WINNIPEG CHILD AND FAMILY SERVICES (NORTHWEST AREA) v. *D.F.G.*: THE IMPOSSIBILITY OF FETAL RIGHTS AND THE OBLIGATIONS OF JUDICIAL GOVERNANCE

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A human being has rights only if he is other than *a* human being. And if he is to be other than a human being, he must in addition become *an* other human being. Then 'the others' can treat him as their fellow human being. What makes human beings alike is the fact that every human being carries within him the figure of the other. The likeness that they have in common follows from the difference of each from each.

Thou shalt not kill thy fellow human being: To kill a human being is not to kill an animal of the species Homo sapiens, but to kill the human community present in him....

J.-F. Lyotard[1]

[T]he unborn child [is] a part of the mother.

Holmes, J.[2]

I. INTRODUCTION

Since the U.S. Supreme Court decision in *Roe* v. *Wade*,[3] the issue of fetal rights has been joined, by lawyers and philosophers, judges and legislators, throughout America, with an unprecedented vigour and intensity.[4] Prior to *Roe*,[5] it was certain — as there

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1 "The Other's Rights," trans. C. Miller & R. Smith in S. Shute & S. Hurley, eds., *On Human Rights* (New York: Basic Books, 1993) 136.

2 *Dietrich* v. *Northampton* 138 Mass. 14 at 17 (1884). The constitutional status of the fetus has been litigated in Canada too. However, *D.F.G.* is the first case in which the Supreme Court has engaged the full force of arguments about the legal status of the fetus — and about the wisdom of the law's ancient view regarding the fetus — unhampered by matters constitutional and criminal. *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, remains the *locus classicus* of Canadian constitutional treatment of the issue.

3 410 U.S. 113 (1973) [hereinafter *Roe*] in which, *inter alia*, the Court held that because a fetus is not a person under the United States Constitution, a woman has a constitutionally protected right to abortion until the fetus is viable.

4 For a sense of the range of the legal and philosophic literature produced in the 1980s, see: J. Buchanan, *Fetal Rights and Fetal Protection: A Bibliography* (Monticello, Ill.: Vance Bibliographies, 1991). For commentary, see: R.M. Kaufman, "Legal Recognition of Independent Fetal Rights: The Trend Towards Criminalizing Prenatal Maternal Conduct" (1997) 17 Children's Legal Rights J. 20; J. Epstein, "The Pregnant Imagination, Fetal Rights, and Women's Bodies: A Historical Inquiry" (1995) 7 Yale J. L. & the Humanities 139; T. Dobson & K.K. Eby, "Criminal Liability for Substance Abuse During Pregnancy: The Controversy of Maternal v. Fetal Rights"

put by the Court — that whatever were the rights of the fetus, at law, they were "narrowly defined ... [and] contingent on live birth."[6] However, the Court's adoption of the trimester division to define "viability" as the moment at which a fetus becomes a being separate and separable from its mother and at which, in consequence, state interest is properly compelled, did not have long to beg the claim that legal status and rights, therefore, attach to the fetus at the technologically receding stage of viability.[7] Not surprisingly, then, the debate about fetal rights, which has since ensued in America, has served as a locus, and oftentimes as a cover, for an on-going and divisive contest over abortion.

This debate is characterized, on the side of those who would defend reproductive autonomy, by consequentialist arguments concerning state paternalism[8] and, on the side of those who would defend the fetus, by moralisms about personhood and *in terrorem* arguments concerning the future state of moral affairs if women continue to be left to their own devices.[9] What the debate, seldom displays, is inquiry of principle regarding the law's ancient view with respect to the status of the fetus. Instead, commentators either defend law in order to prohibit any compromise of women's access to abortion, or compromise the law in order to raise a fetal right to life with which to challenge abortion rights. Which is to say, because their attitudes to the law are strategic and

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(1992) 36 St. Louis U.L.J. 655; B. Bennett, "Pregnant Women and the Duty to Rescue: A Feminist Response to the Fetal Rights Debate" (1991) 9 Law in Context 70; D.J. Krauss, "Regulating Women's Bodies: The Adverse Effect of Fetal Rights Theory on Childbirth Decisions and Women of Color" (1991) 26 Harv. C.R.-C.L. L. Rev. 523; "Symposium: Criminal Liability for Fetal Endangerment" (1990) 9 Criminal Justice Ethics; J. Gallagher, "Prenatal Invasions & Interventions: What's Wrong With Fetal Rights?" (1987) 10 Harv. Women's L.J. 9; and D.E. Johnsen, "The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection" (1986) 95 Yale L.J. 599. For a taste of the legislative proposals championed under the banner of fetal rights, see Krauss, *ibid.* 523-24. For a sample of the specialized literature which has been forthcoming, see S.U. Samuels, *Fetal Rights, Women's Rights: Gender Equality in the Workplace* (Madison: University of Wisconsin Press, 1995).

5 In the U.S., there is but one reported decision, prior to *Wade*, in which the fetus is accorded any legal status. See *Bonbrest* v. *Katz*, 65 F. Supp. 138 (D.D.C. 1946).

6 *Roe*, *supra* note 3 at 161.

7 For the view that the entire fetal rights debate is a reaction to the reproductive autonomy signalled by *Roe*, see Gallagher; Epstein; Bennett; Dobson & Eby, *supra* note 4. For the view — about which more elsewhere in this comment — that the controversy over fetal rights is "an outgrowth of deeper societal problems that endanger both women and their offspring" and not just of the abortion debate, see Krauss, *supra* note 4 at 534. That *Roe*'s concession of legal principle to medical technology has put "the *Roe* framework on a collision course with itself" is now certain. See *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 at 458 (1982) (per Justice O'Connor: "As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back towards conception").

8 See, especially, Johnsen, *supra* note 4, whose arguments unhappily attracted the approval of Madame Justice McLachlin in her judgment for the majority in *Winnipeg Child & Family Services (Northwest Area)* v. *D.F.G.*, [1997] S.C.J. No. 96 (QL) [hereinafter *D.F.G.*].

9 See for example S.W. Calhoun, "Valuing Intrauterine Life" (1997) 8 Regent U.L. Rev. 69.

reference extra-legal ends, neither side to the debate engages the law on its own terms or tests the law's view of the matter in terms of distinctly legal principle.[10]

With *D.F.G.*, the question of fetal rights has, at last, emigrated to Canada. For there, in the unhappy circumstances of a chemically dependent, pregnant woman committed, at first instance,[11] to involuntary confinement and treatment, at the state's behest, to protect her fetus, the facts commanded that the Court assess the law's wisdom in defining as its domain the social and political space bounded by birth and death.[12] Unfortunately, the Court failed to hear or heed the facts. Rather than engaging the law as principle, in upholding the Manitoba Court of Appeal's decision setting aside the order, the Court's majority characterized the question of ascribing rights to the fetus as beyond its competence and, thereupon, referred the matter to legislative determination.[13] As put by Justice McLachlin, "an order detaining a pregnant woman for the purpose of protecting her fetus would require changes to the law which cannot properly be made by the courts and should be left to the legislature," because "the legislature is in a much better position to weigh the competing interests and arrive at a solution that is principled and minimally intrusive to pregnant women."[14]

It will be my purpose in this comment to convince that this reasoning will not do. I shall argue that, since on any at all adequate understanding of the political morality which founds and informs our law, fetal rights are nonsensical and impossible, the Supreme Court ought "properly" to have disposed of the matter before it by articulating the grounds of principle which compel that birth and death set the boundaries of law. I shall also argue that, by failing to defend the law's integrity and by, instead, consigning the matter to the vagaries of majoritarian politics, the Court both abrogated and renounced its obligation to govern.

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[10] This characterization of the matter is, of course, broadbrush, and admits some major exceptions. Particularly significant in the latter regard is R.M. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996) c. 1-6; and R.M. Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (New York: Alfred A. Knopf, 1993).

[11] The August 1996 Manitoba Queen's Bench order was stayed two days later, and was subsequently set aside by the Manitoba Court of Appeal. For the judgments at first instance and on appeal, see: [1996] 10 W.W.R. 95 and 111 respectively. Before the Supreme Court on appeal, was the integrity of the Manitoba Court of Appeal's views that the *parens patriae* jurisdiction, under which the order was made, did not reach the fetus and that extending the law in that regard was a matter for the legislature and not for the courts.

[12] Maternal pre-natal conduct generally, and substance abuse by pregnant women specifically, is a standard *mise-en-scene* of the fetal rights debate. See for instance: Dobson & Eby and Krauss, *supra* note 4; and B. Shelley, "Maternal Substance Abuse: The Next Step in the Protection of Fetal Rights" (1988) 92 Dickinson L. Rev. 691.

[13] The judgment of Lamer C.J. and McLachlin, La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ. was delivered by McLachlin J., with Sopinka and Major JJ. dissenting. The dissent judgment delivered by Major J. not only allowed the appeal, but in so doing, grandly redesigned the law's moral typography.

[14] *D.F.G.*, *supra* note 8 at paras. 4, 56.

The first part of this comment will situate and canvass the arguments which defend fetal rights with a view to establishing that, whatever else may be said of them, such arguments can properly have no legal consequence. The second part will criticize the majority and minority judgments in *D.F.G.* as grounded on woefully inadequate views of judicial governance and obligation, and will sketch a principled defence of the law's view of the fetus. As is the case in *D.F.G.*, slippery slope arguments are often a predominant feature of discussions, moral as well as legal, of fetal rights. In the third part, I will explore the place of consequentialist arguments in legal reasoning, and offer a view of the grounds of principle on which alone pregnancy might be regulated. A concluding part will offer reflections on what we might learn about judicial governance and appointment from the behaviour of our highest judges in not-so-very hard cases like *D.F.G.*

II. FETAL RIGHTS

Arguments for the rights of the fetus intend to establish that the fetus is the kind of being which is properly the object of moral consideration and which ought, therefore, to count in our political and social arrangements.[15] Various criteria have been proffered in defence of this calculation to moral status. Warren, for instance, identifies life, sentience, genetic humanity, and personhood as the most common.[16] Though each of these no doubt carries the burden in numerous arguments for fetal rights, it seems to me that the arguments are better classified according to their point of departure. Under this view, which I will deploy here, arguments for the moral status of the fetus may be segregated into two kinds, namely, those which proceed from the identification of some physiological event, and those which proceed from philosophical conviction.

Arguments of the first sort seek to identify some "person-gaining point" at which the fetus achieves moral status and from which it deserves our moral consideration.[17] Fertilization, implantation, quickening, viability, and the emergence of brain waves are the usual physiological nominees for this point that matters morally.[18] But whichever is the point on which they hinge, arguments from physiological fact suffer from two very significant frailties. The first is confusion. Clearly, what is finally carrying the burden in such arguments is not the physiological characteristic, but some undisclosed criterion of which the stated characteristic is impliedly indicative. Most arguments

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[15] I will later draw a distinction between moral considerability and moral significance, which distinction has everything to do with what I will tender as the law's proper response to the unborn and the dead. For now, it is sufficient to note that the failure to make this distinction renders frail indeed many arguments for the moral status of the fetus.

[16] See M.A. Warren, "Abortion" in P. Singer, ed., *A Companion to Ethics* (Oxford: Blackwell, 1991) 303 at 308.

[17] See W. Cooney, "The Fallacy of All Person-denying Arguments for Abortion" (1991) 8:2 J. Applied Phil. 161.

[18] For a discussion of these nominations, see B. Steinbock, *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses* (New York: Oxford University Press, 1992) at 46-51.

implicate sentience or life itself in this regard, but in that event, they fail to compel because their real force is never articulated.[19]

That, without more, nothing of moral significance follows from physiological fact is a second, this time fatal, difficulty with any argument from physiology. Simply,[20] "because the concept of a 'person' is a moral status concept, the issue of whether the fetus is a person is not a scientific or a medical question to be settled ... by appeal to ontogeny or embryology."[21] While this is not to say that the properties discovered by science might never be eligible for moral consideration, it is to say that, absent "a theory that bridges the gap between life and morality," scientific fact is empty morally.[22] This is so, because "the lack of consensus on the status of the unborn stems not from our inability to ascertain a set of physiological facts, but from the difficulties we encounter in attempting to define personhood."[23] What, of course, definition requires is the specification of characteristics which are themselves defensibly relevant morally.[24]

So arguments from physiological event are not acceptable. Not only do they hide and fail to defend the real grounds for their appeal, they do so on the mistaken view that morality is synonymous with fact. Much more interesting and, for present purposes, instructive, are the arguments which arise from philosophic conviction. There are several. For instance, some argue that the concept of rights cannot possibly properly apply to the fetus;[25] and others that there are grounds separate and apart from personhood which govern our relations to the fetus.[26] Since, however, rights arguments either reduce to verbal legislation or, else, finally depend upon some conception of personhood, and because the arguments which arise from grounds other than personhood are marginal to the literature, I will confine myself to those arguments which are candidly directed to the issue of the personhood of the fetus.

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19 This is not to concede that they would compel even if their premises were articulated and defended. For a telling argument against the life and sentience arguments, see Warren, *supra* note 16 at 308.

20 The same conditions apply with respect to the matter of distinguishing between the living and the dead at the other end of law's domain: death too is a moral category. See for instance A. Browne, "Defining Death" (1997) 4:2 J. Applied Phil. 155; Steinbock, *supra* note 18 at 24-26; and J.J. Thomson, *The Realm of Rights* (Cambridge: Harvard University Press, 1990) at 292.

21 See D. Mathieu, *Preventing Prenatal Harm: Should the State Intervene?* 2d ed. (Washington, D.C.: Georgetown University Press, 1996) at 24.

22 See N. Agar, "Biocentrism and the Concept of Life" (1997) 108 Ethics 147 at 154.

23 See R. Larmer, "Abortion, Personhood and the Potential for Consciousness" (1995) 12:3 J. Applied Phil. 241.

24 In his dissent in *D.F.G.*, Major J. argues physiology in rejecting the significance of birth at law. I will explore this remarkable outcome shortly.

25 See for instance J. Feinberg, "The Rights of Animals and Unborn Generations" in W.T. Blackstone, ed., *Philosophy and Environmental Crisis* (Athens: University of Georgia Press, 1974) 43. Reprinted in T.A. Mappes & J.S. Zembaty, eds., *Social Ethics: Morality and Social Policy*, 3d ed. (New York: McGraw-Hill, 1987) 484.

26 For which, see for example D. Boonin-Vail, "Against the Golden Rule Against Abortion" (1997) 14:2 J. Applied Phil. 187.

Over the past twenty-five years, a tremendous amount of philosophic ink has been devoted to the notion of the fetus-as-person.[27] Indeed, along with consequentialist arguments (which will concern us in part three) and arguments from moral rights, argument about the personhood of the fetus has pride of place in the post-*Roe* contest over abortion.[28] This is not surprising. Whether the fetus is, or is not, a person, has of course everything to do with the moral consideration it is owed. For if the fetus is part of moral community, then arguments that it is owed rights, including especially the right to life, at least become accessible.[29] On the other hand, if the fetus is not a person, and is not, in consequence, part of moral community, argument for rights of any sort are simply forbidden.[30]

Four positions[31] are available with respect to the fetus-as-person. One can propose — generally on the grounds of genetic humanity[32] — that the fetus is a person throughout its development. One can propose — generally by referencing viability, sentience, or brain waves — that the fetus achieves personhood, at some point in its development. One can propose that, because the fetus is not a person, it lacks moral standing completely. Finally, one can propose that, though the fetus is not a person, it yet possesses, on some other ground or grounds, at least some moral standing. In so far as, the first (completely) and the second (generally, though not necessarily) positions depend upon physiology and, in so doing, concede morality to science, they are unacceptable for reasons already canvassed. For opponents of reproductive rights, this leaves open a version of the second position which does not depend upon ontogeny, and a version of the fourth position robust enough to forbid abortion without raising a right to life. Proponents, on the other hand, can adopt either the third position, or a version of the fourth which does not significantly diminish abortion rights.[33] Whether pursued by opponents or proponents, the second position, and the third position, as it

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27 For a sample, see: J. Feinberg, ed., *The Problem of Abortion*, 2d ed. (Belmont: Wadsworth Publishing, 1984). Feinberg's own essay on "Abortion" has quickly become the locus of much of this debate. See: Feinberg, "Abortion" in T. Regan, ed., *Matters of Life and Death: New Introductory Essays in Moral Philosophy*, 2d ed. (New York: Random House, 1986) 259. Reprinted as Feinberg & Levenbook, "Abortion," in T. Regan, ed., *Matters of Life and Death*, 3d ed., (New York: McGraw-Hill, 1993). For commentary on Feinberg, see H. Hudson, "Feinberg on the Criterion of Moral Personhood" (1996) 13:3 J. Applied Phil. 311. For an analysis of the cultural production of the fetus-as-person as "a new form and practice of life" see especially: V. Hartouni, *Cultural Conceptions: On Reproductive Technologies and the Remaking of Life* (Minneapolis: University of Minnesota Press, 1997) c. 2.

28 See Warren, *supra* note 16 at 303 (identifying the "three lines of argument" which have occupied the abortion debate).

29 Though, as we will see in a moment, that the fetus is a person is not determinative of the question of rights.

30 But this does not necessarily mean that it is owed no consideration. Elsewhere in this comment, I will tender a non-rights argument for the moral considerability of the fetus. Also see: Cooney, *supra* note 17.

31 For a summary of these arguments, see Mathieu, *supra* note 21 at 24-26.

32 See Warren, *supra* note 16.

33 As we shall see, Ronald Dworkin's argument to allow state regulation of late pregnancy appears to depend on just this latter position. I will adopt, though amend, Dworkin's view to propose that, in certain, very narrow circumstances, state intervention in pregnancy may be justified.

is pursued by proponents, depend upon the articulation of those characteristics the possession of which constitute moral personhood.

I want now to propose that this debate, this contest over which characteristics signal moral personhood and membership in moral community, can properly have no impact on the law, either generally or as it regards the fetus, and that, whatever its status in moral theory,[34] the personality of fetus is a matter beyond the reach of law. I will then proceed, in Part 2, to defend the law's view on the legal significance of birth, and to criticize the Supreme Court's lamentable effort with respect to the matter in *D.F.G.*

The burden of arguments about the status of the fetus in moral theory is to distinguish between those beings which are persons and those which are not.[35] There are, in my view, several compelling reasons why reasoning of that sort ought never become the law's reasoning. Judith Jarvis Thomson has famously claimed that the personhood of the fetus is not determinative morally, because "the right to life consists not in the right not to be killed, but rather in the right not to be killed unjustly"[36] and, more specifically, because a right to life cannot include entitlement to whatever is necessary to life and, especially, not to the use of another person's body. Thomson's argument about the moral underinclusiveness of personhood is vitally important. For it signals the essential contestability of all argument at this level of debate.[37] Now, in as much as argument of that sort oftentimes — and, indeed, perhaps necessarily — becomes indistinguishable from belief generally, and from quasi-religious belief in particular, then moral reasoning becomes displaced by declarations of commitment, the grounds for which are clearly individual and most often inaccessible.[38]

For just this reason, Dworkin concludes that the view that the fetus has rights is "scarcely comprehensible."[39] He goes on to characterize the debate about fetal personhood and rights as, instead, expressing a world-view that all life is sacred[40] and,

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[34] I will, however, later suggest that the law's view of the fetus happens also to be the best view morally on grounds that that view best accords with a host of our considered moral judgments.

[35] I should caution, as used here, the term "being" means only existent.

[36] See J.J. Thomson, "In Defense of Abortion" (1971) 1:1 Phil. & Pub. Aff. 47 at 48, 57. For a more recent redaction of this argument, see *supra* note 20 at 288-93 (arguing that even supposing that a fetus has "a claim against the woman that she not end the pregnancy, it does not follow that she may not end the pregnancy").

[37] For the notion of essentially contested ideas, see: W. Connolly, *The Terms of Political Discourse*, 2d ed. (Princeton: Princeton University Press, 1983) c. 1.

[38] See G.H. Paske, "The Life Principle: a (metaethical) Rejection" (1989) 6:2 J. Applied Phil. 219 at 225. (Contrasting moral claims which are "rationally compelling" and "hence universal for all rational beings" to "religious claims [which] ultimately appeal to a faith or a commitment which is not rationally compelling"). See also K. Greenawalt, *Private Consciences and Public Reasons* (Oxford: Oxford University Press, 1995) at 5 which contrasts accessible and inaccessible grounds of belief.

[39] See *Life's Dominion*, *supra* note 10 at 20. For commentary, see: D. Marquis, "Life, Death, and Dworkin" (1996) 22:6 Phil. & Soc. Crit. 127.

[40] *Life's Dominion*, *ibid.* at 11. Accord Cooney, *supra* note 18. In *Freedom's Law*, Dworkin offers a "secular version" of the view that "all life is sacred": see *supra* note 10 at 140-42. I will have cause to engage his secular version later when I construct a view of the proper grounds for regulation of pregnancy.

then, to argue that any law incorporating such a view would necessarily also be incorporating a particular religious position.[41] But not only does Dworkin accuse the debate about fetal rights of misconstruing its issue in moral terms, in so far as the intent of the debate is to impact the law, he condemns it as well of committing a fundamental category mistake. In discussing the American abortion debate, he argues that "the key question ... is not a metaphysical question about the concept of personhood or a theological question about whether a fetus has a soul, but a legal question about the correct interpretation" of the law.[42]

There are two very good reasons, in addition to the general tendency of moral theory to degrade into quasi-religious belief, for this disjunction between philosophy and law. First of all, law is not ontology. It does not depend upon or incorporate any "particular conception of the natural individual or of the self."[43] Just the contrary. Legal personality is a political achievement, and not at all a recognition of an already existing pre-political datum. This is so because, rather than constituting "an ontological description of the self or a particular conception of agency,"[44] "rights ascribe a legal persona to the individual that serves as a protective shield for her concrete unique identity, particular motives, and personal choices, but do not prescribe these."[45] To the extent, then, that talk about fetal rights has legal intentions, it is simply misplaced. Unlike that talk, law talk is not about disclosing the nature of existence, but is instead about permitting, whatever the philosopher's or theologian's view of the matter, those who do exist to exist in whichever fashion their inclinations lead.[46]

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41 *Life's Dominion*, *ibid.* especially c. 2.

42 See: *Freedom's Law*, *supra* note 10 at 46, which passage proceeds as follows:

> That is a complex and difficult question, and it does involve moral issues. But it is nevertheless different from the metaphysical question philosophers and theologians debate; it is entirely consistent to think, for example, that a fetus is just as much a human being as an adult, or that it has a soul from the moment of conception, and yet that the [law], on the best interpretation, does not grant a fetus rights competitive with the rights it grants other people.

43 See: J.L. Cohen, "Rethinking Privacy: Autonomy, Identity, and the Abortion Controversy" in J. Weintraub & K. Kumar, eds., *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (Chicago: University of Chicago Press, 1997) 133 at 149. Incidentally, this is why many feminist and all communitarian critiques of the legal self are so off the mark: they mistake the law for philosophy. For rebuttals of such views, see: L.C. McClain, "'Atomistic Man' Revisited: Liberalism, Connection, and Feminist Jurisprudence" (1992) 65 S. Calif. L. Rev. 1171; and Waldron's essays in c. 1, 6 in J. Waldron, ed., *Nonsense Upon Stilts: Bentham, Burke, and Marx on the Rights of Man* (London: Metheun, 1987). In her majority judgment, Justice McLachlin at one point recognizes this disjunction — "the issue," she says, "is not one of biological status, nor indeed spiritual status, but of legal status" — but, as we shall soon see, this insight did not direct her to inquire why this should be so (*supra* note 8 at para. 7).

44 Cohen, *ibid.* at 148.

45 *Ibid.* at 150.

46 That the law is not ontology does not mean — indeed, cannot mean — that it departs from no view of the human situation. But the view from which it departs, as we will discover in exploring the principle of live birth, is more phenomenological than ontological, more commonsensical than moral. For a view of "commonsense personhood" — from which, incidentally, I dissent and which I am not nominating as the law's view — see: Feinberg, "Abortion" *supra* note 27.

Secondly, while moral theory is quite properly concerned with the whole of what persons are morally required to, what they should morally be permitted to do, and what they should be morally praised for doing,[47] the law's concern — voluntary obligations and issues of distributive justice aside — is what people should legally be permitted to do. So viewed, the disjunction between philosophy and law means, in the present context, that while there may, or may not,[48] be compelling reasons for concluding that a pregnant woman has a moral obligation to act in the best interests of her future child, whether the law should recognize such an obligation turns on grounds entirely different and distinctively legal.[49]

What, then, may we conclude concerning the host of arguments from morality about the personhood and rights of the fetus? We may, I think, conclude, that, from the moral point of view, they do not make much sense — none, in the case of those which depart from physiology, and increasingly little liminally, in the case of those which depart from philosophic conviction — and that, from the legal point of view, they do not, and cannot, make any difference.

III. JUDICIAL GOVERNANCE

We come, then, to the law. In this part, I wish first briefly to sketch the view of judicial obligation which attends the rule of law. I will next evaluate the execution of those obligations by both the minority and the majority in *D.F.G.*. Finally, I will offer an argument which defends the law of birth and death, an argument, I should right away indicate, entirely absent in the Supreme Court's ruminations on the matter.

A. BURDENED WITH LAW

One may conceive of the rule of law in either of two fashions. One may adopt what Dworkin has termed the "rule-book conception," according to which "the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all."[50] This understanding "does not stipulate anything about the content of the rules that may be put in the rule book," and "insists only that whatever rules are put in the book must be followed."[51] The other conception of the rule of law is much more robust. For the "rights conception ... assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole."[52] In consequence, "[i]t insists that these moral and political rights be recognized in positive law, so that they may be enforced

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47 In the case of the debate about fetal rights and personhood, however, it is more often than not the case that the critically important differences between these inquiries are blurred.

48 Concerning which, see Mathieu's rehearsal of the arguments, *supra* note 21, c. 3, 4.

49 Those distinctively legal grounds are grounds of political morality, according to which, I will later argue, any such obligation is impossible.

50 See R.M. Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985) at 11.

51 *Ibid.*

52 *Ibid.*

upon the demand of individual citizens through courts."[53] Under the rights conception, then, the rule of law is "the ideal of rule by an accurate public conception of individual rights," an ideal which requires that "the rules in the rule book capture and enforce moral rights."[54]

Which of these views of the matter one adopts makes all the difference with respect to one's view of law, in general, and with respect to one's view of judicial governance and obligation, in particular. If one thinks of the rule of law as a list of rules, then one will be compelled to think of law as mere form, as an otherwise empty vessel into which are poured the products of extra-legal power; and one will be precluded from assigning to law any distinctive point of view. Moreover, since nothing of substance can, therefore, inhere in law as an institution and practice, one will also be compelled to think of legal actors and, especially, judges as technocrats whose mission it is to implement rules elsewhere and otherwise laid down. On the other hand, if the rights conception is right in supposing that there inheres in law a distinctively legal point of view, then one can inquire, first, whence the requirement for such a venue and view, and then, what follows in terms of the mandate and obligations of the legal community generally, and of the judiciary in particular.

Whether there is, or not, a legal point of view which transcends the view of power is, of course, the central and enduring question both of jurisprudence and for legal practice. Reduced to its barest bones, this question asks whether there is cause, or not, to take law seriously as an enterprise. If nothing attaches to law besides deposits of extra-legal power, then clearly anyone interested in the way of the world through rules would best avoid or forsake the law, and to situate herself instead where ever beyond the law the action really is. On the other hand, if there resides in law a distinctive point of view, and if that view turns out really to matter, then — and really only then — is law worth a salt as a discipline and practice.

Our law, the law of liberal democratic societies, proceeds on the understanding that there is indeed something immanent to law which deserves serious discipline and practice. The division of powers institutionally between the executive, the legislative, and the judicial is thought to have something very fundamental to do with an overall political morality in terms of which alone these branches of governance themselves, and the state and society more generally, have a legitimacy which exceeds the circumstances of power. More particularly, under this view of matters, the law burdens judges in a fashion which stands in stark contrast to the technocratic mandate proffered and envisioned by the rule book conception of the rule of law.

It is the business of judges to interpret legal rules, and it is their burden to do so from the legal point of view. The legal point of view assumes that law has integrity, that its substance is never a bricolage of power and interest, but always a coherent moral whole. The legal point of view, therefore, requires that judges "justify the

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[53] *Ibid.* [emphasis in original].

[54] *Ibid.* at 11-12.

practice [they] interpret" by "lay[ing] principle over practice,"[55] and it "insists that judicial decision be a matter of principle, not compromise or strategy or political accommodation."[56] It is the burden of judges, that is, under any view which would take law seriously, to see and enforce the law as "a network of principles."[57]

B. FORSAKING LAW

In *D.F.G.*, it was the Court's sole task to provide a principled justification for — or else a principled rejection of — the law's ancient rule regarding the significance of live birth. For there the state's claim over the body and liberty of the pregnant woman in name of the interests and rights of the fetus, turned exclusively upon whether, or not, the fetus is a subject at and of the law. The rule, of course, declares that it is not, on grounds that "the only right recognized is that of the born person."[58] In consequence, if the rule were good, the state would be precluded *ever* from acting in defence of the fetus's interests or rights, since neither, in that event, *can* exist at law.[59] Regretfully, the Court failed entirely its burden. Where the minority's rejection of the birth principle is uninformed, silly, and just plain bad, the majority's defence is not only wrongheaded but, by expressly resigning judicial office, seriously compromises both the overall integrity of the law and the liberties and security of pregnant women.

As we have seen, courts can take either of two attitudes with respect to standing legal practices and rules. They can adopt the legal point of view, according to which a rule or practice stands or falls on its coherence with the overall political morality of the law, or failing that, they can take an instrumentalist view, according to which the sense of law is to be found, somewhere or another, beyond the law. In the minority judgment, Justice Major takes the second view. For according to his Lordship, the live birth rule is no principle at all,[60] but a happenstance of legal history which — and this is the key — arose for extra-legal reasons which no longer obtain. Those reasons are medical. The rule, he claims, "is a common law evidentiary presumption rooted in rudimentary medical knowledge that has long since been overtaken by modern medical knowledge and should be set aside."[61] This is bad argument. Not only does his

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55 See R.M. Dworkin, *Law's Empire* (Harvard: Harvard University Press, 1986) at 285, 410.

56 See Dworkin, *Freedom's Law*, *supra* note 10 at 83.

57 *Ibid.* at 73.

58 See *D.F.G.*, *supra* note 8 at paras. 11-15.

59 The reason for my emphasis will appear shortly. And again, that the fetus is beyond the reach of rights, does not necessarily mean that it is beyond the reach of moral, or even legal, consideration. Regarding which, see my argument in part three of this comment.

60 See *D.F.G.*, *supra* note 8 at para. 105 ("the 'born alive' rule [is] evidentiary, rather than substantive"). Incidentally, given his Lordship's overall instrumentalist view of law, it is difficult to imagine the grounds on which he could ever possibly declare a rule or practice a principle imminent to law.

61 *Ibid.* at para. 92. Elsewhere (at paras. 67, 109) he identifies the evidentiary problem to have been whether the fetus was alive or not, and goes on (at para. 109) to reason that "since medical technology has ... eliminat[ed] nearly all of the evidentiary problems from which the 'born alive' rule sprang, it no longer makes sense to retain the rule where its application would be perverse."

Lordship base his opinion on a partisan and woefully incomplete view of legal history,[62] he would have us deploy that history alone as an occasion and reason for a paternalist caveating of the rights and liberties of women under law. Where, he instructs us, "the mother decides to bear the child, the state has an interest in trying to ensure the child's health,"[63] and may, in certain circumstances, [64] seize and confine the woman "for purposes of treatment, and not of punishment," though (remarkably) "the mother remains free to reject all suggested medical treatment."[65] This is amazing and amateurish reasoning which, had it not appeared in a judgment of a Supreme Court justice, would bear neither repetition nor reply.[66] As it has, further reply will come indirectly through the defence of the principle of live birth which I offer below.

Where the minority sets aside the rule of birth through a robust concession of legal principle to medical science and technology and, in the result, subordinates the rights of women to state-sponsored (and medically superintended) management of biology, in its timid defence of the rule, the majority — a caveat to which we'll come

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62 His Lordship bases his entire view of the birth principle as "a legal anachronism" on one piece of what he considers to be "persuasive" scholarship, namely, C.D. Forsythe's "Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms" (1987) 21 Val. U.L. Rev. 563. Now, not only is that article not persuasive — the author 'proves' his point by assuming his point: he first resigns the law to medicine in order then to convince that the law is contingent on medical views (see: 580-95) — it is straightaway suspect, since at the time of writing, the author was employed as Staff Counsel by Americans United for Life Legal Defense Fund, an anti-abortion lobby group based in Chicago. Even, however, if none of this were the case, where a judge proposes to engage in legal history, rather than in analysis of principle, he (or his clerk) would be well advised really to research the historic record. On the matter of history which Justice Major thought was before him in *D.F.G.*, there is an abundant scholarship. Besides Epstein and Hartouni (*supra* notes 4 and 27), see, for example M. Thomson, "Legislating for the Monstrous: Access to Reproductive Services and the Monstrous Feminine" (1997) 6 Soc. & Leg. Stud. 401; R. Davenport-Hines, *Sex, Death and Punishment: Attitudes to Sex and Sexuality in Britain since the Renaissance* (London: Fontana Press, 1991); P. Hoffer & N. Hull, *Murdering Mothers: Infanticide in England and New England, 1558-1803* (New York: New York University Press, 1981); and L. Stone, *The Family, Sex and Marriage in England, 1500-1800* (London: Penguin, 1977). For a taste of the 'scholarly' views of Americans United for Life on associated matters, see: T.L. Jipping, *Defending "The Silent Scream": A Rejoinder to Planned Parenthood, Studies in Law & Medicine, No.21* (Chicago: Americans United For Life, 1985); V.G. Rosenblum, *Abortion, Personhood, and the Fourteenth Amendment, Studies in Law & Medicine, No. 11* (Chicago: Americans United For Life, 1983); and J. Lejeune, *et al., The Beginning of Human Life, Studies in Law & Medicine, No. 10* (Chicago: Americans United For Life, 1983).

63 *D.F.G., supra* note 8 at para. 20.

64 Which do not bear repeating: see *ibid.* at paras. 20-21, 28.

65 *Ibid.* at para. 27. His Lordship's logic and language beg an analysis which I will not offer here. Suffice it simply to say: first, that where the incarcerated woman refuses treatment, her continued incarceration must be punishment or, else, if she were then to be freed, the incarceration would appear necessarily (and most curiously) to be at her election from the beginning; second, that it is a curious calculation indeed that would declare an "imposition" of incarceration as a matter "so slight" (at para. 28); and, third, that a pregnant woman should be declared a mother prior to child birth appears a peculiar usage (it seems that his Lordship is of the view that a pregnant woman becomes transmuted into a mother upon her deciding "to bear the child": compare his usage at para. 16 to his usage at para. 20).

66 For a view (which bears both reading and repetition) of the inconsequence of medical technology to legal and moral questions concerning the fetus, see: Dworkin, *Freedom's Law, supra* note 10 at c. 1. Also printed as "The Great Abortion Case" (1989) 36:11 *New York Review of Books* 49.

notwithstanding — surrenders legal principle to sovereign will, and in so doing, abandons both judicial office and the personal security and liberty of pregnant women to the vagrant contingencies of majoritarian politics. The majority manufactures this unhappy result by first confessing, and then avoiding, the matter of enduring principle which is at play in the birth rule. Unlike the minority, the majority straightaway recognizes that something of legal, rather than medical or philosophic, moment is at issue in *D.F.G.*. "The issue," we are told, "is not one of biological status, nor indeed of spiritual status, but of legal status."[67] But not only that. According to the majority, the legal status of the fetus has everything to do with "the relationship between a woman and her fetus," which relationship, in turn, has everything to do with "the pregnant woman['s being] an autonomous decision maker," since her "liberty is intimately and inescapably bound to her unborn child."[68] The majority's redaction of the rule — which, it is careful to point out, is "a general proposition, applicable to all aspects of the law" — proceeds from this very proper understanding, and appears redolent with principle: "The law sees birth as the necessary condition of legal personhood. The pregnant woman and her child are one."[69] Remarkably, however, this promising groundwork did not move the majority to specify and articulate those principles. Justice McLachlin proceeds, instead, to construct a bizarre, homegrown theory concerning the limits of judicial governance which places the matter of principle beyond the Court's competence. Moreover, since, under that view, consequences alone measure the contours of the judicial, the majority is led to offer in the place of principle, a melange of not-very-helpful consequentialist arguments. Let me elaborate.

Though it at one point offers a rote rendition of the positivist view of the subordination of the judicial to the legislative,[70] Justice McLachlin's theory of the division of legislative and judicial governance resonates with none of the standing theoretical expressions of that view of the matter nor, indeed, with any other. Her theory is, rather, idiosyncratic, and concerns not principle, but the size of legal change. "Where," we are told, "the matter is one of a small extension of existing rules to meet the exigencies of a new case and the consequences of the change are readily assessable, judges can and should vary existing principles."[71] On the other hand, "where the revision is major and its ramifications complex, the courts must proceed with caution."[72] Her Ladyship supports this division between "incremental" and "major" change[73] on grounds, first, of the qualities of change and, then, of the respective competencies of the legislative and judicial branches in forecasting and managing the consequences of legal change. Changes vary according to their "magnitude,

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67 *D.F.G.*, *supra* note 8 at para. 12.

68 *Ibid.* at paras. 26, 34.

69 *Ibid.* at para. 55. See also paras. 11, 29.

70 *Ibid.* at para. 18 ("there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform").

71 *Ibid.* at para. 18.

72 *Ibid.*

73 Incremental change is change by "small extensions," whereas major change is "generic" change defined by "complex ramifications." Or so it appears: see *ibid.* at paras. 8, 10, 15.

consequence, and policy difficulty;"[74] and, where those variables are present in a "complex" fashion and the proposed change to the existing rule, therefore, involves "a generic change of major impact and consequence,"[75] the task of legal reform is "more appropriate to the legislatures than the courts," because "the legislature is in a much better position to weigh the competing interests and arrive at a solution that is principled."[76] This, in turn, is so, because the courts are "not in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes [they] might make."[77]

So in this curious and circuitous fashion, the majority in *D.F.G.* both avoids an inquiry of principle regarding the rule of birth, and concedes that fundamental principle of law to the legislative branch. When the majority then musters arguments about the consequences of changing the rule on the rights of women, its arguments lack the ring and force of principle, since they are designed, not to defend the law, but to allow the Court to abandon the law to politics. When, further along,[78] the Court invokes the *Charter* to caveat its consigning the rights of women to legislative will, its warning is facile and empty, because the majority has forbidden itself the grounds of principle in terms of which alone it could possibly guide the legislature regarding fairness, utility, and justice.

What we are, therefore, left with is a view of law which is every bit as narrow and miserly as the minority's. For no less than the minority, the majority ends with the view that the bodily security of women is a matter properly subject to calculation and compromise. That, for the majority, this is a matter of legislative choice, rather than judicial conviction, makes no more matter than its implied promise to subject any such calculation to the scrutiny of principle sometime (and somehow) later. For both the majority and the minority, that is, the rights of women are never, without more, secured sacred by legal principle alone, but are rather contingent on a female biology which properly falls to either judicial or legislative competence. And each comes to this view of matters by proceeding from a view of law which seeks the reason of law, not in the law itself, but in some other external source of sense. That the minority finds this sense in medicine, and the majority in political will, makes no difference at all: under either view, the law remains a discipline and practice whose lack of a meter of its own is so seamless and complete that even the plain case, where what is a issue is the state's power bodily to seize and incarcerate its subjects, is beyond its ability to speak on its own.

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[74] *Ibid.* at para. 47.
[75] *Ibid.* at para. 56.
[76] *Ibid.* at paras. 47, 56.
[77] *Ibid.* at para. 18.
[78] *Ibid.* at paras. 12, 46, 58.

C. DEFENDING LAW

If time, through death, is fatal to justice, then the beginning of time that is birth, announces justice's possibility.[79] That law is, in this fashion, bounded by birth and death is not, as the Supreme Court in *D.F.G.* would have us believe, a happenstance of sovereign will or judicial opinion. Birth and death, rather, are the constitutive foundations upon which the entire edifice of law, finally and necessarily, resides. For the regime of rights that is law makes sense solely in the cadence which birth and death alone permit. Because this is so, to ascribe rights to either the unborn or the dead is nonsense, a contradiction of law's sense and an impossibility in law's domain. Or so, at least, I wish now briefly to argue.

There is a legal point of view, because law expresses and instantiates a distinctly political morality concerning the terms and conditions of human association. That morality declares the moral equality of persons, beyond and despite any of the many differences which inevitably obtain between them. Moral equality accounts for the values — including, above all else, the values that only individuals count, and that everybody counts as one and none as more than one — from which law proceeds, but it does not, without more, tell us which beings count as persons for the purposes of moral equality. What is required, and what law has to provide, is a designation of those beings who are subjects of law's promise of equality of treatment.

Philosophical liberals often depose that moral agency is the characteristic possession of which distinguishes between those beings which are, and are not, the persons of polity. According to this view, moral equality is a cognate of capability: those beings who are agents are persons, and agents are those beings "who are capable of conceiving values and projects, including ... projects that are not about their own experiences, and are capable of acting to realize those values and projects."[80] The law's view is much less complicated and, in one very important respect, much more precise. For while law otherwise presumes that its subjects are agents — the distinction between reason and motive, for instance, depends upon this presumption — it does not qualify legal personality in terms of capability, and instead commits itself to a view of person-as-status which requires nothing of persons besides their presence. This disjunction between law and philosophy is critical. Not only does it obviate for purposes of polity the profound difficulties that more robust philosophical views of persons as agents create with respect, especially, to those persons known to law as the mentally incompetent, it permits disclosure of those fundaments of principle which comprise the

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79 That the possibilities of justice are contained by death is no better revealed than in case of war criminals: justice must endlessly pursue them for its claims will forever end on their deaths.

80 See D. Johnston, *The Idea of a Liberal Theory: A Critique and Reconstruction* (Princeton, New Jersey: Princeton University Press, 1994) at 22-23. Incidentally, the other common nominee for personhood, sentence, is every bit as much a capability as is agency, and raises just as many difficulties. Specifically, where agency is underexclusive in excluding from community many — especially the mentally incompetent — whom we would otherwise think part of community, sentience is overinclusive and provides no principled way to exclude beings — cockroaches and mice, say — whom we not otherwise consider fellows. For Johnston's take on the relationship between the two, see: *ibid.* at 23-24.

legal point of view and which, it turns out, have everything to with law's assessment of the significance of birth and death.

The significance of birth is sometimes defended, morally, on strategic grounds. Warren, for instance, claims that "we treat birth ... as the threshold of moral equality," because "birth makes it possible for the infant to be granted equal basic rights without violating anyone else's basic rights."[81] Dworkin, it seems, offers an equally consequentialist view. The fetus, he claims, is "in a unique situation politically as well as biologically," because "the state can take action that affects it ... only through its mother, and only through means that would necessarily restrict her freedom in ways no man's or other woman's freedom could constitutionally be limited."[82] Whatever might be said of such views — including, besides their practical truth, that they appear very nearly to concede the moral significance of the fetus — law, I think, takes quite a different view.

Law ascribes significance to birth — and subsequently to death — not as a stratagem to support a moral equality which is already presumed, but rather because birth announces the possibility of moral equality, just as does death later declare that possibility then closed. Law thinks the fetus part of the pregnant woman, but not because the fetus is "attached and embodied — in a body, part of a body, and a body that is, still, necessarily and exclusively female," though all of that is true biologically.[83] Law's reasons, though they take notice of biology, are instead political. The fetus is, at law, a being indistinguishable from the woman, because it is a being which is neither with nor for others. For being at law means being here; and to be here, requires individuation, since only then, as Lyotard puts it, can a being become "an other," a fellow of and for others. That we are each of us, profoundly and finally, others is the source and condition of moral equality. And it is, as well, the origin and mandate of rights. Rights of bodily integrity, including the right to life and the right not to be harmed, and the rights which devolve from those core entitlements,[84] ensure those dependent beings, who are beings with and for others, that each will be recognized as an other worthy of "an equivalent chance to transform into an individuated being who can participate in public and political life as an equal."[85] Fetal rights are impossible, not because the fetus is, or is not, an agent, nor because the fetus is, or is not, sentient: fetal rights are impossible, rather, because the fetus is not an other to or for anyone, nor anyone an other to or for it. The fetus, that is, is beyond rights, because, like the corpse, the fetus is not a being equally, and simply, present with others.

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81 See *supra* note 16 at 312. Accord P. Singer, *Rethinking Life and Death: The Collapse of Our Traditional Ethics* (New York: St. Martin's Press, 1994) at 211 (arguing that "birth ... make[s] a difference" because then the woman's "claim to control her own body and her own reproductive system is no longer enough to determine ... life or death").

82 See *Freedom's Law*, *supra* note 10 at 49.

83 See: Hartouni, *supra* note 27 at 27-28.

84 Property rights are, therefore, derivative and secondary, because such rights necessarily refer to the persons for whom they are rights. See: D. Cornell, "Defining Personhood" (1997) 23:3 Phil. & Soc. Crit. 109 at 110.

85 *Ibid.* at 113.

Just because the legal point of view is, in these senses, "the view from here," and law, "the standpoint from which life is lived," the experiences of birth and death set the moral boundaries of law's domain, and cabin its promise of equality.[86] The laws of birth and death are, for this reason, not matters open to negotiation or revision for reason of philosophic argument or medical fact or sovereign will. Or if they are, the cost, as in *D.F.G.*, is no cheaper than the forfeiture of law's reason and the resignation of judicial office.[87]

IV. CONSEQUENCES

Unlike the unborn, the dead are not the object of intense moral and legal controversy.[88] This is, in one sense, curious. Though "we would'nt think of prenatal nonexistence as the same kind of deprivation as death," we nonetheless appear easy prey to arguments concerning fetal death, while simultaneously accepting, with relative equanimity, the deaths of others, even beloved others.[89] Which is to say, while we can easily[90] accept that "at the other end of human life is the human corpse," and that that entity "has no claims," we appear much less willing to accept that the fetus is, morally and legally, one with the corpse.[91] This is so because, in contrast to our convictions and practices regarding the dead, our convictions and practices with respect to the unborn are essentially unsettled. It is just this situation which accounts for the relative appeal of the consequentialist arguments which are made on behalf of, and against, the fetus. They get through to us in the case of the fetus, where they would appear laughable in the case of the corpse, because while our views are convinced with respect to the corpse, they are ambiguous with respect to the fetus. I want to begin making good my intention to identify the reasons of principle which alone would justify state interference with pregnant women,[92] by considering the proper place, if any, of non-rights arguments, such as these, in legal discourse concerning pregnant women and the fetus.

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86 I borrow these words from Nagel's ruminations on "Birth, Death, and The Meaning of Life": see T. Nagel, *The View From Nowhere* (Oxford: Oxford University Press, 1986) 208 at 209, 219.

87 As mentioned earlier, this disjunction between philosophy and law does not mean that commerce is forbidden between the two. Indeed, law's claim that individuation is the threshold of moral equality is true as well in moral theory. If this is so, then individuation is a condition of both morality and politics, and the fetus would lack standing both morally and legally.

88 This is so despite the controversy which attaches to matters such as defining death and to issues such as euthanasia, because those contests do not involve, and they do not disturb, our settled convictions regarding death.

89 See Nagel, *supra* note 86 at 229.

90 I do not mean to discount the uneasiness with which we approach our personal deaths. For a meditation on "what it means to lookforward to our own deaths," see *ibid.* at 223-31.

91 See Thompson, *supra* note 20 at 292.

92 I should, I suspect, immediately caveat this position: while I think there are grounds of principle on which the liberal state could, in circumstances to which we will come, properly regulate pregnancy, I do not think such regulation is either required or desirable under the conditions of political liberty.

Consequentialist arguments are known at law as slippery slope arguments.[93] A form of analogical reasoning, slippery slope arguments propose to make the rights of the parties to the instant case turn on the imagined consequences of the present decision to the parties to some future case or, sometimes, on the imagined consequences of the present decision on society more generally.[94] Slippery slope arguments are, then, arguments about rights which do not themselves rely on rights, but rely instead on proposals with respect to the dangerous implications of a present decision about rights. Arguments of this sort are rightly suspect, if only because the grounds for the analogy between the legal present and future may be weak or, worse still, arbitrary. But that is to say no more than they might be misused. The more important question is whether, however they are used, their use is ever proper? I want to argue that there is indeed a narrow compass within which slippery slope arguments may be arguments of principle which law should properly hear. And I will begin with the arguments which ground our law with respect to the dead.

We have settled convictions and practices regarding the dead. Though we think the dead have no claim on us in terms of rights, we are yet convinced they yet deserve to be treated with respect. Thus, though we think death sufficient cause to treat the entity that was a rights holder as then an object of property rights, we nonetheless back our conviction that the dead be treated well with no less a force than the criminal law.[95] Does our doing this make sense? Well, to begin, our practices do not offend logic. Since there is a difference, which very much counts, between moral considerability and moral significance, we are not contradicting ourselves when we at once declare the dead entities which deserve consideration, but which are not sufficiently significant to attract rights. The more intriguing question is why we would adopt the practices and convictions we have? Is there a cause of principle behind our practices? Or are they instead the muddled result of sentiment and history, improperly cast into law? I want to suggest that our practices are indeed principled, because they are the practices which a political community committed to moral equality would, for reasons of principle, be led to adopt.

Our rules with respect to treatment of the dead are not, under this view, a mere deposit of extra-legal religious sentiment or history. Those rules have, rather, an integrity indigenous to the political morality which founds law. That is simply this: that a political community devoted to the political values associated with the moral equality of persons will be concerned that certain moral sensibilities — including, especially, the sensibility that persons are significant and deserve respect — which are necessary to sustain that political commitment, are perpetuated and flourish. The maintenance of the political sensibilities necessary for government by the ideal of equality is, I am proposing, ground for argument of principle, in excess of rights, which are properly

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93 For a summary of the literature on argument from slippery slope, see L.E. Weinrib, "The Body and the Body Politic: Assisted Suicide under the *Canadian Charter of Rights and Freedoms*" (1994) 39 McGill L.J. 618 at 635-40. For an excellent philosophical treatment, see: W. van der Burg, "The Slippery Slope Argument" (1991) 102 Ethics 42.

94 Weinrib terms the former conceptual and the latter pragmatic.

95 Section 182 of the *Criminal Code* governs our relations with the dead. The provision appears in Part V which contains all of the offences against, *inter alia*, public morals.

arguments at law. The rules governing the treatment of the dead make sense, and can be justified, on just those grounds: though they are not persons, the dead are owed consideration, because how they are treated implicates the political sensibilities required for the continued life of a political community committed to the equality of persons.

Might not the same sort of argument apply to the fetus? I will argue that, though in a narrow compass, it may, on other grounds of principle, it should not. Firstly, I take it as established that to declare the fetus insignificant morally is not to conclude that it is a being which can motivate no moral or political concern. This being so, the question becomes the circumstances under which the fetus might properly concern a political community devoted to moral equality. Dworkin claims that "the most persuasive answer" to the riddle presented by the U.S. position prohibiting late term abortions, is to be found in the interaction between the moral consideration afforded the fetus and the "community's sense of the importance of life."[96] "Even though," he reasons, "a fetus is not a constitutional person, it is nevertheless an entity of considerable moral and emotional significance in our culture, and a state may recognize and try to protect that significance in ways that fall short of any substantial abridgement of a woman's constitutional right over the use of her own body."[97] He goes on to add that "a state might properly fear the impact of widespread abortion on its citizens' instinctive respect for the value of human life, and their instinctive horror at human destruction or suffering, which are values essential for the maintenance of a just and decently civil society"; and then to conclude that "a political community in which abortion became ... a matter of ethical indifference ... would certainly be a more callous and insensitive community, and it might be a more dangerous one as well."[98] This argument is very nearly the argument I am offering here.[99] It proposes a nonrights argument, an argument about consequence, which is simultaneously grounded in, and confined to, political morality. For convenience, I will term this argument 'the sensibilities argument'.[100]

It is that argument, rather than any quasi-religious sentiment about personhood or any technologically-derived silliness about viability or brain waves, which permits the state, in certain circumstances, to interfere with pregnant women. What remains to be determined, however, is the proper ambit of such an argument, and then its content. The sensibilities argument can — though, for reasons to which we'll come, I think it ought'nt — justify state regulation of access to late term abortion. In this case, it is

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96 See *Freedom's Law*, *supra* note 10 at 54-57, 140-42.

97 *Ibid.* at 55. Nothing, I should caution, turns on Dworkin's use of "significance," where I use "considerability."

98 *Ibid.*

99 For another approximation, see Steinbock, *supra* note 18 at 41, 167, 190.

100 As will become apparent, because it is an argument of principle arising from political morality, the sensibilities argument precludes any appeal to the *de facto* views of community. For instance, the Supreme Court's invocation of "the values fundamental to our society" in *Butler* as reason for upholding legislation censoring pornography is not caught by the sensibilities argument because the values there at play were sociological and not political. In that case, indeed, the force of the sensibilities argument would very much have been in the other direction. See *R.* v. *Butler*, [1992] 1 S.C.R. 452.

resemblance which, as Dworkin points out, triggers the sensibilities argument. "A state's concern for the moral significance of a fetus increases as pregnancy advances, when ... the fetus has assumed a post-natal baby's form."[101] This is so, he reasons, because "people's instinctive respect for life is unlikely to be lessened significantly if they come to regard the abortion of a just-fertilized ovum as permissible, any more than it is lessened when they accept contraception."[102] When, however, "a nearly full-term baby is aborted," "the assault on instinctive values is likely to be almost as devastating ... as when a week-old child is killed."[103] This is good argument. It depends, not on cosmetics nor on private belief, but on the political sensibilities required for political equality.

I say it is good, but, as I've indicated, I believe there are countervailing grounds of principle which would led a state governed by equality not to act on it. Any law which would prevent late term abortions presumes not only that, in those circumstance at least, gender counts against equality, it assumes something very specific about the moral and ethical content of gender, at least in those circumstances. What it presumes, of course, is that pregnant women are the sort of beings who, if they are left to their own devices, will, in significant measure, act to destroy the political sensibilities required for moral governance. Because it is universal, this presumption of "the monstrous feminine" is, I think reasonably, a more significant assault on political sensibilities than would be the comparatively insignificant incidence of late term abortion, and governmental regulation of pregnancy ought to be foreclosed, despite the bite of the sensibilities argument in the other direction, on that ground alone.[104] There is another argument, again an argument from sensibility, which militates against state regulation. To proscribe late term abortions is to adopt, as law and policy, the involuntary enlistment of women in procreation. Whatever gains might, in those circumstances, be made with respect to sensibilities, would, I think, be overwhelmed by losses in the other direction, simply because the state's treating a large portion of its citizens in such a fashion is itself so significant an assault on the sensibilities of equality and respect for persons.

The sensibilities argument is, then, a proper, but finally unconvincing, ground for state regulation of late term abortion. As regards the pre-natal conduct of pregnant women falling short of abortion — say, conduct of the sort before the Court in *D.F.G.* — the argument is, without more, misplaced. This is so, at the early stages of pregnancy, because the critical factor of resemblance is not at play and, otherwise and whatever the stage of the pregnancy, because pre-natal conduct, short of abortion, engages, not political sensibilities, but private standards as regards gender-based obligations. But the argument is misplaced in another sense. In as much as it is the case that the women, who are the target of state interference on these grounds, are poor women or women of colour — and based on the U.S. experience,[105] and on the facts

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101 See *Freedom's Law*, *supra* note 10 at 55.

102 *Ibid.*

103 *Ibid.* at 56.

104 Thomson, *supra* note 63.

105 See Krauss, *supra* note 4. Also in this regard, see: G. Mink, *The Wages of Motherhood: Inequality in the Welfare State, 1917-1942* (Ithaca, NY: Cornell University Press, 1995); and L. Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare* (New York: Free Press, 1994).

of *D.F.G.*, the initial Canadian case,[106] that appears exhaustively to be the case — then the state's concern is not political sensibilities at all, but rather the management of the politics of poverty and race, and this is condemnable not only on grounds of political sensibility, but on grounds as well of distributive justice.[107]

Because the majority judgment in *D.F.G.* is so rife with slippery slope arguments, I wish to turn to the question of content, in order briefly to consider which kinds of arguments of that sort may properly sound in the sensibilities argument, regarding state interference with pregnant women. Justice McLachlin marshals a host of consequentialist arguments — in my submission, of course, needlessly on a proper view of the matter — to defeat the state's curious claim that its involuntary confinement and treatment of the woman in *D.F.G.* was caught, alternatively, by *parens patriae* and (amazingly) by a power of detention, through injunctive relief, attaching to the law of torts. What can be said of these? Well, straightaway, it can be noted that the significance of slippery slope arguments turns on their articulating a reason of principle which connects the legal present and the (dangerous) legal future. Otherwise, of course, they constitute, at best, mere speculation (and there is no reason to suppose that judges are any more expert at that than the rest of us) and, at worse, argument *in terrorem*, which aim more to overpower than to persuade. Before turning to the details of Justice McLachlin's argument, I wish first to explore a consequentialist argument which provides a reason of principle against recognizing the fetus as a person at law.

The state in *D.F.G.* urged the Court to recognize the fetus as a person at law. But, supposing the fetus were so declared, what sort of relationship would then follow as between the fetus-as-person and the person, the pregnant woman, in whose body the fetus-person resides? The state had a ready reply: the pregnant woman would then have a duty to care for the fetus, she would, that is, have to treat the fetus in the ways the law requires persons to treat one another, which is to say, as a neighbours, as one of those whose well being would reasonably be contemplated.[108] The issue in *D.F.G.*, even as framed by the state, had, in consequence, everything to do with meaning of treating persons as persons. Generally, the literature approaches this question in terms of the ethical consequences on the woman. Where the fetus becomes a person, the woman, it is said, becomes "a fetal container,"[109] an "incubator,"[110] "a maternal host,"[111] a "pack animal ...,"[112] a mere "vessel ... or means to an end."[113] However

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106 Happily, this circumstance was recognized by Justice McLachlin in the majority, though merely as one of a barrage of consequentialist arguments to defeat a civil duty of care. See *D.F.G.*, *supra* note 8 at para. 12.

107 That, in *D.F.G.*, the woman had, prior to being seized by the state, "voluntarily sought treatment, but had been turned away due to lack of facilities," speaks starkly to this: *ibid.* at para. 5.

108 For an exploration of the notion that pregnant women might owe their fetuses duties as a matter of right, see H.M. Smith, "Fetal-Maternal Conflicts" in J.L. Coleman & A. Buchanan, eds., *In Harm's Way: Essays in Honor of Joel Feinberg* (Cambridge: Cambridge University Press, 1994) 324.

109 See Bennett, *supra* note 4 at 86. For commentary on the 'container' metaphor, see L.J. Peach, "From Spiritual Prescriptions to Legal Descriptions: Religious Imagery of Woman as "Fetal Container' in the Law" (1993-94) 10 J. Law & Relig. 73.

110 Bennett, *ibid.*

111 See Krauss, *supra* note 4 at 539.

true these claims may be as conclusions, because they are mediated by neither convincing premises nor articulated principle, they tend to share the *in terrorem* quality of the host of arguments mustered in the other direction by proponents of fetal personhood. In order to disclose that important argument of principle which I have claimed resides in this region, I want to take a different tack. I want, first, to interrogate more fully what it means to treat persons as persons, and I want next to argue that to require a pregnant woman to treat her fetus as a person is corrosive of, and repugnant to, the political sensibilities of equality and respect.

Though to declare the fetus a person is fundamentally to alter "the ontologic relation between pregnant women and fetuses,"[114] and thereby to transmute what was theretofore self-regarding conduct into possibly sanctionable, other-regarding conduct, my concern is with neither. Rather, assuming the declaration done, and the transmutation accomplished, I wish to focus exclusively on the relationship which follows. What can be said of that? Well, firstly, I think, that the entire matter of treating persons as persons — never mind that one of them is a fetus — is notoriously complex and ambiguous.[115] While it might be somewhat clear, in some vaguely Kantian sense, that the object of treating persons as persons is not to treat them as things or mere means, what it means to do so, the content, is a question no less complicated than the corpus of moral theory. That said, certain principles have been articulated. Chief among these is parity, "the attitude that others are, if not exactly the same as us at any rate equal to us in certain respects."[116] According to Brook, to treat another as a person presumes the possibility of personal relationship, and relationships which are personal are characterized, above all else, by the responsiveness and mutuality and reciprocity which parity alone provides and sustains.[117] Parity, he argues, consists "in mutual feelings or actions, in my allowing the other, and acting as though he has, every significant power, quality and ability which I have (especially the power to choose and to control his own behaviour), in my granting him no powers over me which I do not have over him or vice versa, and perhaps in other things."[118]

That reciprocity is a fundamental predicate of the whole of our law should not surprise. The very notion of moral equality is symmetrical with it. And the law of consent in all of its manifestations, the law of contract, the law of torts, the law of crimes: indeed, the entire edifice of public and private law, procedural as well as substantive, is incomprehensible without it. Viewed in terms of the reciprocity from which the law departs, to require pregnant women to treat their fetuses as persons is, at law, contradiction, since the fetus, by virtue of its biologic location, does not stand, as regards the woman, in a position from which mutuality is at all possible. But not

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112 See Epstein, *supra* note 4 at 155.

113 See Gallagher, *supra* note 4 at 57.

114 See Epstein, *supra* note 4 at 162.

115 In what follows, I will be relying on an argument offered, some years ago, by J.A. Brook. See J.A. Brook, "Treating Persons as Persons" in A. Montefiore, ed., *Philosophy and Personal Relations; An Anglo-French Study* (Montreal: McGill-Queen's University Press, 1973) at 62-82.

116 *Ibid.* at 69.

117 *Ibid.* at 75-76.

118 *Ibid.* at 77.

only that. To declare that pregnant women have alone, under law, to enter personal relationships which are not reciprocating, relationships which, singularly, are not characterized by the equality and mutuality which law exists to serve, but instead by the asymmetry which law abhors, is not merely to offend and to corrode, but frontally to assault, the political sensibilities of a community devoted to equality and respect.[119] And it is just that which provides a principled argument of consequence against any proposal that pregnant women be required, as of right, to treat their fetuses as persons: to do so, would degrade the community's political commitment to moral equality and to respect for persons.

I turn now, finally, to the contribution of Justice McLachlin's slippery slope arguments. In his dissenting judgment, Justice Major accuses the majority of deploying *in terrorem* arguments.[120] His assessment is, in very large measure, correct, though I will not pause to make his case.[121] I wish, instead, to engage Justice McLachlin's argument at the points at which principle — and especially the sensibility principle — was before her, and at which, rather than pursuing the matter, she chose to defer to sovereign will. Early along in the piece, Justice McLachlin articulates the matter of consequence that really matters in *D.F.G.*. "To permit an unborn child to sue its pregnant mother-to-be would,"[122] she tells us, "introduce a radically new conception into the law," namely, "the unborn child and its mother as separate juristic persons in a mutually separable and antagonistic relation."[123] After, then, declaring that such a conception is "belied by the reality of the physical situation,"[124] and, later, speculating on the policy (and sociological) consequences, she immediately forecloses inquiry by announcing that "such a dramatic departure from the traditional legal characterization of the relationship between the unborn child and its future mother is better left to the legislature than effected by the courts." This is lamentable. By articulating the question in terms of the nature of the relationship which would follow upon recognition of the

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119 I would compare the relationship to the paradigm of asymmetry at law, namely, chattel slavery, except I fear I might then be accused of *in terrorem* argument. For a view of the master-slave relationship which would support this analogy, see: C. Clinton & M. Gillespie, eds., *The Devil's Lane: Sex and Race in the Early South* (New York: Oxford University Press, 1997); and P. Morton, ed., *Discovering the Women in Slavery* (Athens: University of Georgia Press, 1996).

120 See *D.F.G.*, *supra* note 8 at para. 27.

121 For instances of Justice McLachlin's misuse of the slippery slope argument, see *ibid.* at para. 33 ("Are children to be permitted to sue their parents for second-hand smoke inhaled around the family dinner table ... for spanking causing psychological trauma or poor grades due to alcoholism or a parent's undue fondness for the office or the golf course?") at para. 39 ("At what point does consumption of alcohol fail to add substantial value to a pregnant woman's well-being? Or cigarette smoking? Or strenuous exercise?") and at para. 42 ("Partners, parents, friends, and neighbours are among the potential classes of people who might monitor the pregnant woman's actions to ensure that they remained within the legal parameters"). The quality of these arguments is, perhaps, the understandable, though unforgivable, result of her Ladyship's sociological take on consequentialist arguments as somehow calculations of "negative effects" (*ibid.* at para 42).

122 Though I'll not pursue the matter, the linguistic contortions which she found necessary to express the situation ought, alone, to have alerted her Ladyship that something worthy of further interrogation was at play here.

123 *D.F.G.*, *supra* note 8 at para. 29.

124 *Ibid.* ("for practical purposes, the unborn child and its mother-to-be are bonded in a union separable only by birth").

fetus, Justice McLachlin had before her an abundance of arguments of principle with which she might easily have defended the integrity of the law's view of the fetus. For instance, she might easily have convinced that, for a political community committed to moral equality, to require pregnant women alone to enter, as of right, asymmetrical relations, is repugnant and unacceptable. That she, instead, offered silly speculation and the *deus ex machina* of sovereign choice, is likewise unacceptable in such a community.

Principle raised its head, this time perhaps more directly, at another point in her Ladyship's judgment, but was in short order consigned to the same, unhappy fate. In discussing the amazing notion of a fetal cause of action for lifestyle choices made by pregnant women, Justice McLachlin tells us that the pregnant woman's "liberty is intimately and inescapably bound to her unborn child."[125] Later still, in a portion of her judgment devoted to the no less amazing question of whether civil injunctive relief contemplates detention of the person, she declares "the right of every person to live and move in freedom," "the most sacred sphere of personal liberty."[126] Quite so, on both counts, of course. Unfortunately, as before, her Ladyship did not pursue these sentiments of principle to mount a defense of law's integrity, a course which, again, would have led her immediately to a political argument from sensibilities. Instead, on both occasions, she uses principle as cause, first, for *in terrorem* speculation and, then, to defer, once again, to sovereign will.[127]

V. CONCLUSION

D.F.G. was an easy case. Not only were the facts undisputed, there was at hand a longstanding rule of law which, without more, governed. Because the appellant state contested the propriety of that rule, it remained only for the Court to determine whether, or not, the rule was sound in principle. If it were, the state's case for interfering with this particular pregnant woman would fall. And, if the principle at play were discovered to be fundamental to law and polity, not only would the state's claim fail in the circumstances particular to the woman before the Court, the possibility of the state's subsequently legislating in those or associated circumstances, would be fundamentally foreclosed.

That, rather than engaging the law of birth as a principle of law, the judges of our highest Court instead chose to treat that law as an instrument, variously, of medical technology and political will, is plainly unacceptable. That, despite its cognizance of the rule's history, meaning, and *de facto* universality in liberal states,[128] the majority,

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125 *Ibid.* at para. 34.

126 *Ibid.* at para. 46.

127 As regards her "sacred sphere," Justice McLachlin subsequently intones as follows: "It is open to Parliament and the legislature to enact new grounds for involuntary confinement" — and, yes, then, the deferred defence — "subject to compliance with the *Canadian Charter of Rights and Freedoms*" (*ibid.*).

128 Concerning which, see *ibid.* at para. 25 ("The common law has always distinguished between an unborn child and a child after birth"); at para. 7 ("This is a general proposition, applicable to all aspects of the law"); and at para. 28 ("[N]o case has been cited to us from any jurisdiction in the world where a pregnant woman has been sued on behalf of her fetus").

in particular, declined principle on grounds that engagement would place the Court "at the heart of a web of thorny moral and social issues," defies legal imagination.[129] That the matter before the Court — a matter, it turns out, no more obscure than the right to bodily security of pregnant women generally and (as the majority at least was aware) of poor, pregnant women in particular — was, in the final analysis, put hostage by an overall failure of judicial imagination and competence, is cause for the gravest concern.

The meter of this concern is the legitimacy of the judicial branch. Citizens in liberal polity have reasonably to depend on the courts to come to the defence of liberty and equality. They have, especially, to rely on the courts' viewing law seriously as a forum of principle at which, perhaps singularly, the power of power to mould the world is no longer determinative. In *D.F.G.*, our highest Court put paid these expectations. Not only did the Court proceed on the ludicrous view that law, other (somehow) than constitutional law, is beyond principle, it declared core rights of citizens properly the object of political calculation and compromise. That the minority accomplished this through recognition of the hegemony of medico-legal power over the lives of women,[130] while the majority did so through an unsupported (and largely unsupportable) consignment of principle to the legislative branch, is not really what matters. What matters, rather, is that justices of our Supreme Court appear so unprepared for their obligations, that they could possibly violate those obligations in so gross a fashion, in so plain and important a case as this. Because this is the nub, I wish to conclude this essay with a few, very brief comments on the matter of judicial appointment.

Canadian citizens do not, nor can they, participate in determining whom it will be who governs them judicially.[131] In contrast to the American process which is intended to confine executive power by subjecting Supreme Court nominees to a test of "jurisprudential integrity and commitment,"[132] appointment to the Supreme Court of Canada is entirely a matter for the executive, which has pursued its uncontradictable power in a process and on grounds distinguished, above all else, by secrecy.[133] In consequence, the "constitutional convictions"[134] of judges of the Canadian Supreme

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129 *Ibid.* at paras. 11, 25, 46.

130 About which, see: Bennett, *supra* note 4 at 70; Gallagher, *supra* note 4 at 57; and Eptstein, *supra* note 4 at 142-43.

131 Though my comments are directed to appointments to the Supreme Court, the reasons of political morality on which they depend, apply with equal force to all judicial appointments.

132 *See Freedoms' Law, supra* note 10 at 331. That these constitutional intentions are sometimes frustrated by political will, does not diminish their importance. For instance, that, in the Clarence Thomas case, constitutional practice was defeated by executive cynicism and legislative partisanship, is a conclusion which depends upon the higher ground of principle which the practice alone provides.

133 This concealment is in no way diminished by the executive's voluntary vetting of nominees through some committee drawn from the legal profession nor by the curious convention that seats on the Supreme Court are designated regionally. Because it cynically takes professional power for principle, the first compounds, rather than diminishes, concern; and because it subordinates conviction and competence to politics, the second constitutes no ground that could properly be termed principled.

134 *Freedom's Law, supra* note 10 at 263.

Court are accessible only after their appointment,[135] but by then, of course, the matter is closed, and citizens are simply stuck with whatever quality of governance — from the excellence of a Rand, to a pandemic just-enough-to-get-along, to rank incompetence, to bully pulpiting — ensues for the (very long and increasingly lengthy) term of the appointment.

That this is unacceptable in a liberal state devoted, not only to respect of the moral responsibility of citizens, but, through that commitment, to transparency as well, should not require defence. That, in practical terms, it leads to the impoverishment of legal culture generally and of judicial governance in particular, is ambly demonstrated, I want finally to submit, by the sorry execution of judicial office in cases such as *D.F.G.*

[135] In a curious concession to this reality, it is increasingly the practice of newly appointed justices to reveal their constitutional convictions in interviews and in speeches. For Justice Bastarache's go at this, see: S. Bindman, "Judicial Activism Vital To Democracy: New Supreme Court Judge Speaks His Mind" *The Edmonton Journal* (7 January 1998) A12. Since, however, it takes place after appointment, this concession more compounds, than cures, the damage.