth and dignity as themselves. The theme of relationships discussed earlier in this chapter stressed how love is a command that is in keeping with human dignity. Love is called the fulfilment of the law and it applies to all people, regardless of how we feel about them or how they feel about us. When subjective feelings are the basis for equality, there is no surprise that our society turns into a fighting ring with one person's rights being pitted against the other's. We need to re-examine our individualistic focus of law and begin to enforce an objective standard for how to treat other persons in a way that is in keeping with the dignity that is naturally theirs. The criteria must come from outside of us so that it is truly objective.

### ***Discourse on New Reproductive Technologies***

The Royal Commission on New Reproductive Technologies grasped the importance of the concept of care by making it the standard to which each of the competing disciplines had to conform if they wanted to be heard. But the Royal Commission was not able, either philosophically or theologically, to defend its reason for why everybody should conform to this concept. They were able to demand it simply because they had the power to ignore all those disciplines which would not conform to it. The concept of care was chosen because they realized the importance of the ethic of care in making decisions on reproductive technologies. They were right in giving it an important place in policy evaluation. The Judeo-

Christian account of dignity provides the *foundation* for care that our secular society has been missing. It explains why we all have a duty to love God and our neighbour.

Applying the Judeo-Christian account of human dignity to Canada's public policy discussion about assisted reproductive technologies would mean that our policy makers should take a radically different approach to considering which technologies should be permitted or rejected. Some disciplines speak highly of human dignity when in fact the dignity they promote is not human. It is a dignity for the specific humans (and possibly animals) that they feel should be worthy of dignity. In contrast, if the Judeo-Christian account were to apply to these policy discussions it would restore a dignity that is truly human by refusing to treat some humans as if they suitable for experimentation. And any technology which treats humans as a commodity rather than a valuable person is an infringement of dignity. Paying humans to offer their bodies to meet the reproductive desires of others can easily result in a commoditization of human life itself. This is a refreshing contrast to this increasing commoditization of human life because it recognizes that our lives are priceless. It is not a question of weighing the life of a few embryos against the medical well-being many adults. Every human has incommensurable worth that is inviolable.

Understanding that all humanity is meant to be directed towards an objective *telos* has more implications on policy and law. For example, part of our *telos* is that we have dominion over creation so we are meant to rule over it. But this does not mean that we are accountable to nobody. God gave us dominion over creation but "the dominion granted to human beings is not inherently ours; it is delegated rulership. We rule over the animals by the authority of

our Creator, and thus we will answer for our stewardship of our rulership.”<sup>353</sup> Albert Mohler provides an example of how this would apply to an issue such as the cloning of animals.

“First, the acknowledgment of our delegated dominion should make clear that our rulership is limited. We are not to take the authority of the Creator as our own. Second, this principle of a delegated rulership should serve as a warning concerning the increasing artificiality of animal life at human hands.” He later adds that “Put bluntly, we were not commanded or authorized to create new forms of life as extension of our own designs and egos.”<sup>354</sup>

It should also be noted briefly that this account, which emphasizes a common *telos*, would give hope to all those who have rightly become disillusioned with any attempts at interdisciplinarity in policy making. Disciplines are unable to work together on important issues because they have very different understanding of what they should be working towards.<sup>355</sup> They are not able to reach any consensus because there is no shared *telos*. This account of dignity is an answer to the problem of interdisciplinarity because it provides grounding that applies to all disciplines. Secularism has abandoned this foundation and struggles to achieve it some other way. It uses principles such as “care” and “sanctity” which have only partial success because it attempts to seize some of the power of the religious terminology while denying its foundation. But it fails because the disciplines only subscribe to it if they have to – they do not do so willingly. And even when they subscribe to it, it is often in name only.

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<sup>353</sup> Albert Mohler, “The Brave New World of Cloning, Part One – The Cloning of Animals and the Ethics of Dominion.” *albertmohler.com* (June 13, 2005):

[http://www.albertmohler.com/commentary\\_read.php?cdate=2005-06-13](http://www.albertmohler.com/commentary_read.php?cdate=2005-06-13).

<sup>354</sup> *Ibid.*

<sup>355</sup> For example, some in the sciences seem to think that anything that is possible should be allowed and impinging on this would be tantamount to denying their basic human rights. In contrast, some ethicists argue that we need to consider the good of society before pursuing some technologies.

## Chapter 5:

### The Legitimacy of the Judeo-Christian Account of Human Dignity in Canadian Law and Public Policy

#### Introduction:

It is one thing to study a Judeo-Christian account of human dignity in a theological seminary. It is another thing to bring it to bear on public life in a secular country. Doing so instantly raises the ire of secular humanists who decry any such attempts as “religious fundamentalism.” The mainstream media would be quick to find quotes from enlightened experts who will remind Canadians about the devastating effects of when religion is brought to bear on public life, being sure to make references to the Crusades or George W. Bush. Because of this vehement opposition towards a religious perspective, it is difficult to move beyond the rhetoric and engage in productive discourse about the heart of the issue. But this move is essential if progress is to be made in dealing with the conflict of worldviews that is being fought in Canada, and indeed the Western world.

This chapter will provide some examples of the unwelcome reception that religion is given when applied to the public square, also in Canada. It will explain the hypocrisy of this intolerance, given that all public contributions are grounded by a particular worldview, whether that worldview is a traditional religion or not (such as some form of humanism cloaked in a “value-neutral” façade). To assume that religion is incompatible with reason and therefore has no place in public debate incorrectly maintains the hypocrisy that it is actually possible to be “value-neutral” and have a worldview that is grounded completely in reason. This chapter will then explain how this unwelcoming response is unwarranted, especially as it applies to a Judeo-Christian account of human dignity, which is in keeping with the liberal

tradition of freedom. It will also clarify how a correct understanding of the term “secular” is imperative to the discussion of how this religious perspective is in keeping with Canadian constitutional law. The term “secular” has been wrongly used to exclude religion when it should mean that religion is just one of many accounts or perspectives that should be given a place in our society. In fact, our Western society, including its legal traditions, is built upon Judeo-Christian principles which were essential in making it the free and strong society that it is. Far from compromising the tenants of the rights and freedoms that our country holds so dear, the Judeo-Christian account of dignity strengthens them and provides a strong foundation that is much needed in an age where many persons are being marginalized and exploited.

### **The Secular Struggle with Hypocrisy**

The most recent strike against religion’s place in the public square came from Richard Dawkins and his bestseller *The God Delusion*. Describing this book, Dawkins’ website states “He shows how religion fuels war, forments bigotry, and abuses children, buttressing his points with historical and contemporary evidence. *The God Delusion* makes a compelling case that belief in God is not just wrong, but potentially deadly.”<sup>356</sup> The vehement opposition to religion, especially Christianity, is also evident in this country. In Canada, religious contributions to the public square are commonly being challenged in human rights tribunals as hateful. It is ironic that the very groups which are pushing for more rights and freedoms to do whatever they want are clamping down on Christians and suppressing their freedoms. A recent example is the case of Stephen Boissoin, a pastor from Edmonton, Alberta who has been found guilty of hate for writing letters to the editor of his

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<sup>356</sup> From Richard Dawkin’s official website, available at <http://richarddawkins.net/godDelusion>.

local newspaper expressing his Christian views about the dangers of homosexuality. Never mind the fact that Pastor Boissoin received the full support of the youth that he worked with (including homosexuals),<sup>357</sup> his comments were found to be hateful because the complainant's feelings were hurt by reading them. Regardless of whether the comments were actually true, and regardless of the fact that Pastor Boissoin had no intention of inciting hatred, the Alberta Human Rights Commission found him guilty. Similar charges have also been brought against the Christian Heritage Party, Catholic Bishop Fred Henry, and the magazine *Catholic Insight*. Our courts and tribunals are suppressing free speech when it comes from the mouths of Christians. The message is clear – religious people must check their religion at the door of the public square.

In an opinion piece entitled “Attackers of Religion Display Their Own Fundamentalist Zeal,” secular ethicist Margaret Somerville challenges Dawkin’s arguments. “Dawkins confuses religion and the use of religion -- I assume deliberately -- to promote his thesis that religion is evil. Religion itself is not evil -- just as science is not evil -- but it can be used for evil purposes, just as science can.”<sup>358</sup> She goes on to argue that “Dawkins' mistake is to see reason (and probably science) as the only valid way of human knowing and, consequently, as the only appropriate tool to explore non-scientific questions, such as profound ethical and existential issues.” But as Somerville points out, as important as reason is, it is insufficient to address many of the most important life issues we face. Furthermore, Dawkins and many who have no use for a religious account of any kind, falsely impose a

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<sup>357</sup> *Today's Family News* quotes one of the homosexual youth who attend the drop-in centre where Boissoin works. “Jason, who is 22 and also gay, believes Lund [the professor who launched the complaint] “should have sat down face-to-face with Steve” before launching his complaint. “If activists use taxpayer dollars to promote homosexuality in public schools, then Christians have a right to stand up and say they don't think it's OK,” he said.” Focus on the Family Canada, “Cases Challenge Freedom of Religion,” *Today's Family News* (September 21, 2005): [www.fotf.ca/tfn](http://www.fotf.ca/tfn).

<sup>358</sup> Margaret Somerville, “Attackers of Religion Display Their Own Fundamentalist Zeal,” *Vancouver Sun* (Aug 20, 2007).



faith vs. reason dichotomy, as if a religious perspective is by nature unreasonable. The argument often presented against a religious account in public life is that a twenty-first century Canada is much too enlightened to entertain the myths of religion. But this thesis has attempted to demonstrate that the secular accounts of human dignity are far from enlightened and are instead weak and poorly grounded. The Judeo-Christian account is very different than these secular accounts and addresses many of their weaknesses by offering a stable foundation for human dignity that is not restricted to autonomy, and that applies equally to all humans.

Many secularists display humanistic fundamentalism that rivals those whom they accuse as being fundamentalists. If we are going to not only coexist but also flourish in this country, both sides need to drop the rhetoric and explain how their vision is really for the well-being of the whole country. Somerville explains how the likes of Dawkins cannot claim to be on a moral high ground, as if only the religious perspectives have to justify their beliefs:

The proposition that faith and reason are incompatible is at the centre of Dawkins' arguments against religion. But they are not incompatible and neither are science and religion. In positing these incompatibilities Dawkins, who is a fundamentalist atheist (atheism is a secular religion), and religious fundamentalists are again identical in that they all take an either/or approach to everything: My beliefs or yours; religion or science; reason or faith; and so on. They both seek to reconcile what they see as the conflicts between the elements in each of these pairings, by dropping one or the other of them. Dawkins' call for the elimination of religion demonstrates such a choice on his part.<sup>359</sup>

Somerville is right in exposing the double-standard that exists. Individuals like Dawkins, along with many Canadians, are wrong to demand that faith has no place in the public square. Their attempt to shut down any debate is not a sign of an enlightened society but of a restrictive society that is closed to accounts that it finds undesirable.

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<sup>359</sup> Ibid.

## **The Judeo-Christian Account of Human Dignity Is In Keeping With Freedom**

Will upholding a Judeo-Christian account of human dignity require a theocratic government? Will it restrict individual rights or even do away with altogether? The reason why many secularists often fear a religious perspective in the public square is often because they believe that religions will want to impose morality and restrict the freedoms that Canadians hold so dear. This response is faulty on at least two fronts. First, it assumes that the status quo (secular humanism) is value-neutral and does not impose a type of morality of its own. Second, the Judeo-Christian faith, including this perspective on human dignity, promotes individual freedom and respects conscience, even to a greater extent than many secularists would.

Canadian courts and government have been imposing a morality of its own in regards to human dignity. As has been demonstrated in Chapter One and Two, our Supreme Court and the Royal Commission on New Reproductive Technologies have been imposing their autonomy-centered (humanistic) visions of dignity and care in recent decades. Without even being asked to do so, our Supreme Court decided to define dignity as autonomy and make it synonymous with the concept of equality in *Law v. Canada*. Since then all Section 15 cases have been interpreted according to the Court's definition of dignity in *Law*. Our Parliament has also legislated morally-based restrictions on new reproductive technologies (such as a 14 day limit to experimentation on embryos) in the name of human dignity. And the Royal Commission blatantly imposed the moral value of care on every stakeholder discipline that wanted to contribute to the Royal Commission's decisions. It is impossible to not enforce an account of human dignity of some sort in any court or policy decisions dealing with human life. The question should not be whether an account of human dignity should be imposed on

our decision making. Rather the question should be which account of human dignity should be imposed?

The teachings of Jesus and the New Testament reveal that Christian doctrines in general (including this Judeo-Christian account of human dignity) promote freedom rather than restrict it. There is a law that must be followed, and a dignity that must be upheld, but for the most part this does not fall into the political or legal realm. Rather, these are requirements that demand the hearts of people – something that law or politics can never achieve. The Bible does provide some laws which must be upheld politically and legally (such as those forbidding theft and murder) but they are more limited than the big-government approach that many others are calling for. This will be elaborated on later in this chapter. First, a case needs to be made to show how the Judeo-Christian faith upholds, rather than restricts, freedom.

As mentioned before, the Judeo Christian account of dignity is ultimately a spiritual (i.e. not political) doctrine because it is rooted in a much bigger account of human nature and our relationship with God. Although there are definite political and legal implications from this account of dignity, it does not look to politics and law for substance or meaning. David McIlroy, in *A Biblical View of Law and Justice*, explains that the Incarnation, death, and resurrection of Christ “demonstrate that legislation is not God’s final answer to the problem of human sinfulness. There are limits to what human law, even if guided by Christian principles, can be expected to achieve in restraining human sinfulness.”<sup>360</sup> A spiritual problem (sin) requires a spiritual answer (Christ). The political and legal implications of sin (indignity, among others) require political answers, still rooted in Christ. An account of dignity that is philosophically based on the Judeo-Christian faith does not make it exclusively

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<sup>360</sup> McIlroy, *Christian Perspectives on Law: A Biblical View of Law and Justice*, 138.

for those who believe in the truth of the Biblical account. On the contrary, it is directed towards humanity in general. Just as someone does not have to be a Christian to benefit from Christmas, so also someone does not have to be a Christian to benefit from the Christian account of dignity.

Canada is a pluralistic nation. Many peoples, cultures, languages, traditions, and religions co-exist to create a vibrant community. Applying ideas from some of these diverse groups to our governments and courts occurs all the time. I noticed one example of this when I used to regularly visit inmates at two federal penitentiaries in British Columbia. I saw how the concept of restorative justice was beginning to get more and more support by Correctional Services of Canada (CSC), partly because the status quo of the Canadian justice system is not working very well. Restorative justice involves incorporating a more holistic view of justice, which recognizes that the whole community is affected by a crime and the offender must make an effort to actually make things better again. This involves taking responsibility for a crime by meeting with the victims (if possible) and making amends. Although a big push for restorative justice comes from Christian organizations, one reason why it is being promoted in Canada by CSC is because it is part of their recent efforts to integrate Aboriginal ideas of justice into the justice system. CSC explains that in the last five years they have been promoting Healing Lodges which “offer services and programs that reflect Aboriginal culture in a space that incorporates Aboriginal peoples' tradition and beliefs.”<sup>361</sup> There seems to be recognition that CSC is not forcing this spirituality on the inmates by incorporating some of its ideas in the way they pursue justice. They are simply benefitting from the good philosophy that was present in the native spirituality and applying

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<sup>361</sup> Correctional Services of Canada, “Healing Lodges for Aboriginal Federal Offenders,” <http://www.csc-scc.gc.ca/text/prgrm/abinit/challenge/11-eng.shtml>.

that to the problems in society. Likewise, our government and courts would not be forcing religion on people by applying a Judeo-Christian account of dignity to Canadian laws. One does not have to be a Christian to recognize the value of this account of dignity. Secularists Margaret Somerville and Leon Kass are relied on heavily in this thesis partly to make the case that one does not have to be a Jew or Christian to see the merit in applying Judeo-Christian principles to public life.

The Bible may be spiritual but it does apply to politics, as it does to all spheres of life. Romans 13 states that governing authorities are instituted by God and therefore demand the respect and obedience of all people. God even gives them the power of the sword to serve as an agent of his wrath. But the power they have is limited in jurisdiction and is still subservient to God's authority. Authorities are under God's laws just like everybody else.

The Bible highlights two purposes of legislation: to restrain the excesses of evil (without which life would be "nasty, brutish, and short" in the words of Hobbes), and to promote harmony between people (and a process for resolution if this is broken).<sup>362</sup> God's command to Noah about punishing murder with death revealed that he expected humans to carry out justice. In Romans 13 it is made clear that it is the authority's responsibility to execute this justice. This means that there are circumstances in which the Bible demands that authorities do not allow freedom. When life is violated they must take action, because life is a gift from God. Nobody has a right to take somebody else's life except those authorities who have been given the responsibility of justice. Applying this to the circumstances discussed earlier in the thesis, a Judeo-Christian account of human worth must be in keeping with the command to not take life. Abortion and physician assisted suicide is the deliberate taking of a human life which makes them unlawful (from a Biblical perspective) and a denial of human

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<sup>362</sup> McIlroy, *Christian Perspectives on Law*, xiii-xiv.

dignity. This means that there are examples where a Judeo-Christian account of dignity will restrict freedoms that currently exist. Abortion will not be legal, except in cases where the life of the mother would be ended if a pregnancy continued. But does that make it automatically illegitimate for Canadian law and politics? Do we choose laws based on whether we like the results? Clearly not. There are many laws which we currently hold dear because they restrain evil, even if many people would desire that evil. Child pornography is one of many examples. The issue is not whether it will take away from current freedoms but whether those restrictions are merited in Canada.

David McLroy rightly points out that it would be wrong to impose a religiously-based principle in law or politics without being able to demonstrate that the principle is for the good of society. Christians believe that there is congruence between what can be established from natural law and what is revealed in Scriptures which results in Biblical principles being good for society by nature.

This is what one would expect to find if the same Holy Spirit is at work in both nature and Scripture, revealing the same God. In order to create a viable, coherent set of propositions from natural law, it is necessary to interpret nature in the light of Scripture. On the other hand, if Christianity is not to be brought into disrepute, Christians must be able to demonstrate the social utility of the laws they are proposing; in other words, it would be wrong to impose on society a law whose benefit could not be argued from nature.<sup>363</sup>

If this thesis was unable to demonstrate why the contemporary accounts of human dignity are lacking and why a Judeo-Christian account would result in an advancement of human dignity in Canada, it would make sense that there would be fear among Canadians about applying it to our law and politics. It would be the same kind of fear that arose when Muslims advocated for Sharia Law in Ontario a few years ago. But the Judeo-Christian account of dignity is for the good of all Canadians. Its social utility has already been demonstrated in this thesis. It

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<sup>363</sup>Ibid, 163-164.

also promotes the cause of many Canadians who are being marginalized and exploited as a result of the current account of dignity being applied to our law. McIlroy adds that “To the extent that the Ten Commandments and other aspects of the Torah are to be reflected upon and applied in contemporary situations, it is precisely because they embody creation principles of what is good for human beings, even for those who do not acknowledge the kingship of God.”<sup>364</sup> To make it even more clear:

Believers should not endeavour to legislate even genuine scriptural moral teachings where the value of the given teaching will only be recognized by those who have already accepted Christ as Lord and the Bible as the Word of God... To legislate such biblical teachings is to confuse law and gospel by forcing non-Christians to practice Christianity apart from personal acceptance of it.

Believers should strive to legislate all those socially valuable moral teachings of Scripture whose value can be meaningfully argued in a pluralistic society...offer[ing] arguments on scientific, social, and ethical grounds potentially meaningful to the non-Christian.<sup>365</sup>

The reason why Christians insist that Biblical concepts can be meaningful to a secular society is because they believe that the Judeo-Christian worldview is true and should therefore be meaningful to the reality of life as all humans experience it. Theologian Christopher Wright explains that “The Bible, therefore, makes no unnatural separation between ‘politics’ and ‘religion’, though neither does it identify them. Both are essential dimensions of what it is to be human.”<sup>366</sup> Confining a Judeo-Christian account of human dignity to the private sphere would be equivalent to telling Canadians to keep our views of human rights to ourselves rather than insist that they be respected in other countries as well. Canada is unable to do so because we believe that human rights, if they are really human and really rights, must apply to all humans. Enforcing them only in Canada would mean that they

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<sup>364</sup> Ibid, 166.

<sup>365</sup> Ibid, 184 quoting J.W. Montgomery “The Limits of Christian Influence”, *Christianity Today* (January 23, 1981).

<sup>366</sup> Wright, *Old Testament Ethics for the People of God*, 215.

are fabrications. Likewise, believing a Judeo-Christian account of human dignity without applying it to the public square is equivalent to stating that it is merely a fabrication.

### **Why a Judeo-Christian Account of Human Dignity Can Have a Place in Secular Canadian Law: Looking to the Charter's Preamble**

The Preamble to the Canadian Charter of Rights and Freedoms includes a clause that states that “Canada is founded upon principles that recognize the supremacy of God and the rule of law.”<sup>367</sup> In his article “The “Supremacy of God”, Human Dignity and the *Charter of Rights and Freedoms*” Lorne Sossin argues that the “reference to the supremacy of God in the Charter’s Preamble should be given meaning as an animating principle of constitutional interpretation, on par with the rule of law with which it is paired.” He is quick to write that this should not be understood to privilege a particular religious perspective but rather should be a statement about the normative aspiration of the Charter. His point is that “if the concept of human dignity was linked with the supremacy of God in the Charter’s Preamble, it would be incumbent on courts to justify their claims regarding human dignity as a leap of faith, and a more coherent and robust elaboration of the Charter’s moral architecture would result.”<sup>368</sup>

Although many may find Sossin’s perspective to be irrelevant because the Supreme Court has treated the supremacy of God as “the embarrassing Preamble,”<sup>369</sup> it is incredibly refreshing because it attempts to provide a much-needed moral framework for interpreting the Charter. Sossin explains that if the supremacy of God refers to all humans having equal moral worth (because we are all equally under God), “then human dignity is not just what

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<sup>367</sup> Preamble to the *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982.

<sup>368</sup> Sossin, “The “Supremacy of God”, Human Dignity and the *Charter of Rights and Freedoms*,” 228.

<sup>369</sup> See Jonathan W. Penny and Robert J. Danay “The Embarrassing Preamble? Understanding the “Supremacy of God” and the *Charter*,” in *The University of British Columbia Law Review: Special Edition – Religion, Morality and Law*, Volume 33, Jason Kuzminski, ed. (Vancouver: UBC Faculty of Law, 2000).



separates us as individuals but also rather what binds us together as a community of mutual obligation.”<sup>370</sup> The Canadian *Bill of Rights* reveals that Sossin’s reasoning is not all that foreign in our legal history. Similar to the Charter, the *Bill of Rights* has a preamble which mentions that “the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person, and the position of the family in a society of free men and free institutions...” Also noteworthy is that it later mentions that “men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law.” There is a strong connection between human dignity and the spiritual values which provide a moral fabric which weave the rights together.<sup>371</sup>

But is it even possible to continue to hold to this interpretation of human dignity in our present-day secular society? Sossin looks at how the Supreme Court has interpreted the Preamble to the Charter simply to “preclude any official recognition of atheism by the state....”<sup>372</sup> Sossin believes that the Preamble means more than that, but not as much as some religious groups may want to it mean. In a very telling few sentences, Sossin explains this:

If supremacy of God is seen as the place where normative claims about Charter rights take on moral legitimacy..., one might well question what remains of God at all in this analysis. Is not God, cleansed of religious particularity, simply the embodiment of general and metaphysical claims about the sources and scope of law? The answer, I think, is probably “yes”. Moreover, I would argue that this is precisely the reading of the term most compatible with the Charter. Thus, ironically, the process of breathing life into the Charter may well alienate precisely those groups seeking the advancement of religion or religious agendas through the courts.<sup>373</sup>

Rather than attempting to advance a specific religious agenda, Sossin believes that the purpose of the supremacy of God in the Preamble is to provide “universal aspiration to moral

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<sup>370</sup> Sossin, “The “Supremacy of God”, Human Dignity and the *Charter of Rights and Freedoms*,” 230.

<sup>371</sup> *Ibid*, 231-232.

<sup>372</sup> *Ibid*, 235.

<sup>373</sup> *Ibid*, 236.

good and social justice.”<sup>374</sup> This does not mean that he believes that religious convictions are irrelevant. Rather, in the Charter they cannot take precedence over other worldviews. For Sossin, what matters is that “all must agree only that a set of justifiable, moral convictions must reside alongside the rule of law and animate the rights and freedoms guaranteed in the Charter.”<sup>375</sup> A religious contribution is important in understanding which moral convictions will be applied. After all, as has already been argued, it is impossible for the Court or a government to make or interpret law from a value-neutral perspective. A Judeo-Christian perspective of dignity must be considered alongside other accounts.

### **Defining Secular: Key to Understanding Religious Contributions**

A major obstacle that needs to be overcome in understanding the role of religion is to challenge the faulty definition of secular and its unsubstantiated claim to neutrality that has been swallowed by many. When it can be proven that it is impossible for the Supreme Court to be value-neutral then the debate shifts to examining the various worldviews and choosing the best ones.<sup>376</sup> The Judeo-Christian account is one of the worldviews that can be considered. Yet the Court, and indeed much of Canada’s public elite, continues to believe that value-neutrality is possible. What do I mean by this? Increasingly the Court attempts to rule on difficult topics, such as abortion and physician assisted suicide, without making any reference to religious or metaphysical principles. It seems to think that these matters can be decided on a purely procedural basis.

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<sup>374</sup> Ibid, 237.

<sup>375</sup> Ibid, 238.

<sup>376</sup> Although I use the word “values” this is only because that is the language being used by the Court and society. I recognize that the term itself is relativist. Values denote the belief that there are no objectively right or wrong norms or principles. We each have our own values just as we each prefer different flavours of ice cream. That is why I attempt to use words such as “principles” or “norms” to reflect my disagreement with this relativistic terminology.

In his article “Notes Towards a (Re)Definition of the “Secular”” Iain Benson provides some examples of when the Court appeals to this false neutrality. Chief Justice Lamer, in his dissent in *Rodriguez*, said that the Court should look at the constitutionality of the issue of physician assisted suicide “without reference to the philosophical and theological considerations fuelling the debate on the morality of suicide or euthanasia.”<sup>377</sup> Although I already explained how the majority chose to uphold the sanctity of life over the choice for death, even that was claimed to be used “in the non-religious sense described by Ronald Dworkin...”<sup>378</sup> Unfortunately Justice Sopinka does not enlighten us on how it is possible to ground a belief in the sanctity of life apart from religion and metaphysics. I would also be curious to ask Justice Lamer how it is possible to talk about the issue of physician assisted suicide without referring to philosophy or theology. Every informed choice is based on some premise which is in turn based on a more general philosophy or worldview. This thesis already revealed how the Court’s use of dignity is at least partly indebted to Kant’s philosophy. Lamer may attempt to not ground decisions on any pre-existing philosophy or worldview but he still has to base it on something.

Perhaps the best example of how the Court relies on some form of metaphysics is in the 1985 case of *R. v. Butler*.<sup>379</sup> Benson explains that in *Butler*, the Court maintained its definition of obscenity even though it was challenged on the grounds of freedom of expression. He posits that “The Court could not avoid the fact that such a restriction depends upon a moral basis, yet, in its manner of reasoning it undercuts any valid ground for moral

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<sup>377</sup> Iain Benson, “Notes Towards a (Re)Definition of the “Secular” in *The University of British Columbia Law Review: Special Edition – Religion, Morality and Law*, Volume 33, Jason Kuzminski, ed. (Vancouver: UBC Faculty of Law, 2000), 524, quoting *Rodriguez* at 366.

<sup>378</sup> *Ibid*, quoting *Rodriguez* at 389.

<sup>379</sup> *R. v. Butler* (1992) 89 DLR (4<sup>th</sup>) 449.

evaluation by saying that the restriction must be found in the Charter itself.”<sup>380</sup> It was Justice Sopinka again who gave the majority decision. He said that the law should not be used “to advance a particular conception of morality” because “To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract.” But later he adds that “On the other hand, I cannot agree with the suggestion of the appellant that Parliament does not have the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society.”<sup>381</sup> In response to this, Benson counters that:

Sopinka J. recognized that moral corruption and harm to society are inextricably linked. But if it is “moral corruption of a certain kind,” that “leads to the detrimental effect on society,” and if Parliament has the right to legislate “on the basis of some fundamental conception of morality,” then it is simply *not possible* to avoid “a particular conception of morality”: the very thing that Sopinka J. said was “no longer appropriate.”<sup>382</sup>

The problem is that the Supreme Court is inconsistent in its decisions and the authority that it appeals to in making these decisions. Although it appealed to “community standards” in *Butler*,<sup>383</sup> it has turned to the principle of harm in the Swingers decision (*R v. Labaye*)<sup>384</sup> in 2005. Given the way it has been going, it will not be surprising if the Court moves away from its affirmation of the “intrinsic value of life” in *Rodriguez* to a ruling more

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<sup>380</sup> Benson, “Notes Towards a (Re)Definition of the “Secular,” 525.

<sup>381</sup> *R. v. Butler* at 476-477.

<sup>382</sup> Benson, “Notes Towards a (Re)Definition of the “Secular,” 526.

<sup>383</sup> *Ibid*, 527.

<sup>384</sup> In *R v. Labaye*, the Court struck down the law prohibiting “common bawdy-houses” which included swingers clubs. The majority refused to acknowledge the minority’s view that “social morality” should be taken into consideration when deciding what criminal conduct is. Instead, they ruled that there are only two factors that must be considered. “The first is that by its nature the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws.... The second requirement is that the harm or risk of harm is of a degree that is incompatible with the proper functioning of society.” *R. v. Labaye*, [2005] 3 S.C.R. 728 at para. 62.

in keeping with its autonomy-centered conception of dignity. It appears that the Court is increasingly trying to ground its decisions in the Charter alone, as if the Charter itself provides the moral basis for making decisions.

This attempt to escape religion and metaphysics is evident in the Court's use of the term "secular." Benson lists three ways that the term "secular" seems to be used most often and then follows it up with a fourth definition which understands it quite differently:

1. The state is expressly non-religious and must not support religion in any way (neutral secular);
2. The state does not affirm religious beliefs or any particular religious group but may act so as to create conditions favourable to religions generally ("positive" secular);
3. The state is not competent in matters involving religion but must not act so as to inhibit religious manifestations that do not threaten the common good ("negative" secular)....;
4. The state must not be run or directed by a particular religion or "faith-group" but must develop a notion of moral citizenship consistent with the widest involvement of different faith groups (religious and non-religious).<sup>385</sup>

Although the first definition seems to be the most prevalent in public discussions of issues like abortion, physician assisted suicide, and pornography, it is seemingly impossible to maintain. Judges are human as well. They were raised in families which held to certain beliefs, they are part of communities which expose them to many different worldviews, they are aware of what is going on in the media, and they possess a human nature like everybody else. It is impossible to separate these experiences and this nature from one's profession. Even if it were possible, the Charter is a very limited document and does not include a comprehensive answer to most issues that are raised in the Court. Benson appropriately quotes Aldous Huxley, in his book *Ends and Means*, where he states:

Men live in accordance with their philosophy of life, their conception of the world. This is true even for the most thoughtless. It is impossible to live without a metaphysic. The choice that is given is not between some kind of metaphysic and no

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<sup>385</sup> Benson, "Notes Towards a (Re)Definition of the "Secular," 530.

metaphysic; it is always between a good metaphysic and a bad metaphysic, a metaphysic that corresponds reasonably closely with observed and inferred reality and one that doesn't.<sup>386</sup>

If neutrality is being espoused, one has only to dig a little deeper to find a worldview behind it. In the past, terms like “community standards” were used to maintain an appearance of value-neutrality while still making a principled decision. Now the Court simply employs different language which attempts the same value-neutrality but with very different results. Regardless of which faith is ultimately grounding the decisions, what matters is that the neutrality is a sham that is being used to promote the Court’s decision over all other perspectives without a legitimate discussion.

Calling the bluff does not mean that religion begins to dictate the Court’s decisions. It just means that all faiths, (religious and non-religious) should get an equal opportunity to voice what they espouse to be the best decision for the country as a whole. When secular is defined in a way that allows this healthy debate, the result is a Court that is not afraid of considering the metaphysical when making decisions on issues like abortion. This appears to be the most consistent interpretation of the secular, given the Charter’s strong freedom of religion protection. This understanding of secular is exemplified in Somerville’s ethics. Her work demonstrates that secular ethics must include the sacred and that policy discourse must be open to religious contributions. Doing so provides an account of dignity which is genuinely human.

### **The Value of a Religious Contribution to the Public Square**

One fact that helps shift the debate to a place that will consider a Judeo-Christian contribution is that Western law itself is indebted to religious contributions. In an address at

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<sup>386</sup> Ibid, 532, quoting Aldous Huxley, *Ends and Means* (London: Chatto & Windus, 1937), 252.

McGill University in the Fall of 2007, David J. Klassen explained how the origin of natural rights in Western society actually goes all the way back to the twelfth century.<sup>387</sup> Pointing to the research of Brian Tierney from Cornell University, he argues that St. Bonaventure applied his Franciscan religious concepts to the legal world. Particularly in his *Apologia pauperum* St. Bonaventure “identifies four types of community of property, and associates a particular type of right with each one.”<sup>388</sup> One of those types may be used by those who are in such need that the property is imperative for their survival. St. Bonaventure argues that they have a right to this property because it comes “from a right naturally imprinted on man, since he is an image of God and the creature of the greatest dignity, for whose sake all the things of the world were made.”<sup>389</sup>

Apparently grounding rights in religion was not only the case for the Franciscans. Tierney also shows similar evidence from what he calls “secular theologians” including Godfrey of Fontaines and Henry of Ghent.<sup>390</sup> It was further developed in the high Middle Ages by other Christian thinkers such as William of Ockham, and then Jean Gerson, and all the way to Francisco Suarez in the seventeenth century.<sup>391</sup> It was within this context that Hobbes, Locke, and other Enlightenment thinkers began to popularize the idea of natural rights, though without the Biblical foundation that once grounded them. That explains the weakness of the modern account, as described in Chapter Three. Canadian and international law continue to rely on a concept of natural rights that is devoid of its religious roots. Recall

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<sup>387</sup> This is many years prior to the prevailing understanding that natural rights in law only came as a result of Enlightenment philosophers.

<sup>388</sup> Klassen, 4.

<sup>389</sup> Ibid, 4 quoting Bonaventure, *Defense of the Mendicants*, vol. 4 of *The Works of Bonaventure*, trans. José de Vinck (Paterson, NJ: St. Anthony Guild Press, 1966), 232-234.

<sup>390</sup> Klassen, 5 quoting Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law 1150-1625* (Grand Rapids: Eerdmans, 2001), 37.

<sup>391</sup> Klassen, 5.

the Supreme Court's definition of dignity in *Law v. Canada* which emphasized the subjective feelings of self-worth as the basis for dignity, and consequently rights in general.

Although the secular modern and postmodern philosophers have been able to uphold an account of natural rights based on human dignity even in an age where religion has little influence, it is indebted to the Biblical account for its origins. After studying this topic for decades, Tierney stated that "The idea of natural rights grew up – perhaps could only have grown up – in a religious culture that supplemented rational argumentation about human nature with a faith in which humans were seen as the children of a caring God."<sup>392</sup>

The valuable place of religion in our secular society is best articulated by Jeremy Waldron in his article "Religious Contributions in Public Deliberation" which was published in the *San Diego Law Review*. In it, Waldron clearly defines the opposition to a religious contribution to public deliberations and then provides a comprehensive explanation of why this opposition is mistaken. He uses a pastoral letter from the National Conference of Catholic Bishops as an example of a religious contribution to a political issue. After detailing the contents of this letter he asks "Is there not something inappropriate or, so to speak, *uncivil* about presenting such arguments in the public forum in a society that exhibits an enormous variety of religious commitments among its members, and in which citizens have committed themselves collectively and fundamentally, in their constitution, to a doctrine of separation between church and state?"<sup>393</sup>

Indeed, that would also be the sentiment in Canada, even though we do not have the separation of church and state entrenched anywhere in our constitution. But how much validity is there to this reaction? After detailing many of the arguments against a religious

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<sup>392</sup> Klassen, 11 quoting Tierney, *The Idea of Natural Rights*, 343.

<sup>393</sup> Jeremy Waldron, "Religious Contributions in Public Deliberations" *San Diego Law Review* 30 (1993): 819.



contribution (in a manner which gives the reader the impression that he in fact agrees with them) he begins to draw out the implications. If it is a problem for legislators to bring their faith to bear on their work, then it should also be a problem for voters to bring their faith to bear on their vote since it is their vote that determines how this secular country is ruled.<sup>394</sup> But authority figures and every-day citizens alike must make a moral decision whenever they vote or rule. Waldron explains that even Ronald Dworkin's position on this "is that a point will come in judicial decision making when the judge must simply make a moral judgment of his own, in his own voice, the best way he knows how."<sup>395</sup> If we are to make important moral decisions, surely our metaphysical or religious beliefs will provide guidance. And even if we are opposed to all religious beliefs, there is still a lot of value that can be gained in allowing this discourse between the opposing views to move forward unabated.

To explain how this discourse is beneficial, Waldron brings up Aristotle's ideas about the importance of public deliberation and summarizes them by saying "When this happens in dense interaction through a community, the group as a whole can attain a degree of wisdom and practical knowledge that surpasses even that of the most excellent individual member."<sup>396</sup> Some might still object that only ideas which share the secular spirit of our country should be allowed to be brought forward. "Perhaps it would be wiser to replace the whole apparatus of that philosophical tradition with something that is secular in its provenance, as well as its phraseology, than to persevere with an ethic of natural law that has lost its law-giver, or a teleology that has lost its *telos*."<sup>397</sup> Aside from having no support as to why this will benefit the discussion, the argument suffers from the same internal problems

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<sup>394</sup> Ibid, 829.

<sup>395</sup> Ibid, 833.

<sup>396</sup> Ibid, 836.

<sup>397</sup> Ibid, 842.

that the concept of human dignity, understood only in a secular fashion, suffers from. Its very roots are religious, and denying the religious perspective leaves it without a foundation. What would liberalism and natural rights look like if they were divorced from any religious influences? According to Waldron, even John Locke's classic *Second Treatise of Government* is permeated with religious terminology that cannot be removed from it without weakening his conclusions. Waldron points out that Alasdair MacIntyre commented on this reality by stating that there are constitutional grounds not to allow *the Second Treatise* to be taught in public schools because of this religious content. How ironic that the doctrine of liberalism itself would not be able to be taught in the United States!

Applying this discussion of foundations more specifically to the issue of human dignity, we have seen how our secular world is doing its best to strip away any religious baggage associated with concepts like human dignity, while trying to preserve the concept itself because it is so rich and even essential as a grounding for our fascination with universal human rights. Waldron explains that "To pretend that we are already in possession of secular conceptions that enable us to do that would be foolish. On the contrary, what is striking about foundational writing in modern secular liberal thought is its dryness and relative inarticulacy."<sup>398</sup> In contrast, Waldron points out that "In a number of ways the Christian conceptions out of which modern liberalism originated remain richer and deeper than their secular offspring."<sup>399</sup> It is because they are so rich that they can contribute a lot to the discussion that our secular world is engaged in. If Canada refuses to buy into this argument, it is simply displaying intellectual arrogance. It would be refusing to consider anything different than what it has already agreed to (which itself is in question).

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<sup>398</sup> Ibid, 846.

<sup>399</sup> Ibid.

## Conclusion: The Importance of this Analysis

A striking reminder of the importance of the issues presented in this thesis comes from Dr. Leo Alexander who was an investigator in the Nuremberg Trials. These trials attempted to understand and bring justice to the extreme indignity that the Nazis were responsible for in the Second World War. In 1949 Dr. Alexander wrote an article in the *New England Journal of Medicine* where he revealed some telling observations from the trials:

Whatever proportions these crimes finally assumed, it became evident to all who investigated them that they started from small beginnings. The beginnings at first were merely a subtle shift in emphasis in the basic attitudes of physicians. It started with the acceptance of the attitude, basic to the euthanasia movement, that there is such a thing as a life not worthy to be lived. This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted, and finally all non-Germans.<sup>400</sup>

It was only 60-70 years ago that the effects of this philosophy of human dignity ravaged the world and resulted in millions of deaths. Yet we can see in Canada the same ideas emerging and gaining strength. This thesis is not suggesting that Canada is heading down the same road to the same result. The outcome may be different today, but there is no doubt that regardless of the outcome, humanity is worse off when we deny the basic dignity of every human. The Judeo-Christian account of dignity, in contrast to the secular humanist account which is employed in Canadian law and public policy, is able to ground an account of human dignity that is truly human.

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<sup>400</sup> Leo Alexander, MD. "Medical Science Under Dictatorship," *New England Journal of Medicine* (July 14, 1949): 9, from Wesley J. Smith, *Culture of Death: The Assault on Medical Ethics in America* (San Francisco: Encounter Books, 2000), 45.

Human dignity is a favourable concept in our Western world. But just because a concept is favourable it does not mean that it is here to stay. By way of analogy, it is fitting to compare the state of dignity to a building. This building is precious because it holds very valuable contents. But these contents are weighty – and that weight is increasing continually. The problem is that we are so enthralled with the contents of the building that we neglect to make sure that the building is able to support all the weight. If we were to dig away some of the dirt we would see that there is no foundation under the building. Do we continue as is, just being thankful that we still can enjoy the precious contents of the building? Ignoring the problem does not mean that the status quo will be maintained. As the weight increases, the likelihood of an all-out collapse is imminent. Then not only is the building destroyed, so are its precious contents. Clearly, in this analogy human dignity is the building and human rights are the contents. Our world treasures human rights and places it in the keeping of the concept of human dignity. But we have neglected to ensure that the modern concept of human dignity is itself supported by a foundation that is able to sustain it under enormous weight. As long as the dirt is not dug up, this world can live in ignorance. But at some point a modern account of human dignity will not be able to uphold the huge responsibility it has in defending human rights. If the entire structure collapses, it will wreak devastating consequences on all humanity. We must examine the foundations before it is too late.

Our Canadian law and public policy is heaping up more and more weight on the concept of human dignity. The Supreme Court is going so far as to define Section 15 of the Charter (equality rights) as contingent on human dignity. Both the Court and the Royal Commission rely on human dignity to make decisions about assisted suicide, abortion, cloning, and other issues that are intricately connected to the essence of humanity. But in

putting all this emphasis on dignity they are ignoring the fact that there is no grounding for human dignity in the way that they define it. Human dignity has become subjective and equated with individual autonomy and equality. No philosophical reason is given to support the increasing weight that is being placed on this concept.

Human dignity, and the rights that it upholds, are too important to be thrown aside when we realize that it lacks a foundation. As a society we still have the option to reground human dignity with the Judeo-Christian foundation that originally supported it. This is not appealing to a society that has little room for the public expression of religion, especially in law and politics, but it is imperative for the very survival of the human rights that we hold so dear.

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