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Résumé de l'article

Le problème des droits non énumérés dans les constitutions des États-Unis et du Canada est examiné afin de rechercher les fondements vrais et objectifs sur lesquels les décisions judiciaires peuvent élaborer de tels privilèges et immunités. Les principes authentiques à la source du droit fondamental de ces deux pays sont retracés dans le droit naturel tel qu'expliqué par St-Thomas d'Aquin, Blackstone, Jefferson, et d'autres philosophes juristes. De ce fonds de connaissance, l'auteur démontre que le droit naturel est un postulat d'ordre constitutionnel aux États-Unis comme au Canada, tel qu'illustré par de nombreuses décisions judiciaires qui traitent entre autres, de la liberté contractuelle basée sur l'abolition de l'esclavage et de la liberté d'acquérir des connaissances utiles.

L'auteur démontre que le droit naturel, en tant que postulat d'ordre constitutionnel, présuppose non seulement l'existence de Dieu, mais aussi prescrit une dignité égale et certains droits « absolus » et « inaliénables » fondés sur la réalité spirituelle de la nature humaine, selon laquelle tous les droits constitutionnels devraient être interprétés et analysés, incluant nos droits non énumérés à la vie privée en matière de sexualité.

L'auteur examine les principaux arrêts américains et canadiens traitant du problème de l'avortement, en mettant l'emphase sur les similarités et les contrastes. Il démontre que, étant donné l'essence spirituelle de l'humanité prescrite par le droit naturel, l'enfant à naître jouit d'un statut légal unique en tant que personne, ce qui est évident dans les traditions de la common law et du droit civil, et que conséquemment, les décisions judiciaires proclamant des droits constitutionnels vastes et radicaux de mettre fin à la grossesse sont en dernière analyse, indéfendables.

L'enjeu selon l'auteur est plus qu'une solution pratique à nos querelles politiques contemporaines au sujet de l'avortement, car la question va au cœur même de l'ensemble de notre système de loi et de justice.

Sont discutées certaines perspectives de développement constitutionnel futur, incluant des voies de compromis possibles.

Natural Law, our Constitutions, and the Unborn

JOHN REMINGTON GRAHAM
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ABSTRACT

The problem of unenumerated constitutional rights in the United States and Canada is examined in order to seek a true and objective basis upon which judicial opinions may elaborate such privileges and immunities. The authentic root principles of fundamental law in both countries are traced to natural law as explained by Aquinas, Blackstone, Jefferson and other such legal philosophers. From this fund of knowledge, it is shown that natural law is a postulate of constitutional order in the United States and Canada, as illustrated by numerous judicial decisions which deal with freedom of contract based on the abolition of slavery, freedom to pursue useful knowledge, and such like.

Natural law as a postulate of constitutional order is shown to presuppose not only the existence of God, but also to ordain the equal dignity and certain "absolute" or "unalienable" rights founded on the spiritual reality of human nature, in terms of which all constitutional rights should be interpreted and expounded, including our unenumerated rights of privacy in matters of sexuality.

RÉSUMÉ

Le problème des droits non énumérés dans les constitutions des États-Unis et du Canada est examiné afin de rechercher les fondements vrais et objectifs sur lesquels les décisions judiciaires peuvent élaborer de tels privilèges et immunités. Les principes authentiques à la source du droit fondamental de ces deux pays sont retracés dans le droit naturel tel qu'expliqué par St-Thomas d'Aquin, Blackstone, Jefferson, et d'autres philosophes juristes. De ce fonds de connaissance, l'auteur démontre que le droit naturel est un postulat d'ordre constitutionnel aux États-Unis comme au Canada, tel qu'illustré par de nombreuses décisions judiciaires qui traitent entre autres, de la liberté contractuelle basée sur l'abolition de l'esclavage et de la liberté d'acquérir des connaissances utiles.

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The author then reviews the main American and Canadian cases on the difficult problem of abortion, giving focus to similarities and contrasts along the way. It is shown that, given the spiritual essence of humanity ordained by natural law, the unborn enjoy a unique legal status as persons, which is evident in the traditions of both the common law and the civil law, and that, consequently, those judicial decisions announcing broad and sweeping constitutional rights to terminate pregnancy are, in the final analysis, indefensible.

At stake, says the author, is more than a practical resolution of our contemporary political dispute over abortion, for the question goes to the very heart of our whole system of law and justice.

Prospects of future constitutional development, including avenues of possible compromise, are discussed.

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L'auteur examine les principaux arrêts américains et canadiens traitant du problème de l'avortement, en mettant l'emphase sur les similarités et les contrastes. Il démontre que, étant donné l'essence spirituelle de l'humanité prescrite par le droit naturel, l'enfant à naître jouit d'un statut légal unique en tant que personne, ce qui est évident dans les traditions de la common law et du droit civil, et que conséquemment, les décisions judiciaires proclamant des droits constitutionnels vastes et radicaux de mettre fin à la grossesse sont en dernière analyse, indéfendables.

L'enjeu selon l'auteur est plus qu'une solution pratique à nos querelles politiques contemporaines au sujet de l'avortement, car la question va au cœur même de l'ensemble de notre système de loi et de justice.

Sont discutées certaines perspectives de développement constitutionnel futur, incluant des voies de compromis possibles.

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A. NATURAL LAW AND CONSTITUTION ORDER

The world is familiar with the grand language of the Declaration of American Independence :

> When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the *laws of nature and nature's God* entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to a separation.
>
> We hold these truths to be self-evident : that all men are created equal; that they are endowed by their Creator with *certain unalienable rights*, among them *life, liberty, and the pursuit of happiness* [...].
>
> [...] [W]hen a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them [*i. e.*, a nation or a people] under absolute despotism, it is their right, it is their duty, *to throw off such government, and to provide new guards for their future security.* [Emphasis added]

The foregoing passages, timeless and universal, define three organic principles :

— There is a moral and political order of the world, applicable in every country and in every age,[1] and ordained by natural law which is established by God;
— Under natural law, there are certain inalienable rights of all human beings, which are a gift of God alone, and which cannot be taken away by any human government; and
— Under natural law, a human government may in some circumstances be overthrown and replaced by revolution.

These principles all derive from natural law, which is undeniable, not only because self-evident (to the observant and wise),[2] but also because self-executing (as the unobservant and unwise may learn to their regret).[3]

Where did Thomas Jefferson discover the truths expressed by his famous words? He acquired his notions, as did all American lawyers at his time in history, from Sir William Blackstone, Professor of Law at Cambridge University, and Justice of the Court of Common Pleas at Westminster in England.

In fact, Blackstone wrote more masterfully on the themes in the Declaration of American Independence than Jefferson. Of natural law, Blackstone said,

> [...] [A]s man depends absolutely upon his maker for everything, it is necessary that he should in all points conform to his maker's will. *This will of his maker* is called the *law of nature*. For as *God*, when he created matter endowed it with a principle of mobility, and established certain rules for the perpetual direction of that

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1. In Part I of Part II, Question 94, Article 4, in the *Summa Theologica*, St. Thomas Aquinas said, "We must say that the first principles of natural law are the same for all, both as to what is right and as to what is known. But in matters of detail, which are conclusions in specific circumstances from such first principles, it is the same for all in most cases, both as to what is right and as to what is known, yet in some cases the general rule may fail both as to what is right because of unusual obstacles, and as to what is known because of the perversion of reason by passion, prejudice, bad habit, or bad character".

2. *Id.*, Article 3, in the *Summa Theologica*, St. Thomas Aquinas said of natural law, "But some propositions are self-evident only to the wise, who understand the meaning of the terms".

3. In the third aphorism in Book I of the *Novum Organum*, Sir Francis Bacon said of natural law, "Nature to be commanded must be obeyed".

> motion; so, *when he created man, and endowed him with free will* to conduct himself in all parts of life, he laid down *certain immutable laws of nature*, whereby that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.
>
> [...] [A]s [God] is [...] a being of infinite wisdom, he has laid down only such laws as were founded in those relations of justice that existed in the nature of things antecedent to any positive precept. These are the *eternal, immutable laws of good and evil*, to which the Creator himself in all his dispensations conforms, and which he has enabled human reason to discover, so far as may be necessary for the conduct of human actions. Such, among others, are these principles : that we should *live honestly*, should *hurt nobody*, and should *render to everybody his due*, to which three general precepts Justinian has reduced the *whole doctrine of the law.*[4]

What Jefferson called "certain unalienable rights" Blackstone called the "absolute rights of individuals". Of these absolute or inalienable rights, Blackstone wrote,

> *Civil liberty*, which that of a member of society, is no other than *natural liberty so far as restrained by human laws and no further, as is necessary and expedient for the general advantage of the public*. We may collect that the law which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind; but every wanton or causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny.[5]

Even in respect of the legitimacy of revolution under natural law, Blackstone anticipated Jefferson. He gave focus to the Glorious Revolution of 1688-1689, which ushered James II from the throne of England, and settled the Crown in William and Mary. Upon describing the ingredients of this extraordinary but constitutional transformation, in keeping with natural law, Blackstone looked into the future, and said,

> If, therefore, any future prince should endeavor to the constitution by breaking the original compact between the crown and the people should violate the fundamental laws, and should withdraw himself from the kingdom, we are now authorized to declare that this juncture of circumstances would amount to an abdication, and the throne would thereby be vacant. But it is not for us to say that any one or two of these ingredients would amount to such a situation, for there our precedent would fail us. In these, therefore, or other circumstances, which a fertile imagination may furnish, since both law and history are silent, it behooves us to be silent too, leaving for future generations, whenever necessity and the safety of the whole require it, the exertion of those latent powers of society, which *no climate, no time, no constitution, no contract, can ever destroy or diminish.*[6]

The Articles of Confederation adopted in 1781, the Treaty of Paris in which King George III conceded American independence in 1783, and the current United States Constitution finally launched with the inauguration of George Washington in 1789, all presuppose the principles of natural law which are ordained in

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4. *Commentaries on the Laws of England*, Christian Ed., 1765, Book I, pp. 39-40 (hereinafter cited : *Blackstone's Commentaries*), emphasis added.
5. *Id.*, pp. 125-126, emphasis added.
6. *Id.*, p. 245, emphasis added.

the Declaration of American Independence, written by Jefferson yet amplified by Blackstone.[7]

Nor can we disregard these assumptions in reading the fundamental law of Canada, for in the Preamble to the *British North America Act of 1867*[8] it says that the fundamental law thereby ordained is "similar in principle to that of the United Kingdom". The present constitutional order of Canada rests upon the grant of Victoria, and continues now under Elizabeth II, and their claims to the Crown depend on the Glorious Revolution, which turned on the same principle of natural law as the American Revolution. The precepts of natural law expounded by Blackstone, being an integral part of the British Constitution, were infused into the fundamental law of Canada through this Preamble.[9]

Furthermore, in the Preamble of the *Constitution Act of 1982*, it is stipulated that "Canada is founded upon principles that recognize the supremacy of God and the rule of law". The supremacy of God means natural law, for Blackstone defined natural law as the will of God.[10] And the rule of law means statutes and discretion confined by natural law.[11]

In the 20th century, a debate has developed in the field of jurisprudence as a branch of philosophy, between those who, on the one hand, maintain that temporal governments, constitutions, legal customs and conventions, statutes, and judicial decisions all rest upon and derive their legitimacy from natural law as taught by the likes of Blackstone, and those who, on the other hand, reject natural law as "mysterious and uncertain",[12] or try to ridicule natural law as a "brooding omnipresence of reason",[13] then adopt legal positivism, epitomized by Hans Kelsen's so-called "pure theory of law".[14]

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7. A good example of natural law jurisprudence in the early days of the United States is found in the opinion of Chase J., who was a signer of the Declaration of American Independence, in *Calder* v. *Bull*, 3 Dall. 386, p. 388 (U.S. 1798).

8. 30 & 31 Victoria, Chapter 3 (1867), R.S.C. 1970, Appendix II, N° 5.

9. On this point see H. BRUN and G. TREMBLAY who have said of the Preamble to the *British North America Act of 1867*, "Ainsi, le Canada fédéral apparaît avoir hérité à ce moment des grands principes du droit constitutionnel anglais, tels qu'ils existaient alors", *Droit Constitutionnel*, Cowansville, Les Éditions Yvon Blais Inc. 1987, p. 18.

10. Deschênes, C. J., speaking for the Superior Court of Québec, in *Nissan Automobile Co. (Canada) Ltd.* v. *Pelletier*, [1976] R.J.Q. 296, 77 D.L.R. 3d 646, demonstrated with astonishing erudition, unmatched anywhere, that the fundamental law of Canada utterly rejects legal positivism, and rests firmly upon natural law.

11. As appears plainly enough in the opinions of Abott, Rand, and Martland, JJ., in the celebrated case of *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121.

12. *E.g.*, BLACK, J., dissenting, in *Griswold* v. *Connecticut*, 381 U.S. 479, pp. 522-523 (1965), who believed that no unenumerated rights exist under fundamental law in the United States, not even a right of husband and wife to practice birth control by such means as may be recommended by their physician, for the thought that there is no such thing as natural law, and hence that all such "rights" are nothing but political creations beyond judicial authority.

13. *E.g.*, FRANKFURTHER, J., in *Guaranty Trust Co.* v. *York*, 326 U.S. 99, p. 102 (1944), who said as *obiter dictum* that the correction of a misreading of an old federal statute on the judiciary, which had promoted use of a distinct body of common law in federal courts, was a rejection of the traditional view of common law as legal custom built upon and consistent with natural law and right reason. Frankfurter's remark was wholly untrue, and wholly irrelevant to the point decided.

14. Kelsen's legal philosophy is summarized by S.P. SINHA in *Jurisprudence*, West Pub. Co., 1993, pp. 185-187, and by E. CAPARROS, "Some Myths and Realities in the Contemporary World of Law," (1990) 35 *American Journal of Jurisprudence* 88-92.

Kelsen spoke of a pyramid of norms, *i.e.*, legal principles which first derive from premises more fundamental, which in turn derive from precepts still more basic, until we finally arrive at an ultimate root of all other principles, which he called the *Grundnorm*.

Fundamental law is the work of sovereign power, because sovereign power is the power to make, unmake, and alter a constitution which organizes a government, and vests, defines, and limits its authority. The existence of sovereign power, however identified, and a basic ordinance which determines or confines all other legal principles, without regard to good or evil, justice or injustice, whether it all happens by historical accident, revolution, *coup d'état*, or formal deliberations, is enough to satisfy Kelsen's idea of the *Grundnorm*, so long as the government established is effective in demanding obedience. Nothing more is required by legal positivism, which, behind the academic niceties, simply means that might makes right.

It is true that sovereign power has a distinctive shape and has acted in a unique way in Great Britain, in the United States, and in Canada, and this fact explains the outward or formal differences which characterize each system, — *e.g.*, constitutional monarchy as against republican form, parliamentary as against presidential standing of executive to legislative power, varying kinds and degrees of judicial involvement in constitutional determinations, etc.

Yet, in Great Britain, in the United States, and in Canada, accounting for cultivated and civilized growth, and uncompromisingly demanding submission, not only as a practical fact, but as a condition or premise defining and limiting the exercise of sovereign power, is the reality of natural law given by the hand of God.[15]

B. Natural Law and American Jurisprudence

In the First Congress under the present United States Constitution, James Madison was a member of the House of Representatives. He there introduced amendments which ultimately became the Federal Bill of Rights. On June 8, 1789, Madison proposed an enumeration of specific rights, touching upon religion, speech, press, assembly, bearing arms, searches and seizures, double jeopardy, due process, etc. He then said,

> It has been objected also against a bill of rights that, by enumerating particular exceptions to the grant of power, it would disparage those rights were not placed in that enumeration; and it might follow, by implication, that those rights which were

15. It will perhaps be claimed that the obviously theological implications of natural law theory are inconsistent with the provision of the 1st Amendment in the United States Constitution which forbids an establishment of religion. It is sufficient here to say that, as acknowledged even in the radically securlarist opinion of Black, J., in *Everson* v. *Board of Education*, 330 U.S. 1, pp. 33-43 (1947), the Establishment Clause derives from the Virginia Statute of Religious Freedom, which was authored by none other than Thomas Jefferson : it begins in the Preamble by saying that "almighty God hath made the mind free", and concludes by saying "that the rights hereby asserted are of the natural rights of mankind". I have given a detailed step-by-step account of the historical facts in chronological order in "A Restatement of the Intended Meaning of the Establishment Clause in Relation to Education and Religion", *Brigham Young University Law Review*, Vol. 1981, pp. 340-354. *Cf.* J. MALBIN, "Religion and Politics : the Intentions of the Authors of the First Amendment", (1978) *Am. Enterpr. Inst. Pub. Pol.* 1-28. The Establishment Clause, no less than the Declaration of American Independence, presupposes the existence of God as the author of natural law and the inalienable rights of mankind.

> not singled out, were to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.[16]

He referred to what became the 9th Amendment to the United States Constitution, which reads simply, "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people". Obviously, since the United States Constitution must be read in light of the Declaration of American Independence, the unenumerated rights protected by the 9th Amendment are those "certain unalienable rights" under the "laws of nature and nature's God", which are mentioned in famous Jefferson's text.[17]

Madison went on in his speech to make a further observation of great importance :

> If [a bill of rights is] incorporated into the constitution [of the United States], independent tribunals of justice will consider themselves in a particular manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will naturally be led to resist every encroachment upon rights expressly stipulated in the constitution.[18]

Like Jefferson and all other American lawyers in that day, Madison was bred to the bar by reading Blackstone, and so he knew that British judges wielded the power (not to be despised) of construing statutes so as to avoid unjust results in particular cases, but could not (as they still cannot) declare statutes null and void for any reason where a repugnant intention of Parliament were clear and unmistakable.[19]

But, having participated in the Philadelphia Convention, and having failed in his best efforts to avoid it, Madison knew that, under the United States Constitution, American judges were meant to possess, above and beyond the power of avoiding unconstitutional results by strict construction, the additional power of declaring legislative acts unconstitutional, and thus null and void, as if never passed.[20] All of the framers of the American Constitution (sixteen of them serving in the First Congress) understood that courts in the United States were to

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16. *Annals of Congress*, Gales & Seaton 1834-1856, Vol. 1, p. 439.

17. As is made even clearer from the fact that the 9th Amendment corresponds to a provision of the Virginia Bill of Rights of 1776 recognizing "certain inherent rights of which, when [men] enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety". See, *e.g.*, the tribute paid to Madison, for his participation in framing the constitution of his State, by H.B. GRIGSBY, *The Virginia Convention of 1776*, J.W. Randolph, 1855, pp. 83-87.

18. 1 *Annals of Congress*, *op. cit.*, note 16, pp. 439-440.

19. 1 *Blackstone's Commentaries* 91, where Blackstone repudiated the ideas of Lord Coke in *Dr. Bonham's Case*, 8 Coke 114a (C.P. 1610), and neatly illustrated *quaod hoc* interpretation of statutes.

20. There are many proceedings in which this point was made plain enough, but the question of what we now call judicial review was most decisively settled upon the final defeat of Madison's proposal for a council of revision on August 15, 1787, as appears in Jonathan ELLIOT (ed.), *Debates on the Federal Constitution*, Lippencott & Co., 1859, Vol. 5, pp. 428-429 (hereinafter cited : *Elliot's Debates*).

have this augmented power. Nobody was surprised by and everybody anticipated early judicial recognition of this judicial authority to declare statutes unconstitutional.[21]

It follows that, under and in keeping with fundamental law in the United States, the American judiciary has the power to declare statutes unconstitutional which in their thrust and substance plainly invade rights ordained by natural law, even if not enumerated in any bill of rights.

Roman jurisprudence was largely based on natural law. And at the time of the American Revolution, the judiciary of England, then much admired in the United States,[22] was famous for such decisions. The novelty in the American experiment was a formally established judicial power to find legislative acts wholly inoperative on the basis that natural law is part of and assumed in the constitution.

The most remarkable judicial decision in England, based on natural law, and destined to have awesome consequences in the United States, was handed down by Lord Mansfield in *Sommerset's Case.*[23] A colonial merchant in Jamaica made a business trip to England, bringing his slave Sommerset with him as a body servant. Upon his arrival in London, Sommerset sued out a writ of *habeas corpus* from the King's Bench. The Chief Justice flatly held that slavery is prohibited by natural law, — that, therefore, no slave could ever be regarded as property at common law, — that slavery existed in the colonies only by virtue of certain statutes,[24] — that these statutes could and had to be read as narrowly as possible so as to have no application in England, — and that, therefore, the moment Sommerset set foot on the soil of the mother country he became a free subject of King George III. Sommerset was accordingly released from the custody of his former master.

Mansfield's judgment was based on an objective truth and a moral absolute, not a subjective view of right and wrong resting upon moral relativism.

And from the principle of natural law which liberated Sommerset, later ordained by the 13th Amendment to the United States Constitution, springs the indubitable right of a citizen "to be free in the enjoyment of all his faculties, to be free in the use of them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and

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21. The first reported exposition of the power of judicial review is in the opinion of Wythe, J., in *Commonwealth* v. *Caton*, 4 Call 5 (Va. 1782). The most perfect exposition is in the jury instructions given by Patterson, J., in *Vanhorne's Lessee* v. *Dorrance*, 2 Dallas 304 (U.S.C.C. Pa. 1795). The most famous exposition is in the opinion of Marshall C. J., in *Marbury* v. *Madison*, 1 Cranch 137 (U.S. 1803). A point frequently overlooked is that Madison and other statesmen of his day thought that the other branches of government could and should also make constitutional determinations. See, *e.g.*, the veto message of Madison as President on February 21, 1811, sustained by the House on February 23, 1811, 22 *Annals of Congress*, pp. 982-985, p. 995, p. 997.

22. See, *e.g.*, *Boyd* v. *United States*, 116 U.S. 616, pp. 625-630 (1886), paying tribute to Lord Camden whose remarks in *Entick* v. *Carrington*, 19 Howell's St. Tr. 1030 (C.P. 1765) had critical impact on the 4th and 5th Amendments to the United States Constitution.

23. 20 Howell's St. Tr. 1, pp. 80-82 (K.B. 1771). This result had been anticipated exactly by Blackstone on the basis of natural law, 1 *Commentaries*, pp. 423-424. And it was scrupulously followed by courts of the South in the United States. See, *e.g.*, *Murray* v. *McCarty*, 2 Munford 393 (Va. 1811).

24. *Viz.*, the Statutes of 10 William III, Chapter 26 (1699); 5 George II, Chapter 7 (1732); and 32 George II, Chapter 31 (1759).

for that purpose to enter into all contracts which may be proper, necessary, and essential".[25]

And so freedom of contract was a consequence of the abolition of slavery and other forms of involuntary servitude, rooted in principles of natural law which had been judicially ascertained before the American Revolution. It was not, as many have alleged, a mere invention of the Manchester school of economics, cunningly disguised in judicial rhetoric.[26]

Yet at the end of the 19th century, the condition of the working classes in the industrial revolution had become such an acute international concern that Pope Leo XIII felt obliged to speak in his famous encyclical *Rerum Novarum*,[27] which is founded on natural law, and is of universal significance, including but transcending Catholic thought.

The Holy Father insisted, and rightly so, that natural law imposes a duty upon the owners capital to respect the dignity of labor, and a duty upon governments to introduce reasonable public measures for the protection of workers. He called for proper laws restraining the hours of work and the use of child labor, respecting the integrity of the human family, assuring just wages for workers, facilitating the ownership of property by the common man, and allowing workers to form unions and other associations for the promotion of their interests.

He denounced both raw capitalism and extreme socialism as founded upon a materialistic view of human nature. He called for a reconciliation between capital and labor based on an understanding of the spiritual reality of human nature. His foresight into the 20th century is stunning for us who have lived in it and brace ourselves for the century now approaching.

The message of *Rerum Novarum* was heard throughout the world. The United States Supreme Court acknowledged freedom of contract or the right to work, and also the duty of governments to protect labor, both demanded by natural law, together requiring fair balancing of interests within the range of reason. Hence, the court upheld as constitutional various statutes regulating working conditions.[28]

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25. PECKHAM, J., in *Allgeyer* v. *Louisiana*, 165 U.S. 578, 589 (1897). Shortly after adoption of the 13th Amendment, this right was acknowledged by Congress in an Act of April 9, 1866 (14 U.S. Stat. L. 27). The 14th Amendment was intended, among other things, to remove any doubts as to the constitutionality of this legislative enactment.

26. HOLMES, J., dissenting, in *Lockner* v. *New York*, 198 U.S. 45, p. 75 (1905), in order to satirize the judicial scrutiny of the majority, made the sarcastic remark, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statistics". The wittiness of his comment has produced more laughter than thought. His implication was that his brothers were substituting their political judgment for the political judgment of the legislature, which overlooks the origin of freedom of contract under natural law, formally acknowledged by the 13th Amendment.

27. Published by the Vatican on May 15, 1891, and now available in many editions in all major languages of the world.

28. See, *e.g.*, *Holden* v. *Hardy*, 169 U.S. 366 (1898), in which a statute fixing maximum hours for workers in underground mines was upheld; *Muller* v. *Oregon*, 208 U.S. 412 (1908), in which a statute fixing maximum hours for women employed in factories was upheld; and *Bunting* v. *Oregon*, 208 U.S. 426 (1917), in which a statute fixing maximum working hours of factory workers, subject to an exception allowing up to a few extra hours of work if the employee were paid half again the regular wage, was again upheld.

Even so, the same tribunal also struck down as unconstitutional a number of statutes regulating working conditions. Some of these cases turn on notions obviously mistaken.[29] Others are more understandable.[30]

In any event, during the great depression of the 1930's, the United States Supreme Court signaled a marked difference of attitude toward this class of legislation.[31] We still have a judicially recognized freedom of contract, based on natural law, subject to reasonable legislative regulation. But we have a change in that, in the area of working conditions and general business, the strictness of judicial scrutiny has been greatly relaxed from what it was at the beginning of this century.

Otherwise, things remain pretty much as they were before. The duty of American courts to review the constitutionality of statutes persists, and this duty includes the task of making such determinations impartially and objectively, even on the basis of privileges and immunities not expressly and specifically set forth in the written text of fundamental law.

In carrying out this duty, American courts have given probably mistaken focus to the language of due process of law in preference to the language of unenumerated rights. But this focus on words is only a minor detail, which will no doubt be corrected in the future. The duty to protect unenumerated rights is inescapable, in any event, and there is no other plausible and feasible way to carry this

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29. See, *e.g.*, *Coppage* v. *Kansas*, 236 U.S. 1 (1915), in which the majority struck down a statute outlawing contracts not to join a union as a condition of employment. This error has long since been corrected in cases upholding the right of workers to organize, and statutes protecting such right. See, *e.g.*, *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

30. *Lochner* v. *New York*, 195 U.S. 45 (1905), is the classic case, often cited as the prime example of judicial extravagance in not showing proper deference to legislative judgment. Peckham, J., writing for the majority, struck down a statute limiting working hours of bakers to ten hours per day. The majority was unable to understand, nor did the record suggest why bakers needed the protective arm of the legislature, or should not be allowed to contract their services freely as they saw fit. If the record had disclosed such reasons, as in *Muller* v. *Oregon*, 208 U.S. 412 (1908), the court would certainly have sustained the statute as constitutional. In *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), Sandford, J., speaking for the court, struck down a law setting up a board to determine minimum wages for women. The judgment seems harsh, except that the women affected were satisfied with their pay, had no grievance against their employers, lost their jobs by operation of the statute, needed the work, and brought suit against the board to regain their employment. The board had nearly unlimited discretion in fixing the pay of women. And, moreoever, the court held, under the 14th and 19th Amendments, that women cannot be denied equal terms of employment with men, anticipating by a half century the view expressed by Brennan, J., in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

31. The leading case is *West Coast Hotel* v. *Parrish*, 300 U.S. 379 (1937), which expressly overruled *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), and sustained a law which set up a commission with power to establish minimum wages for women. Hughes, C.J., speaking for the court, held that freedom of contract is protected from arbitrary restraint, but is not immune from reasonable legislation which is fairly designed to promote the public welfare, and that the judiciary must not review the wisdom and policy of any such law, so long as the legislature has used reasonable means to accomplish legitimate ends. Sandford, J., dissenting, argued that, while doubts should if possible be resolved in favor of the constitutionality of a statute reviewed in litigation, it is the court, and not the legislature, which must resolve those doubts in the judicial process. Ever since the *Parrish* case, while some economic regulation has been found unconstitutional, as in *Morey* v. *Doud*, 354 U.S. 457 (1957), the unmistakable trend in the field of economic regulation has been for the judiciary to show utmost deference to legislative judgment, as appears, *e.g.*, in *Fergeson* v. *Skrupa*, 372 U.S. 726 (1963).

burden, except on the assumption of natural law as a higher truth upon which, in the course of history, the United States Constitution was built.

Freedom of contract was the first great adventure of American courts into the field of unenumerated rights, but there have been many others. In *Meyer* v. *Nebraska*,[32] the court was asked to review a statute which forbade the teaching of any language other than English in early grades of public schools. The statute was declared unconstitutional : an inherent right to learn and be taught foreign languages was judicially acknowledged as part of a larger right to seek useful knowledge, which is a liberty inherent in the people, and grounded, not in legal positivism, but in natural law.

The basic rationale of the court was expressed in language highly pertinent and respected :

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitively stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of conscience, and, generally, to enjoy those privileges [and immunities] long recognized at common law as essential to the orderly pursuit of happiness by free men.[33]

C. AMERICAN DECISIONS ON SEXUAL INTIMACY

The judicial doctrine just restated has never been overruled or discredited as have some decisions of the so-called "Lochner era".[34] And it was only a matter of time before the question of sexual intimacy should reach the United States Supreme Court, as occurred in *Griswold* v. *Connecticut*,[35] in which Douglas, J., speaking for five justices, held that a statute prohibiting the use of contraceptives, as applied to physicians and others advising married persons, is unconstitutional. Relying mainly on *Meyer* v. *Nebraska*,[36] Douglas referred to a general right of privacy found in what he called "penumbras of the Bill of Rights".

Goldberg, J., joined by two other members of the court, agreed that the statute in question was null and void, citing essentially the same body of case law as Douglas had relied upon. But he justified the right of marital privacy by reference to the 9th Amendment in order to show the existence of unenumerated rights protected by fundamental law.

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32. 262 U.S. 390 (1923).

33. REYNOLDS, J., *id.*, pp. 399-400. No finer exposition can be found in American jurisprudence on unenumerated constitutional rights than the opinion of Flaherty, J., in *Commonwealth* v. *Bonadio*, 415 Atl. 2d 47 (Pa. 1980), which is based largely on the writing of John Stuart Mill whose formulations have also been highly influential in judicial decisions on fundamental law in Canada, as appears, *e.g.*, in the seminal case of *Bank of Toronto* v. *Lambe*, (1887) 12 App. Cas. 575.

34. *E.g. Lochner* v. *New York*, 195 U.S. 45 (1905) and *Coppage* v. *Kansas*, 236 U.S. 1 (1915), which are discussed in notes 29-30 *supra*.

35. 381 U.S. 479 (1965).

36. 262 U.S. 390 (1923), which is discussed and quoted in the text accompanying notes 32-33 *supra*.

In the related case of *Eisenstadt* v. *Baird*,[37] the United States Supreme Court made unmistakably clear that a statute prohibiting use of contraceptives is null and void as applied to any adult, married or unmarried, because such a statute contravenes a general right of privacy which is protected by constitutional law.

D. Natural Law and Human Nature

Most interesting about the *Eisenstadt* case is its rationale, which is ultimately founded upon language in the famous opinion of Brandeis, J., in *Olmstead* v. *United States*,[38] which deserves our alert attention :

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's *spiritual nature*, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.[39]

Brandeis did not make this remark thoughtlessly, disengenuously pulling it ouf of nowhere for persuasive impact. He spoke deliberately, because the American Constitution (formed out of the British Constitution, which also gave shape to the Canadian Constitution) is founded on natural law, and the great masters of natural law have always taught, not only that God exists as the father of natural law, but that God gave mankind a spiritual nature, which is the very reason why mankind has rights inviolable by any human government.

The teachings of Thomas Aquinas on natural law[40] were the foundation of what Blackstone said as a professor and judge, and of what Jefferson said as a political leader. Drawing from fragments in the works of Aristotle,[41] Aquinas developed a philosophical demonstration of human immortality.[42]

The substance of this argument is that the human soul is the cause of human life and the essence of human nature, — that the human soul possesses intelligence, which fashions concepts, understands ideal truths, and learns wisdom, all surpassing physical sensation, — that, therefore, human intelligence is a spiritual faculty, — that, however, a spiritual faculty cannot be grounded in physical matter and must be rooted in a spiritual reality, — that, therefore, the essence of human nature is a spiritual reality, — and that, because it is a spiritual reality, the human soul survives death.

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37. 405 U.S. 438 (1972).

38. 277 U.S. 438, p. 478 (1928), a dissent vindicated as good law in *Katz* v. *United States*, 389 U.S. 347 (1967).

39. This specific language in 277 U.S. at p. 478, was cited by Stewart, J., in *Stanley* v. *Georgia*, 394 U.S. 557, p. 564 (1969), on which case Brennan, J., relied in *Eisenstadt* v. *Baird*, 405 U.S., p. 453, emphasis added.

40. In Part I of Part II of the *Summa Theologica*, Questions 90-108, called the "Treatise on the Law".

41. Found, *e.g.*, in Book V, Chapter 8 of the *Metaphysics*, and Book I, Chapter 4, Book II, Chapters 1 and 2, and Book III, Chapter 5 of the *De Anima*.

42. The best passages on human immortality in the writings of Aquinas, in my opinion, are found in Book II, Chapters 51, 66, and 79 of the *Summa Contra Gentiles*. The thrust of the Thomist proof has been given a detailed and elegant modern restatement by J. Maritain, *The Range of Reason*, New York, Charles Scriber's Sons, 1952, pp. 51-65.

The great German philosopher, Immanuel Kant, who lived at the time of the American Revolution, denied the cognitive utility of speculative metaphysics, yet he conceded that natural law governs human morality, based on what he called the "categorical imperative", which, he said, presupposes three "*a priori* postulates of practical reason", *viz.*, human immortality, human freedom, and the existence of God.[43]

But there are purely legal considerations, independent of the teachings of natural law philosophers, which certainly prove that, in the eyes of the fundamental law of the United States, the essence of human nature is a spiritual reality.

In the General Assembly of Virginia in 1832, disciples of Thomas Jefferson[44] argued brilliantly that slavery was wrong and should be abolished. Few scholars have ever heard of, much less studied this very gallant and nearly successful effort of the Old South, for it utterly refutes the usual "Battle Hymn of the Republic" theory of the American Civil War. The central premise of these southerners was expressed by James McDowell in the Virginia House of Delegates :

> Sir, you may place the slave where you please. You may dry up, to your utmost, the fountains of his feeling, the springs of his thought. You may close his mind to every avenue of knowledge and cloud it over with artificial light. You may yoke him to your labors as the ox which liveth only to work and worketh only to live. You may put him under any process which, without destroying his value as a slave, will debase him as a human being. You may do all this, and the idea that he was *born to be free* will survive it all. It is allied to his *hope of immortality.* It is the *ethereal part of human nature* which oppression cannot reach. It is *a torch lit up in his soul by the hand of deity.*[45]

The 13th Amendment was certainly intended to reaffirm this principle of natural law implicit in the Declaration of American Independence.

The fundamental law of the United States and of Canada is grounded in natural law, which ordains a general right of privacy and all other inalienable rights, because natural law, assumed by our constitutions, ordains that the essence of human nature is not a mere biological process, but a spiritual reality, undying and born free.

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43. In the *Kritik der reinen praktischen Vernunft*, or *Critique of Practical Reason*, published in many editions and translated in many important languages, in Book II, Chapter II(VI), Kant said that the postulates of practical reason "all proceed from the principle of morality, which is not a postulate but [natural] law", — are "not theoretical dogmas, but suppositions practically necessary", — and "are those of immortality, freedom, and the existence of God [Unsterblichkeit, Freiheit, und Gott]. The first results from the practical necessity of a duration adequate to complete fulfillment of moral [*i.e.*, natural] law; the second from the practical necessity of the independence of the world, and of the faculty of willing, subject to the [natural] law; and the third from the practical necessity of the *summun bonum* [des höchsten Gutes in der Welt]".

44. In Query XVIII of *Notes on Virginia*, Jefferson urged the abolition of slavery in ardent language so famous that critical passages are today emblazoned on the wall of his Memorial in Washington, D.C.

45. On January 21, 1832, Virginia House of Delegates, quoted in the appendix recapitulating the slavery debates here given reference, in J.C. ROBERTS, *Road from Monticello*, Duke Univ. Press, 1941, p. 103, emphasis added.

E. Natural Law and Constitutional Immunities

What, then, of citizens who do not believe in natural law, or the existence of God, or the spiritual reality of human nature?

Freedom of religion ordained by fundamental law and natural law permits a citizen, without discrimination or penalty, to deny that God exists.[46] Even so, in the contemplation of fundamental law, because it presupposes natural law, God nevertheless exists, and as much is presumed by the Establishment Clause in the United States, as it is declared in the Preamble to the *Constitution Act of 1982* in Canada.

Likewise, individual citizens may deny natural law, inalienable rights, and human immortality — they are free to believe in legal positivism and secular humanism if they wish —, yet the spiritual reality of every member of the human race, each endowed with inalienable rights under natural law, is the timeless foundations of our constitutional order. Were it not so, given the actual distribution of talent and power in our world, it would be absurd to say that each man and woman enjoys equal dignity, and a certain domain of personal sovereignty into which no temporal government may intrude. It is legal positivism which, accommodating a materialistic view of human nature, allows government to define, grant, and take our rights.

These illustrations bring into play two interrelated principles of natural law, which were stated by Aquinas as well as anybody has ever stated them :

> Temporal law has the character of law insofar as it partakes of right reason and is consistent with eternal law. But insofar as [temporal law] deviates from right reason, it is unjust, and is not law but a kind of violence.

And yet, —

> Temporal law does not prohibit certain things, not as approving them, but as being unable to regulate them. Many things are demanded by divine law which temporal law cannot demand, because more things are subject to higher than lower authority. Hence the very fact that temporal law does not meddle with some matters comes under the ordinance of eternal law. But temporal law must never condone what eternal law condemns.[47]

Constitutional rights, both those enumerated and those unenumerated, whether based on legal tradition or newly found, are divided into privileges and immunities, which are terms sometimes used loosely, yet, in the strictest sense, a privilege is a right to do what fundamental law allows and natural law vindicates, while an immunity is a right under fundamental law not to be prosecuted or punished in the proceedings of a worldly government on account of an act or omission, even if not in keeping with the requirements of natural law.

And so, in this sense, a citizen has an immunity but not a privilege, under the 5th Amendment to the United States Constitution, not to be prosecuted and punished for a murder upon the high seas, so long as no presentment or indictment has been returned against him by a grand jury.

There are many things which natural law surely condemns or may well condemn as moral errors, yet constitutional law confers immunities, styled as

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46. So held in *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).
47. *Summa Theologica*, Part I of Part II, Question 93, Article 3, Replies 2 and 3.

rights, to citizens who do such things, not as approving what is done, but as a concession that natural law imposes a limit, usually arising from human incompetence and unwisdom, upon governmental intermeddling in such matters, leaving ultimate justice to God.

We may take as an illustration the controversial teaching of Pope Paul VI on the regulation of human birth only by natural means in wedlock. The encyclical *Humanae Vitae*[48] proposed this practice, not only to Catholics as a voluntary act of faith in order to achieve holiness in marriage, but as advice rooted in the deeper wisdom of natural law for all men and women of good will, of all religions and beliefs, throughout the world.

It could well be that, regardless of common opinion now prevailing, the Holy Father was right in what he said, — right not only as dreamers are sometimes right, but also right as shrewd businessmen are often right. Impressive evidence, already available, suggests that Paul Erlich's theory of a "population bomb" is utterly unfounded, and that socio-political injuries from "contraception mentality" are as ominous as the pope warned us to anticipate.[49] And if Paul VI was right, the rhythms of natural law will prove him right, maybe painfully right, especially as we get into the 21st century.

Even so, a human government cannot practically regulate the sensitive area of human sexuality by ordering people whether and how to prevent pregnancy, and bringing legal proceedings to enforce obedience, without endangering the basic privacy of all citizens, or producing unmanageable conflict between the people and their rulers, or opening the door to great oppression. Least of all did Paul VI propose any such a drastic course.

There must be exigent circumstances, more than probable cause to believe a felony has been committed, before police may enter the privacy of a home without a warrant, nor even does criminal guilt in itself justify such an instrusion.[50] As a constitutional immunity protects husband and wife against an intrusion by police into the privacy of their home without extraordinary cause, so a constitutional immunity protects them from governmental intrusion by the legislature into the privacy of their sexuality without extraordinary cause. A legislative belief that use of contraceptives is wrong is not in itself enough to justify criminal or civil sanctions in this area.

Fundamental law does and should acknowledge, not a privilege to practice birth control by artificial means, but an immunity against governmental intermeddling with a broad range of human privacy in the absence of compelling reasons to justify it.

Even the most ardent believers in what John VI taught in *Humanae Vitae* should have no compunction in endorsing the principle of *Griswold* v. *Connecticut*.[51]

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48. Published by the Vatican on July 25, 1968, and now available in countless editions in all major languages of the world.

49. J. KASUN'S remarkable treatise, *The War Against Population*, San Francisco, Ignatius Press, 1988, is indispensable reading for any impartial student of these questions.

50. See, *e.g.*, *Payton* v. *New York*, 445 U.S. 573 (1980).

51. 318 U.S. 479 (1965), which is discussed in the text accompanying notes 32-37 *supra*.

F. CONSTITUTIONAL CRISIS : *ROE* v. *WADE*

But now, as night follows day, arrives the problem of abortion. Termination of pregnancy is said to be a "right of women", about which men have nothing to say, — a "right to dispose of female body products", and a matter of "reproductive freedom". Is this "right" also protected by fundamental law?

Let us immediately identify the factor which complicates abortion as a constitutional question, making it more difficult than the problem of birth control which can be disposed of with relative ease as matter of general privacy. This complicating factor is *the standing of a human fetus as a legal person.*

The seminal case on abortion is *Roe* v. *Wade*,[52] in which Blackmun, J., speaking for a seven-member majority of the United States Supreme Court, found unconstitutional a Texas statute which made it a crime to perform or attempt any abortion except where done on medical advice to save the life of the mother.

The rationale was that a woman enjoys a constitutional immunity, founded on a general right of privacy, to protect her decision to terminate pregnancy (with the assistance of licensed doctors) from all governmental intrusion during the first three months of pregnancy, and from all such intrusion after the first three months until the fetus becomes viable except for laws regulating procedures to assure medical safety, even though, from and after viability, which is usually reckoned to be from and after about six or seven months, legislative authority to prohibit abortion is unrestricted in all cases except where medically necessary to preserve maternal life and health.

The key question was framed by Blackmun in this way :

> The appellee [the State of Texas] and certain amici argue that *the fetus is a 'person'* within the language and meaning of the [14th] Amendment. In support of this, they outline at length and in detail the *well-known facts of fetal development. If this suggestion of personhood is established*, the appellant's case [*i. e.*, the claims of Roe who brought suit to challenge the Texas statute], of course, collapses, for *the fetus' right to life is then guaranteed* by the [14th] Amendment.[53]

The notion that there is a constitutional immunity to shield a decision to terminate pregnancy collapses if a human fetus is a legal person, and the reason is that a human life cannot be sacrificed merely to suit the convenience or "liberty" of another. Saving a human life is the kind of "compelling interest" which will justify governmental interference with privacy otherwise inviolable, as virtually everybody working on this problem has readily agreed.

But what, after all, are the "well known facts of fetal development"? For this purpose, we need a just and objective assessment, freed of all emotional overtones, and suitable for impartial consideration in a judicial context.

We are fortunate to have such an assessment, good for the record of legal history, resulting from the presention of evidence by Morris Schumaitcher, Q. C., before the Queen's Bench in Saskatchewan, in the form of findings of fact by

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52. 410 U.S. 113 (1973). The questions of standing, justiciability, and mootness in this case are very difficult in terms of American constitutional law, and the right of the woman plaintiff to litigate the merits before the Supreme court after she had already secured a lawful abortion under the decree of the district court has always been acutely debatable, especially on grounds of mootness.

53. *Id.*, pp. 156-157, emphasis added.

Matheson, J., in the case of *Borowski* v. *Attorney General.*[54] These findings were as follows :

> [M]odern biological and genetic studies have verified that the foetus is genetically *a separate entity from the time of conception or shortly thereafter*;
>
> [A]dvances in medical procedures have made it possible for a foetus to be *treated separate from its mother* and, although not sufficiently developed for normal birth, to survive separate from its mother; and
>
> [P]ermitting a pregnant women to terminate her pregnancy results in the termination of the foetal life, which, it seems quite clear, is *an existence separate and apart from that of the pregnant woman*, even though the foetal life may not be maintainable during the early stages of pregnancy, independently of the pregnant woman.[55]

Now, we shall first take these "well known facts of fetal development". We shall add the foundation of natural law, assumed by the fundamental law of the United States and Canada. In particular, we shall give focus to the principle of natural law, often acknowledged in philosophical and legal tradition, and surely assumed in judicial opinions leading up *Roe* v. *Wade*, that the essence of human nature is a spiritual reality, — a spiritual reality which is the cause of the biological manifestations of human life. And the conclusion surely must be that, "from the time of conception or shortly thereafter", a human fetus is a person in the eyes of every constitution which is founded on natural law.[56]

The foregoing conclusion has not yet been judicially acknowledged either in the United States or in Canada, but neither have the "well-known facts of fetal development" mentioned by Blackmun yet been argued before the courts of either country in light of Brandeis' premise for constitutional privacy, that each human being has in essence a "spiritual nature".

In the interests of legal candor, we must weigh the main arguments by Blackmun in *Roe* v. *Wade*, to the effect that the legal status of the human fetus has ever been left unsettled and uncertain.

Blackmun noted the Apportionment Clause in Article I, Section 2 of the United States Constitution, which, as amended by the 14th Amendment, says in relevant part, "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State".[57] He then said, "We are not aware that in the taking of a census under this clause, a fetus has ever been counted".[58]

The quick answer is that neither have foreign tourists traveling through the United States ever been counted as persons under the Apportionment Clause,

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54. 4 D.L.R. (4d) 112 (Q.B. Sask. 1983). We are fortunate to have Schumaitcher's discussion of the historical background and legal arguments made in that case, including a great wealth of material from counsel's research, published as "The *Borowski* Case", (1989) 20 *R.G.D.*, p. 22.

55. *Id.*, pp. 124 and 128, emphasis added.

56. So held in West Germany, as appears in "The Abortion Decision of the Federal Constitutional Court, First Senate of the Federal Republic of Germany, February 25, 1975", as translated and reprinted in the (1976) 9, *John Marshall Journal of Practice and Procedure* 605 ff.

57. The Apportionment Clause originated in a resolution of Congress under the Articles of Confederation, on April 18, 1783, which made reference to the "whole number of white and other free citizens and inhabitants of every age, sex, and condition", and to certain other persons, including Indians taxed, but excluding Indians not taxed (who were also persons for purposes of due process, even if not for purposes of any census), and certain "other persons" who were counted to the extent of three-fifths of their number, *i.e.*, slaves, as appears in 1 *Elliot's Debates*, p. 95.

58. 410 U.S., p. 157.

yet such foreign tourists most certainly are persons within the meaning of the Federal Bill of Rights, as some have learned when charged of public offenses. And so it cannot be maintained that, since a human fetus is not a person under the Apportionment Clause, it is not a person under the 5th, 9th, or 14th Amendments.

Another argument offered by Blackmun was that "the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive". He acknowledged, however that this error had since been corrected. For the traditional rule, he cited a standard treatise on American tort law,[59] overlooking what William Prosser said about why this mistake had to be corrected by courts in the United States :

> So far as duty is concerned, if existence at the time of the tortious act is necessary, *medical authority* has long recognized that *an unborn child is in existence from the moment of conception* [citing long passages from standard treatises on medical jurisprudence and on legal anatomy and surgery], and for many purposes its existence is *recognized by the law.*[60]

Prosser's reference to the recognition of the human fetus as a person in the eyes of the law was to nothing less than an opinion of the English Court of Chancery in the era of the American Revolution, stating the law as it was then universally recognized in the United States. Referring to an "infant *in ventre sa mere*" (law French, meaning a child in his mother's womb,[61] *i. e.*, a human fetus as soon as its existence is known), the court said,

> He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the statute of distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction, and he may have a guardian.[62]

Blackmun noted that criminal abortion statutes have very often carved out exceptions where medical termination of pregnancy is accomplished to save the life of the mother or to protect her from serious injury to her health. He then rhetorically asked, if the constitution protects the human fetus as a person, do not such exceptions "appear to be out of line with the [14th] Amendment's command?"[63]

But criminal statutes are read strictly,[64] and there are occasions when written laws are not applied literally in extraordinary situations to avoid manifest injustice.[65] Even if a criminal abortion statute did not include express exceptions

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59. *Id.*, p. 161.

60. *The Law of Torts*, West Pub. Co., 1971, p. 335, emphasis added. There have been five editions of this treatise, and generations of American lawyers who have learned the subject by reading it. Blackmun cited the fourth edition. All five editions include the language and citations quoted and given in the text of this article.

61. *Black's Law Dictionary*, West Pub. Co., 1990, p. 825.

62. LAWRENCE, J., in *Thelluson* v. *Woodford*, 31 Eng. Rep. 117, p. 163 (Ch. 1799). Many authorities were cited to this effect in the opinion, both from the civil law of Rome and from the common law of England.

63. 410 U.S., p. 157.

64. 1 *Blackstone's Commentaries*, p. 88, a rule observed by prosecutors and judges throughout North America.

65. 1 *Blackstone's Commentaries*, p. 91, a rule universally recognized, and used often by jurists in the United States so as to leave otherwise questionable statutes intact without declaring them unconstitutional. See, *e.g.*, BRANDEIS, J., in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, p. 348 (1936).

for cases in which pregnancy was terminated to save the life of the mother or prevent grave danger to her health, such exceptions could be implied by interpretation or by discretion in relation to unusual facts. And so a legislature may include such exceptions in express language. In Germany, where there is an affirmative constitutional duty of the government to protect unborn human life, this duty need not take the form of criminal sanctions.[66] There is no denial of due process in such legal practices, which, if anything, are required by due process.

Blackmun also noted that, "throughout a major portion of the 19th century, prevailing legal abortions practices were far freer than they are today",[67] *i.e.*, in the 20th century in the United States up to the time of *Roe* v. *Wade*. Blackmun described in his opinion his perception to the historical background.[68] And this further consideration led him to say that a human fetus is not a person within the meaning of the 14th Amendment.

Yet Blackmun obviously had no proper grasp of the legal history he tried to interpret.

The common law of prenatal life was stated by Blackstone in his chapter on the "absolute rights of individuals". Blackmun cited but either did not read or did not comprehend the following striking and explicit language :

> *Life is the immediate gift of God, a right inherent by nature in every individual*; and it begins in the contemplation of the law as soon as an infant is able to stir in the mother's womb. For if a women is quick with child, and by a potion or otherwise killeth it in her womb, or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child, this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor.
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> *An infant in ventre sa mere*, or in the mother's womb, *is supposed in law to be born* for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this respect *the civil law agrees* with ours.[69]

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66. As to the judgment of the federal constitutional court in West Germany, *supra*, note 56 pp. 595-596, Robert Jonas was surely right where he explained, "The court is saying that abortion cannot be legal because every unborn child has a right to life which the state must protect. How unborn life is to be protected is first to be decided by the legislature and the method of protection need not be a penal sanction. For practical purposes, the court holds that there are two principal means of protecting unborn life; the first is the criminal penalty, and the second is education and assistance in the individual case".

67. 410 U.S., p. 158.

68. *Id.*, pp. 132-141.

69. 1 *Blackstone's Commentaries*, pp. 129-130, emphasis added. The rule protecting the rights of an infant *in ventre sa mere* can be traced at least as far back as the *Earl of Bedford's Case*, 77 Eng. Rep. 241, p. 424 (Wards 1587), in which an Earl held certain land in fee tail, and granted certain leases. When he died, the Queen succeeded to the rights of his heirs in tail during their minority, and then exercised rights to void leases outstanding at the time of the Earl's death, relying on the Statute of 32 Henry VIII, Chapter 28 (1540). The court held that the exercise of these statutory rights by the Crown did not deprive the heirs in tail, upon reaching majority, of the right to make the leases good by receiving rents due thereunder. In reaching this result, the court said that, if the holder of a fee tail makes a lease voidable by the heirs in tail, and then dies, leaving a wife pregnant with child, she may enjoy her dower, but may not void the lease, for the law "hath consideration of him [*i.e.*, the infant *in ventre sa mere*] in respect of the apparent expectation of his birth".

We have two rules here, both prevailing in the United States at the time of the Philadelphia Convention of 1787. The first was that, in a prosecution for criminal abortion, the Crown or State had to prove quickening as an element of the offense, because, in the contemplation of the law applicable to such proceedings, life begins at quickening, or as soon as the mother could feel the movement of the child inside her body.[70] And, if the accused were found guilty, she (and those assisting her as accessories) could be punished, yet the penalty could not be the penalty due for murder, manslaughter, or other felony.[71]

Now, the reason for these restraints in penal proceedings is easy enough to understand upon reflection. A criminal prosecution, as distinguished from civil proceedings, presupposes *mens rea* or culpable mind for any serious offense, anything *malum in se*, even a grave misdemeanor. At least intent to do what is forbidden is required even for a lesser misdemeanor which is *malum prohibitum* only. An intent to kill is a difficult attribution to a pregnant woman in dispair, at least where the reality, not only of the pregnancy itself, but of human life is not made clear enough to her in a tangible way by fetal movement.

And so the common law condoned nothing but showed mercy by stipulating that fetal movement had to be sensibly evident to a pregnant woman before she could be convicted of a crime, and also that the offense could not be treated as murder or manslaughter, and could not be punished as would the most serious kind of crime. This restraint was not inconsistent with natural law,[72] so long as neither constitution and statutes, nor legal tradition and custom approved or encouraged abortion.

And this consideration leads to the second rule of the common law, which was that, as soon as it was known that a woman was pregnant, the infant *in ventre sa mere* could receive legal protection in civil proceedings on demand of anybody with a reasonable interest in, and/or willingness to bear responsibility for the welfare of the child.

The child could inherit, and his or her interests could be protected in judicial proceedings. If Charles II had died while Catherine of Braganza was pregnant, the Duke of York would not have become James II, a regent would have been appointed to govern in the place of the infant *in ventre sa mere*, the question of succession would have awaited the royal birth, and the reign of the new prince or princess would have been reckoned from the moment his or her father drew his last breath. Writs of *quo warranto*, *mandamus*, *scire facias*, and injunction might have been granted *ad interim* to protect the interests of the Crown, even before the child could have nursed upon the breasts of Queen Catherine.

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70. *Blakiston's Medical Dictionary*, McGraw Hill, 1973, p. 657, defines "quickening" as the "first feeling on the part of the pregnant woman of fetal movements, occurring between the fourth and fifth months of pregnancy".

71. A felony was defined by the common law as a crime punishable by forfeiture of lands, or goods, or both, to which in many but not all cases death could be superadded according to the degree of guilt, as appears in 4 *Blackstone's Commentaries*, pp. 94-98. Capital punishment was usually remitted on pleading benefit of clergy or by executive reprieve. A lesser but reprobated crime, punishable by fine and/or imprisonment, was called a misdemeanor. In all civilized countries, the death penalty has been abolished or greatly restricted. In our time, a felony is defined by statute as such, and is generally taken as a crime punishable by imprisonment for more than a year. See, *e.g.*, *Ex Parte Wilson*, 114 U.S. 417 (1885).

72. Not in the sense rendered by Aquinas in the *Summa Theologica*, which is quoted in the text accompanying note 47, *supra*.

This example illustrates the operation of the common law as it stood up to the end of the 18th century, which recognized an infant *in ventre sa mere* as a legal person. The 19th century saw, not a weakening of this principle, but a distinct toughening of criminal abortion statutes, such as Lord Ellenborough's Act in England,[73] which made it a felony to secure an abortion at any stage of pregnancy. And nowhere in North America was the law of criminal abortion less strict than the common law, nor was there any abolition or curtailment of the standing of an infant *in ventre sa mere* as a legal person.

In any event, Blackmun's conclusion that a human fetus is not a person within the meaning of the 14th Amendment was founded on analysis of impertinent provisions of fundamental law, reliance on authority which actually proves the standing of a human fetus as a legal person, misunderstanding of the effect of exceptions in criminal abortion statutes, and mischaracterization of the mercy of the common law in cases of criminal abortion.

After conceding that, if a human fetus is a legal person, no case can be made for a constitutional immunity to shield a decision to terminate pregnancy, Blackmun said,

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any concensus, the judiciary at this point in the development of man's knowledge is not in a position to speculate as to the answer.[74]

The question was whether a human fetus is a legal person, which had to be answered upon proper legal reasoning. And essential to deciding this question is the question of when human life begins in the eyes of the law.

In light of what was said of civil litigation by the English Court of Chancery in the era of the American Revolution, and what was ordained shortly thereafter in Lord Ellenborough's Act, life begins in the eyes of the law for all legal purposes as soon as pregnancy was discovered.

And in light of what was said of the common law by Blackstone, human life begins in the eyes of criminal law when quickening occurs, and begins in the eyes of the law for civil purposes as soon as the pregnancy is discovered.

There is room to argue that the restraints of the common law on prosecutions of criminal abortion have a constitutional dimension, and translate into a limited immunity under fundamental law. In other words, it is conceivable that, albeit a human fetus is a person *sui generis* entitled by fundamental law to fuller recognition in civil litigation, criminal sanctions for abortion might be constitutionally limited to the period after quickening and to penalties less than what might be imposed for the willful killing of a person born. This possibility exists, and deserves to be weighed on purely legal grounds.

Even so, we cannot ignore or evade the question of when life begins in the eyes of the law when weighing the constitutionality of abortion laws.

We are not at sea on this question. The common law had a cogent answer for centuries, and was crystal clear at the framing and adoption of the American Constitution. Medicine has traditionally known the answer for thousands

73. Statute of 43 George III, Chapter 58 (1803).
74. *Roe* v. *Wade*, *supra*, note 52, p. 159.

of years since the Hippocratic Oath,[75] and the facts we know through the technology of our modern day support the Hippocratic Oath.

It is true that, in philosophy and theology, there are as many opinions as there schools of thought, ranging in ancient times from Plato's *Meno* and *Phaedo*[76] to Khayyám's *Rubáiyát*,[77] and in our day from the new *Catechism of the Catholic Church*[78] to the first and second *Humanist Manifestos*.[79]

But what counts in a juridical sense is the foundation of our constitutional law. And this foundation is natural law, carefully laid by our forefathers in the Declaration of American Independence and our contemporaries in the Preamble to the *Constitution Act of 1982*.

Natural law ordains, so also, therefore, our fundamental law ordains that mankind has a spiritual nature, from whence the inference must be that prenatal life is entitled to meaningful constitutional recognition and protection.

In saying that a legislature may prohibit abortion only after viability, Blackmun cited "logical and biological justifications".[80] In this way, he effectively defined the legal beginning of human life entirely in physical terms, and adopted a wholly materialistic view of human nature, contrary to the established foundations of our constitutional order.

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75. As discussed by BLACKMUN in *id.*, pp. 130-132. This traditional oath of physicians stipulates, "I will not give a woman a pessary to induce an abortion". Blackmun correctly noted that the oath emanated from the doctrine of Pythagoras that "the embryo was animate from the moment of conception, and abortion meant the destruction of a living being". Blackmun said that the view of Hippocrates represented only a "small segment of Greek opinion", which may be true enough. However, Hippocrates was a contemporary of Socrates who was also influenced by Pythagoras. And Socrates also represented only a small segment of Greek opinion, for he was condemned to death for his teachings by his fellow citizens in Athens, as is so movingly told in Plato's *Apology*, *Crito*, and *Phaedo*. The fact that Hippocrates and Socrates were misunderstood in their day does not diminish their greatness, which, like the greatness of many if not most of the brightest lights in history, was not appreciated until after they died. What matters is that the Hippocratic Oath came to be universally recognized in due course as the truest and highest standard of medical ethics.

76. In these priceless dialogues, featuring Socrates as philosopher and martyr, Plato taught not only survival of the human soul after death, but the existence of the human soul before conception, as well as reminiscence or learning by induced remembrance of timeless truth known before birth, and also reincarnation. As to the latter three points, Aquinas took issue with Plato in Book II, Chapter 83 of the *Summa Contra Gentiles*.

77. We know of this ancient Persian philosopher through the elegant translations of Edward Fitzgerald in five versions or sets of quatrains, a literary classic published in many editions as *The Rubáiyát of Omar Khayyám*, the thrust of which is best captured in this elegant verse :

> Why all the Saints and Sages who discuss'd
> Two Worlds so learnedly, are thrust
> Like foolish Prophets forth; their Words to Scorn
> Are scattered, and their Mouths are stopt with Dust.
> (25th Quatrain, 1st Version)

78. Published initially in French (and later in many other languages) by the Vatican on October 11, 1992, as approved by Pope John Paul II, this document is a restatement of traditional Catholic teaching, clearly endorsing the views of Aquinas on immortality, but rejecting reincarnation taught by Plato, as appears in paragraphs 1006-1019.

79. These two manifestos were published and signed in 1933 and 1973 by prominent American and British secular humanists, teaching that the universe was not created, that there is no supernatural reality or human survival after death, and that the proper end in life is realization of human personality and potential here and now. The signatories to these documents were, and their contemporary successors are the philosophical brain trust for the "new world order".

80. *Roe* v. *Wade*, *supra*, note 52, p. 163.

Blackmun's formulations in *Roe* v. *Wade* came from no source in legal tradition, and were a judicial creation, pure and simple, — a *coup d'état* of secular humanism in the dress of jurisprudence, introducing legal positivism into a constitutional order which was certainly premised upon natural law, and substituting a materialistic view for the spiritual reality of human nature as a postulate of fundamental law.

G. *EVANGELIUM VITAE*

What was sold to public opinion as an accommodation to human privacy in hard cases has quickly become a public agenda, and abortions have been done *en masse*, often for frivolous reasons, even where the parents are well off and the fetus normal. An eminent demographer and economist has observed,

> Unless it is prohibited, *abortion will become* in fact, even if not by law, *increasingly compulsory* in numerous cases *where the bureaucratic élite hands down its judgment* — too young, too poor, unsuited to carry on the race. Sterilization will be even more aggressively promoted, especially if the attempts to limit abortion are successful, and "genetic screening" will assure that, together, sterilization and abortion reach the targeted groups. Infanticide, already tacitly accepted for babies born with Down's syndrome and other conditions, will seep into the mores of society [...] [and] *death control must follow upon birth control* as the night the day [...].[81]

It was in this situation that Pope John Paul II protested in his encyclical *Evangelium Vitae*, addressed "to all people of good will" throughout the world. He said,

> Today there exists a great multitude of weak and defenseless human beings, unborn children in particular, whose fundamental right to life is being trampled upon. If, at the end of the last century, the Church could not be silent about the injustices of those times, still less can she be silent today, when the social injustices of the past, unfortunately not yet overcome, are being compounded in many regions of the world by still more grievous forms of *injustice and oppression*, even if these *are being presented as elements of progress in view of a new world order.*

He continued,

> Decisions that go against life sometimes arise from difficult or even tragic situations of profound suffering, loneliness, a total lack of economic prospects, depression and anxiety about the future. Such circumstances can mitigate even to a notable degree the subjective responsibility and the consequent culpability of those who make these choices which in themselves are evil. But today problem goes far beyond the necessary recognition of these personal situations. It is a problem which exists at the cultural, social, and political level, where it reveals its more sinister and disturbing aspect in the tendency, ever more widely shared, to *interpret* the above *crimes against life as legitimate expressions of individual freedom*, to be acknowledged and protected as actual rights.[82]

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81. J. KASUN, *op. cit.*, note 49, pp. 212-213, emphasis added.

82. These quotations are taken from parts 5 and 18 of the encyclical, published by the Vatican on March 25, 1995, now available in many editions and in all major languages of the world, (emphasis added). John Paul II here acted in the tradition of heroic popes such as St. Leo the Great who intervened against Attila the Hun in behalf of the citizens of Rome, Leo III who revived the West Roman Empire by crowning Charlemagne, and Leo XIII who spoke up for the rights of workers in *Rerum Novarum*.

It is noteworthy that the Holy Father sees the need for some restraint in the application of legal sanctions, so long as temporal law does not condone what natural law condemns. We cannot say exactly what his view would be, for example, of the common law as stated by Blackstone, nor, perhaps, are such technical questions part of his message, for he has urged us mainly to reflect thoughtfully on policies and judgments which fail to acknowledge the moral rights of the unborn, — rights which were legally recognized before they were jettisoned in political legerdemain concealed by judicial pageantry.

Are we really willing to accept a snatching away of our inherited birthright from legal tradition and natural law?

H. Recent Constitutional Transformations in Canada

Before going further, we need to take note of changes in the fundamental law of Canada, which have remodeled its form from characteristics purely British to a unique Canadian mixture of elements both British and American.

Under the fundamental law of Canada as shaped by the *British North America Act of 1867*, including the many amendments thereof designed to accommodate growing size and independence of the country, the judiciary did not declare acts of the Dominion Parliament and Provincial Legislatures unconstitutional on grounds of invading civil rights.[83] Canada had a British-style judiciary, which strictly construed statutes with great agility, as and when necessary to avoid manifest injustice or invasion of civil rights.[84]

At length the Parliament in Ottawa enacted what became known as the *Canadian Bill of Rights of 1960*, [85] which enumerated certain "human rights and fundamental freedoms", including equal protection, due process, speech, press, assembly, and association. It stipulated, "Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge, or infringe" such rights and freedoms.

It was not at first clear whether this act simply set forth a rule of construction for use in resolving legislative ambiguity, after the manner of the English Bill of Rights of 1689, or went further. The Supreme Court of Canada eventually

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83. Sometimes basic human liberties were protected, not by finding laws null and void for having intruded on such rights, but because they were *ultra vires*, or, in other words, because they were unconstitutional for having been enacted beyond the powers delegated to the dominion or a province by the *British North America Act of 1867*. See, *e.g.*, the opinion of RAND, J., in *Saumur* v. *Quebec*, [1953] 2 S.C.R. 299. Seven opinions were delivered on behalf of nine justices, and no single theory was agreeable to a majority. Even so, five voted in such a way as to uphold a free exercise of religion by Jehovah's Witnesses.

84. See, *e.g.*, the opinion of RAND, J., in *Toronto* v. *Forest Hill*, [1957] S.C.R. 569, in which a water treatment law was strictly construed so as not to allow artificial fluoridation of public drinking water, because the law in question was designed to authorize measures for making public drinking water potable, but did not contemplate use of public drinking water as a vehicle of preventative or curative medicine. Comparable results have not been achieved in the United States, even where the plaintiffs were able to prove by preponderance of the evidence, as specifically found by the trial judge, that fluoridation "may cause or may contribute to the cause of cancer, genetic damage, intolerant reactions, and chronic toxicity, including dental mottling in man", as in *Safe Water Foundation* v. *Houston*, 661 S.W. 2d 190 (Tex. App. 1983).

85. R.S.C. 1970, Appendix III.

held that, save where expressly declared effective in any case, if an act of Parliament contravened the *Canadian Bill of Rights of 1960*, such act of Parliament became inoperative, *i. e.*, in effect null and void, until suitably amended.[86]

Then came the *Constitution Act of 1982* which added an American-style bill of rights, an entrenched part of fundamental law, not subject to legislative repeal, called the *Canadian Charter of Rights and Freedoms*. The language of the Canadian Charter is modern in comparison to the wording of the Federal Bill of Rights adopted in the United States in 1791, but it is easy to see correspondences in the provisions of both documents.

The due process language in the 5th and 14th Amendments of the United States Constitution is echoed in Section 7 of the Canadian Charter which says, "Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof, except in accordance with the principles of fundamental justice".

The unenumerated rights language in the 9th Amendment is reflected somewhat in Section 26 of the *Constitution Act of 1982* which says, "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada".

Section 24 of the *Constitution Act of 1982* says, "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances". This provision may mean more, but it means at least that Canadian courts may now declare statutes unconstitutional for contravening rights set forth in the Charter, in keeping with Madison's comments in the First Congress of the United States when he proposed what became the first ten amendments to the American Constitution.[87]

Yet, because Canada was raised into nationhood on British ideas of parliamentary supremacy, it is understandable that Section 33 of the *Constitution Act of 1982* stipulates, "Parliament or the legislature of a province may expressly declare in an act of Parliament or of the legislature, as the case may be, that the act or a provision thereof shall operate notwithstanding a provision contained in section 2 or sections 7 to 15 of this Charter". Section 33 then imposes a maximum limit of five years upon any act which is enacted under the above-quoted "Notwithstanding Clause".

We see, then, as between the United States and Canada somewhat since 1960, but especially since 1982, something much closer to equivalence in the judicial systems in the two countries as constitutionally ordained guardians of civil liberty. It is not surprising that the supreme courts of the two adjacent confederacies have started to cite and quote each other with increasing frequency in the field of civil rights.

And this near equivalence developed at the era of history in which abortion, as a question of unenumerated rights, had become the most heated of all con-

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86. In *The Queen* v. *Drybones*, [1970] S.C.R. 282, a 6-3 majority held that Section 94 of the Federal Indian Act was inoperative by virtue of the *Canadian Bill of Rights of 1960*, insofar as the statute made it a public offense for an Indian to possess, manufacture, or become intoxicated from alcohol, but did not extend the same prohibitions and penalties to other classes of citizens.

87. 1 *Annals of Congress* 439-440 (U.S. House of Representatives, June 8, 1789), quoted in *supra*, note 18.

stitutional issues before the judiciary of the United States, and, needless to say, the problem has since spilled over into courts of Canada.

I. Canadian Decisions on Abortion

The most important Canadian decision before the adoption of the *Constitution Act of 1982* was *Morgantaler* v. *The Queen*,[88] which turned on the *Canadian Bill of Rights of 1960*. The case involved Section 251 of the *Criminal Code* which prohibited any abortion, regardless of the stage of pregnancy, subject to the exception that a procedure might be carried out at an accredited hospital where it was deemed necessary by a committee of physicians to prevent danger to the life or health of the mother.

It was there contended that the majority view in *Roe* v. *Wade* ought to be read into the *Canadian Bill of Rights of 1960*, and that, accordingly, Section 251 ought to be held inoperative. Laskin, C. J., held that such judicial activism would be contrary to the supremacy of Parliament in the fundamental law of Canada, and that Parliament enjoys inherent power to determine the scope and exceptions to any and all criminal liability.

After the *Constitution Act of 1982* was adopted, the case of *Borowski* v. *Attorney General*[89] was brought. The objective of the plaintiff was to secure a judicial declaration that, especially in view of the established facts on the nature of prenatal life, the exception to criminal liability imposed by Section 251 of the *Criminal Code* was unconstitutional, because it contravened Section 7 of the *Canadian Charter of Rights and Freedoms*. It was argued that a human fetus is a person under the Charter, and so is entitled to constitutional protection of his life. The exception to the criminal liability imposed by Section 251 of the *Criminal Code* was said to be constitutionally inadequate in according such protection, and, therefore, null and void.

Matheson, J., evidently believed that, if a human fetus were a person under the Charter, the plaintiff should prevail. He did not attempt, in any event, to evade this question of personhood, although he noted good authority for the rule that Parliament has a general power to create exceptions to criminal liability.

In the *Borowski* case, counsel for the plaintiff cited an impressive body of Canadian case law which acknowledges the standing of a human fetus as a legal person.[90] The court brushed these off, "because all such decisions involved foetuses subsequently born alive, or which, it was anticipated, unless left unprotected, would be born alive".[91] We need to reflect upon this statement.

In the nature of things, human courts cannot confirm proprietary or other hereditary rights in an infant *in ventre sa mere* unless the child is carried to

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88. [1976] 1 S.C.R. 616.

89. Already discussed as to important particulars in the text accompanying notes 54-55, *supra*.

90. These cases included *Montréal Tramways* v. *Léveillé* [1933] S.C.R. 456, in which the Supreme Court of Canada held that a human fetus is a legal person for purposes of the law of negligence under the *Civil Code of Lower Canada*. This case underlined corresponding errors of American courts, which William Prosser worked to correct, as appears in the text accompanying notes 59-62 *supra*.

91. *Borowski* v. *Attorney General*, *supra*, note 54.

term and born alive, for all those who have died can hold title to nothing in this world.

Human courts can grant money damages to grieving parents, but not to an infant *in ventre sa mere* who is not carried to term and born alive, because money damages cannot be granted to anyone who has died, as is true of any suit to redress wrongful death.

Human courts can grant injunctions and other prospective forms of judicial remedy to a guardian in behalf of an infant *in ventre sa mere*, say, to save the child's life, or to preserve the child's estate, but these writs, though they can be kept in place for purposes of imposing sanctions for contempt, cannot remain in force to the benefit of an infant *in ventre sa mere* not carried to term and born alive, because such writs cannot remain in force to the benefit of any human being who has died.

The limitations on every judicial writ granted in behalf of an infant *in ventre sa mere* are all founded on the fact that courts of justice are temporal institutions and confined in their enforceable reach to temporal reality. These limitations are founded on universal principles which apply to all humanity, permeate the whole field of judicial remedies, and do not at all derogate the premise that an infant *in ventre sa mere* is a legal person.

The *Borowski* case was dismissed, essentially because the court misunderstood the significance of the inherent limits on judicial writs, and, with expressed regret in light of the medical facts, supposed that there was no basis for holding that a human fetus is a legal person, holding that the legal definition of fetal rights belongs to Parliament.[92]

We come now to the second *Morgantaler* case, formally entitled, like the first *Morgantaler* case, *Morgantaler* v. *The Queen*,[93] with pretty much the same cast of characters and the same scenario. It was contended that Section 251 of the *Criminal Code* was null and void under Section 7 of the Canadian Charter, which was said to adopt the majority view of *Roe* v. *Wade*.

The easiest solution would have been to hold that the new Charter in the *Constitution Act of 1982* did not materially vary in its terms from the Canadian Bill of 1960, and that, therefore, in keeping with the deference to Parliament shown in the first *Morgantaler* case, Section 251 of the *Criminal Code* was a valid exercise of legislative authority.

Things did not go this way, however, because a 7-2 majority of the court, speaking in three separate opinions, subject to a dissent, adopted the view that values akin to those expressed by the majority in *Roe* v. *Wade* had become the fundamental law of Canada through the *Constitution Act of 1982*.

The flavor of "new thinking" was particularly manifest in the opinion of Dickson, C. J. The court, he said, "has been given new responsibilities" of ensuring

92. The appeal to the Supreme Court of Canada was dismissed as moot in light of the second *Morgentaler* case discussed in the text accompanying notes 93-96 hereof, as appears in *Borowski* v. *Attorney General*, [1989] 1 S.C.R. 342. It is a wonder that the second *Morgentaler* case and the *Borowski* case were not heard together, so as to assure a balanced presentation of arguments from counsel representing every important viewpoint. Surely, if a majority of the judges had really wanted a full and fair presentation of views, the two cases could have been consolidated.

93. [1988] 1 S.C.R. 30.

that legislative initiative conform to the "democratic values" of the Canadian Charter.[94]

This comment came as somewhat of a shock to many, since observers throughout the world believe that democratic values have been actively fostered in Canada both before and since the *British North America Act of 1867*.

Dickson went on to say that Section 251 of the *Criminal Code* must fall before the demands of Section 7 of the Canadian Charter, because, "Forcing a woman, by threat of a criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of person".[95]

This comment might make sense if a human fetus were not a living human reality, distinct from the mother.

Nothing was said about the legal standing and rights of an infant *in ventre sa mere* in the entire opinion, except where Dickson said, "[T]he Crown conceded that the Court is not called upon in this appeal to evaluate any claim to 'foetal rights' or to assess the meaning of 'the right to life'. I expressly refrain from so doing. In my view, it is unnecessary for the purpose of deciding this appeal to evaluate or assess 'foetal rights' as an independent constitutional value".[96]

Something is missing here, — an essential consideration which Blackmun dared not ignore in *Roe* v. *Wade*,[97] and which, left unaddressed, renders meaningless or incompetent anything said about a supposed constitutional immunity protecting a decision to terminate pregnancy.

Upon the heels of the second *Morgantaler* case followed a civil matter, the most dramatic abortion litigation anywhere in North America, entitled *Tremblay* v. *Daigle*.[98]

Tremblay and Daigle were lovers. By mutual agreement in anticipation of marriage, Daigle became pregnant by Tremblay. Daigle was in excellent health. The pregnancy was normal, reaching its eighteenth week, the fetus presumably quick.

The love affair fell apart. We do not know why. We do not know who, if either or both, was at fault. We do not know the motives of these parties. A few allegations were made and denied, but the record of the case is undeveloped as to these secondary questions.

Daigle decided that she wanted an abortion, which was not a criminal act because Parliament had not (and still has not) reacted to the second *Morgantaler* case. Tremblay went to the Superior Court of Québec, and secured an interlocutory injunction, for practical purposes, though not in legal form, a final judgment, forbidding Daigle from undergoing the procedure she desired.

Viens, J., made reference to the *Charte [québécoise] des droits et libertés de la personne*, a quasi-constitutional statute enacted in 1976 by the National Assembly of Québec, not unlike the *Canadian Bill of Rights of 1960*. The first article of the Charter says, "Tout être humain a droit à la vie", — every human being has a right to life. It is interesting that the word "person", which is a more

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94. *Id.*, p. 46.
95. *Id.*, pp. 56-57.
96. *Id.*, p. 74.
97. *Roe* v. *Wade*, note 52.
98. [1989] R.J.Q. 1735, 59 D.L.R. (4d) 609. The judgment of Viens, J., in the Superior Court of Québec is not reported but is described in the report of proceedings before the Québec Court of Appeal.

complicated legal term, is not used. Viens drew the inference that the National Assembly must have meant every human being when it said "every human being".

Viens then observed that a human fetus is alive, distinct, human, and existing, and that, therefore, a human fetus is both human and a being. Consequently, Viens held that a human fetus is a human being within the meaning of the Charte québécoise.

Daigle then went to the Québec Court of Appeal, which, by vote of three to two, expressed in five separate opinions, sustained the decree enjoining the desired abortion. The opinion of Bernier, J., is the most noteworthy here.

Bernier did not address the question of whether a human fetus has rights under the Québec Charter.

He distinguished the second *Morgenthaler* case as involving a criminal statute, found unconstitutional only because the procedure for securing an abortion not subject to prosecution was too burdensome, whereas this case touched upon private rights in civil litigation.[99]

And he held, in keeping with the law governing the conduct of private persons under the *Civil Code of Québec*,[100] that an unborn child is a living human reality with a civil status which cannot be extinguished without adequate cause due to exceptional circumstances, either by the mother or by anybody else, over the protest, on serious and reasonable grounds, of a person who, like the father, has a legitimate concern or interest in the birth of the child.

Bernier held that the record disclosed no adequate cause for terminating the pregnancy in the facts of the case, since the fetus was normal, the pregnancy was voluntary and did not threaten the life or health of the mother, nor were there any facts on the record which derogated the standing of the father to seek judicial aid or indicated anything other than serious and reasonable grounds on his part.

The case was taken on an emergency basis to the Supreme Court of Canada, and is there reported as *Daigle* v. *Tremblay*.[101]

During oral argument, counsel disclosed that Daigle had gotten an abortion in contempt of the injunction. It is difficult to understand why this fact did not end the matter then and there, for it appears to be a universal rule that a litigant defying justice cannot demand a remedy.[102] On the day of oral argument, the court

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99. Good commentary on the distinction between criminal and civil proceedings, as it pertains to the *Daigle* case, discussed in the text accompanying notes 98-109 hereof, is found in an article by J. RHÉAUME, "Daigle : un oubli des questions de droit civil et constitutionnel?", (1990) 21 *R.G.D.* 151.

100. In *Montréal Tramways* v. *Léveillé*, *supra*, note 90, pp. 460-461, the civil law tradition of protecting prenatal life, especially in private litigation, was stressed with quotation and translation of, as well as learned comment upon relevant passages of *Justinian's Digest*, which is why Blackstone said in 1 *Commentaries*, *supra*, note 69, that the "civil law agrees" with the common law in recognizing the status of an infant *in ventre sa mere* as a legal person.

101. [1989] 2 S.C.R. 530.

102. In French law, the rule is stated, "Nul prendra avantage de son tort". In modern legal French, the rule is stated, "Nul ne peut invoquer sa propre turpitude". In English, as a rule of equity practice, as with an application for an injunction, or in proceedings to dissolve an injunction, including an appeal for either such purpose, the rule is rendered, "He who seeks equity must have clean hands". J. POMEROY in his classic treatise, *Equity Jurisprudence*, vol. 1, Brancroft Whitney & Co., 1905, p. 657, commented regarding this principle, "[W]henever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience or good faith or other equitable principle in his prior conduct, then the doors of the court

unanimously ignored the contempt, reversed the lower tribunals, and vacated the injunction.

The *per curiam* opinion following is useful evidence of the mentality of our society at this time in history.

The analysis of Viens in the Superior Court on the Québec Charter was rejected as a "linguistic argument". If the question were as simple as Viens characterized it, said the Supreme Court of Canada, the matter would not have had to be litigated. And, a "purely linguistic argument suffers of the same flaw as a purely scientific argument : it attempts to settle a legal debate by non-legal means, in this case by resorting to the purported 'dictionary' meaning of the term 'human being' ".[103] We must meditate on the significance of this extraordinary remark.

For centuries, lawyers have obeyed the rule of the common law and the civil law that the "fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made by signs the most natural and probable", then continued, "Words are generally to be understood in the usual and best known signification",[104] for which purpose a dictionary has always been the regular and normal standard of meaning.

And it is more accurate to say that the case was litigated, precisely because the meaning of words was plain.

Focus was then given to the analysis of the civil law by Bernier and his colleagues in the Québec Court of Appeal.

Several provisions in the *Civil Code of Québec* were brought forward. As an illustration, Article 338 said, "Les personnes auxquelles on donne des curateurs sont [...] les enfants conçus mais qui ne sont pas encore nés", — The persons to whom curators are given are [...] children conceived but not yet born.[105]

In the face of this article and others like it, expressly and unequivocally referring to unborn children as "persons" in the eyes of the civil law, the Supreme Court of Canada said, "In our view, however, these articles simply provide a mechanism whereby the interests described elsewhere in the Code can be protected : they do not accord the foetus any additional rights or interests".[106]

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will be shut against him *in limine*, and the court will refuse to interfere in his behalf, to acknowledge his right, or to award him a remedy". It is not correct to say that the abortion rendered the *Daigle* case moot, because, if the injunction had been affirmed, contempt proceedings to vindicate the authority of the courts in Québec could have been brought.

103. [1989] 2 S.C.R., pp. 553-554.

104. 1 *Blackstone's Commentaries*, pp. 59-60. Along with this rule is its twin, restated in the same place, "Terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science". The common law drew these rules from the civil law. If the term "person" had been used in the Québec Charter, Viens J. would have been obliged to observe this latter rule.

105. The *Civil Code of Québec* has since been revised. The old Article 338 has been superseded by several new provisions, including what now appears as Article 192, which says that the father and mother are tutors "de leur enfant conçu qui n'est pas encore né, et ils sont chargés d'agir pour lui dans tous les cas où son intérêt patrimonial l'exige" — of their child conconceived but yet unborn, and are responsible for acting on his behalf in all cases where his patrimonial interests require it.

106. [1989] 2 S.C.R. at 557.

Elsewhere in the opinion, attention was given to judicial language from a more distinguished age, interpreting the *Civil Code of Québec* : it was then said that an unborn child "is deemed to have civil rights".[107] This language, said the Supreme Court of Canada, "admits that a foetus does not exist as a juridical person".[108]

It is impossible to debate against blatant denial of the obvious. If such commentary does not refute itself in the eyes of a candid world, little can be done but wait until the obvious becomes even clearer than it already is. The only consolation, if it may be called a consolation, is that this kind of judicial behavior appears earlier to have occurred south of the 49th parallel.[109]

J. A COMING REVERSAL IN THE UNITED STATES

During the 1980's while the *Borowski*, second *Morgantaler*, and *Daigle* cases were litigated in Canada, the Attorney General of the United States urged on no less than five occasions the outright reversal of *Roe* v. *Wade* on grounds that it had been wrongly decided, and could not be saved on any proper legal basis.

Toward the end of the Presidency of George Bush, the United States Supreme Court granted a writ of *certiorari* to hear *Planned Parenthood* v. *Casey*.[110]

At issue was a Pennsylvania statute which required, subject to certain exceptions to accommodate medical emergency, that a woman seeking an abortion be given certain information, including the availability of agencies willing to assist her in carrying her child to term and an illustrated description of the stages and facts of prenatal life, — that she wait at least 24 hours before undergoing the procedure, — that, if married, she provide her husband with notice of her intent before undergoing the procedure, — and that, if a minor child, she either obtain the informed consent of her parents or judicial permission before undergoing the procedure.

The votes on the court splintered in several blocks, with the result that the statute was upheld, except for the provision on spousal notice, as to which there were still four votes to sustain it.

Only five votes could be found to uphold *Roe* v. *Wade*.

There were three opinions for the five-member majority. The "opinion of the court", actually representing only three justices, was delivered by O'Conner, J., joined by Kennedy and Souter, JJ. Theirs was a discourse on the importance of living by precedent, not to be overruled except for weighty cause. They dared not

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107. LAMONT, J., in *Montréal Tramways* v. *Léveillé*, *supra*, note 90.

108. [1989] 2 S.C.R., p. 562. This obtuse misrepresentation of the *Montréal Tramways* case, and the civil law of modern Québec and ancient Rome, is dissected and exposed with unanswerable precision by P.A. CRÉPEAU, "L'affaire *Daigle* et la Cour suprême du Canada", in *Mélanges Germain Brière*, Wilson & Lafleur Ltée, 1993, pp. 197-215.

109. In *Dred Scott* v. *Sandford*, 19 Howard 391, p. 410 (U.S. 1857), Taney, C. J., stated that the authors of the Declaration of American Independence did not intend to include the black race as among those entitled to enjoy "life, liberty, and pursuit of happiness". The author of this Declaration was Thomas Jefferson, who, as the whole court knew very well, was the father of the Virginia abolition movement, advised by Benjamin Franklin, father of the Pennsylvania abolition movement.

110. 505 U.S. — (1992).

say that *Roe* v. *Wade* had been correctly decided, for between the lines lurks fear that it had been wrongly decided.

O'Conner, Kennedy, and Souter fashioned a new formula that no State may impose an "undue burden" upon the decision of a woman to terminate pregnancy at any point before the fetus becomes viable. The trimester theory was thrown out.

The question in future years will be what an undue burden is. We know only that a law imposes an undue burden if it places a "substantial obstacle" in the way of a woman who has decided to terminate her pregnancy. Otherwise, nobody knows what this standard means. It may mean more and more or less and less.

Why is viability the critical point? Nobody knows the answer, because Blackmun never said more on the question than that a viable fetus is a fetus capable of existing apart from the mother, which is nothing but a truism.

Blackmun and Stevens, JJ., wrote separate concurring opinions. Blackmun's writing was the writing of an 83 year-old man nearing the end of his life, lamenting as he sensed a coming end for the monument of his career, singing in his swan song that even the 24-hour waiting period was invalid. For reasons he did not articulate, he thought a human fetus is so insignificant that neither what he had called the "well known facts of fetal development", nor possible alternatives to abortion need be considered by a woman contemplating termination of pregnancy.

A hard-hitting dissent was delivered by Rehnquist, C. J., joined by White, Scalia, and Thomas, JJ.

A combative dissent was delivered by Scalia, J., joined by Rehnquist, C. J., and White and Thomas, JJ.

The theme running throughout all of the opinions was the moral authority of the United States Supreme Court, which had been damaged by *Roe* v. *Wade*. The question was how to save and prevent dissipation of this moral authority : by softening and moderating the old case, yet upholding it in outward form? — or by admitting and correcting the mistake, and doing it right away?

K. Some Notes for the Future

At some point in coming years the question of terminating pregnancy as an alleged constitutional right will again come before the judicial systems of the United States and Canada. When the ripe moment arrives :

— Let nobody say that there are unenumerated rights under the fundamental law of the United States and Canada. There are such rights, and they are exceedingly important, but they are founded upon legal traditions and natural law, which, in cases of doubt, are the only substitutes for subjective feelings and opinions of the judges.

— A human fetus most certainly is a legal person. And it is not difficult, indeed it is easy to discover this legal truth on an objective basis in legal tradition and natural law. There should be an end to the feigned mystification and theatrical bewilderment over this point.

— We must never again use any provision of fundamental law as a pretext for *avant garde* judicial legislation, which is a potent cause of deterioration in the moral authority of the bench.

— High courts lose and deserve to lose moral authority when they do things like citing a learned treatise as if it suggested that a human fetus is not a legal

person, whereas the treatise cited, on the basis of eminent authority, says that a human fetus is a legal person, — and like claiming an express provision of civil law referring to a "child conceived but not born" as a "person" does not mean that a human fetus is a legal person.

— The way high courts can regain moral authority thus lost is to correct such awful mistakes, and to restore sound principles which exist apart from what this or that judge may wish or believe.

— And what are these sound principles? We must be guided by constitutional language, by legal tradition and history which define the words and resolve the ambiguities, and by natural law, especially as it has been collected and taught in classical sources, yet including also inferences which may be drawn from accumulated learning, both ancient and modern.

— This fabulous treasure supplies an ample basis for objective and fair-minded constitutional jurisprudence, including adequate flexibility to deal sensitively and compassionately with new problems as they arise, without any need for political adventurism on the bench.

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