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Article abstract

Cette étude a pour objet de présenter un concept utilisable lors de la discussion juridique de problèmes reliés à la pratique médicale. Après avoir posé le problème et décrit comment mieux cerner ce concept, l'étude le formule en se référant à la jurisprudence actuelle qui nous guide dans la recherche d'un concept philosophiquement sensé de la personne et nous en donne un exemple. Ce concept est difficilement circonscrit par des critères juridiques du fait que la loi n'en a traité qu'incidemment, sans tenter d'en formuler de précis en guise de norme applicable. Ainsi, bien que l'étude s'éloigne des sources purement juridiques, la portée du sujet évitera qu'on lui applique ce commentaire autrement justifié :

A significant problem in any discussion of sensitive medical-legal issues is the marked, perhaps unconscious, tendency of many to distort what the law is, in pursuit of an exposition of what they would like the law to be.

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THE NOTION OF PERSON FOR MEDICAL LAW

by Christopher B. GRAY*

Cette étude a pour objet de présenter un concept utilisable lors de la discussion juridique de problèmes reliés à la pratique médicale. Après avoir posé le problème et décrit comment mieux cerner ce concept, l'étude le formule en se référant à la jurisprudence actuelle qui nous guide dans la recherche d'un concept philosophiquement sensé de la personne et nous en donne un exemple. Ce concept est difficilement circonscrit par des critères juridiques du fait que la loi n'en a traité qu'incidemment, sans tenter d'en formuler de précis en guise de norme applicable. Ainsi, bien que l'étude s'éloigne des sources purement juridiques, la portée du sujet évitera qu'on lui applique ce commentaire autrement justifié:

> *A significant problem in any discussion of sensitive medical-legal issues is the marked, perhaps unconscious, tendency of many to distort what the law is, in pursuit of an exposition of what they would like the law to be.*[1]

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1. *In the Matter of Karen Quinlan*, (1976) 355 A. (2d) 647, 665.

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"La jurisprudence, en délimitant le champ de défense de la vie privée, fait nécessairement appel à une certaine notion de la personne humaine. Comment le droit appréhende-t-il la personne humaine — ou plutôt, comment la personne humaine apparaît-elle dans le droit — telle est la question que doivent se poser le philosophe du droit et le juriste, qui ne devrait être qu'une seule et même personne."

Bernard Edelman, *Esquisse d'une théorie du sujet: l'homme et son image,* Recueil Dalloz Sirey, 1970, 26e cahier, Chronique, XXVI, p. 119.

FIRST CHAPTER

THE PROBLEMATIC: LEGAL TRADITION AND MEDICAL NOVELTY

I - The Need for Conceptual Tools

The issues of medical law are our new abilities to act upon the human person. The questions about these issues are whether the new actions are legally justifiable, or how they are to be legally justified. The problem in answering these questions is that existing answers fit only the singular situations which elicited the answers. The solution to this problem is an instrument which contains both the old singular answers and the new singular actions, and allows comparison of them by what is common to them. This instrument is called a concept, and is not an original suggestion for the tool to deal with novelty.

> The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence.[2]

II - The Concept of Person as a Tool

The concept of person contains the resources of both the old answers and the new actions. The scope of person in old law will follow; here is discussed only its use upon our new actions. If we know what person is, we can determine when and how long the data

2. O.W. HOLMES, Jr., "The Path of the Law", (1897) 10 *Harvard L.R.* 457, 476.

indicate that this sort of existent is present for treatment; the difficulties of unborn plaintiffs and comatose wards gain a criterion. If we know that this reality is present, and know what it is, we will also know what treatment it requires in order to remain what it is, and whether preserving what it is is worthwhile; manipulation of bodies and behaviours has here a standard. If we know the extent of this reality, we will also know where its limits lie and where others begin. Responsibility of patient and of professionals among themselves vis-à-vis patient is more discriminable. Any supplementary information on the problems is then used to determine the application of the concept, not to challenge it.

That the concept of person is sufficient to resolve legal-medical issues is classically acknowledged. "Les lois, dit-on, sont faites pour les hommes et toutes les règles juridiques peuvent donc être considérées comme suivant de près ou de loin la personnalité de l'homme."[3] This is not to say, however, that its role is unchallenged, whether on its sufficiency[4] or, if that be admitted, on its necessity for resolving these problems. Other competitors and techniques are put forward as better problem-solvers than the notion of person.

A - Policy Alternative

The characterisation of law most rooted in the West of recent centuries is that legal decision and legislation are matters of public policy, that is, of public utility. Whether this means that there is a public interest distinct from individuals', as for Roscoe Pound, or else that public interest consists in peaceable solution to individuals' conflicts, as for J.S. Mill, the centre of gravity is placed apart from individuals. Its ethos is to "cut through" distracting irrelevancies, to get at the real dynamics, those of social benefit.

> The assumption of rights and the balancing process would avoid both metaphysical speculation as to whether the prenatal child

3. R. NERSON, "De la protection de la personnalité en droit privé français", dans *Travaux de l'Association Henri Capitant*, t. 13, Paris, Dalloz, 1963, p. 51; quoted in Edith DELEURY, "Une nouvelle perspective: le sujet reconnu comme objet de droit", (1972) 13 *C. de D.* 529.

4. "The concept of 'person' is not primary, as non-Marxist social and legal philosophers assume, in understanding the relations of society and the state. Such a primary concept is an illusion or an intentional myth of the bourgeois ideologists of the contemporary capitalist world." D. POPOFF, "The Full Development of Personality in Socialist Societies", in *Equality and Freedom*, ed. G.L. Dorsey, Dobbs Ferry, N.Y., Oceana Publ., 1977, I, 245; quoted in review by L.C. GREEN, (1978) 56 C.B.R. 555, 557.

"exists" as an entity to which rights can adhere and pseudo-scientific debate on topics such as viability.[5]

The difficulties of following this through, however, are notorious. How little, for example, of the following avowedly "public policy" solution is truly independent of sortal considerations, and how much of it is constituted by a still implicit, in fact covert, appeal to the criterion of personhood.

> The individual's use of his intact body is legally controlled by considerations of public policy. Civil law may subscribe to the maintenance of individual autonomy, exercised even to one's own detriment, save in those few cases when the public interest is contravened. Criminal law... [is] doctrinaire, and centres on the twin principles of preservation of life and prohibition of maim.[6]

The source of the difficulty is not far to seek. For public is not the matter of fact it is alleged to be, but is the ascription of some benefit to some holder. Benefit is some good, desired under some description or merely received as a result; and that good is dependent upon the character of the holder who is benefitted. That character may be the individual's determinate need, as for pleasure in the older Mill and friend Bentham; or may be his separate wish, as the younger Mill found more helpful towards individual development; or it may be either of the former but as regards a social subject rather than an individual subject. But in no case is one exempted from the requirement of probing that subject's character; and in the final case one is plunged either into corporative metaphysics or into statistical verification which make the investigation of personhood look like the highroad of practical common sense.

While the fact that one cannot escape asking "*whose* benefit?" is as true regarding a judiciary as a legislature, the courts are even less able to go that route of policy. Understood as an argument that "justifies a political decision by showing that the decision advances or protects some collective goal of the community as a whole",[7] rather than being understood in the pedestrian meaning of a decision which seeks the substance of justice instead of its mere form, public policy is prohibited to the courts for two reasons. Courts of policy would be assuming responsibility for matters regarding

5. Donald W. BRODIE, "The New Biology and the Prenatal Child", (1970) 9 *J. of Fam. L.* 391, 403; quoted by DELEURY, *loc. cit.*, note 3, 301.

6. Bernard M. DICKENS, "The Control of Living Body Materials", (1977) 27 *U. of Toronto L.J.* 142, 163.

7. Ronald M. DWORKIN, "Hard Cases", (1975) 88 *Harv. L.R.* 1057; in his *Taking Rights Seriously*, Harvard University Press, 1977, p. 82.

which they bear no political, that is, electoral responsibility. They are not deputy legislatures, and have no authority for developing programmes. In addition, to pursue such a policy-bound stance would be to punish the losing party because of some new duty created after the event; the courts may enforce retroactive law, but not make it.

Even such legal policy-scientists as Lasswell and McDougall make policy-decision a sine qua non of legal advancement only because they perceive that courts are always involved with realizing some ends, which it is better they recognize and evaluate than pursue blindly. But the issue is whether their ends are those best qualified as arguments of policy in the definition above, or best qualified as arguments of principle. "Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right",[8] that is, some consequence of a personal attribute. This is as much a purpose as is policy, and law is no more abstractly speculative under one directive stimulus than under the other.

B - "Human Being" Alternative

The phrasing of some texts of both Canadian criminal law and Quebec civilian law might suggest that the key concept to which law attends is not person, but is human being, thereby implying some difference between them and, as well, a greater restrictiveness to person, as a concept whose instantiation requires a greater development than that of human. The overall response to such a suggestion is that there is no such difference; since the justification for this claim makes up the substance of the third part of this study, this simple rejoinder must suffice for now.

The text of the *Criminal Code*[9] would not bear such an interpretation, however, even were the general rejoinder not true. The sections which would support the suggestion occur in the sixth part, concerning "Offences Against the Person and Reputation". The peculiar setting of the term "person" in the title is repeated only in the description of assault "to the person of the other" in s.244. The use implies that offence is possible against some aspect of a person, that aspect known as "the person of" that person, an aspect perhaps

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8. *Ibid.*

9. R.S.C. 1970, c. C-34, am. R.S.C. 1970, cc. 11 and 44 (1st Supp.); c. 2 (2d Supp.); 1972, cc. 13 and 17; 1973-74, cc. 17, 38, 50; 1974-75, cc. 19 and 48; 1974-75-76, cc. 93 and 105.

solely corporeal, or solely emotional. Ordinarily, however, such an extravagant use is not envisaged; in almost all sections of this part, "person" is the victim of the offence, not some aspect of him.

Only in those offences which are forms of killing, sections 205 to 221, is the victim identified as a human being instead of a person. Is the law looking to the fact of mere life, rather than the some later personal development? Subsection 201 (1) could be so read, in defining the term "human being" to mean any "child when completely proceeded from the body of its mother in a living state". But a human being is not the law's lower limit of protection, for subsection 221 (1) protects a child before it becomes a human being, in the same manner as if it were a human being. So the spectrum of concern in the criminal law runs not to human beings as a term of art distinct from persons, but rather to anything which can develop either to human being or to person. That is, these three stages are protected as being all the same thing. This we can just as readily call "person".

Another strikingly dual usage is found in the *Civil Code of Quebec*. Article 18, line 1, provides that "Every human being possesses juridical personality"; article 19, line 1, provides that "The human person is inviolable". This was new law in 1971, article 18 being taken from the *Report of the Civil Rights Committee* to the Civil Code Revision Office in 1966, at article 1, and repeated as article 1 of the *Report on Legal Personality* in 1976. The notes to article 1 of the first report explained that:

> Most civil codes and jurists recognize that every person is endowed with juridical personality, which belongs to him by reason of his very existence, and which comprises a number of fundamental rights or inherent attributes intended to protect his physical and moral individuality.

The endowment of what is indiscriminately human person or human being is made even more forceful in article 2 of the same report, "Every one/ *Tout être humain* has the right to life, to physical security, and to personal freedom", the first phrase of whose text is identified with the last phrase of the note which identifies them:

> The Committee wishes to emphasize that the expression "physical security" /"*Sûreté de la personne*" must be understood in the widest sense to include protection of the mental and psychological integrity of the human person.[9a]

9a. *Report of the Civil Rights Committee*, II, Montreal, Civil Code Revision Office, 1966, p. 12.

So when its next three articles begin "Every one/*Toute personne* has a right..." we already know "that the word 'person' found in most of the proposed articles refers primarily to human beings".[9b] These are "the fundamental principles", namely, "central position to the individual in private law";[10] corporations have special rules. Person and human are identical; treatment will be given in the third part of the study to the fact that the "human being" of article 18 C.C. can be derogated from only legally (with "full enjoyment of civil rights, unless otherwise expressly provided by law"), while the "human person" of article 19 C.C. has both legal and consensual derogations ("No one can cause harm to the person of another without his consent, or without being authorized by law to do so.").

C - Patrimonial Alternative

In modern civilian tradition, at least, the most striking alternative to considering legal matters under the rubric of person is to consider them under the rubric of patrimony. More accurately, instead of resolving disputes over persons' rights and duties by reference to persons' personality, disputes may be resolved by reference to persons' patrimony. Subject to precisions to follow, patrimony is property, both the right to property and the objects under this right of property. As such, there must be analogous categories in common law systems, related to the category of estate, which also is property "projected upon the plane of time" in Maitland's phrase.[10a] But because of the more pronouncedly remedial character of the category of personalty and the more tenurial character of realty, the comparison can be only piecemeal, and attempted only via single cases subsequent to the present consideration of civilian doctrine and jurisprudence.

It is not so much the case that modern civilian doctrine might turn to patrimonial considerations to resolve problems of the person, although that turn has not been lacking.[11] Rather it is that the way of distinguishing the alternatives of patrimony and personality may complicate unnecessarily the treatment given to persons, treatment which may be as well understood upon a more direct approach to persons. At the very least, once patrimony is

9b. *Ibid.*, p. 6.

10. *Ibid.*, p. 2.

10a. POLLOCK and MAITLAND, *History of English Law*, 2d ed., II, p. 10.

11. Louis JOSSERAND, *La personne juridique dans le commerce juridique*, Recueil hebdomadaire, Dalloz, 1932, Chronique, p. 1.

discriminated from personality, one begins to need good reason to move beyond the former; in the luminous phrase of Jean Carbonnier, "pourquoi provoquer l'étincelle, pourquoi donner le déclic qui transformera cette masse amorphe en un être vivant?"[12] At present, only an analysis of accepted civilian doctrine is to be undertaken; at the end of the third part a replacement will be suggested.

Roman law allowed of property in the human body, although some jurists broke ranks to assert that *dominus membrorum suorum nemo videtur.*[13] Revealed religions' doctrine of a Creator-God has been suggested as the origin of the distinction of patrimonial from extra-patrimonial or personal, alleged to have been given formulation by Thomas Aquinas.[14] The human body belongs properly to God, as its creator, while man has only a right of usufruct over himself, with no right to dispose of parts nor to let it perish but only to get reparation from those who violate its integrity. Besides the anachronistically Lockean theory of the origin of property herein, and the breakdown of a usufructuary model at points where the property becomes too structually degenerate to keep in repair, the posture of deity as landlord may be incompatible with more centrally divine attributes.

Person enters the modern codal era girt, indeed, with secular inviolability; but the Napoleonic Code's protections extended only to an abstraction in 1804, a year after the death of Immanuel Kant, disciple of the autonomous moral individuality of Jean-Jacques Rousseau. Person's inviolability was the natural consequence of his utter isolation in natural freedom. The manager of his sheer will, he bore no attachment to any institution intermediary between or subsidiary to the state his mutual surrender of will brought about. Left in complete freedom toward other wills, he bore only the quality of *citoyen,* unprotectable from becoming the lackey of his own will's exercise.

When Jean Pradel points out that today the protection of particular concrete conditions of deprivation has become as much an article of public faith as was the autonomy of will in 1804, his phrasing is suggestive of the route we must take. "Aujourd'hui, la

12. "La communauté entre époux, est-elle une personne morale", dans *Travaux de l'Association Henri Capitant,* tome 8, Dalloz, 1955, p. 282.

13. *Dig.,* 9, 2 ad lef., Aquil., 13, p. 2; quoted in François HELEINE, "Le dogme de l'intangibilité du corps humain et ses atteintes normalisées dans le droit des obligations du Québec contemporain", (1976) 36 *R. du B.* 2, 5, note 9.

14. *Ibid.,* p. 4, referred to Louis BAUDOUIN, "La personne humaine au centre du droit québécois", (1966) 26 *R. du B.* 66, 67, but not found there.

santé est devenue un attribut de la personnalité au même titre que le patrimoine."[15] That is, health is one attribute of personality, patrimony is another attribute of personality; but personality governs both, rather than being cut off from patrimony.

This first modern code did not contain in the book on persons any rights of personality over body, nor any of the provisions for moral persons, unlike many later codes.[16] In the Quebec code, moral persons have a "logical and natural place",[17] despite the assumption that this code is more the home of patrimony than of person.[18] Whence arose this orbiting of inviolable persons out of reach of the attachability of their patrimonies?

The term *patrimoine* is used only once in the Quebec code, at article 743, and there is paralleled by "property", not "patrimony". Its development, then, is purely doctrinal during the six decades between the French and Quebec codes' adoptions. Its German originator, C.S. Zachariae, distinguishes among the object of civil rights: some are identified (*se confondent*) with the existence of the person having the rights; others exist outside (*dehors*) and independent of his existence. These latter are looked at not as they are in themselves, but only insofar as they are useful to persons; that is, they are *bona, biens,* things useful, goods. Taken in their collective utility, they form patrimony.[19]

But Zachariae's seemingly rigorous distinction of person from patrimony has oases. For the utility which constitutes objects of rights as "goods" is broader than economic value, and includes also contributions to moral welfare. So, persons also have utility and can be "goods"; Zachariae gives the example of family relations.[20] Thus his *patrimoine* includes items today classified as extra-patrimonial. The usefulness of the two differs, however, in that personal rights do not exhaust the usefulness of the object they concern, whereas property rights do; therefore the latter rights can be materially

15. *La condition civile du malade,* Paris, Librairie générale, 1963, p. 79.
16. P. ARMIJON, B. NOLDE, M. WOLFF, *Traité de droit comparatif,* Paris, Librairie générale, 1950-51, pp. 217-218.
17. L. BAUDOUIN, *loc. cit.* (n. 14), p. 66.
18. DELEURY, *loc. cit.* (n. 3), p. 530.
19. *Cours de droit civil français,* 5e éd., 1838, trans. in P. AUBRY and Fr. RAU, *Cours du droit civil français d'après la méthode de Zachariae,* 2e éd., 1850, t. 1, pp. 160-161, no. 168.
20. *Ibid.,* n. 5.

represented by the thing, whereas the former cannot.[21] The distinction, then, is not one attaining between mutually exclusive legal domains; the order of personality is broader than the patrimonial, but includes it; it is "extra"-patrimonial insofar as it occupies also the remainder of the domain they both share in part.

The doctrine of patrimony is given its French placement into French law by Aubry and Rau, for whom patrimony is "une émanation de la personnalité, et l'expression de la puissance juridique dont une personne se trouve investie comme telle".[22] Thus far no difference appears between this and personality; for, just as patrimonial rights, this latter must appear in an emanation and an expression if it is to be legally recognizable. Just as personality, also, patrimony appears as rights: "Le droit de propriété dont toute personne jouit sur son patrimoine se désigne aussi sous le nom de patrimoine".[23] Both personality and patrimony have a conceptual unity identified with the person of their bearer: "Le patrimoine est, en principe, une et indivisible comme la personnalité même..."[24] Thus the ability to manipulate the whole or parts of both patrimony and personality are on the same footing; either both are possible or both are impossible. But there has never been any problem regarding, for example, alienation of singular objects subject to the patrimonial rights; whence, then, is the difficulty regarding the same treatment of objects subject to the extrapatrimonial rights, viz., body and personality? If principles of public order and good morals have sufficed to channel the one, they should suffice also for the other.

Perhaps, however, it is the difference noted already by Zachariae between outer goods and inner goods which grounds the differences between the manipulability of patrimonial and extrapatrimonial rights. But while Zachariae includes *biens innés* among the *biens,* Aubry and Rau exclude them from *biens* and thus by definition from patrimony, making unsubstantiated reference to the compilers of the *Code civil* who are assumed to assume internal goods outside patrimony because of being inestimable in pecuniary terms.[25] Their own etymology, however, proferred from Roman law, disinclines one to deduce such a drastic separation. For "naturaliter

21. *Ibid.*, n. 6.

22. *Op. cit.* (n. 19), 5e éd., 1917, t. IX, no. 573, p. 335.

23. *Ibid.*, no. 577, p. 349.

24. *Ibid.*, no. 574, p. 336.

25. *Ibid.*, n. 7.

bona ex eo dicuntur quod beant. Beare est prodesse";[26] but *prodesse* means "to advance" only in its secondary sense, and even then in only a spatial context, while primarily it means "to appear in public, to become",[26a] which personality does as well as patrimonial objects. Once more is this borne out by their characterization of patrimony as "la personnalité même de l'homme, considérée dans ses rapports avec les objets extérieurs sur lesquels il peut ou pourra avoir droit à exercer".[27] In this it seems less the fact that the objects are external than that personality must be related to them which hinders seeing rights of patrimony and of personality as of one piece. But the human person must be related also to moments of his own existence, allegedly more "inner" than external goods, in no less of a disunited fashion.[27a]

Thus, the difficulty which Geny finds in the notion of patrimony, viz., that it is dangerous and a hindrance to seek the attributes of patrimony in the very essence of personality,[28] is a historical product. For the dangers and hindrances come from the isolated setting of personality, with which the preceding authors identified patrimony. But that isolation is not a logically necessary result of the doctrine of patrimony, it has been urged. The alternative better pursued is to root property in person, indeed, but to make neither personality nor patrimony more dominant than person himself is.

Nor does the caselaw firmly support the patrimonial-extrapatrimonial distinction in civilian actions, not lay down anything analogous to it at common law. The foundational case in civil law is *Philipps* v. *The Montreal General Hospital,*[29] which still was found nearly twenty-five years later to be the only Canadian precedent, in the foundational Canadian decision at common law.[30] *Philipps* was the trial on a preliminary objection that no cause of action lies for a wife suing in damages for the hospital's autopsy upon her husband, dead of cancer, contrary to her instructions. The objection

26. *Ibid.*, no. 573, p. 334, n. 6.

26a. *Cassell's Latin Dictionary*, rev. J.R.V. Marchant and J.F. Charles, Funk and Wagnall Co., n.d.

27. AUBRY and RAU, *op. cit.*, note 19, no. 573, p. 334.

27a. Economists' "marginal utility" casts doubt on externals' "externality", also.

28. Fr. GENY, *La méthode d'interprétation et sources du droit privé positif*, 1919, t. I, no. 67, p. 143.

29. (1908) 33 C.S. 483.

30. *Edmonds* v. *Armstrong Funeral Home*, [1931] 1 D.L.R. 677 (Alta. C.A.).

of the hospital to her suit was that she suffered no damage to her "purse", her property, since she had no right or claim as to her husband's body; she therefore had no suit, since the *Civil Code* protects only "person, reputation and property".

The objection was defeated; the wife had a cause of action. Davidson, J., gave his conclusions nuances which accurately situate person and property. (1) "Full admission may be made that a dead body does not represent property in the ordinary sense."[31] (2) "A blind acceptance of these doctrines would lead to the conclusion, from [e] very conceivable point of view that a cadaver is... *nullis in bonis*"[32] But (3) "...to say there is no property whatsoever in a dead body is, in some respects at least, epigrammatic."[33] Yet (4) "This property in dead human remains is *sui generis,* to which peculiar and limitative qualities attach."[34] Still (5) "Immunity as regards them all is itself a property."[35] So, both the human person and even the sentiments related to him are an object of property, although that property is peculiar.[36]

The judge showed that the dead body could be neither stolen, nor held for debt, which seems to imply no property in it on the part of those holding it. But the reverse side is that, if executors can claim it back from an unpaid jailor, then they could rest their claim only "on something in the nature of property and on the right to possess it".[37] Similarly, English statutes allowing revocation of a right to examine, possess and move a corpse are all "expressive of a right of property, in some sense", on which to trespass or act tortiously is actionable.[38] Finally, the early English case then often cited against such a right is just not on point:[39] from a question of who owned the graveclothes stolen from a corpse, one could conclude nothing about the ownership of the corpse.

Davidson, J., laid such weight on English law because he clearly had scoured in vain the systems akin to his own for direction.

31. *Philipps, loc. cit.* (n. 29), p. 485.

32. *Ibid.*

33. *Ibid.*, p. 486.

34. *Ibid.*, p. 489.

35. *Ibid.*, p. 490.

36. *Peculium* was the pocketmoney of the slave owned by a Roman.

37. *Philipps*, p. 486.

38. *Ibid.*, p. 487.

39. *Hynes Case, ibid.*, p. 485.

In French law he found nothing on point. In American law he found, as answering the question of how far ownership lay in a corpse, that there is a right to indemnity for tort to the corpse, and that the elements of the damages are the outrage and suffering; but evidently that answer simply slips the issue and solves the case, such that nothing certain can be derived from its non sequitur.

But in Belgian law, at the section of the *Pandectes* upon the topic of "Cadavre", the judge found statements both that the corpse "belongs" to the family and that its disposal "belongs" to the representative of the family, as continuing the *de cujus*. Since the term *appartient* expresses this relationship of "belonging", Davidson, J., would hardly have been justified in going beyond legal obligation as the explanatory tool, and postulating *sui generis* property. But the *Pandectes* went on the conclude: "Ceci admis, l'homme sujet du droit, peut-il disposer de son corps vivant et de son cadavre? Oui: tous les jours il dispose de son corps vivant, en pleine liberté".[40] Not only is this a form of property, but it is extended in principle to the living person's body as well; and, since disposal as of property at death is the same as disposal of body daily, that is, giving it dispositions, expressing with it or in it, etc., thus the full spectrum of human reality can be expressed in property terms. Thus, the other object of property in the person to which Davidson refers at less length, the reverential feeling for the corpse, is a right. It is control over the right, not over the object, which "property" means; for, as shall be seen, the body owned is not an object.

The more recent two citations of *Philipps* among the total of four to be found in Quebec do not advance Davidson's explanation. *Brouillette* simply decides that there was sufficient reason for an autopsy for the widow's prohibition of an autopsy to be overridden;[41] *Bernier* v. *Yager* gave moral damages for a dead child's incineration during the fire which destroyed a funeral home due to its staff's negligence.[42] Marchand, J., however, more expansively in *Lambert* v. *Dumais,* acknowledged the control over the remains decided in *Philipps,* and went on to say why the right of property *Philipps* gave deserved the characterization as *sui generis:*

> Mais ce droit, cette priorité de droits du conjoint survivant sur le corps d'un défunt ne lui est pas donné pour qu'il n'en use pas. Ces

40. Quoted *ibid.*, p. 489.

41. *Religieuses hospitalières de l'Hôtel-Dieu de Montréal* v. *Brouillette,* [1943] B.R. 456.

42. [1946] C.S. 362.

> droits lui sont donnés en fonction du devoir, de l'obligation, de procurer des funérailles et une sépulture convenable.[43]

For another to act upon this obligation when the family member so charged does not do so, as in this case, allows the caretaker to recover funeral expenses from the estate. But these follow not as damages for the civil responsibility arising from a legal obligation unperformed, in which no setting for property would arise; instead, the claim arises from a quasi-contract. Quoting Ulpien, *contrahere cum defuncto creditur.*[44] It is not a legal obligation simply, but that characterization of one which employs proprietary categories, even though they are only "deemed" (*creditur)* to apply.

Even more forcefully, in the earliest citation of *Philipps* in Quebec by Archambault, J., in *Ducharme* v. *l'Hôpital Notre-Dame;* the judge states:

> Il n'y a aucun doute que le cadavre d'une personne demeure la propriété du conjoint et de la famille du défunt, et que ceux-ci ont droit d'action en réparation d'injure ou d'outrage contre ceux qui, sans leur consentement, soumettent ce cadavre à une autopsie.[45]

At common law the yet earlier citation of *Philipps* in the leading Canadian case of *Edmonds* v. *Armstrong Funeral Home* does not move towards an assimilation of patrimonial and extrapatrimonial rights as the preceding pages have argued *Philipps* does.[46] Instead, in this prosecution under the *Criminal Code* for abuse of a corpse, namely, unauthorized autopsy by a funeral home, Harvey, C.J.A., cited Halsbury's Digest to the effect that the law recognizes no property in a dead body, but does recognize rights to dispose of it as incident to the duty to dispose of it. Instead of property, the *Corpus Juris* is cited as stating that this right of burial is a "sacred trust" for all who have an interest in it; thus it is not an absolute right, but one which yields to a public good or demands of justice. So, once interfered with, it is violated and a right of action will arise in which damage is presumed without being shown, upon much older cases. What is not said is that "damages" will flow from the "damage". However, despite the explicit exclusion of property interest, this may well be present implicitly, insofar as the "sacred trust" may well have to be taken in its technical equitable sense rather than in its daily affective use. For it is a duty imposed not simply to exercice

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43. [1942] B.R. 572.

44. *Ibid.*, p. 573.

45. (1933) 71 C.S. 377, 378.

46. [1931] 1 D.L.R. 677 (Alta. C.A.).

care lest harm follow, but rather to do something affirmatively for the benefit of another. While not a proprietary trust under real property law, it is the fiduciary duty of which the trust is a species. But, at equity, there is no incompatibility between an equitable duty and a proprietary interest, such that if the duty is seen to be one, then conceptually it cannot be the other.

Such ambiguity permits of the difference in opinion among jurisprudents regarding the rights in the dead body, and by extension in the person. Exemplary is the interpretation of the older Canadian case of *Miner* v. *Canadian Pacific Railway* by B. Dickens and by R. Kouri, respectively. Upon the passage from Beck, J., that

> [t]he law recognizes property in a corpse, a property, of course, which is subject to the obligations, for example, of proper care... and to the restraints upon its voluntary or involuntary disposition and use provided by law or arising out of the fact that the thing is a corpse...,[47]

Dickens finds an indication of the "insubstantial basis of the 'no property' rule",[48] while Kouri decides that "this *sui generis* ownership is a fiction".[49] Kouri's distinction of patrimonial from extrapatrimonial claims is based on the difference that the "quasi-owner", terminology stemming from the American case of *Pierce* v. *Proprietors of Swan Cemetery,*[50] cannot claim damages for disturbance of the dead body, but only a recovery for grief and anguish; that is, law does not protect the body, but protects the family from injury to feeling. Besides the acknowledgement by Kouri that English law is an exception to this, for giving a claim in trespass rather than a solatium for violation of a right to hold for burial, the fact that it is in fact "damages" by name that have been given by courts, and that the distinction of feelings from property is reduced in importance when the courts require no evidence for injury to feelings but treat them like a *per se* nominate tort upon property, make the denial of property and assertion of mere fiction somewhat less plausible.

All that this shows is that such claims are not clearly extra-patrimonial, non-proprietary; it does not show that they are clearly patrimonial or proprietary. That is, their status remains ambi-

47. (1910) 15 W.L.R. 161.

48. *Loc. cit.* (n. 6), p. 143, n. 10.

49. R.P. KOURI, "The Bequest of Human Organs for Purposes of Homo-Transplantation", (1970) 1 *R.D.U.S.* 77, 82.

50. (1872) 14 Am. Rep. 667, 681.

guous. The ambiguity is hardly dispelled by the updating of this caselaw in *McNeil* v. *Forest Lawn Memorial Services*[51] wherein parents sued for damages for unauthorized cremation of their daughter's body. They had contracted with the funeral home to obtain her body from up north, to arrange a viewing of it for them, and then to cremate it; because of a breakdown in internal communications, the funeral home cremated the body before the parents saw it. The court would have assessed only special damages of $35 for a dress bought for the already cremated girl; no general damages would have been assessed, for the funeral home caused "only a minute fraction" of the parents' "long drawn-out agony" caused mostly by the "protracted seriatim unfolding of sinister circumstances" surrounding their distant daughter's death. That is, damages would have laid; they would have laid for "agony"; they needed to be proven causally related, but were not.[52] The divergence on several points from preceding claims and cases is striking: it is claimed that it was not properly "damages" which lie for feelings; and, in the case of feelings, proof was not required by caselaw, and so could be neither rebutted nor split.

However, the ambiguity surrounding the damages to have been assessed is only deepened; for no damages were found to lie at all, because no compensable cause of action was present, in either contract or tort. While the parents did not plead in tort, the judge devoted most of his analysis to tort. No tort of trespass was committed, for there was no duty general or particular apart from contract to exhibit before cremating; this implies the need for a duty of care for a nominate tort. Nor was there a tort of negligence, for "there was no wilfulness on the part of the defendant in its wholly inadvertent neglect to arrange the viewing of the body", implying the need for wilfulness when harm is caused negligently.[53]

Nor is there a cause of action in contract. The judge explained why his same court gave no damages in *Miner* but did in *Edmonds* (implying these had been laid in contract) by pointing out that while *Miner* excluded damages unless these lay "for mental suffering and nothing else", *Edmonds* allowed them for "wilful violation" of "the right to custody and possession"; and *Miner* was not a case of wilful harm.[54] This deviation aside, the court finally decided that no

51. (1977) 72 D.L.R. (3d) 556.

52. *Ibid.*, p. 559.

53. *Ibid.*, p. 560, citing principles from *Loach* v. *Kennedy*, (1952) 103 L. Jo. 76 (Engl. Co. Ct.).

54. *McNeil*, *loc. cit.*, p. 561.

damages for agony lay in contract since the mental anguish, though foreseeable, did not cause damage to health; this implies, on the authority of *Cook* v. *S.* of the English Court of Appeals in 1967,[55] that mental suffering is not actionable unless itself foreseeable and unless there is damage to health.[56] This piling of error upon legal error make *McNeil* of little use for either side of the present argument, despite its encounter of a situation ideal for this.

However problematic the distinction of patrimonial and extra-patrimonial rights may be as a basis for characterizing person in law, the various reports to the Civil Code Revision Office of Quebec over the past decades have accepted, indeed intensified, the distinction while having always to make room artifically for its points of failure. The *Report on Civil Rights* in 1966 gave as the reason for its article 9 ("No one may renounce the enjoyment of civil rights and fundamental freedoms, nor forego the free exercise thereof in a manner contrary to law, public order or good morals.") that these rights are not objects of commerce; the term which characterizes this, viz., "extrapatrimonial", is not used at this point. But the cogency of the support is shown threadbare by the array of exception: "it goes without saying" that some of the most daily exercises do forego the rights, e.g., lease and hire of services, donation of blood; and these are continually expanded on the basis of fact, not of principle, for these exceptions "show the importance of the judicial role in the appreciation of facts and determination of the limits beyond which the contracting parties cannot go without violating law, public order and good morals".[57] It should better be said that there is nothing clinging to rights of this sort which makes their surrender, any surrender, *per se* contrary to order; rather, the factual circumstances may render a particular bargain of rights abusive of these rights, no differently than the possible abuse of the most proprietary of rights.[58]

The *Report on the Recognition of Certain Rights Concerning the Human Body* in 1971 now calls these allegedly distinctive rights by name, in the notes to article 2: "Since no patrimonial right is involved here, the writing need not be in testamentary form" in

55. [1967] A.E.R. 299, 302.

56. Despite the demand only for direct result since *Wilkinson* v. *Downton*, [1897] 2 Q.B. 57, and only for shock, not damage to physical health, since *Marshall* v. *Lionel Enterprises*, [1972] O.R. 177.

57. *Report on Civil Rights*, II, Montreal, Civil Code Revision Office, 1966, p. 22.

58. B. EDMEADES updates abuse of rights in his comment by that title in 24 *McGill L.J.*, 136 (1978).

order to regulate one's own burial. The reason given in notes to article 1 why they are such, is that body cannot be made an object of commercial dealings. But escape is again allowed from these impossible confines, this time by what Dickens has called a "mask" over the reality of the transaction: "... but this does not prevent the donor from receiving indemnity or compensation according to the circumstances". In addition, derogation of the principle is again permitted straightforwardly: "... the end sought by the alienation or the experiment must not be contrary to public order", that is, to an end which determines the permissibility of each action individually, and not via such concepts as patrimoniality as against personality. Finally, one of the most recent of the reports, the *Report on Legal Personality* of 1977, repeats in article 4 the article 1 from the 1975 *Report on Security on Property:* "Every person has a patrimony which consists of all his property and all his debts. He also possesses extra-patrimonial rights and duties peculiar to his status/*propres à son état*". Person is related to both sorts of rights by a relation of having, of possession, not of identity. While the status is meant to differentiate physical from corporate persons, as the notes reveal, there is nonetheless no refusal of extrapatrimonial rights to corporate persons; instead they have rights appropriate to themselves. That is, the patrimonial rights are determined by the person's individuality, the extrapatrimonial rights by the type or class of person. So rather than extrapatrimoniality being those rights inseparable from person, patrimoniality appears even more deeply rooted in the real individual. The reversal is but a manifestation of the incoherence of the distinction between extrapatrimonial personality and patrimonial property.

As has been asserted, to judge whether and when one has property in his body, or more extensively in his person, "requires a more precise definition of property, possession, ownership and associated legal concepts than seems to exist."[59] While those remarks are made apropos the common law, the study of patrimoniality and extrapatrimoniality suggests that the same is true in civilian law. Therefore one need not fear the incorporation into the civil code of articles dealing with extrapatrimonial disposition, on the grounds that the civil code is concerned only with patrimony.[60] Instead, both the personal rights of the first book and the proprietary rights of the second book are controlled by personality.

59. DICKENS, *loc. cit.* (n. 6), p. 144.

60. HELEINE, *loc. cit.* (n. 13), taking his cue from R.P. KOURI, "Blood Transfusions, Jehovah's Witnesses and the Rule of Inviolability of the Human Body", (1974) 5 *R.D.U.S.* 157.

SECOND CHAPTER

METHODOLOGY: DEFINITION OF PERSON AT LAW

Given that person is the concept which must lie at the core of medico-legal analysis, the meaning of that concept must be clarified. The clarification of a concept is a process frequently called definition. There are, however, a vast array of activities which have been identified as definition, since clarification is achieved differently depending on its different objects. The choice of which activity to identify with definition is, in turn, a function of what the clarification is intended to accomplish, that is, the reason why one is undertaking it.

If one intends to show *how* a term functions in discourse, or a concept in a system of argumentation, he defines by relating the word to other words or *nomina,* and by relating the concept to other concepts; this is called "nominalist' or "conceptualist" definition. If one intends to show *what* individuals are referred to by the term or included in the extension of the concept, he defines by relating the word or concept to things or *res*: this is called "realist" definition. If one intends to show why individuals are referred to by the term, or what is the comprehension of the concept, he defines by relating the word or concept to those characteristics of individuals which indispensibly depend upon it, and upon which it depends, that is, necessary and sufficient conditions for the individual to be present; this is called "essentialist" definition.[60a] This last form of defining is employed when one desires not just to speak of an individual intelligibly nor just to act upon it surely, but to benefit it; for the benefit requires knowledge not simply of how theorists speak of it nor of how agents act upon it, but of what it requires itself in order to endure, that is, to develop. This the intent of medical treatment; also for that intent, legal definition of the term "person" is sought.

These modes of defining a concept or a term are not unrelated. Nominalist and realist definitions may be sought because essential

60a. These concepts are not idiosyncratic, although the historically more varied array of meanings is exemplified in *Definition* by R. Robinson, Oxford, Clarendon, 1954, pp. 3-5. Thus Robinson, p. 18, differentiates by their purposes between "word-word", "word-thing" and "thing-thing" definitions; while Raziel Abelson in his *Definition,* 1-2 The Encyclopedia of Philosophy 314-324, New York, Macmillan, 1967, differentiates "linguistic", "prescriptivist" and "essentialist" definitions from his "pragmatic-contextualist", more similar to essential definition here, and to the *aporiae* of analogous terms found in Aristotle by P. Aubenque, *Le problème de l'être chez Aristote,* Paris, P.U.F., 1962.

definition seems illusory, an appeal both to intuitive and incorrigible faculties, and to abstract and occult entities, masking the real fact that we construct meanings; thus did Dr. Pangloss' explanation in Voltaire's *Candide,* that the reason why his medicine could cure was that it contained *vis medicativa.* This illusion may drive one back towards made-up meanings in discourse or in practice, that is upon nominal or real definition, freed of any discipline from the individual referred to in the definition. On the other hand, essential definitions may be sought because nominal and real definitions seem impractical, an imposition which works only when spinning its wheels but which there is no reason to think will drive our active relations with the world once we try to engage it with individuals; thus did the Cheshire Cat tell Alice that he controls the discussion who controls the use, "The point is, who is to be master", but kept sliding away when he tried to come down to earth. To get to work, one may seek purchase on reality through essential definition.

Nominal and real definitions are alike in the above respect, and so will be called by the single name, "stipulative" definition. Although that term is often distinguished from the term, "lexical" definition, the distinction is negligible for the present purpose, especially since we thereby gain that legal flavour for the type of definition which will be suggested to characterize legal discourse. Stipulative definition is an indication of how a term is intended to be used in a given context or of how the term is in fact there used. It is a definition of the term, not of the referent of that term. It is arbitrary insofar as the choice of where to end its proper use is something chosen. It is not arbitrary insofar as the limits of the use must be drawn within a domain where there can be some members of the class; it is, for example, not possible so to define "airplane" that it include rocks. While one may stipulate a use by indicating the intension or comprehension of his term, that is, the attributes he shall use it to refer to, the purest form of stipulative definition is to indicate by it the extension of his term, that is, the members circumscribed in the class which the term picks out. This is called ostensive definition, one in which meaning is given by pointing to the objects meant: "I mean x_1 and x_2 and ... x_n, when I say 'X' ".

It is one contention of the present study that stipulative and especially ostensive definition cannot stand on its own. While the fuller support of this thesis follows below via Aristotle's description of nature, the readiest indicator is Hegel's succinct noting that although "this" seems to be the most concrete and individually limited word possible, it is in fact the most universal word; there is

nothing of which it cannot be said.[61] So its use requires some intension, some attributes of the referrent which make its meaning both possible and intelligible. Every "thing" is "something".

I - Stipulative Definition of Person in Law

The legal use, though infrequent, of the term "person" is largely stipulative; it means what it is intended to mean, what things it picks out. The legislator determines which these individuals are, and responds to a spectrum of irreconcilable interests each with its own definition. The judiciary steers far clear of rationalizing that use, for it sees this as invasion of legislative supremacy and public accountability; its aim is more modest, deciding conflicts on the narrowest possible ground. And there is always some derivative feature of personhood to which it can attach, without penetrating its sources. Thus there is almost no discussion of the meaning of the term "person" in legislation, and caselaw has done little to expand that paucity.

Thus in section 28 of the *Interpretation Act* we are told only that " 'person' or any word or expression descriptive of a person, includes a corporation".[62] The *Criminal Code* at section 2 states only that " 'every one', 'individual', 'person', 'owner' and similar expressions include Her Majesty and public bodies ... in regard to the act and things they are capable of doing and possessing, respectively".[62a] The *Civil Code of Quebec* in article 17.11 sets down that "the word 'person' includes bodies corporate and political, and extends to heirs and legal representatives, unless such meaning is contrary to law or inconsistent with the particular circumstances of the case". This reticence is rationalized by the Committee on Civil Rights in its report to the Civil Code Revision Office. Having noted that there are many lists and definitions of the nature of the rights of personality upon which the committee lays such stress,

> the Committee did not think it advisable to provoke controversy on the subject by accepting one definition rather than another. It suffices to note that all civilized countries recognize the right of each individual to the enjoyment of juridical personality.[63]

So also did Lord Sankey, L.C., speak with due modesty in the

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61. G.W.F. HEGEL, *Phenomenology of Mind*, A, I, 1.

62. R.S.C. 1970, c. I-23.

62a. R.S.C. 1970, c. C-34, as amended (n. 9).

63. *Report of the Civil Rights Committee*, II, Montreal, Civil Code Revision Office, 1966, p. 10.

case of *Edwards* v. *Attorney General of Canada*, the only Canadian case in which an opportunity to expatiate on the concept of person arose directly.[64] Upon the issue whether the words "qualified person" in section 24 of the *British North America Act* regarding eligibility for the Senate included women, the Privy Council recommended affirmatively because the word 'person' is ambiguous. That is, although its original meaning included both sexes, it had been used in the past so as to exclude women since at common law they were incapable of holding public office because they could not hold property. To determine its present meaning, such extraneous circumstances could not be used; instead, by the internal evidence of the Act the word could include both, and so the burden lay on objectors to show why it should not. Because common law impediments had ceased, and because all necessary requirements for senators are set out in section 23 without mentioning the male sex, it is not required that one be male. It could not be clearer that Lord Sankey is intent upon saying not what it takes to be a person at law, but rather how the term is used.

Jurisprudence justifies statute and caselaw here. Says Hart, "It is, therefore, more profitable to investigate how the word 'person' is used, not what it refers to".[65] Hart's "therefore' is expanded by Dias as the avoidance of two linguistic fallacies, namely, that similarity of language shows similarity of function, and that words stand for things. Thus, though one speaks of corporations and of humans in the same language, "person" does not refer to the same function or thing. And "there is no 'essence' underlying the various uses of 'person' ". While application of the word to humans is shared with ordinary usage, although the connotation differs slightly as "a unit of jural relations", its application to non-humans is purely a matter of legal convenience, namely, to take account of the unity of the group.[66] But the difficulty of maintaining the purity of such an account is shown by Singer in his critique of Hart.[67]

> The search for a definition... is the search for the distinctive, central and important features that mark off a complex and important social phenomenon. The fact of borderline cases and the fact that there may be no set of properties common and peculiar to law cannot show that the search is misguided. ... [A]s Hart himself has said: 'Definition, as the word suggests, is primarily a matter of

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64. [1930] A.C. 128.

65. H.L.A. HART, "Definition and Theory in Jurisprudence", (1954) 70 *L.Q.R.* 37.

66. R.W.M. DIAS, *Jurisprudence*, 4th ed., Butterworths, 1976, p. 365.

67. M. SINGER, "Hart's Concept of Law", (1963) 40 *J. of Philosophy* 197, 201.

> drawing lines or distinguishing between one kind of thing and another, which language marks off by a separate word'...

Of course, Singer has moved the analysis only from nominal to real definition.

The suggestion implicit in Dias' note above, that it is corporate personality which provokes the unreality, is pushed yet further by his acknowledgement that " 'person' is a purely legal conception even when applied to a human being and... one is looking at his conduct all the time and imputing it to his legal *persona*".[68] Kelsen, Holmes and Lawson all have views showing that the substitution of a construct which suppresses the humanity for a disguise which only conceals the humanity[69], the original sense of *persona*, is not only respectable but also that the stipulative definition of person is legally cross-cultural rather than just intrasystematic.[70] Kelsen can discover no contrast between persons natural and juristic, for both are only subjects of duties and claims; the totality of claims and duties is the person, and person is not some entity that has claims.[71] In classical terms, claims are the substance of person, not his accidents or properties.[72] The racy style of Holmes' pronouncement

> but then personality is an illusion only to be accepted on weekdays for working purposes. We are cosmic ganglia; this I believe as much as I believe anything. And personality is merely the gaslight at the crossroads with an accidentally larger or smaller radius of illumination,[73]

is no different in substance than the level analysis by Lawson:

> It is indeed easy to see that all legal relations are abstract and exist not in fact but only in contemplation of law. Rights and duties do not belong to the physical world.... It is a little harder to see that the persons between whom relations exist do not themselves live in the physical world but play parts in the drama of the law. But that

68. *Op. cit.* (n. 66), p. 348.

69. J.N. NOONAN, *Persons and Masks of the Law*, Farrar, Straus and Giroux, 1976, p. 20.

70. J.C. SMITH, "The Unique Nature of the Concepts of Western Law", (1968) 46 *C.B.R.* 191, shows their constructivity as a highlight of our system, while G.H. KENDAL, "The Role of Concepts in the Legal Process: A Comparative Study", (1959-63) 1 *U.B.C. L.R.* 617, charts their standing with greater catholicity at p. 642.

71. *The Pure Theory of Law*, U. California Press, 1970, pp. 168-192.

72. H. ROMMEN, *Natural Law: Man and Society*, (1955) 24 Fordham L.R. 128, 138.

73. O.W. Holmes, Jr., letter to L. Einstein, 1909, quoted by NOONAN, *op. cit.* (n. 69), p. 106.

> is certainly so. If relations are abstract, the persons who are the ends of them are abstract also....
>
> All that is necessary for the existence of a person is that the lawmaker, be he legislator, judge, or jurist, or even the public at large, should decide to treat it as a subject of rights or other legal relations.... Once this point has been reached, a vista of unrestricted liberty opens up before the jurist, unrestricted, that is, by any need to make a person resemble a man or collection of men. If in any scheme of legal relations it suits him to interpolate a person at any point, he can do so and he can give it the characteristics he wants...
>
> Legal personality and legal persons are, as it were, mathematical creations devised for the purpose of simplifying legal calculations.... There is a steady drop in resemblance to human persons, until in the end personality is attributed to various kinds of *things*, whether individual or collective, and even to disembodied purposes.[74]

Even jurists of a bent otherwise akin to natural law, the natural home for essential definition, are inclined to use the resources of stipulative definition for their own ends. So, Wu first distinguishes from empiricism, which remains content with facts, the position of philosophical realism, which pushes beyond the affirmed actualities and does not take its norms from them; then he concludes that

> the function of a court is to administer justice, and justice requires in certain situations the finding out of the real relationship between principal and agent, and in other situations the ignoring of the real relationship.[75]

The relevance of this reasoning to legal personality is brought out by Ellul's that the artificiality of "person" in law both limits law and permits of law. That is, the artificial concept first keeps law out of the profundity of the real person, where it does not belong since law is not our highest function; and then abstracts to a common measure which by excluding in advance some accidental individual possibilities stabilizes the flux of time so that relations can be established and communication occur between human entities.[76]

While the criticisms of reading corporate personality upon the individual model are facile,[77] and while "there is no topic in juristic

74. F.H. LAWSON, "The Creative Use of Legal Concepts", (1957) 32 *N.Y.U. L.R.* 909, 914-15.

75. John C. WU, "Truth and Fiction in the Art of Justice", (1958) 36 *U. Detroit L.J.* 130, 131.

76. J. ELLUL, "Sur l'artificialité du droit et le droit d'exception", (1963) 8 *Archives de philosophie du Droit* 21, 27-28.

77. D. LLOYD, *The Idea of Law*, Penguin, 1964, pp. 302-303.

literature which has made a greater noise in the schools or in the world" than corporate personality,[78] it is still difficult to see why its flaws would be read over onto individual legal personality, tarring it too with the unreality and maleability of stipulative definition. But the underground current attaching individual and corporate person is the abstract notion of right, mentioned by Lawson. That abstraction cannot be seen nor heard of either individual or group. This leads in two directions: the group is thus as real as the individual person; or the individual is as unreal as the group person. While Mazeaud does not draw the latter conclusion, his description of the group expresses strikingly the metaphor from which it is drawn.

> Mais ces collectivités naturelles n'existent pas dans le droit. Races dispersées, peuples sans nationalité, professions inorganisées, le législateur les maintient dans l'ombre. S'il ne les charge pas d'obligations, il ne leur reconnaît pas de droits. Elles sont sans droit, sans patrimoine. Pâles fantômes, qui souffrent et ne peuvent se plaindre, le juge ne peut les entendre. Ils n'ont point revêtu la robe — je voulais dire la personnalité — qui donne accès au prétoire. Ils n'ont pas acquis le droit à la parole. Il ne parlent pas la langue du droit, et les oreilles du juge ne perçoivent aucune autre langue.[79]

But these *pâles fantômes* are as visible as are natural persons.

> A corporation is as visible a body as an army.... When therefore a corporation is said to be invisible, that expression must be understood of the right in many persons, collectively, to act as a corporation, and then it is as visible in the eye of the law, as any other right whatever of which natural persons are capable.[80]

One reaches the same point historically, in M. Koessler's study of the *persona ficta.* Originally a figure of speech, when "person" meant only the individual human, the *persona ficta* became absolute and no longer fictitious in a second stage when the fiction had conquered law and "person" had come to mean either individual or corporation, equally real, that is, any rights — and — duties-bearing unit, as a rule of positive law. Then, at some third stage, to challenge the real existence of either sort of person becomes to challenge the real existence also of the other sort. Even if "it is, as

78. Maximilian KOESSLER, "The Person in Imagination or Persona Ficta of the Corporation", (1949) 9 *La. L.R.* 435, 447, n. 60.

79. Léon MAZEAUD, "Défense des intérêts moraux collectifs", (1956) 16 *R. du B.* 349, 351.

80. Th. KYD, *Treatise on the Law of Corporations,* London, 1793, p. 16; quoted in KOESSLER, *loc. cit.* (n. 78), p. 439.

a matter of law, just not possible to challenge the real existence, as a separate rights and duties-bearing unit; a rule of positive law will never abdicate before an injunction of abstract speculation",[81] there nonetheless will be considerably different content given to person if that challenge is thrown, however firmly a rule of law enforces any possible content. Even "if it was a real thing, if it had a legal existence",[82] there remains a difference whether the corporate person has the capacity of a natural person and so cannot act beyond its capacity, or does not have this and so can act ultra vires;[83] the latter has only the incidents given to it, while the former can get for itself any at all.[84] If individual person has the same origins, the same is true of it. Thus, for example, if "the *fiction* that they are but one person in law is the underlying principle at the root" why husband and wife cannot conspire together, and if this "may well be amended by legislation", then a similar fiction of individual personhood is as open to creation and destruction at law.[85]

The important difference between being a person and being given personality is implicitly recognized by the ways in which personhood arises in the first two articles of the *Report on Legal Personality,* which "every human being possesses" but "every corporate person is granted". The latter have "the same capacity as a human person", "except with respect to anything peculiar to a human being" in article 8, the first phrase implying fiction of both, since the latter implies it of corporations. While article 45 expresses clearly that corporations are creatures created in the form willed, in French (*en observant les formalités*) if not in English ("in accordance with the law"), article 31 is less clear about this in its text ("Corporate personality is conferred according to the terms and conditions provided by law/*selon les modalités prévues par la loi*") although its note reaches the same conclusion ("It is not necessary to make provision for the manner of creating corporate persons; the law will do this in each case").[86]

81. *Ibid.*, p. 447.

82. *Aron Salomon* v. *A. Salomon and Co.,* [1897] A.C. 22, 33.

83. *Bonanza Creek Gold Mining Co.* v. *The King,* [1916] 1 A.C. 566, 584.

84. *Ibid.*, p. 578.

85. *Harry Kowbel* v. *The Queen,* [1954] S.C.R. 488 (my emphasis); the wish expressed here by the editors of C.E.D. (Ont.) 3d at no. 507 of "Criminal Law", smarting at the continued authority of *Kowbel*, is unlikely to be soon relieved in the light of *Koskyn* v. *Metropolitan Police Commissioners,* [1978] 2 W.L.R. 698 (H.L.).

86. *Report on Legal Personality,* XLIII, Montreal, Civil Code Revision Office, 1976, p. 43.

II - Essential Definition of Person of Law

The counterpart to stipulative definition has been presented in most of the examples of stipulative definition above. In each instance the stipulative definition was sought out of despair at finding something unbudgeable at the core of personality, or else out of the desire to have the freedom to construct that core. The core, dissolving because constructed, is a product of the mode of approaching it, however. The pattern is Cartesian:

> Let us attentively consider the wax, withdrawing from it all that does not belong to it, so we may see what remains.... When I distinguish wax from its external forms; when stripped as it were of its vestments I consider it in complete nakedness...,[87]

then only the mathematical constructivity of extension remains. From recognizing that the having of any particular shape, smell, texture, etc., is unnecessary to the wax, Descartes concluded that the having of sensory attributes as such is unnecessary. Similarly it would be erroneous to conclude that, because persons change and vary, there is nothing essential to us; the variability and stages of development are as characteristic of what we are as is the possession of various shapes to the wax. The reductionist critique of personal reality is rebutted not by virtuosity within its framework, but by refusing its models from the start.

Legal decisions are not concerned to develop general intellectual methodologies, but at times the grooming of their matter at hand includes statements of more adequate approaches to personhood. Lord Porter in the *Attorney General of Ontario* v. *Winner* was concerned whether a bus route from Boston to Halifax under a New Brunswick licence to use its highways but not to board or unboard passengers thereupon is an undertaking that is interprovincial and thus beyond provincial restriction. To determine this he stated:

> The question is not what portions of an undertaking can be stripped from it without interfering with the activity altogether; it is rather what is the undertaking which in fact is being carried on.[88]

The question of Viscount Haldane in *Bonanza Creek Mining Co.* v. *The King* is clear within the following quote, but the thrust of his methodology for definition is much the same:

87. René DESCARTES, *Meditations on First Philosophy*, II (Adam and Tannery French edition, p. 25).

88. [1954] A.C. 546, 581.

> The doctrine simply means that it is wrong... to start by assuming that the Legislature meant to create a company without capacity resembling that of a natural person, such as a corporation created by charter would have at common law, and then to ask whether there are words in the statute which take away the incidents of such a corporation.[89]

Each of these jurists saw that the reality he was attempting to characterize bore the legal characteristics that were sought only because it was the kind of thing it was, independently of law. It could not give correct answers to his questions if it were taken prematurely narrowed by exclusions of "non-essentials", that is, those aspects which come and go. To know the existent, the inquirer must take all the twists and turns of its history as possible to that being only because of the kind of being it is.

> Reason does not create its own law, any more than man creates himself. ...The "man" it knows is not the Lockean individual, leaping full grown into abstract existence in a "state of nature", but the real man who grows in history, amid changing conditions of social life, acquiring wisdom by the discipline of life itself, in many respects only gradually exploring potentialities and demands and dignities of his own nature. The natural-law philosopher does not indeed speak of a "natural law with a changing content", as do the Neo-Kantians, to whom natural law is a purely formal category, empty of material content until it be filled by positive law and its process of legalizing the realities of a given sociological situation. However, the natural-law philosopher does speak of a "natural law with changing and progressive applications" as the evolution of human life brings to light new necessities in human nature that are struggling for expression and form.[90]

This can be conceived not only historically, but in terms of Aristotelean formal and final causes, which are the same. "... [T]he 'what' and 'that for the sake of which' are one...."[91] "We also speak of a thing's nature being exhibited in the process of growth by which its nature is attained,"[92] A person cannot be characterized by what he is at any single moment, but only by the fulfilments appropriate to him, for something is what it is when it is fully completed: "the actuality of whatever is potential is identical with its formulable

89. [1916] 1 A.C. 566, 577.

90. John COURTNEY MURRAY, *We Hold These Truths*, Sheed and Ward, 1960; quoted in E.A. KENT, ed., *Law and Philosophy*, Appleton-Century-Crofts, 1970, p. 28.

91. *Physics*, II, 8, 198a26.

92. *Physics*, II, 1, 193b13.

essence".[93] Definitions, then of person will include this dimension by picking out not the features which at any given moment are found to be present, but by identifying the drive they manifest, the needs which they partially respond to, the remedy of the contradictions acted out in the present features.

III - Operational Definition of Person at law

The major concern of the next part will be to set the legal stipulations about the major phases of personal life — beginning, continuance, and end — side by side with the demands of human nature. "An ethical definition is complete without criteria for recognition, but a legal definition would not work if it did not contain such criteria."[94] So beyond this setting, it will be necessary to formulate criteria for legal personality. This is known as an operational definition: find these, and you find person; make these, and that is a recipe for person. These cannot be fully satisfactory, because every criterion is also a sample and has its own features as well as its reference to the features of its referent, person.[94a] But there will be some value in offering it.

THIRD CHAPTER

THE LEGAL STIPULATIONS AND ESSENTIAL ATTRIBUTES OF PERSON IN LAW

With it established that stipulative definition cannot be meaningful nor activated unless it is dependent on essential definition, the present section will test the legal stipulations of personality against the essential definitions of personhood.[95] This will be done

93. *De Anima*, II, 4, 415b14; this and other Aristotelean texts are from the McKeon edition of the Ross translation, in *The Basic Works of Aristotle*, Random House, 1941.

94. Yves SIMON, *Philosophy of Democratic Government*, U. Chicago Press, 1951, p. 209.

94a. L. WITTGENSTEIN, *Philosophical Investigations*, 2d ed., Blackwell, 1958, no. 73-74.

95. "Personhood" is a term found barbaric by L.W. SUMNER, *Moral Persons*, Canadian Philosophical Association, unpublished paper, 1978; but it has been em-

at the three contemporarily crucial points of human life. First, what is the person at his commencement? Is he recognized by law to be present at any particular point, from fertilization to birth to maturity to death? Is there any difference between the position of civil law upon the recognition of an unborn plaintiff, and of the criminal law upon the vulnerability and protection of the abortee? Are these recognitions sheer whim, or are they validated by the facts of life?

Secondly, the person once recognized, how is he to be treated, by others and by himself? Overall, the question is one of the restrictions upon action: can he have rights he cannot act upon? Is his autonomy a complete opening unto self, and his inviolability a complete exclusion of others? And, returning to a resolution of the earlier patrimonial issue, is there a difference between the way he has himself, and the way he has other things which he is allowed to dispose of?

Finally, does law give enlightenment upon what person is at his completion, by noting at what point he may be treated as no longer a person? In this as in the other crucial points where law would be expected to have had to take a stand and define personhood, we shall see that the response has been to assume implicitly a definition, and proceed to resolve the issue upon other technical grounds. Out of the resolution, however, we can see what must have to have been assumed, sometimes more clearly than at others.

I - Achievement of Person: Personal Teleology, and Senses of Potentiality

If, per hypothesis, the characteristic of person at law is to be a rights — and — duties bearer, then whenever rights and duties are found to lie there must be present a person, in the eyes of the law. The caveat upon this logic is double. Not every right need lie in order for some right to be attributed to the bearer; so a right to sue may not be recognized, but a right to protection from harm may be. Also, it is not only person which is protected from harm; property is protected, so also are parts of the body. So finding a duty upon others not to harm an unborn need not imply a right in the unborn nor his personhood, but only a right in his family. It is necessary, then, to discover when in fact the law does recognize the person as rights-bearer to be present.

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ployed for some decades to distinguish the existence of a being that is a person, from the selection out from this being of those habitual behaviour patterns which constitute for empirical psychology the personality.

A - Civilian Law

Prenatal children are expressly included in international documents protecting basic human rights.[96] Civil law's approach has derived from the Roman *nasciturus* principle.[97] The French code makes such rights to depend upon "viability" at birth, as to succession and gifts only; the Dutch and Spanish codes hold the same tradition, but add a resolutive condition upon still-birth and a suspensive condition of birth with human form plus twenty-four hours alive, respectively. The Italian and German codes depart from the deeming, making legal capacity an acquisition upon birth, although then rights are acquired in favour of the neonate since conception; Chile and Argentina follow suit, adding the condition that one must live a "moment" separately.[98] Quebec uses both "nasciturus" and "viability" regarding successions at article 218 C.C.; but acticle 30 of the *Report on Legal Personality* would lift this out as a general principle of "Persons", where the deeming of conception within three hundred days of birth is now found at article 608 C.C.

The difficulty of confining the objective words to their intended meaning is illustrated by *Allard* v. *Monette*, a suit between legal heirs turning on whether an infant was born viable, and so took a share inheritable only by his heir.[99] Monette, C.J., acknowledged that live birth was not enough; it had to be viable birth, that is, able to continue outside the womb and pursue ordinary life. While this seems like an excessive demand, in fact it brings viability and thus personhood far back into the womb, for "c'est la respiration complète qui constitue la vie". Accurately, "c'est par la respiration complète que sa circulation du sang s'établit dans les poumons...", and the conclusion is "... et que l'enfant vit de sa propre vie".[100] An independent circulation is what life is, and respiration establishes it; so if, as is widely recognized, an independent circulatory system

96. *Declaration of the Rights of the Child*, G.A. Res. 1386, 14 U.N.G.A. OR Supp. 16 at 19, U.N. Doc. A/4354; unanimously adopted as a supplement to the *Universal Declaration of Human Rights* in 1959.

97. "Nasciturus pro jam nato habetur quando agitur de eius commodo", located at *Dig.*, I, 5, 7, by E. VEITCH, "Delicta in Utero", (1973) 24 *No. Ireland L.Q.* 40, 50, but given in its more correct form by Lamont, J., in *Montreal Tramways Co.* v. *Léveillé*, [1933] S.C.R. 456, 461, as "Qui in utero est, perinde ac si in rebus humanis esset, custoditur quoties de commodis ipsius partas quaeritur".

98. ARMIJON, *op. cit.* (n. 6), p. 218.

99. (1928) 66 C.S. 291.

100. *Ibid.*, p. 293.

is discovered even before birth, then the absence of respiration is negligible. All that is required for life is present, even through it does not take place, as the case demands, *hors du sein maternel.*

The core civilian principle is set out in *Montreal Tramways Co.* v. *Léveillé.*[101] The action is taken by father as tutor for his child born club-footed after her injury at seven months when her mother was detrained negligently. The company defended that the child was not an existing person when injured, but only a part of her mother, and so not "another" under article 1053 C.C. This defence was rejected, and the action sustained in a judgment by Lamont, J., in the Supreme Court, concluding:

> Being an existing person in the eyes of the law it comes within the meaning of "another" in article 1053 C.C.[102] and is, therefore, entitled through its tutor to maintain the action.

Nothing could be more forceful than that statement, and this is nearly the only case in which so straightforward a phrase can be found.[103] This case has been seminal among the citations at common law under similar facts.[104] But the citations never quote that conclusion as ratio, attaching instead to various preparatory arguments made by Lamont, J., and to his principle of natural justice offerred in support of his ratio. For the judge prefaced his conclusion by stating that:

> For these reasons I am of the opinion that the fiction of the civil law must be held to be of general application. The child will, therefore, be deemed to have been born at the time of the accident to its mother.[105]

This can be taken as either a displacement of the ratio onto "these reasons" preceding, or else a fictional "deeming born" rather than, "being person".

The natural justice argument deserves quotation at length, since it has been alleged as the correct ratio.

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101. [1933] S.C.R. 456.

102. *Ibid.*, p. 465.

103. But Karen M. WEILER and Kathleen CATTON, in "The Unborn Child in Canadian Law", (1976) 14 Osgood Hall L.J. 643, 653, are too forceful in saying also that here "judicial notice was taken of the fact that in some areas the law has long recognized an unborn infant as a person".

104. In Quebec civilian law, however, *Léveillé* in the numerous citations collected in *Index Gagnon* has never been cited on this point, but only as regards the evidentiary principles it lays down on presumptions of fact.

105. *Ibid.*, p. 465.

> If a child after birth has no right of action for pre-natal injuries, we would have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.[106]

It is, however, improper to take this natural justice as a ground of action in itself; for unless one has decided that there is a person being deprived of justice, there is no deprivation. The father is satisfied, as is the mother; the child now born is satisfied, too, if there was no wrong done to him since the time he began to exist as a person.

The deeming-through-fiction, too, is something that cannot support itself, or at least is not allowed to do so by Lamont, J. for, having found that English equity recognized the *nasciturus* principle even if English and American common law did not, the judge posed the objection that the principle was simply a rule of construction for the term "child". He denies this, for the case of *Doe* v. *Lancashire* which used the principle did not simply construct the will there in question, but revoked it upon the birth of a child for, said Gross, J., "I know of no argument, founded on law and natural justice, in favour of the child who is born during his father's life, that does not equally extend to a posthumous child".[107]

Lamont, J., also looked to English criminal law to verify the point, namely, the unborn's separate existence rather than existence as a part of its mother. For

> it is well established that if a person wrongfully causes injury to a child before its birth which results in death after it has been born alive, such person will be guilty of a criminal offence although his wrongful act was directed solely against the mother.[108]

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106. *Ibid.*, p. 464.

107. (1792) 5 T.R. 49, at *Léveillé, loc. cit.*, p. 463.

108. *Ibid.*, p. 464.

The example is relevant, for "crime and tort are merely different aspects of the same set of facts".[109]

Absence of analogy from one area of law to another is, however, the point of the dissent by Smith, J. For the citations from the civil law in the majority opinion are drawn all from property law, which even in the common law allows acceptance of the *nasciturus*. Smith argued that there is no more reason to apply the principle from property law to civilian delict than there is to apply it from property law to common law tort.[110] Lamont, J., does not rebut this objection.

In fact, to see how really trailblazing Lamont's opinion is, we must compare it to the French civilian sources which he offers as, in his eyes, its support. So Baudry-Lacantinerie and Houques-Fourcadé are quoted:

> L'homme constitue une personne dès le moment même de sa naissance. Jusque-là il n'est pas une personne distincte, il n'est encore que *pars viscerum matris*. Pourtant, en droit romain, on considérait, par une fiction de droit, l'enfant simplement conçu comme déjà né, lorsque son intérêt l'exigeait.[111]

And from Aubry and Rau:

> Dans le sein de sa mère, l'enfant n'a point encore d'existence qui lui soit propre, ni par conséquent, à vrai dire, de personnalité. Mais, par une fiction des lois civiles, il est considéré comme étant déjà né, en tant du moins que son intérêt l'exige.[112]

But, all said, Lamont's conclusion stands: the "fiction" is taken to mean that there *is* a prenatal person, whose lack of remedy would violate natural justice. This highpoint is hardly reached again.

Surely, at least, the attempt in *Lavoie* v. *Cité de Rivière-du-Loup* to read backwards in time the *nasciturus* "fiction" fails. For, by appeal to the definition of "human being" in criminal law, the civil suit in the name of an injured fetus still in the womb is judged premature. "Comme elle ne s'est pas rendue jusqu'au terme de sa grossesse, il n'y a pas eu, à véritablement parler, d'enfant".[113] And Valleron, J., while rejecting this conclusion from criminal law in evaluating a damage suit for the loss of a child aborted after

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109. *Ibid.*

110. *Ibid.*, p. 481.

111. *Ibid.*, p. 462.

112. *Ibid.*

113. [1955] C.S. 455, 457.

negligent injury and likely to have been born viable, did not in *Langlois* v. *Meunier* allow the child its personhood.[114] The child is "another" under article 1053 C.C., but is not a person, a juxtaposition impossible under the *Léveillé* assumptions.[115]

> Cet enfant à naître n'est certes pas une personne et les principes du droit civil concernant le décès ne peuvent s'y appliquer. Il n'est pas non plus une chose, non plus qu'un membre de sa mère. Il ne se situe, à vrai dire, dans aucune catégorie de biens ou de personne qu'identifie la loi. Cela ne signifie pas pour autant que sa perte ne constitue pas un dommage. L'article 1053 C.C. en effet parle "...du dommage causé par sa faute à autrui...", mais ne dit pas que ce dommage se limite à la perte ou à la dépréciation d'une chose ou d'une personne que la loi a cru utile d'identifier comme tel dans l'une ou l'autre de ses dispositions.

Ample reason is there for the comment:

> Étrange réalité que le foetus, puisque, sans être une entité légale, il n'en mérite pas moins la considération de la loi! N'eut-il pas été plus logique, à tout le moins, de lui reconnaître une personalité juridique au regard du concept de viabilité...?[116]

B - Common Law

Again at common law there is recovery possible for injury done to an unborn, for which he can sue. But in the reasoning of the various cases it is even harder to find an acknowledgement of personhood as the ratio. The early modern precedent was the Irish case of *Walker* v. *Great Northern Railway*,[117] whose denial of a right of action is explained away by later citations as holding only, that, when laid in contract as it was, the defendant had no privity with a person he did not know of nor contract with, viz., the *nasciturus;* there is an inclination to read this as though it also denied a duty of care in tort, but the cases dispose of that, as well as the fear in *Walker* that causation could not be proven.[118] Today, there is an

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114. [1973] C.S. 301.

115. *Ibid.*, p. 305.

116. Edith DELEURY, "Naissance et mort de la personne humaine ou les confrontations de la médecine et du droit", (1976) 16 *C. de D.* 265, 280; also in *Travaux de l'Association Henri Capitant*, t. 26, Paris, Dalloz, 1977, 77.

117. (1891) 28 L.R.Ir. 69.

118. L.M. BLOOMFIELD, "La Convention de Varsovie dans une optique canadienne", (1974) 9 *R.J.T.* 91, 101; H. TEFF, "Products Liability in the Pharmaceutical Industry at Common Law", (1974) 20 *McGill L.J.* 119.

action for the unborn plaintiff in England by statute,[119] and by caselaw in the common law countries: in mixed jurisdictions by *Bonbrest* v. *Katz* in the U.S.A.[120] and by *Pinchin* v. *Santam Insurance Co.* in South Africa;[121] in Canada by *Duval* v. *Séguin*[122] following the Australian *Watt* v. *Rama* of the same year.[123] Both these latter overcome the hint in *Walker* that the victim was too remote to be subject to a duty of foreseeability, by citing the English cases developing Lord Atkin's "neighbour principle" from *Donoghue* v. *Stevenson*[124] to the effect that damages need not coincide in time or place with the wrongful act, but rather that the damages crystallize at the time when the injury is suffered. But the price for doing so is high, for the fetus' personality at the time of the prenatal wrong act is not relied upon, and need not even be raised.

Thus in *Watt* v. *Pama,* Winneke, C.J., and Pape, J., not only made the right of action accrue when the damage is suffered and not when the act is committed, but used the occasion to say, unnecessarily, that personhood did not arise before birth.[125]

> But as the child could not in the very nature of things acquire rights correlative to a duty until it became by birth a living person, and as it was not until then that it could sustain injuries as a living person...,

it was only at birth that duty of care, and the corresponding omission and breach, attached to the defendant. The third judge, Gilland, did favour regarding the unborn as a legal person in order to attract a remedy. But even in this minority the principle is both hypothetical and not needed for the ratio, and is a fictional deeming rather than the straightforward acknowledgement.

> If it were necessary to come to the conclusion that the infant plaintiff should establish an existence in law in order for a duty of care to be owed to her by the defendant at the time of the fault committed by him, I would be inclined to the view... that for the purpose of protecting her interests, the infant plaintiff was deemed to be a person in being at the time of the collision, and on birth was entitled to

119. *Congenital Disabilities Act,* 1976, c. 28 (U.K.).

120. (D.D.C., 1946) 65 F. Supp. 138.

121. (1963) (2) S.A. 254.

122. (1972) 26 D.L.R. (3d) 418.

123. [1972] V.R. 353.

124. [1932] A.C. 562, 580.

125. *Watt, loc. cit.,* p. 360.

> receive compensation for any damage caused by a breach of duty by the defendant at the period...[126]

The Canadian recovery contemporary with *Watt* v. *Rama* had been anticipated by *Smith* v. *Fox*[127], where as in *Lavoie*[128] an action on behalf of a fetus still unborn was refused as too early, but without prejudice to a later action which looked likely. But the comments of Riddell, J., show clearly the confines he would have taken in such later suit; for damages cannot be assessed "till after birth and separate existence... There is no certainty that there will be any such entity".[129] That is, the postnatal child would recover on damages then accrued or as a deemed person, but not as a real entity until birth. While this concerned only ascertainment of damages and not the plaintiff's standing, it is Riddell's ground for decision.

Fraser, J., in *Duval* v. *Seguin* was considering the action by a child injured by a negligent auto collision with its mother eight months pregnant; the child was born spastic at term. He allowed the suit after noting the deeming-for-benefit principle used in *Léveillé, Smith* v. *Fox* and *Pinchin,* but gave damages to a child since birth, not to a fetus.

> For negligence to be a tort there must be damages. While it was the fetus or child en ventre sa mère who was injured, the damages sued for are the damages suffered by the plaintiff Ann since birth and which she will continue to suffer as a result of that injury.[130]

In fact, he self-consciously refrains from any further pronouncement: "I refrain from expressing an opinion as to what, if any, are the legal rights of a child en ventre sa mère or of a foetus. Many difficult problems in this area of the law remain to be solved".[131] But at least he recognizes that his solution sidesteps problems whose resolution would allow him to change the position, rather than taking his sidestepping as itself their resolution, in the fashion of Weiler and Catton commenting upon *Duval:* "The advantage of an approach which does not confer legal personality until birth is that it avoids conflict with any abortion legislation",[132] which surely is putting the currette before the harms.

126. *Ibid.*, p. 377.
127. [1923] 3 D.L.R. 785.
128. *Supra* (n. 113).
129. *Smith* v. *Fox,* [1923] 3 D.L.R. 785, 787.
130. [1972] 26 D.L.R. (3d) 418, 433.
131. *Ibid.*, p. 434.
132. *Loc. cit.* (n. 103), p. 657.

The classical commencement of United States law on point is with Holmes, J., who opines in *Dietrich* v. *Inhabitants of Northampton* that fetus and mother form one entity,[133] an opinion followed at the turn of the century in *Allaire* v. *St. Luke Hospital.*[134] In mid-century *Bonbrest* v. *Kotz* reversed this stand, giving suit for prenatal injury as long as it occurred when viable, since then independent legal existence follows the separate biological existence found by Boggs', J., dissent in *Allaire:*[135]

> It is but to deny a palpable fact to argue that there is but one life, and that the life of the mother. Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life, and that though within the body of the mother, it is not merely a part of her body.[136]

Kelly v. *Gregory* followed this in New York, adding a point of departure: "... legal separability should begin where there is biological separability. ... And what we now know makes it possible to demonstrate clearly that separability begins at conception".[137] Finally, Illinois did away with the requirement that the prenatal child must be viable when injured, allowing suit for preconception injury, using for it the term, ironically, of Mr Justice Holmes in *Dietrich,* "a contingent prospective duty to a child not yet conceived", as follows.

In *Renslow* v. *Mennonite Hospital*[138] a mother suing for her child won a claim for brain damage to the child inflicted by negligent transfusion to her of the wrong blood type eight years before conception. The appellate court discounted a New Jersey decision contrary on point, as based on precedents from four jurisdictions all in turn based on the since-overruled *Allaire.* It concluded that "... in other types of cases, tort liability has not been barred because the allegedly wrongful conduct occurred long before the resultant injury if duty and causation can be established", citing not Lord Atkin but American precedents to the same effect.[139] The court used what was a foreseeability analysis of duty, forcefully refusing

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133. (1884) 138 Mass. 4.

134. (1900) 184 Ill. 359.

135. (D.D.C., 1946) 65 F. Supp. 138.

136. (1900) 56 N.E. 638, 641; this requirement of injury when viable should be distinguished from the civilian granting of suit on condition of viable birth.

137. (1953) 282 App. Div. 542, 125 N.Y.S. (2d) 696, 697.

138. (1976) 351 N.E. 2d 870.

139. *Ibid.*, p. 384.

its reduction to the mere causation of strict liability cases on products' warranty. The State Supreme Court, approving the result, nonetheless criticized even this analysis of duty;[140] duty is, instead, a composite of foreseeability and policy, and emphasizing policy permits the court to maintain complete control in determining the scope of liability.[141] While duty is already a question of law, not of fact as is causation, its foreseeability component is less controllable than its policy component. Here the court controls the duty by limiting it to prospective application: there is a duty to one not yet conceived; but only "[a]t the time of the child's conception, the prospective duty ripens into a cause of action which may be pursued by or on behalf of the child or those deprived of its services".[142]

The commentators on the Illinois Supreme Court decision in *Renslow* note a conflict herein with abortion legislation, which violates a legal interest now acknowledged in a child at the time of its conception, or at least circumvents it and thereby violates due process.[143] To the same point, Dellapenna argues[144] that in at least one case, *Raleigh-Fitkin Memorial Hospital* v. *Anderson*[145] the fetal rights are the fetus', not the parents and not rights in the postnatal child since conditioned upon live birth. In this New Jersey case, a Jehovah Witness' right to refuse transfusion because of her religious freedom and her right to the use of her own body is overridden by her unborn child's right to live. So the right to live birth is not conditioned on subsequent live birth, for without the transfusion there would have been none. The commentator, however, acknowledges that this seems to have been overridden by *Wade,* as follows.

C - Public Law

The issue in *Jane Roe* v. *Henry Wade*[146] is whether a Texas statute prohibiting abortion except for reasons of health is unconstitutional as contrary to the due process guaranteed by the Four-

140. Slip opinion, no. 48782, filed 8 Aug. 1977; reported with comment by M.L. CLOSSEN and J.D. WITTENBERG, (1978) 83 *Case and Comment* no. 5, 38.

141. *Ibid.,* p. 5 (p. 44, comment).

142. *Ibid.; Lavoie* and *Fox* also refused premature suits, but their point of maturity came much later.

143. *Renslow,* p. 45, n. 36 of comment.

144. Joseph W. DELLAPENNA, "Neither Piety Nor Wit: The Supreme Court on Abortion", (1974-75) 6 *Columbia Human Rights L.R.* 379, 402.

145. (1964) 42 N.J. 421, 201 A. 2d 537; cert. denied 377 U.S. 985.

146. (1973) 92 S. Ct. 705.

teenth Amendment. The issue in the nearly contemporaneous case of *Mary Doe* v. *Arthur K. Bolton*[147] varies only because the Georgia law requiring approval of a hospital committee for an abortion is also argued to have taken away rights reserved by the people under the Ninth Amendment. The rights in question are the mother's, although the decisions are of interest in our context because of what they say of the child's rights under these same amendments, and thus of his personhood. The Supreme Court recognizes that, personhood being once granted to the fetus, the issue is predecided.

> The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the 14th Amendment. ... If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment.[148]

How is it to be decided whether the fetus is a person? Although the Constitution does not define "person", past decisions have not treated fetuses as persons. More importantly, there are laws which permit abortion; and, if the fetus were considered a person by legislation, such permission could not be allowed. If the fetus were a person and deprived of life without due process, this would contradict a constitutional amendment. As supplementary consideration, the penalties for even impermissible abortion are less than the penalties for homicide. So "the word 'person', as used in the 14th Amendment, does not include the unborn".[149]

The two faces of these grounds are obvious, that the same laws which permit abortion also restrict it, and there are some penalties for abortion, both of which imply the reverse, namely, that there is a person whose rights are being violated.[149a] Also, the circularity of the argument is unmistakable, wherein the question of whether the existence of abortion laws violates a constitutional right is answered by pointing out that there are abortion laws. This simply restates the problem, rather than resolving it.

One of the nagging worries for this court is that the civil law of tort and property does recognize the fetus as a person, as we have seen. The reply of Blackmun, J., is: "Such an action, however, would

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147. (1973) 93 S. Ct. 739.

148. *Wade, loc. cit.* (n. 146), p. 728, *per* Blackmun, J.

149. *Ibid.*

149a. As, in the logic manuals, after a contract to pay for his sophistical instruction when winning his first case, upon a suit — his first — for payment, both student and teacher claim the benefit of either a win or a loss of the suit, indiscriminately.

appear to be one to vindicate the parents' interest and this is consistent with the view that the fetus, at most, represents only the potentiality of life".[150] It is clear why the sense of "person" in civil law was canvassed first in the present study, since the judge's opinion is simply false here. The bypass and its impact on the *Wade* and *Bolton* decisions is stated well by the Connecticut court shortly before.[151]

> Of course, the fact that a fetus is not a person entitled to Fourteenth Amendment rights does not mean that government may not confer rights upon it. A wide range of rights has been accorded by statutes and court decisions. These include the right to compensation for tortious injury, the right to parental support, and the right to inherit property. But the granting of these rights was not done at the expense of the constitutional rights of others. A tortfeasor has no constitutional right to inflict injury on a fetus. When government acts through legislation to confer upon a fetus the absolute right to be born contrary to the preference of a pregnant woman, it abridges her constitutional right to marital and sexual privacy. Whether it may do so cannot be established by the fact that other protections can be accorded which do not abridge another's constitutional rights.

The civil remedies, that is to say, are constructs which confirm no reality. Once that reality is disposed of, there is no competition with the mother's right, namely, her right to privacy defined by Douglas, J., in *Bolton* positively as "the right to organize her life freely"[152] and negatively, following the landmark decision of Brandeis, J., as "the right to be left alone".[153] This right found in the penumbra of many amendments includes here decision to abort, and she is protected against its deprivation without due process.

Her right is unqualifed by the fetus' interests, but it is qualified by the State's "important and legitimate interest in potential life". With regard to this interest, "the compelling point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb". After that first trimester, the State can intervene to protect its interests.

> State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe

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150. *Ibid.*, p. 731.

151. *Abele* v. *Markle*, (D. Conn., 1972) 351 F. Supp. 224, 229.

152. (1973) 93 S. Ct. 739, 757.

153. *Olmsted* v. *U.S.*, (1928) 277 U.S. 438, 478.

abortion during that period except when it is necessary to preserve the life or health of the mother.[154]

This is, however, no recognition of fetal personhood in the last two trimesters, but only of the State's interests; the court openly eschews any attempt even in later pregnancy to say "when life begins", because the "experts" cannot agree.[155] Nor can the State's interest oppose the mother's right of privacy as could a fetus' right to continue its life, if that had been acknowledged. Instead, the State's interest is not just in potential life, but also in the mother's health (*Wade*), and not just her healthy life but also her well-being to which her emotional, psychological and familial circumstances are relevant (*Bolton*). By means of the denial of prenatal personhood, the mother's right of privacy is opened in two directions to State interest, namely, to abridgement by reason of the interest in potential life, and limitation of that abridgement by reason of the interest in her present life. By refusing personhood, the centre of gravity has been shifted from mother to State, under the guise of high liberty.

If the development of this crux of personhood appears underdeveloped in the American abortion decision dependent upon it, it does not even appear in the relevant Canadian decision. In *Morgenthaler* v. *The Queen*[156] the Supreme Court sustained the appellate conviction of a physician accused under section 251 (1) of the *Criminal Code* of having aborted a child from a customer without using the legitimating provisions of section 251.[157] Of his several defences the only ones in which the personhood of the abortee arose urged that section 251 was, firstly, unconstitutional and, secondly, inoperative under the *Canadian Bill of Rights*.[157a] Only Chief Justice Laskin, in dissent upon a different point, agreed to hear those two defences, while Pigeon and Dickson, JJ., refused comment because the court had already decided that no case had been made out for them. The wariness of solving instead of simply disposing of the issue is striking in Mr Justice Dickson's preface to his opinion.[158]

154. *Doe* v. *Wade*, (1973) 92 S. Ct. 705, 732; also both preceding quotations.

155. *Ibid.*, p. 731.

156. (1975) 53 D.L.R. (3d) 161.

157. Section 251 (1) reads: "Everyone who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intentions, is guilty of an indictable offence and is liable to imprisonment for life."

157a. S.C. 1960, c. 44.

158. *Morgenthaler*, *loc. cit.* (n. 156), p. 203.

> It seems to me to be of importance, at the outset, to indicate what the Court is called upon to decide in this appeal and, equally important, what it has not been called upon to decide. It has not been called upon to decide, or even to enter, the loud and continuous public debate on abortion which has been going on in this country between, at the two extremes, (i) those who would have abortion regarded in law as an act purely personal and private, of concern only to the woman and her physician, in which the state has no legitimate right to interfere, and (ii) those who speak in terms of moral absolutes and, for religious or other reasons, regard an induced abortion and destruction of a foetus, viable or not, as destruction of a human life and tantamount to murder. The values we must accept for the purposes of this appeal are those expressed by Parliament which holds the view that the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion.

In his defence by unconstitutionality, the accused argued that section 251 concerned health and was therewith of provincial concern, ultra vires of the federal power to legislate in the *Criminal Code.* It was proved that the matter is health, by arguing that if the section were intended to protect personhood, then it would allow no abortion at all rather than simply providing conditions to legitimate it. Laskin, C.J. escaped the circularity of Blackmun, J., byslipping the point, replying that section 251 reflects not a preoccupation exclusively with the mother's health, but also a prohibition of an intervention which is socially undesirable and therefore sanctionable. As for the permission of abortion under certain conditions, it is competent for Parliament to decide what is not criminal as well as what is.[159] The protection of personhood is not commented upon.

Inoperability under the *Canadian Bill of Rights* was urged because of similarities in language between the Canadian bill and the American, and the alleged relevance of American decisions to the Canadian bill's interpretation as a result of similar wording. Chief Justice Laskin characterized those decisions as persuasive, only, and declined the invitation to adopt them. Due to Canadian parliamentary sovereignty rather than popular, there is no substantive review of legislation.

> This Court indicated in the *Curr* case how foreign to our constitutional traditior, to our constitutional law and to our conception of judicial review was any interference by a Court with the substantive content of legislation. ... [I]t cannot be forgotten that [the Canadian bill] is a statutory instrument, illustrative of Parlia-

159. *Ibid.*, p. 169.

> ment's sovereignty within the limits of its assigned legislative authority...[160]

Thereunder, State interest cannot be weighed against individual rights. The American decisions did so, not leaving the rights supreme.[161]

> The convention under part (1) that a right of privacy, as an element of liberty, is protected against federal invasion, is founded upon *Roe* v. *Wade*. Yet that case did not recognize this as absolute to the exclusion of a State interest to protect health or potential life. Rather, it sought to balance its recognition of the right to privacy (that is, the right to decide on an abortion) with the right, time-wise, of the State to intervene.

But, far from this balancing, Canadian State interest lies only where Parliament has placed it. Only what Parliament protects is protected.

> In a situation such as exists in Canada, where there is an exclusive national federal criminal law power and no constitutionally entrenched bill of rights, I am unable to agree that we would be warranted in dividing the normal gestation period into zones of interest, one or more to be protected against State interference and another or others not.[162]

Where the American decisions agreed that once fetal personality is acknowledged, whether at conception or at a first trimester, then the case for abortion falls, the Canadian court has set no such limit upon State interference. Not only is the person a legal construct, as the American decisions might be read to say, too; but even once constructed its rights are yet a further construct upon it, to the second power. The personhood stipulated by Canadian criminal law is torn away from essential definition completely, out-Cheshiring the Cat.

D - Essential Definition

Coke phrased the problem so that its paradoxical core is more striking. Speaking of the child born alive but dying of prenatal harms, he explained that "in law it is accounted a reasonable creature, *in rerum natura,* when it born alive".[163] For, quite apart from its prenatal status, "reasonable" is just what it is not, "in the nature of

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160. *Ibid.*, p. 173.

161. *Ibid.*, p. 174.

162. *Ibid.*

163. 3 *Institutes* 58 (1648).

things", when a neonate. It has achieved no rationality; it just is rational potentially. And what is good for this moment of life is good also for any other, unborn or terminal.

The fact of recognizing human development is something different from properly characterizing it. It is also, one might note, different from acting upon it, as authors show who recognize that "the New Biology emphasizes that life is a continuing process",[164] and then conclude "that it is impossible to pinpoint the exact time when life begins", so that:

> Even if the fetus were accorded legal personality from conception..., this does not mean that legal personality is an inherent characteristic of the fetus from the point of conception onward.
>
> It must be recognized that, at the present state of medical science, according the fetus legal personality is an arbitrary decision.[165]

The non sequitur of saying we know life is a process and we know when the process begins, but we do not know when life begins, is all too clear. The unbroken continuity itself gives the criterion for its presence, namely, the start of such an unbroken and identifiable process.

Kluge expresses this accurately, although his embarrassment at human biology eventually leads his characterization awry. In order to say that a tadpole is a frog, one need be able to claim only two points: "... surely it belongs to the species *rana pipiens* through its phylogenetic development, and is one and the same individual throughout the whole course of its biological career".[166] Not only is this clear; its identity could allow for nothing else.

> ... [I]t is not possible to single out any one part or stage of that development as the point at which it fully realizes this potential or as the stage at which it ceases to be merely a potential and becomes a [frog] in actuality. Nor should we want to, for in actual fact the organism is a [frog] all along. The ascription of potentiality is really not at all with respect to its [frog]-hood, for that is never in doubt. Instead it is with respect to the final external and morphological evidence of (characteristic of) its [frog]-hood, which of course will obtain later in its career. In fact, given the very nature of [frog]-hood, it would be surprising if this were not the case..., if what was said to be... [frog] never underwent such morphological chan-

164. WEILER and CATTON, *loc. cit.* (n. 103), p. 657.

165. *Ibid.*, p. 658.

166. E.-H.W. KLUGE, "The Right to Life of Potential Persons", (1976-77) 3 *Dalhousie L.J.* 837, 840. The demand for individuality will either rule out those blastocyts which undergo mitosis, or will provide for a form of parthenogenesis.

> ges or a phylogenetic development. It would not be... a [frog]... if it did not.[167]

Characterization of potential existence is easy to flaw, however, and easy to misunderstand when not flawed. Thus, "classical hylomorphism" is rejected by Dellapenna because of his taking Aristotle to have said the potential living being is animated when it "looks" human; this is his reason for moving toward a "genetic criterion",[168] never realizing that he has moved from the condition to its sign.

The treatment by Thomas Aquinas, largely expository of Aristotle, is a more adequate source for the doctrine of potency and actuality. Firstly, potency is spoken of at all because existence and exercise is not continuous; it comes about by change, and for change the product must not be but must be able to be.

> Only while anything is being moved, is it in such actuation; neither before nor after that. Before that, when it is in potency only, the motion has not begun. After that, when it has altogether ceased to be in potency, there is no motion because it is in completed actuation.[169]

Next, the broadest distinction of potency is between passive and active potencies. There can be an absence of the obstacles and impediments to a change, or there can be a presence of its prerequisites. In the first case there is no reality yet to the product; in the second case there is.

> We learn the distinction between the two by comparing the power to its object. For if the object relates to the power as that which under-

167. *Ibid.* In the light of this, the notorious decision in *The Queen* v. *Stearns-Rogers Engineering Co.*, (1973) 37 D.L.R. (3d) 753 (B.C. C.A.) is less ludicrous. Accused of "depositing a deleterious substance where it might enter water frequented by fish", contrary to statute, by bulldozing above a salmon bed and sending silt downstream into it, the company successfully defended that at the time there were only eggs and not fish in the bed. Since eggs cannot be spoken of in ordinary language as "frequenting" water, and since another section spoke specifically of "eggs or fry", Parliament intended to distinguish them. This has a bizarre feel to it because the breaking of the continuity of the process into stages is unreal. The realism would be restored by recognizing that unfertilized eggs are not yet in any continuous developement. This begins with fertilization. Of course, it is not perhaps reasonable doubt were the Court to ask after the whimsies of male salmon as proof of fertilization.

168. *Loc. cit.* (n. 144), p. 405.

169. *Exposition of Aristotle's Physics*, III, 1.3, n. 2; trans. McWILLIAMS, *Physics and Philosophy*, Washington, D.C., A.C.P.A., 1945, pp. 28-37.

> goes and is changed, the power will be active. If, on the other hand, it relates as agent and mover, the power is passive.[170]

Such potencies are also spoken of as substantial potency and accidental.

> Something may be in potency to either sort of existence. For it may be in potency to be a man, as is the case with male seed or the menstrual blood [sic]; or it may be in potency to be white, as is the case with a man. Both that which is in potency to substantial existence and that which is in potency to accidental existence may be called matter; as the seed in regard to man, and the man in regard to whiteness. But there is this difference: the matter that is in potency to substantial existence is called the matter out-of-which; while that which is in potency to be accidentally is called the matter in-which.[171]

Finally, there is habitual potency when the substance is able to become disposed to exercise, and operative potency when it is disposed to exercise.

> Thirdly, [Aristotle] distinguishes two senses of the term "act". In one sense knowledge is an act, in the other thinking is an act; and the difference can be understood by relating these acts to their potencies. Before one acquires the grammatical habit and becomes a grammarian, whether self-taught or led by another, one is only potentially so; and this potency is actualised by the habit. But once the habit is acquired one is still in potency to the use of it, so long as one is not actually thinking about grammar; and this thinking is a further actualisation. In this sense, then, knowledge is one act and thinking another.[172]

The "potential person" of such concern to commentators such as Kluge is of little concern in the sense of substantial and passive potency, but only in the sense of accidental and active potency. The former may raise an action by the parent should his or her genetic components be harmed, but only the latter is of concern to the unborn himself; for only now is he present, at least until *Renslow*. But then present he is, launched on a track of continuing development which, contingencies aside, he will run to its end.

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170. *Disputed Questions on Truth,* XVI, 1, ad 13; trans. MULLIGAN, McGLYNN, SCHMIDT, *Truth,* II, Chicago, Regnery, 1952-54, p. 307.

171. *The Principles of Nature,* c. 1, no. 2, trans. GOODWIN, Indianapolis, Bobbs-Merrill, 1965, p. 7.

172. *Exposition of Aristotle on the Soul,* II, 1.1; trans. FOSTER and HUMPHRIES, *Aristotle's De Anima with the Commentary of St. Thomas Aquinas,* New Haven, Yale U.P., p. 168.

The embarrassment aforementioned with this metaphysics arises from a failure of imagination before intellectual demands. Potentiality is not identified with a material principle or stage as distinguished from an immaterial; rather, it is a condition for the possibility of the change which characterizes persons, as well as other realities. But the assumption that there is such a distinction, plus the assumption that a material stage must precede an immaterial and properly personal stage, discourages acceptance of the demands in the facts. So Kluge's otherwise helpful analysis fails when he blushes that hylomorphic positions

> identify personhood with the possession of a biological property. In fact, they do more than this: both ignore the fact that the notion of person is not an inherently biological notion.[173]

His substitution of "the present constitutive potential for rational self-awareness", namely, "the presence of a nervous system complete in its basic cellular structure vis-à-vis the nuclei of the non-limbic cortex"[174] is characteristic of the "prevailing Kantian philosophy that insists that human persons be accorded nothing less than full human dignity and not be relegated to the status of sub-humans or objects".[175] There is less note of the fact that Kantian philosophy bases that demand on the sole right, that to freedom, and bases this in turn upon inexorable human penchant to generalize.[175a] This bent, in turn, being unfounded in materiality or, in-

173. *Loc. cit.* (n. 166), p. 841.

174. *Ibid.*, p. 842.

175. DICKENS, *loc. cit.* (n. 6), p. 145; also, Ruth MACKLIN and Susan SHERWIN, "Experimentation on Human Subjects: Philosophical Perspectives", (1975) 25 *Case Western Reserve L.R.* 434, *passim.*

175a. KANT expresses this in his *Foundations of the Metaphysics of Morals*, trans. L.W. BECK, Indianapolis, Bobbs-Merril, 1959, pp. 51-52, and 54, in the second section as follows:

> Man was seen to be found to laws by his duty, but it was not seen that he is subject only to his own, yet universal, legislation, and that he is bound to act in accordance with his own will, which is, however, designed by nature to be a will giving universal laws. ... This principle I will call the principle of *autonomy* of the will in contrast to all other principles which I accordingly count under *heteronomy.*
>
> The concept of each rational being as a being that must regard itself as giving universal law through all the maxims of its will, so that it may judge itself and its actions from this standpoint, leads to a very fruitful concept, namely, that of a realm of ends. ... In the realm of ends everything has either a *price* or a *dignity*. Whatever has a price can be replaced by something else as its equivalent; on the other hand, whatever is above all price, and therefore admits of no equivalent, has a dignity....
>
> But that which constitutes the condition under which alone something can be an

deed, even cognizant thereof, cannot help but embarrass when a biological commencement of potentiality is found to be its only meaningful context.

More adequate to Aristotelean demands is the philosophy of embodiment which escapes the Cartesian dualism inherent in Kantial morals. Under the rubric of embodiment, biological reality is not something other than or prior to personhood; rather, the personal intelligence which distinguishes men from non-humans is found in bodiliness, and any succeeding autonomy must be explained by this rather than explain it away. Human body itself is not a thing, although the tendency so to consider it is pervasive. Thus Maurice Merleau-Ponty struggles against the good-intentioned attempt of classical psychology to treat human body as a thing or object with peculiar characteristics, by arguing that those characteristics simply remove body from the range of objects entirely. "What prevents its ever being an object, ever being 'completely constituted', is that it is that by which there are objects."[176] This is not a mechanism of self-regulation; rather it is the presence of human meaning.

> A completely different orientation of the research is given if one understands the body itself as "ensouled". This does not mean philosophical speculation, but the conviction which is based on empirical grounds that the organic is *always* the manifestation of self-forming "unity of meanings", while the law-governed physical order is recognizable exclusively as a "unity by correlation".[177]
>
> The object of biology — as we noted — is only thinkable as a "unity of signification" which discovers our consciousness in it and sees itself unfolded in it (Merleau-Ponty). In biology one is compelled to recognize and to study the context of the phenomena of that which is living — that is to say, of the living *occurence*. Thus perception and thought emerge in a completely different way when one turns from the physiochemical processes on which life *is based* to the vital performances themselves. The "ideal" relations which one then discovers cannot — as with a machine — be understood apart from intentions, meanings and insights of a dimension which emerges from the organism or dwells within the organism (entelechy, soul). It is the course of the life which is developing itself, which makes itself known as the *becoming* of a context in a mate-

end in itself does not have mere relative worth, i.e., a price, but an intrinsic worth, i.e., dignity.

176. *Phenomenology of Perception*, trans. C. SMITH, London, Routledge and Kegan Paul, 1962, p. 90.

177. F.J.J. BUYTENDIJK, *Prolegomena to an Anthropological Physiology*, Duquesne U.P., 1974, p. 17.

> rial whole, that we call the body or the organism. What is called ensouled bodiliness is thus an *empirically* given thematic order, an ideal unity which unfolds spatiotemporally.[178]

Under such categories, one is not dehumanizing developed personhood by locating it at a time long before it continues to actualize its autonomy and inviolability in a visible, social manner.

II - Continuance of Person: Identity Through Change

Given his fetal commencement and an identity continuing therefrom, a person may do and may undergo whatever is appropriate to him. He can also do and undergo some things which are inappropriate to him. The mere fact of being capable of participating in these latter is not an argument justifying the engagement; rather, it allows the question to be put at all, that is, the question of the permissibility of such engagement, a question of norm, legal or moral. For the possibility of contrary behaviour, of violation, far from being a rebuttal, is instead an indispensible feature of an essential definition. For, as was supported above, essential definition is an identification of formal cause in terms of final cause. To use less classical terminology, every description is also a prescription, every "is" an "ought", every protocol sentence also a performative, every knowledge-bit also a path of interest.

Instead of detailing the spectrum of personal rights and duties, and their limitations, the present part will deal first with legal capacity, distinguishing the enjoyment of rights and their exercise, as an escape from having to make a demand for or upon persons absolutely. Next, the two features of personal action which are taken to set the boundaries of the problem will be studied: does autonomy end where inviolability begins? Or is autonomy the constitutive feature of inviolability? Finally, an alternative and patrimonialized model of the person's self-possession will be proposed.

A - Capacity: Enjoyment and Exercise

The person recognized at law as the bearer of rights and duties is not therewith launched onto his legal voyage. Intermediate between capacity for enjoyment of rights and their exercise is the capacity for their exercise. Being able to enjoy or "have" rights is not equivalent to being able to exercise them; beyond the attributes needed to enjoy rights, one must have yet further attributes in order to exercise them. The distinction arises from German law's distinc-

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178. *Ibid.*, p. 66.

tion of *Rechtsfaehigkeit* from *Handlungs faehigkeit,* whose absence from the French code is alleged to yield no practical difficulties, though less precision.[179]

It might be better suggested that this immediacy in the French civil law is of a piece with the obliteration of intermediaries between person and his general will after the Revolution. The distinction is not now present in the Quebec code in frank form, but is there implicitly and is under recommendation for inclusion.

The *Report on Legal Personality*[180] recommends inclusion of an article 3, duplicating the present article 18(2) C.C., stating that: "Legal personality confers/*emporte* full enjoyment of civil rights". The report also recommends, as article 6, subsuming the present article 985 C.C., that: "Every human being of full age and capable of discernment has full exercise of his civil rights". The equivalence of personality and rights is suggested more by the French verb in the suggested article 3. Besides the clear acknowledgement that not every person can exercise rights, though all persons enjoy them, the possibility of losing the exercise is more feasible than loss of the enjoyment. For article 3 continues: "There can be no derogation [of enjoyment] save by express provision of law," a refrain taken up in article 5 as "No person may renounce enjoyment of his civil rights and fundamental liberties," whereas in its article 13, "No person may deprive himself of the exercise of his civil rights and fundamental liberties contrary to public order and good morals".

J.-L. Baudouin notes that total absence of enjoyment is equivalent to absence of legal personality. This is his reason why deprivation of enjoyment can be only specific and partial, but continuing as long as does the affront to public order leading to the deprivation, while deprivation of exercise can be only temporary and terminating when does the cause from which the protection is required.[181] P.-B. Mignault goes further, for the total absence even of exercise is equivalent to be absence of enjoyment and thus of personality. The exercise of which one is deprived is delegated to mandataries who represent one; but if none of these are allowed, "le droit dont on ne peut bénéficier ni par soi-même, ni par un représentant, ... est un droit purement nominal et sans valeur". Even further, of some rights exerciseable by no one but oneself, "la privation de l'exercice

179. ARMIJON, *op. cit.* (n. 16), p. 218.

180. XLIII, Montreal, Civil Code Revision Office, 1976.

181. *Les obligations,* Montréal, P.U.M., 1970, nos. 183, 185, 186.

équivaut à la privation de la *jouissance* elle-même"; these are *essentiellement personnel.*[182]

The distinction is present though unclearly also in the common law. Stoljar relates "status" and "capacity" as one more comprehensive than the other.

> Rather than a specialized meaning to differentiate it from "capacity", "status" can be used in the widest possible sense to denote the "condition" or "position" of persons or property in a legal system; and also in a narrowed, where... it compares... the legal incidents attaching to one with those attaching to another person of a related kind or class.[183]

Used in the wider sense, it "includes both a person's legal entitlements and his incapacities",[184] in a manner reminiscent of the compatibility between full enjoyment and a truncated exercise of rights. Dias agrees in giving status a meaning equivalent to the condition of a person, although he disagrees by contrasting this to a narrower capacity.

> When such groupings are related to certain types of individuals (distinguished, e.g., by role, social or racial characteristics), they constitute status, which may be limited or extensive, e.g., the status of parent, slave, etc.
>
> When groupings are related to certain types of jural relations, they constitute capacity. Different groupings of these latter may be vested in the same individual... But none of this denotes dual personality.[185]

More adequately conceptualized under civilian law, the importance of the distinction between enjoyment and exercise of rights for the present study is demonstrated in the dispute between Pradel and Lombois in France over the following question: does the state of being-ill constitute an *état* in any formal sense? That is, is there and ought there be a formal recognition that the capacity of a sick person is abridged, or is there only the matter of fact to be proven in each act that some deficiency may be present? In one sense, the only difference regards the burden of proof; but that is a considerable difference. Pradel urges that law has passed beyond the abstract person of pure will nearly immune from incapacitation — and protection — generated by the Revolution, and has recognized the state of health

182. *Droit civil canadien*, I, 1895, p. 132-133.

183. S.J. STOLJAR, "The Notion of Status", (1973) 18 *Amer. J. of Jurisp.* 136.

184. *Ibid.*, p. 138.

185. *Op. cit.* (n. 66), p. 340.

as an attribute of personality on the same level as patrimony;[186] so sickness is an external attack, a *force majeure* depriving one of capacity for his protection in both contract and delict.[187] Lombois argues instead that the embodiment to be read over the abstract will of the imperial code requires that illness not be a phenomenon external to the patient's will, for it implies also a personal ground on which it develops for which no other is responsible.[188] No regime, as for minority or insanity, can be designed for sickness as such because the condition of the sick is too elusive to grasp, unlike the others.[189]

The importance of this debate in the present context is that the condition of personhood is subject to abridgment not only regarding the temporary exercise of personal capacities, as judged in the one-to-one meeting of the person and his acts or treatments, but also (if one believes Pradel) on the basis of changing conditions of personal life which both endure in a fashion akin to the endurance of deprivations of enjoyment, and yet are contingent, coming and going with the regular changes of life. The doctrine of Pradel illustrates a way in which rights and immunities of persons can be diminished in the concrete, whatever the a priori decisions regarding the interface of autonomy and inviolability may be, a diminishment appealing to the humanitarian interest in protection of the weak. Remedy can be sought only in Mignault's much closer attachment of exercise to enjoyment than, for example, the humanitarian articles of the *Report on Legal Personality* give in Quebec, nor at common law the twentieth-century liberalism of hindrance in collective interest takes from the nineteenth-century liberalism of hindrance only for mutual harms.

B - Autonomy: Commitment into the Future

The groundwork of personal reality is clearly laid out in the introduction to the *Report Concerning Certain Rights Over the Human Body*:[190] "A person is free to dispose of his own body as he sees fit, both during his lifetime and after death, provided that the exercise of this freedom is not contrary to public order". This is limited immediately in article 1, now article 18 C.C., by the condition

186. Jean PRADEL, *op. cit.* (n. 15), pp. 14, 78.

187. *Ibid.*, pp. 87-90; 144, 152.

188. Jean-Claude LOMBOIS, *De l'influence de la santé sur l'existence des droits civils*, Paris, Librairie générale, 1963, p. 113.

189. *Ibid.*, p. 326.

190. II, Montreal, Civil Code Revision Office, 1966.

that the benefit of the disposal must outweigh the risk, and that the disposal cannot be by sale. In turn, these limitations are limited, first, by the permission of higher risk when the reason is higher than other values of the person, as in article 4; and, secondly, by the permission of sale where the organ is regenerable. Autonomy can be exercised only by gift, for the value to its motive of love is superior to the other values of the person, whereas the pecuniary value received is always inferior to the value of the person because person is "outside commerce", runs the rationale to article 1 of the report. The limits upon the limits, and the motive preceding disposal with the recompense following it, display the uncertainty behind such stopgap measure, leading to such a caustic reduction in the French approach to the question as Louis Josserand's:

> D'abord, on peut être surpris que le "risque accepté" soit retenu par ceux-là mêmes qui repoussent le concept du "risque crée" [i.e., objective or strict responsibility, which Josserand promoted]... Voilà donc que le risque, impuissant à faire naître la responsabilité, va pouvoir, en revanche, l'atténuer ou même l'éliminer![191]

A major portion of the confusion rests in the juxtaposition of the view that "the body, it is now recognized, has a special dimension"[192] with the view that the dignity of the person is protected against affront even when, with no one present to affront it, it cannot be affronted. Does person's autonomy in disposing of self rest upon social contract, or upon isolated immunity?

The series of cases concerned with developing an "implied bill of rights" in Canadian law offer a spectrum of the placements given to the autonomy between social and individual poles.[193] In the *Refe-*

191. *Loc. cit.* (n. 11), p. 13.

192. *Report, loc. cit.* (n. 190), p. 2.

193. The arguments made against using public law recognition of human rights as private law models seem unconvincing. In fact the arguments are not consistent with each other. While HELEINE, *loc. cit.* (n. 13), pp. 110-111, following Kouri, rejects civil liberties from the code because the code is concerned only with patrimonial issues, DELEURY in *Une perspective nouvelle..., loc. cit.* (n. 3), pp. 522 and 533, finds rights of personality, e.g., the right to one's image, protected in the civil law even though they are extrapatrimonial, subjective and non-economic as closely tied to the rights-holder, and thereupon discourages their acceptance in the code.

Overall, the arguments depend upon the patrimonial distinction, which is doubted throughout the present study. The residual issue of constitutional competency is no more difficult to handle than harmonizing the right of property needed for livelihood associated with the "federal person", with the limitation of landholding by the "provincial person" worked out in *Morgan and Jacobsen* v. *Attorney General of Prince Edward Island*, (1975) 65 D.L.R. (3d) 527.

rence Re Alberta Statutes[194] Duff, C.J., associated the freedom of speech challenged by an Alberta enactment to institutional needs. The British North America Act

> contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs. ... [I]t is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.[195]

In *Saumur* v. *City of Québec,* Rand J., goes further by associating "freedoms of speech, religion and inviolability of the person" both together and also not just vis-à-vis community but as well to the individual human person.

> Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. ... Civil rights of the same nature arise also as protection against infringements of these freedoms.[196]

Casey, J. carries this deeper when discussing inviolability of conscience, namely, the right to control the religious education of one's children,

> It is well to remember that the rights of which we have been speaking find their source in natural law, those rules of action that evoke the notion of a justice which "human authority expresses, or ought to express, but does not make... But if, as they do, they find their existence in the very nature of man, then they cannot be taken away and they must prevail should they conflict with the provisions of positive law."[197]

Again, to reach this point is obiter, "it is not necessary to go further than the needs of the case require".[198] From institution to individual

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194. [1938] S.C.R. 100, 132. The often cited statement is as often noted to be obiter, since the judge admits that the Act is ancillary to an Act which he had previously decided to be ultra vires of the province, so that the present Act fell on those grounds, already.

195. *Ibid.*

196. [1953] 2 S.C.R. 299, 329. Again it is a commonplace, as the dissent in the following case of *Chabot* points out, that this statement is only weakly a ratio.

197. *Chabot* v. *Les commissionnaires d'écoles de Lamorandrière,* [1957] B.R. 707, 721-722.

198. *Ibid.*, p. 722.

to nature, the sweep of autonomy or "inviolability of conscience, or of person" refuses to be kept isolated from a social context which, while ensuring and demanding it, requires its limits. So, from the start, it is improper to place the question of the autonomy of person in opposition to social demands.

The alleged privacy of freedom has its modern sources in two fallacies. René Descartes defines, in the "Second Meditation", a subject accessible only to itself, and then identifies this as his whole self, so that he cannot be known as a person to anyone but himself. John Locke, in chapter five of his *Essay Concerning Civil Government,* assimilates property to self, upon the model of ingestion, by labour, thereby cutting it off from contact with others and making property the very peak of privacy. Both the Cartesian non-bodily self and the Lockean bodily self are persons who subsist in privacy, and thence derive their autonomy.

To open this up and accommodate the insights of the series of cases on rights, it is necessary to grasp human person's identity as formed through a grasp on world, rather than through a grasp of self. The latter stares at the past of isolated experience, while the former looks to the future preformed by commitment to it. The moments and days are bound together by a reach which places our personal consistency in the binding of parts into meaning, rather than by accumulation of passive events which are already dead. Contrast the identity discovered by Hume with that brought out by Marcel.

> As memory alone acquaints us with the continuum and extent of this succession of perceptions, it is to be considered, upon that account chiefly, as the source of personal identity. Had we no memory, we never should have any notion of causation, nor consequently of that chain of causes and effects which constitute our self or person.[199]

> Let us say that the *ego,* as such, is ruled by a sort of vague fascination, which is localised, almost by chance, in objects arousing sometimes desire, sometimes terror. It is, however, precisely against such a condition that what I consider the essential characteristic of the person is opposed, the characteristic, that is to say, of availability (*disponibilité*).

> This, of course, does not mean emptiness, as in the case of an available dwelling (*local disponible*), but it means much rather an aptitude to give oneself to anything which offers, and to bind oneself by the gift. Again, it means to transform circumstances into oppor-

199. David HUME, *A Treatise of Human Nature,* I, IV, VI, "Of Personal Identity".

tunities, we might even say favours, thus participating in the shaping of our own destiny and marking it with our seal. It has sometimes been said of late, "Personality is vocation".[200]

The point of the comparison is that personhood for the latter rather than repelling any social conditions from its autonomy includes and forms them. The autonomy is not contained in an identity accumulated from isolated experiences bound together by custom, but is the mode of existence for an identity committing itself to forming the social future according to the demands impressed upon it. Autonomy is not the opposite of heteronomy.[200a]

C - Inviolability: Publicity of Privacy

Whatever his autonomy, "the human person is inviolable" stands as the basic characterization of his personhood. This means that "no one may harm/*porter atteinte* the person of another without his consent or unless authorized by law to do so", as article 19 C.C. amplifies the principle. But the French term goes further than the English, hinting at what is etymologically any contact, harmful or not; or rather that contact is the harm. It is an implicit reference to the fact stated by article 14 of the *Report on Legal Personality*[201] that "everyone has the right to privacy/*au respect de sa vie privée*", where once again the French text moves beyond the abstraction of a right set off from its bearer's reality, and onto a right which is that reality, his reality as a private existence. Thence arises his inviolability: he *should not* be "done unto", because he *cannot* be done unto, being inaccessible. The horror under this model is poignant in the rape victim's cry on a popular dramatization, "I live in here!" And presumably not "out there"... even to oneself.

R. Kouri[202] sketches three current theories of the interaction between such an inviolability and a person's autonomy, thus far hardly distinguishable. When a person's wishes (autonomy) are to violate his own integrity (inviolability), one can either give full scope to the wishes, or can limit their scope by demanding a situation of immediate extremity, or by subordinating them to a preeminent integrity to life itself, a boundary inviolability; apparently no model is available for is the giving of full scope to inviolability. While favouring the first design, Kouri appears to overlook the con-

200. Gabriel MARCEL, *Homo Viator*, Harper and Row, 1962, p. 23.

200a. See n. 175a.

201. XLIII, Montreal, Civil Code Revision Office, 1976.

202. KOURI, *loc. cit.* (n. 60), pp. 158-165.

ditioning factor in the passage he refers to in this vein from Dierkens, as does Dierkens himself. From the fact that man is more than an organism, but a free being with value whose service may call for him to give up his physical integrity and even his life, Dierkens concludes that he has not only a right to defend himself against the outside world, but a right to his power of reaching his proper destiny, freely and autonomously.[203] When stressing the autonomy, it is easy to overlook the "proper destiny" which conditions it. Once aware of it, Dierkens' principle is no different from that of Mayrand, who is placed into the second camp by Kouri,: "L'inviolabilité de la personne aurait pour but sa protection, or, les droits doivent être exercés dans le sens de leur finalité".[204] Since "c'est un but de protection", it is absurd to forbid *atteintes utiles,* but only those which are harmful or damaging, even a contact that is involuntary, even moral damage.[205] Instead, then, of autonomy (an isolated act) serving as a reason to remove the limits of inviolability, autonomy (a finality) becomes the end to be attained by insisting upon inviolability and thus itself serves as the limit to inviolability. Freedom as a goal dictates that freedom of choice be so empowered that the goal may be obtained.

For all the clamour about its meaning and extent, the absence of any provision of law such as article 10 C.C. leaves the status of the person highly vulnerable. The principle can barely survive if not statutorily. In *R.* v. *Lalonde,*[206] for example, admission of a blood test upon one accused of driving impaired when his car killed another was objected to as having been taken without consent. Drouin, J., decided that in fact consent had been given; but first he had to expatiate upon whether consent was required. On the basis of the earlier case of *R.* v. *Frechette,*[207] Drouin, J., phrased the principle as follows:

> The person of the accused is inviolable and the right reserved to each individual as to his person cannot be taken away from him. It is a forbidden domain — the accused is free — a blood analysis constitutes an attack upon the human body and a judge does not have

203. R. DIERKENS, *Les droits sur le corps et le cadavre de l'homme,* Paris, Masson, 1966, p. 42, n. 49.

204. A. MAYRAND, *L'inviolabilité du corps humain,* Montréal, Wilson et Lafleur, 1975, n. 40.

205. Léon MAZEAUD, "Les contrats sur le corps humain", (1956) 16 *R. du B.* 157, 161 and 173.

206. [1953] 110 C.C.C. 374.

207. [1940] 93 C.C.C. 111, affd. 94 C.C.C. 392.

> the right, does not have the power to authorize it, if the law does not authorize it.[208]

But, and here is the crux, the Crown asserted that "the principle of the inviolability of the human body does not rest on an provision of our laws"; and the judge frankly admits that it flies in the face of recent decisions to the effect that blood is not protected as a confession is. Drouin, J., doggedly continues:

> ... but we remain convinced that these decisions are going against a natural right, the right to the inviolability of the human person. ... [W]e maintain only a single argument — that of the inviolability of the human person, believing or hoping that this was the reason above all that the Quebec Court of Appeal affirmed the decision of Roy, J., [in *Frechette*]. In short, we... decide... that there is a limit to the illegality and that this limit is the inviolability of the human body. ... The violation of the human person is repugnant to a sense of justice.[209]

While the American decision he relies upon is based on the U.S. Constitution,

> [i]n our Canadian law... if it is true to say that a man cannot be deprived of his liberty unless a text of law compels it, by so much greater reason can we say that the integrity of the person himself must be respected insofar as and as long as no law happens to authorize it. ... Such authorization may sometimes be given by virtue of public policy.[210]

The case of *Rochin* v. *California*[211] on which Drouin, J. relies heavily without ever quoting it is itself an illustration of how borderline the inviolability is even in the Supreme Court opinion, which never mentions inviolability as such. Frankfurter, J., for the majority decided that it violates the 14th Amendment for police to force a suspect to regurgitate capsules of morphine so as to prosecute for possession. Due process prohibits confession after abuse from being used. Although the "contours of the protection are not fixed and final" but are "indefinite and vague", they are not "merely personal, not self-willed"; rather they are "fused into the nature of judicial process", as "what shocks the conscience", what "offends a sense of justice". To this, a minority of Black and Douglas, JJ., reply that such an "evanescent", "nebulous" and "idiosyncratic" right under the 14th Amendment could be and has actually been used to

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208. *R.* v. *Lalonde*, [1953] 110 C.C.C. 374, 376.

209. *Ibid.*, p. 377 and 379.

210. *Ibid.*, p. 378.

211. (1952) 342 U.S. 165, 96 L. Ed. 183, 25 A.L.R. 2d 139.

limit civil rights, so their refusal of the evidence is based instead on the 5th Amendment's protection against self-incrimination. As Drouin, J., recognized, without entrenched rights (or even an unentrenched text, at the time) and without exclusion of "poisoned" real evidence (later made definitive in *Wray*[212]), how much more "evanescent" is inviolability in Canada. In fact, even in the U.S.A., while the *Rochin* protection is confirmed in a recent case in point and explained in *Huguez* v. *U.S.*[213] as penetration beyond "the surface and natural cavities", the removal of a bullet from a suspect without consent is no longer illegal search and seizure.[214]

That sort of involvement with the human person which violates his inviolability is expressed in *Metropolitan Toronto* v. *The Village of Forest Hill*[215] which, while not talking about inviolability, says what is true of it. In the case, the village argued that the city lacked power to fluoridate water under its charter-authority to regulate every aspect of securing a supply of "pure and wholesome water". The city claimed its end remained the providing of wholesome water and that fluoridation as a means of promoting health was a means to this, rather than the end being a health purpose and the water just a means to that; only the latter would be beyond its capacity. The dissent agreed that there is a parallel between the addition of chlorine, which "renders it sterile, and less likely to cause... water-borne diseases, or fluoride, to render it less likely to be injurious to health by contributing to tooth decay". "[I]t is not a means to an end of wholesome water for water's function, but to an end of a special health purpose for which a water supply is made use of as a means".[216] The difference in achieving the "nature" of water lies between "a medicinal addition for other than a water purpose", and "reducing objectionable foreign matter"; the latter, even if it consisted in developing a supply of totally synthetic water "so as to furnish what the body has become adapted to receive as water" would be the achievement of a natural supply, and within the city's powers.[217]

Beyond their narrow purpose, these considerations bear out the "social dimension of body" which the Code Revision Office derives

212. *R.* v. *Wray*, [1971] S.C.R. 272.

213. (1968) 406 F. 2d 366.

214. *U.S.* v. *Growder*, (1976) 543 F. 2d 312.

215. [1957] S.C.R. 569.

216. *Ibid.*, p. 574.

217. *Ibid.*

as a principle from R. Nerson,[218] a principle which limits inviolability understood as simple privacy, exclusion of others in order to hold the spot ourselves. The "nature" of body simply lacks such isolation: its purity is achieved by providing what we have become accustomed to live in as body. Inviolability refers not to acts bringing bodiliness or personhood to its proper condition, but only to additions or treatments which make person only an end for some other purpose.

The identity of the individual person is already relational.

> In the beginning is relation — as category of being, readiness, grasping form, mold for the soul; it is the a priori of relation, *the inborn Thou*. ... The first primary word can be resolved, certainly, into "I" and "Thou", but it did not arise from their being set together; by its nature it precedes "I".[219]

This means that our personhood has community among its purposes.

> Man... does not live a communal life with other finite personal spirits from pure accident and only de facto... The conscious experience of *belonging* to a community, of being a "member" of it, was present even in [Robinson Crusoe], present just as originally as his individual "I" — feeling or self-awareness. It implies that awareness of membership is a characteristic even of persons living in such isolation. ... [I]f community is more than a historically fortuitous, earthly cooperation of intelligent bodies, resting on artificial and arbitrary man-made contracts,... then *from the outset* each one of us must be responsible for all, not only for himself (though he is that, too).[220]

This is the personal nature which is inviolable, that is, which serves as the criterion of treatment of it rather than allowing some other purpose to make of it a means. It is inherently social inviolability, a purpose achieved only in common and impeded when privatized.

> People possessing the citizen status, when surrendering their citizen role to play that of a mere food gatherer or technological expert, also surrender the strengthened place in the world which follows upon establishing terms of common and continuous communication with one's fellows. For they permit or perpetuate a "privati-

218. R. NERSON, "L'influence de la biologie et de la médecine moderne sur le droit civil", (1970) *R.T.D.C.* 660; quoted in *Report on the Recognition of Certain Rights Concerning the Human Body*, XIV, Montreal, Civil Code Revision Office, 1971, p. 1.

219. Martin BUBER, *I and Thou*, Scribners, 1970.

220. Max SCHELER, *On the Eternal in Man*, Archon, 1972.

zation" of meanings and risk, if not actually bring about, the social disorder which is the necessary outcome of that condition.[221]

To assert, then, that autonomy and inviolability can be in conflict can be said only if each is made the characteristic of private selves, the first of a private will and the second of a private body. The conflict ceases when bodily privacies become at once public and teleological: we open upon existence, and that opening is a manifestation of our demands upon it and its demands upon us.

D - Self-Possession: Person as Subject Having Attributes, and as Object of the Attributes Had

Throughout the preceding discussions, a continuing dichotomy has appeared in several forms. At first appearing as personality versus patrimony, it reappeared as privacy versus publicity in, surprisingly, both the issue of autonomy and that of inviolability. Implicit under each facade, however, was the characteristic of person as subject and things as objects; this characterization, in turn, meant that subjects possess or "have" objects (whether things or rights) and that objects are things or rights which are "had" by subjects. The relationship is similar to that found by Aristotle between substance and accident, that substance is that of which accidents are predicated but which is never predicable of them, and accidents are that which is predicated but which has nothing predicated of it; the difference, is, however, that here both subject and object, persons and things, are substances.

The setoff of subject and object appears in basic legal discourse but not always in the same fashion. The description in the last paragraph is approximated by Mazeaud's look at "the fundamental division in our law", between body, liberty, honour, feelings and rights of personality like parental power forming as a block the person, as opposed to patrimony; thus goods and debts are objects of transactions, and therefore in commerce, while person is not the object of law but its subject, and so outside of commerce.[222] The distinction in the common law is less crisp, but still present. In its legal dictionary, one stream considers person as a subject in two senses: the subject of a right is "the person of inherence", while the subject of a duty is "the person of incidence";[223] alternatively, stressing the

221. Ruth L. HOROWITZ, "Phenomenology and Citizenship: A Contribution by Alfred Schutz", (1977) *Philosophy and Phenomenological Research* 293, 310.

222. Léon MAZEAUD, "Les contrats sur le corps humain", (1956) 16 *R. du B.* 157.

223. *Black's Law Dictionary,* rev. 4th ed., 1968, "person".

latter relationship, person is taken as the object of rights and duties, that is, capable of having rights and of being liable to duties, while a thing is the subject of rights and duties[224] — distinctly contradictory to the civilian terminology, but expressing the same conceptualization.

A recent clarification of the distinction by Sumner,[225] making "S" = subject and "O" = object, analyzes (moral) person, the bearer of rights and duties, as follows: "All Ss have a duty not to do A to any O". Though restricted to negative rights, it distinguishes between person-as-subject (duty-bearer) who must be at least a moral agent able to adopt the normative point of view, and person-as-object (rights-bearer) of whom the question is to be asked, what sort of treatment is legitimate for them? Sumner affirms that "there is no obvious reason for restricting the class of moral persons to that of moral agents"[226] That is to say, one could be person without being subject. Underlying this separation far beyond mere distinction, floats the assumption that it would be incoherent to speak of subject as being something "had", since this is just what makes up the meaning of "object" and its distinction from subject. From this perspective, the only way for something to become possessible is for it to become alien to person. So, while it shall be suggested that this is not philosophical truth,

> a philosophical approach to the origination from a living body of... material capable of isolation may be to consider them *res nullius*, that is, corporeal items in the legal ownership of nobody. They may be reduced into possession by the first person to obtain physical control who intends to exercise control over them, in accordance with the tests of classical jurisprudence.[227]
>
> A better approach... might be to consider the human source as having an inchoate right of property in materials issuing from his body, which right he may expressly or by implication abandon to another, or somebody make prevail over a contentious claim,[228]

lest his claim be too weakened and so serve neither the source's interests nor others!

This explanation shall be attacked not on policy, but in terms of the underlying assumption. Succinctly, there is nothing contra-

224. *Jowitt's Dictionary of English Law*, II, 1959, "Person".

225. L. Wayne SUMNER, *Moral Persons*, unpublished paper, Canadian Philosophical Association congress, London, Ontario, 1978.

226. *Ibid.*

227. DICKENS, *loc. cit.* (n. 6), p. 180.

228. *Ibid.*, p. 183.

dictory in the subject possessing itself; in fact, this can be its only relation to itself, since it is not the totally transparent Cartesian self, not totally identified with itself. Its only way to "be" itself is to "have" itself. This can be seen from several viewpoints.

Classically, the "having" of self is known as *habitus,* habit. "This is our second nature", no less our nature for being changeable since even nature in the unqualified sense is changeable.

> Now some think that all justice is of this [legal] sort, because that which is by nature is unchangeable and has everywhere the same force. This, however, is not true in this unqualified way...; with us there is something that is just even by nature, yet all of it is changeable, but still some is by nature, some not by nature. ... [B]y nature the right hand is stronger, yet it is possible that all men should come to be ambidextrous.[229]

> In the case of physical agents, their actions are determined; consequently they do not have to choose the means to their end. Avicenna gives the example of a harpist (*Physics,* II, 10) who does not have to deliberate over each plucking of the strings, because the pluckings have become determinate in his case; otherwise, there would have to be a delay between the pluckings and that would not sound right.[230]

This having of ourself is not immediate but mediated through action upon those existences whose presence forms the context for our own existence as persons.

> Once the mind has become each set of its possible objects, as a man of science has, when this phrase is used of one who is actually a man of science (this happens when he is now able to exercise the power on his own initiative), its condition is still one of potentiality, but in a different sense from the potentiality which preceded the acquisition of knowledge by learning or discovery; the mind too is then able to think itself.[231]

> In like fashion, also, the parts of the soul or its potencies are more evident to us than is the soul itself. So, we proceed in our knowledge of the soul from the objects to the acts, and from the acts to the potencies, and the soul itself becomes known through them. Thus, its essential character (*ratio*) is made evident in an appropriate manner through its parts.[232]

From the contemporary perspective, which emphasizes self-

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229. ARISTOTLE, *Nicomachean Ethics,* V, 7, 1134b.

230. AQUINAS, *Principles of Nature,* II, 19.

231. ARISTOTLE, *De Anima,* III, 4.

232. AQUINAS, *Exposition of Aristotle on the Soul,* II, 1.2, no. 235.

creation or self-appropriation by person rather than the givenness of the human being, our "habits" are identified with our human existence. Merleau-Ponty states:

> It is quite true that what brings together in habit component actions, reactions and "stimuli" is not some external process of association. ... As has often been said, it is the body which "catches" (*kapiert*) and "comprehends" movement. The cultivation of habit is indeed the grasping of a significance, but it is the motor grasping of a motor significance. ... To get used to a hat, a car or a stick is to be transplanted into them, or conversely, to incorporate them into the bulk of our own body. Habit expresses our power of dilating our being in the world, or changing our existence by appropriating fresh instruments.[233]

As Aristotle said that "the soul is analogous to the hand, for as the hand is the tool of tools, so the mind is the form of forms and sense the form of sensible things",[234] so Merleau-Ponty says that habit "is knowledge in the hands, which is forthcoming only when bodily effort is made, and cannot be formulated in detachment from that effort".[235]

The metaphysics of this self-possession is concretely manifested for legal purposes in the fact that law must characterize its terms of art, even if not stipulatively. And

> characterization implies a certain setting of myself in front of the other, and (if I may say so) a sort of radical banishment or cutting-off of me from it. I myself bring about this banishment, by myself implicitly coming to a *halt*, separating myself, and treating myself (though I am probably not conscious of so doing) as a thing banded by its outlines.[236]

This makes of the personal self a possession in the same manner as body.

> We should then realize that, contrary to the belief of many idealists, particularly the philosophers of consciousness, the *self* is always a thickening, a sclerosis, and perhaps — who knows? — a sort of apparently spiritualized expression (an expression *of* an expression) of the body, not taken in the objective sense but in the sense of *my* body, inasfar as it is mine, insofar as my body is something I have.[237]

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233. *Op. cit.*

234. *De Anima*, III, 8, 432a1.

235. *Op. cit.*

236. Gabriel MARCEL, *Being and Having*, London, 1965, p. 168.

237. *Ibid.*, p. 167.

The having of oneself is, then, the proper way of being oneself, namely, the "way of being what one is not".[238] This way of being is especially true of personal self, for the penchant to protect the hidden intimacy of ourselves, on the model of a secret, is dialectically exposed.

> The most interesting and typical example [of having] is *having a secret*. But... this secret is only a secret because I keep it; but also and at the same time, it is only a secret because I could reveal it.[239]
>
> What one has is really by definition something one can shew. It is interesting to note how difficult it is to make a substantive of *to on; to on* becomes changed *to ekomenon* as soon as it is treated as something that can be shewn. But there is a sense in which "to have consciousness of" means "to shew to oneself".[240]

Thus "we shew that we have; we reveal what we are (though of course only in part)".[241] The having of ourself, not remaining distinct from our personal existence, becomes identified with it. "This relation, which essentially *affects* the subject-unit, tends to pass into it, to be transmuted into a state of the subject-unit, without its being possible for this transmutation or reabsorption to be completely carried out".[242]

The legal relevance of this metaphysics is shown in the conclusion that " 'to have' is 'to have power to', since it is clearly in a sense 'to have the disposal of'. Here we touch on one of the most obscure and fundamental aspects of having".[243] Since it seems legitimate to conclude that Marcel has in mind no such analytical distinction as the Hohfeldian distinction of power from right, liberty and immunity, we can take this as a characterization also of the relevance of having to rights. His applications are allusive, only; but one relevant passage occurs in the distinction between martyrdom and suicide, on the basis of having, in "apparent identity and real opposition".[244]

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238. *Ibid.*, p. 147.

239. *Ibid.*, p. 160.

240. *Ibid.*, p. 134.

241. *Ibid.*, p. 135.

242. *Ibid.*, p. 134; thus Stephan Strasser's insistence is mistaken, in his use of Marcel's "metaphysics of being and having" in his *The Soul in Metaphysical and Empirical Psychology*, Duquesne U.P. 1962, that "I do not 'have' my own ego" because "*a priori* I can 'have' an endless number of relatively subsistent beings, but *a priori I can 'be' only a single subsistent being*".

243. MARCEL, *Being and Having*, p. 150.

244. *Ibid.*, p. 148: this is mirrored in the opposition of desire and love, of autonomy and freedom, as on p. 152.

> What is affirmed in martyrdom is not the self, but the Being to which the self becomes a witness in the very act of self-renunciation. But one can conversely say that in suicide, the self affirms itself by its claim to withdraw from reality.
>
> But the reality of sacrifice is there somehow to prove to us in fact that being *can* assert its transcendency over having. There lies the deepest significance of martyrdom considered as witness: it *is* the witness.[245]

Herein it is the identity of person and his self as "had", property, their integrations as a process instead of their dichotomy as a permanent state, which supports the normative conclusion. There is no need to speak of the disposability of property as set against the indisposability of person.

The best and, blessedly, concise formulation of this doctrine in a legal context is by Bernard Edelman,[246] as regards the personal right to one's image, a novel right at the borderline of the traditional distinction between person and patrimony-property, and so all the more useful as a vehicle to mediate the one domain to the other. His conclusion reached on the terminology of one French case,[247] but dependent on many others, too, is that this personal right is included in a *patrimoine moral,* whose apparent opposition to "patrimonial patrimony" counts for nothing:

> le qualificatif de moral ne change rien à la nature profonde du concept de patrimoine. Toute personne physique se possède soi-même: elle est, à elle-même, son patrimoine. Contrairement à l'opinion aussi répandue qu'erronée que la personne humaine n'est point dans le commerce, il apparaît que le prolongement de la personne que constitue l'image, se vend et se protège.[248]

The reason is that person appears as subject of himself (the original source of his rights) and object of himself (as himself those rights), since he is envisaged as *having* "attributes of personality" which are that personality.[249] As object he is in commerce, as subject he is free, especially to alienate and recover his attributes.[250] [L]e sujet n'existe qu'à titre de représentant de la marchandise qu'il possède,

245. *Ibid.*, pp. 148, 84.

246. *Esquisse d'une théorie du sujet: l'homme et son image*, Recueil Dalloz Sirey, 1970, 26e cahier, Chronique, XXVI, p. 119.

247. Trib. grande inst. Seine, 23 juin 1966, *Blier* c. *Jours de France*, J.C.P. 1966.II.14875, note Lindon.

248. EDELMAN, *loc. cit.* (n. 245), 120-121, no. 9.

249. *Ibid.*, p. 119, no. 1.

250. *Ibid.*, no. 2.

c'est-à-dire, en l'occurence, de sa propre personne".[251] His personal attributes are conceived of as *démembrements* of his property.

Protection of this person or (moral) patrimony is given not against violation of its hiddenness, but against its improper use. Edelman identifies this use as use without consent; it should be apparent that the present study would amplify that with use contrary to *destination,* whether arising from an act of will or not.[252] The reason why use contrary to destination is a violation is because the person produces himself by reifying himself, that is, by continually making himself concretely embodied in the world, whether in his organic body or, perhaps even more, in his extensions of that body into the tools he makes and the products of those tools, including the communities, human relationships and other persons his body and his constructions mediate to him. This mediatory phrasing is more appropriate to the thrust of this study than Edelman's use of Marxian discourse in a way which is not yet escaped from Cartesian immediacy, but is nonetheless otherwise enlightening of the process of personhood.

> Autrement dit, l'essence de l'homme est, sans médiation, aliénée dans sa propre représentation. ... Or, cette aliénation de l'homme dans sa représentation — c'est-à-dire la réification du sujet dans la production de soi-même en tant que représentation de lui-même — n'est pas sans rappeler le rapport de sujet et de son oeuvre, le droit moral étant considéré comme une "émanation" de la personnalité. La création, elle aussi, est attribut du sujet.
>
> En d'autres termes, dans tout ce qui ressortit à la production de soi-même, soit active, soit passive, l'essence de l'homme est directement donnée, et ne peut être donnée que dans une forme spécifique.[253]
>
> Si l'image — pour ne prendre qu'elle — est un attribut de la personnalité, qu'est-ce que la personnalité qui a des attributs? Précisément, la définition du sujet doit se comprendre comme l'*apparition* d'un *sujet-attribut.* Autrement dit, le sujet *apparaît* dans le rapport personnalité-attributs, et ce rapport lui-même est la *Forme du sujet.*[254]

This is the model of personality which, in the domain of the person's lifelong disposition of himself, is intended to replace the model of

251. *Ibid.,* p. 120, no. 5.

252. *Ibid.,* p. 122, no. 14; Edelman does agree implicitly, however, with his subheading B. 1°, on p. 121, no. 11.

253. *Ibid.,* p. 121, no. 13.

254. *Ibid.,* p. 122, no. 14.

patrimonial restrictions, consistently with the characterization of the commencement of personal life in terms of potentiality.

III - Completion of Person: Continuity, or Recurrence

While a corporate person may exist in perpetuity,[255] the individual person is judged not to do so but instead to end, or die, when he disappears.[256] The most common way to disappear is, apparently, to stop replacing body parts and then to rot away from sight. The performance of other activities are taken as signs that this activity has not commenced. This is true even when those other activities are performed only with artificial support, for "it would place too much of a strain on credulity"[257] to acknowledge death until then, for "death is not an ambiguous term, and there is no room for construction".[258] Dispute has occurred on which activities to take as signs and, upon choosing some, whether artificial support is even relevant. Thus, a definition in terms of the spontaneity of performance or of its irreversible proximity will signal death despite supported continuance of the activities[259], while a definition in terms of merely the absence of certain signs will signal death only when it occurs, even if it would occur without support. Such is the Harvard definition[260] by absence in repeated tests of receptivity and responsibility, of movements and breathing, of electrical brain activity, and of conditions such as hypothermy or depressants which might interrupt the above only temporarily, to which French physicians[261] add abnormal elevations of certain chemical enzymes in the spinal fluid, and Canadian doctors an ultimate reliance on clinical judgment.[262] What does, however, seem true is that any test "acceptable to determine the end

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255. *Report on Legal Personality*, XLIII, Montreal, Civil Code Revision office, 1976, a. 40, simplifying articles 368-370 C.C.

256. Art. 94 C.C.

257. *Evans* v. *Evans*, (1958) 317 S.W. 2d 275, cited in Jack MOOALLEN, "The Moment of Death", (1971) 12 *C. de D.* 613, 617.

258. *Douglas* v. *Southwestern Life Ins. Co.*, (1964) 374 S.W. 2d 788, in MOOALLEN, *loc. cit.*

259. The statutes referred to by DELEURY, *loc. cit.* (n. 116), p. 312, n. 156: *Act Relating to and Defining Death*, Kans. Stat. Ann. 77.202 [1972 Cum. Supp.], almost identical to Art. 43, #54F, Md. Ann. Code 1974, and 32.364.3; I Vir. Ann. Code (1974).

260. Special Committee of the Faculty of Medicine of Harvard University, "A Definition of Irreversible Coma", (1968) 205 *J.A.M.A.*, vol. no. 6, 35, 37.

261. DELLAPENNA, *loc. cit.* (n. 144), 407, n. 178.

262. C.M.A., *Statement on Death*, Nov. 1968, Doc. 17.13.69 of C.M.A.; cited in DELEURY, *loc. cit.* (n. 116), p. 310.

of a distinct human personality entitled to respect and value as *such... should be adequate to determine its beginning point*",[263] and vice-versa.

The aim of pinpointing a moment of death is to allow the disposal of the body before tissues are useless to others, but not before a moment when the one so disposing would no longer be civilly or criminally responsible for causing death. The proximate inevitability of that moment is the time at which it is permissible to end or abstain from supporting life artificially; but allowing that moment to occur, after ending artificial support, is indispensible for any disposal of the body to be made. Ceasing artificial support is permissible only when that support is exceptional, for artificial support of life is a lifelong and ordinary activity, different in principle from the use of elegant medical machinery. The support becomes exceptional when it can be accessible to only a few persons or is not ordinarily done, when it is a burden outweighed by benefits in disconnecting it, and especially when no reasonable hope of recovery can be expected with present or soon foreseeable technology. In this situation it is permissible to continue life support; but it is also permissible to discontinue it, on the principle that *nemo tenetur ad impossibilia*. So there is no right to it, nor complaint at its unequal distribution, even on the basis merely of ability to pay for it.

The factual questions of "the moment" and of "exceptional means" come together at the point of irreversibility. Not to rule out any palliative care nor, indeed, any care throughout life since we are continually growing towards death, this irreversibility must be in immediate proximity to death according to the judgment of experienced members of the caring professions. Even though they may be wrong, error of judgment is not neglectful care. The circularity here is apparent, for there is such proximity only if exceptional means are ended, and the death which is judged to be proximate is the very problem at issue. That point in life, its proximity and the means of staving it off are mutually dependent issues.

This hermeneutical circle is inadequate neither to the understanding of the issue nor the dealing with the facts. The solution to human commencement in terms of potentiality, and to human continuance in terms of development, can handle completion as well. Potentiality is a matter of identity in nature, not of factual likelihood for particular manifestations of that nature appearing; so the unlikelihood of a return to manifest exercises of that nature's key

263. DELLAPENNA, *loc. cit.* (n. 144), p. 408.

and signal activities is no disclaimer upon the continued possession of that potentiality. And the meaningfulness of bodily activities of the human existent, as opposed to the Cartesian identification of person with higher functionings, criticized *passim,* can allow for no judgment of death when even the so-called vegetative functions alone remain. On the other hand, the presence of these alone cannot be self-supporting except in circumstances as exceptional as those of the life-supporting machinery itself, such as the "rebound" effect of the machinery; and so the ending of life support is permissible. The resolution of the circle depends, then, upon prudential decision whether continued living, at any level, is possible off the machinery. But since it is permissible to halt machinery if it is not, and since it is no question at all if life can so continue, the decision to end it is always prudent.

This solution is represented well in the celebrated case *In the Matter of Karen Quinlan.* A father applied to the New Jersey Superior Court to be appointed guardian of the person and property of his daughter who was incompetent and moribund in hospital following two periods of fifteen minutes each during which unexplainedly she stopped breathing; he also sought that the letter of guardianship contain express power to authorize discontinuance of all extraordinary medical procedures sustaining her life. He admitted she was alive under any legal standard, but relied on the power of equity as well as on the constitutional rights of privacy, free exercise of religion, and protection from cruel and unusual punishment; the state Attorney General intervened because of the State's undoubted constitutional interest in the preservation of life. The lower court allowed as admissible hearsay the daugher's earlier statements of distaste for such extraordinary procedures, but found them without significant probative weight because remote and impersonal, and refused the application.[264]

The girl was admittedly alive because the oxygen deprivation had affected her brain cortex so as to deprive her of cognitive functions (relation to the outside, talking, seeing, feeling, thinking) as well as of control over breathing although this is a brain stem function, but not so as to deprive her of vegetative functions (blood pressure, heart rate, chewing, swallowing, sleeping, waking). She had electrical brain activity, although without the slightest chance of recovering cognitive functions.[265]

264. (1975) 348 A. 2d 801.

265. (1976) 355 A. 2d 647m 654-7.

The Supreme Court of New Jersey on appeal[266] refused to accept the claims based on free exercise of religion and on the prohibition of cruel and unusual punishment, but appointed the father as guardian with the special powers requested by reason of its power of equity, by reason solely of the right of privacy, "included in the class of what have been called 'rights of personality' " by Roscoe Pound.[266a] Under that right, the Court expressed "no doubt" that if Karen were lucid, she could decide herself to terminate the life support.[267] That right is the only way to ensure the specific constitutional guarantees to which it is penumbral; in turn, the present application for guardianship is the only way to prevent destruction of a valuable incident of her right to privacy. That incident is "to permit this non-cognitive, vegetative existence to terminate by natural forces". If broad enough to embrace the abortion decision,[267a] privacy embraces this one, too.

That right being established, there is also no "compelling external State interest"[268] to justify intruding upon her right of privacy to force her "to endure the unendurable". The only State interests would be to preserve the sanctity of life, and to protect physicians' right to treat as seen fit. As for the first, "the State's interest contra weakens and the individual's right of privacy grows as the degree of bodily invasion increases and the prognosis diminishes".[269] As to the second interest, physicians' responsibility cannot "preclude an examination by the court as to the underlying human values and rights".[270] Existing standards place Karen among the living; but they are ambiguous, and are frequently ignored even far short of brain death. On the one hand, physicians "refuse to treat the curable as if they were dying"; for these, life support may be valuable, necessary by medical ethics, and thus ordinary, and so no physician would have failed to resuscitate Karen at the outset. On the other hand, physicians "sometimes refused to treat the hopeless and dying as if they were curable"; for these, life support is extraordinary, and so no physician would commence resuscitative, sur-

266. *Ibid.*

266a. (1916) 29 Harvard L.R. 640, 668.

267. Unlike *J.F. Kennedy Memorial Hospital* v. *Heston,* (1971) 58 N.J. 76, where a Jehovah's Witness in shock but apparently salvable to long life and full health was not permitted to terminate her treatment.

267a. As in *Roe* v. *Wade,* (1973) 92 S. Ct. 205.

268. As required, by *Griswold* v. *Connecticut,* (1965) 381 U.S. 479, 85 S. Ct. 167.

269. *In Re Quinlan,* (1976) 355 A. 2d 647, 664.

270. *Ibid.,* p. 665.

gical or transfusion procedures upon Karen now that she had deteriorated.[271] Between these, no physician would now interrupt it except for brain death;[272] it is this impasse against human values which the court breaks through.

Although ending support would accelerate Karen's death, no criminal liability could follow for two reasons. First, the ensuing death would not be homicide, but expiration from existing natural causes. Secondly, even if it were homicide, it would not be unlawful for it is pursuant to the exercise of a right to privacy and *ipso facto* lawful.[273]

In concluding, the court made its principles both broader and more informal than the facts of the present case.

> The declaratory relief we here award is not intended to imply that the principles enunciated in this case may not be applicable in diverse types of terminal medical situation... not necessarily involving the hopeless loss of cognitive or sapient life.[274]
>
> By the above ruling we do not intend to be understood as implying that a proceeding for judicial declaratory relief is necessarily required for the implementation of comparable decisions in the field of medical practice.[275]

Involved here are all the elements of the decision offerred in outline above. The definition of a moment of death is of less importance than the irreversibility of degeneration as justifying allowance of natural death to occur. Judgment about the latter fact is prudential, and may be wrong (as in fact it was in the case of Karen Quinlan, who survived her removal from life support). Her potentiality is honoured by allowing her autonomy of self-regulation to carry her by itself. The hermeneutic of meaning for the human person is closed into a circle which includes Karen's involvement with others (State interest) and their involvement with her (protection of her privacy). The solution is reached by what appears at first as a balancing procedure but which, once the decision is reached, is reintegrated into the dialectic of publicity and privacy; the State does not have an interest, rather than its interest being defeated (just as, in the contrary decision, the person would not have here a right of privacy, rather than it being defeated).

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271. *Ibid.*, pp. 667-8.

272. *Ibid.*, p. 657.

273. *Ibid.*, p. 670.

274. *Ibid.*, p. 671.

275. *Ibid.*, p. 672.

EPILOGUE

The notion of person has been defined so as to supply a norm for medical actions. The method of definition has consisted of testing legal stipulations or, more often, the absence of any, against essential definitions of the human person. The points of essential definition were developed at the key points in life when the question of personality might arise: at commencement, in continuance, and at consumation. The human person is individual, that is, one identity throughout. This identity was expressed as the potentiality for completion. The moment of presence of this potentiality was identified as the moment of commencement of personality. The issues regarding the mode of exercise and of treatment during that identity were raised in terms of the opposition of autonomy and inviolability. These categories were defined as no longer opposed but rather both governed by the destination of human potentiality, once the modern opposition of privatized body and abstract mind covertly present were overcome by the device of finding the personal subject to have his personal attributes, that is, the person as object. From this framework, personal consumation was grasped as a matter of personal regulation, that is, in the interaction of individual and group in terms of their mutual nature. Thus the definition of death became less crucial than the treatment ensuring that the person was able to consumate his life.

The criterion which can be offerred as a conclusion of the study is the following: *person is the continuance of identity from human fertilization without extraordinary dependence upon non-human support.* This does not specify content to the central notion of human personal destination. That is the point which will inevitably be settled by negotiations of interests, ethical and otherwise. But some movement toward specifying the ethical interest can be drawn from the criterion offerred even here.