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<b>ADRESSE POSTALE / MAILING ADDRESS:</b>	122 Ste-Cécile Street Vanier, Ontario K1L 5L2
<b>GRADE / DEGREE:</b>	<b>ANNÉE D'OBTENTION / YEAR GRANTED</b>
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**FLAHERTY, Timothy**

AUTEUR DE LA THÈSE - AUTHOR OF THESIS

**Ph.D. (Theology)**

GRADE - DEGREE

**Theology (Saint Paul University)**

FACULTÉ, ÉCOLE, DÉPARTEMENT - FACULTY, SCHOOL, DEPARTMENT

TITRE DE LA THÈSE - TITLE OF THE THESIS

**Using the Expression "Human Dignity" in Public Documents Discussing  
Genetics : A Theological Contribution to the Discussion of its Meaning in Light  
of the Work of Richard A. McCormick**

**Hubert Doucet and Kenneth R. Melchin**

DIRECTEUR DE LA THÈSE - THESIS SUPERVISOR

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***Using the Expression "Human Dignity" in Public Documents Discussing Genetics:  
A Theological Contribution to the Discussion of Its Meaning  
In Light of the Work of Richard A. McCormick***

by

Timothy Flaherty

A dissertation submitted to the Faculty of Theology, Saint Paul University,  
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## **ABSTRACT**

### **Using the Expression "Human Dignity" in Public Documents Discussing Genetics: A Theological Contribution to the Discussion of Its Meaning In Light of the Work of Richard A. McCormick**

**Timothy Flaherty**

This thesis is directed towards the goal of advancing ethical discourse in public policy development. It examines a piece of the public policy process in a specific instance -- public documents discussing genetics and the use of genetic technologies. The documents considered are examples of a part of the process that raises values questions and issues in the public domain as an explicit part of a decision process. This project is about one value in particular--human dignity--which is used as one of the core values in virtually all public policy documents discussing genetics. Human dignity is an example which focuses our discussion on how the term is used, what is the content of its expression, and what is its meaning for those who make decisions. The thesis is not an exhaustive inquiry into the meanings attached to human dignity. In addition, the thesis will explore the meaning of the expression human dignity from a theological perspective. It will be argued that the theological perspective may serve to be illustrative of insights not noticeably present in the public discourse.

This thesis is presented in four chapters. Chapter 1 presents a brief overview of the rapidly evolving science of genetics and the issues it raises in the public forum. Chapter 1 serves to bring awareness of at least some of the basic notions, applications, and consequences of genetics in order to appreciate both its complexity and its applications and, consequently, to appreciate the complexity of the questions the science

of genetics and its applications raise. It also illustrates some of the reactions to the science of genetics in the public sphere.

Chapter 2 is a more detailed examination of some of the public documents noted in passing in Chapter 1. It works with their presentations of human dignity and its importance in their presentations. Documents chosen are from public bodies in Canada, France, and the United States. We have chosen three documents from each country: one that deals with research involving human subjects, in that much of the technology in the field of genetics is presently at the level of research; one that deals with genetic testing; and one that deals with reproductive cloning. Our examination only somewhat advances the project of determining the content or meaning of the expression human dignity as it is used in these public documents and leaves questions concerning the relationship, if any, with references to autonomy; and the tensions between the individual and social meanings attached to the expression human dignity.

Chapter 3 attempts to bring some clarity in the use of human dignity through a brief sketch of the meanings attached to it, as well as its relationship with the term autonomy. Kant and Rawls are discussed and a perspective on their work from the point of view of Habermas, Virtue Ethics, Feminist philosophy, and the law as found in the *Canadian Charter of Rights and Freedoms* is included. These additional perspectives allow us to determine if the deontological justification of human dignity found in the public documents and supported by the positions of Kant and Rawls is broadly accepted in the community and thus sufficiently useful in determining the content and meaning of human dignity in public discourse.

Further efforts to bring clarity to the discussion of the content and meaning of the term human dignity is sought via a theological perspective represented by Richard A McCormick. His work offers an anthropology that advances the discourse and provides insight into how we may address questions of human dignity, genetic technologies, and public policy on this and similar issues in the future. The impact of using a theological anthropology on the process and the results of the public policy process is then assessed. We proposed that while it may not necessarily alter the final recommendations or conclusions of a policy process, it serves to make the process clear, transparent and inclusive within a framework that allows for ethical discourse. It is the purpose of advancing the ethical discourse in the development of public policy that directs this project.

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## **INTRODUCTION**

As with many other aspects of both public and private life, the challenges for those developing public policy are becoming more numerous, not only because of the increasing complexity of issues but also because of the changing nature of the public that the policies are meant to serve. In Canada, our society is increasingly multifaceted and heterogeneous, and there is no one social, cultural, or moral system that can direct public policy to the satisfaction of all. This raises questions about how those who contribute to the formulation of public policy address these complexities in the content of the policies they develop-- what are the social, cultural, or moral systems that contribute to public policy development and how are they reflected in these policies? In other words, in a country that values diversity, how do the varied values held by the general public enter into the public policy discussion and formulation, and how are conflicts or tensions resolved between competing systems of values?

We expect our public policy makers, as part of a significant social institution, to demonstrate a respect for pluralism in their decision-making and that this will be demonstrable in their work. We wonder if this works out in practice. Some may suggest that the formulation of public policy works at the level of "what most reasonable persons" could agree was acceptable; others may propose that it is rather a balancing of power between groups and ideologies; still others may appeal to general social trends. We can be certain, however, that if the discourse surrounding the development of public policy is to be accepted as ethical discourse it must not only allow for but also must engage the pluralistic society in which it is developed. This initiative must not be for the purpose of power balancing, nor setting minimum standards, nor agreeing to the lowest common

denominator. Rather, to ensure our discourse in the development of public policy is ethical discourse, it must be characterized by the following: acceptance of the multiplicity of values that surround issues; exploration of their meaning and import to those who hold them; addressing the implications for the communities involved when one value is to be privileged over another; and co-operative decision-making by the community or accepted representatives.

Our project here is not to address directly nor critique the development of public policy. It is rather the general context for our project. We note that those who have engaged in this analysis of the public policy development process find that there are patterns or methodologies that policy makers employ and that in those it is possible to discern the place of philosophies or value systems in the process. We will explore this further in Chapter 1.

This project examines a piece of the public policy process in a specific instance -- public documents discussing genetics and the use of genetic technologies. The documents chosen are examples of a part of the process that raises values questions and issues in the public domain as an explicit part of a decision process. At issue is not the science of genetics but how we make decisions about the place of this science in our lives. This thesis project is about one value in particular--human dignity—since it is a core value that enters into other public policy documents discussing genetics. This value term is an example to focus our discussion which is about how the term is used, what is the content of the expression, and what is its meaning for those who make decisions. It is not an exhaustive

inquiry into the meanings attached to the expression. Although we will explore the meaning of the expression human dignity from a theological perspective, this project is not directly concerned with the debates surrounding public theology. The theological perspective is here an example of a system of values that may serve to be illustrative of insights not noticeably present in the public discourse.

In this project we focus our inquiry on the public documents as the various national or supranational consultative bodies have published them. We analyse the notion of human dignity as it appears in these texts, which is largely the source of information used by policy makers and the public at large. This is important for our purpose. While the more expected methodology for a thesis would define human dignity, as it should be understood through a literature search and then to analyse the documents against this definition, we find that there are significant authors who have explored this more historical approach to the use of the term human dignity. Our concern here is to try and discover how the term is used today in the context of western society and to assess whether its actual usage is helpful and broadly acceptable as a parameter for the use of genetic technologies. The approach is one of descriptive and inductive analysis.

This thesis is presented in four chapters. In Chapter 1, we present a brief overview of the rapidly evolving science of genetics and the issues it raises in the public forum. This is a background piece that anticipates the use of the expression human dignity in the public documents. Chapter 1 serves to bring awareness of at least some of the basic notions, applications, and consequences of genetics in order to appreciate both its complexity and its

applications. It also illustrates some of the reactions to the science of genetics in the public sphere. Indications of both the promise of genetic technologies and the fears they raise are noted, as are the efforts made to address concerns through public bodies as contributors to the policy development process. We note how the public bodies use the expression human dignity in their publications, and we conclude by observing that it is not immediately clear as to the understanding of human dignity they employ. We argue that this lack of clarity in expressing the meaning of human dignity may limit the effectiveness of the expression as a value or parameter in public discourse and in public policy development.

Chapter 2 is an examination of some of the public documents noted in Chapter 1. In this chapter we will examine selected documents in more detail to try and expose their presentation of human dignity and its import in their presentation. This will either confirm or refute the suggestion that there is a lack of clarity in the use of the expression. Documents presented are from public bodies in Canada, France, and the United States. For the sake of consistency an effort is made to examine documents that deal with similar subjects. For the purpose of this project, we have chosen three documents from each country: one that deals with research involving human subjects, much of the technology in the field of genetics is presently at the level of research; one that deals with genetic testing; and one that deals with reproductive cloning. Our finding is that there is ambiguity to be found in the documents themselves, nor do the documents reference any bodies of work that would yield a clue to the meaning their authors attached to human dignity beyond their justification of the use of human dignity deontologically. We find

ourselves left with a series of questions that direct us to a broader search for the meaning of the expression human dignity.

Having noted the difficulties in determining with any precision the meaning attached to the expression human dignity in the public documents discussing genetics which were reviewed in Chapter 2, we were also left with questions concerning the relationship, if any, with references to autonomy; and the tensions between the individual and social meanings attached to the expression human dignity. We argue that it is important to make this determination to understand what value the term has in public documents concerning genetic technologies. In chapter 3, we aim to achieve some clarity by giving a brief sketch of the meanings attached to human dignity, as well as its relationship with autonomy in philosophy, as a proposed avenue of discovery. The avenue of pursuit is through two influential philosophers and acknowledged contributors to contemporary bioethics debates, Immanuel Kant and John Rawls, and their work related to human dignity, which is also from a deontological perspective, autonomy, and the relationship between the two values. To assess their contribution to this project we also offer a perspective on their work from the point of view of other philosophical works, notably Jürgen Habermas, who also offers a deontological perspective on the issue and as well as representative works from the schools of virtue ethics and feminist thought. These additional voices allow us to assess whether the presentation of human dignity from the deontological perspective of Kant and Rawls is generally accepted. We also examine the use and understanding of human dignity as it is found in the *Canadian Charter of Rights and Freedoms* and in its interpretation by the

Supreme Court of Canada. Again, this presents another avenue for understanding how human dignity is presented and interpreted. This chapter is not meant to be exhaustive nor comprehensive of what is clearly an extensive debate in philosophy.

From chapter 3, having arrived at a less than successful conclusion to our exploration, we expand the scope of the discourse more broadly in Chapter 4 to include the theological perspective, which has not been highly noticeable in the public policy discourse. We have chosen the work of Richard A. McCormick because he proposes an anthropology that advances the discourse and provides insight into how we may address questions of human dignity, genetic technologies, and public policy on this and similar issues in the future. As well, McCormick is widely known and has extensively written in the area of bioethics. He offers a comprehensive perspective that is grounded in a theological worldview while engaged with society. It is the purpose of advancing the ethical discourse in the development of public policy that directs this project.

## **CHAPTER ONE**

### **THE SCIENCE OF GENETICS AND THE ISSUES IT RAISES IN THE PUBLIC FORUM**

#### **1.0 Introduction**

This chapter begins with a presentation of the science of genetics and follows with a brief presentation of the reactions and responses that recent developments in the application of genetic technologies have elicited in the public forum. This is the context for the discussions in this paper. The use of the expression “human dignity” in public documents discussing genetics has prompted the question of its meaning. While the science itself is not the object of this inquiry, it seems necessary to be aware of at least some of the basic notions, applications, and consequences of genetics in order to appreciate both its complexity and its applications and, consequently, to appreciate the complexity of the questions the science and its applications raise. The latter point is of particular significance in this inquiry.

#### **1.1 The Science**

Genetics is the science of heredity.<sup>1</sup> For centuries it has been known that certain desirable characteristics or traits of animals or plants could be promoted through selective

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<sup>1</sup>What follows here is a summary of material presented in numerous sources that were compiled to aid non-expert persons in understanding the very basic elements of the science involved in the field of genetics. Some examples of texts used are: William D. Stansfield, *Theory and Problems of Genetics*, 3rd ed. (Toronto: McGraw-Hill Inc., 1991); David

breeding. Similarly, undesirable traits might be made less evident. The exact how and why was not known but the results were. The Austrian monk Gregor Mendel laid the groundwork for the modern science of genetics in the mid-1800s with his work on peas. He concluded that variations in the height of plants or the smoothness or wrinkling of seeds were controlled by a single physical factor. Those “something in the gametes” that Mendel credited as the physical link between generations were later called “genes” (from the Greek meaning *to give birth to*). However, Mendel’s work was largely ignored until the early 1900s when it was noted that chromosomes behaved like Mendel’s “something.” Subsequently, genes were discovered to be located along these chromosomes in the nucleus of each cell. Discovering the chemical basis of genes was the next challenge.

The discovery of an acidic substance in the remains of cells found on used bandages by Miescher in 1869 and its naming in 1871 as nuclein (and later as nucleic acid, as this material was found in the nucleus of a cell), and the link that was established by Garrod in 1909 between inheritance of traits and missing or abnormal enzymes set the stage for the identification of deoxyribonucleic acid (DNA) as the agent responsible for trait transmission. This identification was confirmed in the mid-1940s and reiterated in the early 1950s, along with confirmation of the chemical characterization of DNA. Research converged and allowed Watson and Crick to construct a representation of the structure of DNA--the now well-known double helix. Two long molecules of DNA are entwined in a

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Suzuki and Peter Knudtson, *Genethics: The Clash Between the New Genetics and Human Values* (Cambridge: Harvard University Press, 1990); Ricki Lewis, *Human Genetics: Concepts and Applications* (Dubuque, IA: WC Brown Publishers, 1994).

fashion resembling a twisted ladder. The key to the function of DNA lies in the sequence of the ladder rungs, which are pairs of bases (adenine and thymine and guanine and cytosine). These are the distinct chemical ingredients of DNA and of the genes located along the strand of the DNA sugar (deoxyribose)-phosphate backbone. By 1972, scientists had combined the DNA from two viruses (known as recombinant DNA or rDNA) and introduced this rDNA into bacteria that reproduced or cloned the rDNA. Thus, genetic technologies or genetic engineering was born.

There are approximately three billion base pairs that compose the complete set of instructions for the cells in the human person. This complete set is called the human genome. Of the three billion bases, approximately three million differ from person to person. The chains of bases (the strings of DNA) are divided into sections called chromosomes, which in the human person number 46. Along the chains are sections of bases identified as genes that contain specific instructions for the making of cells and that direct their function. There can be thousands or millions of bases in one gene and thousands of genes in each chromosome. The estimated number of genes in the human genome is 30,000 to 50,000. There are millions of more pairs of bases that link the genes together. The role or function of these bases, if any, is the subject of speculation at this time. What is known is that when a gene becomes active, it leads to the production of one of the thousands of proteins that are the basic chemicals that compose the structure of cells and cause the multitude of actions and reactions involved in all parts and all functions of the human body. There are those who posit that genes also play a role in behaviour.

From increased understanding about the composition of genes and how they function followed knowledge of changes in the ordering of bases that occurred from time to time, either as the gene replicated itself (most often in germ cells, i.e. those in the gametes for reproduction) or as the result of environmental factors such as radiation or viruses. These changes or mutations may affect the production or instructions for proteins and, consequently, may affect functioning of the cells. This may result in the appearance of new or different traits, some of which may be passed on from generation to generation. Mutations may be regarded as desirable when they contribute to the evolutionary process that allows for the continuation of the species, or they may be seen as harmful when they impair the expected or desired function of the body. Many mutations seem to be harmless.

## **1.2 The Application of the Science**

The rapidly growing and evolving science of genetics, with knowledge of the makeup of genes, their function, and processes, has opened the way for manipulation of genes--the fundamental building blocks of life. These advances have raised some fundamental questions about the nature of the human person and the relationship of science to the human person. Ongoing research, particularly that of the Human Genome Project (HUGO),<sup>2</sup> has begun to find the specific locations on each chromosome of genes that code

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<sup>2</sup>Details of the depth and the scope of the Human Genome Project and the Human Genome Organization can be found at [www.hugo.gbd.org](http://www.hugo.gbd.org) or [www.oml.gov.hgms](http://www.oml.gov.hgms). The massive international project to map the human genome has accelerated the discussion of appropriate use of genetic technologies as it points to more potential applications with each new "discovery". It is worthwhile to note at this point that any discussion of HUGO most often includes a discussion of the social and ethical issues involved.

for specific traits. This combined knowledge leads to the first of several issues related to genetic technologies that have generated discussion and some controversy--genetic testing.

### 1.2.1 Genetic Testing

In *genetic testing*, scientists look for the gene responsible for a specific trait or for the presence of the protein it controls. Genetic tests are being developed for the detection of disorders caused by mutations in genes. The results of these tests can indicate whether a person has the mutation and will develop the disorder or whether the person may be at risk for developing the disorder. Other tests can determine whether an individual carries a mutation, and although that person may not be at risk for the disorder themselves, they may have the potential to hand it on to their offspring. Testing can be either prenatal or postnatal. While genetic testing at first might seem to be a boon for those with disorders, we must note that while there are an increasing number of tests available, treatment options are extremely limited.

It is also important to note that virtually everyone has mutant genes, and while genes play a role in many disorders, and in some instances may be the sole cause (Huntington Disease), a person's environment also has a role. Moreover, in many cases (diabetes, for example) several mutations of several genes seem to be the cause. Genetic testing at this time cannot tell whether the effect of the mutation will be major or merely noticeable; nor do all mutations cause disease. While there may be some promise in genetic testing, there is also the spectre of genetic determinism or reductionism and the question of the limits of this intervention when treatment is not on the horizon. The potential disadvantage for or

discrimination against those identified with a mutation has already been noted in many discussions.

### **1.2.2 Gene Therapy**

*Gene therapy* is an experimental effort to respond to the results of genetic testing when a harmful genetic mutation is discovered. The mutated gene causes the production of a protein that does not do the necessary task for the health of the organism or causes an undesired result or disease. This therapy involves cloning genes that conform to the norm, and these cloned copies of the correct gene are inserted into a virus that in turn inserts itself into the cells of the therapy's subject. The hope is that the virus with the correct coding for the gene will take over enough cells to produce the correct protein for the health of the subject. To date there has been only limited success. There remains the challenge of having the correctly coded gene replicate continuously. This type of gene therapy is known as "somatic cell therapy" or "body cell therapy," as distinct from a cell that is a gamete (sperm or egg) and is called a germ cell. In somatic cell therapy only the cells of the individual treated are expected to be affected. *Germ-line therapy* is an intervention that attempts to correct errors in the genes present in the germ cell prior to conception. Any changes in the germ cell will be passed on to all future generations. With both types of therapy, it is necessary to note that limitations are imposed due to the small number of diseases caused by single gene anomalies. The tentative nature of our knowledge of the consequences of gene therapy, most notably in the case of germ-line intervention and its

potential effect on the future of the gene pool, has led some to demand limits to the use of this technology until our understanding has advanced.

### **1.2.3 Genetically Engineered Medicine**

Significant success has been achieved in the field of disease therapy with *medicine that is genetically engineered*. Diabetes is a prime example. The insulin necessary for treatment of the disease was formerly obtained from cattle and pigs. It is now obtained by cloning the gene that directs the protein that produces insulin. The result is a greater supply of a quality-controlled product at a lesser cost than was formerly available. This is generally accepted as an all around good use of genetic technologies. In a similar instance, however, there are the signs of a controversy. Some individuals, because of a mutation in the gene that controls the trait of height, do not grow normally and can be treated with a human growth hormone obtained by cloning the gene which carries the instructions for normal height. These individuals generally have families who have normal height. A question arises when an individual wishes to augment his or her height, which they regard as unsatisfactory, when their stature results not from a mutation but from the genetic stock from which they were born. Are there limits to how genetically produced medicine may be used when there is no disease--and, more basically, what is disease, and who defines it?

### **1.2.4 Eugenics**

This raises the expansive issue of *genetic enhancement* and the related matter of *eugenics* (from the Greek meaning "well born"). As history has shown, humankind has

been aware for some time that in agriculture and animal husbandry certain desirable traits in crops and livestock could be developed through selective breeding. Similarly, undesirable traits were avoided. Attempts have been made to enforce sterilization on “lesser humans,” particularly the poor, the feeble minded, the alcoholic, and the criminal, to prevent their reproducing and passing on their “defects” or what were considered by others to be undesirable traits. This was practised in Canada (notably in Alberta), in the United States (particularly California), and in Europe (England and Germany). The memory of the Nazi experiments and the horrors they entailed in pursuit of a genetically pure race casts a shadow over many discussions of genetics and genetic technologies.<sup>3</sup> Yet one cannot assume that the attitudes that support eugenic practices ended with the fall of the Nazi regime or the repeal of eugenic statues in the countries named. The editor of the magazine *Science* is noted to have said in an address delivered at the First Human Genome Conference in 1989, during a discussion of the billions spent on HUGO and the needs of the poor, the infirm, and the underprivileged, “What these people don’t realize is that the

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<sup>3</sup>The full impact that the memory of the abuses perpetrated during the Nazi regime, particularly the medical experiments, has upon today’s reactions and responses to the subject of genetic technologies is difficult to assess and is in itself a subject for a separate research exercise. The War Trials in Nuremberg following 1945 brought to the attention of the world certain norms for legitimate medical experiments, particularly informed consent on the part of all participants. It is not difficult to follow from that time the development of further norms. More detailed information on the events following the fall of the Nazi regime can be found in: George Annas and Michael Grodin, *The Nazi Doctors and the Nuremberg Code* (New York: Oxford University Press, 1992); Nuremberg Tribunal, *Trials of War Criminals Before the Military Tribunals. The Medical Case* (Washington, D.C.: U.S. Government Printing Office, 1948); and Robert Baker, “A Theory of International Bioethics - The Negotiable and the Non Negotiable,” *Kennedy Institute of Ethics Journal* 8, no. 3 (September 1998): 233-274.

homeless are impaired . . . indeed, no group will benefit more from the application of human genetics.”<sup>4</sup> The implication of the comment is clearly that homelessness is the result of genetic shortcomings and will be overcome by genetic manipulation!

Questions of what factors constitute disease and are, therefore, rightly the subject of a treatment, stand beside questions of how we value persons, especially those with a disability. Questions of gender equality are raised alongside of questions concerning the desirability of enhancing certain traits that some find desirable, and the associated question of who decides what is desirable. In an age of limited resources there are also questions about the allocation of scarce funds for research or "treatments" surrounding enhancement genetics, be it physical or intellectual. Again the question is--what is acceptable and what are the limits, if any?

### 1.2.5 Cloning

The world was startled to attention in February 1997 when Scottish scientists made known the birth of a sheep, named Dolly, that had been cloned by combining the nucleus of an adult sheep mammary cell and an enucleated sheep egg.<sup>5</sup> Dolly was an identical copy of her "parent," produced without sexual reproduction, without germ cells. Some months later the headless frog was produced. Later Richard Seed, a physicist from Chicago allowed that

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<sup>4</sup>Evelyn Fox Keller, "Nature, Nurture, and the Human Genome Project," in *The Code of Codes: Scientific and Social Issues in the Human Genome Project*, eds. Daniel Kevles and Leroy Hood (Cambridge: Harvard University Press, 1992), 282.

<sup>5</sup>I. Wilmut, A. E. Schnieke, J. McWhir, A. J. Kind & K. H. S. Campbell, "Viable offspring derived from fetal and adult mammalian cells" *Nature* 385 (February 27, 1997), 810 - 813.

he would clone a human being for a fee. The question was quickly raised--is this beyond the limits of what is acceptable?

### **1.3 The Reaction--Social and Political**

Most of the texts on the subject of genetic technologies note some common reactions. These are chiefly characterized as high expectation and high apprehension. Science holds out great promise for the treatment of disease and the alleviation of suffering. It seems almost weekly that news stories reveal that a researcher somewhere has been able to locate a certain gene on a chromosome that when mutated is responsible for a certain disease. This is closely followed by speculation on when a treatment or a cure might be available. The reality of effective gene therapy remains a long way off, but hopes and expectations are raised. Yet, when certain members of the scientific community speak of efforts like the Human Genome Project as allowing us to finally know what it is that "makes us human", the fear of reductionism, the biological alone as defining our humanity, is raised, and the broader social consequences of the science are examined. Cloning has captured the public attention and has raised the stakes in the potential of genetic technologies. An editorial from the *Ottawa Citizen* repeats a commonly raised point: [can we] "cling to a blind faith in scientists' ability to keep their genies corked in test tubes . . . headless frogs promise, in time, to become headless humans lying on a metal tray growing organs for transplantation? That will shake human identity to its core, raising awful moral

and spiritual questions.”<sup>6</sup> Some fears are based in fact and in the potential direction that uncontrolled technology may lead. Not long after Dolly appeared, it was rumoured that parents seeking to “replace” a dead child through cloning approached the scientists responsible!

Some fears raised are nurtured by a lack of understanding of the science. Because of the complexity and the rapid development of the science of genetics, this is understandable. The situation is not aided by fictional horrors such as Ira Levine’s *The Boys from Brazil*, a novel about Hitler clones, or *Jurassic Park*, the recent movie about the reinvigorating of dinosaurs by cloning their DNA from an archaeological dig. Nor is the situation aided by fanciful speculation on sports teams of clones of Michael Jordans or Mario Lemieuxs! These exploitations of the situation do not diminish the valid concerns raised about where this technology has the potential to lead humanity.

Very often the concerns find expression in legislation that is a reaction to the technology. The most recent notable example is in the United States following the Dolly revelation. Bills were introduced in both the Senate (the Bond-Frist Bill) and in the House of Representatives (the Ehlers Bill) that would not only restrict the cloning of humans but also would end all cloning experiments that use human cells. This reactive approach is regarded by many, particularly in the scientific community, as “knee-jerk” and ill conceived,<sup>7</sup> as it does not acknowledge the potential benefits from some research. The

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<sup>6</sup>*Ottawa Citizen*, Sunday, October 26, 1997.

<sup>7</sup>See for example Jerome P. Kassirer, M.D., Nadia A. Rosenthal, Ph.D., “Should Human Cloning Research Be Off Limits?” *The New England Journal of Medicine* 338, no. 13 (March 26, 1998).

legislation is now being withdrawn and rethought. In Canada legislation proposed by the Minister of Health did not come to the floor of the House of Commons before the end of the Session and at present is being reviewed before it is represented. The legislation proposed, however, differs from the American bills mentioned above in that it is part of legislation recommended after the lengthy Royal Commission on Reproductive Technologies and might therefore be considered a response to proposed genetic technologies rather than a reaction to them. The distinction is considered in the next section.

#### **1.4 The Response**

Not all considerations of the potential of genetic technologies, the desirable aspects and the potential pitfalls, can be considered a reaction. Since the early days of recombinant DNA there has been a pattern of thoughtful reflection that acknowledges genetic technologies as having not only medical but also social and ethical content.

##### **1.4.1 The Public Debate**

The public debate about the potential and the pitfalls of genetic technologies is multifaceted. Within the scientific community there has been whole-hearted endorsement of the potential of genetic technology by some. Richard Dawkins, an evolutionary biologist, is one example. His position is one of genetic determinism or socio-biology and sees a very clear and promising place for the species to make of itself what it wills through

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technological manipulation if it so chooses. Other scientists' views are more nuanced. David Suzuki repeatedly asks who is deciding what will be. In *Genethics* he specifically questions whether the scientific, military, and the economic interests of a few going to drive the agenda surrounding genetics and biotechnology, or are there other voices to be heard? He is one of many who raise the questions surrounding the social and ethical issues that are part of these new scientific developments. Daniel Kevles is another such individual who raises concerns and invites discussion and reflection on the issues brought to the fore by the Human Genome Project.

Strongly opposing most of the genetic technologies are individuals such as Jeremy Rifkin, an economist who takes a position diametrically opposed to Dawkins. He promotes an understanding of these developments as destructive of society and the human person.

Churches have made their positions known. For example, in the Roman Catholic tradition, Pius XII (*Moral Aspects of Genetics*, 1953) approved of the science of genetics in its goal to alleviate suffering, while he cautioned that any experimentation must respect the innate dignity of the human person. John Paul II has made two clear statements, again reiterating the need for respect for the totality of the human person and calling for moral discernment in proceeding with the use of genetic technologies. The World Council of Churches has issued several reports on genetics and its impact that range from the welcoming and supportive to the cautious and the suspicious. Respected theologians in the Christian tradition including Paul Ramsey and Richard A. McCormick have extensively written on issues in bioethics and the multiple dilemmas in this field, many of which relate to the possibilities raised by genetics.

The field of bioethics has seen several authors produce works that have become “classics” in discussions on issues surrounding health care dilemmas including genetic technologies. James Childress, Tom Beauchamp, Tristram Engelhardt, Leroy Walters, and others engage the issue of how medical technology and its application relates to our understanding of the human person. They invite reflection on our self-understanding as a determinate of the appropriate use of medical technology.

#### **1.4.2 Public Structures for the Discussions**

In the course of the discussions by scientists, philosophers, theologians, and other parties, formal structures to consider the issues began to emerge, such as research ethics committees and hospital ethics (clinical) committees. These were tentatively interdisciplinary. Structures that were supranational and later national in scope began to appear to address many of the questions that scientists, philosophers, theologians, and others raised. In some cases the same individuals who were noted above as authors became members of these groups. Called variously "boards" or "committees," these groups are mostly found in Western countries that are Latin or Nordic, and while each began in an attempt to address a particular question or situation in their particular country, each expanded its scope to address broader issues. National ethics structures in varying forms can be found in Australia, Belgium, Canada, Cyprus, Czech Republic, Denmark, Finland, France, Germany, the Holy See, Malta, Mexico, Norway, The Netherlands, Philippines,

Poland, Portugal, Romania, Spain, Sweden, Switzerland, Turkey, The United Kingdom, and the United States.<sup>8</sup>

#### **1.4.3 The Work of Public Consultative Structures and the Public Policy Framework**

While the genesis of each structure is varied, there is a similarity in motivation--the call for broad public discussion on the subject of genetic experimentation and interventions to determine whether there are appropriate limits that require definition, or controls that need to be established, and to determine who decides.<sup>9</sup> These national (and supranational) consultative structures with varied mandates formulate reports, studies, consultations, policies, opinions, or legislation and tend to operate in one of three fashions. They operate by way of the following: 1) the enunciation of guiding principles that are the foundational values of the society, and these principles are used to define policy or policy direction. This approach recognizes that pluralism in each society makes the selection of values a challenge. Nonetheless, several values emerge in each instance; 2) the development of

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<sup>8</sup>Details of the history, composition, mandate, and reporting structure of national ethics committees or boards can be found in works such as Office of Technology Assessment, *Biomedical Ethics in U.S. Public Policy* (Washington, D.C.: U.S. Government Printing Office, 1993); Sonia Le Bris, *Les instances nationales d'éthique* (Strasbourg: Les Éditions du Conseil de l'Europe, 1993); and Christian Byk and Gérard Mémeteau, *Le droit des comités d'éthique*, Collection médecine et droit (Paris: Éditions Alexandre Lacassagne and Éditions Eska, 1966).

<sup>9</sup>An example of such a call for discussion by a broad spectrum of social groups was made in a letter to President Jimmy Carter on June 20, 1980. The letter from the representatives of Protestant, Catholic, and Jewish leaders in the United States is contained in U.S. House of Representatives, *Human Genetic Engineering: Hearings before the Subcommittee on Investigations and Oversight of the Committee on Science and Technology*, no. 170 (1982), 130-131.

procedures to address ethical questions, particularly when ethical principles conflict.

Procedural values in these cases are grounded in core values; or 3) integration of guiding principles and procedural values. The enunciation of the guiding principles is the first issue of interest for this paper. The second is the procedures for addressing the questions put before society and the need to ensure they are reflective of that society or community.

Against this discussion of the contribution of the consultative bodies and their role in public policy development are the observations of analysts of the public policy development process that observe challenges to the inclusion of new value systems or procedures for engaging the public policy process. A question arises as to whether the consultative bodies' contribution is able to effectively enter the process in an influential way so as to allow the public policy to be reflective of the society or community that will be governed by the policy. The nature of these challenges is found in the methodologies generally employed in the policy development process as outlined in the following pages.

In his work, *Making Policy: A Guide to the Federal Government's Policy Process*, Glen Milne defines policy as "an intention and direction. Policy directs, but does not consist of, operational programs and details."<sup>10</sup> It is the purpose of this excursus on policy development to briefly explore some aspects of the policy making process. We will not concern ourselves with the institutions responsible for, or the mechanics of the development of policy *per se*. Instead, we wish to uncover general philosophies or value systems that policy makers generally adhere to in the process. This portion of our study will primarily

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<sup>10</sup> Glen Milne, *Making Policy: A Guide to the Federal Government's Policy Process* (Ottawa, ON: Glen Milne, 1999), 17.

entail a review of academic literature on the subject of public policy development.

We will limit our discussion to the model of government generally associated with nations in North America and Western Europe. The reason for this is the difference in prevailing social attitudes between Eastern and Western cultures (at the same time acknowledging the differences that exist even within Western culture). Western society, and the United States in particular, is characterized by a feeling of individualism by its citizens. Contrary to this individualism is collectivism, the predominant social situation in Eastern Europe, Africa, and Asia.

Individualism poses a different challenge to policy makers because they must be responsive to the different values that this ideology entails, and the different social pathologies it spawns. David Popenoe argues the following:

Societies marked by an individualistic culture . . . rank higher than collectivist societies in political democracy, individual development, scientific achievement, and (with the important exception of the newly advanced and relatively collectivist Asian societies of the Pacific Rim) economic advancement. Advanced societies accord the highest priority to these goals. . . . [These societies are] well suited to the development of autonomous individuals and thus to the growth of human freedom - the supreme value of individualistic societies.<sup>11</sup>

James E. Anderson offers a similar assessment in his commentary on American society:

They [American values] include individual freedom, equality, progress, efficiency, and practicality. Values such as these - and others, such as democracy, individualism and humanitarianism - clearly have significance for policy-making. For example, the general approach of Americans to regulation of economic activity has been practical or pragmatic, emphasizing particular solutions to present

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<sup>11</sup> David Popenoe, "The Family Condition of America: Cultural Change and Public Policy," *Values and Public Policy*, Henry J Mann, Thomas E. Taylor, and Timothy Aaron, eds. (Washington DC: The Brookings Institution, 1994), 83-84.

problems rather than long range planning or ideological consistency. Moreover, concern with individual freedom has created a general presumption against restriction of private activity in favor of the broadest scope possible for private action. Stress on individualism and private property finds expression in the notion that a person should generally be free to use his property as he sees fit.<sup>12</sup>

Anderson notes that differences exist in the extent of individualism in Western cultures.

For example, he points to the general acceptance by British citizens of their government's ownership of several business and industry areas.<sup>13</sup>

In addition to being sensitive to the values held by their electorate, policy makers in the West must be responsive to certain social problems, which Popenoe contends are made more likely by an individualistic cultural preference.

. . . the shift from collectivism to individualism entails social costs as well as human gains. Along with political democracy and economic advancement, individualistic societies tend to have high rates of individual deviance, juvenile delinquency and crime, loneliness, depression, suicide, and social alienation. In short, individualistic societies have a greater number of free and independent citizens, but a weaker social order.<sup>14</sup>

Clearly then, policy-making in the West will likely differ substantially from that in the East.

The literature reviewed in this study focuses primarily on the former.

We begin by describing four models that attempt to explain the decision-making process involved in public policy formation: group theory, elite theory, rationalism, and incrementalism.

Thomas Dye has the following to say concerning group theory:

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<sup>12</sup> James E. Anderson, *Public Policy Making* (New York, NY: Praeger Publishers, 1975), 31.

<sup>13</sup> *Ibid.*

<sup>14</sup> Popenoe, *Values and Public Policy*, 84.

**Public policy at any given time is the equilibrium reached in the group struggle. This equilibrium is determined by the relative influence of any interest group. Changes in the relative influence of any interest groups can be expected to result in changes in public policy; policy will move in the direction desired by the groups gaining influence and away from the desires of groups losing influence.<sup>15</sup>**

Similarly, Anderson writes:

**Public policy, at any given time, will reflect the interests of dominant groups. As groups gain and lose power and influence, public policy will be altered in favor of the interests of those gaining influence against the influence of those losing influence.<sup>16</sup>**

It is interesting to note that this theory ignores the personal inclinations and values of policy makers, and instead regards them as mere puppets to be manipulated by interest groups.

Anderson recognizes this, and says:

**Group theory, while focussing attention on one of the major dynamic elements in policy formation, especially in pluralist societies . . . seems to both overstate the importance of groups and to understate the independent and creative role that public officials play in the policy process.<sup>17</sup>**

The second theory we will look at, elite theory, is similar to group theory in that policy makers again pander to influential groups, disregarding their own ideas and acting on those of the group. The difference with the elite theory is that instead of responding to competing interest groups of varying levels of influence, government is seen to respond to the ideas and opinions of the “elite” of society (wealthy individuals and institutions). Furthermore, this theory purports that the elite are generally in agreement with each other, and share similar values. Anderson holds that:

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<sup>15</sup>Thomas R. Dye, *Understanding Public Policy* (Englewood Cliffs, NJ: Prentice Hall, 1995), 23.

<sup>16</sup>Anderson, *Public Policy Making*, 20.

<sup>17</sup>*Ibid.*

**Elites share a consensus on the basic values of the social system and the preservation of the system. [In the United States, the elite consensus includes private enterprise, private property, limited government, and individual liberty.]”<sup>18</sup>**

**If in fact the elite theory accurately describes the true state of the policy making process, then we would expect changing attitudes of the elite to dictate shifts in public policy. As Dye puts it:**

**. . . change and innovation in public policy come about as a result of redefinitions by elites of their own values. Because of the general conservatism of elites - that is, their interest in preserving the system - change in public policy will be incremental rather than revolutionary.<sup>19</sup>**

**Rationalism is the third model of policy-making that we will examine. The general idea behind this model is that policy makers should choose policies that result in gains to society that exceed the costs by the greatest amounts. Dye warns that such an equation should not be thought of in monetary terms only, but all costs and benefits to society: “Rationalism involves the calculation of all social, political, and economic values sacrificed or achieved by a public policy, not just those that can be measured in dollars.”<sup>20</sup>**

**Fred M. Frohock identifies three criteria that must be present in a policy decision scenario in order for rationalism to be a feasible strategy. Firstly, there must be present at least two policy alternatives, even if they are merely to proceed or stop. Secondly, there must be at least a minimum amount of information available to the decision maker although Frohock does not articulate the meaning of “minimum amount”. Thirdly, the policy makers**

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<sup>18</sup>Ibid., 21.

<sup>19</sup>Dye, *Understanding Public Policy*, 26.

<sup>20</sup>Ibid., 28.

are actually capable of choosing from among the policy options.<sup>21</sup>

Finally, incrementalism is the fourth policy-decision model we wish to discuss. According to this model, radically new policy decisions are uncommon. Instead, government generally builds upon past policy, each new addition being in step with the reasoning that led to the piece before it. Dye claims:

. . . existing programs, policies, and expenditures are considered as a base, and attention is concentrated on new programs and policies and on increases, decreases, or modifications of current programs.

. . . in the absence of any agreed-on societal goals or values, it is easier for the government of a pluralist society to continue existing programs rather than to engage in overall policy planning toward specific societal goals.<sup>22</sup>

Frohock adds that under conditions of inadequate or unreliable information, or when policy-makers are greatly divided on an issue, it is most likely that an incrementalist strategy will be adopted.<sup>23</sup>

On the topic of the United States, from what we have seen so far, it is unlikely either Dye or Anderson would claim that country suffers from “the absence of any agreed-on societal goals or values. . .” In fact, as we noted above, Anderson himself writes, in reference to the United States: “The [values] include individual freedom, equality, progress, efficiency, and practicality... and others, such as democracy, individualism, and humanitarianism - clearly have significance for policy making.”<sup>24</sup>

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<sup>21</sup>Fred M. Frohock, *Public Policy: Scope and Logic* (Englewood Cliffs, NJ: Prentice-Hall, 1979), 25-26.

<sup>22</sup>Dye, *Understanding Public Policy*, 31.

<sup>23</sup>Frohock, *Public Policy: Scope and Logic*, 49.

To what extent a particular society will share like values will obviously depend on the country and its acceptance of pluralism. What this text suggests, however, is that, at least in the United States, any one particular model may not dominate the policy-making arena. It implies that government has to be responsive to the values listed, and ensure that they are represented in their policy decisions.

Milne proposes that there are two types of inputs on policy development: political and bureaucratic. Bureaucratic inputs are:

. . . institutionalized, and characterized by formal decisions and consultative processes that include rules, regulations, hierarchy, correct channels, coordination and negotiation.<sup>25</sup>

He does not explicitly define political inputs, but we can speculate on what they might be. Political inputs are ideas and opinions delivered to policy planners by elected officials. In general, these ideas are likely to reflect many of the values of the voting public, as it is by virtue of this body that such officials have risen to power. Milne writes:

In the period immediately preceding and following a general election, the political side of the process plays a larger role than usual until the new government's priorities are well launched into the bureaucratic system.<sup>26</sup>

Thus, we would anticipate that it is during this period immediately surrounding an election that societal values come to bear the most on public policy.

We have listed several American social values, and proposed that these may be present in other countries to varying degrees. Daniel Yankelovich argues that a phenomenon called the "affluence effect" has led to a change in "people's attitudes toward

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<sup>24</sup>Anderson, *Public Policy Making*, 31.

<sup>25</sup>Milne, *Making Policy*, 2.

whether social problems are to be addressed, how they should be paid for, what the role of government should be, and how the problems are to be solved."<sup>27</sup> As he later suggests, policy makers themselves cannot ignore the impact of the affluence effect.

The first stage of the affluence effect is new prosperity, but accompanied by uneasiness as to how long it will last. Yankelovich believes this period is marked by a social conservatism, and claims personal choice remains limited. He uses as an example the United States in the period lasting from the end of World War II until the late 1960s as a society in such a position. In the second stage of the effect, society becomes more at ease with its prosperity. Conservative mentalities give way to more charitable ones, and people generally adopt an attitude of, as Yankelovich puts it: "I'm doing okay. Why shouldn't others get a break too?"<sup>28</sup> He believes that during this period, citizens are more open to government spending for programs to help those in need. Finally, in the third stage, which Yankelovich says became the American situation in 1990, people begin to fear the loss of affluence. They revert to the more conservative ways of the first stage.

The second and third stages mark shifting views about who should receive what, and how government should act to mediate socio-economic inequalities. Yankelovich says that during the feel-good years of the second stage, people embraced two different concepts of fairness relating to public programmes:

One was the traditional concept of fairness based on deserving, for example, 'I'm entitled to X because I worked for it and deserve it.' . . . The other was a newer

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<sup>26</sup>Ibid.

<sup>27</sup>David Yankelovich, "How Changes in the Economy Are Reshaping American Values," in *Values and Public Policy*, 24-25.

<sup>28</sup>Ibid., 25.

conception of fairness based on need, for example 'I'm entitled to X - welfare, housing, a college education, health care - because I *need* it.'<sup>29</sup>

As American society moved into the third stage, entitlement based on need found less and less support. Yankelovich believes that public policy regarding social programs now incorporates more of a "balanced social contract."<sup>30</sup> He offers the following as the new model:

If the society gives you a benefit, you must, if you are able, pay it back in some appropriate form. What the public is saying is that most government programs should require some form of reciprocity: people should no longer expect something for nothing. Above all, they should not expect something for nothing as a matter of right.<sup>31</sup>

Yankelovich is convinced that, at least in the United States, policy makers will, to some degree, favour policy initiatives that incorporate some form of this balanced social contract. He says: "To the extent that the value orientation of the public now embraces the doctrine of reciprocity rather than need-based entitlements, few social policies will remain unaffected."<sup>32</sup>

Until now, we have not discussed the role the media plays in public policy formation. Much has been written on the topic, and the general consensus appears to be that a media bias towards sensationalism may compel policy makers to act in ways they may otherwise not. Witness, for example, Rothman and Lichter: "Left liberal political

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<sup>29</sup>Ibid., 26.

<sup>30</sup>Ibid.

<sup>31</sup>Ibid.

<sup>32</sup>Ibid., 27.

ideology is a key predictor of journalists' and policymakers' attitudes toward food safety."<sup>33</sup>

In Dye we find a similar opinion, with an important distinction. Observe:

In exercising their judgement regarding which stories should be given television time or newspaper space, the media executives must rely on their own political values and economic interests as guidelines. In general, these executives are more liberal in their views than other segments of the nation's leadership. Topics selected weeks in advance for coverage reflect, or often create, current liberal issues: concern for problems affecting the poor, blacks, and minorities; women's issues; opposition to defence spending; environmental concerns; and so forth. But liberalism is not the major source of bias in the news.

. . . The principle source of distortion in the news is caused by the need for drama, action, and confrontation to hold audience attention. Television must entertain.<sup>34</sup>

He continues by describing the effects that the media can have on the policy making process:

Media effects can be categorized as (1) identifying issues and setting the agenda for policymakers, (2) influencing attitudes and values toward policy issues, and (3) changing the behavior of voters and decision makers. These categories are ranked by the degree of influence the media are likely to have over their audiences. The power of television does not really lie in persuading viewers to take one side of an issue or another. Instead, *the power of television lies in setting the agenda for decision making* - deciding what issues will be given attention and what issues will be ignored.<sup>35</sup>

Throughout the course of this review, we have tried to identify what, if any, values and methods of decision-making those responsible for formulating public policy adhere to in carrying out their task. While we could not decisively conclude that a government in position X will choose a strategy Y based on their values A, B, and C, we were able to uncover some trends in the policy making process. We described four models of decision

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<sup>33</sup>A. Plutzer and E. Maney, "Scientific Information, Elite Attitudes, and the Public Debate Over Food Safety," *Policy Studies Journal* 24, no. 1 (1996), 44.

<sup>34</sup>Dye, *Understanding Public Policy*, 304.

making in policy formation. These were: group theory, elite theory, rationalism, and incrementalism. After these models were discussed, we noted several basic societal values. While these values were purported to be American values, we suggested that they might be present in other Western countries as well. It was suggested that elected officials and policy makers must respect these values, so they could be predictors of policy outcomes. Next we briefly talked about political and bureaucratic inputs into the policy making process. We noted that some Canadian literature suggests that societal values, reflected most strongly in the political arm of the input action, are most relevant to policy making in the period immediately before and after an election.

Finally we turned to the role the media plays in the policy making process. We saw that it is generally more liberal than national leaders, and that its most recognizable effect may be in setting the policy agenda by reporting dramatic or sensational events to the citizens it serves.

In this exposition on policy development we note that in North America and Western Europe there is a privilege accorded to the value of individualism in policy development and that this value appears to trump most other values. We also note that in at least one decision model for policy making--incrementalism--there is a conscious effort to circumvent decisions based on values or goals when there is division over an issue or no agreement on what value should be privileged. This would suggest that in societies where individualism is a prevailing value, when a difficult issue arises and there is no clear agreement or decisions on which other values need to be considered, individualism will

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<sup>35</sup>Ibid., 305.

remain the core value rather than allowing for a new discourse that might be called ethical discourse according to the description above. This is an issue worth investigating for those who value ethical discourse in public policy development, and we will address some aspects of it in this project.

The preceding discussion notes potential problems for the inclusion of values in the public policy process and we suggest the problem is greater for the issue of genetic technologies because of their novel character, their broader impact, and the fact that they are the subject of much debate which is often impassioned. And yet, whether as a guiding principle, a core value, or an integrated expression of the two, concern for human dignity emerges as a significant value in each of the value hierarchies proposed by consultative bodies. It is seen variously as one principle or as the principal foundation for human rights and respect for human life, as well as the basis for autonomy and privacy, the root of equality among persons, and the bedrock for the non-commercialization of persons. For this reason, it is important to pursue this study to examine the input of the public consultative bodies, and make an assessment of their value and impact in the public policy process.

#### **1.4.4 Examples of Public Documents that Address Human Dignity as an Issue**

There is no standard form or reporting structure among the countries cited above. As their mandates and structures vary, so do their methods for communicating their deliberations or opinions. Yet, most of them generate freestanding documents that are intended to be public and to be influential in the national sphere, at the least in policy

development and in some cases in legislation. Among the documents that demonstrate this point are:

1) United States. *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research* (1978).

While not employing the phrase "human dignity", this early document chooses a parallel phrase "respect for persons" as the foundation for the principle of autonomy. It is included here to show how the values cited are not static but have a continuous thread surrounding the nature of the human person.

**Respect for Persons.** -- Respect for persons incorporates at least two ethical convictions: first, that individuals should be treated as autonomous agents, and second, that persons with diminished autonomy are entitled to protection. The principle of respect for persons thus divides into two separate moral requirements: the requirement to acknowledge autonomy and the requirement to protect those with diminished autonomy.<sup>36</sup>

2) France. Comité consultatif national d'éthique pour les sciences de la vie et de la santé, Avis (1984-2000).

In its *Réponse au Président de la République au sujet du clonage reproductif*, the committee situates its conception of the understanding of "human dignity" in its deliberations:

La signification d'un recours à des techniques de clonage pour donner naissance à des personnes et l'analyse des différentes indications avancées sont ensuite envisagées d'un point de vue philosophique et éthique, mettant au centre de la réflexion la notion de dignité de la personne qui fonde, depuis son origine, la démarche du C.C.N.E.<sup>37</sup>

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<sup>36</sup>National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research* (Washington, 1978), especially 4-12.

<sup>37</sup>Comité consultatif national d'éthique pour les sciences de la vie et de la santé. "Introduction," *Réponse au Président de la République au sujet du clonage reproductif*, Avis no. 54 (April 22, 1997); available from <http://www.ccne-ethique.org/ccne/avis>;

This committee has produced 60 opinions to date, many of which are of interest in this study. On the question of reproductive cloning the committee leaves little doubt as to its position:

Nul n'est bien entendu en droit de prétendre à régenter les croyances d'autrui. Mais en l'occurrence, si l'identification insensée entre un défunt et son clone devait se traduire par la mise au monde d'un être ainsi produit, il ne s'agirait plus de croyance à respecter mais de claire instrumentalisation d'une personne, et il y a exigence éthique de l'empêcher.

Car, voulu pour lui-même selon un regard tout superficiel, le clone serait en vérité la prothèse d'un désir fantasmagorique où il n'aurait nulle place. En aucun cas la technique biomédicale ne saurait se mettre au service de telles divagations sans s'y pervertir scientifiquement et éthiquement : elle s'y ferait la supplétive d'une pensée magique pour une fabrication bafouant la dignité humaine.<sup>38</sup>

3) Denmark. Danish Council of Ethics, *Working Paper on Cloning*. (May 20, 1997).

In its Working Paper on Cloning, the Danish Council of Ethics also uses human dignity as a value:

It has also been stressed that what we are faced with here are techniques that assail the notion that every human being is unique, and that every human being has the right to an individual identity, to be him or herself. The Danish Council of Ethics views it as a matter of course that every person has and ought to have such a right. It would therefore represent a violation of a human right to an individual identity, of that person's integrity and dignity, to be brought into the world as a copy of another person, who thus assumes the role of a master copy. For some, the imperative thing in this connection is the ability to use somatic cloning to create genetically identical people across two generations.<sup>39</sup>

4) Council of Europe. Parliamentary Assembly. *Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine* (November 19, 1996).

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Internet. There are to date 66 Opinions from 1984-2000. Of these, 15 deal with the issue of human dignity as a value.

<sup>38</sup>Ibid., II, *Considérations éthiques*.

<sup>39</sup>The Danish Council of Ethics, *Working Paper on Cloning*, Section III (May 20, 1997); available from <http://www.etiskraad.dk/english/cloning.htm>; Internet. The Council produces annual reports (1998 to present) which are also of interest.

This document situates the agreements contained in the Convention in terms of the need to consider human dignity as the most significant value.

Convinced of the need to respect the human being both as an individual and as a member of the human species and recognizing the importance of ensuring the dignity of the human being;  
 Conscious that the misuse of biology and medicine may lead to acts endangering human dignity;  
 Resolving to take such measures as are necessary to safeguard human dignity and the fundamental rights and freedoms of the individual with regard to the application of biology and medicine;  
 Have agreed as follows: . . . <sup>40</sup>

In the explanatory section that is part of the document there is, however, no clarity added to the term.

The concept of the human being has been used because of its general character. The concept of human dignity, which is also highlighted, constitutes the essential value to be upheld. It is at the basis of most of the values emphasized in the Convention.<sup>41</sup>

5) Canada. Royal Commission of New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (1993).

In Canada, the Royal Commission of New Reproductive Technologies produced its final report in 1993.<sup>42</sup> In 1996 the federal government set out its policy framework and

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<sup>40</sup>Council of Europe, " Preamble," *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*, Adopted by the Committee of Ministers on November 19, 1996.

<sup>41</sup>Ibid., Explanatory Report, section 9.

<sup>42</sup>Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993) vol. 1: 53-66. See also Science Council of Canada, *Genetics in Canadian Health Care* (1991); Law Reform Commission of Canada, *Human Dignity and Genetic Heritage* (1991); Privacy Commissioner of Canada, *Genetic Testing and Privacy* (1992); Medical Research Council of Canada, Natural Sciences & Engineering Research Council of Canada, Social Science & Humanities Research Council of Canada,

strategy for dealing with new reproductive and genetic technologies (NRGTs). In proposed legislation prohibited activities include germ-line genetic alteration, ectogenesis, cloning of human embryos, and the creation of animal-human hybrids, among others. In introducing the framework the document states:

The development and application of NRGTs in Canada have raised many profound social, ethical, legal and health issues. While some NRGTs can enhance health and well-being, others threaten human dignity and treat women, children and the reproductive process as commodities . . . Canadians have made it clear that they are looking to the federal government to manage these technologies in a way that protects those most affected and reflects our collective values.<sup>43</sup>

6) Brussels. European Commission. *Group of Advisors to the European Commission on the Ethical Implications of Biotechnology of the European Commission* (1996).

Since November 1991, GAEIB has presented nine opinions. They concern the ethical implications of a broad range of practices including: 1. the use of performance enhancers in agriculture and fisheries (bovine somatotrophin or BST); 2. the manufacture of human blood or human plasma products; 3. the Commission's proposal for a Directive on the legal protection of biotechnological inventions; 4. the gene therapy; 5. the labelling of foods derived from modern biotechnology; 6. the technique of prenatal diagnosis; 7. the genetic modification of animals; 8. the patenting of inventions involving elements of human origin; 9. the cloning techniques. From these opinions a number of ethical principles have emerged including respect for human dignity as the foundation of ethical reflection; individual freedom and the social rights of European citizens; and scientific freedom as an aspect of freedom of opinion, with limits imposed by due respect for human rights and dignity.<sup>44</sup>

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*Policy Statement on Ethical Conduct for Research Involving Human* (Ottawa, 1998). These documents provide some additional background to the Canadian discussion.

<sup>43</sup>Minister of Health, *New Reproductive and Genetic Technologies: Setting Boundaries, Enhancing Health* (Ottawa, June 1996).

<sup>44</sup>See especially European Commission. *Group of Advisors to the European Commission on the Ethical Implications of Biotechnology* (Brussels: European Commission, 1996), 21-22. See also *Opinion of the Group of Advisors on the Ethical Implications of Biotechnology of the European Commission* (Brussels: European Commission, 1996).

7) UNESCO. *Universal Declaration on the Human Genome & Human Rights* (1997).

This document adopted in November 1997 contains the following perspective on human dignity:

Recognizing that research on the human genome and the resulting applications open up vast prospects for progress in improving the health of individuals and of humankind as a whole, but emphasizing that such research should fully respect human dignity, freedom and human rights, as well as the prohibition of all forms of discrimination based on genetic characteristics,  
Proclaims the principles that follow and adopts the present Declaration.

A. HUMAN DIGNITY AND THE HUMAN GENOME

1. The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity.

2. a) Everyone has a right to respect for their dignity and for their rights regardless of their genetic characteristics.

b) That dignity makes it imperative not to reduce individuals to their genetic characteristics and to respect their uniqueness and diversity.<sup>45</sup>

**1.4.5 Impact of the Use of “Human Dignity” in Public Documents**

It is clear from the examples cited above, and they are only examples, that human dignity is at or near the top of a hierarchy of values, which the documents present as significant in decision-making regarding genetic technologies and their application or development. It is not clear, however, whether these documents understand human dignity

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<sup>45</sup>*Universal Declaration on the Human Genome & Human Rights* (Paris: UNESCO, 1997); available at <http://www.unesco.org/ibc/uk/genome/projet/index.html>; Internet. See also UNESCO Sources, “Human Dignity First” no. 94 (October 1997); available at <http://www.unesco.org/general/eng/publish/sources/sources.html>.

as one principle among others or as an integrative principle. Human dignity is generally part of a list of values or principles, although most often the first mentioned, that includes autonomy, equality, freedom from discrimination, distributive justice, beneficence, privacy, confidentiality, protection of life and health, non-commercialisation, and solidarity with other persons. While the content and the meaning of most of the other terms used is more evident in some documents in that its application is given more precision, the content and the meaning that belong to "human dignity" are not. For example, autonomy is expanded as respect for persons and the right to self-determination that requires informed consent and participation in decision-making on the part of the subject. Human dignity is often discussed in relation to rights, although the connection is not entirely clear. There is the suggestion in some places that dignity is the source of rights, although in others the mention of dignity comes after rights. The documents themselves most often do not note any philosophical or historical sources for their understanding or use of "human dignity" in their presentation. There remains a lack of precision in the presentation of this concept.

### **1.5 Summary of Chapter One**

The rapidly developing science of genetics and the present and potential health care technologies that it makes possible, bring promise and challenges on social and ethical planes, as well as in the field of health care policy and practice. On the whole, there seems to have been a judgement made in Western societies that the potential for good is at least equal to the potential for problems. However, the cautions raised are being given serious attention. This is most evident when we observe the initiation of national and supranational

consultative structures to dialogue with and offer opinions to governments and societies after interdisciplinary consultation among experts and interested parties.

The work of these consultative structures does not whole-heartedly endorse all avenues of scientific pursuit in the field of genetics. Some research and technologies have been encouraged, some forbidden, some held up for further discussion. Many documents have a cautious tone. In striving to lay out the limits for the acceptable use of genetic technologies, one of the terms used in these public documents as a value and as a parameter is the need to maintain “respect for human dignity” in any intervention. According to many of these documents, violation of this dignity renders the action or the intervention offensive. The documents are not, however, immediately clear as to the understanding of human dignity they employ. This lack of clarity may limit the effectiveness of the expression as a value or parameter in public discussions and more so in the public policy development process where there is already a noted reluctance to engage the values discussion explicitly.

The next chapter will explore specific documents to try and expose their presentation of human dignity and its import in their presentation.

## **CHAPTER TWO**

### **NATIONAL AND INTERNATIONAL DOCUMENTS**

#### **2.0 Introduction**

In the opening chapter we noted, after our cursory examination, how the use of the term "human dignity" in national and international public documents discussing genetics lacked a clear, evident, and consistent presentation of the expression. Also noted was the potential for this lack of clarity to limit the effectiveness of the expression as a value or parameter. In this chapter we will examine selected documents in more detail to try and expose their presentation of human dignity and its import in their presentation. This will either confirm or refute the suggestion that there is a lack of clarity in the use of the expression.

#### **2.1 The Choice of Documents**

There is a multitude of public documents discussing genetics from countries all around the world, although they are primarily from the industrialized West. To engage in an examination of all or even most of these documents is beyond the scope of this present project. To achieve a manageable number of documents we will choose to focus on those that are representative of the nature and the scope of the broader field. We limit the number of documents to be considered here by specifying documents from selected countries, and further by choosing documents that represent the scope of subject considered in those

countries. To allow for some comparison (although it will be minimal as this is not the purpose of this project) of how human dignity is understood across international boundaries, the subjects of the documents chosen as representative will be similar if not the same.

### **2.1.1 The Countries**

We begin with an examination of documents from Canada. The choice of Canada as our starting point for this exploration is because it is the country of principal interest for the author. While Canada does not have a national body that bears the responsibility for commenting on genetic technologies, there has been sufficient work done by national institutions to make the effort worthwhile. The second country chosen is the United States. This choice is based upon the great influence the United States has in setting or confirming trends, be it in commerce or in thought. Its significance cannot be underestimated. The United States has had a series of national bodies that have commented on genetic technologies. The third country is France. Distinct in culture from both Canada and the United States and with a national body mandated to address issues raised by science and medical technologies, such as genetics, France provides us with an example of a third window, as it were, to observe how the expressions that include reference to “human dignity” may be understood.

### **2.1.2 The Choice of Documents**

As with the multitude of countries from which to choose for our project, there is a plethora of documents. Again, we appeal to the representative. For the sake of consistency an effort is made to examine documents which deal with similar subjects. For the purpose of this project, we have chosen three documents from each country:

- one that deals with research involving human subjects, in that much of the technology in the field of genetics is presently at the level of research;
- one that deals with genetic testing; and
- one that deals with reproductive cloning.

The documents are not all an exact fit into the three categories, but they do deal with the area of concern. Documents that exactly parallel the subject matter of the two other countries are not always to be found in each country's collection. The material chosen is sufficient for our purpose.

### **2.1.3 The Methodology**

As noted in the discussion of the choice of documents, there are not clear parallels with the documents from each of the countries. Therefore, the methodology for examining the documents is also not identical in each case. Differences will be noted as each document is introduced. However, the overall methodology is one of descriptive analysis.

## **2.2 The Canadian Documents**

This section of our project is a descriptive analysis intended to inform the reader of how three Canadian documents have incorporated the expression “human dignity” in their discussions. The goal of this analysis is to strive to understand the meaning attached to the term in these documents. In order to do this, we have examined three Canadian initiatives, namely the Law Reform Commission of Canada’s *Human Dignity and Genetic Heritage*, the Royal Commission on the New Reproductive Technologies report *Proceed with Care*, and the Tri-Council policy statement *Ethical Conduct for Research Involving Humans*.

Of each document, we asked the following questions:

1. How many times is the term “human dignity” used in the text?
2. Is human dignity the main subject in the passage (what we termed a “stand-alone reference”) or is it used in a list with other subjects?
3. How does the text under consideration contribute to our awareness of the understanding of human dignity as it is employed by the document’s authors?

While this methodology was slightly altered in some instances in this section, an effort was made to conform throughout, to ensure a coherent and logical work presentation.

### **2.2.1 *Human Dignity and Genetic Heritage*—The Law Reform Commission of Canada**

In 1991, the Law Reform Commission of Canada published a report entitled *Human Dignity and Genetic Heritage*, which was authored by Bartha Knoppers. The paper was part of a series of reports called *The Protection of Life Series*.

The report consisted of six chapters: Genetics Overview (chapter one), The Genome and the Gene Pool (chapter two), Human Dignity and Genetics--the International Context (chapter three), Human Dignity and Genetics--the *Canadian Charter of Rights and Freedoms* (chapter four), Genetic “Ab-normality” (chapter five), and Towards Genetic Justice (chapter six). The term “human dignity” is used extensively in chapters three and four, with less explicit mention made in five and six. Human dignity is not discussed explicitly in chapters one or two. As will be seen from the passages cited from within its report, the Law Reform Commission used the term “human dignity” or “dignity” predominantly as a stand-alone subject in its text. By this we mean it is not included in a list, but is itself the sole subject of the accompanying discussion.

In chapter one, a brief description of Mendelian genetics and genetics at the molecular level was followed by a discussion of the various types of genetic disorders. The report identifies three classes of disorders: chromosomal disorders such as trisomy 21 (Down’s Syndrome), single gene disorders such as phenylketonuria (PKU), and finally multifactorial disorders such as hypertension, coronary heart disease, and atherosclerosis.

The changing practice of medical genetics was also discussed in the report. The Commission highlighted the improvement in the clinicians’ ability to determine, prenatally, whether or not a foetus will carry a certain genetic “defect.” Previously, the only way to do so was through family pedigree analysis using the mathematical probabilities of population genetics. However, with the development of genetic sequencing techniques, it is now possible to determine whether or not a fetus’ genome contains a deleterious allele.

Chapter two addressed the issue of what exactly constitutes heritage, and in particular, what is genetic heritage? The Commission examined both the scientific and legal dimensions of “genetic heritage” and concluded that it was both an individual and social concept.<sup>46</sup> At the individual level, a person’s genome represents a genetic heritage that has been passed on from generation to generation. However, each individual’s genome contributes to the social concept of the gene pool.

The majority of chapter two was concerned with the different property law perspectives and how genetic heritage could be best served. Specifically, the report found that private, public, and international law did not acceptably deal with genetic heritage, primarily because they failed to adequately account for the unique scenario it presented (this being the combination of private and public dimensions). None of these legal approaches, it concluded, could reconcile the individual aspect of the genome (that is the genetic inheritance of the person) and the social aspect (the collection of genomes that constituted the gene pool). It was for that reason that the Commission advocated an integrated approach that it said would “respect the person in the totality of his or her being and as a member of society.”<sup>47</sup>

The description of this integrated approach is sketchy. The report states that such an approach would “balance the notions of individual ‘genetic control’ together with public

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<sup>46</sup>B.M. Knoppers, *Human Dignity and Genetic Heritage* (Ottawa, Law Reform Commission of Canada, 1991), 7.

<sup>47</sup>*Ibid.*, 21.

stewardship of the larger 'gene pool' or human genome without recourse to property law."<sup>48</sup>

However, nowhere does the report actually suggest how such an integrated approach may be realized, nor how it would reconcile the private, public, and international systems of property law should they impinge upon the suggested integrated approach.

To summarize chapter two, three approaches to property law were discussed, and each was dismissed as too limited to adequately address the issue of genetic heritage. A suggestion is made for a more integrated approach, but the suggestion merely indicates the need for such a strategy, no discernable framework for it is offered. Furthermore, it remains unclear as to how this integrated approach would reconcile the three systems of property law discussed earlier.

If we turn our attention to chapters three, four, and five, we see that the way in which "human dignity" is used may afford us the opportunity to discover how the Law Reform Commission understood its meaning.

In chapter three, the report discusses human dignity and genetics in the international context. Much of the focus of this chapter is clearly on the opinions of the European Commission. "Dignity" is referred to at least twenty-five times. It is used by itself each time. We earlier referred to this as a stand-alone reference. Through careful review of this chapter, one discovers that the European Commission (EC), as well as other foreign bodies (not identified by the report) considers human dignity as a "concept." This concept is the

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<sup>48</sup>Ibid.

basis upon which human rights are founded. Consider the following statement made by the report:

... as is evident from the very wording of the foregoing international texts, a respect for human dignity is seen as a *sine qua non* for the elaboration and construction of all other fundamental human rights. Human dignity being so basic in nature and the source of all human rights, perhaps it is not deemed necessary to guarantee or limit that notion. All human rights derive from respect for this inherent dignity.<sup>49</sup>

The report addressed this sentiment of the European Commission concerning human dignity. Essentially, the European Commission argued that we have basic human rights because we have dignity. That is, our inherent human dignity entitles us to enjoy certain fundamental rights. By examining these rights and how they protect us, we may achieve a better understanding of what dignity means. The report decisively conveys this. In its discussion of the European Commission, the report stated:

At the Parliamentary Hearings preceding the recommendation, there was a general acceptance of the notion that all rights derive from this inherent dignity and contribute to its meaning. The report of those hearings states as follows.

Among the fundamental human rights embodied in this convention, absolute priority is given to the right to life (Article 2) and to integrity of persons (Article 3); these rights, together with all the regulations contained in the convention and in its protocol signed in Paris on 20 March 1952, provide a highly refined concept of human dignity which has inspired the member states which have committed themselves under this, an international instrument, to respecting them and participating actively in their development.<sup>50</sup>

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<sup>49</sup>Ibid., 23-24.

<sup>50</sup>Ibid., 26.

This “concept” of human dignity, as the Parliamentary Assembly referred to it, is not explicitly defined in this chapter of the Law Commission report.

Reference to “human dignity” is made eleven times in chapter four. In eight of these eleven references it stands alone, whereas it is used with at least one other subject in the remaining three. The Commission refers to dignity as a notion, theme, value, and concept in the chapter.

The author, Bartha Knoppers, stated that: “The Canadian Charter does not explicitly refer to the notion of human dignity. However, it is the fundamental theme that underlies the *Charter*.”<sup>51</sup> Much of the report’s attention in this chapter is devoted to sections of the *Charter* that protect human dignity, and it identified four sections. They were:

- Section 2: Freedom of Association and of Conscience and Religion;
- Section 7: Life, Liberty, and Security of the Person;
- Section 8: Unreasonable Search and Seizure; and
- Section 15: Equal Treatment and Freedom from Discrimination.<sup>52</sup>

As was stated earlier, human dignity was discussed both as a stand-alone reference and in connection with at least one other subject. While it would be cumbersome and of little additional value to list all stand-alone references here, we may wish to do so for the instances in which human dignity appears with other subjects.

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<sup>51</sup>Ibid., 33.

<sup>52</sup>Ibid., 33-34.

The first such reference comes in the opening paragraph of the chapter. The author stated that: “There is no doubt of the need to legislate in the future to protect the inherent dignity and self-worth of individuals with respect to their genetic heritage.”<sup>53</sup> She later wrote:

Mandatory screening of adults or adolescents to determine whether they are carriers of genetic disease would clearly be an interference with this right [life, liberty and security of the person]. The dignity and self-respect of those persons would be affected.<sup>54</sup>

Finally, she reported that:

. . . the Court reiterated that the values of a free and democratic society include ‘respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.’<sup>55</sup>

We may now address the contribution of this chapter to the Law Reform Commission’s presentation of the meaning of human dignity in so far as we have been able to determine it. To do this, we recall that the Commission asserted that the *Charter* was founded on the “theme” of human dignity. We contend that if the rights spelled out in the *Charter* are based on our inherent human dignity, then they themselves must, at least partially, reflect the meaning of human dignity. It would seem that sections 2, 7, and 8 demonstrate the Commission’s belief that autonomy, privacy, and justice are important to human dignity, and that section 15 does likewise for equality.

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<sup>53</sup>Ibid., 33.

<sup>54</sup>Ibid., 35.

<sup>55</sup>Ibid., 41.

If one accepts this position, we may conclude from reading this chapter that human dignity was looked upon by the Commission as a notion, theme, value, or concept that encompassed the principles of autonomy and equality

Chapter five addressed the issues of genetic determinism and naturalism, genetic discrimination, genetic perfectionism, and genetic wrongs. Human dignity is referred to ten times in this chapter. Nine of these references are stand-alone, and one includes another subject in connection with it. It is referred to as a concept once in the chapter.

From the ideas discussed in chapter four of the report, we argued that autonomy and equality must be important components of human dignity. Several aspects of chapter five strengthen this argument.

Equality is certainly violated by social discrimination. In the realm of genetic testing, this danger may indeed become a reality. If such testing poses a risk to equality amongst Canadians, it must by extension pose a risk to human dignity. The report recognized this and stated:

At present, the three areas of genetic testing (workplace, insurance and reproductive testing) pose risks of adverse genetic discrimination while at the same time providing information on cause and prevention. It is not too early to begin a societal debate on these issues with the aim of developing a coherent policy respectful of human dignity.<sup>56</sup>

The other component of human dignity identified in chapter four was autonomy. Again, human dignity is mentioned in chapter five with an allusion to autonomy.

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<sup>56</sup>Ibid., 58.

**Respect for the inherent dignity of the human person is manifested in a respect for decisions that are as private and personal as the decision to bear a child, under what conditions and with whom. The legitimate rights of the injured child in cases of negligence by third parties cannot be extended to require parents to avoid giving birth to a genetically disabled child. The possibility of legal action by disabled children against their parents constitutes a grave threat to familial relationships.**

**. . . In a society where individual values and mor[als] are revered and closely guarded, legal actions by defective children against their mothers would seem to fly in the face of this reverence, and confound traditional freedom of choice.<sup>57</sup>**

In chapter six, human dignity is referred to eight times, twice in connection with another subject, and six times by itself. The two usages of the term in connection with other subjects are of particular importance, because they appear to present a contradiction to what we have come to accept about the Commission's concept of human dignity. We will return to this discussion at the end of chapter six.

Justice is the focus of this chapter. We require a system of justice: "Where resources are limited and there is a competition, we must find a basis for allocating goods to individuals."<sup>58</sup> With respect to genetics, the Commission reported that the flow of genetic information and the allocation of health care funds to medical genetics are issues of justice.

While it later goes on to suggest a solution to the former, it ignores the latter. Four systems of justice were discussed; utilitarianism, libertarianism, egalitarianism, and John Rawls' social contract system. To address the considerations brought about by genetics, the Commission advocates a modified version of the social contract.

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<sup>57</sup>Ibid., 57.

<sup>58</sup>Ibid., 64.

A utilitarian system measures justice in terms of aggregate goods versus harms. An action is morally permissible if greater good is produced than harm is done. The Commission condemned this system of justice on the grounds that it failed to respect autonomy.

Before elaborating on their argument against this approach, we should pause to define autonomy, a term we have used frequently but have not explicitly defined. The Commission stated that:

Autonomy, meaning self-rule, generally refers to a view that we have of ourselves and of others as being self-governing. Autonomy implies both physical and psychological control.

. . . Autonomy also includes the person's control over his or her choices and actions.<sup>59</sup>

The Commission objected to a utilitarian approach to justice, because it did not take into consideration all the aspects that enter into human decision-making. By failing to do so, it ignores some fundamental processes in free-choice, thereby violating autonomy and, by extension, human dignity. Consider the following:

. . . utilitarianism reduces all human goods or choices to a single scale rather than recognizing the diversity of human behaviour and choices. We know, however, that life and health are not 'commodity values'. Second, this cost-benefit approach embodies a high standard of rationality. We know, however, that workplace or career choices are often seen by others as 'irrational', as may be the choices of individuals following genetic counselling. Thus, the utilitarian approach in human genetics would undermine the freedom of choice (autonomy) and consequently, respect for human dignity.<sup>60</sup>

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<sup>59</sup>Ibid., 60-61.

<sup>60</sup>Ibid., 64-65.

The second system of justice outlined in the report was libertarianism. This approach advocates minimal government interference in individuals' decision-making. All such decisions must be free and informed. Applying this scheme of justice to genetics, one's genes would be regarded as private property and subject to free-market forces.<sup>61</sup> (For example, they could be sold to interested parties.) However, since genetic technologies, as they relate to human application, are largely the domain of the health care system, this ideology is incompatible with the Canadian environment, because we insist on a more egalitarian approach.<sup>62</sup>

The Commission does not, however, embrace an entirely egalitarian justice system for medical genetics. The rationale behind this is that in order to achieve true egalitarianism, significant compromises of individual rights would have to be made in order to offset the many social inequalities that exist. The Commission was critical of this and said:

The problem with the egalitarian approach is that it may conflict with liberty . . . liberty or free choice is an important element in protecting the inherent dignity of the person, which is the underlying basis of international and Canadian constitutional law . . . at least minimal distributive justice is required to compensate for the disparities within a society. However . . . substantial equality is a necessary condition of respect for the intrinsic worth of the human person...such egalitarian objectives cannot be realized without excessive curtailment of individual liberty and the use of coercion.<sup>63</sup>

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<sup>61</sup>Ibid., 66.

<sup>62</sup>Ibid.

<sup>63</sup>Ibid., 67.

The final system discussed is the social contract. Essentially, the social contract is based on what a “society of rational individuals would decide to be just if they did not know what their actual lot in life would be . . .”<sup>64</sup>

The Commission favoured a modified social contract that would be applicable to genetics. A person’s original position would include knowledge of their genetic make up, because this, according to the Commission, would be required for them to decide what is just. In addition to this knowledge, two ethical principles would be required for the effective implementation of the new social contract: reciprocity and mutualism.

Reciprocity is based on autonomy.<sup>65</sup> There is a natural imbalance in the distribution of medical genetic knowledge between medical practitioners and the public. Reciprocity involves the dissemination of genetic knowledge to patients in return for clinicians collecting data from patients who have provided informed consent. The requirement for informed consent ensures autonomy is respected.

The second principle, mutualism, is based on beneficence and non-maleficence.<sup>66</sup> Individuals in familial relationships, who are informed through genetic testing that they carry a deleterious gene, are duty-bound to inform their family of such, so as to enable the family members to be tested and to receive treatment if necessary. This obligation to prevent harm represents the non-maleficence component of mutualism. The Commission

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<sup>64</sup>Ibid.

<sup>65</sup>Ibid., 69.

<sup>66</sup>Ibid., 70.

advocates that should such an individual refuse to disclose such knowledge, clinicians should have legal recourse to inform the family themselves. This apparent breach of autonomy is not expanded on in the report.

The state has a responsibility to provide its citizens with facilities for the diagnosis, research, and treatment of genetic disorders.<sup>67</sup> This represents the beneficence component.

At this point, we summarize the Law Reform Commission's discussion of human dignity. As we have seen, it was referred to as a concept, theme, notion, and value. "Concept" and "theme" in particular suggest that it may encompass a number of components. Indeed, we saw throughout the report, particularly in chapter four, that autonomy and equality were important elements of human dignity. This conclusion may be drawn into question in light of two passages contained in chapter six. Consider the following unrelated excerpts:

The Court or the Commission held that '[a] patient must have the ultimate power to control what becomes of his or her tissues. To hold otherwise would open the door to a massive invasion of human privacy and dignity in the name of medical process.' Thus, respect for the person is often linked to autonomy.<sup>68</sup>

And:

Thus, guidelines on confidentiality are needed to ensure respect for the dignity and autonomy of the human person . . .<sup>69</sup>

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<sup>67</sup>Ibid.

<sup>68</sup>Ibid., 61.

<sup>69</sup>Ibid., 63.

Clearly, both of these passages affirm the connection between autonomy and dignity. However, at issue is the nature of that connection. Earlier, we contended that autonomy was a component of human dignity. However, these passages do not reflect that. Rather, they suggested a horizontal rather than vertical relationship.

Our examination's goal was to assess the role human dignity played in the formulation of any recommendations of the Law Reform Commission. However, their study paper did not contain many recommendations *per se*. Rather, it contained conclusions that commented on the material presented in each chapter. Chapter six does contain some suggestions regarding the adoption of an appropriate justice system for issues raised by new medical genetic techniques. We can be clear from our analysis of chapter six that human dignity played a formidable role in guiding the Commission in this matter as we make several conclusions.

There is in the document *Human Dignity and Genetic Heritage* a strong emphasis on the law and its relationship to human dignity. We noted that the Commission stated that human dignity was the underlying concept upon which the *Charter* was based. Neglect for human dignity is seen to have legal ramifications, such as those found in "wrongful birth" actions before the courts where lawsuits are brought against mothers of children suffering from genetic abnormalities.

We have noted that on several occasions throughout the report, human dignity is referred to as a concept. The report subsequently expands on these assertions and states that autonomy and equality are elements of human dignity. The following evidences this:

We have argued that, at present, the Canadian *Charter* may offer the freedom of choice necessary to safeguard the concept of human dignity on which the *Charter* is founded. However, considering current social prejudices surrounding disease, can we rely on these general *Charter* rights to safeguard the freedom of genetic choice?

. . . Respect for the inherent dignity of the human person is manifested in a respect for decisions that are as private and personal as the decision to bear a child, under what conditions and with whom.<sup>70</sup>

We also recall that the Commission stated: "At the Parliamentary Hearings preceding the recommendation, there was a general acceptance of the notion that all rights derive from this inherent dignity and contribute to its meaning."<sup>71</sup> We have argued that since the Commission asserted that the *Charter* is based on human dignity, and since it highlighted four *Charter* freedoms, these freedoms (or basic human rights) may be seen as elements of human dignity. These were: freedom of association and of conscience and religion; life, liberty, and security of the person; freedom from unreasonable search and seizure; and equal treatment and freedom from discrimination. "Freedom of association and of conscience and religion" certainly resembles the principle of autonomy, and "equal treatment and freedom from discrimination" undeniably reflects the principle of equality. We therefore conclude that dignity is referred to consistently throughout the report as being an intrinsic quality in people, the source of human rights, and it rests upon the principles of autonomy and equality of persons. Additionally, since no explicit definition of the term is given, we feel this also constitutes the most plausible definition that we can arrive at from the document.

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<sup>70</sup> Ibid., 56.

### **2.2.2 The Royal Commission on New Reproductive Technologies**

To many people, having children and raising a family are important. The prospects of assuming new responsibilities as well as leaving behind a legacy are at the same time exciting and intimidating. However, the joy and rewards of parenting provide those individuals with perhaps the greatest sense of pride and accomplishment possible. Unfortunately, physiological deficiencies prevent nearly half of a million Canadian couples from conceiving.<sup>72</sup> Recently however, developments in the area of reproductive medicine have made it possible for some of these couples to bear children. While these new reproductive techniques may carry the promise of great benefits, they also may pose the risk of significant harms.

It is now possible to separate fertilization from sexual intercourse and pregnancy, to allow embryos to exist, temporarily, outside a woman's body, and to permit characteristics of a fetus to be known early in a pregnancy.<sup>73</sup> It is not difficult to see that these issues raise more than scientific inquiry. Social, ethical, and moral considerations are brought into play and require serious deliberation. For example: How might these new technologies

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<sup>71</sup> Ibid., 26.

<sup>72</sup>P. Baird. *et al.*, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993), 1. Infertility is defined as the absence of a pregnancy after engaging in unprotected sex with the same partner for a period of one year.

<sup>73</sup>Ibid.

potentially alter definitions of parent, family, and generation? Will women be viewed differently in society?<sup>74</sup> Clearly, these questions needed to be addressed.

By Order in Council of October 25, 1989, the Canadian Government created the Royal Commission on New Reproductive Technologies. The mandate of the Commissioners was to:

. . . inquire into and report on current and potential medical and scientific developments related to new reproductive technologies, considering in particular their social, ethical, health, research, legal and economic implications and the public interest, recommending what policies and safeguards should be applied, and examining in particular,

- implications of new reproductive technologies for women's reproductive health and well-being;
- the causes, treatment and prevention of male and female infertility;
- reversals of sterilization procedures, artificial insemination, *in vitro* fertilization, embryo transfers, prenatal screening and diagnostic techniques, genetic manipulation and therapeutic interventions to correct genetic anomalies, sex selection techniques, embryo experimentation and fetal tissue transplants;
- social and legal arrangements, such as surrogate childbearing, judicial interventions during gestation and birth, and "ownership" of ova, sperm, embryos and fetal tissue;
- the status and rights of people using or contributing to reproductive services, such as access to procedures, "rights" to parenthood, informed consent, status of gamete donors and confidentiality, and the impact of these services on all concerned parties, particularly the children; and

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<sup>74</sup>Ibid.

the economic ramifications of these technologies, such as the commercial marketing of ova, sperm and embryos, the application of patent law, and the funding of research and procedures including infertility treatment.<sup>75</sup>

The Commission adopted a wide range of strategies in order to carry out its mandate. It engaged in direct consultation, convened public hearings, reviewed submitted briefs, set up toll-free telephone lines, and conducted public surveys.<sup>76</sup> All this was intended to garner expert as well as public opinion.

After four years of investigation and deliberation, the Commission published *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* in 1993. The report contained three parts. Part one discussed the context of the inquiry, identified the major ethical and scientific framework that guided the study, and gave an overview of the proposals for legislative and regulatory framework. Fifteen volumes of research reports accompanied part two. This part of the report focussed on the following four areas of inquiry included in the mandate:

1. The prevalence, risk factors, and prevention of infertility;
2. Assisted human conception and alternatives to it;
3. Prenatal diagnosis and genetics; and
4. Research involving human zygotes, embryos, and the use of fetal tissues.

Part three was a summary of recommendations, organized by area of responsibility for implementation.

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<sup>75</sup>Ibid., 2.

<sup>76</sup>Ibid., xxxi.

**The Commission established three broad goals for its work:**

- 1. To provide direction for public policy by making sound, practical, principled recommendations to help Canadians and our social institutions deal with the technologies now and to put in place mechanisms to ensure a continuing capacity to deal with them.**
- 2. To leave a legacy of increased knowledge in the field of Canadian and international experience with new reproductive technologies.**
- 3. To enhance public awareness and understanding of the issues surrounding new reproductive technologies and to encourage public participation in determining the future of these diverse technologies and their place in Canadian society.<sup>77</sup>**

The Royal Commission's report is a very lengthy document, and it was clear from the outset that a complete examination of the report was not feasible. In order to produce a concise yet accurate descriptive analysis, it was imperative to develop a strategy that would ensure important topics and issues were examined in a manner in keeping with the scope of this project.

To that end, the following methodology was implemented for this study:

- 1) Chapters 1, 2, and 3 were reviewed in their entirety, and each was commented on separately. The reason for this was to provide background information not only to the reader of this study, but also to facilitate the researcher's understanding of the report.**
- 2) Recommendations of the Commission were examined that contained direct references to dignity or ideas that may relate to human dignity. The latter were**

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<sup>77</sup>Ibid., 5.

recommendations that discussed any of the following: autonomy, non-commodification of individuals, equality, privacy, or confidentiality, while not explicitly mentioning human dignity. The recommendations that were examined were concerned with the following aspects of reproductive technologies:

- development of technologies and practices
- infertility (prevalence, risk factors, and prevention)
- adoption
- assisted insemination
- *in vitro* fertilization
- handling of eggs and embryos
- embryo research
- preconception arrangements
- commercial interests and new reproductive technologies
- prenatal diagnosis and genetic technologies
- uses of fetal tissues

To carry out this examination, relevant recommendations in Part Three, "Overview of Recommendations," were identified and cross-referenced with the pertinent discussion in Part Two. Cases where the supporting discussion made reference to human dignity were identified and documented.

- 3) **Conclusions were drawn regarding the perceived meaning of human dignity based on the work of the Commission, and on what impact the issue of human dignity had on the development of the recommendations.**

**It had been our original intent to examine chapters 25, 26, 27, and 29 separately and in a systematic manner. However, we found early on that examining recommendations according to theme (e.g., non-commodification) proved much more useful.**

**As the material in chapter one of the Commission's report formed the basis for our introduction to the report, we proceed with chapter two. This chapter does not discuss human dignity to any great extent, and the term is mentioned only twice. Both references to human dignity use it in connection with at least one other subject.**

**The two references suggest a relationship exists between autonomy and human dignity but do not imply that autonomy “belongs” to human dignity or is encompassed by it.**

**The references of interest are:**

**Nevertheless, equality is now entrenched as a constitutional principle, and Canada has accepted and institutionalized diversity and encouraged individual and group efforts to pursue autonomy, empowerment, and human dignity. . . This power imbalance places a heavy responsibility on physicians to be aware of its potential consequences and of the need to make information available to patients and to support their decision making without directing it an without infringing on their dignity and autonomy.<sup>78</sup>**

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<sup>78</sup>Ibid., 32.

It is important to note that these passages merely raise the possibility of this more separate relationship. An act could be an affront to, for instance, autonomy, but not to privacy. In such a case, human dignity could still be violated, even if both were components of human dignity. Thus, the use of “and” between human dignity and one of these potential components does not necessarily negate the possibility that there exists a relationship such that the principles of autonomy, privacy, or equality “belong” to human dignity. Such usage, however, creates an ambiguity that is not resolved in the report.

We now turn our attention to chapter three and the discussion of the ethical framework and guiding principles of the report. The Commission adopted eight principles for ethical debate in an effort to be consistent and precise in an area often mired in personal feelings, emotions, and differing moral values. The report stated:

Although there is consensus on the principle of respect for human life and dignity . . . Canadians are deeply and seemingly irresolvably divided over how to interpret that principle. Where we encountered such differences in preparing our report, we used our guiding principles to help identify and explain the nature of the disagreement as clearly as possible.<sup>79</sup>

The Commission made little mention of human dignity in this chapter, and little inference as to its meaning can be drawn from the ethical principles set forth. By its own admission: “This brief sketch of the Commission’s guiding principles conveys our ethical stance in somewhat general and abstract terms.”<sup>80</sup> These eight principles were:

1. Individual autonomy;
2. Equality;

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<sup>79</sup>Ibid., 59.

<sup>80</sup>Ibid., 66.

3. Respect for human life and dignity;
4. Protection of the vulnerable;
5. Non-commercialization of reproduction;
6. Appropriate use of resources;
7. Accountability; and
8. Balancing individual and collective interests.<sup>81</sup>

In chapter three, human dignity is spoken of in abstract terms. By this, we mean that the context within which it is used does not give any indication as to its meaning. It is used only twice, once individually and once in a list.

The individual usage of the expression adds little to the discussion presented here. The second usage of the term, that which includes it in a list, does little to help us ascertain the meaning of dignity. This chapter lists dignity in a context that makes it appear as if it were separate from certain principles recognized in other literature as encompassed by human dignity, particularly the discussion above on the Law Reform Commission's report. The passage to which we refer is the following:

. . . the principle of non-commercialization of human beings and human reproduction is largely a conclusion from the other principles, such as equality, protection of the vulnerable, and respect for human life and dignity.<sup>82</sup>

In order to gain a better understanding of what human dignity meant to the Royal Commission, their recommendations were examined. This approach proved to be of twofold benefit. Firstly, it elucidated the Commission's understanding of human dignity

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<sup>81</sup> *Ibid.*, 53.

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

and, secondly, afforded us with the opportunity to determine the extent to which concerns for human dignity weighed in on the recommendations made by the Commission.

In their report, the Royal Commission made 293 recommendations about a wide range of issues relating to reproductive technologies. The recommendations are listed in order throughout part two of the report. Part three summarizes the recommendations by grouping them according to the party or parties responsible for their implementation (i.e. legislative division of federal government, Health Canada, Medical Research Council of Canada, etc.).

Many of the issues were of an administrative nature, such as the development and role of regulatory bodies as well as the licensing requirement for institutions and practitioners engaging in the use of reproductive technologies. However, it is not difficult to see that a concern for human dignity, as well as the other guiding ethical principles, guided the Commissioners in the formulation of a number of their regulations. In their preamble to the summary of recommendations, the Commission stated:

As a society we all have an interest in the character and values of the community in which we live and responsibility to ensure that the community is one in which people are not treated as commodities and technologies are not used in ways that offend human dignity.<sup>83</sup>

In discussing some of its recommendations, the Commission frequently refers to dignity, which suggests its importance in the deliberations of the Commission and in the

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<sup>83</sup>Ibid., 1020.

formulation of the recommendations. Consider the following recommendations and the accompanying discussions by the authors:

184. Human zygote/embryo research related to ectogenesis, cloning, animal/human hybrids, and the transfer of zygotes to another species be prohibited, under the threat of criminal sanction.<sup>84</sup>

Although research on zygotes in the first 14 days is ethically permissible, any such research must always respect the zygotes' connections to the human community. Commissioners believe that certain kinds of research, such as cloning and formation of cross-species hybrids, deny these connections and so violate basic norms of respect for human life and dignity.<sup>85</sup>

192. The sale of human eggs, sperm, or zygotes be prohibited, under threat of criminal sanction.<sup>86</sup>

As we have emphasized throughout this report, it is inappropriate for decisions involving human reproduction to be motivated by the prospect of financial gain. Thus, the buying and selling of gametes and zygotes would be unacceptable, and we recommend their prohibition. This prohibition is essential, not only as a matter of respect for human dignity, but also to protect anyone who might be pressured or induced to sell gametes or zygotes. [Non-profit cost-recovery measures are permissible.]<sup>87</sup>

Through its inclusion in the preceding discussion, respect for human life and dignity (one of the Commission's "basic ethical principles") is demonstrated to be an important ingredient in the creation of these recommendations. Moreover, we may argue that this also affirms that non-commodification of the human person is a component of human dignity. If prohibiting the sale of human biological materials is implemented to safeguard human dignity, one may infer this to mean that the Royal Commission assumes non-

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<sup>84</sup>Ibid., 637.

<sup>85</sup>Ibid., 636-637.

<sup>86</sup>Ibid., 643.

<sup>87</sup>Ibid.

commodification to be a contributing factor to human dignity. The Commission in several other recommendations recognizes this connection between human dignity and non-commodification as well:

199. The federal government legislate to prohibit advertising or acting as an intermediary to about a preconception arrangement; and to prohibit receiving payment or any financial or commercial benefit for acting as an intermediary, under threat of criminal sanction. It should also legislate to prohibit making payment for a preconception arrangement, under threat of criminal sanction.<sup>88</sup>

286. Provincial human tissue gift acts be amended specifically to prohibit the sale of fetal tissues and any payment to the women from whom the tissue is obtained.<sup>89</sup>

287. The prohibition of the commercial exchange of fetuses and fetal tissue extend to tissue imported from other countries, so that no fetuses or fetal tissues are used in Canada for which women have received payment, or where a profit has been made by an intermediary.<sup>90</sup>

288. The costs of handling fetal tissue be recoverable only on a not-for-profit basis.<sup>91</sup>

On the commercial preconception arrangements, the Commission commented that:

. . . they [commercial preconception arrangements] offend human dignity by commodifying women's reproductive capacities and commodifying children; they contradict the principle that human reproduction should not be commercialized in any way.<sup>92</sup>

And concerning fetal tissue use:

The non-commercialization of reproduction is one of our guiding principles. Apart from its threat to human dignity, the commercialization of fetal tissue could open

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<sup>88</sup>Ibid., 690.

<sup>89</sup>Ibid., 1002.

<sup>90</sup>Ibid., 1003.

<sup>91</sup>Ibid.

<sup>92</sup>Ibid., 683.

the door to exploitation of poor women, especially in developing countries, who might be persuaded to begin and end pregnancies for money.<sup>93</sup>

It is interesting to note that this last excerpt also highlights the Commission's principle of protection of the vulnerable. We recall that this was one of the eight guiding ethical principles articulated by the Commission in chapter three, along with respect for human life and dignity, and the non-commercialization of reproduction, two other principles we have so far seen at work in the recommendations. The issue of non-commercialization is addressed by several other recommendations, including (but not limited to): 88, 94, 154, 168, 179, 198, 281, and 293. The Royal Commission summarized its position on this matter by stating:

Among the activities that we see as ethically unacceptable on the basis of the principle of non-commercialization are buying and selling of gametes, zygotes, embryos, or fetuses, and the use of financial incentives in preconception or adoption arrangements. To allow commercial exchange of this type would undermine respect for human life and dignity and lead to the commodification of women and children.<sup>94</sup>

Respect for autonomy is the subject of 34 recommendations of the Commission. In discussing these recommendations, human dignity is referred to on one occasion. The Commission made the following recommendation and statement:

273. Judicial intervention in pregnancy and birth not permissible. Specifically, the Commission recommends that:

(a) medical treatment never be imposed upon a pregnant woman against her wishes;

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<sup>93</sup>Ibid., 1001.

<sup>94</sup>Ibid., 718.

- (b) the criminal law, or any other law, never be used to confine or imprison a pregnant woman in the interests of her fetus;
- (c) the conduct of a pregnant woman in relation to her fetus not be criminalized;
- (d) child welfare or other legislation never be used to control a woman's behaviour during pregnancy or birth; and
- (e) civil liability never be imposed upon a woman for harm done to her fetus during pregnancy.<sup>95</sup>

Judicial intervention . . . ignores the basic components of women's fundamental human rights - the right to bodily integrity, and the right to equality, privacy, and dignity.<sup>96</sup>

Thus, the findings from our examination of the Royal Commission's work seem to suggest an interpretation that we wish to summarize here.

Human dignity is not explicitly defined nor is a strong interpretation of its meaning given by the Commission. However, through examination of several of their recommendations, we may infer that human dignity encompasses other principles, including the non-commodification of the person and justice. We suspected that autonomy is also to be included in this group, but no definitive indication of this is given in the report. This is merely a hypothesis, as human dignity is usually spoken of without reference to its meaning, and often only simple statements such as "respect for human dignity" are mentioned. However, as we have seen in several passages from the text, our contention that there is indeed a connection between these three principles and human dignity may be valid.

We have noted, however, that certain passages from the report appear to contradict this position.

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<sup>95</sup>Ibid., 964.

While human dignity is not defined explicitly, it appears that the Commissioners had an intuitive sense of its meaning and gave considerable value to it, as suggested by the numerous recommendations focussed on preventing human commodification and ensuring provisions for informed consent (at minimum, these comprised 16% of all recommendations made). We can conclude from this that a concern for human dignity did in fact play a role in the creation of these recommendations.

It is difficult clearly to isolate the basis for the Royal Commission's discussion of human dignity. Its inclusion in the list of "guiding ethical principles" would suggest that the emphasis is on ethics. However, we also see it used in connection with the social phenomena of empowerment and medicalization. Regarding empowerment, the Royal Commission stated that:

Empowerment has far-reaching implications for policy making. The number of voices at the table has increased, often making it more difficult to reach consensus, and potentially creating unrealistic expectations and heightening social conflict . . . equality is now entrenched as a constitutional principle, and Canada has accepted and institutionalized diversity and encouraged individual and group efforts to pursue autonomy, empowerment, and human dignity, even though their achievement is seldom uniform or easy.<sup>97</sup>

Of medicalization, it wrote:

A key issue in the medicalization of women's reproductive lives is the unequal distribution of power inherent in the doctor/patient relationship. The patient has less technical and medical knowledge than the physician and may tend to surrender personal decision making. This power imbalance places a heavy responsibility on physicians to be aware of its potential consequences and of the need to make

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<sup>96</sup>Ibid., 958.

<sup>97</sup>Ibid., 30.

information available to patients and to support their decision making without directing it and without infringing on their dignity and autonomy.<sup>98</sup>

Throughout the Royal Commission's report, human dignity is referred to as a principle but not always as a stand-alone principle. As we saw earlier, human dignity been mentioned a long with other terms such as empowerment<sup>99</sup>, autonomy<sup>100</sup>, respect for human life<sup>101</sup>, and equality and protection of the vulnerable.<sup>102</sup> Thus, human dignity is established as a principle related to but distinct from other ethical principles and is treated that way throughout most of the report. Where it is closely connected with another subject, it is most often in the phrase "human life and dignity."

We also note that human dignity is consistently used in relation to the principle of non-commodification. In fact, the report asserts that the latter is "a conclusion from the other principles such as . . . respect for human life and dignity."<sup>103</sup> This relationship is again mentioned in the following statement:

. . . in which people are not treated as commodities and technologies are not used in ways that offend human dignity.<sup>104</sup>

As well, as we have seen in earlier passages, this relationship is mentioned when it is claimed that human dignity would be offended by commodifying women's reproductive

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<sup>98</sup>Ibid., 32.

<sup>99</sup>Ibid., 32

<sup>100</sup>Ibid.

<sup>101</sup>Ibid., 59.

<sup>102</sup>Ibid., 53.

<sup>103</sup>Ibid., 53.

<sup>104</sup>Ibid., 1020.

capabilities and children<sup>105</sup>, and by commercializing reproduction.<sup>106</sup> Human dignity is, therefore, used consistently throughout the report as a primary reason for the existence of the principle of non-commodification of the human body.

We have noted that the Royal Commission did not provide an explicit definition of human dignity. In lieu of this, we offer the following as a definition consistent with the text of the report:

Human dignity is the result of each person's uniqueness and individuality. Dignity requires that individuals be allowed to make their own decisions about their lifestyle, provided such decisions are not injurious to the health or liberty of others. Dignity also means that it is not acceptable to treat any person as less than a person, and so actions that would liken individuals to commodities must be forbidden.

### **2.2.3 Tri-Council Policy Statement--*Ethical Conduct for Research Involving Humans***

In 1994, the Medical Research Council (MRC), the Natural Sciences and Engineering Research Council (NSERC), and the Social Sciences and Humanities Research Council (SSHRC) initiated the Tri-Council Working Group with the purpose of developing a joint policy statement on the ethical treatment of human subjects in scientific and social science research endeavours.<sup>107</sup>

The mandate of the Tri-Council was:

. . . to promote research that is conducted according to the highest ethical standards. The Councils have therefore adopted this policy as our standard of ethical conduct

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<sup>105</sup> *Ibid.*, 683.

<sup>106</sup> *Ibid.*, 1001.

<sup>107</sup> *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* (Ottawa: Public Works and Government Services Canada., 1998), i.1.

for research involving human subjects. As a condition of funding, we require as a minimum, that researchers and their institutions apply the ethical principles and the articles of this policy.<sup>108</sup>

In July of 1998, the Tri-Council published *Ethical Conduct for Research Involving Humans*. In this policy statement, the Councils championed a twofold approach to the ethics of research. Firstly, the ends of the research must be morally acceptable. Secondly, the means to achieve those ends must themselves be morally acceptable.<sup>109</sup> In order to help scientists and institutions scrutinize their research for its moral acceptability, the Councils produced in their policy statement 52 articles governing conduct for research involving humans. Any researcher or institution wishing to receive funding from one of the granting councils would have to ensure that they abided by the relevant articles.

Reference is made to human dignity approximately 26 times in the policy statement. In twenty-one of these references, it is used alone. The remaining five use the term in connection with at least one other subject. The stand-alone references are mostly non-informative. Fifteen only mention the importance of “the principle of respect for human dignity,” but most do not explain what this involves. We should note three stand-alone references that do give some meaning to the term human dignity. These are:

It is unacceptable to treat persons solely as means (mere objects or things), because doing so fails to respect their intrinsic human dignity. . .<sup>110</sup>

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<sup>108</sup>Ibid., i.2.

<sup>109</sup>Ibid., i.4-i.5.

<sup>110</sup>Ibid., i.5.

**Respect for human dignity entails high ethical obligations towards vulnerable persons - to those whose diminished competence and/or decision-making capacity make them vulnerable.<sup>111</sup>**

**Respect for human dignity also implies the principles of respect for privacy and confidentiality. In many cultures, privacy and confidentiality are considered fundamental to human dignity.<sup>112</sup>**

These three statements, and in particular the third, suggest that human dignity is something that encompasses several components. We may surmise that these components include the non-objectification of the person, the freedom of informed decision-making, and privacy and confidentiality.

In the Tri-Council Policy Statement, we encounter a similar inconsistency to that first observed in the Law Reform Commission's report on genetic heritage. In that discussion we saw that human dignity was described as a theme or concept that could be seen as encompassing a set of principles (namely autonomy and equality, and privacy). However, we noted that several passages from that same document suggested instead that, while there indeed was a relationship between these principles and human dignity, it was not such that they "belonged" to human dignity.

The basis of the Tri-Council's references to dignity appears to be founded in their understanding of ethics. The evidence supporting this conclusion is limited, but nevertheless we suggest it is valid. Consider the following two passages: "Respect for

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<sup>111</sup>Ibid.

<sup>112</sup>Ibid.

human dignity entails high ethical obligations . . . ,” and “Dignity and autonomy of human subjects is the ethical basis of respect for the privacy of research subjects.”<sup>113</sup>

We note an inconsistency in the work of the Tri-Council, however. In contrast to the suggested relationship of non-objectification of the person, freedom of informed decision-making, and privacy and confidentiality, the following statements imply that autonomy and privacy, while still related to human dignity (in a capacity not described), do not “belong” to it.

Dignity and autonomy of human subjects is the ethical basis of respect for the privacy of research subjects. Privacy is a fundamental value, perceived by many as essential for the protection and promotion of human dignity.<sup>114</sup>

Due to the need for respect for privacy, even in public places, naturalistic observation raises concerns of the privacy and dignity of those being observed.<sup>115</sup>

This fundamental inconsistency makes it very difficult to derive a definition of human dignity from the Tri-Council Policy Statement. Dignity is spoken of in connection with autonomy and privacy, but the conflicting ways in which it is done complicate an understanding of the term.

#### **2.2.4 Concluding Comments on the Canadian Documents**

The documentation considered and its discussions surrounding human dignity and its implications for the use of new genetic techniques demonstrates a clear concern by

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<sup>113</sup>Ibid., 3.1.

<sup>114</sup>Ibid.

<sup>115</sup>Ibid., 2.5.

relevant Canadian institutions. Unfortunately, a clear understanding or presentation of the term “human dignity” appears to remain an elusive goal. The emphasis for the discussion of human dignity appeared to be somewhat different in each report. The Law Reform Commission tended to base their opinions on legal issues, the Royal Commission emphasized both ethical and social factors, and the Tri-Council spoke of human dignity in connection with ethics only.

One trend emerged throughout our study; there is a relationship between human dignity and the concepts of autonomy, equality, privacy, non-commodification of persons, and justice. However, the nature of this relationship is not clear. Some passages from the texts under consideration suggested that these concepts belonged to an all encompassing “theme” or “notion” of human dignity. We have called this type of relationship a “vertical” one, and it was usually suggested when human dignity was used in a stand-alone reference. We also identified what we have called a “horizontal relationship” between these concepts and human dignity. In this case, there was a relationship between them, but these concepts were not seen as belonging to human dignity. This type of relationship was implied when human dignity was used in a list of other subjects.

We found that two institutions, the Law Reform Commission and the Royal Commission, made recommendations that appeared to be based, to a large extent, on direct concerns for human dignity. We noted that in arguing for a new social contract model of justice, the Law Reform Commission appealed to the need to respect autonomy and equality in adopting such a system. As we have contended, these are components of human dignity.

Also, it was determined that at least 16% of the Royal Commission's near 300 recommendations appeared to be direct initiatives to protect human dignity. While explanations and rationale vary among the documents, there is clearly an attempt to appeal to principles to support respect for human dignity and an evident deontological orientation to the documents' arguments to support this approach.

### 2.3 French Documents

The Comité Consultatif National d'Éthique pour les sciences de la vie et de la santé (CCNE) was established on February 23, 1983 under the administration of President François Mitterrand and was enacted into law on July 29, 1994.<sup>116</sup> The Committee's mission from the outset was:

. . . donner des avis sur les problèmes éthiques soulevés par les progrès de la connaissance dans les domaines de la biologie, de la médecine et de la santé et de publier des recommandations sur ce sujet.<sup>117</sup>

Thirty-nine members comprise the CCNE. Of these thirty-nine, 5 are from the main philosophies and religions, 19 are appointed for their special interest and competence in bioethics and 15 are from scientific research institutions. A president and honorary

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<sup>116</sup>Comité Consultatif National d'Éthique pour les sciences de la vie et de la santé. Présentation; available at [http://www.ccne-ethique.org/ccne\\_ang/start\\_uk.htm](http://www.ccne-ethique.org/ccne_ang/start_uk.htm); Internet; accessed December 5, 2000. The texts quoted from the website will be cited according to the section or subsection in which they are found, i.e., Présentation.

<sup>117</sup>Ibid., Présentation. The CCNE website offers texts in both French and English. The English translations of the French texts cited here are taken from the website's English version. The English translation of the CCNE mandate is "to give opinions on ethical problems raised by progress in the fields of biology, medicine and health, and to publish

president head the Committee. As its name implies, the CCNE is a purely consultative body.<sup>118</sup>

Several means are used for disseminating the opinions of the Committee to the French public and industry. Among the most important are the Committee's annual public conference and their quarterly review, *Les Cahiers du Comité*.<sup>119</sup>

To date, the CCNE has published 66 opinions.<sup>120</sup> They have paid considerable attention to issues pertaining to genetic testing (8 opinions), advancements in reproductive technologies (8 opinions), and the use of human subjects in scientific research (7 opinions). The remaining opinions mostly address unrelated issues, such as mandatory drug testing in the workplace, aging, and antiviral HIV treatments.

To examine the issue of human dignity, we sought the answers to two distinct yet related questions:

1. What does the term "human dignity" mean to the CCNE?
2. Does human dignity factor into the recommendations made by the CCNE?

We began our study by entering "dignity" in a keyword search at the CCNE homepage. The search identified 17 opinions containing a direct reference to "dignity."

These were:

- No. 60: Réexamen des lois de bioéthique (Re-examination of the law on bioethics) (1998-06-25)

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recommendations on this subject."

<sup>118</sup>Ibid., Présentation.

<sup>119</sup>Ibid., Présentation.

<sup>120</sup>Ibid., Liste des avis.

- **No. 59: Rapport sur le vieillissement (Report on aging) (1998-05-25)**
- **No. 58: Consentement éclairé et information des personnes qui se prêtent à des actes de soin ou de recherche (Informed consent of and information to persons accepting care or research procedures) (1998-06-12)**
- **No. 57: Progrès techniques, santé et modèle de société: la dimension éthique des choix collectifs (Technical progress, health and societal models: the ethical dimension of collective choices) (1998-03-20)**
- **No. 54: Réponse au Président de la République au sujet du clonage reproductif (Reply to the President of the French Republic on the subject of reproductive cloning) (1997-04-22)**
- **No. 51: Recommandations sur un projet de loi "renforçant la prévention et la répression des atteintes sexuelles contre les mineurs (Recommendations on a draft bill "Reinforcing prevention and repression of sexual offences against minors) (1996-12-20)**
- **No. 46: Avis et recommandations sur "Génétique et Médecine: de la prédiction à la prévention" (Opinion and recommendations on "Genetics and medicine: From prediction to prevention) (1995-10-30)**
- **No. 43: Rapports du Comité consultatif national d'éthique pour les sciences de la vie et de la santé sur les toxicomanies (Reports on drug addiction) (1994-11-23)**
- **No. 41: La coopération dans le domaine de la recherche biomédicale entre équipes françaises et équipes de pays en voie de développement économique (Cooperation in the field of biomedical research between French teams and teams from economically developing countries) (1993-12-17)**
- **No. 38: Avis sur l'éthique de la recherche dans les sciences du comportement humain (Opinion on the ethics of research in the sciences of human behavior) (1993-10-14)**
- **No. 28: Avis sur la transfusion sanguine au regard de la non-commercialisation du corps humain (Opinion on blood transfusion with reference to not making commercial use of the human body) (1991-12-02)**

- **No. 26: Avis concernant la proposition de résolution sur l'assistance aux mourants, adoptée le 25 avril 1991 au Parlement européen par la Commission de l'environnement, de la santé publique et de la protection des consommateurs (Opinion concerning a draft resolution on assistance to the dying adopted on 25<sup>th</sup> April 1991 by the Commission for the Environment, Public Health, and Consumer Protection of the European Parliament) (1991-06-24)**
- **No. 21: Avis sur la non-commercialisation du corps humain (Opinion that the human body should not be used for commercial purposes) (1990-12-13)**
- **No. 18: Etat des études conduites par le Comité concernant les dons de gamètes et d'embryons (Update on studies undertaken by the committee regarding gamete and embryo donation) (1989-12-15)**
- **No. 14: Avis sur les problèmes éthiques posés par la lutte contre la diffusion de l'infection par le virus de l'immuno-déficience humaine (VIH) (Opinion on ethical problems raised by action to combat the spread of infection by the human immunodeficiency virus (HIV)) (1988-12-16)**
- **No. 9: Avis sur les problèmes posés par le développement des méthodes d'utilisation de cellules humaines et de leur dérivés (Opinion on problems arising because of the development of methods using human cells and their derivatives) (1987-02-23)**
- **No. 8: Avis relatif aux recherches et utilisation des embryons humains *in vitro* à des fins médicales et scientifiques (Opinion on research and use of *in vitro* human embryos for scientific and medical purposes) (1986-12-15)**

We selected 6 opinions based on their relevance to the issue of human dignity and genetics. In our selection, we also included opinions addressing reproductive technologies (including human cloning) and opinions concerned with the use of human research subjects, because many aspects of genetic testing may cross over into the use of reproductive technologies and research involving human subjects. The opinions we reviewed were 8, 18, 21, 38, 46, and 54. In order to examine each opinion in an organized and consistent fashion, we briefly describe the background of each opinion (provided such information

was available) and follow this by outlining the opinion's structure. Finally, we discuss any reference to "dignity."

### **2.3.1 Opinion No. 8--Avis relatif aux recherches et utilisation des embryons humains *in vitro* à des fins médicales et scientifiques (Opinion on research and use of *in vitro* human embryos for scientific and medical purposes) (1986-12-15)**

The CCNE intended opinion no. 8 to be a continuation of opinion no. 3 on artificial reproductive techniques.<sup>121</sup> The opinion contained recommendations regarding *in vitro* fertilization embryo transfer as a remedy to infertility, *in vitro* embryo transfer, and certification of *in vitro* fertilization centres. A discussion of the scientific and ethical aspects of these techniques was also included.

Human dignity is referred to eight times in this opinion. Each time it is mentioned, it stands alone in the text. Consider the following examples:

L'exigence fondamentale du respect de la dignité humaine est une valeur supérieure à toute autre et doit être traduite dans la réalité des situations de fait...<sup>122</sup>

Au respect de la dignité humaine que certaines pratiques scientifiques ou médicales pourraient mettre en péril au regard d'une appréciation exclusivement subjective de son sens, s'ajoute le respect de la science et de ses propres exigences méthodologiques. Chercher dans la dignité humaine une éthique pour la science impose aussi que l'éthique intellectuelle de la science soit respectée.<sup>123</sup>

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<sup>121</sup>Ibid. Avis no. 8: Avis relatif aux recherches et utilisation des embryons humains *in vitro* à des fins médicales et scientifiques (December 15, 1986).

<sup>122</sup>Ibid., Rapport éthique. "The basic requirement on which the respect for human dignity is based is the highest of all values and must be translated into the actual *de facto* situations."

<sup>123</sup>Ibid., Rapport éthique. "The respect for human dignity that some scientific or medical practices could jeopardise by considering subjectively only their own aims cannot be separated from the respect for science itself and its own methodological requirements. To seek in human dignity ethical grounds for science itself requires that the intellectual ethics of science should be respected."

**Le respect de la dignité humaine doit guider à la fois le développement des connaissances et les limites ou les règles que la recherche doit observer.<sup>124</sup>**

**Il ne s'agit pas de nier l'héritage culturel, philosophique ou éthique, qui depuis l'antiquité gréco-latine jusqu'à nos jours a contribué laborieusement à forger les représentations et les significations de la personne humaine, et à fonder le respect de sa dignité.<sup>125</sup>**

**La recherche d'une éthique respectueuse de la dignité humaine . . . et de la dignité de la science au service d'une connaissance et d'une protection de la vie. . .<sup>126</sup>**

The remaining references to human dignity in this opinion are unified by their inclusion of the idea that commodification of the individual is an act not consistent with human dignity (see excerpts below). Thus, we may postulate that non-commodification is a part of dignity. The following three excerpts demonstrate this principle that people must not be treated as objects:

**Respecter la personne humaine - aussi bien chez autrui qu'en soi-même - c'est, selon un précepte qui paraît recueillir l'adhésion générale, la traiter toujours comme une fin et jamais simplement comme un moyen, et donc ne jamais se comporter à son égard d'une manière à laquelle elle ne pourrait librement adhérer par elle-même. C'est reconnaître sa dignité, et donc la considérer comme une valeur incommensurable à tout prix.<sup>127</sup>**

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<sup>124</sup>Ibid., Avis. "Respect for human dignity must guide both the development of knowledge and the limits or rules to be observed by research."

<sup>125</sup>Ibid., Rapport éthique. "Since Greek and Latin antiquity, and up to the present day, the cultural, philosophical and ethical heritage has painstakingly contributed to a building up a representation and significance for the human being, and establishing respect for the human being's dignity."

<sup>126</sup>Ibid., Rapport éthique. "Trying to define ethical principles respecting human dignity . . . and the dignity of science for the benefit of knowledge and protection of life requires confronting this dual requirement . . ."

<sup>127</sup>Ibid., Rapport éthique. "To have respect for the human person - whether in others or in oneself - is, according to a generally accepted principle, to treat it as an end in itself and never as an instrument. As a consequence, the human person must never be treated in a

**Le fait de reconnaître dans l’embryon humain une personne humaine seulement potentielle ne saurait rendre si peu ce soit facultative l’obligation de respect à son égard. Ainsi, potentielle ou non, la personne humaine a une dignité et non un prix, ce qui conduit à tenir toute pratique vénale concernant l’embryon humain pour absolument inéthique.<sup>128</sup>**

**On ne doit pas procéder, même avec le consentement des géniteurs, à des fécondations en vue de la recherche. Elles conduiraient à faire des embryons humains de simples moyens ou de purs objets, au mépris du respect de la dignité humaine, qui doit prévaloir sur les utilités de la recherche scientifique.<sup>129</sup>**

The basis for the discussion of human dignity in this opinion is ethics. We arrive at this conclusion for two reasons. Firstly, we note that each of the above mentioned passages are found in the section of the opinion entitled *Rapport éthique*. Secondly, human dignity is spoken of in relation to ethical principles. The CCNE remarked that: “Trying to define ethical principles respecting human dignity . . . and the dignity of science from the benefit of knowledge and protection of life requires confronting this dual requirement . . .”<sup>130</sup>

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way he would not freely accept for himself. It means recognising the dignity of the human person and therefore considering it to be of incommensurate value.

<sup>128</sup>Ibid., *Rapport éthique*. “The fact that the human embryo is recognised only as a potential human person does not make the obligation of respect for that embryo optional. Therefore, potential or not, the human person has a dignity and not a price. This leads to consider absolutely unethical any commercial practice in relation with the human embryo.”

<sup>129</sup>Ibid., *Recommandations générales*. “Even with the consent of genitors, fertilisation should not be done for research purposes alone. If it were, human embryos would purely and simply be used as tools or objects, and human dignity, which must override scientific research, would not be respected.

<sup>130</sup> Ibid., *Rapport éthique*.

With respect to its meaning, “human dignity” is used in a consistent manner throughout this opinion. As we have noted, ethics is established as the basis for discussion, and this remains the case throughout the opinion. In particular, the principle of non-commodification appears to be at the forefront of the discussion on human dignity. We refer to fact that 3 of the 8 references to the term also contain an allusion or direct statement to the effect that human beings or human derived tissues must not be made tradeable commodities.

It should also be noted that although “human dignity” is referred to eight times in this opinion, an explicit definition of its meaning is not given.

### **2.3.2 Opinion No. 18--Etat des études conduites par le Comité concernant les dons de gamètes et d’embryons (Update on studies undertaken by the committee regarding gamete and embryo donation) (1989-12-15)**

Opinion no. 18, published on December 15, 1989, addresses studies undertaken on embryo donation. The purpose of the opinion was twofold:

- To recapitulate general ethical principles which guided the work of the Committee.
- To offer replies to questions regarding conditions for embryo donation to a recipient couple and conditions regarding *in vitro* human embryo research.<sup>131</sup>

Human dignity is referred to twice in this opinion, yet neither reference offers much insight into the meaning ascribed to the term by the CCNE. In both instances, human dignity is referred to individually, however the context within which it is used does not

provide much information as to its meaning. The two passages concerned with human dignity are:

**Le souci éthique majeur qui nous guide dans ces difficiles questions est de sauvegarder la dignité présente et future de l'être humain, exposé par ces méthodes à des risques multiples.<sup>132</sup>**

**. . . les gamètes sont vecteurs de l'identité d'un nouvel être humain; l'embryon, selon une formulation employée dans plusieurs de nos avis, doit être reconnu comme une personne humaine potentielle. Sa réification transgresse l'exigence fondamentale du respect de la dignité humaine.<sup>133</sup>**

It is difficult to draw many informative conclusions about the CCNE's concept of human dignity from this opinion because of the infrequent use of the term. We can suggest that the emphasis is on ethics. This is indicated by the passage above: "In these difficult issues our major ethical preoccupation is to protect the present and future dignity of the human being which, through these methods, is exposed to numerous hazards."

We cannot comment on the consistency of the use of this term here. It is simply mentioned too few times. Furthermore, as was the case with opinion no. 8, no explicit definition of "human dignity" is offered here.

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<sup>131</sup> Ibid., Remarques générales.

<sup>132</sup> Ibid., Remarques générales. "In these difficult issues our major ethical preoccupation is to protect the present and future dignity of the human being which, through these methods, is exposed to numerous hazards.

<sup>133</sup> Ibid., Remarques générales. ". . . gametes are the vectors of identity of a new human being; the embryo, to use an expression to be found in several of our Opinions, must be recognised as a potential human person. To reify it is a violation of the fundamental respect owed to human dignity."

### 2.3.3 Opinion No. 21—Avis sur la non-commercialisation du corps humain (Opinion that the human body should not be used for commercial purposes) (1990-12-13)

Opinion no. 21 was intended to articulate one of the basic ethical principles that guided the CCNE in all deliberations about matters of ethics.<sup>134</sup> This principle is that the human body should not be used for commercial purposes.<sup>135</sup> That this principle is important to the CCNE's view of human dignity is undeniable, as articulated in this December 13, 1990 opinion:

Les deux rapports de synthèse: *Recherche médicale et respect de la personne humaine, Ethique et connaissance*, contiennent la somme de ces principes lesquels constituent des éléments essentiels des avis rendus de 1984 à 1990.

Parmi les plus constants d'entre eux, il faut citer la non-commercialisation du corps humain.<sup>136</sup>

Besides this reference to one of its previous publications, human dignity is mentioned twice in this very brief opinion. Both statements concerning dignity are essentially similar. They both use human dignity in an individual context (i.e., it is not mentioned as part of a list), and both seek to espouse this fundamental principle of non-commercialisation of the human body.

Ainsi un organe tel que le rein, ne saurait être vendu par celui d'ou il provient, et, fût-il cédé gratuitement, être rendu par un tiers quelles que soient les incitations du

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<sup>134</sup>Ibid., Avis no. 21: Avis sur la non-commercialisation du corps humain (December 13, 1990).

<sup>135</sup>Ibid. Avis.

<sup>136</sup>Ibid., Avis. "The two summary reports: '*Recherche médicale et respect de la personne humaine*' (Medical research and respect of human dignity) and '*Ethique et connaissance*' (Ethics and knowledge) contain the complete set of principles upon which Opinions expressed from 1984 to 1990 are founded. . . . One of them, to which constant reference is made, is that the human body should not be used for commercial purposes."

receveur éventuel ou de son entourage. Ces incitations pourraient aller jusqu'à engendrer des chantages sur les personnes dépendantes, comme par exemple les détenus ou toute minorité dominée. Il y va de la dignité de l'être humain de ne pas tirer finance de son amoindrissement physique même temporaire.<sup>137</sup>

Ainsi la dignité de l'homme, critère éthique fondamental, trouvera, au regard de l'argent, sa vraie place et sa plus utile protection.<sup>138</sup>

Ethics again seems to be the basis for the discussion of human dignity presented in this opinion. Evidence of this can be found in two excerpts that we have previously identified as pertaining to human dignity. The first is actually a reference to an earlier work by the CCNE, but nevertheless suggests ethics as the basis for the Committee's consideration of human dignity.

The two summary reports: '*Recherche médicale et respect de la personne humaine*' (Medical research and respect of human dignity) and '*Ethique et connaissance*' (Ethics and knowledge) contain the complete set of principles upon which Opinions expressed from 1984 to 1990 are founded . . . One of them, to which constant reference is made, is that the human body should not be used for commercial purposes.<sup>139</sup>

We have seen in our examinations of previous opinions that the non-commodification of the human body is an important aspect of human dignity in the eyes of

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<sup>137</sup>Ibid., Avis. "When it is said that the human body is not for sale and not on the market, the two statements are complementary: on the one hand, the human body or one of its components cannot be the object of a contract, on the other hand, it cannot be negotiated by anyone. For instance, an organ such as the kidney, cannot be sold by a third party however much the would-be recipient or his entourage insist on it. Such insistence may be tantamount to blackmailing dependent individuals, for example prison inmates or misused minorities. Human dignity is at stake if financial gain becomes the result of physical weakness, however temporary."

<sup>138</sup>Ibid., Avis. "Thus, the fundamental ethical criterion represented by the dignity of man would find its proper place in relation to money and its most effective protection."

<sup>139</sup>Ibid.

the CCNE. This principle finds frequent usage in the CCNE's publication "Ethics and knowledge," which would thereby seem to suggest that human dignity is rooted in ethics. Support for this contention is also found when the CCNE declares that "... the fundamental ethical criterion represented by the dignity of man would find its proper place in relation to money and its most effective protection."<sup>140</sup> The assertion that dignity represents a "fundamental ethical criterion" leaves little doubt that the CCNE emphasizes ethics as the basis for human dignity. It should be noted, however, that the opinion does make a brief reference to the obligation of those in power to protect the dignity of vulnerable groups in society when it states that: "Such insistence may be tantamount to blackmailing dependent individuals, for example prison inmates or misused minorities. Human dignity is at stake if financial gain becomes the result of physical weakness, however temporary."<sup>141</sup>

This statement reflects an ethical issue--social justice. However, since it might require making special considerations for disadvantaged sections of the population, we suggest that this passage expands the discussion of human dignity to encompass sociological issues as well. However, we reiterate that the emphasis clearly lies on ethics.

"Human dignity" is used in a consistent manner in this opinion. Two of the four passages mentioning human dignity do so in concert with a statement about the non-commodification of the individual. It is once again the case that no explicit definition of "human dignity" is offered.

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<sup>140</sup> Ibid.

<sup>141</sup> Ibid., Avis.

**2.3.4 Opinion No. 38--Avis sur l'éthique de la recherche dans les sciences du comportement humain (Opinion on the ethics of research in the sciences of human behavior) (1993-10-14)**

Opinion no. 38 on the ethics of research on human behaviour is a unique opinion. Only two direct references to human dignity are made; one is a non-specific usage, the other in the wording of a subtitle. However, this opinion proves to be a valuable resource in gaining an understanding as to what human dignity means to the CCNE through its implicit references to human dignity.

As usual, the opinion is divided into several smaller discussions. The Committee began by asserting four principles that must be considered in human research: freedom of persons, the safety of the subjects, justice, and ethical review by independent bodies.<sup>142</sup> We will return to these principles latter on. The opinion also addressed several problems specific to human behaviour research, those being: consent, safety, equity, and the review of protocols.<sup>143</sup>

As was stated earlier, two direct references to human dignity are made. The first is an expression of the need to ensure human safety and dignity are maintained during experimental procedures:

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<sup>142</sup>Ibid., Avis no. 38: Avis sur l'éthique de la recherche dans les sciences du comportement humain. (October 14, 1993).

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

... de veiller à ce que la liberté et la sécurité des sujets soient protégées: en s'assurant que les expériences envisagées ne menacent ni la sécurité, ni la dignité des personnes qui s'y prêtent ...<sup>144</sup>

The second mention of dignity is its inclusion in a subtitle: "La justice. La dignité humaine."<sup>145</sup> It is interesting to note here is that the term human dignity is not mentioned even once within this subsection outside of the subtitle. Returning to the first mention of dignity, it is clear the document intends to require that human dignity must be respected in any research involving humans. The CCNE had also made the following statement:

Dans son rapport *Ethique et connaissance* (1990), le CCNE écrit: "chercher à connaître scientifiquement l'être humain est un bien, mais cela ne peut se faire au prix de la justice, de la sécurité ou de l'autonomie des personnes."<sup>146</sup>

We may be justified, based on these two statements, in inferring that the CCNE saw autonomy, justice, and security as components of human dignity. If human dignity must be respected in any research experiment, as must autonomy, justice, and security, one may postulate that there is a connection and that these three principles in fact are part of human dignity. This of course is speculative and not necessarily true; respect for all three principles as well as respect for human dignity could be mandated in any research involving human subjects with no connection between them. However, the possibility still exists.

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<sup>144</sup>Ibid., Avis. "... with ensuring that the freedom and safety of subjects are protected: by making sure that proposed experiments do not threaten either the safety or the dignity of the persons who consent to them."

<sup>145</sup>Ibid., Rapport. "Justice. Human dignity."

<sup>146</sup>Ibid., Rapport. "In its report *Ethique et Connaissance* (Ethics and Knowledge), the CCNE writes: 'seeking to gain scientific knowledge of the human being is good, but this cannot be done at the expense of justice, or of the safety and autonomy of individuals.'"

The opinion addresses these three principles. Of autonomy, the CCNE stated that “(autonomie): agir en accord avec ce qu’on veut réellement pour soi-même.”<sup>147</sup> Security, while not as well defined, is spoken of also. The CCNE claims that the safety of a human subject must not be compromised.<sup>148</sup> In cases where there exists a risk of harm to the subject, the experiment can only be ethically justified if there exists: “bénéfice individuel direct” or “un bilan risques-avantages acceptable, c’est-à-dire avantage certain pour la communauté, risque nul ou minime pour l’individu.”<sup>149</sup> Finally, in discussing justice, the Committee stated: “le principe de justice sert d’abord à rappeler que la recherche scientifique ne doit pas être l’occasion d’une exploitation.”<sup>150</sup>

The title of this opinion places the emphasis of the discussion of human dignity on ethics: “Opinion on the ethics of research in the sciences of human behaviour.” In a subsequent statement, the CCNE remarks that: “. . . with ensuring that the freedom and safety of subjects are protected: by making sure that proposed experiments do not threaten either the safety or the dignity of the persons who consent to them.”<sup>151</sup> It can thus be concluded that to ensure that human dignity is not threatened in experiments is to act

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<sup>147</sup>Ibid., Rapport. “(autonomy): acting in accordance with what one really wants for oneself.”

<sup>148</sup>Ibid., Rapport.

<sup>149</sup>Ibid., Rapport. ““direct individual benefit” and “an acceptable risk-advantage balance, that is, a definite advantage for the community, and a zero or minimal risk for the individual.”

<sup>150</sup>Ibid., Rapport. “. . . the principle of justice serves primarily to recall, that scientific research must never involve exploitation . . . ”

<sup>151</sup>Ibid.

ethically. This is common sense, but it indicates that, once again, ethics is the basis for the discussion of human dignity.

We cannot comment on the consistency of the use of the term, because it is used so sparingly. However, unlike previous opinions, we can arrive at plausible definition of “human dignity” from the ideas presented here. We propose that the following definition is consistent with opinion no. 38:

**Human dignity is a quality that exists in individuals. The existence of this quality means that individuals have equal intrinsic worth because of their uniqueness, independent of their socioeconomic status. Thus, decisions about how an individual is to be treated must not be based on socioeconomic factors. Further, because each individual is unique, it is by definition impossible for one person to replicate the total experience of another.**

**Thus, to act or make decisions on behalf of another without permission, or to coerce that person into acting in a way in which they otherwise would not, forces that person to accept an outcome not necessarily commensurate with that person’s system of beliefs or experiences. Therefore, such intrusive action is impermissible.**

### **2.3.5 Opinion No. 46—Avis et recommandations sur “Génétique et Médecine: de la prédiction à la prévention (Opinion and recommendations on “Genetics and medicine: From prediction to prevention) (1995-10-30)**

Opinion no. 46 on the use of genetic testing in predictive and preventative medicine was published on October 30, 1995. The opinion contained a scientific report that outlined the role of genes in disease, as well as methods for analysis of genetic characteristics, a section detailing the scope of applications of genetic testing (presymptomatic diagnosis, evaluation of genetic risk for descendents, and testing genetic susceptibility for severe diseases in adults), and an ethics report. The ethics report was divided into four sections:

**Basic Rules and References; Guidelines and Ethical Rules for the Private Life of Individuals; Reflections Concerning the Dignity of the Individual in Society; and Reflections on the Responsibilities of Society Towards Individuals.**

Human dignity is explicitly referred to twice in this opinion. The first reference is made in the opinions and recommendations section. Its usage in this opinion is unique and deviates from what we have seen so far. Unlike previous instances, human dignity is used here in a list with a series of other ideas, rather than simply standing alone.

L'utilisation de ces informations à des fins de sélection ou de discrimination dans la vie sociale et économique, que ce soit dans le domaine des politiques de santé, de l'emploi ou des systèmes d'assurances, conduirait à franchir une étape d'une extrême gravité vers la mise en cause des principes d'égalité en droits et en dignité, et de solidarité entre tous les êtres humains, sur lesquels repose notre société.<sup>152</sup>

The second reference to human dignity is made in the ethical considerations. Here, dignity is referred to with respect to its perceived connection with human rights:

“Cependant, elle [la connaissance génétique] entre en conflit avec une perspective éthique formelle mais qui est au centre de la problématique des Droits de l'Homme: l'égalité de tous en dignité.”<sup>153</sup>

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<sup>152</sup>Ibid. Avis no. 46: Avis et recommandations sur "Génétique et Médecine: de la prédiction à la prévention" (October 30, 1995). Rapport éthique. "To use such information for the purpose of selection or discrimination in social or economic terms, be that in the realm of public health policies, employment, or insurance systems, would be crossing a boundary of the most extreme gravity and would question those principles of equality of rights, dignity and solidarity for all human beings upon which society as we know it is based.

<sup>153</sup>Ibid., Rapport éthique. "However, it [genetic knowledge] enters into conflict with an ethical perspective which is of a formal nature but is at the very centre of the principles of Human Rights: equality in dignity."

Ethical, social, and legal concerns are invoked in this discussion of human dignity. Previous opinions have focussed almost exclusively on the ethical aspects of human dignity. However, this opinion makes statements such as: “. . . dignity and solidarity for all human beings upon which society as we know it is based” and “an ethical perspective which is of a formal nature but is at the very centre of the principles of Human Rights: equality in dignity.” While ethics remains important to this discussion of human dignity, allusions to legality (human rights) and direct reference to social concerns as well are made. Thus, the basis for human dignity in this opinion is not so straightforward as it is in the others, because the emphasis is spread over several areas of concern.

Because human dignity is only mentioned twice in this opinion, it is difficult to gauge the level of consistency with which it is used. However, we note that “equality” is used in both statements: first as “equality of rights, dignity and solidarity . . .” and the second as “equality in dignity.” Neither of these statements reveals much about the meaning of dignity, but it does emphasize the equality of human beings.

Finally, the limited usage of “human dignity” in this opinion makes it too difficult to arrive at a definition of the term. This difficulty is compounded by the fact that the meaning is not at all alluded to in either passage within which it is used. It was noted that only “equality in dignity” is mentioned. We wish to comment on this before we leave the present opinion. The CCNE’s use of “dignity” here is ambiguous. How can it be ensured that equality in dignity is preserved in cases of genetic testing when even rough parameters of what constitutes dignity are not established? We would suggest that the CCNE’s opinion

may be strengthened if it first set forth some collection of principles or ideals from which the reader could infer the meaning of human dignity.

**2.3.6 Opinion No. 54—Réponse au Président de la République au sujet du clonage reproductif (Reply to the President of the French Republic on the subject of reproductive cloning) (1997-04-22)**

On February 23, 1997, news broke that Dr. Ian Wilmut and his colleagues at the Roslin Institute in Scotland were about to announce the successful cloning of a sheep.<sup>154</sup> To address this new development in the world of biotechnology, President Chirac asked the CCNE for a complete analysis of the French regulatory framework and any proposals for modifications which might be required to avoid any risk of the use of cloning technologies on human beings.<sup>155</sup> The Committee responded to his request and published opinion no. 54 on the subject of reproductive cloning on April 22, 1997.

The opinion was divided into three sections: Scientific and Technical Aspects; Ethical Considerations; and Legal Considerations. “Human dignity” finds its way into the opinion in 15 different references, most in the ethical considerations, but several are found in the introduction, legal considerations, and the opinion’s conclusion. In ten references it is used alone and in five it is listed along with other topics.

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<sup>154</sup>National Bioethics Advisory Committee, *Report on Cloning Human Beings* (United States, June 1997), 1; available from <http://bioethics.gov/pubs.html>; Internet; see below section 2.4.3 for further information.

<sup>155</sup>CCNE. Avis no. 54: Réponse au Président de la République au sujet du clonage reproductif (April 22, 1997), Introduction.

One mention of human dignity is made in the introduction. It does not deal at length with human dignity, other than to state the fact that it is a “concept” which is the foundation of all the CCNE work.

**La signification d’un recours à des techniques de clonage pour donner naissance à des personnes et l’analyse des différentes indications avancées sont ensuite envisagées d’un point de vue philosophique et éthique, mettant au centre de la réflexion la notion de dignité de la personne qui fonde, depuis son origine, la démarche du CCNE.<sup>156</sup>**

Similarly, the discussion of the ethical considerations opens with the mention of the term human dignity: “Une réflexion éthique sérieuse s’impose quand il y va, à un titre ou à un autre, de la dignité de l’être humain.”<sup>157</sup> Common to both these passages is the usage of the term “human dignity” as a singular idea, that is, human dignity stands alone and is referred to as a thing unto itself. This idea, revealed in other statements, is made in this opinion as well:

**Tout en exprimant avec force un concept de base, la préservation de la dignité humaine qui conduisait à proscrire les interventions tendant à modifier la descendance de la personne . . .<sup>158</sup>**

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<sup>156</sup>Ibid., Introduction. “The significance of using cloning to give birth to humans and an analysis of reasons for doing so that have been put forward are subsequently considered from philosophical and ethical points of view. Central to this reflection is the concept of the dignity of the human person which is the very foundation of the CCNE’s outlook since it was created.”

<sup>157</sup>Ibid., Considérations éthiques. “Serious ethical reflection is an obligation when, in one way or another, the dignity of the human being is at stake.”

<sup>158</sup>Ibid., Considérations juridiques. “Whilst expressing firmly a basic concept, namely the protection of human dignity which led to a ban on procedures which could modify a person’s descent.”

Elle comporte, comme le droit français, l'affirmation solennelle que l'être humain doit être protégé dans sa dignité . . . .<sup>159</sup>

L'interdiction du clonage reproductif trouverait son expression la plus solennelle en prenant place dans des dispositions juridiques fondamentales, concernant la protection du corps humain et la dignité de la personne.<sup>160</sup>

Une société qui s'est mise d'accord sur l'affirmation très solennelle de principes protecteurs de la dignité humaine n'a rien à gagner à ce que soit périodiquement ouverte la boîte de Pandore des applications les plus bizarres de la science.<sup>161</sup>

En effet, le remplacement dans l'espèce humaine de la procréation par une méthode de reproduction faisant appel aux techniques du clonage constituerait, sur le plan biologique, symbolique et philosophique, une rupture considérable portant gravement atteinte à la dignité de la personne humaine.<sup>162</sup>

“Concept” was used to describe human dignity in an earlier passage. However,

“principle” serves the same function in two instances as well:

L'Organisation mondiale de la santé a publié une déclaration le 11 mars 1997 selon laquelle *l'utilisation du clonage pour reproduire des êtres humains n'est pas acceptable car elle violerait certains principes fondamentaux de la procréation médicalement assistée. Ceux-ci incluent notamment le respect de la dignité de la personne humaine et la protection de la sécurité du matériel génétique humain.*<sup>163</sup>

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<sup>159</sup>Ibid., Considérations juridiques. “It contains, as does French law, the solemn statement that human beings must be protected in their dignity.”

<sup>160</sup>Ibid., Considérations juridiques. “The ban on reproductive cloning would be expressed in the most formal manner by inclusion in fundamental legal assertions on the subject of the protection of the human body and the dignity of the human person.”

<sup>161</sup>Ibid., Considérations juridiques. “A society which has agreed on a most solemn assertion of principles safeguarding human dignity has nothing to gain by periodically reopening a Pandora’s box of the more bizarre scientific applications.”

<sup>162</sup>Ibid., Conclusion. “Were humanity to replace procreation by cloning technology, a momentous break with the past and a serious threat to human dignity would be made.”

<sup>163</sup>Ibid., Considérations juridiques. “The World Health Organisation published a declaration on 11<sup>th</sup> March 1997 according to which *the use of cloning for the replication of human individuals is ethically unacceptable as it would violate some of the basic principles which govern medically assisted procreation. These include respect for the dignity of the human being and protection of the security of human genetic material.*”

**Ce qui est en jeu touche aux droits et à la dignité de l'homme, en ce que ces principes ont d'universel.<sup>164</sup>**

As we have seen in earlier opinions of the CCNE, this “thing” called human dignity will reveal itself to encompass different principles.

On three occasions, the section detailing ethical considerations refers to human dignity together with autonomy. The first such reference was:

**Le caractère unique de chaque être humain, dans quoi l'autonomie et la dignité de la personne trouvent support, est exprimé de façon immédiate par l'unicité d'apparence d'un corps et d'un visage, laquelle résulte de l'unicité du génome de chacun.<sup>165</sup>**

This statement does not establish any link between autonomy and dignity, other than the fact that, in the eyes of the CCNE, they are afforded us by our uniqueness as individuals. However, the second reference that mentions these two ideas together implies that by respecting autonomy and liberty, we are also respecting human dignity. This is consistent with what we have seen earlier, that is, autonomy is considered by the CCNE as an aspect of human dignity. This is suggested by the Committee's statement: “Respecter l'autonomie de la personne, sa liberté et par là sa dignité. . . .”<sup>166</sup> The opinion finally disposes of all uncertainty about the relationship between autonomy and human dignity in

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<sup>164</sup>Ibid., *Considérations juridiques*. “The stake is human rights and dignity inasmuch as those principles are universal.”

<sup>165</sup>Ibid., *Considérations éthiques*. “The uniqueness of each human being, which upholds human autonomy and dignity, is immediately expressed by the unique appearance of body and countenance which is the result of the singularity of each genome.”

<sup>166</sup>Ibid., *Considérations éthiques*. “Respecting the autonomy of a person, and that person's liberty and therefore dignity . . .”

avowing that: “la reconnaissance et la protection de sa singularité et de son autonomie, deux éléments essentiels de la condition humaine et de sa dignité.”<sup>167</sup>

Another important aspect of the CCNE’s concept of human dignity is the non-commodification of the human person. This is affirmed in two references to human dignity; one made in the ethical considerations, the second in the legal considerations. The Committee first expresses this conviction by asserting:

Mais en l’occurrence, si l’identification insensée entre un défunt et son clone devait se traduire par la mise au monde d’un être ainsi produit, il ne s’agirait plus de croyance à respecter mais de claire instrumentalisation d’une personne, et il y a exigence éthique de l’empêcher. Car, voulu pour lui-même selon un regard tout superficiel, le clone serait en vérité la prothèse d’un désir fantasmagorique où il n’aurait nulle place. En aucun cas la technique biomédicale ne saurait se mettre au service de telles divagations sans s’y pervertir scientifiquement et éthiquement: elle s’y ferait la supplétive d’une pensée magique pour une fabrication bafouant la dignité humaine.<sup>168</sup>

The Committee also cites the opinion of the *Conseil constitutionnel*:

*...un ensemble de principes au nombre desquels figurent la primauté de la personne humaine, le respect de l’être humain dès le commencement de sa vie, l’inviolabilité, l’intégrité et l’absence de caractère patrimonial du corps humain ainsi que l’intégrité de l’espèce humaine; que les principes ainsi affirmés tendent à assurer le respect du principe constitutionnel de sauvegarde de la dignité de la personne humaine.*<sup>169</sup>

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<sup>167</sup>Ibid., Conclusion. “. . . the recognition and protection of that person’s singularity and autonomy; these are two essential elements of the human condition and dignity.”

<sup>168</sup>Ibid., Considérations éthiques. “The issue here is manifest instrumentalisation of a person, and ethics demand that this should be prevented because although very superficially desired as a person in his own right, the clone would be a substitute for a phantasmagorical yearning to which he would be totally alien. In no circumstances should biomedical competence be put at the service of such ravings; that way lies scientific and ethical perversion, support given to dreams of magical practices and constructions which outrage human dignity.”

<sup>169</sup>Ibid., Considérations juridiques. “. . . a corpus of principles including primacy of the

Before leaving Opinion no. 54, it is worth noting that the CCNE leaves little room for doubt concerning its conviction that reproductive cloning offers an affront to human dignity:

**Il n'y a donc pas une seule variante concevable du clonage reproductif d'êtres humains, que ce soit à partir d'un adulte ou d'un embryon, qui échappe à une accumulation d'objections réhivitoire. A l'ensemble de ces titres, il ne peut susciter qu'une condamnation éthique véhémence, catégorique et définitive. Une telle pratique, mettant en cause de manière radicale l'autonomie et la dignité de la personne, constituerait une grave involution morale dans l'histoire de la civilisation.<sup>170</sup>**

This opinion uses law and ethics as bases for its discussion of human dignity. This is evidenced by several of the aforementioned statements, such as the previously mentioned CCNE statement regarding cloning and the important relationship between philosophical and ethical points of view and the concept of human dignity.<sup>171</sup> The centrality of ethics to the discussion of human dignity is also highlighted in the following statement:

**. . . Serious ethical reflection is an obligation when, in one way or another, the dignity of the human being is at stake.<sup>172</sup>**

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human person, respect of the human being from the beginning of life, that the human body is unalienable, that its integrity and the principle of non-patrimony must be respected as must also be the integrity of the human species; that the principles stated above aim to ensure respect of the constitutional principle to safeguard the dignity of the human person.”<sup>170</sup>

<sup>170</sup> Ibid., Considérations éthiques.

<sup>171</sup> Ibid., Introduction.

<sup>172</sup> Ibid., Considérations éthiques.

We also note that there are four additional statements concerning dignity that are found in the "Ethical Considerations" section. Thus, it is clear that ethics is certainly a foundation upon which the CCNE builds their discussion of human dignity. Legal concepts are also included in this foundation. Recall that the CCNE made five statements about human dignity in this opinion, all coming from the section entitled "Legal Considerations". The first statement regarded the banning of procedures that could modify a person's descent in order to protect human dignity.<sup>173</sup> The second makes a comparison to French law, which explicitly states that human dignity must be protected.<sup>174</sup> The third statement addresses the ban on reproductive cloning for the reasons of protecting the human body and dignity<sup>175</sup>. The fourth statement remarks that in order for society to remain consistent in respecting human dignity, it must not make exceptions for wondrous new scientific inventions.<sup>176</sup> Finally, the fifth statement, which we saw earlier, discusses the need to ensure respect for the constitutional principle to safeguard human dignity.<sup>177</sup>

We find in this opinion some general consistency in the use of the term "human dignity." We have noted that in some opinions, passages using the term do so in a manner that does not lend much insight into how the meaning of the term is perceived by the CCNE (for an example of this, revisit the discussion of Opinion no. 46).

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<sup>173</sup> *Ibid.*, Considérations juridiques.

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

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*

However, in opinion no. 54, the CCNE develops a notion of human dignity that is generally followed throughout the document. It is helpful to classify each of the references to human dignity as either a conceptual statement or a directive statement (although these are not mutually exclusive). This classification is not arbitrary. Conceptual statements are those that mention some ideal or principle (e.g., autonomy) in relation to human dignity. Directive statements are those statements that do not generally add anything to our understanding of the term but assert something about the CCNE's position on the role of human dignity (e.g., France should respect human dignity in medical research). Seven of the references to human dignity in this opinion are what we would classify as conceptual statements. Of these seven, four mention autonomy in connection with human dignity. One such statement explicitly identifies autonomy as an element of human dignity, ". . . the recognition and protection of that person's singularity and autonomy; these are two essential elements of the human condition and dignity."<sup>178</sup> The idea that singularity or uniqueness of the individual is important to human dignity is also developed in two other conceptual statements.

Opinion no. 54 affords us perhaps our best opportunity to infer what the CCNE's definition of human dignity is. There clearly is a strong emphasis on autonomy and uniqueness of the person. Thus, we propose the following as a definition consistent with Opinion no. 54:

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<sup>178</sup> Ibid., Conclusion.

**Human dignity is a quality that results from the uniqueness of each individual. This uniqueness is manifest not only in the genome of the person, but also in that person's collection of life experiences. Because this uniqueness is the foundation of the existence of human dignity, persons must be treated in a manner that recognizes and respects their individuality.**

**In our study of the CCNE, we have examined six opinions to help us gain an insight into their understanding of "human dignity." In all six opinions, we found that this topic was discussed, at least to some degree, with an emphasis on ethics. This was not unexpected. Additionally, two opinions talked about dignity with reference to social and legal issues. In general, we conclude that ethics forms the basis of the CCNE's conception of human dignity.**

**Throughout this study, we have at different times proposed plausible definitions of human dignity based on our examination of the various opinions. Autonomy is consistently mentioned as an important element of human dignity. We can state with confidence then that autonomy is of great importance to the CCNE's understanding of human dignity. In opinion no. 54 we saw autonomy used in connection with the uniqueness or singularity of the person on several occasions. Although this connection was not emphasized in any of the other opinions, it appears from its relatively frequent occurrence in no. 54 that this uniqueness may, in the eyes of the CCNE, account for the existence of human dignity. We also noted that justice, liberty, and non-commodification of persons were mentioned as important to human dignity. However, these were not discussed as consistently as autonomy, nor were they explicitly identified as elements of dignity, as autonomy was in the documents considered.**

### 2.3.7 Consideration of Recommendations

We now turn our attention to the recommendations and conclusions contained in each opinion. We do so in order to answer the second of our two questions, namely: Does the CCNE's apparent concern for human dignity guide them in making their recommendations?

Certainly the recommendations made in opinion no. 8 appear to demonstrate this concern. The CCNE recommended that *in vitro* fertilization should be done only with the intent of producing the birth of a child. Fertilization solely for research purposes should be strictly forbidden.<sup>179</sup> In a statement we saw earlier, the CCNE argues against this practice by emphasizing the principle that people must not be treated as objects; that their dignity must be respected.<sup>180</sup>

Not only does this argument make reference to human dignity, but it also refers to the non-commodification of individuals, an aspect of human dignity we have previously come across in our study of the CCNE. This idea is reiterated in the recommendation section on a number of subsequent occasions:

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<sup>179</sup>CCNE. Avis no. 8. Recommandations générales.

<sup>180</sup>Ibid., Avis no. 8. Recommandations générales. "Even with the consent of genitors, fertilisation should not be done for research purposes alone. If it were, human embryos would purely and simply be used as tools or objects, and human dignity, which must override scientific research, would not be respected."

Toutes les fécondations ou intervention médicales ou scientifiques sur l'embryon humain doivent exclure toute commercialisation. Les gamètes ou les embryons humains ne peuvent être vendus et ne doivent faire l'objet d'aucun commerce . . . <sup>181</sup>

D'un autre côté, il peut constituer un premier pas vers la production d'embryons voulus pour l'adoption. Le "surplus" d'embryons qui en résulterait présente des risque graves, avec le danger de commercialisation.<sup>182</sup>

Le Comité souhaite donc que des règles juridiques soient élaborées avant que ce don d'embryon à d'autres couples puisse être envisagé. Il souligne l'urgence d'une intervention législative. Faute de quoi il risque de se développer un véritable marché noir d'embryons.<sup>183</sup>

The Committee's advocacy of respect for human dignity is not well reflected in its recommendations in opinion no. 18. The opinion contained six recommendations regarding embryo donation to a recipient couple and seven regarding *in vitro* human embryo research.

While no explicit mention is made of human dignity, the recommendations do refer to the importance of the non-commodification of human beings. This reference is made on two occasions. With respect to embryo donation to recipient couples, the Committee stated:

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<sup>181</sup>Ibid., Avis. "Fertilisation, or other medical or scientific intervention on human embryos must exclude all forms of commercialisation. Human gametes or embryos must not be sold nor submitted to any form of trade . . . ."

<sup>182</sup>Ibid., Avis. "On the other, it could represent a first step towards the production of embryos intended for adoption. The resulting "supply" of embryos leads to a serious risk of commercialisation, and might give rise to illicit trading."

<sup>183</sup>Ibid., Avis. "Therefore, the Committee is of the opinion that legal provisions should be devised, before considering the possibility of donating embryos to other couples. The Committee stresses the need for urgent legislation in that domain. Failing that, a real "black market" for embryos could emerge."

... l'ensemble des étapes nécessaires à la réalisation du processus du don d'embryons ne peut faire l'objet d'aucune rétribution ou profit. La non commercialisation du don d'embryons est un principe intangible ...<sup>184</sup>

Concerning human embryo research, the Committee reaffirmed their position: "le don d'embryons ne peut faire l'objet d'aucune rétribution. La non commercialisation du don d'embryons est un principe intangible ..."<sup>185</sup> Within the Committee's recommendations in this opinion, these are the only passages which allude to human dignity.

Opinion no. 21 does not contain a recommendation section *per se*. The entire opinion is essentially a recommendation that may be applied to a wide range of biomedical or biotechnological endeavours. This opinion/recommendation is based on the Committee's principle of non-commodification of the human person, as is obvious from its title, as well as ideas expressed by the CCNE in the text of this opinion.

As we have seen throughout our study, this principle appears to be a cornerstone of the CCNE's understanding of human dignity. Thus, we may say that this opinion, and the recommendation included in it, is based on the need to respect human dignity.

Opinion no. 38 does not contain a distinct section describing the Committee's recommendations on this matter. However, the opinion section does propose how a researcher should proceed in situations where full disclosure of the experimental protocol to

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<sup>184</sup>CCNE, Avis no. 18. Réponses aux questions. "... none of the steps required for achieving embryo donation can give rise to remuneration or profit. The principle of embryo donation being entirely free of any commercial aspect is inviolable."

<sup>185</sup>Ibid., Réponses aux questions. "... embryo donation may not give rise to any form of remuneration. The principle of total exclusion of any mercantile element is inviolable; ..."

the subject is not possible, since it would compromise test validity. These proposals reflect the Committee's concern for the autonomy of the individual. This is another example of an aspect of human dignity finding its way into the recommendations of the CCNE. We have seen this trend occur with the principle of non-commodification in the three opinions previously considered in this regard. This concern for autonomy is expressed in the following:

Dans les cas où les sujets qui se prêtent à l'étude ne peuvent pas être entièrement éclairés avant l'expérience, parce que leur information complète modifierait les comportements qu'on veut étudier, le CCNE recommande:

- (1) qu'au moment de recueil initial de leur consentement, les sujets soient avertis que certains aspects des objectifs ou de la méthodologie leur sont délibérément cachés dans l'intérêt de l'étude, qu'ils peuvent à tout moment interrompre leur participation, et qu'il sera répondu à toutes leurs questions à la fin de l'étude,
- (2) qu'au terme de l'expérience, les sujets reçoivent des explications complètes sur l'objectif du travail, sur les observations réalisées sur eux-mêmes, et sur l'usage qui sera fait des données recueillies, leur permettant, ainsi pleinement informés, de confirmer or d'infirmer leur consentement. Au cas où les chercheurs recueillent des données (directement ou indirectement) identifiables, le consentement explicite des personnes concernées est indispensable pour tout usage qui sera fait de ces données.<sup>186</sup>

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<sup>186</sup>CCNE. Avis no. 38. Avis. "In the event that subjects who consent to the study cannot be completely informed before the experiment, because providing them with complete information could modify the behaviour one wishes to study, the CCNE recommends:

- (1) that, when they give their initial consent, the subjects be warned that certain aspects of the research objectives or methodology are being deliberately held back, in the interests of the study, that they may interrupt their participation at any time, and that all their questions will be answered when the study is over;
- (2) that the subjects be given, at the end of the experiment, an exhaustive explanation of the objective for the work, of the observations made of themselves, and of the use to be made of the data, allowing them, once fully informed, to confirm or to withdraw their consent. Whenever researchers collect data that (directly or indirectly) identifies a subject,

Seven recommendations are put forth in opinion no. 46. These seven recommendations can be summarized as follows:<sup>187</sup>

1. Informed consent is required and the information must be as accurate and complete as possible.
2. Confidentiality of results must be maintained from third parties (including family members).
3. Confidentiality must be ensured if any computer databases storing identifiable genetic information are to be established.
4. The use of results of genetic tests outside clinical and research applications (i.e., for insurance or employment purposes) should be prohibited.
5. The federal Drug Agency must approve products and procedures used for genetic testing.
6. All medical practitioners (i.e., paramedics, nurses, physician assistants, and physicians) should attend medical genetic training courses at universities.
7. The fundamental principles of equality of rights, dignity, and solidarity for all human beings must be preserved.

Clearly, 1, 2, and 3 are all concerned with protecting the individuality of the person by seeking to prevent the unwanted dissemination of personal information. This reflects the concern for human dignity on the part of the CCNE. Likewise, the prohibition on the use of genetic test results for insurance or employment purposes aims to prevent discrimination and thus to protect human dignity. The final recommendation is very general but nevertheless reflects the fact that the CCNE did consider the matter of human dignity in formulating these recommendations.

The recommendation of the CCNE in opinion no. 54 is very succinct and leaves little room for differing interpretations of its meaning:

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his explicit consent is absolutely necessary for any use to be made of such data.”  
<sup>187</sup>CCNE. Avis no. 46. Avis et recommandation.

**Le danger pour la condition et la dignité humaine d'un recours à ces techniques de clonage reproductif dans le but d'engendrer des personnes est tel qu'une concertation mondiale est indispensable afin que toutes les nations déterminent les moyens de s'en prémunir. La France pourrait prendre, en ce domaine, à l'intention des différentes instances internationales, une initiative majeure comme elle a su le faire à de multiples moments de son histoire pour affirmer les Droits de l'Homme.<sup>188</sup>**

While perhaps a bit apocalyptic, this statement clearly demonstrates the importance of concerns for human dignity in the eyes of the CCNE. We will see during our examination of the United States' NBAC, that an interesting contrast exists between this opinion on cloning by the CCNE and the NBAC's report on cloning. As we will see, the NBAC discusses human dignity in very reverent terms and holds it in the highest esteem, but in the final analysis condemns reproductive cloning almost entirely on a risk/benefit assessment. In this opinion by the CCNE, some mention of risk/benefit assessment is made, but clearly their vehement condemnation of human reproductive cloning is based on their adamant belief in the importance of human dignity.

### **2.3.8 Concluding Comments on the French Documents**

In conclusion, we wish to summarize our objectives, our methodology, and our findings.

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<sup>188</sup>CCNE. Avis no. 54. Conclusion. "The use of such reproductive cloning techniques for the purposes of engendering humans imperils to such an extent the human condition and dignity that global collaboration becomes essential so that all the nations of the world find means to save themselves from this danger. As on so many occasions throughout history, France might well sponsor a major initiative in various international fora to uphold Human Rights."

Essentially, we sought to answer a very broad question: How is human dignity used by the Comité Consultatif National d’Ethique pour les sciences de la vie et de la santé?

In answering this question we separated it into two more manageable ones:

- 1) What does the term “human dignity” mean to the CCNE?
- 2) Does human dignity factor into the recommendations made by the CCNE?

To begin our study, we entered “dignity” in a keyword search in the appropriate field of the CCNE’s website. Seventeen opinions were found to contain the word dignity somewhere within their text. After a cursory examination of all 17 opinions, we selected 6 that were relevant to the topics of genetic testing, reproductive technologies and research involving human subjects.

After a study of each opinion, we found that the CCNE saw human dignity as something that is inherent in all humans and that encompasses a set of principles. According to the CCNE’s opinions these principles include (but may not be limited to): freedom of persons (often spoken of as autonomy), justice, security, and the non-commodification of individuals. Here in our conclusion, we refer to human dignity as “something” rather than assigning it a label such as concept, principle, value, or quality. This is to reflect the fact that such a distinction is not made by the CCNE, and human dignity is in fact referred to as many different things on various occasions throughout the opinions.

We then examined the recommendations made or conclusions reached by the CCNE in each of its opinions to determine whether or not a concern for human dignity guided their

formulation. We found that the answer to this question was “yes.” Explicit references to human dignity as well as to autonomy and non-commodification were frequently found, and thus we concluded that the CCNE’s concern for human dignity did in fact guide them in their recommendations and conclusions.

## **2.4 The American Documents**

The period of time covered by the documents from the United States covers a greater span than either Canada or France. This was to include the *Belmont Report* which will be recognized for the tremendous significance the material presented there has had on discussion in the field of ethics and medical practice ever since.

### **2.4.1 The Belmont Report**

The National Commission for the Protection of Human Subjects of Biomedical and Behavioural Research was created by the National Research Act, signed into law on July 12, 1974.<sup>189</sup> One goal of the Commission was:

. . . [to] identify the basic ethical principles that should underlie the conduct of biomedical and behavioural research involving human subjects and to develop guidelines which should be followed to assure that such research is conducted in accordance with those principles.<sup>190</sup>

In order to achieve this goal, the Commission was directed by the National Research Act to:

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<sup>189</sup>National Institutes of Health, National Human Genome Research Institute, Ethical, Legal and Social Issues Program, (Bethesda, MD); <http://www.nih.gov:80/grants/oprr/humansubjects/guidance/belmont.htm>; Internet.

- (i) Consider the boundaries between biomedical and behavioural research and the accepted and routine practice of medicine;
- (ii) Consider the role of assessment of risk-benefit criteria in the determination of the appropriateness of research involving human subjects;
- (iii) Consider appropriate guidelines for the selection of human subjects for participation in such research; and
- (iv) Consider the nature and definition of informed consent in various research settings.<sup>191</sup>

The basic ethical principles identified by the Commission are summarized in the *Belmont Report*. It was the result of an intensive four day discussion by the Commission in February of 1976, held at the Smithsonian Institution's Belmont Conference Center in Washington, D.C.<sup>192</sup> The Commission deliberated monthly for another four years and published the *Belmont Report* on April 18, 1979.<sup>193</sup>

No explicit reference to human dignity is made in the text of the report. Three principles, which the report calls "basic ethical principles" are discussed that "refer to those general judgements that serve as a basic justification for the many particular ethical prescriptions and evaluations of human actions."<sup>194</sup>

The report's three basic ethical principles were respect for persons, beneficence, and justice.<sup>195</sup> Respect for persons, the report claimed, entails two moral requirements in our interaction with others: that we acknowledge the autonomy of others, and that we protect

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<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.* The National Commission for the Protection of Human Subjects of Biomedical and Behavioural Research, *The Belmont Report* (April 1979), Basic Ethical Principles.

<sup>195</sup> *Ibid.*, Basic Ethical Principles.

the autonomy of those with a diminished capacity to do so themselves.<sup>196</sup> In the words of the *Belmont Report*:

An autonomous person is an individual capable of deliberation about personal goals and of acting under the direction of such deliberation. To respect autonomy is to give weight to autonomous persons' considered opinions and choices while refraining from obstructing their actions unless they are clearly detrimental to others.<sup>197</sup>

Respect for persons should be observed in any research setting in the form of informed consent.<sup>198</sup> When a researcher abides by this standard of practice, he or she gives the potential subject the opportunity to choose what shall or shall not happen to them.<sup>199</sup> The report identified three components that should be present to ensure the most informed consent possible: information, comprehension, and voluntariness.<sup>200</sup>

The requirement for information necessitates the full and accurate dissemination of items such as the research procedure, its purposes, risks and anticipated benefits, alternative procedures, and a statement offering the subject the opportunity to ask questions and to withdraw at any time from the research.<sup>201</sup> This does not limit the requirement for information, and the unique consideration of each experiment must be explained to the subject. As an immutable rule regarding the dissemination of information, the report stated that: "Information about risks should never be withheld for the purpose of eliciting the

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<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

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

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid.

cooperation of subjects, and truthful answers should always be given to direct questions about the research.<sup>202</sup>

The ability to comprehend the information provided to a potential subject is recognized as being a function of that person's intelligence, age, life experience, and a host of other factors.<sup>203</sup> The report claimed, however, that researchers are responsible for ensuring that all the information that is material to the patient's decision-making ability is adequately understood to the extent that the subject understands the benefits and harms as they pertain to themselves.<sup>204</sup>

Finally, voluntariness is also important for informed consent. The report conceded that, at times, it may be necessary to try to persuade an individual to accept the role of research subject. However, there must never be unjustifiable pressures placed on him or her. These unjustifiable pressures would include coercion (overt threat of harm or refusal of treatment) and undue influence (offering excessive or inappropriate rewards).<sup>205</sup>

Beneficence is understood by the *Belmont Report* to be an obligation to (a) do no harm and (b) maximize possible benefits and minimize possible harms.<sup>206</sup> The report stated that the principle of beneficence is closely linked to the assessment of risks and benefits that must be part of any research protocol. It justified this claim by saying: "Beneficence thus requires that we protect against risk of harm to subjects and also that we be concerned about

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<sup>202</sup>Ibid.

<sup>203</sup>Ibid.

<sup>204</sup>Ibid.

<sup>205</sup>Ibid.

the loss of the substantial benefits that might be gained from research.”<sup>207</sup> This dilemma is resolved, according to the Report, by the risk/benefit analysis. That is, anticipated benefits to the individual and society must outweigh the risks to the subject that the experiment entails.

The report offered a statement that raised a question concerning the task of balancing individual safety and social interests, because it suggested that social concerns may, on occasion, outweigh individual interests.

In balancing these different elements, the risks and benefits affecting the immediate research subject will normally carry special weight. On the other hand, interests other than those of the subject may on some occasions be sufficient by themselves to justify the risks involved in the research, so long [as] the subjects’ rights have been protected.<sup>208</sup>

It is difficult to imagine a scenario in which the interests of others (e.g., society) would be sufficient by themselves to justify putting an individual at risk, while at the same time preserving that individual’s rights. One may imagine a case in which a person stands to gain nothing from the results of an experiment themselves, but agrees to participate because of the great potential social benefit it promises. However, one may wonder if the researcher’s allowance of an experiment to proceed under such a condition would be consistent with the principle of justice discussed below.

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<sup>206</sup>Ibid., Basic Ethical Principles.

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

<sup>208</sup>Ibid.

The third ethical principle identified by the *Belmont Report* is justice. The report notes that the heart of the principle of justice is that “equals ought to be treated equally.”<sup>209</sup> In the context of medical research, the principle of justice finds its application in the selection of suitable subjects for experimentation. It is the duty of the scientists, the report contends, to ensure that the human subjects used in scientific experiments are suitably fit to bear both the burdens and enjoy the benefits of the research in which they are involved.<sup>210</sup> Consider the following statement from the report:

Social justice requires that a distinction be drawn between classes of subjects that ought, and ought not, to participate in any kind of research, based on the ability of members of that class to bear burdens and on the appropriateness of placing further burdens on already burdened persons . . . unjust social patterns may . . . appear in the overall distribution of the burdens and benefits of research.<sup>211</sup>

We can confidently state that the *Belmont Report* espoused the importance of respecting the individuality of the human research subject. To do so, they must be allowed to make decisions about participation free of any coercion or undue influence with an appreciation of the relevant risk and benefits (respect for persons or autonomy). The experimenter must also ensure that the greatest amount of benefit is afforded the subject with the least risk of harm (beneficence). Finally, the subjects chosen for experimentation must be capable of bearing the burdens placed on them by such an activity, and beneficial research should be available to all suitable candidates, without favouritism or discrimination (justice).

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<sup>209</sup>Ibid., Basic Ethical Principles.

<sup>210</sup>Ibid.

We stated at the outset of our discussion that human dignity was not explicitly discussed in the *Belmont Report*. It has been noted that the *Belmont Report*'s three principles (respect for persons or autonomy, beneficence, and justice) demonstrate its authors' position that the research subject must be respected as an individual human being. Autonomy affords them the right to privacy, beneficence affords them the right to security, and justice the right of equality. These rights ensure the individuality of the person is respected.

To consider these principles in relation to dignity, we might ask the following question: Why respect the individual? The *Belmont Report* establishes how we should do this, but it does not explain why we should do this. An explanation may be arrived at if one accepts that each human life has an intrinsic worth. If human dignity is the expression of this worth, one could argue that the rights, secured by the three principles discussed here, are themselves an expression of human dignity. This argument, as we have said before, is purely speculative, because the term "human dignity" is not used in the report. We do know that privacy, security, and equality of the individual were held in the highest regard.

We suggest here that human dignity might be discussed in any of four possible contexts: ethical, social, legal, or religious, which are of course not mutually exclusive. Certainly a discussion of legal principles is irrelevant if their effects on society are not examined. Despite the interrelationships between these four perspectives, it is possible for human dignity to be discussed by emphasizing one of these four aspects over another, and it

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<sup>211</sup> *Ibid.*, Applications.

can be hard to discern where one aspect begins and another ends. For example, justice is discussed in the report, as it is claimed that equals should be treated equally. In addition, it could be claimed that the responsibility for upholding individual autonomy is the responsibility of society as a whole, in that we demand and respect the rights of others. “Rights” would bring into play a discussion of legal obligations. Thus, one might argue that the *Belmont Report* also emphasizes the social and legal bases of human dignity.

We recall that the report is structured around what it calls three “basic ethical principles.” The principles are important for “those general judgements that serve as a basic justification for the many particular ethical prescriptions and evaluations of human actions.”<sup>212</sup>

In light of this, we propose that the report’s basis for human dignity (which we recall is only implicitly referred to) is mainly grounded in ethics. However, we see a shift later in the report to discussing human dignity with reference to one person or group of people in relation to others.

In part B of the report, basic ethical principles are discussed. Respect for persons and beneficence are two of these three principles. In both cases, the report focuses on behaviour by the researcher(s) towards the subject(s) which constitute acceptable experimental procedure. The emphasis here is on the proper treatment of one individual by another, that is, it emphasizes ethical behaviour (we are presuming on the grounds that human dignity is to be respected).

The discussions of both respect for persons and beneficence involve frequent statements about the individual, for example: “. . . individuals should be treated as autonomous agents,” “. . . respect for persons demands that subjects enter into the research voluntarily and with adequate information,” and “persons are treated in an ethical manner not only by respecting their decisions and protecting them from harm, but also by making efforts to secure their well-being.”<sup>213</sup>

These statements are contrasted by those made in the section discussing justice. Here, attention is shifted from an individual-to-individual interaction, to a discussion of proper research conduct in the context of groups within society with respect to other groups. Statements about the individual are not found in the section on justice. Instead, we see statements such as the following: “. . . distinctions based on experience, age, deprivation, competence, merit and position do sometimes constitute criteria justifying differential treatment for certain purposes,” “research should not unduly involve persons from groups unlikely to be among the beneficiaries of subsequent applications of the research,” and the following:

. . . the selection of research subjects needs to be scrutinized in order to determine whether some classes (e.g., welfare patients, particular racial and ethnic minorities, or persons confined to institutions) are being systematically selected simply because of their easy availability, their compromised position, or their manipulability, rather than for reasons directly related to the problem being studied.<sup>214</sup>

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<sup>212</sup>Ibid., Basic Ethical Principles.

<sup>213</sup>Ibid.

<sup>214</sup>Ibid.

It is difficult to identify a discrete definition of human dignity from the *Belmont Report* for the simple reason that the term is not explicitly mentioned in it. However, based on the three “basic ethical principles,” we may be able to propose one that would be consistent with the report’s discussion of what qualifies as ethical conduct in research settings. In such a case, we believe the report would most likely agree with the following definition of human dignity.

Human dignity is an intrinsic quality that exists in each individual. It means that the decisions one makes about how they are to be treated by others must be respected so long as these decisions do not require an action that would be incommensurate with the dignity of another person. It also means that as human beings, we should not be intentionally subjected to actions by others that will cause us to suffer a greater harm than good. Finally, the intrinsic value of all people is equal, and so in making judgements about the allocation of resources, differing intrinsic worth of individuals cannot be a basis upon which to do so, because such a difference does not exist.

It should be noted again that this proposed definition is based only on text found within the *Belmont Report*.

#### ***2.4.2 Promoting Safe and Effective Genetic Testing in the United States***

In 1990, the National Institutes of Health (NIH) and the Department of Energy (DOE), created the Ethical, Legal and Social Implications Program (ELSI) as part of the Human Genome Project initiative.<sup>215</sup> The mandate of ELSI was to “anticipate and address the ethical, legal and social issues that arise as a result of human genetic testing.”<sup>216</sup>

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<sup>215</sup>National Institutes of Health, National Human Genome Research Institute, Ethical, Legal and Social Issues Program; information available at <http://www.nhgri.nih.gov/Elsi/>;

In September of 1997, ELSI published a report entitled *Promoting Safe and Effective Genetic Testing in the United States* (PSEGT). In their report, ELSI sought to make recommendations to ensure the development of safe and effective genetic tests and the availability of laboratories of assured quality.<sup>217</sup>

It was disappointing to discover that only a small portion of the PSEGT (the section entitled “Overarching Principles” in the introductory chapter) was devoted to the ethical concerns relating to genetic testing. Most of the report focussed on issues such as licensing and certification, medical education, and the roles of various laboratory personnel managers

The ethics of genetic testing is spoken of briefly in chapter one. ELSI’s central concern with regards to this topic appeared to be the privacy of the individual whose DNA is analysed. This concern manifests itself in the form of two statements calling for the autonomy of the individual and one statement made in favour of confidentiality.

Autonomy, one’s right to make informed decisions free of coercion or undue influence, involves more than an individual’s privacy. It requires that one is made aware of relevant information for decision-making and that one’s decisions are respected as final. Privacy is, nevertheless, important for autonomy, because autonomy requires the absence of coercive and intrusive behaviour on the part of others. To make an autonomous decision about something, such as whether or not to receive a genetic test, it may be the case that

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Internet.

<sup>216</sup>Ibid.

<sup>217</sup>Ibid., Ethical, Legal and Social Implications Program, *Promoting Safe and Effective Genetic Testing in the United States* (September, 1997).

persons need to be alone or with trusted confidants, away from any outside parties (such as researchers or other medical personnel) that may influence their deliberation. Thus, privacy remains an important facet of autonomy.

As noted above, ELSI demonstrates its concern for autonomy through two statements made in PSEGT. It asserted that: “It is unacceptable to coerce or intimidate individuals or families regarding their decision about predictive genetic testing. Respect for personal autonomy is paramount.”<sup>218</sup> As well, ELSI insisted that: “Prior to the initiation of predictive testing in clinical practice, health care providers must describe the features of the genetic test, including potential consequences, to potential test recipients.”<sup>219</sup>

Without question, privacy is also the basis of maintaining confidentiality. ELSI saw the importance of this and stated: “Results should be released only to those individuals for whom the test recipient has given consent for information release.”<sup>220</sup>

In addition to its obvious concern for privacy, ELSI also briefly discussed equality as something that must be protected in the area of genetic testing. Discrimination is the basis for inequality, and the report claimed that: “No individual should be subjected to unfair discrimination by a third party on the basis of having had a genetic test or receiving an abnormal genetic test result.”<sup>221</sup>

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<sup>218</sup>Ibid., Chapter 1: Introduction (Overarching Principles).

<sup>219</sup>Ibid.

<sup>220</sup>Ibid.

<sup>221</sup>Ibid.

We can clearly discern from PSEGT that ELSI held the right to privacy as an important ethical consideration for genetic testing. However, this limited discussion of ethics is somewhat discouraging from the point of view of understanding the rationale for establishing parameters for genetic technologies. While some mention is made of equality, it is only brief, no other ethical issues are discussed. What other ethical aspects of genetic testing may be appropriate to discuss?

The following may merit some consideration:

Will the Human Genome Project or genetic testing lead to any form of gene patenting? If so, is such commercialization morally permissible?

In cases where multifactorial genetic anomalies are discovered, how does one proceed? Given the fact that such genetic conditions only present predispositions to disease, does the expenditure of limited health care funds on such testing, at the expense of present health concerns such as AIDS and cancer research, pose any ethical dilemmas (such as distributive justice)?

Are there any conflicts between the social benefits that genetic testing may accrue, and the interests of the individual? If so, how is this conflict resolved?

Had the report addressed any of the preceding questions, not only would a more in depth discussion of ethics been produced, but greater stock would have been placed in the dignity of the individual which, it should be mentioned, is not explicitly referred to in the report. The short-sightedness of ELSI appears to downplay the importance of human dignity, since it focuses almost exclusively on privacy. This could allow for certain acts which, while respecting privacy, are nevertheless injurious to human dignity. PSEGT's limited scope leaves many gaps that should be addressed if dignity is to be of value as a consideration in the use of genetic technologies.

As with the *Belmont Report*, we are presented here with a document that does not explicitly mention human dignity, so we must make the assumption that it is an underlying premise for ethical conduct in human genetic testing.

The document suggests that the basis for human dignity is rooted in ethics. We identify only one section that appears to address dignity, and so it is difficult to comment on the consistency of discussions on dignity in the report. Within the section itself, autonomy and confidentiality are stressed, and it is this emphasis that leads us to suggest the basis for human dignity, in the eyes of the document's authors, is ethics.

At the end of examination of the *Belmont Report*, we offered a plausible definition of human dignity that was consistent with the report's content. We will do the same here, again noting that since human dignity is not explicitly mentioned, this is merely a hypothetical definition. Based on the report's emphasis on autonomy and confidentiality, we suggest the following definition:

Human dignity is an intrinsic quality that exists in each individual. It means that the decisions one makes about how they are to be treated by others must be respected so long as these decisions do not require an action that would be incommensurate with the dignity of another person. Important to this self-determination is the respect for the privacy of decisions made by others.

#### **2.4.3 National Bioethics Advisory Committee Report on Human Cloning**

In the fall of 1993, The White House Office of Science and Technology Policy (OSTP) was approached by the National Institutes of Health (NIH), the Department of Energy (DOE), and other research-oriented agencies to establish a national committee on

bioethics.<sup>222</sup> The result was the National Bioethics Advisory Committee (NBAC). Created by Executive Order 12975 of the President of the United States on October 3, 1995, the Committee was originally comprised of 15 members, all professionals and primarily academics, appointed by the President.<sup>223</sup> The amendment of September 16, 1996 expanded the NBAC to 18 members.<sup>224</sup>

The NBAC's mandate is broad in its scope. The Committee seeks to:

- Provide advice and make recommendations to the National Science and Technology Council and other appropriate government entities on: the appropriateness of agency policies, missions guidelines, and regulations, as they relate to bioethical issues arising from research on human biology and behaviour; and applications, including clinical applications of that research.
- Identify broad principles to govern the ethical conduct of research.<sup>225</sup>

On February 23, 1997 it was learned that the Scottish scientist Ian Wilmut and his colleagues at the Roslin Institute were about to announce that they had successfully cloned a sheep using a technique never before applied to mammals: somatic cell nuclear transfer cloning.<sup>226</sup> Within days of this announcement, U.S. President Bill Clinton instituted a ban

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<sup>222</sup>National Bioethics Advisory Committee, General Information; available at <http://www.bioethics.gov/general.html>; Internet.

<sup>223</sup>*Ibid.*, Executive Order 12975 (October 3, 1995).

<sup>224</sup>*Ibid.*, Amendment to Executive Order 12975 (September 16, 1996).

<sup>225</sup>*Ibid.*, Executive Order 12975 (October 3, 1995).

<sup>226</sup>*Ibid.*, Executive Summary, *Report on Cloning Human Beings* (June 1997), i.

on federal funding for research into human cloning technologies.<sup>227</sup> The President also asked the NBAC to consider the matter and report back to him within 90 days. In his address to the NBAC, Clinton said: “any discovery that touches upon human creation is not simply a matter of scientific inquiry, it is a matter of morality and spirituality as well.”<sup>228</sup>

In June of 1997, the NBAC released its report on human cloning. The report consisted of two volumes. Volume 1 was a 120 page document discussing aspects of cloning that included the science and application of cloning, religious perspectives, ethical considerations, and legal and policy considerations. This publication consisted not only of opinions and conclusions reached through the deliberations of the Committee itself, but also those of experts in various fields who testified in front of the NBAC. Volume 2 consisted of a series of commissioned papers.

The term “human dignity” is used 37 times in 22 different references in volume 1. In terms of its use alone or in connection with other terms, the chapter by chapter breakdown is as follows:

- Chapter 1--Introduction: used once (in connection with another term);
- Chapter 3--Religious Perspectives: used 32 times (27 times alone, 5 times in connection); and
- Chapter 4--Ethical Considerations: used 4 times (2 times alone, 2 times in connection).

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<sup>227</sup>Ibid., Executive Summary, i.

<sup>228</sup>Ibid., Introduction, 7.

The sole reference to human dignity in chapter 1 also makes mention of human rights. However, there is no connection drawn between the two as the NBAC stated:

The reasons [for public condemnation of human reproductive cloning] ranged from frightening science fiction imagery to the judgement that cloning of human beings is a serious violation of basic human rights and human dignity.<sup>229</sup>

Human dignity is spoken of almost entirely in the context of religion. Eighty-six percent of its use comes in Chapter 3 on religious perspectives. This view of human dignity is a departure from what we saw in our examination of the CCNE, where human dignity was discussed in an entirely secular context.

The NBAC made it clear that in its view, human dignity is a religious issue. Not only was it used primarily in the chapter on religious perspectives, but the references themselves support this position:

The concepts and norms associated with human dignity cannot be reduced to secular ideas of autonomy, even though they may overlap to some extent. Human dignity sets more limits than autonomy does on what the agents may do.<sup>230</sup>

. . . the religious principle of human dignity as well as the secular principle of respect for persons.<sup>231</sup>

In addition to establishing human dignity as primarily a religious concept, the first reference seems to suggest that autonomy exists separately from human dignity, despite some potential overlap. We argued earlier that the authors of the *Belmont Report* may have

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<sup>229</sup>Ibid., Introduction, 3.

<sup>230</sup>Ibid., Religious Perspectives, 52.

<sup>231</sup>Ibid, 50.

held autonomy as an important aspect of human dignity. This reference by the NBAC thus appears at odds with the *Belmont Report*.

The second reference noted above also challenges the idea of human dignity established in the *Belmont Report*. The report outlined three ethical principles to be observed in experimentation involving human subjects: autonomy, beneficence, and justice. Obviously, these principles were developed to respect the personhood of the human subject. We argued that this respect for persons was necessitated by the inherent human dignity of all people. However, by stating “. . . the religious principle of human dignity as well as the secular principle of respect for persons,” the NBAC appears to refute this argument. It insinuates that respect for persons is not necessarily demanded by human dignity, because the one is a religious principle and the other is a secular one. According to the NBAC position, one would have to wonder what would compel a non-religious person to respect other people, if not human dignity? This question is not resolved.

We have seen that the NBAC viewed human dignity as a largely religious concept. We now seek to advance our knowledge about the NBAC's understanding of what this concept involves.

The report confirmed that it saw human dignity comprising several aspects, stating: “Whether creating a human being through cloning necessarily or only under certain circumstances violates human dignity depends on the conception of rights and duties that

specify human dignity.”<sup>232</sup> One is left to wonder what these “rights and duties,” or as stated earlier “concepts and norms” associated with human dignity are.

Sanctity of life is one principle that the NBAC attributed to human dignity. It stated:

Sanctity of life is one norm associated with human dignity. For instance, the prohibition of the shedding of human blood is connected with God’s creation of humans in his own image (Genesis 9:6).<sup>233</sup>

It is not altogether clear from the report what “sanctity of life” may be.

Uniqueness of the person was also identified as an important aspect of human dignity. The NBAC noted that:

Human cloning would violate human dignity, according to some religious opponents, because it would jeopardize the personal and unique identity of the clone (or clones) as well as the person whose genome was thus duplicated. . . . This problem does not arise in the case of identical twins, because neither is the ‘source or maker of the other’.<sup>234</sup>

The NBAC also contended that non-objectification of the individual is important to human dignity. The report conveyed this idea on two occasions:

However, many fear that the human dignity of persons created through cloning will be violated . . . through enslavement to others and other forms of ‘man’s mastery over man’.<sup>235</sup>

. . . Objectification . . . represents a fundamental breach of human dignity. To treat persons who are the sources of genetic material for cloning or persons who are

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<sup>232</sup>Ibid., 51.

<sup>233</sup>Ibid., 50.

<sup>234</sup>Ibid., 49.

<sup>235</sup>Ibid.

created through cloning as mere objects, means or instruments violates the religious principle of human dignity . . . ”<sup>236</sup>

Throughout this chapter, human dignity is spoken of as a quality inherent in each individual because of their connection to God (be they Christian, Jew, or Muslim). It is referred to as a number of different things: a norm, a religious theme, a value, a concept, a fundamental moral norm, and an overarching right.

Catholic moral theologians invoked **norms** of individuality, dignity, and wholeness in condemning this research.<sup>237</sup>

. . . major **religious themes** regarding the cloning of humans: responsible human dominion over nature; human dignity; and procreation and families.<sup>238</sup>

Survival is meaningful only if **values** of human dignity and freedom are respected.<sup>239</sup>

Much of the debate about limits focuses on human dignity and several related **concepts**.<sup>240</sup>

Other religious thinkers deny that this technology has any legitimate uses, contending that it always violates **fundamental moral norms**, such as human dignity.<sup>241</sup>

Others express their views by arguing about **overarching rights** - the child's right to individuality and dignity. . . <sup>242</sup>

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<sup>236</sup>Ibid., 50.

<sup>237</sup>Ibid., 42.

<sup>238</sup>Ibid., 44.

<sup>239</sup>Ibid., 47.

<sup>240</sup>Ibid., 49.

<sup>241</sup>Ibid., 57.

<sup>242</sup>Ibid., Ethical Considerations, 63.

The chapter dealing with ethical considerations addresses human dignity on four separate occasions. As we have noted, the term is used twice by itself, and twice in connection with another term.

In her testimony before the NBAC, bioethicist Ruth Macklin argued:

Intuition has never been a reliable epistemological method, especially since people notoriously disagree in their moral intuitions. . . . If objectors to cloning can identify no greater harm than a supposed affront to the dignity of the human species, that is a flimsy basis on which to erect barriers to scientific research and its applications.<sup>243</sup>

Macklin's statement alludes to a debate between science and religion. Essentially, society is left to judge whether cloning pushes the frontier of science beyond what religion would deem acceptable (i.e., it must respect human dignity). Her statement quickly dismisses human dignity and strips it of any importance in this debate. In doing so, she nullifies the contention that concerns for autonomy, uniqueness, sanctity of life, and preventing the objectification of humans play any role in defining what science can and can not do. It would appear from this view that the science-religion debate is moot, and that if human dignity is not enough to check the advancements of science, the only limit that exists is the necessity to prevent physical or psychological harm to people in scientific endeavours. Clearly, this seems at odds with the *Belmont Report's* goal of respecting the person.

Chapter four contains a section entitled "Treating People as Objects." The inclusion of concerns for human dignity in this section support what we have already seen from the NBAC, which is the importance of non-objectification of the individual. The

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<sup>243</sup>Ibid., 70.

report asked: “In sum, will being cloned from the somatic cell of an existing person result in the child being regarded as less of a person whose humanity and dignity would not be fully respected?”<sup>244</sup>

While the NBAC did conclude its report by condemning reproductive cloning of human beings as ethically unacceptable, the basis for this contention was not a direct concern for human dignity, despite its consideration in both chapters 3 and 4. Instead, it stated that:

The Commission concludes that at this time it is morally unacceptable for anyone in the public or private sector, whether in a research or clinical setting, to attempt to create a child using somatic cell nuclear transfer cloning. The Commission reached a consensus on this point because current scientific information indicates that this technique is not safe to use in humans at this time.<sup>245</sup>

What can we conclude about human dignity from our examination of the NBAC’s report on human cloning? Several aspects are apparent from our analysis:

(1) “Human dignity” is used by the NBAC in a rather *ad hoc* fashion. It’s referred to as a norm, religious theme, value, concept, fundamental moral norm, moral right, and overarching right. Despite the fact that the term is used extensively in chapters 3 and 4, the many terms used to describe it, noted here, create an overall impression of confusion and complicate its inclusion in the debate about human cloning. For example, it is referred to as both a religious theme and a fundamental moral norm. Are moral norms also religious themes? Can morals be described in a secular context? In an entirely secular society (were

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<sup>244</sup>Ibid., 71.

<sup>245</sup>Ibid., Recommendations of the Commission, 108.

one to exist), do concrete moral norms such as human dignity exist? Would it be permissible to clone someone in such a society, but impermissible in a strongly religious society? This conflict, generated by the inconsistent description of human dignity, is not resolved.

(2) We would argue that the designation of human dignity as an entirely religious concept does it a great disservice in that it weakens its place in any debate about human reproductive cloning, and perhaps genetic testing as well. Were human dignity discussed in a secular context, that is, with more attention on fundamental principles such as autonomy, justice, and beneficence, both the religious and non-religious alike would appreciate it. However, as it is used in the report on cloning, human dignity is assigned a role that may only be relevant to the religious person.

(3) Human dignity is built upon certain principles of which the sanctity of life, individual uniqueness, and the non-objectification of the person were discussed in the report.

(4) Human dignity does not appear in the NBAC's ethical condemnation of human reproductive cloning. Essentially, the NBAC concludes human cloning is unethical because the risk of physical harm to the newly created person outweighs the benefits of this technology. This position seems to be in general agreement with that held by Macklin, even if not stated explicitly. If such is the case, human dignity appears to bear no weight in the risk management of human cloning, and the sole issue at stake is preserving human safety.

The basis for NBAC's concept of human dignity appears to be grounded in both religion and ethics, with the majority of emphasis falling on the former. The use of the term "human dignity" is inconsistent in the report. It is initially described as an entirely religious "theme." Later it is described as a "moral norm." It is used again in the section on ethics without explaining the transition. By the reasoning presented in the report, religion and ethics would be the same thing, artificially separated into two chapters. Our proposed NBAC definition of human dignity is as follows:

Human dignity is a quality each person possesses because of their connection to God and their creation in His image.

This definition of human dignity is limited, reflecting the fact that, despite its frequent use, the NBAC's understanding of it appears equally limited.

## **2.5 Some Conclusions on the American Documents**

In this section, we assess the level of consistency with which the term "human dignity" is used in the three American documents studied in this section. We conclude that the term is used quite inconsistently for the following reasons:

(1) The basis for each report's concept of dignity is not the same. The *Belmont Report* emphasized human dignity (implicitly) in terms of ethics and to a lesser degree, society. *Promoting Safe and Effective Genetic Testing* had a limited discussion of human dignity (again in purely implicit terms) and based its discussion on ethics. The NBAC's

*Report on Cloning* used the term almost exclusively in a religious context, with some mention of ethics.

(2) Human dignity was of great importance to one document, while it was essentially inconsequential to two others. The *Belmont Report* discussed the way in which human subjects are to be treated in research settings. The underlying assumption we made is that human dignity was the basis for this manner of treatment. *Promoting Safe and Effective Genetic Testing* focussed on technical and educational standards important in human genetic testing, with a brief glossing over of what we assumed was an implicit discussion on human dignity. *Report on Cloning* frequently talked about human dignity, but in the final analysis, denounced cloning only on the grounds that its health risks were determined scientifically to be unacceptable. The dignity of the human does not appear to influence the recommendations at all.

## **2.6 Some Observations**

We noted in the opening of this chapter that the cursory examination of public documents conducted for chapter one lacked a clear, evident, and consistent presentation of the expression “human dignity.” Also noted was the potential for this lack of clarity to limit the effectiveness of the expression as a value or parameter. The more detailed examination of selected public documents appears to support our initial observation. While we noted earlier that the purpose of this chapter was not to compare documents, some observations and comparisons demonstrate our contention.

Some documents did not use the expression “human dignity,” and the import we attached to the concept in the document is speculative. For example, when we examined human dignity in American public documents, we discovered that their presentation of human dignity lacked clarity about the meaning of the expression. We concluded that the *Belmont Report* saw autonomy as a component of human dignity, although the expression was not used there. The “why” of respect for human dignity was posited as follows: An explanation may be arrived at if one accepts that each human life has an intrinsic worth. If human dignity is the expression of this worth, one could argue that the rights, secured by the three principles discussed here, are themselves an expression of human dignity.

Documents from within one country were not consistent in their use or presentation of “human dignity.” For example, we noted that the NBAC presented human dignity as a religious concept and did not share the Belmont position that autonomy was part of human dignity. Of autonomy and human dignity, the NBAC stated:

The concepts and norms associated with human dignity cannot be reduced to secular ideas of autonomy, even though they may overlap to some extent. Human dignity sets more limits than autonomy does on what the agents may do<sup>246</sup>

The inconsistent presentation or understanding of human dignity also varied from country to country. As we have discussed above, the NBAC’s French counterpart, the CCNE, clearly saw autonomy as part of human dignity. This highlights the fundamental difference between the respective opinions of the CCNE and the NBAC regarding human dignity. In

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<sup>246</sup> National Bioethics Advisory Committee, Religious Perspectives, *Report on Human Cloning* (June 1997), 52.

addition, NBAC generally spoke of it as a religious issue, while the CCNE did not invoke religion at all.

What implications does this have on the role of “human dignity” as a parameter in bioethical debate in such fields as research, genetic testing or human reproductive cloning?

We noted earlier that in many of the recommendations by the CCNE, they expressed a concern for human dignity. We concluded that an appreciable value must have been given to it in CCNE deliberations. For example, we saw this in the CCNE’s condemnation of human cloning. Recall that they stated:

Le danger pour la condition et la dignité humaine d’un recours à ces techniques de clonage reproductif dans le but d’engendrer des personnes est tel qu’une concertation mondiale est indispensable afin que toutes les nations déterminent les moyens de s’en prémunir. La France pourrait prendre, en ce domaine, à l’intention des différentes instances internationales, une initiative majeure comme elle a su le faire à de multiples moments de son histoire pour affirmer les Droits de l’Homme.<sup>247</sup>

Compared to the CCNE’s strong condemnation of human cloning as an affront to human dignity, the NBAC opposition to cloning showed it to be less concerned with human dignity as a factor that should be considered in such a decision. In opposing this technological application, they stated:

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<sup>247</sup>CCNE, Avis no. 54, Conclusion, “The use of such reproductive cloning techniques for the purposes of engendering humans imperils to such an extent the human condition and dignity that global collaboration becomes essential so that all the nations of the world find means to save themselves from this danger. As on so many occasions throughout history, France might well sponsor a major initiative in various international fora to uphold Human

The Commission concludes that at this time it is morally unacceptable for anyone in the public or private sector, whether in a research or clinical setting, to attempt to create a child using somatic cell nuclear transfer cloning. The Commission reached a consensus on this point because current scientific information indicates that this technique is not safe to use in humans at this time.<sup>248</sup>

Thus, whereas the French opposed human cloning because it violated human dignity, the American opposed it because of the technical risks it posed to human beings. We used human cloning as a basis of comparison here between France and the United States, because both have thoroughly examined the topic in easily accessible public documents.

Whether or not human dignity plays comparable importance in discussions on genetic testing is more difficult to determine. We saw in our analysis of opinion no. 46 that CCNE made reference to human dignity in its recommendations about genetic testing. It also spoke of the importance of autonomy, equality, and privacy. With regard to the ethics of genetic testing, ELSI focussed almost entirely on privacy and did not mention human dignity, but we may speculate that one could hold the right to privacy as flowing from dignity. While we may infer that human dignity was again more important to the French than the Americans, at least in the realm of genetic testing, there is again the problem of lack of certainty or clarity.

All this to say we are only somewhat more advanced in our project to determine how to understand the use and the meaning of the expression “human dignity” in public

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Rights.”

<sup>248</sup>NBAC, Recommendations of the Commission, *Report on Human Cloning*, 108.

documents discussing genetics. At this point we are again left with questions that cannot be answered from examining the documents. Some of these are as follows:

Is there a generally accepted understanding of the expression “human dignity” in use outside of documents discussing genetics—for example, is there a common presentation of the expression, or at least a dominant one in the schools of philosophy?

The documents used the expression “human dignity” as we noted above, alone and in conjunction with other terms. How are we to understand the relationship between dignity and other terms such as autonomy, which figured prominently in the discussions above?

There appears to be a tension, which is unresolved, between the individual and the social meanings attached to human dignity, and we wonder if this can be resolved?

Is there a general acceptance in the societies receiving these documents of the deontological justification of the use of the expression human dignity?

These are examples of questions that are left after our examination of the documents. It is necessary to begin to address them in order to continue this project of trying to understand the value of the expression “human dignity” in public documents discussing genetics. To do this we turn to an exploration of the history and the use of the term in philosophy.

## **CHAPTER THREE**

### **“HUMAN DIGNITY” IN PHILOSOPHICAL THOUGHT**

#### **3.0 Introduction**

In Chapter 2 we noted the difficulties in determining with any precision the meaning attached to the expression human dignity in the public documents discussing genetics we reviewed; the relationship, if any, with references to autonomy; and the tensions between the individual and social meanings attached to the expression human dignity. We have suggested that it is important to make this determination in order to understand what value the use of the term has for the application of genetic technologies. In order to achieve some clarity, a brief sketch of the meanings attached to human dignity as well as its relationship with autonomy from the perspective of philosophy, is proposed. As this is not a focus of this research project, there is a need to limit the scope of this part of the endeavour. This will be accomplished in two ways. First, we will examine representative philosophers and some aspects of their thought; representative in the sense that those chosen represent the principal influences upon much of the thought that is current today in the field of bioethics and acknowledged as having an interest in the issue of human dignity. Second, we will look at their ideas and their influence mainly through secondary sources. This will provide sufficient material for discussion without embarking on a distinct exercise.

Throughout recorded history, human beings have been concerned with their unique place in the universe and with what it means to be human. In whatever manner one describes this search, there is an underlying assumption that human beings share some

intangible, but nonetheless real, characteristic, capacity, property, or attribute (expressed variously: created by God; capable of obedience; rational beings; beings capable of forming social bonds etc.) which is of the essence of humanity, and as such, establishes human worth or value relative to other creatures. The notion, we suspect, is probably as ancient as philosophical inquiry itself. However, there is no clear consensus, or even wide agreement, on what this essential aspect of human beings would be. Yet, the contention that humans have dignity, have autonomy, have inherent worth, pervades modern moral, political, and social discourse with uncompromising and seemingly self-evident force.

In the first section of this chapter, we briefly review some of the current confusions in the uses of the terms dignity, autonomy, and worth among others. The second and third parts will examine the critical impact of two pre-eminent philosophical thinkers, Immanuel Kant and John Rawls, on these matters. We deal with Kant and Rawls for a number of reasons. In writings in the field of bioethics, Kant is evidently among the most influential and Rawls appears almost as often; the number of references to them and their work establish them as major interlocutors in the debates. Their work is noted both by those who support and advance their positions and is also dealt with in the positions of significant schools of thought such as virtue ethics (e.g. McIntyre and the communitarians). In this sense, Kant and Rawls serve as a door to other philosophical positions.

Kant and Rawls both raise the issue of human dignity, although there are differences in manner and degree. They do however both approach the matter from the perspective of

the actors involved and present a deontological perspective on human dignity.<sup>249</sup> We will observe how both of these philosophers have crucially influenced our current conceptions of dignity and autonomy. With respect to Kant, we see that his work has been pivotal in establishing human dignity as flowing from the inherently moral capacity for rationality. With respect to Rawls, we see that his "theory of justice as fairness" is significant exactly because it is a *moral* theory of political structures that is the first coherent attempt to apply Kantian autonomy to praxis.

This examination will be followed by a critique of the type of discussion of dignity/autonomy offered by Kant and Rawls from the perspective of Jürgen Habermas, virtue ethics, and the feminist school of thought (represented here principally by the work of Susan Sherwin and Carol Gilligan). After canvassing this body of philosophical criticism, we turn our attention to the law, specifically, the *Canadian Charter of Rights and Freedoms* and its interpretation by the Supreme Court of Canada. From our examination of the law, it will be seen that human dignity has been positioned as the underlying concept of this document. We will also note that the Supreme Court has been criticized for not giving full effect to the communitarian values found in the *Charter*, and it will be suggested that this inconsistent interpretation of our Constitution has ramifications on the Court's understanding of human dignity.

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<sup>249</sup>We recognize here that Mills and others who would advance a utilitarian perspective are also important in this discourse. However, for this part of the project it seems preferable to deal with the issues at hand from the point of view of the actors and the perspective of the deontology represented by Kant and Rawls as this approach is the one we recognize in the

The critical perspectives discussed here, both from philosophy and the law, not only add a dimension of critique for the purpose of understanding the evidently influential thought of Kant and Rawls in the field of bioethics, but they will allow us to judge the contribution of the work of these two men to our project. Specifically, these critiques allow for an assessment of whether the writings of Kant and Rawls can be considered to be generally accepted and thus be known as the definers of human dignity in the public documents and the references that we use to interpret these documents.

Finally, we will examine if and how the impact of the philosophical discourse represented by Kant and Rawls can be found in the public documents discussed in Chapter 2. We will endeavour to show that the various national advisory boards use a deontological approach consistent with Kant's presentation of human dignity in the creation of their respective policy documents. For example, the concept of "incomparable worth" as a consideration of human dignity finds utility in the Canadian and French work, but is absent in that of the Americans. Furthermore, it will be seen that there exists within all three jurisdictions confusion about the relationship between dignity and autonomy.

### **3.1 The Sketch**

Herbert Spiegelberg refers to the kind of intuitive understanding of dignity many hold when he says that it may not be the case that it makes no sense, but rather that it makes

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public documents. Our purpose here is to understand the meaning the documents attach to the expression.

too much sense, or too many sound senses.<sup>250</sup> He outlines some of the "inconsistencies and vagueness" inherent in our use of the term in ordinary talk and in philosophical discourse.

First, with respect to non-philosophical discourse, he points out the following confusions:<sup>251</sup>

1. Human dignity is described as inherent in every man. But it is also held up as a goal to be 'achieved' or even 'created' and hence not man's natural endowment.
2. Human dignity is proclaimed as 'unassailable'. Yet 'indignities' are denounced as flagrant violations of such dignity.
3. Human dignity is presented as independent of recognition by other people. Yet it is also fervently demanded by the disinherited, as something conferred on or withheld from them ('Give us our dignity').
4. Freedom movements aim at awakening in the suppressed a 'sense' of their (inherent) dignity. But often they talk as if the suppressed are deprived of the very dignity of which they are to develop a sense.
5. Every man is supposed to be incapable of losing human dignity. Yet some seem to be losing it by doing things which are below human dignity.
6. Dignity is something that attaches to persons who are considered as ends in themselves. Yet in speaking of treating humans 'with dignity' we seem to imply that dignity qualifies as an action and is something like a 'means' (*with which*).<sup>252</sup>

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<sup>250</sup>Herbert Spiegelberg, "Human Dignity: A Challenge to Contemporary Philosophy," in *Human Dignity, This Century and the Next*, ed. Rubin Gotesky and Ervin Laszlo (New York: Routledge, 1993), 43.

<sup>251</sup>Spiegelberg also points out that there are varied interpretations in this term, depending on theological or cultural underpinnings or values. *Ibid.*, 45-48.

<sup>252</sup>*Ibid.*, 44.

The confusion carries over into philosophical discourse as well. For instance, there are both normative and descriptive connotations to the phrase "treating with respect," as well as with the idea of "intrinsic worth" which, depending on the way they are understood, seem to demand different things from, and on behalf of, persons. Also, we need to ask if being "worthy of respect" is identical to being "worthy of dignity"? And is worthiness an inherent property of humans, or of some actions that humans do, or is it a political and moral term with specific purposes? These questions, among others, are crucial to any adequate understanding of dignity and, for the purpose of our inquiry here, of autonomy.

Given the conceptual confusion surrounding dignity and autonomy, it is little wonder that Spiegelberg worries that the term will be reduced to an empty platitude if its meaning and force as a foundational concept are not clarified. Thus, he proposes a "prologomena" for such an endeavor. His focuses include several that are important for our present purposes. These are as follows:

1. That the idea of human dignity plays a decisive role in today's social and political thought and action, even more so than commonly realized;
2. That our ordinary way of talking about it is confused and vague to the point of contradictoriness;
3. That the way to a better philosophy of human dignity requires certain basic distinctions such as those between absolute and relational, intrinsic and extrinsic dignity, dignity in itself and the grounds of dignity.<sup>253</sup>

Clearly, it is necessary to draw these basic distinctions initially, because to the extent that human dignity is conceived of as standing in relation to *both sides* of each pair of concepts,

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<sup>253</sup> Ibid., 40-41.

inconsistencies and confusions arise as to the character of human dignity itself. Any adequate account of human dignity should, then, explain the nature of such relationships in order to either synthesize or dissolve these inconsistencies. That more comprehensive goal is outside of the scope of this paper and our purposes here. For now, we want to begin some of this work by turning to an examination of Kant's specific conceptions of autonomy and dignity, with commentaries from Onora O'Neill, Spiegelberg, and Thomas Hill.

### **3.2 Kant's Basic Contributions to Moral Theory**

Herbert Spiegelberg writes that Kant constructed the "first sustained philosophical case for human dignity."<sup>254</sup> Previously, dignity had been conceived of in political or religious terms (i.e., accruing through civil obedience, or because humans reflected the "image of God"). Kant proposed that dignity accrues to humans because they are autonomous, and that autonomy itself is grounded in the rationality of humans.<sup>255</sup> The

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<sup>254</sup> Ibid.

<sup>255</sup> In establishing a starting point for interpreting the philosophical foundations of the documents, Kant and Rawls are an obvious choice because even a brief overview of the literature reveals their influence. For example, Kurt Bayertz in contrasting human dignity and sanctity of life identifies Kant as the principle source of a modern reason based justification of human dignity. Bayertz writes "Modern philosophy was reformulated in categories of secular reason. Kant, for example, connected human dignity with the reasonable nature of the human being: the individual possesses dignity because of its participation in the reason of the species and its autonomy." (xiv). As such Kant's philosophy grounds a purely reasoned-based notion of human dignity for Western philosophy and the public policy documents which make use of the notion of human dignity.

It seems difficult to underestimate Kant's influence here, as even more recent reports link Kant to the rational foundation of human dignity. Michael McDonald bases the governance of research involving human subjects squarely upon the dignity of the research

radical nature of his argument consists in the fact that he makes a series of critical, and innovative, connections. He links rationality and autonomy in a new way, then (autonomous) rationality with morality, and finally rational, inherently moral autonomy

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subjects which he writes is itself often "...based on Kant's claim that one should act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means but always at the same time as an end'. This means that one ought always to treat persons as having an inherent worth in their capacity for autonomous action that gives them a dignity beyond all price."(See Michael McDonald, *The Governance of Health Research Involving Human Subjects*, 1998. [www.lcc.gc.ca/en/themes/gr./hrish/macdonald/macdonald.pdf](http://www.lcc.gc.ca/en/themes/gr./hrish/macdonald/macdonald.pdf) )

Some other references linking reason based notions of human dignity are:

R.W. Krutzen, "Intrinsic value and human dignity" in *Religious Studies and Theology*, 16, 1, June, 1997, 35-47.

Richard DeSmart, "Materials toward and indo-western understanding of the dignity of the human person" in *Journal of Dharm*, 21, 1, 1996, 39-46. DeSmart writes, "It is usually through a reference to Kant that the notion of dignity of the human person is defined." 39. He then directly links this to the *Universal Declaration of Human Rights*.

Teresa Iglesias, "Bedrock Truth and the Dignity of the Individual" in *Logos: A Journal of Catholic Thought and Culture*, 4,1, 2001, 114-134. Iglesias writes "the main exponent and advocate of the idea of the dignity of every human being, as inherent in rational nature, is Immanuel Kant." 122.

Hannah Arendt, *The Human Condition*, (The University of Chicago Press: Chicago, 1969) where she writes "the anthropocentric utilitarianism of *homo faber* has found its greatest expression in the Kantian formula that no man must ever become a means to an end, that every human being is an end in himself...For the same operation which establishes man as the 'supreme end' permits him 'if he can to subject the whole of nature to it that is, to degrade nature and the world into mere means, robbing both of their independent dignity.'" 155-156.

Martin Hailer and Dietrich Ritschl "The General Notion of Human Dignity and the Specific Arguments in Medical Ethics" in *Sanctity of Life and Human Dignity* Kurt Bayertz, ed., 91-106 (Kluwer Academic: Boston, 1996) write "Immanuel Kant's influence

with dignity. For Kant, these four concepts: rationality, autonomy, morality, and dignity are inextricably linked. In order to understand Kant's crucial philosophical contribution to the discussions of human dignity, it is important first to trace how autonomy (and rationality and morality) were conceived prior to his account, and then to see how he re-interprets and integrates these concepts into his account.

### 3.2.1 Political and Religious Conceptions of Autonomy

Prior to Kant, autonomy was considered in political and/or religious terms (although it connected with morality in various, somewhat indirect ways). "Autonomy" from the Greek *autos* (meaning "self") and *nomos* (meaning "rule" or "governance") literally means living under self-imposed laws, rather than under imposed rule or the control of others.<sup>256</sup> This conception, then, was a political one, dealing with the manner in which a society could be said to be self-governed.<sup>257</sup> Clearly most social contract theory (until Kant and Rawls) is rooted in this political conception of autonomy. Rousseau conceived of autonomy as "moral liberty" ("the condition of being constrained only by laws which you give to

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on the understanding of human dignity and its place in ethics as well as its incorporation into constitutional law can hardly be overestimated." 98.

<sup>256</sup>Willard Gaylin and Bruce Jennings, *The Perversion of Autonomy* (New York: Free Press, 1996), 30.

<sup>257</sup>For Plato, designing laws for self-governance required the exercise of unencumbered reason, independent of any interests other than the "good." But expressing the "good" was an exercise of the soul, the highest part of man's intellect. It was only through the soul that man could grasp the pure forms (ideas) from which the (true) principles of self-governance would emerge. And moral behaviour was expressed as obedience to these principles. However, not all men had the capacity to grasp these truths, so in fact not all men could discern the rules of self-governance, but were bound by the rules decided by others.

yourself"<sup>258</sup>), expressed by setting aside "natural liberty" in favour of a sort of contractual freedom arising from obligations of mutual protection. So conceived, moral duty is derived from obedience to these obligations, which in turn devolved through political process, rather than rational moral deliberation independent of citizens' particular interests.<sup>259</sup> Following from the assumption that political communities were capable of self-government, the Renaissance emphasized the ability of individuals to do likewise.<sup>260</sup> In addition, the rise of capitalism and the switch from an agrarian to an industrial economic base "forced individuals to break out of traditional roles, obligations and expectations . . . Combined with Protestant individualism . . . capitalism was the cradle of autonomy's notions of independence, self-reliance, and working for self-satisfaction and fulfilment."<sup>261</sup> But the concept of autonomy still retained its political connotation, now finding expression in individual legal rights.

This changing political conception was inextricably linked with an evolving religious notion of both morality and autonomy. Before the Reformation, morality entailed obedience to God's will (as expressed through revelations, as well as through God's representatives in government and the clergy). However, the political notions instrumental

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<sup>258</sup>Thomas Hill, *Dignity and Practical Reason in Kant's Moral Theory* (London: Cornell University Press, 1992), 81.

<sup>259</sup>Hill says that on Rousseau's conception, "one gave laws to oneself through the political process, rather than through rational moral deliberation." See *Ibid.*, 81.

<sup>260</sup>"Received orders and hierarchies, both social and cosmological, had been the framework of medieval thought. But . . . the power of mankind--and by extension the human individual--to create the conditions for its own existence was central to Renaissance humanism." Gaylin, 32.

<sup>261</sup>*Ibid.*, 35.

in the idea of social self-governance (rationality) and individual self-governance (rights, including equality) influenced thought about the relationship between humans and God. Rejecting much of the ritual, structure, and hierarchy of authority of the Roman Catholic Church, the reformers posited that “individuals had the spiritual capacity in their hearts to receive God’s forgiveness, and that, rather than liturgical ceremonies or good works, was the path to salvation.”<sup>262</sup> Martin Luther expanded Saint Paul’s teaching “that the need for discipline by the external law . . . was past and that justification by faith, or conscience, could take its place.”<sup>263</sup> This was essentially a defence of the rational capacities of man to interpret God’s will for himself.<sup>264</sup> But if human reason (i.e., conscience) could discern God’s will, human autonomy (freedom) was still located in acquiescing (through faith) to God’s law (mirroring the social contract notion of freedom in obedience).

It should be clear that the conception of autonomy (i.e., freedom) as described so far is somewhat limited, since its expression is found in following rules. Religious self-governance entails obedience to God as the final authority and the bestower of rationality, conscience, and faith in the first place. And political self-governance essentially depends on “freely” chosen obedience to the laws arising from the “general will” or, if one’s “private will” is reluctant, of being “justly” coerced, or as Rousseau puts it, “forced to be free.” In

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<sup>262</sup>Ibid.

<sup>263</sup>Ibid.

<sup>264</sup>But note that human rationality was not enough, because one also needs faith, which is either a gift from God, or something earned. Either way, one’s worth was merit-based, although not based on one’s accomplishments, but on one’s standing with God.

other words, the autonomy of humans is contingently related to external sources, conditions or causes.

### **3.2.2 Kant's Reconceptualization of Autonomy**

#### **3.2.2.1 Autonomy**

Autonomy and freedom are not interchangeable for Kant, as they appear to be in previous political/religious accounts. In fact, it will turn out that Kant employs two significantly different notions of freedom, one theoretical and one practical. However, the two are not mutually exclusive, as we show later. The crucial distinction between autonomy and practical freedom is that autonomy is inherent, while freedom is largely merit-based. Freedom is the choice to act in accord with the moral laws we give ourselves.<sup>265</sup> Then while one can forfeit or be deprived of one's rights and freedoms (i.e., legal sanctions such as imprisonment, coercion to conform etc.) by choosing to act against these rules, one cannot forfeit or be deprived of one's autonomy. One reason is that "autonomy is a necessary condition of even having moral obligations" in the first place.<sup>266</sup> So to say that one has forfeited or lost one's autonomy would imply that one was released from (or never had) such obligation. But this in turn would make mockery of the very meaning of practical freedom, since freedom includes the *choice* to follow moral rules or not (i.e., to meet or reject these obligations).

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<sup>265</sup> Ibid.

<sup>266</sup> Hill, 178.

A second reason is that autonomy is not a political right, or a spiritual attitude, but a property of all practical wills.<sup>267</sup> In fact, it will turn out that autonomy is derived because the will is an end in itself (i.e., independent of extrinsic influences). Kant argues that everything found in the natural constitution of organic beings has a purpose, and that “no organ is to be found for any end unless it is also the most appropriate to that end and the best fitted for it.”<sup>268</sup> If that end were merely the preservation, the welfare, the happiness of that entity, then this end “could have been maintained far more surely by instinct than it ever can be by reason.”<sup>269</sup> But since it is clear that humans do, in fact, have reason, and since “reason has been imparted to us as a practical power--that is, as one which is to have influence on the *will*, its true function must be to produce a *will* which is *good*, not as a means to some further end, but *in itself*.”<sup>270</sup> Kant says that

[A] good will is not good because of what it effects or accomplishes--because of its fitness for attaining some proposed end; it is good through its willing alone--that is, good in itself. Considered in itself it is to be esteemed beyond comparison as far higher than anything it could ever bring about merely in order to favour some inclination or, if you like, the sum total of inclinations. Even if . . . this will is entirely lacking in power to carry out its intentions; if by its utmost effort it still accomplishes nothing, and only good will is left . . . even then it would still shine like a jewel for its own sake as something which has its full value in itself.”<sup>271</sup>

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<sup>267</sup> *Ibid.*, 80.

<sup>268</sup> Immanuel Kant, *Groundwork of the Metaphysic of Morals*. trans. H. J. Paton (New York: Harper and Row, 1964), 62.

<sup>269</sup> *Ibid.*, 63.

<sup>270</sup> *Ibid.*, 64.

<sup>271</sup> *Ibid.*, 60.

The highest practical purpose of reason, then, is the establishment of a "good will" by reason alone.<sup>272</sup>

### 3.2.2.2 Connecting Autonomy and Rationality

We have said that Kant employs two conceptions of freedom (practical and theoretical). This second, theoretical sense in which Kant conceives of freedom is key to understanding the connection between autonomy and rationality. For Kant, autonomy requires contra-causal freedom. In other words, autonomy requires freedom that is not constrained by *alien* causes. This means more than simply freedom unconstrained by external factors. It means that the only acceptable constraints on freedom must arise solely *from freedom itself*, that is, from human reason acting autonomously. Kant says "Reason must look on itself as the author of its own principles independent of alien influences. Therefore, as practical reason, or as the will of a rational being, it must be regarded by itself as free."<sup>273</sup>

Reason regarding itself as free is, in fact, a pre-condition for moral deliberation. For as Thomas Hill points out, "in deliberating and choosing to act, as a rational agent one must take oneself to be deciding between outcomes that are still open . . . not fixed by causes operating independently of one's deliberation and choice."<sup>274</sup> And the notion of deliberation

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<sup>272</sup>Ibid.

<sup>273</sup>Quoted by Onora O'Neill, *Constructions of Reason: Explorations of Kant's Practical Reason* (New York: Cambridge University Press, 1989), 55.

<sup>274</sup>Hill, 85.

logically entails that one think the choice is up to oneself, because if it were predetermined, this would not be deliberation at all.

In the *Groundwork*, Kant analyzes the nature of freedom in a series of four moves. The first three are analytical arguments in which he makes only conditional claims: “if rational beings are free, they are not simply negatively free, but (capable of) autonomy, and that if (capable of) autonomy, they are subject to the principle of morality, that is, to the supreme principle<sup>275</sup> of practical reason.”<sup>276</sup> In order to establish that reason is something *actual* in human nature, and that it has the authority to make moral laws that can be binding, Kant adopts a radical shift in strategy. Through a recursive critique of reason itself, he shows that reason is self-disciplining.<sup>277</sup> The authority of reason comes exactly from reason’s autonomous scrutinizing and critiquing of itself.

Reason’s discipline cannot be alien; it must be autonomous . . . [And] only autonomous, self-disciplining beings can act on principles that we have grounds to call principles of reason. Reason has no transcendent authority; it can only be vindicated by critique; and the critique itself is at bottom no more than the practice of autonomy in thinking. Autonomy does not

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<sup>275</sup>This supreme principle is the Categorical Imperative: “never to choose except in such a way that in the same volition the maxims of your actions are also present as universal law.” O’Neill, 52-53.

<sup>276</sup>*Ibid.*, 53 (see also O’Neill, 51-58).

<sup>277</sup>“[Kant says] ‘Reason must in all its undertakings subject itself to criticism; should it limit freedom of criticism by any prohibitions, it must harm itself, drawing upon itself a damaging suspicion. Nothing is so important through its usefulness, nothing so sacred, that it may be exempted from this searching examination, which knows no respect for persons. Reason depends on this freedom for its very existence. For reason has no dictatorial authority; its verdict is always simply the agreement of free citizens, of whom each one must be permitted to express . . . without hindrance, his objections or his veto.’” *Ibid.*, 56-57.

presuppose but rather constitutes the principles of reason and their authority.<sup>278</sup>

And what all this means is that humans are autonomous (and free) exactly because they are rational, because they are capable of using reason to critique reason itself.

### 3.2.2.3 Connecting Autonomous Rationality and Morality

Kant constructs a different connection between autonomy and morality than previous political and religious accounts. For Kant, autonomy is “a property of the will of every rational being, namely, the property of legislating to oneself universal (moral) laws without the sensuous motives of fear, hope for reward, and the like.”<sup>279</sup> This is clearly a different kind of legislation than that invoked by the political/religious concepts of autonomy, which were exactly motivated by fear, or hope of reward. And although following the resultant laws was considered to be fulfilment of moral duty (i.e., obedience to external authority) the actual legislating was not the result of *moral* deliberation. Kant reversed this: the exercise of rational autonomy is expressed through the actual process of deliberating and legislating laws, which is an inherently moral act. Following the laws, then, is a moral imperative not because it fulfils one’s duty, but because doing so is the rational outcome of autonomous deliberation, while transgressing them is irrational.

Kant’s establishment of the connection between autonomous rationality and morality is grounded in a particular conception of humans. Previous political/religious

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<sup>278</sup>Ibid.

<sup>279</sup>Hill, 9, 47.

accounts of autonomy had assumed a negative conception. That is, since human impulses are most often self-interested, moral sentiment is an undependable ground basis for self-legislation. Then, since unrestrained self-interest potentially clashes with the "common good," individual freedom must be constrained by public reason (expressed as laws).<sup>280</sup> Then in these accounts reason has a specific kind of *instrumental* value, because properly applied, it compensates for the moral lacks in persons that make constraints of freedom necessary in the first place.

But Kant found in the social reaction to the French Revolution a symbolic argument against this picture of human nature. He perceived "a sympathy bordering on enthusiasm"<sup>281</sup> for other persons, strangers. "The enthusiasm for the Revolution is a sign, according to Kant, of a moral disposition in mankind."<sup>282</sup> There are two points to note here. The first is that this "moral disposition" is significantly different than the kind of undependable "moral sentiment" eschewed by previous accounts. It is rationally derived. That is, from the notion that individuals are capable of self-government it logically follows that they have the capacity to discern the morally correct course of action through

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<sup>280</sup>For Hobbes, reason overcomes the aggressive, selfish, violent tendencies of humans. For Locke and Rousseau, the underlying assumption motivating contractual obligations of mutual protection (person and property) is that if left to themselves, humans would only respect the rights of others if assured of reciprocity. In religious terminology, sinners were weak, susceptible to the temptations of evil influences unless assured of sufficient reward at a later date.

<sup>281</sup>Michel Foucault. "The Art of Telling the Truth" in *Critique and Power*, ed. Michael Kelly (London: MIT Press, 1995), 145.

deliberation. Then granting respect to the moral agency of others is critical, since withholding respect would be irrational (and by extension, as will become clear later, immoral).

The second point here is that, in contrast to previous conceptions in which people are forced to act in moral ways by contingent interests (rewards, fear), Kant argues that they have a disposition to act morally because morality expresses their highest value. In other words, acting morally is its own reward:

Kant speaks of the failure to act on the moral law as giving rise to shame and not to feelings of guilt . . . acting in a manner that fails to express our nature as free and equal rational beings. Such actions therefore strike at our self-respect, our sense of our own worth, and the experience of this loss is shame . . . we have acted as though we belonged to a lower order, as though we were a creature whose first principles are decided by natural contingencies.<sup>283</sup>

This is why Schneewind says:

Kant invented the conception of morality as autonomy . . . autonomy, as Kant saw it, requires contracausal freedom . . . in the unique experience of the moral ought we are 'given' a 'fact of reason' that unquestionably shows us that we possess such freedom."<sup>284</sup>

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<sup>282</sup>Ibid., 145. Foucault goes on to say that this moral disposition manifests itself "firstly, in the right possessed by all peoples to give themselves the political constitution that suits them, and, secondly, in the principle, in accordance with law and morality, of a political constitution so framed that it avoids, by reason of its very principles, all offensive war."

<sup>283</sup>John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 256.

<sup>284</sup>J.B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy*, Cambridge, New York: Cambridge University Press, 1958), 3.

### 3.2.2.4 Connecting Autonomous Rational Morality to Dignity

Key to understanding how Kant links morality with dignity is his distinction concerning kinds of ends. Hill notes “Kant distinguishes (relative) personal ends from ends in themselves by saying that the latter have dignity whereas the former have only price.”<sup>285</sup> Hill goes on to say that “The definition of *price* is that ‘something can be put in its place as an equivalent,’ and *dignity*, by contrast, ‘admits of no equivalent’.”<sup>286</sup> Hill says:

[D]ignity is characterized as ‘an unconditional and incomparable worth’ . . . it is a value not dependent upon contingent facts . . . whatever has dignity has value independent of any effects, profit, or advantage which it might produce.”<sup>287</sup>

In other words, “ends in themselves” have absolute (unconditional) value, which cannot be forfeited, denied, or lost.

Only things which are of absolute value in and of themselves can have dignity. So far, we have been leading up to the implication that, on Kant’s account, dignity must accrue to morality in the following way. First, autonomy must have dignity for two reasons. It is a value independent of contingent facts (i.e., cannot be forfeited or lost). It is also a property of the will, specifically the “property of legislating to oneself universal (moral) laws” without influence from external motives (i.e., fear, hope of reward). And the will (essentially practical reason) is an end in itself; its value is not dependent on its effects or accomplishments. Second, the freedom necessarily attaching to rationality (reason scrutinizing itself) establishes that the exercise of reason (again, without appeal to external

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<sup>285</sup>Hill, 47.

<sup>286</sup>Ibid, 47.

<sup>287</sup>Ibid.

authority or contingent facts) is an end in itself. Finally, the disposition to act morally is an expression of the highest value of humans; moral deliberation, then, is its own reward.

“Dignity attaches directly to morality as based on moral legislation . . . Kant goes so far as to say that the basis of morality, legislation itself, which determines all value, must have a dignity.”<sup>288</sup>

### 3.2.2.5 Human Dignity

The last step, then, is to see how Kant connects dignity to humans (or humanity).

“‘Humanity’ in a person, as contrasted with a person’s ‘animality’, is one’s ‘rational nature’.”<sup>289</sup> In other words, humanity inheres in the capacity humans have to set ends, any ends, for ourselves. Setting ends is clearly impossible without rationality, so setting ends is a manifestation of that rational nature.

However, Kant makes clear that this capacity in and of itself does not establish that humans have intrinsic value.<sup>290</sup> Setting ends entails making normative judgments about what action one “ought” to take to attain that end. The “ought,” then, is a rationally derived, logically necessary imperative. However, the deriving of an imperative, in and of itself,

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<sup>288</sup> Spiegelberg, 49.

<sup>289</sup> *Ibid.*, 10.

<sup>290</sup> “In the system of nature [man] is a being of little significance, and, along with the other animals, considered as products of the earth, has an ordinary value (‘vulgar’ price). Even the fact that he exceeds them in having understanding and can set up ends for himself gives him only an external value for his usefulness, namely the value of a man in preference to other animals.” *Ibid.*, 50.

cannot establish the relative (i.e., good or bad) value of any end.<sup>291</sup> But clearly the ability to make judgements about the moral value of one's ends is critical. Now, in order to decide whether an imperative is absolute, Kant distinguishes between hypothetical and categorical imperatives. "A hypothetical imperative thus says only that an action is good for some purpose or other, either *possible* or *actual*. . . . A categorical imperative . . . declares an action to be objectively necessary in itself without reference to some purpose--that is, even without any further end."<sup>292</sup>

Hill notes that the distinction "is based on the different sorts of reasons that support the judgement. In brief, particular hypothetical imperatives are rational to follow only because (and so long as) doing so is necessary to achieve ends that one desires and wills to pursue but could abandon (or limit). Particular categorical imperatives are based on the general Categorical Imperative, and they prescribe constraints and ends required *by reason* whether or not one happens to desire them or desire anything to which they serve as a means." [emphasis added]<sup>293</sup> In other words the rationality for following a categorical imperative is that it is an end in itself. Hill goes on to say that "Kant uses his special terminology to put forward a bold analytical thesis: whenever we conceive an imperative as moral, we regard it as categorical; otherwise we see it as hypothetical."<sup>294</sup>

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<sup>291</sup>"Here there is no question about the rationality or goodness of the end, but only about what must be done to attain it. A prescription required by a doctor in order to cure his man completely and one required by a poisoner in order to make sure of killing him are of equal value so far as each serves to effect its purpose perfectly." Kant, 82-83.

<sup>292</sup>Kant, 82.

<sup>293</sup>Hill, 7.

<sup>294</sup>Ibid.

In moral deliberation, then, there are two essential elements: an end in itself, and a (categorical) imperative that specifies the rationally necessary action that will assure this end. Some critics argue that Kant has formulated the Categorical Imperative in two ways. First, to “act only on that maxim through which you can at the same time will that it should become a universal law.”<sup>295</sup> And second, “act in such a way that you always treat humanity, in your own person or in the person of any other, never simply as a means, but always at the same time as an end.”<sup>296</sup>

However, H. J. Paton argues:

[A] categorical imperative . . . merely bids us act in accordance with universal law as such--that is, it bids us act on a principle valid for all rational beings as such, and not merely on one that is valid *if* we happen to want some further end. Hence it bids us accept or reject the material maxim of a contemplated action according as it can or cannot be willed also as a universal law. . . . There is thus only one categorical imperative.”<sup>297</sup>

The Categorical Imperative, then, is the “supreme principle of practical reason”<sup>298</sup> in that at the same time it both derives from morality itself and provides a methodology for the exercise of human rationality (i.e., a strategy for determining whether the proposed action is contingent or necessary).

But here is a critical point. While particular (relative) ends can be brought into existence by one’s actions, ends in themselves, because they are autonomous, cannot be.

Paton says that ends in themselves:

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<sup>295</sup>H.J. Paton “Analysis of the Argument” in *Groundwork of the Metaphysic of Morals* (New York: Harper and Row, 1964), 30.

<sup>296</sup>*Ibid.*, 33.

<sup>297</sup>*Ibid.*, 30.

[C]ould not be mere products of our actions, for . . . no mere product of our actions can have an unconditioned and absolute value. They must be already existent ends; and their mere existence would impose on us the duty of pursuing them (so far as this was in our power). That is to say, they would be the *ground* of a *categorical imperative* in somewhat the same way as merely subjective ends are the ground of hypothetical imperatives. . . . Without such ends in themselves there would be no unconditioned good, no supreme principles of action, and so--for human beings--no categorical imperative."<sup>299</sup>

Then, treating humanity as an end in itself is not an *imperative per se*, because an imperative is the resultant *action* that is required to reach or bring about a specific end. The Categorical Imperative *follows from* (i.e., is grounded in) the fact that humanity is an (already existent) end in itself, and not vice versa. Treating humanity as an end in itself, then, is the expression of the end-in-itself that is morality, since morality as Kant defines it is essentially identical with the highest nature of humanity. Since morality (as an end in itself) has dignity, and since morality is the essential nature of humans (as ends in themselves), humans have dignity.

We now turn to explore some aspects of the work of John Rawls, which are of interest to this project.

### 3.3 Rawls's Philosophical Heritage

Early social contract theory (Hobbes, Locke, Rousseau) was essentially political in nature. The central concern was the protection of private property (persons, their goods, and their rights) while minimizing infringements on personal liberty. Both rationality and

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<sup>298</sup>Ibid., 30.

<sup>299</sup>Paton, 33.

autonomy (i.e., political autonomy) were key elements. Rationality was the procedural requirement, concurrently providing both an explanation and a justification for preferring one conclusion, one political arrangement, to another. And as Rousseau showed, some constraint on liberty is not inconsistent with autonomy if it is voluntarily agreed upon by parties who freely consent (i.e., are uncoerced) to live under legislation they give themselves.

Prior to Kant, morality was not a central element of social contract theory, and moral duty itself was formulated as equivalent to obedience to civil law. Although Kant adopts the contractarian framework, he reconceives the familiar notions of rationality, will, liberty, and autonomy, to establish that the connection among them is essentially a moral one. His recursive critique of reason itself shows that since rationality is self-reflective (i.e., self-disciplining) it is already and always autonomous.

Reason has no transcendent authority; it can only be vindicated by critique, and the critique itself is no more than the practice of autonomy in thinking. Autonomy does not presuppose but rather constitutes the principles of reason and their authority."<sup>300</sup>

The supreme principle of reason, the Categorical Imperative, "has the corollary that freedom and autonomy are at the heart not just of morality but of all reason."<sup>301</sup> Then, according to Schneewind, Kant was the first to develop the conception of morality and autonomy.<sup>302</sup> He not only shows that morality is inherent in the (proper) exercise of autonomous rationality, but that self-legislating on the basis of rationally derived maxims

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<sup>300</sup>O'Neill, 57.

<sup>301</sup>Ibid., 52.

<sup>302</sup>Schneewind, 3.

expresses the highest nature of humans (as ends in themselves, having inviolable moral value and dignity).

### 3.3.1 Rawls's Basic Contributions to Moral Theory

We want to consider the contribution of John Rawls in two parts: the first is the position that is developed in *A Theory of Justice* published in 1971; and the second in *Political Liberalism* published in 1993. We do so for two reasons: *Political Liberalism* is based on a subtle change of the arguments found in *Theory* but the general argument remains the same and it is therefore important to understand Rawls's basic position; and second we want to see the subtle change separate from the arguments in *Theory* as it is significant for our purpose here. For these reasons the discussion of the alteration of Rawls's position will be treated in a separate section below. We begin with the work of Rawls as found in *Theory*.

Rawls, following Kant, constructs a theory of justice that *implicitly* incorporates the notion of "morality as autonomous rationality" into political theory (although his treatment of morality itself is much less central than Kant's). Rawls adopts the social contract framework for two different kinds of reasons. The first reason is pragmatic: autonomous rationality (i.e., rational *choice*) is at the heart of contractarian theory. Rawls characterizes social contract theory as consisting in two parts, "an interpretation of the initial situation

and of the problem of choice posed there” and “a set of principles which, it is argued, would be agreed to.”<sup>303</sup> Thus he refers to contractarianism as “the theory of rational choice.”<sup>304</sup>

In fact, autonomous rationality is inherent in the contractarian conception of “contracts.” The obligations specified are self-imposed, being those that free and equal persons assent to under a voluntary and mutually acceptable scheme. The term “contract,” then: denotes the aim of mediating the (often contentious) relations among groups; it affirms “the appropriate division of advantages must be in accordance with principles acceptable to all parties”,<sup>305</sup> and since contracts are necessarily public agreements, it establishes that these principles are publicly acknowledged as those that others will also follow. Rawls says:

The merit of the contract terminology is that it conveys the idea that the principles of justice may be conceived as principles that would be chosen by rational persons, and that in this way conceptions of justice may be explained and justified.<sup>306</sup>

Rawls’s second reason for adopting this framework is concerned with ethics. He says that although his theory of justice is a part, “perhaps the most significant part, of a theory of rational choice”<sup>307</sup> it is not a complete contract theory. But he wants to posit his theory as a paradigmatic case for showing that autonomous rationality, as the necessary *procedural* requirement for social contracts, is uniquely conducive to resolving all sorts of ethical dilemmas. The success of his theory would confirm his contention that “the

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<sup>303</sup>Rawls, *A Theory of Justice*, 15.

<sup>304</sup>Ibid., 17.

<sup>305</sup>Ibid., 16.

<sup>306</sup>Ibid.

<sup>307</sup>Ibid.

contractarian idea can be extended to the choice of more or less an entire ethical system, that is, to a system including principles for all the virtues and not only for justice.<sup>308</sup> It will turn out that for Rawls, virtues have inherent moral value. The important first point, though, is that this inherent value is established, as it was for Kant, solely on the basis of autonomous rationality. The primary focus of his theory, then, is to delineate the conditions under which autonomous rationality must operate to produce morally sound basic political and social structures.<sup>309</sup>

### 3.3.2 Rawls's Theory of Justice as Fairness

Rawls says:

[J]ust as each person must decide by rational reflection what constitutes his good, that is, the system of ends which it is rational for him to pursue, so a group of persons must decide once and for all what is to count among them as just and unjust.<sup>310</sup>

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<sup>308</sup>Ibid., 16-17.

<sup>309</sup>Rawls says that "the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation . . . The major institutions define men's rights and duties and influence their life-prospects, what they can expect to be and how well they can hope to do. The basic structure is the primary subject of justice because its effects are so profound and present from the start . . . the institutions of society favor certain starting places over others. These are especially deep inequalities. Not only are they pervasive, but they affect man's initial chances in life; yet they cannot possibly be justified by an appeal to the notions of merit or desert. It is these inequalities, presumably inevitable in the basic structure of any society, to which the principles of social justice must in the first instance apply. These principles, then, regulate the choice of a political constitution and the main elements of the economic and social system." (Ibid., 7.)

<sup>310</sup>Ibid., 12.

Rawls posits the "original position" as a hypothetical situation equivalent to the state of nature in previous social contract theory. One feature of this hypothetical situation is that the deliberators operate behind a "veil of ignorance" which ensures that the procedures and conditions concerned with choosing principles of justice are fair.

No one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. For given the circumstances of the original position, the symmetry of everyone's relations to each other, this initial situation is fair between individuals as moral persons.<sup>311</sup>

The parties in the original position are assumed to be equal, in that "all have the same rights in the procedure for choosing principles; each can make proposals, submit reasons for their acceptance, and so on."<sup>312</sup> But in fact it is the rational capacities of moral personality, rather than any intrinsic moral worth, that make persons entitled to equal justice.<sup>313</sup> Moral personality is defined as the capacity to conceive of one's own good, and a capacity for having a sense of justice. "The capacity for moral personality is a sufficient condition for being entitled to equal justice. Nothing beyond the minimum is required . . . that moral personality suffices to make one a subject of claims is the essential thing."<sup>314</sup> In other words, equality is a formal procedural condition of the theory of justice, but the notion of equal liberty "does not suppose that the ends of different people have the same intrinsic value, nor that their freedom

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<sup>311</sup>Ibid., 12.

<sup>312</sup>Ibid, 19.

<sup>313</sup>Ibid, 505.

<sup>314</sup>Ibid, 506.

and well-being is of the same worth."<sup>315</sup> Rawls says that the notion of equal intrinsic value is neither a necessary nor a sufficient condition for equal liberty.<sup>316</sup>

In addition, the parties are not required to set aside their own interests in order to reach consensus. The principles agreed to represent "principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association."<sup>317</sup> Then, the necessity of finding principles that all would agree to, coupled with the fact that in the original position no one can identify their own interests, constrains the amount of self-interest possible. However, the important point here is that the negotiation of principles of justice does not require an explicit regard for the interests of other parties, and in fact the attitude of "rationally prudent choice" together with a mutual disinterest in the ends of other parties is expected.

Rawls states that given these conditions, the parties in the original position would affirm two principles of justice:

First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all."<sup>318</sup>

These two principles

... are a special case of a more general conception of justice that can be expressed as follows. All social values--liberty and opportunity, income and

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<sup>315</sup>Ibid, 329.

<sup>316</sup>Ibid.

<sup>317</sup>Ibid, 11.

<sup>318</sup>Ibid, 60.

wealth, and the bases of self-respect--are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage. Injustice, then, is simply inequalities that are not to the benefit of all.<sup>319</sup>

From the preceding description, it is clear that Rawls has constructed a theory of justice that does not depend on any particular conception of morality, moral sentiment, or any specific moral values. Nor does it depend on a conception of humans as inherently valuable. Nevertheless, his theory of justice is a moral theory. The moral elements, then, are "built in" to the framework itself, by virtue of the fact that justice will turn out to be an end in itself (i.e., will have absolute, unconditional moral value). Rawls begins and ends his theory of justice with the same contention: that justice is the first virtue of social institutions.<sup>320</sup>

The inherent value of justice as an end in itself, then, is established in the following way. Rawls says that "Justice is the first virtue of social institutions, as truth is to systems of thought. A theory, however elegant and economical, must be rejected or revised if it is untrue; likewise laws and institutions, no matter how efficient and well-arranged must be reformed or abolished if they are unjust . . . being first virtues of human activities, truth and justice are uncompromising."<sup>321</sup>

The analogy between truth and justice serves to establish that just as truth is the end goal of thought, justice is the end goal of social institutions.

Further, Rawls contends that the two principles of justice have the status of categorical imperatives, in Kant's sense. That is, a categorical imperative is necessary in

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<sup>319</sup>Ibid, 62.

<sup>320</sup>Ibid, 4, 566.

<sup>321</sup>Ibid, 3-4.

itself, regardless of purposes and ends.<sup>322</sup> And as Kant has argued, “whenever we conceive an imperative as moral, we regard it as categorical; otherwise we see it as hypothetical.”<sup>323</sup>

Rawls says that:

... by a categorical imperative Kant understands a principle of conduct that applies to a person in virtue of his nature as a free and equal rational being. The validity of the principle does not presuppose that one has a particular desire or aim. . . . The argument for the two principles of justice does not assume that the parties have particular ends, but only that they desire certain primary goods. These are things that it is rational to want whatever else one wants. Thus given human nature, wanting them is part of being rational. . . . To act from the principles of justice is to act from categorical imperatives in the sense that they apply to us whatever in particular our aims are. This simply reflects the fact that no such contingencies appear as premises in their derivation.<sup>324</sup>

From the fact that the principles of justice represent categorical imperatives, and that justice is an end in itself, Rawls says that

... each person has an inviolability founded on justice that even the welfare of society as a whole cannot override. . . . Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.<sup>325</sup>

### 3.3.3 Human Dignity

For Kant human dignity accrues to all persons by virtue of the fact that as entities capable of autonomous, inherently moral rational self-legislation, they are ends in themselves (having absolute and inviolable moral value). In fact, it is in the act of self-legislation that dignity emerges, as the expression of the highest nature of humans. But

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<sup>322</sup>Kant, 82.

<sup>323</sup>Hill, 7.

<sup>324</sup>Rawls, 253.

<sup>325</sup>Ibid, 4.

unlike Kant, for whom the concept of human dignity is implicitly central, Rawls pays it scant attention.

Like Kant, Rawls thinks that the category of "moral persons" is inextricably linked to autonomous rationality. Rawls says "all men have equal dignity, meaning by this simply that they satisfy the conditions of moral personality . . . and being alike in this respect, they are to be treated as the principles of justice require."<sup>326</sup> The characteristics of moral persons (moral personality) are defined in relation to the "natural capacities" common to all humans.

He conceives of moral persons as having two defining features:

. . . first they are capable of having (and are assumed to have) a conception of their good (as expressed by a rational plan of life); and second they are capable of having (and are assumed to acquire) a sense of justice, a normally effective desire to apply and to act upon the principles of justice, at least to a certain minimum degree.<sup>327</sup>

Respecting persons, treating them as ends in themselves, then, means treating them in ways that they can see to be rationally justified. "But more than this, it is manifest in the content of the principles [of justice] to which we appeal. Thus to respect persons is to recognize that they possess an inviolability founded on justice."<sup>328</sup> The inviolability of persons, then, is founded on the fact that justice is an end in itself, having absolute moral value.

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<sup>326</sup>Ibid, 329.

<sup>327</sup>Ibid, 505. Rawls goes on to say "one should observe that moral personality is here defined as a potentiality that is ordinarily realized in due course. It is this potentiality which brings the claims of justice into play."

<sup>328</sup>Ibid, 586.

According to Rawls inherent human dignity and worth cannot be the basis for a theory of justice, because moral worth is not a "first principle" of justice. That is,

. . . it cannot be introduced until after the principles of justice and of natural obligations and duties have been acknowledged. Once these principles are on hand, moral worth can be defined as having a sense of justice. . . . Thus the concept of moral worth is secondary to those of rights and justice, and it plays no role in the substantive definition of distributive shares.<sup>329</sup>

In fact, Rawls argues that intrinsic worth cannot play a role, since this would amount to rewarding moral desert. But moral desert itself derives from a willingness to follow the principles of justice, so these principles must be antecedent to any evaluation of moral worth.<sup>330</sup>

Further:

. . . the notion of distribution according to virtue fails to distinguish between moral desert and legitimate expectations. Thus it is true that as persons and groups take part in just arrangements, they acquire claims on one another defined by the publicly recognized rules. Having done various things encouraged by the existing arrangements, they now have certain rights, and just distributive shares honor these claims. A just scheme, then, answers to what men are entitled to; it satisfies their legitimate expectations as founded upon social institutions. But what they are entitled to is not proportional nor dependent upon their intrinsic worth. . . . No one supposes that when someone's abilities are less in demand or have deteriorated (as in the case of singers) his moral deservingness undergoes a similar shift. All of this is perfectly obvious and has long been agreed to. It simply reflects the fact . . . that it is one of the fixed points of our moral judgments that no one deserves his place in the distribution of natural assents any more than he deserves his initial starting place in society.<sup>331</sup>

Then it is clear that for Rawls, basing a theory of justice on intrinsic worth and dignity

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<sup>329</sup> Ibid, 312-313.

<sup>330</sup> Ibid., 311-313.

<sup>331</sup> Ibid., 311.

would disrupt the conditions of fairness (i.e., equality) that make accidents of birth and fortunate inheritance morally arbitrary factors. However, the important point here is that for Rawls, moral worth equates to goodness, which in turn equates to rationality. He makes the connection between rationality and goodness in the following way.

There may exist properties which it is rational to want in persons when they are viewed with respect to almost any of their social roles. Let us say that such properties, if they exist, are broadly based. . . . By analogy, a good person, in contrast to a good doctor or a good farmer, and the like, is one who has to a higher degree than the average person the broadly based properties (yet to be specified) that it is rational for persons to want in one another.<sup>332</sup>

Rawls contends that the “fundamental moral virtues, that is, the strong and normally effective desires to act on the basic principles of right, are undoubtedly among the broadly based properties.”<sup>333</sup> He goes on to connect the notion of goodness with moral worth, saying that “a good person, then, or a person of moral worth, is someone who has to a higher degree than the average the broadly based features of moral character that it is rational for the persons in the original position to want in one another.”<sup>334</sup> He concludes that:

It suffices to recall that . . . what permits this definition of the good to cover the notion of moral worth is the use of the principles of justice already derived. Moreover, the specific content and mode of derivation of these principles is also relevant. The main idea of justice as fairness, that the principles of justice are those that would be agreed to by rational persons in an original position of equality, prepares the way for extending the definition of good to the larger questions of moral goodness.<sup>335</sup>

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<sup>332</sup>Ibid., 435.

<sup>333</sup>Ibid., 436.

<sup>334</sup>Ibid., 437.

<sup>335</sup>Ibid., 438.

Thus it is clear that Rawls's account of dignity is significantly different from Kant's in several respects. First, for Kant moral worth is established by possessing the capacity for autonomous rationality alone, not by character, the outcome of one's deliberations, nor one's actions. And on Kant's account, one cannot lose or forfeit one's essential moral value and dignity. Further, the moral worth of humans is absolute and unconditional and does not admit of degrees. Finally, although dignity is expressed through the deliberative process involved with self-legislation, it is logically *a priori* to both deliberation and the principles of morality that are derived. On Rawls's account, then, it would be easy to argue that he has retained the traditional contractarian notion of moral duty as obedience to civil law, albeit law self-legislated and consented to by the parties in the original position, under the formal conditions of justice as fairness.

### **3.3.4 Respect for Persons**

There are crucial points that must be further clarified in the following sections for the purpose of our project. The first concerns the general notion of respect for persons. Respect for the worth of persons is not a motivating factor in the original position, but is a result of the principles derived. One manifests respect for persons when one acts on the principles of justice. Rawls states:

I believe, however, that while the principles of justice will be effective only if men have a sense of justice and do respect one another, the notion of respect or of the inherent worth of persons is not a suitable basis for arriving at these principles. It is precisely these ideas that call for interpretation. The situation is analogous to that of benevolence; without the principles of right and justice, the aims of benevolence and the requirements of respect are both

undefined; they presuppose these principles already independently derived. . . . Once the conception of justice is on hand, however, the ideas of respect and of human dignity can be given a more definite meaning. Among other things, respect for persons is shown by treating them in ways that they can see to be justified. But more than this, it is manifest in the content of the principles to which we appeal. Thus to respect persons is to recognize that they possess an inviolability founded on justice that even the welfare of the whole society cannot override. It is to affirm that the loss of freedom for some is not made right by a greater welfare enjoyed by others. The lexical priorities of justice represent the value of persons that Kant says is beyond all price. The theory of justice provides a rendering of these ideas but we cannot start out from them. . . . These remarks bring us back to the common sense conviction . . . that justice is the first virtue of social institutions. . . . Justice as fairness is the outcome; it articulates these opinions and supports their general tendency.<sup>336</sup>

Gaylin and Jennings argue that the notion of autonomy that Rawls posits is inadequate.

They claim that Rawls holds:

. . . that autonomy is 'neutral' with respect to any particular substantive conception of the human good. What [he means] by this is that autonomy has no inside; it is an empty freedom waiting to be filled with choices, like a house to be filled with furniture. . . . Neutral autonomy also has no direction, no purpose beyond itself. It is the freedom to choose and the activity of choosing that matter, not what is chosen. This makes autonomy like the expensive treadmills so many Americans buy today to go nowhere in particular, but just to go. . . . Many Americans do think of autonomy as choice for its own sake.<sup>337</sup>

Consequently, they argue that there are two senses in which this conception of autonomy is lacking. First, self-mastery does not mean simply "doing your own thing." Self-mastery is, they argue, compatible with "human interdependence and life in a community of mutual aid

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<sup>336</sup>Rawls, 586.

<sup>337</sup>Gaylin, 39-40.

and reciprocal obligations.”<sup>338</sup> They argue that freedom and autonomy are inextricably connected, but not in the way Rawls thinks. They claim:

Freedom makes community possible. But taking care of each other, being a person in the fabric of such community, is what gives freedom its point. Freedom and commitment, independence and dependence, rights and restraints--these are not, in the final reckoning, contraries.<sup>339</sup>

### 3.3.5 Autonomy

According to Gaylin, the second problem is that Rawls’s autonomy in *Theory of Justice* represents an unrealistic notion of socially detached rationality. Gaylin and Jennings suggest that in the mind of Rawls one must be ‘hyper-conscious’ about social roles and rules, examine each and “play only those roles that have passed rational and moral muster by your autonomous, judging ego. Kant made autonomy in this sense the essence of ethics.”<sup>340</sup> This would render actions from habit, for example, to fall outside the actions of an autonomous person as would much of human behaviour which is “nonrationally determined.”<sup>341</sup>

In rejecting this conception of autonomy they argue that:

We can defend the nobility of the human species without assuming that we are uninfluenced by genetics and without insisting that man must occupy the center of the universe. Similarly, we can defend the dignity of man without clinging to outmoded definitions of human autonomy and rationality. We know that unlike any other creature human beings are self-determining. We are obliged to do for ourselves basic things necessary for our survival that nature does for other creatures. We elect to be ruled by rulers, and we

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<sup>338</sup>Ibid., 40.

<sup>339</sup>Ibid., 41.

<sup>340</sup>Ibid., 42.

<sup>341</sup>Ibid., 43.

determine the degree of their power. The ant does not elect her queen and cannot choose to convert from an absolute monarchy to a constitutional monarchy or a democracy. . . . So apparent and so startling is this special quality of autonomy that it is tempting to exaggerate the degree to which we are self-determining, as well as to overvalue it.<sup>342</sup>

They argue that the limits to autonomy are built into the human biological condition, by virtue of the fact that humans are mutually dependent on each other for survival, well-being, and social support. However, the notion of mutually dependent persons does not preclude autonomy.

Nothing more clearly contradicts the individualistic assumptions to the culture of autonomy than the nature of birth and childhood. Social structures--community, family, state, and tribe--are not dispensable inventions of human history. The need for a social structure of some kind is part of our biology and a necessary part of our development and survival; we could not survive as a species or develop true to type did we not have a social structure to support us. Social order is not something from which we can be 'autonomous'. Rather it is the precondition of autonomy. . . . [This fact] is absent in the culture of autonomy.<sup>343</sup>

Although it could be argued that Gaylin and Jennings present a rather casual and seemingly unsophisticated argument here, it is clear that they raise a crucial set of concerns with respect to the Kantian/Rawlsian notion of autonomy as detached, rational, insular, and atomistic. The social facts of persons' lives do seem to play a somewhat more weighty role than either Kant or Rawls is willing to concede, and one must wonder whether or how it is entirely possible to attain the kind of rational, autonomous moral deliberation that is

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<sup>342</sup>Ibid., 108.

<sup>343</sup>Ibid., 133.

required in their theories, without losing their significant connections to others, and to their social communities. And to the extent that one's social context defines, at least in part, how one conceives of oneself, the kinds of things one thinks about, the actual moral dilemmas that arise, and the acceptable notions of what constitutes rationality and good reasons in the first place, this question becomes more pressing.

### 3.3.6 Analysis of Rawls

Above, we noted that there were crucial points that need clarification with respect to Rawls's conception of autonomy as a moral capacity. The first is the one just discussed, that respect for persons is not a motivating factor in the original position, but is a result of the principles derived. The second point follows from the fact that, as we have stressed, Rawls, like Kant, constructs a moral theory. We recall that Kant has established the inherent moral nature of rationality as the basis of autonomy, and human dignity. It is important to notice that both theories are based on an *a priori* rationality that belongs to all humans by virtue of the fact that they share in humanity.

However, it is also important to notice that Rawls does not posit any moral motivations to the *participants* in the original position. The parties "decide solely on the basis of what seems best calculated to further their interests so far as they can ascertain them. In this way we can exploit the intuitive idea of rational prudential choice."<sup>344</sup> In fact, the moral elements are present by virtue of the formal conditions of the principles

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<sup>344</sup>Rawls, 584.

themselves, and the veil of ignorance.<sup>345</sup> The formal conditions of the principles, of course, are that they are derived rationally and with the assumption that they are universally acceptable.

So, following Kant's notion of the inherent morality of rational deliberation, (which is constrained from immoral results by the fact that they are also irrational results), the moral nature of the theory accrues through the requirement of rational deliberation, and not because the participants are morally motivated or inclined.

Several theorists have questioned whether this morally neutral claim is, in fact, sound. If it is not, then the conception of autonomous rationality which lies at its heart is destabilized, because it itself will be suspected of being not morally neutral. In fact, the very notion of autonomy may turn out to be the construction of a certain mode of moral thought, or even a cultural artifact. If so, then it cannot be considered either universally accepted, or an adequate grounds for the moral theories which depend on it. And, the attached notion of human dignity is also called into question as the grounds upon which mutual respect, and certain practical rights and freedoms, are accorded.

Thomas Hill, for instance, argues that the original position is not morally neutral. And because of this, as a method for settling disputes about basic moral values, the original position is inadequate.

The problem is that many of our most fundamental moral convictions are already built into the description of the original position. As Rawls says, it is a point of view designed to represent widely accepted assumptions about a *fair way* to determine and rank competing guidelines for constitutional and

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<sup>345</sup>Ibid., 585.

legislative choices. [Although Hill does not stress this, the notion of fairness is itself a moral value that is implicit in Rawls's theory.] Its defining features were selected partly for moral reasons: that everyone's interests count, that no one 'deserves' his or her natural gifts, that conceptions of justice should be public, general, universal, and not tailored to special interests, that malicious envy should be discounted, that the welfare of future generations is important, and that procedural fairness, rather than particular visions of the good life, should provide the primary standard for our basic institutions . . . shared basic moral assumptions are *represented* by the overall characteristics of the parties together with their choice situation. Moreover, the justificatory force of arguments from the original position to the principles of justice is largely dependent upon audience acceptance of those basic moral assumptions.<sup>346</sup>

Walter Kaufman makes the argument with respect to Rawls's notion of distributive justice: that he does not in fact offer a theory of justice but rather a theory of fairness which is concerned with outcome rather than procedure.<sup>347</sup> G. E. Pence makes a similar point. He notes that Rawls's "root idea is that where the choice conditions are fair and men are rational, the resulting principles will also exhibit fairness and rationality."<sup>348</sup> However, he goes on to argue that, in fact, what is exhibited is a predisposition to certain preferences. For instance, he claims that because of the way Rawls's theory is constructed, all utilitarian principles are arbitrarily rejected. He concludes that:

Rawls's contract method, with its strong dependence on reflecting moral intuitions, is not better and no worse than the quality of those intuitions. Whose intuitions count as *good* moral intuitions therefore becomes critical. . . . we conclude here that although Rawls has not proved, via contractualism, the superior rationality of his principles over competing principles, he may have shown that his method can

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<sup>346</sup>Hill, 236, 237.

<sup>347</sup>Walter Kaufman, *Without Guilt and Justice* (New York: Peter H. Wyden, Inc, 1973), 69.

<sup>348</sup>G.E. Pence, "Fair Contracts and Beautiful Intuitions" in *New Essays on Contract Theory*, Kai Neilsen and Roger A. Shiner, eds. (Guelph: Canadian Association for Publishing in Philosophy, 1977), 138.

**'expand' the moral intuitions of ordinary people to cover new and difficult moral situations.<sup>349</sup>**

**This is, of course, exactly what Rawls hopes to avoid, because he sees his theory as an antidote for intuitionism.<sup>350</sup>**

**Because fairness is pre-eminently a quality of procedures and not of results, . . . while 'just' is pre-eminently a predicate ascribed to results and specifically to what is meted out, . . . the way we proceed to make a distribution can be fair but not just. Even if it is fair, it does not follow that everybody gets his just deserts.<sup>351</sup>**

**There are various grounds for distributive justice (merit, need, equality, and equality of opportunity). Kaufman claims that when appeals to these breaks down, one can either develop an autonomous morality or reinterpret justice. In his view, distributive justice theorists "fall back on a formal conception of justice; they say that justice consists of treating like cases alike. [But] this popular claim is actually false. Treating like cases alike is merely a necessary but not a sufficient condition of what is meant by justice."<sup>352</sup> The latter, Kaufman thinks, is Rawls's response, but his reinterpretation of justice is not neutral, because:**

**. . . he does not consider alternative goals and possible conflicts. He discusses at great length what is involved in developing a 'rational life plan', and makes this terse but telling concession. . . . 'For simplicity I assume that there is one and only one plan that would be chosen, and not several (or many) between which the agent would be indifferent, or whatever. Thus I speak throughout of the plan that would be adopted with deliberative rationality.' Here 'simplicity' and 'whatever' trivialize the crucial refusal to consider alternatives.<sup>353</sup>**

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<sup>349</sup>Ibid., 151-152.

<sup>350</sup>See Rawls, *Theory*, 560-561.

<sup>351</sup>Kaufman., 69.

<sup>352</sup>Ibid, 85-86.

<sup>353</sup>Ibid, 92.

In fact, Rawls's contention that a certain conception of justice would be the outcome of rational deliberation is belied by his admission that "we want to define the original position so that we get the desired solution."<sup>354</sup> Kaufman says:

Here the strategy of moral rationalism parallels that of exegetical thinking. Reason is considered authoritative, but the cards are stacked to make sure that reason will deliver the desired verdict. The moral rationalist reveres justice as transcending preferences--but makes sure that her verdicts accord with his preferences. Thus he sees to it that his own moral ideas come back to him endowed with authority.<sup>355</sup>

As we have said, if these criticisms are correct, the status of autonomous moral agents is called into question, by virtue of the fact that they might represent a particular, and not necessarily neutral, conception of the important characteristics of persons.

Another important issue, raised by Kenneth Baynes, concerns the relationship between moral theories and conceptions of persons, which, he says, are:

[E]specially relevant for a Kantian theory that attempts to distinguish between the right and the good--or normative questions of justice and evaluative questions of the good life--on the basis of a (normative) conception of the person (e.g., in relation to a conception of moral autonomy or practical reason).<sup>356</sup>

Baynes recapitulates Michael Sandel's criticisms of Rawls's conception of the person.

First, on a metaphysical level . . . Rawls's conception of the person implies a 'simple view' of personal identity: His theory presupposes an 'antecedent unity of the self', that is, the self attains its identity apart from the particular values, ends, or attachments it has. Second, on a moral level . . . Rawls's conception of the self violates certain deeply affirmed notions of moral desert and responsibility. . . . What must be true of Rawls's conception of

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<sup>354</sup>Ibid.

<sup>355</sup>Ibid.

<sup>356</sup>Kenneth Baynes, *The Normative Grounds of Social Criticism* (New York: State University of New York, 1992), 123.

the self is that the self possesses a unity and identity prior to its membership in any particular historical community and prior to its attachment to any specific ends. What is constitutive of the self is not any specific set of ends or attachments, but simply its *capacity* to choose. According to this 'thin' view of the self, the self relates to its ends as a mere 'system of desires'. These desires can perhaps be rationally ordered according to their relative intensity, but they do not essentially define the self's identity. But . . . such a distinction between the self and its ends ultimately undermines the very notion of moral agency itself!<sup>357</sup>

The criticism is expanded to include the following, which further calls into question the validity of considering social relationship of persons in decision making:

On the alternative conception advocated by both Sandel and Taylor, human beings are conceived as 'self-interpreting animals.' This suggests that our relation to our desires is not that of a 'simple weigher' of preferences, but that the process of interpreting and evaluating those desires is *constitutive* of who we are. Moreover, our membership in specific historical communities also informs our attempts at self-understanding and shapes our self-identity. Thus, we are 'thick' selves in the sense that we exist only *in* our individual and collective self-interpretations.<sup>358</sup>

Baynes questions whether Sandel's criticism is entirely adequate, since Rawls does not deny that our identities are socially embedded, but:

. . . agrees that no degree of personal identity is 'natural or fixed'; rather, he claims, it depends upon the ideals and values fostered by a society and its institutions. The real question at issue is whether it is possible, in the context of a plausible theory of moral psychology, to distinguish between certain capacities that an agent has--such as the capacity to have and revise a conception of the good--and the exercise of those capacities in connection with varying content and within different situations. Sandel does not address this question of a moral psychology.<sup>359</sup>

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<sup>357</sup>Ibid., 129-130.

<sup>358</sup>Ibid., 130.

<sup>359</sup>Ibid., 130.

However, there does seem to be some credibility to Sandel's criticism, because even though Rawls does not deny that personal identity is impacted by social context, there is a sense in which he does take the autonomy that accrues to persons (following Kant) by virtue of their status as rational beings, as exactly a "natural and fixed" property, a "unity and identity" as rational being, capable of reasoned choice. And, further, he assumes that, notwithstanding the social embeddedness of persons, this capacity for rationality will, in fact, override the importance of these particular social factors in the deliberation process.

Baynes also presents another moral objection to Rawls's "notion of a rational life plan, his apparent Kantian assumption that such a plan will not involve any deep moral conflicts, and the connection between this assumption and the notion that the moral point of view can be described as one of impartiality."<sup>360</sup> Baynes' objection is quoted from Charles Taylor.

Kant's formalism and rationalism distort our understanding of moral phenomena (and moral reasoning) by giving rise to the illusion that there is a single, consistent domain of the moral and that there is one set of considerations (or one model of calculation) that defines what is morally right. He suggests further that there exists a 'diversity of goods' (personal integrity, charity, justice, liberation, rationality etc), all of which are central to our conception of ourselves as moral agents but that may not be coherently united into one rational life plan in which justice plays the predominant role. Rather, it may be the case that these goods place incompatible demands on us, even though we feel we cannot repudiate or deny any one of them. Part of our understanding of moral agency consists precisely in the fact that a language of 'qualitative contrast' is essential to it and cannot be avoided.<sup>361</sup>

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<sup>360</sup> Ibid., 133.

<sup>361</sup> As referenced in Ibid., 133

An important corollary question is raised here by Taylor's arguments. If moral agents are, in fact, required to make moral choices between incompatible but equally valuable goods, does this render them incapable of the kind of detached rationality that Rawls describes? If so, and if autonomy is attached necessarily to a particular kind of rationality (i.e., impartial and abstract), what does this mean for the assumption that humans are worthy of respect as autonomous agents, with inviolable and unconditional human dignity?

Onora O'Neill offers a different slant on Rawls's conception of persons. She argues that Rawls presupposes an ideal of the moral person, which plays an essential role in determining the principles of justice.<sup>362</sup> Then this ideal is built into the original position. The importance of O'Neill's criticism is that the notion of the autonomous person that Rawls builds his theory around may, in fact, represent a cultural and political artifact. That is, it may be exactly the conception of person that a liberal political theory must posit, in order to justify itself.

The ideal of the person on which his argument rests is not that of the abstract individual . . . but that of persons as citizens of a modern democratic polity, who (though they may disagree about the good) accept the original position as a 'device of representation . . . that accurately captures their ideal of a fair system of cooperation between citizens who so disagree. Far from deriving a justification of democratic citizenship from metaphysical foundations, Rawls invites us to read *A Theory of Justice* as a recursive vindication of those deep principles of justice that 'we' would discover in drawing on 'our' underlying conceptions of free and equal citizenship. This vindication of justice does not address others who, unlike 'us', do not start with such ideals of citizenship; it has nothing to say to those others. It is 'our' ideal, and 'our' justice. Worries about relativism come flooding back.

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<sup>362</sup>O'Neill, 210.

... In a way these worries are intensified, for it is not just by way of equilibrating theory with 'our considered moral judgments', but in the very formulation of the most abstract theoretical principles, that Rawls now appeals to the judgments of 'our' tradition. Kantian constructivism, it seems, claims only to offer a coherent articulation of the outlook of modern liberal societies. The Kantian ideal of the person is socially embedded, and antirelativism is not attainable. We are offered a coherent articulation of the deep moral commitments of 'our' society. With hindsight many of Rawls's earlier writings can be seen to acknowledge this derivation of justice.<sup>363</sup>

### **3.3.7 Political Liberalism**

As we noted in the beginning of this section on the contribution of John Rawls to the exploration of the meaning attached to the expression human dignity, following his publication of *A Theory of Justice* in 1971 there were a number of criticisms raised, among them are those discussed above.

Among the core criticisms levelled at Rawls for his position in *Theory* was the position that while he could account for the action or the choosing of the individual, he was less clear as we have seen in terms of social relationships. This matter is of concern to us here, for as we recall the tension between the individual and social meanings attached to human dignity was an issue

*Political Liberalism* acknowledges that individuals do not function alone and in doing so Rawls makes a shift towards political theory from moral theory. Individuals are members of communities and this is how they function as members of society. If Rawls is to allow his theory to stand, it must be modified to express a political theory that will allow

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<sup>363</sup>Ibid., 210-211.

for the participation of citizens in a pluralistic society who hold differing "comprehensive doctrines" be they religious or philosophical. This move allows members of diverse communities, with some limitations, to enter the dialogue and is accomplished by modifying the original position from that of *Theory* where the original position not only justified the principles of justice but also specified the democratic institutions that would be necessary to hold justice as fairness.<sup>364</sup> The more modest proposal in *Political Liberalism* allows that there is only a specific set of principles that can function in a democratic society that accepts reasonable pluralism.<sup>365</sup> This change in position allows for the social relationships that are marked by diversity to be accounted for in social dialogue and recognises the individual and social contexts of the person.

Rawls goes further than making changes in the process of justifying justice as fairness by making a modification to the first of his two principles of justice. In *Theory* it appears as: "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all"<sup>366</sup> This becomes: "each person has an equal claim" and the phrase "system of basic liberties" becomes "a fully adequate scheme of equal basic rights and liberties."<sup>367</sup> These changes are not

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<sup>364</sup> See Rawls, *Theory* Chapter 2.

<sup>365</sup> John Rawls, *Political Liberalism* (New York, Columbia University Press, 1993), 22-29.

<sup>366</sup> Rawls, *Theory*, 302.

<sup>367</sup> Rawls, *Political Liberalism*, 5.

explained by Rawls<sup>368</sup> but one may speculate that there is a further recognition of the social relationships. There are further modifications to Rawls's positions but they are not as significant for our purpose here. Suffice it to say that some of the criticisms of Rawls noted above and some that will follow in the section on the feminist critique are partially addressed by the modification of Rawls position. There remain further problems to be worked out but these are beyond the scope of this project.

### **3.3.8 Concluding Comments on Rawls and Kant**

From the criticisms mentioned here, it is clear that Rawls's notion of the autonomous moral person is problematic for a myriad of reasons. And yet it continues to exert critically significant force in political discourse. Whether the issue is rights claims, or protection of children, or the status and entitlement of marginalized and oppressed groups, autonomy is a central claim. However, the question must arise at this point as to what, if anything, could justify the assumptions that autonomy (and so, human dignity) is either an attribute of all humans that can, or should, have some practical force in the world; or that it is universally recognized and valued. The brute facts of inequality and injustice speak against these assumptions, as does the difficulty of deciding on universal principles of justice or human rights that are acceptable across cultures and nations.

In addition, with respect particularly to Kant and Rawls, the question must arise as to why autonomy is inextricably linked with rationality, as if rationality is the supreme

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<sup>368</sup> Rex Martin, "Rawls's New Theory of Justice," *Chicago-Kent Law Review*. 69

human virtue and capacity? In fact, this is exactly the sort of question feminists raise. They challenge the assumption that there is only one morally acceptable form of deliberation, which is abstracted from the real, lived circumstances of peoples' lives and concerns. And they ask why the value of autonomy must be, in effect, posited as dichotomous with interdependence and embeddedness in social relations.

Beyond these issues, and directly related to the purpose of this project, is the issue of the relationship between the understanding of human dignity in the public documents and the philosophical presentation of the same term in the works of Kant and Rawls. We note here as in other places that a certain connection cannot be made, however we also note that there are clear linkages in the central language of the documents and the writings of the two philosophers (for example, incommensurability) and in the deontological presentation of both. This suggests there is a link to be found. This is important, we note again, in that if the writings of Kant and Rawls form the resource for the public documents presentation and understanding of human dignity we need to examine whether or not this is a generally accepted or satisfactory foundation for the term as a parameter for the use of genetic technologies.

With these concerns and criticisms in mind, we turn to the work of another prominent thinker, Jürgen Habermas, to explore an alternative view of human dignity from which to continue our assessment.

### 3.4 Contribution of Habermas to the Discussion

In contrast to Rawls and Kant, but still within a deontological framework, the work of Jürgen Habermas represents an attempt to develop a universal ethics. While Kant and Rawls ground their work on a conceptual idealization, Habermas develops his work on the (concrete) structure of cooperative discourse.

For Habermas, discourse offers a more solid ground for a universal ethics because it is in discourse or communication that people in a democratic society must rationally present and defend moral positions. Habermas's discourse ethics is a cognitivist attempt to ground the public validity of moral norms through the logic of argumentation.<sup>369</sup> Discourse as argumentation is founded upon practical reasoning toward consensus. Ethics is the discourse about the question: how shall we live? Habermas argues that ethical discourse is the argumentative, reasonable and communicative interaction among participants concerned about normative social action. It is a discourse that tends toward a universal moral point of view that deemphasizes ego-centric positions while emphasizing a general communicative

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<sup>369</sup> Elements of Habermas's theory of discourse ethics can be found in most of his writings, for example, *The Theory of Communicative Action: Reason and the Rationalization of Society*, Thomas McCarthy, trans. (Boston: Beacon Press, 1984); "Moral Consciousness and Communicative Action", in *Moral Consciousness and Communicative Action* Christian Lenhardt and Shierry W. Nichol森, trans., (Cambridge, Massachusetts: The MIT Press, 1991), pp. 116-194; "Morality and Ethical Life: Does Hegel's Critique of Kant apply to Discourse Ethics?", in *Moral Consciousness and Communicative Action* Christian Lenhardt and Shierry W. Nichol森, trans., (Cambridge, Massachusetts: The MIT Press, 1991), pp. 195-216. Yet, the clearest account is his article, "Discourse Ethics: Notes on a Program of Philosophical Justification", in *Moral Consciousness and Communicative Action* Christian Lenhardt and Shierry W. Nichol森, trans., (Cambridge, Massachusetts: The MIT Press, 1991), pp. 43-115.

perspective.<sup>370</sup> The philosophical justification for Habermas's discourse ethics is founded upon two principles. First, the principle of universalization (U)<sup>371</sup> states, "Every valid norm must fulfil the condition that all affected can accept the consequences and the side effects its general observance can be anticipated to have for the satisfaction of everyone's interests."<sup>372</sup> (U) is the cognitive and formal justification that moral norms not only have real content, but that norms can be generalized to include all those people who would be affected by the norm in question.<sup>373</sup> This generalization of moral norms emerges in the cooperative argumentation of communicative action that tends toward the moral point of view. The moral point of view is facilitated by a shift in the discourse from ego-centric interests to a general interest of all participants of the discourse. For Habermas, (U) is the principle that moral norms are expressions of a general will formation representing interests of a real common good.

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<sup>370</sup> See "Morality and Ethical Life: Does Hegel's Critique of Kant apply to Discourse Ethics?" 198.

<sup>371</sup> The citation for the two principles of discourse ethics as (U) and (D) is taken from Habermas. See, for example, "Discourse Ethics: Notes on a Program of Philosophical Justification" 65.

<sup>372</sup> "Discourse Ethics: Notes on a Program of Philosophical Justification", 65.

<sup>373</sup> Habermas is in line with a Kantian tradition of moral norms that is reflective of a concern not with questions of the good life, but questions of the right or just action in social living. The intersubjective orientation of this kind of ethics is characterized by deontological, cognitivist, formalist and universalist tendencies. Habermas's discourse ethics, therefore, is both universal and particular. It is universal since rational will formation through the procedure of discourse is the same for all communities tending toward communicative action. It is particular since only real communities engaged in actual discourse can arrive at the necessary consensus on moral norms through practical discourse. In "Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?", Habermas writes that his discourse ethics, "...reformulate(s) Kant's ethics by grounding moral norms in communication", 195.

Following the principle of universalization, the second principle of discourse ethics (D) states, "Only those norms may claim to be valid that could meet with the consent of all affected in their role as participants in a practical discourse".<sup>374</sup> This principle orientates the communicative action of ethical discourse toward the equality of participants engaged in a non-coercive, cooperative interaction. (D) establishes that the validity of moral norms is linked with the discourse of real participants truly affected by their consensus in the redemption of moral norms. Without this real discourse and real consensus, norm making will not tend toward communicative action of understanding, but strategic action of coercion. For Habermas, only with the principles of (D) and (U) can ethical discourse achieve real consensus grounded on a general will formation on claims of what actions ought to be deemed right for social living.

These principles practically ground ethical discourse upon concerns of mutual understanding and cooperative action. The discourse emerges when the living out of certain norms becomes conflictual. The question arises: Is the moral norm right? - whereby the term "right", one means that the norm in question fulfils the criteria of universality and discourse. The validity of the norm, or in Habermas's words, the redemption of the norm, is the issue that discourse ethics aims to resolve.<sup>375</sup>

For Habermas, discourse ethics is a procedure of rational argumentation among equal partners aimed toward consensual agreement on the redemption of moral norms. As a

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<sup>374</sup> Ibid., 197.

<sup>375</sup> It is not about action; see *Moral Consciousness and Communicative Action*, 125.

consensual discourse participants become engaged in communicative action.<sup>376</sup> This kind of action is contrasted by Habermas from strategic action. Communication orientated toward strategic action is grounded upon coercion not reason.<sup>377</sup> Partners in this type of discourse force participants to accept outcomes based upon threats or sanctions. Communicative action as discourse ethics, however, attempts to arrive at rational agreement through mutual understanding among equal partners. The reasonable influence among participants consists of the force of individual speech acts.<sup>378</sup> Speech acts that make up the content of the discourse can influence discourse partners in three ways. Each way corresponds to a different kind of validity claim to truth. Speech acts make claims to *truth* as objective state of affairs; *right* as legitimate regulatory relationships of social order; and *truthfulness* as a claim of sincerity.<sup>379</sup> Although each of these kinds of claims are made through consensual discourse, validity claims of truth and sincerity are not properly the realm of discourse ethics since the end of discourse ethics consists of validity claims of what is right in social living. Yet, both claims to truth and sincerity can emerge in discourse when the debate consists of issues over data or issues over the sincerity of the participants. Discourse ethics aims therefore toward consensual and rational agreement on

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<sup>376</sup> See p. 58 and *Moral Consciousness and Communicative Action*, 133.

<sup>377</sup> For this distinction see *The Theory of Communicative Action: Reason and the Rationalization of Society*, 285-86.

<sup>378</sup> See “*Discourse Ethics: Notes on a Program of Philosophical Justification*”, 37.

<sup>379</sup> For a succinct account of these kinds of claims, see “*Discourse Ethics: Notes on a Program of Philosophical Justification*”, 58.

the redemption of existing moral norms when the validity of these norms as socially regulative is in question.<sup>380</sup>

Argumentation, then, is the medium of Habermas's discourse ethics.<sup>381</sup> For Habermas, argumentation over the status of existing moral norms is correctly the form of discourse since only in rational argumentation is there any possibility of communicative agreement. Argumentation structures the ethical discourse as it is geared toward achieving the moral point of view necessary for ethical agreement.

Habermas borrows from G.H. Mead to describe the moral point of view as the common perspective of the participants of discourse that emerges when each participant is able to understand the position of the other through ideal role-taking. Argumentation structures this ideal role-taking since it presupposes mutuality, trust, and minimal logic.<sup>382</sup> Mutuality and trust demand equality in discourse and a willingness to understand the other's

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<sup>380</sup> The claims are in need of redemption since discourse ethics assumes that the norms in question are practically in conflict. The issue is whether or not a particular norm deserves to be recognized. Discourse emerges in response to resolve the conflict about particular norms. Habermas writes, "the validity of a contested norm is put in abeyance when practical discourse begins", *Moral Consciousness and Communicative Action*, 125.

<sup>381</sup> Ordinarily one may think argumentation is an emotionally driven debate among participants at cross-purposes. Common experiences of argumentation can tend to be disturbing situations worth avoiding. For Habermas, however, the very process of putting forward reasons for a particular moral position presumes that one is arguing on the grounds of rational, cooperative discourse. See, "*Discourse Ethics: Notes on a Program of Philosophical Justification*", 67.

<sup>382</sup> Argumentation depends upon participants taking a performative perspective. The performative perspective means simply that the participants' claim to sincerity are fulfilled. With this condition, argumentation is, "...geared to convincing an opponent that he makes performative use of something he expressly denies and thus gets caught up in a performative contradiction", *Moral Consciousness and Communicative Action*, 129.

reasonable arguments. Minimal logic requires that participants observe the basic canons of logic such as the principle of self-contradiction.

In summary, these normative conditions of discourse ethics ground the discourse toward the moral point of view necessary for possible agreement. Furthermore, ideal role taking, "...insures that the right to universal access to and equal opportunity for participation in argumentation is enjoyed freely and equally".<sup>383</sup> For Habermas, dignity involves universal access and equal opportunity for discourse, which are conditions of discourse ethics since they are contained in the pragmatic presuppositions of argumentation. Argumentation, therefore, structures discourse ethics with normative commands of mutuality, trust, equality, universal access and minimum logic toward a common moral point of view.<sup>384</sup>

From this short description of his work, we suggest that Habermas presents an understanding of human dignity that is broader than that of Kant and Rawls, although still deontologically based. His work also appears to broaden the notion of human dignity from that found in the public documents by allowing for a more dynamic understanding of this aspect of the human person. We now continue with observations regarding another school

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<sup>383</sup> *Moral Consciousness and Communicative Action: Reason and the Rationalization of Society*, 163.

<sup>384</sup> Habermas's understanding can be contrasted with that of David Tracy. For Tracy argumentation is a particular moment in the entire dialogue of a community of communication since formal arguments do not exhaust the range of legitimate inquiry. See for example, *Plurality and Ambiguity: Hermeneutics, Religion and Hope* (San Francisco:Harper and Row, 1987), 23-5.

of thought to sketch its understanding of human dignity and determine its congruence with Kant and Rawls.

### 3.5 Virtue Ethics

Virtue ethics has emerged in moral theory as a resurgence of the Western philosophical tradition from Aristotle through to Augustine and Aquinas. The renewal of this traditional line of thought is in response to dissatisfaction with utilitarian consequentialism and neo-Kantian formalism that focuses too narrowly upon principles and moral action. James Donahue argues that these moral theories result in a moral discourse that either collapses "...into a type of rote and rationalistic legalism, or (is) 'reductionist' in that it fails to capture the totality of moral experience".<sup>385</sup> Virtue ethics widens the analysis of moral experience by focusing attention on the moral subject or agent as the originator of moral value and action (and by default to a community). In this way, virtue ethics can claim to be more relevant to concrete instances of moral decision-making and behaviour.<sup>386</sup> Nevertheless, recent efforts of virtue ethics do not propose to be new moral theories, nor a replacement of rule and principle-based theories. As Spohn writes "Virtue ethics is not a clear-cut theoretical alternative to Kantianism or utilitarianism because both can be expanded to include virtues".<sup>387</sup> Rather, virtue ethics attempts to focus on those aspects that are missed or undervalued by utilitarian and neo-Kantian theories.

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<sup>385</sup> James Donahue, "The Use of Virtue and Character in Applied Ethics", in *Horizon* 17 (1990), 231.

<sup>386</sup> Spohn describes it this way "Almost all proponents of virtue ethics consider it more adequate than utilitarianism or neo-Kantianism because it provides a more comprehensive picture of moral experience and stands closer to the issues of ordinary life", in "Notes on Moral Theology 1991: The Return of Virtue Ethics" in *Theological Studies*, 53,1991,60-75.

<sup>387</sup> *Ibid.*, 64.

Proponents of virtue ethics claim that a moral analysis of virtue provides a number of advantages. First, the focus on a moral agent's character will reveal the agent's values and commitments since virtues are derived from one's basic convictions about what is true, right, and good. Second, the convictions of a moral agent are developed from one's moral community and tradition. Virtues are expressed or portrayed in the collection of a community's narratives, biographies, and poems. These provide moral agents with examples and illustrations of virtuous people and situations that can facilitate one's choice in living a moral life. Thus, a virtue ethics will broaden moral analysis to investigate a community's literature and history in order to arrive at a comprehensive understanding of the nature and application of virtues. Third, a virtue ethics will be teleological since virtues tend toward human flourishing and the good life. Virtues ethics claims that virtues, more than rules, provide the basis of moral action, since they orientate a moral agent toward human fulfilment. Virtues link the meaning of rules to a community's basic convictions and beliefs.<sup>388</sup> Fourth, a virtue ethics will develop with an account of moral psychology to understand that moral action is a patterned unity of a moral agent's attempt at human flourishing and achievement. This analysis will attempt to account for both the coherence of moral choice and the development of moral living through life cycles and stages.

Virtue ethics, however, is not without its own difficulties and problematic. Donahue discusses six critiques made against virtue ethics. First, while it may be interesting to probe the human psyche and will to discover one's motives and convictions, morality ultimately is concerned with right action. Right action is observable only through the behaviour of a moral agent. This objection to virtue ethics brings the debate to an either/or alternative. It appears that either one must focus on moral action and rules, or one

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<sup>388</sup> See Donahue, "The Use of Virtue", 231.

must focus on a moral agent's motives and virtue. Second, critics of virtue ethics claim that it is unclear exactly how moral stories and narratives actually facilitate moral decision making in concrete situations. Are narratives instructive through intuition, imitation, or analogy? Third, most theories of character ethics have an individualistic focus. It seems that little current research in virtue ethics has focussed on the community's virtue, or the structural aspect of group action and virtue. Fourth, the virtue ethicists' argument that an understanding of the virtues is dependent upon an understanding of a community within which the virtues have meaning can cast virtue ethics within a sectarian framework. This raises the question of whether all virtue is community constitutive, or whether there are universal virtues that transcend particular communities. Fifth, critics claim that the justification of virtues has been imprecise. To justify virtues by appealing to a community's narratives is a circular argument since the truth of a virtue is contained within the narrative. Sixth, the issue of foundationalism versus non-foundationalism is inadequately dealt with in virtue ethics. These issues concern the philosophical justification of virtue ethics within a pluralistic society. These six critiques pose challenges to all theories of virtue and ethics. However, they are not insurmountable if virtue ethics is viewed as complementary with other approaches in moral theory.

Virtue ethics has attempted to improve on utilitarian and neo-Kantian theory by focusing on four key elements: the character of moral agents, community literature and history, teleology, and an account of moral psychology. These are areas which many feel have been left out in previous theory, and should be included in order to provide a better account of the coherence of moral choice and the development of moral living through life cycles and stages. Virtue ethics has encountered several criticisms, some claiming that it lacks an important focus on actions, rules and how moral stories apply to decision making in concrete situations. Others have criticised virtue ethics for being too individualistic, not

accounting for universal virtues that transcend particular communities, inadequately dealing with the issue of foundationalism versus non-foundationalism, and inaccurately justifying virtues.

We turn now to another perspective that also suggests that the deontological perspective of Kant and Rawls and the reflection of their positions on human dignity that are found in public documents discussing genetics are not wholly accepted by significant portions of society. The relatively new school of thought is feminist theory that is becoming an increasingly important aspect of public discourse.

### **3.6 Feminist Skepticism Regarding the Concepts of Dignity and Autonomy**

Most feminists<sup>389</sup> are skeptical about philosophical theories that grant pride of place to rationality, as the essential and primary human attribute. Traditionally, political and moral deliberation are required to be abstract, general, and dispassionate, and moral actors are assumed to be rational, autonomous, independent, and virtually identical. However, historically these attributes of agency have been deemed lacking in women. These theories utilize a conception of persons that has been instrumental in gender oppression, and in the effective exclusion of women (and certain other groups) from public discourse.

In responding to the inherent gender bias in mainstream theories, feminists have been engaged in at least three kinds of activities: active criticism of specific traditional

frameworks; identification of common problematic aspects that appear across the range of traditional theories; and construction of alternative theoretical frameworks which are more inclusive and better reflect the actual, practical lived experience of moral agents. For feminists, traditional frameworks have turned out to be inadequate and flawed.

There are significant problematic aspects related to the traditional privileging of autonomy (and the related concepts of rationality, objectivity, and impartiality) that lead feminists to ask whether autonomy is the correct grounding for human dignity. This does not mean that all feminists reject these values. However, many question the manner in which these concepts have historically been understood to outweigh all other human values, and the implications for women of such an understanding. Some feminists also question whether the capacity for abstract rational deliberation can properly be considered the best, or only, human attribute given credence in moral thinking and action. Specifically, they argue that since persons are formed by and remain immersed in significant relationships of care with others, and with their communities, the capacity for care is at least as important a human attribute as that of rationality.<sup>390</sup> Then, to demand that persons entirely set aside the interests, responsibilities, and commitments that arise from relationships of care is to

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<sup>389</sup>It should be noted that although all feminist theory is concerned with the oppression of women, there is a myriad of streams of feminist thought, and it would be virtually impossible to describe a "typical" feminist perspective. However, the problems we note here with respect to dignity and autonomy are ones which many feminists cite as generally significant and troublesome.

<sup>390</sup>Here is an example where the later work of Rawls in *Political Liberalism* addresses some of the concerns that are raised in the critique of his position.

disrespect critical aspects of human existence. In fact, this sort of thinking seems to embrace a fractured conception of humanity.

The serious questions that arise then, include the following: If the privileging of these certain values means that other, equally human values must be valued as less significant or even discarded, how does this entail respect for humanity *qua* humanity? And, an equally critical question is: how do we know that ascribing priority to some values over others is not arbitrary, reflecting the prerogative of those with power to enforce the values that best serve their interests and maintain their privilege?

In addition, feminists argue that to the extent that traditional philosophy takes "universal man" as its standard of judgment, it imposes a false homogeneity upon humans that cannot take into account the bare facts of difference. The ascription of autonomy and rationality to humans is ostensibly assumed by the modern day heirs of traditional philosophy to apply universally.<sup>391</sup> However, even if autonomy itself could be conceived of as a neutral term, the notion of universality is far from being neutral and merely descriptive. This is because the ideal that underwrites ascriptions of "universality" has usually turned out to be that of the "universal *man*," which takes male defined norms, values, and interests as the sole standards of judgment.

The abstract notion of "universal man" is, of course, meant to stand in for the "human race," but as feminists point out, in practice "human" has traditionally meant "male

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<sup>391</sup>That is, (almost) all persons are assumed to be at least *capable* of autonomous action and thought. In fact, autonomy has been entrenched as a right in most Western Constitutional documents.

humans." Women have been conceived of as so "other" (and so outside the boundaries of normal competencies) that they were traditionally considered irrelevant to moral discourse. Or, alternatively, normative theory implicitly assumes that women can be subsumed within, and are identical to, this universal male model. When normative theory both endorses this universal "masculine" standard, and judges "human" against it, those whose capacities differ will be judged inferior. But for feminists, it is not clear that difference need necessarily indicate inferiority.<sup>392</sup> And in fact there does not seem to be any reason to assume that autonomy and difference cannot coincide, unless one insists on retaining the traditional notion that properly expressed autonomy necessarily leads to consensus among all rational persons.<sup>393</sup> In attempting to deal with these problematic aspects of traditional philosophical discourse, most feminists have concluded that these traditional theories represent inadequate frameworks for answering the critical questions that arise in moral dilemmas.

### 3.6.1 Frameworks

The choice of an adequate framework for moral discourse is not merely academic. That is, it does not just matter to philosophers or theorists. This is because the kinds of concerns, modes of thought, rules, and categories that are included or excluded in moral discourse influence how we as a society think and what we think about. Joan Tronto says:

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<sup>392</sup>This is the motivational force behind communitarianism and other forms of "politics of difference."

. . . the process by which we make some questions central and others peripheral or marginal is not simply a benign process of thought. Theorists' exclusions operate forcefully to set boundaries between those questions and concerns that are central and those that are peripheral . . . theories and frameworks exert a power over how we think. . . Certain ways in which we think about moral life influence what kinds of moral arguments we find persuasive. In this regard, all moral theories have a context which determines the conditions for their relevance.<sup>394</sup>

This is a critical insight. If philosophical theories have a context which influences not only their content (what can be left out, what is required) but the very generation of the theories themselves, then two things flow from this. First, the kinds of behaviors and outcomes that are deemed acceptable (i.e., purely rational deliberation, abstract moral rules) seem somewhat arbitrary, in isolation from the social and political interests that dictated them in the first place. And, contrary to the traditional philosophical assumption that the theoretical categories of "truth" and "knowledge" are essentially neutral, independent of human interests, in fact it looks as if truth and knowledge are socially constructed and context-laden. This is a crucial point, and one that Michel Foucault stressed. Richard Kearney writes:

Foucault did not believe that knowledge was innocent or neutral. Behind the conventional veneration of the knower as a disinterested transcendental knower, Foucault identified ways in which truth was monopolised by certain repressive institutions. This resulted in attempts to circumscribe knowledge in such a manner that whatever surpassed its official limits was categorized as a form of 'deviancy' . . . [by] covert epistemological codes by means of which society contrives to legitimate certain formal practices of knowledge by outlawing others. The history of these strategic divisions into 'official' and 'deviant'

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<sup>393</sup>This is exactly the expectation that underwrites most traditional theories (although possibly not liberalism to the same extent) such as those of Kant, Rawls, Rousseau.

<sup>394</sup>Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993), 4.

modes of experience, into 'normal' and 'abnormal' practices, is characterized . . . as a hidden history of *power*.<sup>395</sup>

If Foucault is correct, then the insistence that the only proper way to morally deliberate is in a rational, detached, and abstract manner is not, in fact, some sort of requirement of epistemological inquiry, but the preferred method of a patriarchal society that has constructed truth and knowledge in a certain image. And deeming certain modes of accessing knowledge and truth as inferior, lacking, or pathological<sup>396</sup> is an expression of the

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<sup>395</sup>Richard Kearney, "Michel Foucault," in *Modern Movements in European Philosophy* (Manchester: Manchester University Press, 1994), 291.

<sup>396</sup>There is a myriad of examples of ways in which patriarchy rejects or brands as inferior, or pathological, differing kinds of moral thought. "Freud . . . considered women incapable of justice because of their commitment to the personal and their unwillingness to evaluate ethical claims in abstraction. Lawrence Kohlberg, in seeking to develop cross-cultural data on the development of moral reasoning . . . deliberately excluded women from his sample groups on the assumption that their inclusion would contaminate the data." Susan Sherwin, "Ethics, 'Feminine' Ethics, and 'Feminist' Ethics," in *A Reader in Feminist Ethics*, ed. Debra Shogan (Toronto: Canadian Scholars Press, 1993), 12. Aristotle, Kant, Aquinas, Rousseau, Hegel, Nietzsche, Sartre all "saw women as having a significantly different character from men, one they considered morally inferior because it was too focused on the particular and inattentive to the level of generality that moral thought was said to require . . . men were equated with reason (the essential feature of morality) and women were associated with inclination (a barrier to moral thought). Women's deficiency. . . was taken as justification for excluding women from active roles in political life, and for limiting their power and influence in the home. Moreover many moral theorists believed that subordination was the natural condition of women and perceived in them a willingness to accept their status passively." (Ibid., 10) And, says Sherwin, in case one is tempted to assume that these are antiquated notions, John Rawls, in *The Theory of Justice*, developed his theory "without attending to the special perspective of women; therefore he proposed having the 'heads' of households represent the interests of the whole family, without acknowledging the tendency of patriarchy to grant men authority to disregard and regularly violate the interests of other family members. Rawls also failed to account for the development of any sexual division of labour." (Ibid., 11) Then, Rawls retains the notion of women relegated to the private sphere, incapable of representing themselves.

kind of power that entrenches rationality and autonomy as the primary values of humans.<sup>397</sup>

Political analysis of this sort, then, is critical to the kinds of questions feminists want to ask with respect to moral agency.

### **3.6.2 The Problem of Ignoring the Ties and Commitments of Social Relationships**

Susan Sherwin engages this type of political analysis in her assessment of the three major approaches to philosophical problems. She argues that because the philosophical approaches are laden with elements that are oppressive and/or exclusionary for women, they need to be replaced with a more inclusive feminist ethics. Her criticisms will serve as a broad overview of the tensions between feminist and patriarchal discourses, especially, for our purposes, with respect to the concept of autonomous personhood. Sherwin presents feminist ethics<sup>398</sup> as an alternative to the three traditional philosophical approaches: consequentialism;

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<sup>397</sup>Similarly, Susan Bordo has argued “precisely by virtue of its dominance, a reigning discourse creates its own sites of resistance and contestation. First, in the very process of establishing its norms, it constructs and defines all those who are deviant as resistant, ‘outside’ . . . of the cultural norm. . . . Dominance emerges *through*, not in the absence of, contestation.” Kathleen Okruhlik, “Birth of a New Physics or Death of Nature?” *Women and Reason*, eds. Harvey and Kathleen Okruhlik (Ann Arbor: University of Michigan, 1992), 148.

<sup>398</sup>Sherwin distinguishes between “feminine” ethics and “feminist” ethics. Feminine ethics is concerned with “how the traditional approaches to ethics fail to fit the moral experiences and intuitions of women . . . [and] how ethics must be modified if it is to be of value to women. . . . Feminist ethics proper . . . applies a specifically political perspective and offers suggestions for how ethics must be revised if it is to get at the patterns of dominance and oppression as they affect women.” (Sherwin, 9-10) Although we appreciate this distinction, in this paper we treat of these criticisms as both falling within the scope of feminism, because I think that moral experience can correctly be conceived of as a political concern, and vice versa.

social contract; and deontological theories. She finds each of these three problematic for, or contributing to, the oppression of women.

Sherwin says that consequentialists (most notably utilitarians), as opposed to deontologists, judge the value of a moral action exactly on the consequences:

“Utilitarians deny that rules should be followed if they result in less desirable outcomes, even if those rules appear rational in the abstract. . . [and] the particular feelings and attitudes of both agents and of those affected by the actions in question should be considered . . . their analysis focuses on concrete experience.<sup>399</sup>

However, as Sherwin notes, consequentialism is still abstract, because:

. . . the rightness of an action is calculated by appeal to the total amount of happiness and suffering created by an act, without regard to whose happiness or suffering is at issue. . . . What is important about persons is their status as bearers of utility: an individual’s relationship to the agent contemplating action and all other qualities that are specifically associated with the individual are of indirect relevance only. . . . Like Kantianism, then, consequentialism has usually been understood to demand a level of impartiality . . . which many people find psychologically unacceptable and morally repugnant. The details of the emotional lives and the relationships of the particular persons affected are rendered irrelevant . . . except insofar as these details contribute to overall happiness or suffering. All persons are essentially interchangeable for the purposes of both moral theories. Specifically, no special role is directly assigned to a person’s status in dominance/subordination relationships. . . . Both theories deny giving special weight to the details of individuals’ positions in dominance hierarchies. This abstract neutrality is objectionable from the perspective of feminist ethics, which demands explicit focus on the social and political contexts of individuals in its moral deliberations.<sup>400</sup>

But if persons are essentially interchangeable, then the kind of human dignity they possess is so abstract that while it might be said to accrue to all persons, it cannot be said to accrue to any particular person in a meaningful way. But if their value lies in their “status as

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<sup>399</sup>Ibid., 7.

<sup>400</sup>Ibid., 8.

bearers of utility" this seems to render persons simply of instrumental value to the common good, rather than as inherently worthy in their own right. One implication of this, of course, is that if persons should lose their instrumental value, then they also lose their worth. So in the case of a person who is incapacitated, for instance, any value he/she would have had would dissipate. And this, as well, is morally repugnant to most people.

Second, Sherwin notes that although social contract theory grants that moral deliberation takes place within (artificial and ideal) social contexts, it assumes that humans are competitive, self-interested, and essentially independent, and that the purpose of moral rules is to protect persons and their property from others.

The ideal moral community . . . is described as being composed of equal, rational, autonomous, independent persons. Generally, social contract theorists do not address the moral status of persons who do not meet these ideal standards, nor do they investigate the nature of the moral relationships that exist among persons of unequal power. Attention to the particular details of the lives of the contractors (for example, family life, status in the hierarchical pecking order, specific skills or disabilities) is generally thought to compromise, rather than enhance, the legitimacy of the contract. . . . By refusing to distinguish between various differences among people, most contractarians proceed as if traits such as gender and race can be treated as being on a par with eye colour; they fail to identify the mechanisms that must be put into place in a currently oppressive society to achieve the quality they presume.<sup>401</sup>

It is clear that for feminists, attention to the "hierarchical pecking order" is crucial, because it is always women and other marginalized groups who occupy the lowest positions. And the dynamics of power critically impact upon whether persons have practical access to conditions of equality in the first place. In addition, the brute fact of

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<sup>401</sup>Ibid., 8-9.

oppression is taken to be morally wrong. However, without analysis of the ways in which the ideal moral community, comprised of ideal moral agents, fosters and maintains the conditions under which oppression can flourish, persons who do not fit the ideal will continue to be oppressed and excluded.

Finally, with respect to deontological theories, Sherwin notes that the conception of women that Kant<sup>402</sup> and many other theorists adopted:

. . . assumed that only men would fully qualify as moral agents. He believed that women--along with children and idiots--were unable (or unwilling) to engage in a process that required them to ignore personal sentiments in their moral decision-making. Because of this 'deficiency', he considered women inferior moral agents, unfit for public life. Rather than accept Kant's view of women as deficient moral agents, feminists generally judge his determination to discount the role of sentiment to be a mark of inadequacy in the theory itself. With many other critics, feminists reject the notion of a moral theory that is wholly detached from concern about consequences.<sup>403</sup>

These theories are characterized by their emphasis on moral rules which cannot take into account consequences (Kantian) or which deny that the consequences can have significant moral relevancy (W. D. Ross). Further, they pay little attention to the moral experiences and relationships of agents, and concentrate on general, rather than the particular, obligations of persons.

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<sup>402</sup>Sherwin uses Kantian ethics as the paradigm of deontological theory, although Kant saw himself as following in the path of social contractarians, especially Rousseau.

<sup>403</sup>*Ibid.*, 6.

### **3.6.3 Implications of Sherwin's Views**

Several problems arise here. Reading Kant one way, it is already clear that when he ascribes autonomy to humans as the basis of human dignity, he does not mean to include women. Then, since autonomy accrues to individual humans exactly because they share in a common humanity, the further implication is that women are not fully human, and so do not have inherent dignity.

Alternatively, one could argue that since Kant does acknowledge that persons cannot lose their autonomy based on failure to properly apply moral rationality, he did not mean to exclude women. However Kant also made clear that one (or society) can judge the moral worth of others' actions and deliberations. And based on such judgment, they can be subject to punishments and sanctions that would entail their loss of freedom, privilege, etc. But if autonomy accrues to agents on the basis of their capacity for rational moral deliberation, and if women are deemed incapable of this sort of thought, then what they are left with is an empty kind of autonomy without power. So, in fact, there would seem to be two levels of autonomy. The first would accrue to men, who are capable not only of engaging in "proper" moral deliberation, but of judging the outcomes of others' deliberations (in the case of women, as inferior outcomes). The second would accrue to women as members of the human race, but inferior members whose dignity is grounded in a capacity that they are deemed, by definition, not able to exercise.

A second problem arises because individual moral experiences and relationships are ignored, and general obligations are stressed over particular ones. Sherwin states that:

... as Cheshire Calhoun (1988) argues, such neglect creates two ideological views about the moral life that amount to an inherent gender bias: most moral theorists imply (1) that it is self-evident that special obligations are less important than the general, impersonal duties . . . and (2) that general, rather than special, obligations are experienced most frequently in the moral lives of persons. The moral lives of women are often taken up with the details of special obligations, yet these concerns are discounted.<sup>404</sup>

But this perspective gives a skewed account of human life. Joan Tronto, who advocates an ethic of care, argues “our account of moral life should provide us with a way to respect and deal justly with others. In order to do so, we must honor what most people spend their lives doing: caring for themselves, for others, and for the world.”<sup>405</sup> As Tronto implies, there is, in fact, a basis for respecting others based on the fact that they are immersed in caring, in exactly the same kinds of ways that we are. But if, as Kant implies, autonomy is a capacity accruing to individuals, and if individuals have dignity exactly because they are autonomous, then how sensible is it to deny or ignore the details of individuals’ lives, and, in essence, give them respect *in spite of* their individual commitments of care?

Then, Tronto continues, because these frameworks of philosophical discourse have generated and/or maintained the notions of truth, knowledge, and moral agency that have historically been used to justify the oppression of women, they are inadequate. In addition, the portrait of autonomous humans who are purely rational, independent of social ties, and essentially identical, has no significant basis in the ways in which real persons live their lives.

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<sup>404</sup> Ibid.

Sherwin says that feminist ethics rejects:

. . . the moral paradigm of moral subjects as autonomous, rational, independent, and virtually indistinguishable from one another; it seems clear that an ontology that considers only isolated, fully developed beings is not adequate for ethics. (Whitbeck, 1984) We must reconceive the concept of the individual, which has been taken as the central concept of ethical theory in Western thought. People have historical roots; they develop within specific human contexts, and they are persons, to a significant degree, by virtue of their relations to others like themselves (Baier, 1985a).<sup>406</sup>

She goes on to say that the valuing of persons is relational and recognizes individuality in a complex web of social relationships and that it is in those relationships that values are learned.

In place of the isolated, independent, rational agent of traditional moral theory, feminist ethics appeals to a more realistic and politically accurate notion of self as socially constructed and complex, defined in the context of relationships with others. Moral analysis needs to examine persons and their behaviour in the context of political relations and experiences, but this dimension has been missing so far from most ethical debates.<sup>407</sup>

It must be noted that Sherwin is not advocating that feminists entirely reject the notions of autonomy, rationality, independence, and universality, although some other feminists have

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<sup>405</sup>Tronto, x.

<sup>406</sup>Sherwin, 19.

<sup>407</sup>Ibid.

argued exactly that.<sup>408</sup> In fact, she argues that rationality (or, as she says here, justice<sup>409</sup>) is a necessary component of ethics.

Feminist ethics . . . [recognizes] that personal feelings, such as empathy, loyalty, or guilt, can play an ethically significant role in moral deliberations . . . [but] the proponents of abstraction are right to insist that there are limits to the place of caring in ethics. We should guard against allowing preferences, especially those tied to feelings of personal animosity, from being granted full range in ethical matters. . . . Morality must include respect for sentiments, but it cannot give full authority to particular sentiments without considering both their source and their effects. Because feminism arises from moral objections to oppression, it must maintain a commitment to the pursuit of social justice; that commitment is not always compatible with preferences derived from existing relationships and attitudes. Hence we must recognize that feminist ethics involves a commitment to considerations of justice, as well as to those of caring.<sup>410</sup>

In addition, Kathleen Okruhlik argues that taking into account the social context of people's actual lives does not, in fact, undermine the philosophical quest for objectivity that arose with the scientific revolution. She says that the critique points out the limits of

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<sup>408</sup>Genevieve Lloyd, for instance, writes that "our trust in a Reason that has no sex has . . . been largely self-deceiving . . . there are not only practical reasons, but also conceptual ones, for the conflict many women experience between Reason and femininity." Genevieve Lloyd, *The Man of Reason: 'Male' and 'Female' in Western Philosophy* (Minneapolis: University of Minnesota Press, 1984), 9. Hilda Smith argues that "reason and learning are traps, catching would-be feminists in the structures, principles, and practices that [are], indeed, a male preserve." By "yearning after the bitter fruit of the male intellectual system, such feminists . . . are buying into a set of values that places men's moral, intellectual and personal development at the center of human experience and defines it as universal." Hilda Smith, "Intellectual Bases for Feminist Analysis: The Seventeenth and Eighteenth Centuries," *Women and Reason*, Harvey and Okruhlik, eds. (Ann Arbor: University of Michigan Press, 1992), 22.

<sup>409</sup>"Justice" here refers to the name Carol Gilligan has given to the abstract, formal, "masculinist" discourse; she calls the relational, situated, and particular discourse the "ethic of care."

<sup>410</sup>Sherwin, 18.

reductionism, which she holds in this case to be particularly crude, and argues for a unified and truly objective account of human experience.<sup>411</sup>

It should be clear from the last comments by Sherwin and Okruhlik that a feminist perspective need not, and should not, abandon all of the values of traditional moral theory out of hand, simply on the grounds that they arise from "masculine" discourse. But the question still remains as to whether autonomy can be reconceptualized to avoid assuming the implications of that discourse: that moral deliberation must abstract from the practical circumstances of human life. Further, the connection between human dignity and autonomy remains unclear. This connection, as it appears in traditional philosophical theories, seems to be somewhat flimsy and arbitrary, when analyzed from a feminist perspective, as I have shown above. However, part of this arbitrariness arises from the manner in which patriarchal discourse has defined autonomy. That is, it assumes that autonomy is best, or solely, expressed through rational, dispassionate, and universalistic deliberation.

#### **3.6.4 The Problem of Universality**

As we noted above, feminists argue that the perspective of humans that results when traditional philosophy takes "universal" man as its standard of judgment is falsely homogeneous, and denies or ignores differences amongst people. This is problematic for at least three reasons. The first, as we noted earlier, is that when women are either subsumed within the category "man" or judged according to certain "masculine" norms, they are

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<sup>411</sup>Okruhlik, 70.

judged to be inferior. And when they are excluded from the category "human" because they do not fit the category "man," they are judged to be the "other" and irrelevant to moral discourse. In either case, their status as persons with inherent worth is significantly compromised. Second, the capacity for autonomy essentially accrues to individuals, and it is traditionally expressed as either the right or the responsibility of individuals to deliberate and decide on the correct moral actions and rules.<sup>412</sup> However, the brute facts of power and privilege guarantee hierarchical and unequal social, economic, and political arrangements. Then, while differential power grants some the privilege of acting on their own moral deliberation, it also constrains others from even the possibility of doing so. But if autonomy is considered to be the primary value of human worth, the worth of some turns out to be less valuable than the worth of others. Then, their specific needs and concerns can be overridden or ignored.

Finally, and following from the assumption that autonomy is both a sufficient and necessary condition of dignity, the implication that arises here is that if persons fail to act on their autonomy (and so fail to express their inherent dignity), this is a failure of the persons (and by extension, of certain groups), rather than a problem within the discourse itself, which unrealistically insists on universality and sameness. With respect to women

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<sup>412</sup>This is most clearly the case, for instance, in Kantian and Rawlsian theory, where individuals initially decide for themselves the principles under which moral decisions are to be made, and then follow those rules because they rationally follow from the principles. However, it is also a structural component in all Western notions of democratic process, where each person is assumed to have access to political deliberation and expression (through voting, or through public debate, etc.), and where it is the responsibility of citizens to inform themselves and form their own rationally defensible opinions.

and other marginalized groups, traditional theories have assumed that such failure must represent a flaw or lapse of moral competency in these persons and/or groups, and then, a justification for excluding them from moral discourse. However, when certain groups are labeled inferior or excluded, they have little power with respect to criticizing, renegotiating, or changing these systems.

Then, the notion of universality, which was originally intended not to exclude any members<sup>413</sup> of society, has become exactly the instrument for such exclusion. In fact, it turns out that the assumption that persons can adopt universally agreeable perspectives is an assumption that only those with privilege can make. Iris Marion Young suggests:

The privileged are usually not inclined to protect and further the interests of the oppressed partly because their social position prevents them from understanding these interests, and partly because to some degree their privilege depends on the continued oppression of others . . . group representation also exposes in public the specificity of the assumptions and experiences of the privileged. For unless confronted with different perspectives on social relations and events, different values and language, most people tend to assert their own perspective as universal.<sup>414</sup>

Young is correct in stating that privilege and oppression are interdependent, one cannot exist without the other. And privilege does prevent persons from understanding the interests of others, differently located. But the critical claim is her last one, that "most people" assert their perspective as universal *unless* different perspectives confront them.

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<sup>413</sup>However "members" of the community were defined at any particular stage.

<sup>414</sup>Iris Marion Young, " Polity and Group Difference," in *Theorizing Citizenship*, ed. Ronald Beiner (Albany: State University of New York Press, 1995), 190.

However, the *choice* of being confronted by different perspectives belongs solely to those with privilege. Bell Hooks, a Black feminist writer, notes that marginalized persons do not have the luxury of either assuming that their perspective is universal, nor of disregarding the perspectives of others.

Living as we did--on the edge--we developed a particular way of seeing reality . . . we focused our attention on the center as well as on the margin. We understood both . . . our survival depended on an ongoing public awareness of the separation between margin and center and an ongoing private acknowledgment that we were a necessary, vital part of the whole. This sense of wholeness, impressed upon our consciousness by the structure of our daily lives, provided us an oppositional world view--a mode of seeing unknown to most of our oppressors.<sup>415</sup>

### 3.6.5 The Perspective of Carol Gilligan

Patriarchal power takes for granted that its values, norms, rules, and definitions are the true ones. However, if the notion of universalizability attaches not to truth, as traditionally thought, but to power, then how do we know that the perspective of those with power are, in fact, correct? And, then why should we take it as a universal truth that the ground of human dignity is rational autonomy? Or for that matter, why should we take it that the correct moral deliberation is rational, dispassionate, and abstract? Or even that women are "naturally" less inclined to think in the ways that traditional discourse considers to be rational?

These are exactly the kinds of questions that Carol Gilligan considers in her critique of the gender-bias apparent in the way in which traditional discourses, including

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<sup>415</sup>Bell Hooks, "Preface," *From Margin to Centre* (Boston: South End Press, 1984), 1.

psychology, judge different modes of moral deliberation. Gilligan has reinterpreted the findings of Lawrence Kohlberg's "categories of moral reasoning" study.<sup>416</sup> She shows that there are inherent biases in his interpretations with regard to the capacities of children to develop moral reason. For one thing, Kohlberg ignored social factors that impact on how persons think. For another, he used male norms and standards to judge moral development. These biases, then, give wrong information about women's abilities and capacities. In fact, Gilligan found that there are at least two specific modes of moral deliberation. In moral dilemmas women respond as follows:

[They] tend to focus on details about the relationships that hold between the individuals concerned, and they seek out innovative solutions to protect the interests of all participants; that is, they strive to find options that avoid bringing harm to anyone. Men, in contrast, tend to try to identify the appropriate rules that govern the sort of situation described; they select the course of action most compatible with the dominant rule, even if someone's interests may be sacrificed to considerations of justice. Gilligan named the former an ethic of responsibility or care, and the latter an ethic of justice. The empirical gender correlations are not perfect . . . but statistically she found that girls and women are likely to choose responses that are sensitive to considerations of responsibility, whereas boys and men are likely to reflect considerations of justice in their analysis.<sup>417</sup>

Feminist response to Gilligan's work was varied. Some accused her of essentializing women, while others embraced the notion that women displayed a different, but equally justifiable mode of moral thought. However, Gilligan herself refused to assert

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<sup>416</sup>Gilligan was a colleague of Lawrence Kohlberg. Kohlberg developed a six-stage theory to study the manner in which moral thinking developed from childhood to adulthood. However, his subjects were all boys, who Kohlberg studied for a period of more than twenty years. When women's moral development is assessed based on Kohlberg's scale, they failed to progress to the higher stages like men did. Gilligan reinterpreted the results in her book *In a Different Voice* (Cambridge: Harvard University Press, 1982).

<sup>417</sup>Sherwin, 12.

that these two modes of thinking could be taken to indicate a gender-based difference in approaches to moral dilemmas.

The different voice I describe is characterized not by gender but by theme. Its association with women is an empirical observation, and it is primarily through women's voices that I trace its development. But this association is not absolute, and the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex . . . no claims are made about the origins of the differences described or their distribution in a wider population, across cultures or through time. Clearly, there are differences that arise in a social context where factors of social status and power combine with reproductive biology to shape the experiences of males and females and the relations between the sexes. My interest lies in the interaction of experience and thought, in different voices and the dialogues to which they give rise.<sup>418</sup>

As Sherwin notes, on deeper political analysis, the claim that these two modes of moral thinking divide along gender lines is further belied. There is evidence that the very social factors that traditional philosophical theories discount as unimportant with respect to proper moral deliberation are, in fact, responsible for certain differences in modes of moral thinking. Sherwin states:

Within dominance relations, those who are assigned the subordinate position, that is, those with less power, have special reason to be sensitive to the emotional pulse of others, to see things in relational terms, and to be pleasing and compliant. Thus the nurturing and caring at which women excel are, among other things, the survival skills of an oppressed group that lives in close contact with its oppressors. . . . Sandra Harding (1987) . . . shows that the orientation and associated worldview that are ascribed to women in Gilligan's study of American women are similar to the orientation and worldview held by contemporary African and Afro-Americans of both genders. The dichotomy of values that Gilligan identifies between men and women is paralleled by a dichotomy between Europeans and formerly colonized peoples. Whatever positive attributes these common traits may hold, the virtues to which women have been shown to aspire seem to be virtues of subordination.

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<sup>418</sup>Gilligan, 2.

Further, the African data reveal that the perspective that Gilligan associates with men is actually held only by some men, specifically those of European descent.<sup>419</sup>

If these virtues of a care ethic are, as Sherwin thinks, virtues of subordination that are displayed by both men and women who occupy positions of little power, then it follows that the kind of practical rational autonomy (independent, abstract, dispassionate) that traditional theory credits to moral agents seems, in fact, to accrue only to those in positions of dominance. This is because, as Bell Hooks pointed out, only the privileged can have the luxury of neglecting the perspectives of others who are different than themselves. Now it looks like patriarchy has, indeed, fashioned autonomy in its own image. But then what happens to the asserted connection between autonomy, rationality, and human dignity? Surely it would be a *reductio ad absurdum* to say that since autonomy is the property of those with relative power, only those persons would have dignity.

To suggest such a thing seems morally questionable. Unless, of course, autonomy, rationality, and dignity do not enjoy the sort of mutually dependent relationship that traditional theory posits. The feminist perspective would contend that these concepts have actually been misapplied in the interest of patriarchal power, an eminently credible theory. Admitting this would mean that the door is open for other aspects of human nature to stand as being the necessary ones upon which dignity is grounded (for instance, meeting the requirements of care for others). And it would admit the moral lives and concerns of women (and others without power) into the realm of moral deliberation "proper," from which they have been historically excluded.

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<sup>419</sup>Sherwin, 16.

On Gilligan's view, the ideal for all moral agents would be an ethics that includes elements of both approaches. Thus it appears that Gilligan supports the assumption, common to Kant, Freud and others, that women focus on the particular, expressing their concern for the feelings and special relationships of the persons involved in moral dilemmas, but unlike Kant and his followers . . . she does not disallow such responses from the realm of the moral. Instead she expands the definition of moral considerations, so that traditional feminine thinking is recognized as morally relevant, rather than deficient. Gilligan thereby includes women's characteristic moral experiences and approach to moral decision-making in the field of legitimate moral thinking.<sup>420</sup>

Earlier we quoted Joan Tronto. Her comments bear repeating here. Tronto said "our account of moral life should provide us with a way to respect and deal justly with others. In order to do so, we must honor what most people spend their lives doing: caring for themselves, for others, and for the world."<sup>421</sup> We note that there does seem to be a basis for respecting others exactly on the grounds that they are immersed in the same sorts of relations of care that we are. Tronto defines care as denoting not only an interest in something, but some kind of engagement and "a reaching out to something other than the self, it is neither self-referring nor self-absorbing . . . care implicitly suggests that it will lead to some type of action . . . semantically, care derives from an association with the notion of burden, to care implies . . . the acceptance of some form of burden."<sup>422</sup> She outlines the ethical elements of care as being attentiveness, responsiveness, competence, and responsibility.<sup>423</sup>

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<sup>420</sup>Ibid., 12-13.

<sup>421</sup>Tronto, x.

<sup>422</sup>Ibid., 102-3

### **3.6.6 Concluding Comments on the Perspective of Feminism**

There are, in fact, good grounds for thinking that an ethic of care might provide the basis for a reconceptualization of the notions of rationality, autonomy, and dignity, and of the relationship among them. If autonomy is to be a central moral value, then one way of expressing one's autonomy is exactly in relationships of care. By this we mean that if, as Tronto says, care means "reaching out to something other than the self," then it would seem that this reaching out can be construed as voluntary, as can the acceptance of some responsibility, some burden. We mean to draw an analogy here with Kant's notion of voluntary action. Voluntary actions are entirely rational, because once one has determined the right course of action, it is irrational not to follow it. Thus, one can be said to follow the moral rules and fulfill the moral duties one has determined to be necessary, as a purely voluntary action. Then, since people exist in contexts of relationships with particular others, and since care is a requirement of all humans, fulfilling this requirement seems like a rational response to those sorts of relationships. And since the response of care (caring for, caring about) is both rational and voluntary, and since rationality is inherently moral, an ethic of care may in fact represent the epitome of moral actions. And while being immersed in relations where care for others is a primary value might disrupt the notion of autonomy as traditionally conceived, it need not disrupt the relationship amongst rationality, autonomy, and dignity, if one accepts that an expanded sense of rationality takes into account the things that humans, as inter-dependent social beings, take to be crucially important. A

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<sup>423</sup>Ibid., 128-136.

strong argument could be made for the claim that it is exactly through taking responsibility for the things we are most strongly committed to and most highly value that we attain the kind of autonomous, rational thinking which, in fact, constitutes the inherent dignity and worth of humans.

This notion of taking responsibility for oneself and one's actions is taken further, and is in fact the central theme in another system of ethical analysis called virtue ethics.

### **3.7 The Legal Perspective: The *Canadian Charter of Rights and Freedoms***

#### **3.7.1 The Relevance of the *Charter* to the Present Discussion**

When the ideas expressed in the types of public documents studied in this work take on prescriptive and/or proscriptive authority as legislation, it is imperative that they conform to the series of rights guaranteed in the *Canadian Charter of Rights and Freedoms*.<sup>424</sup> An exhaustive, or even in depth analysis of the *Charter* and the jurisprudence flowing from it is outside the ambit of this study. However, a cursory discussion of this document will lend itself to our present purposes for several reasons.

First, the expression "human dignity" has found its way into the lexicon of the Supreme Court of Canada jurisprudence interpreting the *Charter*. Second, it has been argued that the *Charter* represents an attempt to avoid the absolutism that a strictly

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<sup>424</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [Hereinafter, *Charter*]. Section 52(2) of the *Constitution Act, 1982* makes the *Charter* part of the Constitution of Canada, and s. 52(1) provides, "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

deontological perspective mandates, and does this by introducing a social cost-benefit analysis. Third, the Court's treatment of the *Charter* has been criticized by some as privileging individual rights and the expense of a more communitarian approach to social governance. We will see that, as is the case with the other public documents studied here, the Court may not have an obvious framework for understanding "human dignity", and thus may be without a principled approach to using it as a way of conducting analysis under the *Charter*.

### 3.7.2 Human Dignity and *Charter* Analysis

The judiciary has recognized human dignity, as a guiding principle for *Charter* analysis, at least as far back as the landmark case of *R. v. Big M Drug Mart*.<sup>425</sup> In *Big M Drug Mart*, a case involving a retailer's right to operate on Sunday, Mr. Chief Justice Dickson said:

It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is the same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.<sup>426</sup>

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<sup>425</sup> [1985] 1 S.C.R. 295

<sup>426</sup> *Ibid.*, at S.C.R. 347

Similarly, in the famous case of *R. v. Morgentaler*<sup>427</sup> in which it was held that a provision of the *Criminal Code* outlawing abortions was unconstitutional, Madame Justice Wilson said in her concurring judgment:

The *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity. Professor Neil McCormick, Regius Professor of Public Law and the Nature of Nations, University of Edinburgh, in his work entitled *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (1982), speaks of liberty as “a condition of human self-respect and of that contentment which resides in the ability to pursue one’s own conception of a full and rewarding life.”<sup>428</sup>

Thus, human dignity was positioned early on as a concept underlying the *Charter*, a concept that the Supreme Court has used in judging the constitutionality of Acts of Parliament and the several Provincial Legislatures. Some authors contend, and it would seem logical for them to do so, that matters of public policy concerning the use of genetic technologies will become the subject of constitutional litigation in the years ahead.

Professor Roxanne Mykitiuk writes:

While it is certain that economic considerations will play a key role in future government decisions about the allocation and use of genetic resources, these considerations will be tempered and constrained by the individual rights and freedoms guaranteed under the *Charter*.<sup>429</sup>

Recent statements from the Court evidence that the justices have already begun thinking about human dignity in the context of obtaining body samples for forensic

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<sup>427</sup> [1988] 1 S.C.R. 30

<sup>428</sup> *Ibid*, at S.C.R. 172

<sup>429</sup> R. Mykitiuk and S. Penney, “Screening for ‘Deficits’: The Legal and Ethical Implications of Genetic Screening and Testing to Reduce Health Care Budgets.” (1995) 3 *Health L.J.* 235 at 268.

analysis. In *R. v. Stillman*<sup>430</sup>, Mr. Justice Cory said, “The taking of bodily samples was highly intrusive. It violated the sanctity of the body which is essential to human dignity.”<sup>431</sup>

Similarly, in *R. v. Dyment*<sup>432</sup>, Mr. Justice La Forest wrote, “The use of a person’s body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity.”<sup>433</sup>

### **3.7.3 The *Charter* Was Intended to Strike a Balance Between Individual Liberties and Social Values**

It has been recognized in the jurisprudence and academic literature that while the American *Bill of Rights* tends towards absolute individual rights, the *Charter* represents and attempts to curb the harsh results that sometimes flow from the unfettered supremacy of autonomy. Professor Patrick Monahan, one of Canada’s leading academics on constitutional theory, distinguishes the Canadian and American entrenchment of individual liberties within their respective constitutions:

The second fundamental value which I claim underlies the *Charter* is a related one – that of community. The communitarianism implicit in the *Charter* should not be regarded as an attempt to ignore or obliterate individuals. On the contrary, this communitarianism is premised on the belief that it is only through political communities that individuals define and develop their own individuality. As such, it rejects the simplistic assumption that there is an inevitable contradiction between individual and community. By enhancing the opportunities for communities to define their common identity, we can simultaneously enrich the lives of individuals in those communities.

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<sup>430</sup> [1997] 1 S.C.R. 607.

<sup>431</sup> *Ibid*, at para 51.

<sup>432</sup> [1988] 2 S.C.R. 417.

<sup>433</sup> *Ibid*, at 417

. . . What is apparent is that the drafters of the *Charter* either rejected or modified many of the elements found in the American *Bill of Rights* . . . certain distinctively Canadian elements were included in the *Charter*; these elements were directed towards protecting communitarian and democratic values.<sup>434</sup>

The advancement of communitarian over individualist values is seen throughout the text of the *Charter*. Several provisions throughout the document provide for a balancing of individual and community interests before a law may be struck down as unconstitutional. The most identifiable example of the communitarian influence in the *Charter* however, is section one. Until this provision was copied by New Zealand in its 1990 *Bill of Rights*, Israel in its 1992 *Basic Law on Human Dignity and Liberty*, and South Africa in its 1996 *Bill of Rights*, it was a very unique constitutional balance between the enjoyment of individual liberties, and the maintenance of broader social values. We will return to discuss this section shortly, but first we look to one of the most frequently cited differences in legal practice between Canada and the United States: the respective treatment of evidence obtained unconstitutionally.

In the United States, the operation of the so-called “fruit of the poisonous tree” doctrine excludes any and all evidence that is obtained in violation of a constitutional right of an accused. This was affirmed by the Mr. Justice Day of the United States Supreme Court in *Weeks v. United States*<sup>435</sup>:

The tendency of those who execute the criminal law of the country to obtain conviction by means of unlawful seizures should find no sanction in the judgments

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<sup>434</sup> P. Monahan, *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada*. (Scarborough: Carswell, 1987) at 99.

<sup>435</sup> 232 U.S. 383 (1914).

of the courts. To sanction [such seizures by allowing evidence from them] would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibition of the Constitution, intended for the protection of the people against such unauthorized action.<sup>436</sup>

The United States' exclusionary rule has been extensively criticized for allowing even the smallest violation of an individual right as grounds to return an otherwise guilty person to the community.<sup>437</sup> Accordingly, the framers of the *Charter* were careful to draft section 24(2) as a means of admitting this type of ill-gotten evidence if, in the estimation of the court, the social benefit of allowing it into evidence would outweigh the prejudice that had occurred to the individual right of the accused. The section provides:

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.<sup>438</sup>

Underscoring the communitarian element of this section are the words of Justice

Lamer in the leading case interpreting it, *R. v. Collins*<sup>439</sup>, wherein he said:

The concept of disrepute necessarily involves some element of community views, and the determination of disrepute thus requires a judge to refer to what he considers to be the views of the community at large.<sup>440</sup>

As referred to earlier, section one is the most cogent evidence of communitarian values in the *Charter*. It gives the State the opportunity to justify the enactment of a law

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<sup>436</sup> *Ibid.* at para.35.

<sup>437</sup> J.C. Morton, *Pocket Guide to Evidence*. (Toronto: Butterworths, 2000).

<sup>438</sup> *Charter*, s.24(2).

<sup>439</sup> [1987] 1 S.C.R. 265.

<sup>440</sup> *Ibid.* at 281, quoting G. Gibson, *The Law of the Charter: General Principles*. (Calgary, Carswell, 1986) at 246.

that has been found to infringe one of the guaranteed rights. The section says:

*The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Chief Justice Dickson in *R. v. Oakes*<sup>441</sup> formulated the legal test for justification under this section. While an analysis of the actual test<sup>442</sup> is outside the scope of this study, it does merit comment here as it has been cited as an example of the *Charter's* avoidance of strict individual rights-based ordering. Professor Dwight Newman writes:

This reasoning [including that in *Oakes*] creates tests that seem deontological but that, in reality, involve powerful consequentialist undercurrents . . . A deontological test would determine the legitimacy of limits on rights based on normative conceptions of rights and responsibilities rather than based on consequences. A consequentialist test would determine the legitimacy of limits on rights based solely on the consequences of allowing those limits. These flow from the more

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<sup>441</sup> [1986] 1 S.C.R. 103.

<sup>442</sup> For completeness, we note the Chief Justice's words here, reported at S.C.R. 107: "The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance . . . To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" . . . Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test" . . . Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

fundamental precepts of these ethical schools. Deontology considers morality as based on duty; consequentialism considers morality as based on consequences.<sup>443</sup>

### **3.7.4 Critique of the Supreme Court's Emphasis on Individual Rights and the Concurrent Under-Emphasis of Community Values**

As we have seen, the text of the *Charter* suggests that it was intended as a document that would avoid the unshackled operation of autonomy to trample *bona fide* community values at each turn. However a body of criticism has emerged that accuses the Court giving privilege to individual rights in a way that, the critics claim, was not intended by the framers of the *Charter*. Again, we do not wish to engage in a full-scale analysis of *Charter* jurisprudence with a view to testing this proposition; an undertaking such as this would be both lengthy and well beyond the scope of our study. We simply note here that it is not entirely clear that the communitarian objectives of the *Charter* have been realized.

Professor Kent Roach writes:

The Court's early approach to the *Charter* was shaped primarily by three judges: Chief Justices Brian Dickson and Antonio Lamer and Justice Bertha Wilson . . . In an extraordinary public interview, Justice Michel Bastarache, a former law dean who was appointed by Prime Minister Chretien in 1997 and who remains the youngest member on the Court, indicated that he has been "more conservative than the majority of the court over the last few years," in particular, the recently retired Chief Justice Lamer. In Justice Bastarache's view, the Court has gone "too far" in inventing an exclusionary rule beyond the level Parliament intended and in protecting "ill-defined" Aboriginal rights. It should be careful not to extend rights beyond the area "Parliament really wanted to protect" or to have its legitimacy

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<sup>443</sup>D. Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of the *Oakes* and *Sparrow* Tests", (1999) 62 *Sask. L. Rev.* 543 at 544.

question by being “consistently seen by a majority of the people as going too far, as extending rights, as having . . . an agenda . . . that’s not something we want”.<sup>444</sup>

In an in-depth account of academic deconstructions of the *Charter*, Bryce Tingle notes that many scholars take issue with those who would over-emphasize the importance of communitarian principles in the *Charter*. Says Tingle, “The complaints in the academic literature surrounding the Charter all boil down to the concern that the Charter has picked up this hierarchy [of the individual over the society] from liberalism.”<sup>445</sup>

After enumerating the arguments put forth as justifying this view that the *Charter* is essentially an embodiment of liberal values, Tingle approaches the matter from the other side and looks at the claims a society has against the individual. The result, he finds, is equally unsatisfying. The author writes:

This is the condition of aporia. It is when we discover that any privileged position between the individual and the community is an illusion. The individual depends on the community much like we thought the community depended on the individual. Indeed, we have seen that the very reason that the individual is usually privileged over the community in the Charter would suggest that the community be privileged above the individual. We should also have the feeling that it is impossible to make the kind of sharp distinction between the individual and the community that the Charter requires. The individual and the community apparently collapse into each other at a variety of points.

. . . This poses certain problems for the law. The law promises justice in the form of conclusions rationally derived from morally acceptable premises. Neither the community nor the individual are morally acceptable starting points. To start reasoning from the individual is to privilege the individual over the community, which is morally indefensible. The community embodies a great many ethical

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<sup>444</sup> K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*. (Toronto: Irwin Law, 2001) at 4, quoting Justice Basterache in C. Schmitz, “Supreme Court goes ‘too far’: Judge,” *National Post*, 13 January 2001, A1, A7.

<sup>445</sup> B.C. Tingle, “Redeeming the Promise of Our Laws,” (1992), 4 *Alta. L. Rev.* 1324 at 1329.

values. To start with the community on the other hand, is to privilege it over the individual. The individual also has moral claims to being recognized and kept separate from society.<sup>446</sup>

### 3.7.6 Concluding Remarks on the Contribution of the *Charter* to the Present

#### Discussion

What then can we conclude from the forgoing cursory examination of the *Charter* and the judiciary's experience with it? Some, like Professor Monahan, would contend that the *Charter* introduces into Canada a guarantee of personal rights that, unlike the American Bill of Rights, is designed to extend due regard to communitarian values. On the other hand, we must account for the dissent from this view. These dissenters, both academics and jurists, have expressed discontent that the Court has interpreted the *Charter* as giving too much privilege to individual rights. Tingle suggests this leads us to the condition of *aporia*. How should the Court precede? If primacy of the individual and primacy of the society are both morally indefensible means of approaching *Charter* analysis as he suggests, what does this mean for the Court's understanding of human dignity which, as we have seen, is held up as a bedrock principle of this constitutional document.<sup>447</sup> We contend that, as with the public documents reviewed in Chapter Two, an ambiguity exists in the Supreme Court's understanding of human dignity as an underlying principle of the *Charter*. In Chapter Four, we will suggest an approach that may go some distance to resolving the *aporia* described by Tingle.

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<sup>446</sup> *Ibid.* at 1332

### **3.8 Human Dignity: Reflections from Philosophy and Public Policy**

We have suggested above that many public policy statements speak of human dignity but the work usually lacks explicit statements about the content and the meaning of this phrase. However, we have suggested that it may be possible to discern some of the content of the phrase “human dignity” intended by these documents, the expression’s relationship with autonomy and make some sense of the individual and social meanings attached if we can connect the documents and their perspectives with the writings of several influential philosophers and their discussions concerning human dignity. We have seen that both Kant and Rawls can supply us with a sense of the content of the expression human dignity, although it is not always satisfying; we have seen how they relate dignity and autonomy. Much less clearly do they address the individual/social tension that we have observed. We have also seen that the Feminist philosophy outlined above does not rest easily with the two major philosophers discussed nor do the works of communitarians or the school of virtue ethics. The purpose of this portion of our exercise is to identify the philosophical bearings of each contributor and if possible, the policy initiatives in which they are reflected.

#### **3.8.1 Immanuel Kant**

Some philosophical reflections on dignity, particularly Kant’s thought, speaks of dignity as an incomparable worth. It develops the notion that humans are not commodities,

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<sup>447</sup> See notes 431 and 433.

and cannot be used solely as means to ends, as they themselves are ends. Several Canadian, American, and French policy advisory bodies have discussed human dignity in relation to the new reproductive technologies. We found the notion of incomparable worth reflected in the Canadian and French work, but nearly absent in that of the Americans.

We previously cited Thomas Hill on the work of Kant. He interprets two important points in Kant's account of human dignity. First, human dignity is something that is valued by perfectly rational persons, and second, dignity is of incomparable worth.<sup>448</sup>

This idea (albeit *much* less developed) is frequently echoed in several public documents by the CCNE. In fact, we would go so far as to say it forms a cornerstone of the CCNE's interpretation of dignity. This is demonstrated in the following passages:

To have respect for the human person - whether in others or in oneself - is, according to a generally accepted principle, to treat it as an end in itself and never as an instrument. As a consequence, the human person must never be treated in a way he would not freely accept for himself. It means recognising the dignity of the human person and therefore considering it to be of incommensurate value.<sup>449</sup>

The fact that the human embryo is recognised only as a potential human person does not make the obligation of respect for that embryo optional. Therefore, potential or not, the human person has a dignity and not a price. This leads to consider absolutely unethical any commercial practice in relation with the human embryo.<sup>450</sup>

Even with the consent of genitors, fertilisation should not be done for research purposes alone. If it were, human embryos would purely and simply be used as tools or objects, and human dignity, which must override scientific research, would not be respected.<sup>451</sup>

And finally:

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<sup>448</sup>Hill, 47-48.

<sup>449</sup>CCNE, Opinion No. 8.

<sup>450</sup>Ibid.

<sup>451</sup>Ibid.

When it is said that the human body is not for sale and not on the market, the two statements are complementary: on the one hand, the human body or one of its components cannot be the object of a contract, on the other hand, it cannot be negotiated by anyone. . . Human dignity is at stake if financial gain becomes the result of physical weakness, however temporary.<sup>452</sup>

In the Canadian context, similar statements are made by the Royal Commission on New Reproductive Technologies, and by the Tri-Council. The Royal Commission writes:

. . . the principle of non-commercialization of human beings and human reproduction is largely a conclusion from the other principles, such as equality, protection of the vulnerable, and respect for human life and dignity.<sup>453</sup>

As we have emphasized throughout this report, it is inappropriate for decisions involving human reproduction to be motivated by the prospect of financial gain. Thus, the buying and selling of gametes and zygotes would be unacceptable, and we recommend their prohibition. This prohibition is essential, not only as a matter of respect for human dignity, but also to protect anyone who might be pressured or induced to sell gametes or zygotes.<sup>454</sup>

. . . they [commercial preconception arrangements] offend human dignity by commodifying women's reproductive capacities and commodifying children; they contradict the principle that human reproduction should not be commercialized in any way.<sup>455</sup>

Similarly, the Tri-Council declared: "It is unacceptable to treat persons solely as means (mere objects or things), because doing so fails to respect their intrinsic human dignity."<sup>456</sup>

As we observed, sparse reference to the idea of "incomparable worth" is to be found in the American documents under consideration. However, one allusion is made in the

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<sup>452</sup>CCNE, Opinion No. 21.

<sup>453</sup>Royal Commission on New Reproductive Technologies, 53.

<sup>454</sup>*Ibid.*, 643.

<sup>455</sup>*Ibid.*, 683.

<sup>456</sup>Tri-Council, i.5.

NBAC's 'Report on Cloning'. The authors assert: "Objectification. . . represents a fundamental breach of human dignity. To treat persons who are the sources of genetic material for cloning as mere objects, means or instruments violates the religious principle of human dignity. . ."<sup>457</sup>

### 3.8.2 Autonomy

A recurrent problem in the public documents reviewed here seems to be the term "autonomy." We say this is problematic because of the inconsistent manner in which it is used. We discussed autonomy at length above, and described the theories of it according to Kant and Rawls with comments from other schools of thought.

The Canadian, American, and French advisory bodies essentially shared the same operational definition of autonomy: self-rule. Consider the Law Reform Commission's statement: "Autonomy, meaning self-rule, generally refers to a view that we have of ourselves and of others as being self-governing."<sup>458</sup> Similarly, the *Belmont Report* decrees: "An autonomous person is an individual capable of deliberation about personal goals and of acting under the direction of such deliberation."<sup>459</sup>

We clearly established above that autonomy and dignity are related yet distinct concepts. We believe that dignity is a later concept [than autonomy] that can be sorted out through a discussion of autonomy which has a longer history and that the two terms are

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<sup>457</sup>NBAC, 50.

<sup>458</sup>Law Reform Commission, 64.

<sup>459</sup>*Belmont Report*, Basic Ethical Principles.

related. Hill writes: “Autonomy is said to be the ground of dignity, and this is a property of the will of every rational being, namely, the property of legislating to oneself universal (moral) laws without the sensuous motives of fear, hope for reward and the like.”<sup>460</sup>

Herein lies the problem with the use of autonomy in the public documents. Very rarely do they seek to define its relationship to human dignity. As we saw from Hill’s work it is clear that if dignity is grounded in autonomy, the two cannot be identical. These documents make frequent reference to “dignity and autonomy” but do not suggest a basis for their relationship, other than an intuitive one.

We attempted to unfold Kant’s relationship between autonomy and dignity. It is no mean task, and we repeat it in summary here: When one considers the relation of dignity and autonomy, it is clear that human dignity establishes and requires a moral duty on the part of all persons. Autonomy, as the grounds of dignity, is a property of the will. It belongs, without exception, to all rational beings (all humans). Autonomy is ‘the property of legislating to oneself universal (moral) laws without the sensuous motives of fear, hope for reward and the like’. Here, again, it is important to note that autonomy accrues to persons because of the activity of legislating such laws, but it is not dependent on the outcome of such legislation (i.e. one does not lose autonomy on the basis of legislation of faulty or mistaken laws). And again, one need not respect these outcomes, but one must always respect the autonomous will of the person who has derived them. So while respect for outcomes is, in a sense, a hypothetical imperative (in the way described above) respect

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<sup>460</sup>Hill, 47.

for autonomy is a categorical, essentially moral, imperative. Then, because moral deliberation has rationality built in. . . humanity is integrally committed to morality a priori, and this fact establishes moral duty on the part of humans. And, for Kant, it establishes the moral duty to respect the inherent dignity of persons.

It is evident that the public documents generally regard autonomy and dignity as separate concepts, because of their usage in the manner we describe earlier. However, as a whole, they do not attempt to establish the idea that dignity is grounded in autonomy (via rationality and morality, as described by Kant). There are, however, two notable exceptions. The Law Reform Commission suggests that autonomy is the basis for dignity, as it states: “. . . the utilitarian approach in human genetics would undermine the freedom of choice (autonomy) and consequently, respect for human dignity.”<sup>461</sup>

In its statement on cloning, the NBAC writes: “The concepts and norms associated with human dignity cannot be reduced to secular ideas of autonomy, even though they may overlap to some extent. Human dignity (which the NBAC views as a religious principle) sets more limits than autonomy does on what the agents may do.”<sup>462</sup> Interestingly, at least a large part of the motivation for the notion of self-governance as a moral notion came from the necessity to establish it more firmly as a religious notion. Religious self-governance is a limited form of autonomy because one still depends on God as the final authority, and the granter of rationality and faith in the first place.

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<sup>461</sup>Law Reform Commission, 64-65.

<sup>462</sup>NBAC, Religious Perspectives, 52.

The NBAC statement regarding autonomy and dignity appears at odds with the Kant's theory. It suggests that human dignity sets limits on what people may do. In fact, this seems counterintuitive to autonomy. Kant argued that autonomy accrues as we legislate universal laws to ourselves, and our capacity for rational thought in doing so establishes us as moral agents, and thus possessors of dignity. The NBAC's position describes a scenario wherein religious precepts actually restrict our ability for self-rule, and thus retard our basis for human dignity (i.e., the NBAC's view of human dignity actually diminishes human dignity as theorized by Kant).

### **3.8.3 Feminist Ethics, Virtue Ethics and the *Charter***

We also have included a discussion of feminist theory on human dignity and autonomy. Essentially, this theory calls into question Kant's assessment of these issues. It questions his assertion that autonomy is the correct grounding for human dignity and that rationality is the only true form of moral deliberation. Feminist theory proposes that the ability to care for others is equally important to human dignity. They are also critical of Kant's failure to assign special roles and obligations to persons in regards to their position in a dominance/subordination relationship.

There are instances where the documents recognize the need to evaluate a person's status in dominance/subordination relationships, rather than look upon them with the impartiality demanded by Kant. As we saw earlier in a passage from Susan Sherwin, she denounces consequentialism for being abstract, claiming such a high level of impartiality is unacceptable to feminist ethics because it reaffirms, without admitting it,

dominance/subordination relationships in society. It perpetuates a patriarchal society, and denies the existence of one of society's main necessities, which is to focus on care relationships.<sup>463</sup>

This notion is reflected in a particular statement in the NBAC's *Report on Cloning Human Beings*.

However, the more a reproductive choice is not simply the determination of one's own life but the determination of the nature of another, as in the case of cloning via somatic cell nuclear transfer, the more the interests of that other person—that is the resulting child—should carry moral weight in decisions that determine its nature. . . . In addition to the parents and child, reproduction is also a communal phenomenon. It thrusts a new person in to the world, and the whole community has obligations for this new member's well being.<sup>464</sup>

Here, explicit attention is given to the dominance/subordination relationship (parent and clone) and the requirement that the interest of the subordinate carry moral weight.

Sections of the Law Reform Commission of Canada's *Human Dignity and Genetic Heritage* also appear to be influenced by feminist thought. In much the same way as the *Report on Cloning* does, this paper recognizes a dominance hierarchy in society, and the necessity to prevent discrimination based on it.

Despite the strong criticism that has been leveled at biological determinism, it seems to underlie certain proposals to justify budget cuts for welfare and education, to support restrictive immigration policies and to prevent equality in the workplace. According to this position, the existing hierarchy is natural and inevitable, since it is based on intrinsic heredity factors. All the more reason to appeal to a system of justice and political order to redress inequalities.<sup>465</sup>

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<sup>463</sup>Sherwin, 8.

<sup>464</sup>NBAC, 77.

<sup>465</sup>Law Reform Commission, 45-46.

Here again, Sherwin's criticism of Kantianism is valid, because complete impartiality in determining the obligations of individuals would not address the inequalities in such a dominance hierarchy. The Commission suggests the following as one means of dealing with the social hierarchy that exists in the possession of knowledge:

The first founding principle of the new social contract is reciprocity, or exchange. It recognizes a "difference", that is, an inequality between the knowledge held by ordinary individuals and that held by practitioners of medical genetics. Justice requires that such knowledge be redistributed in a way that is beneficial to the less well-informed, that is, the ordinary citizen. A redistribution is essential to ensure that knowledge of medical genetics is not used by the state to impose decisions on individuals and to monitor their compliance. To ensure that it is the least advantaged who benefit from this exchange of knowledge, the exchange is best conducted within the physician-patient relationship, which has traditionally provided protection for the patient.<sup>466</sup>

In its criticism of utilitarianism, the Law Reform Commission writes: "this cost-benefit approach embodies a high standard of rationality. We know, however, that workplace or career choices are often seen by others as 'irrational'."<sup>467</sup> We would argue that this marks a contribution by feminist theory to the work of the Commission, but we do not stop here.

We also discussed the problem of universality. As we noted above, feminists argue that the perspective of humans that results when traditional philosophy takes 'universal' man as its standard of judgement is falsely homogeneous, and denies or ignores differences amongst people.<sup>468</sup> Returning to the Commission's appraisal of utilitarianism, we note the following: "utilitarianism reduces all human goods or choices to a single scale rather than

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<sup>466</sup>Ibid., 69.

<sup>467</sup>Ibid., 65.

recognizing the diversity of human behaviours and choices.”<sup>469</sup> Again, a case can be made for the influence of feminist theory here.

Similarly, the approaches outlined above in the section on Virtue Ethics demonstrate that there are understandings of human dignity that while acknowledging the deontological approach of Kant and Rawls find it insufficient and propose an approach and understanding that specifically requires the inclusion of the social and historical relationships of persons as integral to our understanding of their being and their dignity. This again draws into question the sufficiency of the public documents’ understanding of human dignity as it becomes increasingly clear that a purely deontological approach is not universally acceptable. Our discussion of the Canadian legal scene, with particular reference to the Charter and the decisions of the Supreme Court of Canada also underscore the point that there is no general agreement on the nature of the relationship between the social and individual meaning attached to human dignity and that there remains an unresolved tension between the two. We suggest here that as it is true in the formulation of the law and the judgements of the courts, so too is it to be found in the development of public policy. Moreover, we suggest that merely developmental approaches to public policy that avoid hard values decisions particularly in hard areas such as genetic technologies will not resolve the problem. In a sense the approach of Rawls to the issue of a social contract attempts to address this, but as we can see from the inclusion of this notion in public documents, in the end does not.

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<sup>468</sup>See note 391.

### 3.8.4 John Rawls's Social Contract

Rawls describes his social contract as follows:

This initial situation is fair between individuals as moral persons, that is, as rational beings with their own ends and capable, I shall assume, of a sense of justice. . . . Justice as fairness begins. . . with one of the most general of all choices which persons might make together, namely, with the choice of the first principles of a conception of justice which is to regulate all subsequent criticism and reform of institutions. . . the persons in the initial situation would choose two rather different principles: the first requires equality in the assignments of basic rights and duties, while the second holds that social and economic inequalities . . . are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society. . . . Once we decide to look for a conception of justice that nullifies the accidents of natural endowment and the contingencies of social circumstances as counters in quest for political and economic advantage, we are led to these principles. They express the result of leaving aside those aspects of the social world that seem arbitrary from a moral point of view.<sup>470</sup>

Essentially then, a system of justice is consistent with the Rawls model if it ensures the following (as summarized in *Human Dignity and Genetic Heritage*):

- each person has the most extensive liberty compatible with a similar liberty for others;
- equality in opportunity; and
- any inequality resulting from differences in natural ability or merit would be adjusted in a way that would give the greatest benefit to the least advantaged.

Several of the advisory bodies discuss a system or systems of justice in their documents, and we have looked for any of the above three elements in them.

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<sup>469</sup>Law Reform Commission, 65.

<sup>470</sup>Rawls, *Theory*, 12-15.

The *Belmont Report* describes justice in relation to research on human subjects. It states:

. . .the selection of research subjects needs to be scrutinized in order to determine whether some classes (e.g., welfare patients, particular racial and ethnic minorities, or persons confined to institutions) are being systematically selected simply because of their easy availability, their compromised position, or their manipulability, rather than for reasons directly related to the problem being studied. Finally, whenever research supported by public funds leads to the development of therapeutic devices and procedures, justice demands both that these not provide advantages only to those who can afford them and that such research should not unduly involve persons from groups unlikely to be among the beneficiaries of subsequent applications of the research.<sup>471</sup>

The most identifiable feature of the social contract theory in the *Belmont Report's* treatment of justice is equality in opportunity.

The CCNE also addresses justice, and for this we turn to their Opinion No. 38: *The ethics of research in the sciences of human behaviour*. This opinion contains a section titled "Justice. Human Dignity," which says:

. . . scientific research must never involve exploitation of poor populations in developing countries, which serve as 'guinea pigs' for the acquisition of knowledge, whose therapeutic spin-offs are of benefit mainly to populations in rich countries. . . . It then serves to recall, as the CCNE has done . . . that participation in a research protocol calls for 'fair indemnity' or 'compensation' for the subjects . . .<sup>472</sup>

Again we see equality in opportunity here, but the other two features of Rawls's theory are not strongly emphasized.

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<sup>471</sup>*Belmont Report*, Basic Ethical Principles.

<sup>472</sup>CCNE, Opinion No. 38.

The Law Reform Commission of Canada, perhaps more than any other institution included in this study, is strongly influenced by the social contract model of justice. They write:

If knowledge of genetic differentiation will permit the development of the social contract from a position of informed “genetic equality” as we have suggested, what additional ethical principles should contribute to a formulation of the social contract? Two founding principles are suggested, the first being that of reciprocity - of exchange, and the second being that of mutuality - of civic responsibility.<sup>473</sup>

The principle of reciprocity is primarily concerned with the third aspect of Rawls’s theory, that any inequality resulting from differences in natural ability or merit would be adjusted in a way that would give the greatest benefit to the least advantaged (or “the difference principle”<sup>474</sup>). The Commission describes reciprocity as follows:

The first founding principle of the new social contract is reciprocity, or exchange. It recognizes a “difference,” that is, an inequality between the knowledge held by ordinary individuals and that held by practitioners of medical genetics. Justice requires that such knowledge be redistributed in a way that is beneficial to the less well-informed, that is, the ordinary citizen. A redistribution is essential to ensure that knowledge of medical genetics is not used by the state to impose decisions on individuals and to monitor their compliance. To ensure that it is the least advantaged who benefit from this exchange of knowledge, the exchange is best conducted within the physician-patient relationship, which has traditionally provided protection for the patient.<sup>475</sup>

We also noted that reciprocity was in line with feminist theory, because it recognized a dominance/subordination relation and the need to give special consideration to those with less power.

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<sup>473</sup>Law Reform Commission, 69.

<sup>474</sup>Ibid., 67.

<sup>475</sup>Ibid., 69.

The second principle of the Commission's new social contract model, mutuality, is most closely affiliated with the first aspect of Rawls's theory, namely that each person has the most extensive liberty compatible with a similar liberty for others.

The second founding principle of the new social contract is mutuality or civic responsibility. It recognizes that genetic diseases affect not only individuals but also families and communities. Recognition of that fact gives rise to a need for a responsible sharing of genetic information. Thus, mutuality is based on the principle of beneficence and is compatible with the principle of liberty or free choice which 'implies proper regard for the responsibility of individuals.'<sup>476</sup>

Finally, we turn to the Royal Commission's report on new reproductive technologies. In it they outline their "guiding principles," and several of these reflect the social contract theory.

Rawls's assertion that each person should have the most extensive liberty compatible with a similar liberty for others may be the basis for the principle of "balancing individual and collective interests." According to the report:

This principle reflects our belief that both individual and collective interests are worthy of protection, and that individual interests do not automatically take precedence over collective interests, or vice versa. The individual interests with which we are concerned include that of women or couples seeking assisted conception or prenatal diagnosis services, those of gamete donors, and those of children born as a result of a new reproductive technology. The collective interests include those of society as whole, as well as those of identifiable groups within society, such as women, children, people with disabilities, and members of racial and ethnic minorities.<sup>477</sup>

Rawls's idea of equality in opportunity is represented by the Commission's principle of "equality," of which it says:

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<sup>476</sup>Ibid., 70.

<sup>477</sup>Royal Commission on New Reproductive Technologies, 57.

The principle of equality means that every member of the community is entitled to equal concern and respect. The view that the well-being of each person matters and matters equally precludes any social practice that reflects or perpetuates the assumption that some people's lives are worth less than others. Adopting the principle of equality keeps this tenet in view.<sup>478</sup>

The third aspect of the social contract is the idea that any inequality resulting from differences in natural ability or merit would be adjusted in a way that would give the greatest benefit to the least advantaged. The Commission's principle of "protection of the vulnerable" recognizes the fact that not all Canadians share the same social status, and that safeguards must be in place to offset status inequalities that may arise:

Vulnerability relates to power imbalances, and this principle requires that the welfare of those who are less capable of looking after themselves or who are open to exploitation for various reasons be given special consideration. . . . Society . . . has a responsibility to ensure that vulnerability is reduced where possible and that those who are vulnerable are not manipulated or controlled by those in positions of power and authority.<sup>479</sup>

### 3.8.5 Concluding Analysis

As with Chapter 2, in this chapter, in exploring the perspectives on human dignity and the related notion of autonomy from the point of view of philosophy, we are able to move forward somewhat in discovering the content and meaning that the expression "human dignity" might have in the public documents and as a tool for decision making regarding the use of genetic technologies. The public documents demonstrated that even in their somewhat vague use of the term, we could discern legal, individualistic, social, religious, and ethical levels of meaning—although the consequences of using any one of

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<sup>478</sup>Ibid., 54.

these terms over another was never drawn out. At the same time, we noted that each of the documents tended to give its emphasis to one level of meaning over the others—again without noting the consequence of doing so. The documents also do not clearly explain their preference for choosing one value over another.

The exploration of the philosophical roots or philosophical expositions of the positions on human dignity that began this third chapter allowed us to see where some of the background to the meanings attached to human dignity in the public documents came from and where it may allow one to proceed. However, there are many suppositions and weakly supported inferences that have allowed us to suggest connections. We note again that there are very few references in the public documents to the philosophers we have examined or to their work that would allow us to make definitive connections. Having examined the public documents and found there to be no definitive answers to the questions surrounding the content and meaning of the expression “human dignity” and having speculated on the possible sources of content and meaning from significant philosophers whose thought may have influenced the public documents, we are not very much further along in our project of understanding how respect for human dignity might direct our actions in the field of genetics.

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<sup>479</sup>Ibid., 55.

## **CHAPTER FOUR**

### **THE CONTRIBUTION OF RICHARD A. McCORMICK TO THE DISCUSSION**

#### **4.0 Introduction**

After examining the public documents discussing genetics, we have noted that there is not a clear, nor unambiguous presentation of one of the central terms used in circumscribing or suggesting limits on the use of genetic technologies. The term is, of course, the subject of this present project--“human dignity.” Our somewhat cursory examination of the possible roots or sources of meaning for the term human dignity from the field of philosophy has led us to suggest that while there are probable links between some of the schools of thought examined, there is no clear, evident, or generally demonstrable link between the philosophical writings discussed and the public documents reviewed in this project. We have noted the fact that there are related concepts from these schools of philosophy, particularly notions of autonomy, incommensurability, and the notion of the law as the protector of individual rights. However, we also note that there has been no satisfying exposition of dignity in these schools that would allow us to connect their presentation and understanding with the public documents, nor the public documents with the schools of philosophy, in any complete way. The exploration of the schools of philosophy does not, therefore, allow us to clarify the understanding of the term human dignity in the public documents that discuss genetics in a fully satisfactory way.

We suggest here that there is a plausible explanation for this. As noted earlier, the public documents do not clearly reference any school of philosophy as their source for understanding human dignity, nor do they offer any type of definition of the term. The documents identify related concepts and demonstrate a tendency to lean more heavily on some than on others – the French documents on incommensurability; the American documents on autonomy or rights. We have identified possible roots for these preferences in the writings of Kant and Rawls, but still there is uncertainty concerning how the documents intend us to understand human dignity. In addition, as the critiques of Kant and Rawls on this matter demonstrate, even if the connection of the documents to their works were certain it would not allow them to stand as a broadly accepted source of understanding of human dignity. This is particularly true in the realm of policy development where we suggest a more broad based agreement would be desirable for effective instruments.

Could it be that the documents' understanding and, consequently, the presentation of human dignity within them is based on segments of thought from these philosophers combined with segments from the social and political thought of the time in which they were developed? Probably yes, but such a detailed examination is beyond the scope of this project. We raise the issue here to suggest not that segments of thought from multiple sources be excluded from the development of policy or public documents, but to state that if this has been the case in the public documents concerning genetics, the result is less than satisfactory in conveying clear content and meaning. Moreover, we suggest that when public policy is being formulated, there needs to be a more comprehensive system of

thought included in the considerations, so that the broad range of considerations necessary to ensure more solid and enduring policy is clear in the content and meaning of such pivotal terms as human dignity in the discussion of genetics. A comprehensive system of thought is desirable also from the point of view of consistency in addressing the issue under consideration in all its aspects and the unity of approach that would ensure the elimination of gaps in the policy. This clearly recommends that there be a move beyond any of the methodologies for policy development which we outlined in the introduction to this paper – those the experts in the field proposed are the models for policy development in our society.

A more comprehensive system of thought, in this case concerning the use of the term human dignity, would consider the human person in him/herself, as our discussion of Kant has emphasized, and in relation to others, as was part of the Rawls' discussion of autonomy and certainly a focus of the Feminist critique. However, both of these aspects would be considered in relation to the other, as well as in relation to issues of the nature of the human person and possibly questions of origins and ends. Individuals and social groups exist in time and with a history that is also a necessary aspect for policy consideration. What we are really talking about here are the issues that may be found in a rounded anthropology – something not referred to in the public documents, nor in the philosophical thought discussed in Chapter 3.

#### **4.1 The Case for considering Theological Voices within the Public Discourse**

As we have noted, attempts to clarify the content and the meaning of human dignity by surveying its use outside of the public documents on genetics, and to determine if there is a general understanding of the term, allow us to make some progress. But, even with these attempts, the content and meaning of what is clearly a significant phrase remain vague. In looking at the uses of the term at various points in history and at its meaning in representative philosophies, observers have been allowed to conclude the following:

Human Dignity has in recent years become a catch-all word for the unresolved problems of individuals and societies. What has impressed us about this concept are (1) its vagueness in most current usage, (2) its generally acknowledged importance (whenever wrong has been committed, a primary emphasis has been the violation of human dignity), and (3) its universal relevance: dignity is considered to be an essential condition for the good life of all persons, wherever they may live.<sup>480</sup>

The volume that these comments introduce considers human dignity in its history and application, as well as considering the philosophical reflection on the topic from the perspective of the Western world. The reflections are consistent with those found in other texts. Some salient points are noted in the following comments.

“Human dignity” may be a relatively new expression. It can be found in the later years of the Enlightenment and certainly in the papal encyclicals from Leo XIII to the present, particularly in the documents of Vatican II.<sup>481</sup> It is also found in documents of the

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<sup>480</sup>Rubin Gotesky and Ervin Laszlo, eds., *Human Dignity This Century and the Next: An Interdisciplinary Inquiry into Human Rights, Technology, War, and the Ideal Society* (New York: Gordon and Beach, Science Publishers, 1970), v.

<sup>481</sup>See Michael Schuck, *That They Be One: The Social Teaching of the Papal Encyclicals: 1740-1989* (Washington D.C.: Georgetown University Press, 1991).

United Nations. While the concept has much longer usage, the difficulty in tracing it is found in the confusion over the content of the concept. The content at varying times refers to the distinctiveness of humanity, the excellence of humanity, the superiority of humankind over other creatures, or human rationality. These expressions of the content of dignity are relational, and may in the end be referred to as the extrinsic dignity of the human person. The intrinsic dignity of the person, that which entitles him/her to respect in and of him/herself, is much less clearly expressed in philosophy or history. Language of what is absolute or inherent in human dignity points out that our discussions of human dignity are often discussions of its different senses. For example, dignity is described as inherent but at the same time something to be achieved. Dignity as intrinsic worth is sometimes descriptive and sometimes normative as in 'worthy of respect'.

Herbert Spiegelberg continues this discussion by pointing out a number of differing perspectives that come into play when one speaks of humanity or human dignity.<sup>482</sup> Within Catholicism, human dignity is a basic understanding in the Judeo-Christian tradition founded on the belief that human beings are made in the image of God and that of humanity as abandoning dignity in sinfulness. The writings of Augustine and Aquinas are given as examples of these tenets of faith. Spiegelberg also gives examples of similar points of view from the secular world from Pascal, Hobbes, Hume, and Erasmus. On the other side, Kant in his *Foundation of the Metaphysics of Morals* adds to the positive understanding of

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<sup>482</sup>Spiegelberg, "Human Dignity: A Challenge to Contemporary Philosophy," *Human Dignity This Century and the Next*, 46-67.

human dignity in his presentation of the need to respect the person as an end in him/herself and never only as a means. The person as an end in him/herself is without price and in this sense has no equivalent. The person expresses him/herself in autonomy and rationality.

In the works of philosophers from Aristotle to Charles Taylor there are multiple perspectives on what is a human's dignity. The person as image of God, as worthy of respect, as end in him/herself, as free and autonomous, all speak of dignity as intrinsic worth, and this is the basis for the claim to respect. However, Spiegelberg and others raise the question--is this basis for the claim to respect for human dignity self-sufficient, or does it have grounds in turn? His response is as follows:

The search for grounds of human dignity presupposes a full-fledged philosophical anthropology, showing not only man's essential nature, its ingredients, its structure and its place in the cosmos, but also his values, rights and responsibilities. Only on such a basis will it be possible to make an adequate survey of the possible grounds for his dignity.<sup>483</sup>

This material suggests that the historical and philosophical use and understanding of human dignity is not sufficiently clear to identify an agreed upon content and meaning to the term, nor to determine how it is to be understood in the public documents noted above. Again, as noted above, the public documents we considered do not specify an appeal to a particular historical tradition or philosopher that would clarify for us the content that "human dignity" has for them.

Neither is there an appeal in the public documents to a theological tradition or traditions to support an understanding of human dignity. As noted above the theological

use of the term human dignity is not without ambiguity in its content and meaning. In papal encyclicals of the last 150 years, the term is present, and these documents may be the first public use of such a value.<sup>484</sup> And while more recent public statements and documents touch directly on human dignity and health care and even explicitly on genetic technologies, including mention of a specific anthropology of humanity's essential nature, its content and meaning are not found spelled out in any one place. Nevertheless, it is in ecclesial documents that a conscious awareness of the link between human dignity and a clear anthropology can be found. No text is complete in this respect but each gives a lead into the direction of the anthropological thought. For example:

The biological nature of each person is untouchable in the sense that it is constitutive of the personal identity of the individual throughout the whole course of his history. Each human person, in his absolutely unique singularity, is constituted not only by his spirit, but by his body as well. Thus, in the body and through the body, one touches the person himself in his concrete reality. To respect the dignity of man, consequently, amounts to safeguarding this identity of the man "corpore et anima unus," as Vatican Council II says.[Constitution, *Gaudium et Spes*, n. 14, par. 1.]

It is on the basis of this anthropological vision that one should find the fundamental criteria for decision-making in the case of not strictly therapeutic interventions, for example, those aimed at the amelioration of the human biological condition.

In particular, this kind of intervention must not infringe on the origin of human life, that is, procreation linked to the union, not only biological but also spiritual, of the parents, united by the bond of marriage. It must, consequently, respect the fundamental dignity of men and the common biological nature which is at the base of liberty, avoiding manipulations that tend to modify genetic inheritance and to

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<sup>483</sup>Ibid., 61.

<sup>484</sup>Ibid., 52.

create groups of different men at the risk of causing new cases of marginalization in society.<sup>485</sup>

The anthropological vision the Pope mentions can be identified in different threads of other papal and ecclesial documents and in the theological reflection upon these documents and the understanding of a human person found in the Church's history. These do not represent for us the totality of all points of view on the subject of human dignity that would allow us to understand it as a value for guiding decision-making in genetic technologies, but it is one significant voice in the broad societal discussion of the subject.

A valuable insight into the theological contribution on the discussion of human dignity may be found in examining the work of one theologian on this question. This may offer us a coherent beginning to any dialogue. One such theologian is Richard A. McCormick, a moral theologian of long standing, who is clearly speaking as a Catholic Christian but who is respected in the different milieus that touch upon this issue.

#### **4.1.1 Richard A. McCormick**

McCormick has a significant corpus of literature spanning and including the public discussion of genetic technologies. Throughout his work, there is one insight that is foundational and important for our purpose here--the human person in all its dimensions is the measure of right and wrong in human actions. Human dignity is a concept that he uses

in his presentations.<sup>486</sup> Significant also for our purpose here is McCormick's vision of moral theology, which situates it as part of a dialogue and not as the "last word" on the subject. His presentation and discussion are open to those outside of the Catholic or even Christian community by design. He writes:

- I dream of a moral theology that is
1. Christocentric and anchored in charity (vs. onesidedly philosophical);
  2. universalizing in its appeal (vs. narrowly sectarian);
  3. with appropriate subsidiarity (vs. overcentralization);
  4. personalistic (vs. excessively biologistic);
  5. modest and tentative (vs. "infallibalistic");
  6. ecumenical (vs. exclusively parochial and Roman);
  7. inductive (vs. abstractly deductive in method);
  8. pluralistic (vs. a universal conformism);
  9. aspirational (vs. minimalistic); and
  10. specialistic (vs. omnicompetent).<sup>487</sup>

Moreover, McCormick bases his moral theology on an anthropology and its understanding of the content of "human dignity" that is not extrinsic but intrinsic to the human person. We recall here the statement of Spiegelberg, as quoted above, that calls for a philosophical anthropology that addresses "man's essential nature, its ingredients, its structure and its place in the cosmos"<sup>488</sup> in order to establish the grounds for human dignity. In proposing

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<sup>485</sup>Pope John Paul II, *Dangers of Genetic Manipulation, Address to members of the World Medical Association* (October 29, 1983); available at <http://listserv.american.edu/catholic/church/papal/jp.ii/gmanip.asc>; Internet; accessed August 3, 1997.

<sup>486</sup>See for example, Richard A. McCormick, *Corrective Vision: Explorations in Moral Theology* (Kansas City: Sheed and Ward, 1994), 171. This term figures significantly in McCormick's anthropology--who is the human person in relation to the cosmos and to others.

<sup>487</sup>*Ibid.*, 38.

<sup>488</sup>Spiegelberg, 61.

his anthropology, McCormick addresses these issues and also concerns raised in the section above on human dignity in history and philosophy and the lack of a clear distinction between the meanings. Human activity, he writes, must be judged “insofar as it refers to the human person integrally and adequately considered.”<sup>489</sup> Finally, McCormick is recommended to our discussion because of his consideration of the issues at hand in a manner that is open to “human experience and the sciences,”<sup>490</sup> which makes the discussion valuable and credible if it is to be part of a larger dialogue.

To understand the content and the meaning of “human dignity” as a value or a limiting factor in the use of genetic technologies requires further exploration of the term. This is necessary if the concept is to have value in the public discourse concerning genetic technologies, as at present there does not seem to be a clear or consistent understanding of how the term may be used in this context. We pose the question here of whether a further exploration, from a theological perspective, may provide us with the insights into the content and meaning of the expression human dignity, which will allow us to evaluate its use as a significant term in the public documents discussing genetics?

#### **4.2 Richard McCormick and a Theological Anthropology**

It is the aim of this chapter to examine representative writings of Richard McCormick with the goal of coming to an understanding of the presentation of his

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<sup>489</sup>McCormick, *Corrective Vision*, 14. This phrase runs throughout McCormick’s work.

anthropology – his understanding of the human person. The deliberations considered here are found in a variety of formulations: direct commentary on bioethical issues, replies to critics, and reviews of literature. McCormick himself spells out the importance of this subject: “anthropology . . . means nothing more . . . than the pervasive concept of the human person. It functions in the way we make moral judgements.”<sup>491</sup>

#### 4.2.1 The Notion of Wholeness

The grounding for McCormick’s anthropology is the notion of “wholeness.” We will return to this idea shortly, but cite the following as an introduction to this part of our discussion:

The document *Donum Vitae* . . . refers repeatedly to the ‘integral good of the whole person.’ That is the criterion that we ought to use in judging the morality of specific interventions. We look at the impact on the whole person (the many dimensions of the person, relationships, etc.) to find out whether this particular procedure is going to be promotive or undermining.<sup>492</sup>

From the work surveyed, three aspects of the human become apparent for McCormick’s work: the connection to God, the person as an individual, and the person as a social being. We will carry out this portion of our study by first discussing the meaning of “wholeness”(the grounding of the anthropology), then address each of the three aspects in turn. We follow this by describing the ways in which McCormick relates individuality and

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<sup>490</sup>Ibid., 14. See also McCormick, *The Critical Calling: Reflections on Moral Dilemmas Since Vatican II* (Washington, D.C.: Georgetown University Press, 1989), 31.

<sup>491</sup>McCormick, “The Ethical and Religious Challenges of Reproductive Technology,” *Cambridge Quarterly of Healthcare Ethics* 8 (Fall 1999), 548.

sociality to each other, and to human dignity. Once we have a firm understanding of the anthropology as presented, we will conclude our study by addressing its function and its impact on our understanding of human dignity in the context of setting parameters for the use of genetic technologies.

In order to appreciate the aspects of the person that will be discussed here, it is important to understand how they are linked together. As we shall see, it is not appropriate in McCormick's view, to consider a human as a collection of traits to be judged individually as a measure of that person's worth. Wholeness refers to the unity of all aspects of a person. We have introduced this topic by citing some of McCormick's comments on *Donum Vitae*. Here, we turn to his reflections on the prospect of human genetic engineering to further our understanding. He admonishes this practice for the affront he sees it posing to wholeness, as he writes:

. . . such programming involves a subtle but very real change in our attitudes toward human persons. We can easily begin to evaluate them not for the whole that they are - unique refractions of the Creator, image of God - but for the part that we select.<sup>493</sup>

We find a similar statement in the following:

. . . the critical flaw in 'preferential breeding' is the perversion of our attitudes: we begin to value the person in terms of the particular trait he or she was programmed to have. In short, we reduced the whole to a part. People who do that are in a moral wilderness.<sup>494</sup>

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<sup>492</sup>Ibid.

<sup>493</sup>McCormick, "Genetic Technology and Our Common Future," *America* 152, no. 6 (April 27, 1985), 340.

<sup>494</sup>McCormick, "Should We Clone Humans?" *Christian Century* 110, no. 33 (November 17, 1993), 1148.

Thus, wholeness would appear to impose on us obligations towards our fellow human beings. We suggest the obligations involve remembering that a person's qualities do not exist separate from one another, but rather they are rooted in that person's being. McCormick supports such a proposition in his statement: "I believe it is naive to think that we can program for certain characteristics and continue for long to 'love the child for itself' when it does not have them."<sup>495</sup>

On several instances throughout the literature, McCormick takes issue with the work of Joseph Fletcher, as he opposes Fletcher's apparent deconstruction of the person.

... Fletcher sets out to establish an operational profile of personhood. He lists fifteen positive human criteria and five negative. With no importance in the ordering, the positive criteria are: minimal intelligence . . . , self-awareness, self-control, a sense of time, a sense of futurity, a sense of the past, the capability to relate to others, concern for others, communication . . . , control of existence . . . , curiosity . . . , change and changeability, balance of rationality and feeling, idiosyncrasy . . . , neocortical function.

Fletcher's negative assertions are: man is not nonartificial, essentially parental, essentially sexual, a bundle of rights, a worshipper.<sup>496</sup>

McCormick opposes Fletcher's position and this opposition, which we note here, serves to illustrate the importance of the idea of wholeness in McCormick's thought. He is resistant to the notion that these criteria set a standard that must be met in order to enjoy the respect due persons:

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<sup>495</sup>McCormick, "Blastomere Separation: Some Concerns," *Hastings Center Report* 24, no. 2 (March 1994-April 30, 1994), 15.

<sup>496</sup>McCormick, "Of Death and Dying," *Notes on Moral Theology 1965 Through 1980* (Washington, D.C.: University Press of America, 1981), 445.

There are still very many who believe that human life prior to and regardless of its share in the *bene esse* that some call "personhood" makes profound claims on our loyalty and care - indeed, the more profound because of the weakness, dependency, and vulnerability due to a lesser share in this *bene esse*. It is the pride of Christian tradition and practice that such have been viewed and treated as our neighbour in greatest need.<sup>497</sup>

Perhaps McCormick has wholeness in mind in the preceding statement. He is rejecting a formulation in which personhood status appears to be a privilege bestowed upon a human once he/she has satisfactorily met several criteria. From such a scenario the following question may arise: If I satisfy more of Fletcher's criteria, or if I satisfy them more fully than another individual, does that make me more of a person? If the answer is yes, the idea of wholeness is replaced by the individual consideration of human qualities, and a comparative judgement arises regarding the extent to which individual humans satisfy these.

In his assessment of Fletcher on human cloning, McCormick provides us with the following:

[On Fletcher] There then follows one of the most remarkable sentences in the contemporary literature on genetics:

I suspect I would favour making and using man-machine hybrids rather than genetically designed people for dull, unrewarding or dangerous roles needed nonetheless for the community's welfare - perhaps the testing of suspected pollution areas or the investigation of threatening volcanoes or snow slides.<sup>498</sup>

Fletcher addresses what he sees as anticipated objections to his position, and McCormick is

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<sup>497</sup>Ibid.

<sup>498</sup>McCormick, "Genetic Medicine: Notes on the Moral Literature," *Notes on Moral Theology*, 403.

quick to offer his opinion on the matter:

. . . he [Fletcher] confronts the [objection] that there might be something inhuman about the laboratory reproduction of human beings. If one has a sneaking suspicion that behind Fletcher's enthusiasm there lurks a concept of "the human," he is absolutely right. 'Man is a maker and selector and a designer, and the more rationally contrived and deliberate anything is, the more human it is.' This opens on a judgement that is at least competitive for "most remarkable statement of the year":

Laboratory reproduction is radically human compared to conception by ordinary heterosexual intercourse. It is willed, chosen, purposed and controlled, and surely these are among the traits that distinguish *Homo sapiens* from others in the animal genus, from the primates down. Coital reproduction is, therefore, less human than laboratory reproduction . . .<sup>499</sup>

Again, Fletcher is seen to attack the notion of wholeness as he praises the selective designing of humans. His words do little to belie the incompatibility of his anthropology with that of McCormick, for the former subverts the idea of wholeness, which is so vital to the latter.

#### 4.2.2 The Notion of a Relationship with God

Thus far we have discovered wholeness as a central notion of McCormick's anthropology. It is important to bear this in mind as we proceed with our exploration of the three aspects of the human person: our connection to God, the person as an individual, and the person as a social being. As we do so, we remember that these aspects should only be considered separately for the purposes of discussion. In reality, they are interwoven and constitute the wholeness of the person, as McCormick has presented it.

It is not unreasonable to assume that, as a species, we feel that we occupy a special place in the biological world. There are likely many reasons why this is so, but from a religious standpoint it may be because of our unique relationship with God. The United States' National Bioethics Advisory Committee commented in their *Report on Cloning Human Beings*: "One major theme in the theological conception of creation in God's image is human dignity: Humans have dignity because they are created in God's image."<sup>500</sup>

We chose the preceding statement as an introduction to the first element of McCormick's anthropology; our connection to God, because the author himself makes a comparable one: "Life is sacred" he says, "because of its origin and destiny, because of the value God puts on it. . . . Such sacredness demands reverential attitudes and practices from genetic science."<sup>501</sup>

Although he disagrees on some points, McCormick draws on the writing of Robert O. Johann in which Johann describes personhood as a matter of being open to God's love for humanity.

Man's very personhood is a call to responsiveness to Being. 'What this affirmation of Being requires, i.e., what actually constitutes an adequate response to Being in any particular situation, is a matter for discerning intelligence.' This does not exclude universally binding norms. 'For we are not related to the Absolute and Infinite except through the mediation of the finite and relative.' Reason discerns the radical distinction between the order of persons and the order of the impersonal nature . . . one cannot love God without loving the neighbour. Therefore, any exploitative conduct offensive to the dignity of the person is intrinsically evil (e.g.,

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<sup>499</sup>Ibid.

<sup>500</sup>National Bioethics Advisory Committee, "Report on Cloning Human Beings," (June 1997), 49; see Chapter Two, section 2.4.3 for further information on this report.

<sup>501</sup>McCormick, "Genetic Technology and Our Common Future," 341.

racial discrimination, economic exploitation, rape, etc.). Fr. Johann insists that his general approach, since it is thoroughly ontological in character (founded on man's nature as person), is one of natural law . . . <sup>502</sup>

McCormick agrees with Johann here, including him in a group of moral theologians who, he writes: "all make excellent points." "Johann," he says, "establishes a personalistic context for the reading of natural law."<sup>503</sup> The question then becomes: How does this contribute to McCormick's anthropology?

Insofar as it relates to the focus of the present study, and assuming it reflects McCormick's beliefs, Johann's statement introduces us to the notion that God's love for us as persons is not merely an abstract idea. It asserts that God's love is to be realised in the way we choose to live our lives, the way in which we love other people and thereby love God. Essentially, it is our response to the "call to Being." It is not enough, therefore, to say, "I love God." Personhood places a demand on us to prove this love in our daily lives.

In the preceding discussion of Johann, we have alluded to the choice of being open to God's love by loving others. He has written: "Man's very personhood is a call to responsiveness to Being." McCormick describes what is a seemingly a similar concept -- fundamental freedom. He writes:

[Fundamental freedom] is the more basic choice with respect to the whole meaning and direction of my life. It is "yes" or "no" to the whole moral order. It is the free determination of one's self with regard to the totality of existence, a fundamental choice between love and selfishness, between ourselves and God our Saviour. It is the fundamental acceptance or rejection of the grace that is the person of Jesus into

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<sup>502</sup> McCormick, "Contraception," *Notes on Moral Theology*, 42-43.

<sup>503</sup> *Ibid.*, 46.

my life as invitation of the Father. It is our acceptance or rejection deep in our person of God's enabling love."<sup>504</sup>

McCormick also cites Ronald Modras who positions fundamental freedom as

follows:

. . . It is out of the inmost core of our beings that we make those basic decisions of transcendental freedom (fundamental options) which lead to or away from God. But because freedom extends formally to the whole person, free actions can arise from outside the inmost core which do not affect us as acts of transcendental freedom do.<sup>505</sup>

These comments allow us to propose that part of McCormick's anthropology is this relationship between God and the human person, and have noted this to be so because of the belief that understands the person's creation to be in the image of God. We expanded upon this by describing the "call to Being" and "fundamental freedom." We understand that, from McCormick's perspective, persons are not passive actors in this relationship, but are faced with a choice of being open to God's love or not. Openness to the love of God is not notional but rather demonstrated by the relationship of love that is to be seen with fellow human persons. The choices persons make in this regard affects "the whole meaning and direction . . . of life," and are vital to the individual's personhood as "it is out of the inmost core of our beings that we make those basic decisions of transcendental freedom (fundamental options) which lead to or away from God."

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<sup>504</sup> McCormick, *Corrective Vision: Explorations in Moral Theology* (Kansas City, MO: Sheed & Ward, 1994), 59.

<sup>505</sup> *Ibid.*, 61-62.

McCormick frequently refers to Paul Ramsey's formulation of the relational (love-making) and procreational (life-making) spheres of the conjugal act.<sup>506</sup> He relates this to our connection to God in his analysis of Ramsey's deliberation on human genetic engineering, which he praises as: "the most thorough and satisfying study of the moral aspects of genetic control that I have yet seen . . ."<sup>507</sup> McCormick writes:

Ramsey means that the spheres of personal love and procreation should not be put asunder. He derives this inseparability of spheres from a Christian reflection on the Prologue of John and Ephesians 5. We procreate new beings like ourselves in the midst of our love for one another and 'in this there is a trace of the original mystery by which God created the world because of His love.' Therefore Ramsey concludes that 'to procreate from beyond the sphere of love . . . or to posit acts of sexual love beyond the sphere of responsible procreation . . . means a refusal of the image of God's creation in our own.'<sup>508</sup>

In addition, he comments:

In Christian conviction the same sexual love that generates becomes the parental love that nurtures. Parents do not love their children simply because the children are there and need love. They love them because they have loved each other and because the children are the visible fruit and extension of this love. . . . Therefore to separate the acts which nurture from the act which generates and then to associate parental love only with the former is to undermine the very foundation of the love which nurtures. To limit the notion and love of parenthood to "caring for and rearing a child" is therefore a radical attack on several basic humano-Christian values (the meaning of human sexuality, the meaning of marriage and parenthood.)<sup>509</sup>

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<sup>506</sup>For a detailed discussion of the spheres of the conjugal act, consult McCormick, "Theology and Biomedical Ethics," *Logos: Philosophic Issues in the Christian Perspective* 3 (1982) : 38-40. Additionally, reference is made by McCormick in the following "Genetic Medicine: Notes on the Moral Literature." *Notes on Moral Theology*, 285 and 406; *How Brave a New World: Dilemmas in Bioethics* (Washington, D.C.: University Press of America, 1985), 315.

<sup>507</sup>McCormick, "Genetic Engineering," *Notes on Moral Theology*, 283.

<sup>508</sup>*Ibid.*, 285.

<sup>509</sup>*Ibid.*, 287.

The unique position of human beings in the biological kingdom can be understood by our connection to God through these passages, but an implicit premise needs to be mentioned. Essentially, what these writings are saying is that when a child is created by parents, in the midst of the loving conjugal act, they are subsequently loved, because they are extensions of the parents' love for each other. Loving the creation of a new human reflects God's love in creating humanity. This appears to be the basis for an understanding of the unique connection between God and human persons. For this relationship to be unique, however, we must assume that other animals do not experience the same love in the conjugal act, as do humans. That is, while human sexuality involves the inseparable spheres of relation and procreation, other creatures only experience the procreative aspect. McCormick's argument logically connects human sexuality to our unique connection with God. Thus we posit that this connection, founded in creativity and love, manifest in the expression of our sexuality, is a feature of McCormick's anthropology.

#### **4.2.3 The Person as Individual**

This brings us to the second element of the anthropology--individuality. We will address this issue in two steps. First, we will demonstrate its importance to the understanding of the person, and second, we will highlight the author's reflections on the emergence of personhood, which he relates directly to the topic of individuality.

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The extensive attention paid to individuality (or uniqueness) certainly suggests its place in McCormick's anthropology. He calls individuality a "dimension of the human person" and writes:

Uniqueness and diversity (sexual, racial, ethnic, cultural) are treasured aspects of the human condition. Theologically viewed, we are images of God in our humanity and in its enchanting, irreplaceable uniqueness and differences. Diagnostic and eugenic interventions that would bypass, downplay or flatten these diversities and uniquenesses should be viewed as temptations.<sup>510</sup>

We see strikingly similar testimony in the following:

. . . human beings, in their enchanting, irreplaceable uniqueness and with all their differences, are made in the image of God. Eugenics schemes that would bypass, downplay or flatten human diversity and uniqueness should be viewed with a beady eye.<sup>511</sup>

These statements make it difficult to argue against individuality as part of McCormick's anthropology. Later on, we will return to individuality to discuss its relation to human dignity, and to the third aspect of the concept of the person, sociality. For now, we focus on what the author has to say about the emergence of personhood. As we will see, his presentation differs somewhat from classical Catholic formulations.

McCormick describes two theories on when personhood arises, and both relate directly to individuality. These theories are personhood *ab initio*, and personhood at the attainment of a certain level of biological stability.

Personhood *ab initio* is the theory that personhood arises at the moment of conception, that is, when egg and sperm fuse. McCormick says:

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<sup>510</sup>McCormick, "Genetic Technology and Our Common Future," 341.

The strongest case for personhood *ab initio* I have heard argues from the fact that there is no stage of nascent development that is so significant that it points to a major qualitative change: not implantation, not quickening, not viability, not birth.<sup>512</sup>

He cites T.F. Torrence, a proponent of this theory, who sees the situation as this:

If . . . we want to think of the human embryo as 'potentially person,' that must be taken to mean not that the embryo is in the process of becoming something else, but rather that the embryo continues to become what he or she already is.<sup>513</sup>

The second theory holds that mere genetic uniqueness is not sufficient to merit the same moral status to which persons are entitled. Simply put, the immediate result of fertilization is not itself a new person, but rather the beginning of a developmental process leading to personhood.

In contrast to this [personhood *ab initio*] is the view that demands a certain biological stability in the organism before personhood is possible. This stability is not present prior to the stage of primary embryonic organization. As Grobstein has written . . . 'The first sign that primary organization is underway is the appearance of what is called the primitive streak.' Prior to this time, twinning and recombination can occur. In other words, primary embryonic organization is the time when singleness is being established.<sup>514</sup>

It would appear that McCormick favours this latter theory over personhood *ab initio*. His preference is revealed in the following:

I contend . . . that the moral status - and specifically the controversial issue of personhood - is related to attainment of developmental individuality (being the

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<sup>511</sup>McCormick, "Should We Clone Humans?" 1148.

<sup>512</sup>McCormick, "Who or What Is the Preembryo?" *Kennedy Institute of Ethics Journal* 1, no. 1 (March 1991), 8.

<sup>513</sup>*Ibid.*, 9.

<sup>514</sup>*Ibid.*

source of one individual). This contrasts with the view that holds that personhood occurs earlier, at the point of genetic uniqueness.<sup>515</sup>

Clearly, individuality is an essential element of McCormick's concept of the person.

This makes intuitive sense. When we think of a person, we often have the image of a creature with a compendium of thoughts, feelings, and abilities that are distinct from other such beings.

#### 4.2.4 Person as Social Being

McCormick recognizes that we do not exist as individuals in our own personal vacuums. We cherish our individuality, but express it by interacting with other human beings. This interaction appears to be of such importance to McCormick in his discussion of human nature, that we posit this as the third element of his anthropology. Consider the following:

This fact (our essential sociality) - attested to by so many biblical images - underscores two aspects of our personhood . . . our essential equality (regardless of functional importance) and our radical sociality. Let me emphasize this latter aspect. It suggests that our well being is interdependent. It cannot be conceived of or realistically pursued independently of the good of others. Social insertion is part of our being and becoming.<sup>516</sup>

"Essential sociality" resurfaces again as McCormick engages in his discussion of the "dimensions of the human person." Therein, he identifies sociality as one such dimension, saying: "While genetic technology must respect the irreplaceable uniqueness and basic

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<sup>515</sup>Ibid., 2.

<sup>516</sup>McCormick, "Theology and Biomedical Ethics," 38.

equality of the individual, both its purposes and process must also take account of our essential sociality."<sup>517</sup>

McCormick makes it clear that sociality is not just an adult phenomenon, but it extends to children as well. This further entrenches it as part of his anthropology, because it is established as natural to *all* humans.

I suggested that there are other things that the child ought, simply as a human being, to choose. And I then suggested that minimal involvement in experimental procedures would be among these other things, not because they are of benefit to himself, but because at little or no cost to himself he could contribute to benefits for others.

. . . Let us put it another way. If we can say of adults . . . that it is reasonable to expect that they will want certain good for others and contribute to those goods if there is no discernable risk, discomfort, or inconvenience, it is not precisely because they are adults that we conclude this, but because they are social human beings. Being adults we assume that they [children] will understand, acknowledge, and respond to the claims rooted in their sociality, their social nature . . . the claims themselves are rooted in the sociality of our being. They are not primarily rooted in the adult's capacity or willingness to respond to them as an adult . . . but in the social nature of human beings.<sup>518</sup>

#### **4.2.5 Person as both Individual and Social**

We now come to the point in our discussion where we wish to explore the relationship between the person as individual and the person as social. We recall here that

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<sup>517</sup>McCormick, "Genetic Technology and Our Common Future," 341.

this is an area where we were left with some lack of clarity following our analysis of the public documents discussing genetics earlier in this paper. McCormick's writing actually suggests that these aspects of the person are related in two ways, directly and indirectly.

The direct relationship between the concept of the person as individual and the person as social is based on the idea that our rights as individuals are somehow derived from our insertion into a social group. On the topic of an article he had written earlier, McCormick says:

I began, as one ought to begin, with the idea that human rights ought not to be defined before the individual is viewed as a social being, before insertion into the web of human relationships that define our very being.<sup>519</sup>

We suggest that this implies a direct relationship between the person as individual and as social. Personal rights and liberties—the things ensuring us our individuality—must be understood and delineated in a context that can ensure the individuality of other persons as well (recall McCormick: “our essential equality”). What is the context that mediates this? It would appear to be “the web of human relationships”.

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<sup>518</sup>McCormick, "Experimentation in Children: Sharing in Sociality," *Hastings Center Report* 6, no. 6 (December 1976) : 42. The writings by McCormick that have been quoted here are only a select few. We have included these because of the undeniable explicit endorsement of sociality as an element of McCormick's anthropology. However, the following also contain reference to sociality, and should be consulted for further affirmation of its proper place in our study: "Theology and Biomedical Ethics." *Logos*, 32, 36, and 37; "Genetic Medicine: Notes on the Moral Literature," *Notes on Moral Theology*, 419.

<sup>519</sup>McCormick, "Experimentation in Children: Sharing in Sociality," 43.

Further statements to this effect are found elsewhere in McCormick's writing.

Although lacking the same explicitness seen above, the following communicates a similar message:

The contemporary emphasis on patient autonomy represents a needed corrective to an earlier paternalism in medical practice. It is a reaction to a former distortion. But it is easy to forget that reactions easily become overreactions. . . . The offshoot of this absolutization [of autonomy] is that very little attention is given to the values that ought to guide the use of autonomy. The sheer fact that the choice is the patient's is viewed as the sole right-making characteristic of the choice . . . Choices, however, can be right or wrong, and unless we confront the features that make choices right or wrong, autonomy usurps the evaluation. It trumps everything else and tends to drive necessary distinctions into the shadows.<sup>520</sup>

In a similar vein, he writes: "in describing our status in Christ as a shared status, it makes it especially intelligible to think that our well being and the rights that protect this flourishing cannot be conceived in isolation from others."<sup>521</sup> Here, he seems to reiterate that individuality must relate to sociality, in order for all persons to enjoy equally in the former.

At the risk of belabouring this issue, we make one final reference to McCormick in regards to it. In commenting on organ donation, he says:

Adults may donate an organ to another (*inter vivos*) precisely because their personal good is not to be conceived individualistically, but socially - that is, there is a natural order to other human persons which is the very notion of the human personality itself. The personal being and good of an individual does have a relationship to the being and good of others, difficult as it may be to keep this in a balanced perspective. For this reason, an individual can become (in carefully delimited circumstances) more fully a person by donation of an organ; for by

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<sup>520</sup> McCormick, "Vive La Difference! Killing and Allowing to Die," *America* 177, no. 18 (6 December 1997), 12.

<sup>521</sup> McCormick, "Theology and Biomedical Ethics," 38.

communicating to another of his being he has more fully integrated himself into the mysterious unity between person and person.<sup>522</sup>

In light of this we can suggest that a definite direct relationship exists between individuality and sociality on the basis that our essential sociality acts as a substrate from which we derive individual rights and freedoms, thus affording all humans (ideally) an equal opportunity to experience their own individuality, and consequently their personhood.

We also introduced the notion of an indirect relationship between the person as individual and the person as social, and here suggest human dignity as the basis for it. Our argument proceeds from very limited explicit discourse by McCormick on dignity, but we feel it is sound nevertheless. McCormick speaks of dignity in direct relation to both individuality and sociality. This, we posit, indirectly links these two aspects of the anthropology.

In a particular article in which McCormick develops the idea of individuality, he draws on the writings of John A. Robertson who asks: "Are later born children harmed because a twin or triplet already exists? The claim rests on the notion that the later born child lacks the uniqueness or individuality that we deem essential to human worth and dignity."<sup>523</sup> McCormick also raises the subject of human dignity in a discussion about dependence, which is regarded unquestionably as a sign of our sociality. He notes that for many, "Dependence on others is foreign to our notion of human dignity. Human dignity

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<sup>522</sup>McCormick, "Genetic Medicine: Notes on the Moral Literature," *Notes on Moral Theology*, 409.

means independence,” but concludes this observation by advising we re-examine this understanding of human dignity:

. . . our notion of dignity needs to incorporate the reality of dependence. Christians realize that Christ displayed great dignity in dependence: ‘Not my will but thine be done.’ Christians do not view dependence as dedignifying, but as a sacrament of our openness to and dependence on God. In the fragility of dependence we are invited to cling to and trust in a power beyond our control. In this sense rejection of interdependence is closely tied to rejection of creaturehood and mortality.<sup>524</sup>

Dignity is also described in connection with human sociality as McCormick discusses the right to silence. He begins by quoting from Patrick Granfield, who writes: “the best argument for the right to silence is the fundamental dignity of man as God’s superb creation, destined to perfect himself in society . . .”.<sup>525</sup> To which McCormick adds:

Precisely because this dignity can be developed and maintained only within society is the right [to silence] limited by the common good; but precisely because the common good purposes the good of individuals is the limitation itself severely limited.<sup>526</sup>

In arriving at this point in our discussion, we have identified a person’s connection to God, the nature of a person’s individuality, and of their sociality as the elements of Richard McCormick’s anthropology. We noted the significant attention paid by McCormick to human sexuality and the proper joining of the unitive and procreative spheres of the conjugal act. It was argued that the proper expression of our sexuality is

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<sup>523</sup>McCormick, “Blastomere Separation: Some Concerns,” 16.

<sup>524</sup>McCormick, “Value Variables in Health-Care Reform Debate,” *America* 169, no. 19 (May 29, 1993), 11.

<sup>525</sup>McCormick, “Dignity of the Human Person,” *Notes on Moral Theology*, 33.

<sup>526</sup>*Ibid.*

symbolic of God's unique love for humanity, an important feature setting us apart from the rest of the biological world.

The person as individual and the person as social have also been discussed as elements of McCormick's anthropology. Although each of these aspects of personhood is important in and of itself, they cannot be conceived of separately. Instead, we set out an argument that detailed a relation between these two concepts, on both a direct and indirect basis.

We proposed that individuality is directly related to sociality by quoting from McCormick in which he describes the web of social interaction as the substrate for the emergence of our individual rights and freedoms. Likewise, we cited his work to support our assertion of the indirect relation between the two elements of the anthropology. Specifically, we contended that McCormick envisions human dignity as resting on our "uniqueness or individuality" and our dependence on one another, reflected in the words of Christ: "Not my will but thine be done."

#### **4.3 McCormick and Dignity**

At this point we turn our attention to the concept of dignity, the topic which has been the focus of our study. McCormick summarizes the position of Bruno Schüller on the function of human dignity in moral analysis, and claims Schüller's opinion is an accurate reflection of his own.

The dignity of the person, as an image and likeness of God, means that the person must be respected and loved as an end in him/herself. It is the 'dignity of the person' that makes the command of love of neighbour, as well as the golden rule, intelligible. Once this connection is made between the dignity of the person, love of neighbour, and the golden rule, Schüller argues that 'dignity of the person' has the same argumentative function in normative ethics as the other two. That is, it determines moral goodness but not moral rightness. In other words, it is a necessary condition for moral rightness but not a sufficient one.<sup>527</sup>

Here, dignity is a consequence of our being an image of God. Earlier, we made reference to McCormick's description of our relationship with God, and posited this as part of his anthropology. The preceding passage furthers our understanding of this relationship as it is identified as the basis for our human dignity. It is similar to the statement in the American NBAC document noted above: "one major theme in the theological conception of creation in God's image is human dignity: Humans have dignity because they are created in God's image."

McCormick also considers instructive statements on human dignity as part of a rather unusual topic for discussion: competitive athletics. We say "unusual" because much of his work focuses on healthcare and genetic science issues. Nevertheless, his thoughts on this matter are important to consider because they connect the notion of "human qualities" with human dignity. He writes:

Victory is inseparable from the notion of competitive athletics. Because this struggle for victory sharpens personal skills and coordination, develops foresight through strategic thinking, intensifies cooperation and unselfishness through teamwork, enlarges toleration for adversity - in short, calls forth and promotes

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<sup>527</sup>McCormick, "The Person and Personal Action," *Notes on Moral Theology*, 802-803.

human qualities which reflect man's dignity and worth, it has always been honoured as a *human* achievement.<sup>528</sup>

#### 4.3.1 How McCormick's Anthropology Functions

We quoted McCormick at the outset of our study as stating that “[the anthropology] functions in the way we make moral judgements.” This gives us a context for considering the purpose of the anthropology, but we still seek answers. Specifically, we would like to know *how* it functions in the capacity in which the author contends it does.

As we wrestle with this question, we refer to “Theology and Biomedical Ethics” in which McCormick addresses, among other issues, the consideration of personhood as fundamental to moral judgement. It is a common quip that finds its way into everyday utterance--“It’s human nature.” Surely it is safe to assume that most people believe human beings, like other animals, have innate instincts and tendencies that have been acted upon time and time again throughout the history of our species. We probably also believe that some of these instincts are unique to us, and give us a special place in the biological world. In essence, they reflect our personhood.

Logically, the question arises: What are these inclinations? With no pretence of comprehensiveness, McCormick offers the following:

. . . the tendency to preserve life; the tendency to mate and raise children; the tendency to explore and question; the tendency to seek out other persons and obtain their approval - friendship; the tendency to use intelligence in guiding action; the tendency to establish good relations with unknown higher powers; the tendency to develop skills and exercise them in play and the fine arts. In these inclinations our

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<sup>528</sup>McCormick, “Dignity of the Human Person,” *Notes on Moral Theology*, 35-36.

intelligence spontaneously and without reflection grasps the possibilities to which they point, and prescribes them.<sup>529</sup>

If one hears the whispers of “individuality” and “sociality” in these words, it may be with good reason. “[T]he tendency to explore and question,” “the tendency to develop skills and exercise them in play and the fine arts.” Can these not be expressions of our own uniqueness? “[T]he tendency to seek out other persons and obtain their approval - friendship”: an assertion of our natural sociality. Furthermore, we discussed our connection with God; a statement echoed in our “tendency to establish good relations with unknown higher powers.” In sum, these tendencies or *inclinaciones naturales*<sup>530</sup> reflect our essential personhood, our anthropology.

So what of these *inclinaciones naturales*? How do they factor into moral judgements? Once again McCormick furnishes us with an answer:

. . . Since these basic values are equally underived and irreducibly attractive, the morality of our conduct is determined by the adequacy of our openness to these values.

. . . we must take them into account in our conduct. Simple disregard of one or other show we have set our mind against this good . . . when we can do so as easily as not, we should avoid acting in ways that inhibit these values, and prefer ways that realize them . . . we must make an effort on their behalf when their realization in another is in extreme peril. . we must never choose against a basic good in the sense of spurning it . . . particular moral judgements are incarnations of these more basic normative positions, which have their roots in spontaneous, prereflective inclinations.<sup>531</sup>

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<sup>529</sup>McCormick, "Theology and Biomedical Ethics," 27.

<sup>530</sup>Ibid.

<sup>531</sup>Ibid., 27-28.

We have covered a lot of ground very quickly. It is perhaps important to pause and draw out the essential point we are trying to establish here. McCormick lays down several normative positions. The morality of our conduct is to be judged with respect to its accordance with these positions. These positions are in turn, rooted in spontaneous, pre-reflective inclinations. We have argued that these inclinations are in fact reflections of our personhood, as characterized by McCormick's anthropology. Thus, if one accepts our argument, the morality of human actions is to be judged on the respect these actions have for the essential aspects of our humanity.

McCormick describes these inclinations as being "present prior to acculturation." He does admit however, that they may become "culturally conditioned," and says that "our way of looking at the world can, then easily distort our perception of the basic human values, and hence our moral judgements."<sup>532</sup> Thus, while the anthropology remains the same, our attitudes towards how we express the values rooted in them, that is, the practical side of the anthropology, change in time and space. McCormick crystallizes the issue as he writes:

We tend toward values as perceived. And the culture in which we live shades our perception of values. Philip Rieff in *The Triumph of the Therapeutic* notes that a culture survives by the power of institutions to influence conduct with 'reasons' that have sunk so deeply into the self that they are implicitly understood. In other words, decisions are made, policies are set not chiefly by articulated norms, codes, regulations, and philosophies, but by 'reasons' that lie below the surface. This is the dynamic aspect of a culture, and in this sense many of our major moral problems are

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<sup>532</sup>Ibid., 28.

**cultural. Our ways of perceiving the basic human values and relating to them is shaped by our whole way of looking at the world.<sup>533</sup>**

**We are confronted with a conflict. On the one hand, we have established a concept of the person, which we have argued forms a basis for moral judgement in the manner we have described. On the other hand, the human values that manifest these essential aspects of the person are subject to interpretation through the social climate in which their actors exist. The question becomes: Does moral judgement remain consistent from time to time and place to place, and if it does, how?**

**On this matter, as in others we have encountered, McCormick is instructive. He speaks of the role faith can play in aiding our moral judgements. He suggests that it gives us stability in our understanding of human values, so that they are not so subject to distortion. Note the following:**

**Love of and loyalty to Jesus Christ, the perfect man, sensitizes us to the meaning of persons. The Christian tradition is anchored in faith in the meaning and decisive significance of God's covenant with men, especially as manifested in the saving incarnation of Jesus Christ, his eschatological kingdom which is here aborning but will finally only be given. Faith in these events, love of and loyalty to their central figure, yields a decisive way of viewing and intending the world, of interpreting its meaning, of hierarchizing its values. In this sense the Christian tradition only illuminates human values, supports them, provides a context for their reading at given points in history. It aids us in staying human by underlining the truly human against all cultural attempts to distort the human. It is by steadying our gaze on the basic human values that are the parents of more concrete norms and rules that faith influences moral judgement and decision making.<sup>534</sup>**

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<sup>533</sup>Ibid.

<sup>534</sup>Ibid., 29.

Let us re-examine the role of the anthropology in light of our discussion of faith, thus far.

Our original position is unchanged: The morality of our conduct is to be judged with respect to its accord with several normative positions described earlier. These positions are in turn, rooted in spontaneous, prereflective inclinations. These inclinations are reflections of our personhood, as characterized by McCormick's anthropology. Thus, the morality of human actions is to be judged on the respect they have for the essential aspects of our humanity.

"Love of and loyalty to Jesus Christ" do not change the structure of our position. Rather, they strengthen it by bracing our prereflective inclinations against means of expression that distort their intended purpose (a true reflection of the person). We noted that "present prior to acculturation" does not preclude these inclinations (values) from existing as "culturally conditioned." McCormick's position then, is that the Christian tradition stabilizes our understanding of how to properly express these values, which in turn preserves their intended purpose.

#### **4.4 Decision-Making and Moral Judgement**

In McCormick's presentation, faith keeps human values in their proper perspective, thereby framing the role of the anthropology in moral judgement. This is, as we have said, the short answer. Not surprisingly, such an answer will not suffice. *How* does faith accomplish this? The key to answering this question is to bear in mind that faith does not

directly influence the concrete moral judgements. Its power lies in its ability to keep human values, the expression of our personhood, in proper perspective. McCormick makes a statement to this effect:

. . . Franz Böckle of the University of Bonn argues that faith and its sources have a direct influence on ‘morally relevant insights,’ not on concrete ‘moral judgements.’ I have referred to a ‘decisive way of viewing and intending the world’ and to the stories and symbols that affect our ‘perspectives.’ These phrases seem to me to be referring to substantially the same thing.<sup>535</sup>

He claims the answer lies in the Christian story, and lists the following as points of this story:

- God is the author and perserver of life. We are ‘made in His image.’
- Thus life is a gift, a trust. It has great worth because of the value He is placing in it (Thielicke’s ‘alien dignity’).
- God places great value in it because He is also (besides being author) the end, purpose of life.
- We are on a pilgrimage, having here no lasting home.
- God has dealt with us in many ways. But his supreme epiphany of Himself (and our potential selves) is His Son Jesus Christ.
- In Jesus’ life, death and resurrection we have been totally transformed into ‘new creatures,’ into a community of the transformed. Sin and death have met their victor.
- The ultimate significance of our lives consists in developing this new life.
- The spirit is given to us to guide and inspire us on this journey.
- The ultimate destiny of our combined journey is the ‘coming of the Kingdom,’ the return of the glorified Christ to claim the redeemed world.

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<sup>535</sup>Ibid., 30.

- Thus we are offered in and through Jesus Christ eternal life. Just as Jesus has overcome death (and now lives), so will be who cling to Him, place our faith and hope in Him, and take him as our law and model.
- This good news, this covenant with us has been entrusted to a people, a people to be nourished and instructed by shepherds.
- This people should continuously remember and thereby make present Christ in His death and resurrection at the Eucharistic meal.
- The chief and central manifestation of this new life in Christ is love for each other (not a flaccid ‘niceness’, but a love that shapes itself in concrete forms of justice, gratitude, forbearance, chastity, etc.).<sup>536</sup>

This story is the benchmark for the judgement of human actions. McCormick expresses this in the following remark:

The very meaning, purpose and value of a person is grounded and ultimately explained in this story. Since that is the case, the story itself is the overarching foundation and criterion of morality. It stands in judgement of all human meaning and actions. Actions which are incompatible with this story are thereby *morally wrong*.<sup>537</sup>

#### 4.5 Implications of a Theological Anthropology for Our Project

We have dealt with a number of ideas in this study. The following from McCormick encapsulates several of these:

Vatican II stated: ‘The moral aspect of any procedure . . . must be determined by objective standards which are based on the nature of the person and the person’s acts’. . . the human person must be understood as ‘the human person integrally and adequately considered,’ that is, taking account of all the characteristics of human persons both as individuals and in their various relationships, familial, social, political and religious. No dimension of the human person may be omitted in

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<sup>536</sup>Ibid., 30-31.

<sup>537</sup>Ibid., 31.

**understanding and applying the criterion; nor may any single dimension be so isolated and highlighted that distortion results.<sup>538</sup>**

**We have discussed the three elements of McCormick's anthropology: our connection with God, the person as individual, and the person as social. Additionally, we stated that the concept of wholeness obliges us to consider all aspects of the person, or as the author writes in the preceding statement: "taking account of all the characteristics of human persons both as individuals and in their various relationships."**

**Direct and indirect relationships between the individual and social aspects of personhood were noted. At the direct level, we argued that our web of social interactions defines and shapes our rights and freedoms as individual, so that (ideally) all humans may enjoy their individuality equally. An indirect relationship exists insofar as these two elements of the anthropology form a basis for our human dignity, as described earlier. Autonomy and dependence, representing individuality and sociality respectively, were both considered by McCormick to be fundamental to dignity.**

**The role of the anthropology was also detailed in our study. We contended that it functions in the way we make moral judgements. Specifically, it was the root of several normative positions against which the morality of human actions is to be measured. Faith plays a role in aiding our judgement since it prevents our human values that are "present prior to acculturation" from becoming distorted or "culturally conditioned."**

#### 4.5.1 Theological Anthropology, Philosophers and the Public Documents

Earlier in the chapter we quoted from Spiegelberg in which he stated

The search for grounds of human dignity presupposes a full-fledged philosophical anthropology, showing not only man's essential nature, its ingredients, its structure and its place in the cosmos, but also his values, rights and responsibilities. Only on such a basis will it be possible to make an adequate survey of the possible grounds for his dignity.<sup>539</sup>

While we have not suggested that what McCormick has proposed nor what we have presented is a full fledged philosophical anthropology, what we have been able to demonstrate is that there is a difference in the result of the presentation of human dignity in the public documents, the philosophical writings surveyed, and the theological anthropology presented by McCormick. The differences relate to the understanding of the meaning and the content of the expression human dignity as it is found in each of these three places.

It is not necessary to repeat in detail the grounds for the conclusion that the public documents themselves do not allow us to make definitive judgements on the meaning and content of human dignity, as they contain no direct discussion of the issue, nor do they point to sources of understanding. The philosophical thought that we have discussed may be related to the public documents, and may offer insight into aspects of human dignity as, for example, unconditional and incomparable worth; autonomy and the social contract; and ethic of care. But, the connection to the documents is unclear as we have noted, and we

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<sup>538</sup>McCormick, "Genetic Technology and Our Common Future," 340.

<sup>539</sup>Spiegelberg, 61.

have not been able to connect how the schools of thought set out their individual understanding of human dignity in the context of a comprehensive anthropology. This in itself separates the work of McCormick from the others. But the value of the inclusion of a more comprehensive anthropology, in this case represented by a theological perspective from the point of view of Richard McCormick is beyond this. It allows for a fulsome exploration of the content and meaning of the term human dignity that is more comprehensive than presentations that are not intended for this purpose or are in fact intended for other purposes. This often is the case in philosophical discussions where one point of view is presented in response or reaction to another and is therefore limited in its scope.

#### **4.5.2 Specific Contributions**

The theological anthropology presented by McCormick has, as we noted, three parts--the relationship with God the Creator; the person as individual; and the person as social being. These three parts are explored under one umbrella--that of wholeness. No part of the discussion stands on its own and each of the three parts must be considered in relation to the other. This in itself is a significant contribution to the discussion. One of the issues raised as a problem in the examination of the public documents was that of the listing of terms which included human dignity, autonomy, and the like without an indication of the relationship of one to another. The perspective presented here recognizes that there is a

relationship between aspects of the human person, which may not be considered without including a consideration of the relationship with other aspects of the person.

The inclusion of the relationship with a creator God provides the discussion of the nature of the human person with a context. That this context is outside of the human person, both individually and socially considered, serves to broaden the considerations of the nature of the person and prevent a myopic view that would not recognize relationships beyond the visible and the human. It opens the discussion of the human person to consideration of beginnings and endings (in the sense of *telos*) and can prevent a potentially destructive self-absorption that does not see beyond the here and now, the immediate situation with its immediate implications. The consideration of a relationship with God opens the possibility of a discussion of transcendence--both of the individual circumstance and the present condition of humanity.

The second consideration is that of the person as an individual. This consideration confirms our experience of individuality and uniqueness as well as diversity, both in being and in circumstance. Its importance lies in providing assurance that uniformity and conformity are not of the essential nature of human personhood and that individual experiences and thought have a value. Perhaps most importantly it underlines the fact that diversity is consistent with human personhood and that it neither elevates nor denigrates individuals. This is of particular importance in the discussion of genetics where the spectre of eugenics never seems to be far away.

The third consideration is that of the person as social being. One of the questions we were left with after the discussion of the public documents was that of the nature of the relationship between the individual and the person as social being. This takes on particular importance in light of the emphasis in some of the documents on the role of individuality and autonomy in decision-making. In an earlier quote, McCormick emphatically stated the fact that we are social beings, and to conceive of ourselves in any other way is unrealistic.<sup>540</sup>

Of particular interest is the notion that follows--that individual rights need to be conceived of in a social context. This is a move towards addressing a potential conflict between "my right" to decide and the impact that it may have upon others. This consideration is valuable in understanding the autonomy of a person. Above all, this consideration invites us to engage in discussions with a view to balance--perhaps another aspect of McCormick's admonition to view aspects of the human person under the umbrella of wholeness.

#### **4.5.3 The Discussion of Human Dignity**

Rather than its use as essentially a "stand-alone" term, as in the public documents and in the philosophical writings, the expression "human dignity" in the theological anthropology of McCormick is discussed only in context of the wholeness of the person -- the person as individual; the person as social being; and the person in relationship to the

Divine. Its representation in the work of McCormick is another aspect of the considerations of wholeness. Human dignity, for McCormick, is a consequence of our relationship with God. The relationship is as creature made in the image of the Creator. In that creaturehood, the person shares in the creative role of God while remaining dependent upon the Creator. Human dignity is also found in the individuality and uniqueness of each person. What is good for this individual person, what is respectful of one's human dignity, is what is consistent with the Christian story of Creation and Redemption and the mission and relationships that flow from them. Human dignity is also understood as a posture of interdependence with other persons--essential equality and radical sociality.

We noted in Chapter Three that the context of the law, the Supreme Court of Canada has positioned human dignity as the underlying principle of the *Charter*, and has suggested it form the basis for *Charter* analysis. However, we also attempted to demonstrate that a clear approach to interpreting this document might not yet have been achieved. *Prima facie*, the *Charter* suggests that the enjoyment of individual rights is subject to broader social considerations, yet critics argue that its communitarian objectives have not been fully realized, and that primacy has been bestowed on individual rights.

This poses a particular problem for some, who suggest the individual/society debate is a situation that leads to no morally defensible starting point for *Charter* analysis. The type of approach introduced in McCormick's anthropology, that is, human dignity understood through the three dimensions of man – the transcendent, the individual, and the

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<sup>540</sup>McCormick, "Theology and Biomedical Ethics," 38.

social, may be the solution to the “aporia” described in Chapter Three. If the critics are correct and the Supreme Court has over-emphasized individual rights, and if this is a result of the Court’s understanding of human dignity (recall Chief Justice Dickson in *Big M Drug Mart*: the primacy of individual rights in the *Charter* is a result of “basic beliefs about human worth and dignity), then an appreciation of human dignity as it has been conceptualized by McCormick may lead to an interpretation of the *Charter* in a manner more consistent with its communitarian elements, as described by Professor Monahan.

#### **4.5.4 The Limitations**

The methodical approach and the comprehensive structure of the theological anthropology, as suggested by McCormick, have an appeal that is in some sense intuitive. This is what initially recommends it for our consideration as a foundation piece for discussions of human dignity. Yet, it is not without its problems. The most obvious is perhaps the most significant. Would persons who do not accept Christianity or even persons who do not accept the existence of a personal God or a creator “buy into” the anthropology in such a way as to make its implications practical for decision-making in genetics technologies or any other field? Would there be an opportunity to include a religious or denomination perspective in the public policy discourse in Canada? The answer to these questions at first glance may be negative. In some cases the proposal of a divinity of any sort may impede some individuals and some social or political contexts from even considering the content of a theological anthropology, not so much from the point of

view of the considerations of the person as individual and the person as social – but rather the notion of the person in relationship with God. There is a significant portion of society that would not accept this idea of a relationship with God as a legitimate factor in the development of public policy. This would present a problem from the point of view of inclusiveness of views in the development of such a policy. There is thus a seeming roadblock that would limit the applicability or the usefulness of the anthropology of McCormick in this sphere.

However, there is an approach that may provide a direction for a resolution to this problem. It has a basis in understanding the relationship with God of which McCormick speaks, as a case in point of the reality of the human persons relationship with the transcendent -- understood broadly as ‘that which is more than what one is now in this present circumstance.’ Walter Conn in his book *Christian Conversion*<sup>541</sup> argues from the perspective of developmental psychology to show that a normative structure of personal development exists that can provide empirical criteria for individual self-fulfillment and social well being. For Conn, self-transcendence is a normative orientation of humans. He argues that

Whether we look to Fowler’s theory of faith development or to Kohlberg’s analysis of the development of moral reasoning, or whether we examine the more fundamental development of cognitive structures as explicated by Piaget and of psychosocial patterns of affectivity as described by Erikson, we find in each of them one central and dynamic reality: *self-transcendence* (be it of objective knowing through contextualized formal operations; of the fidelity and intimacy in loving and

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<sup>541</sup> Walter Conn, *Christian Conversion: A Developmental Interpretation of Autonomy and Surrender*, (New York: Paulist Press, 1986).

responsible care; of the universal intent of a principled conscience; or be it of universalizing faith) as the normative direction of fully human development and therefore the key criterion of personal maturity (*italics in original*).<sup>542</sup>

In other words, self-transcendence is transcultural in structure though culturally determined in content. As normative, self-transcendence provides the foundational criterion for personal self-fulfillment in concrete living and in relation with others. Conn explains the normative structure of self-transcendence through the work of the philosopher/theologian Bernard Lonergan. Lonergan's fourfold structure of human intentionality provides the cornerstone of a philosophical position on the normativity of self-transcendence which Conn later empirically grounds through an analysis of developmental psychology. Lonergan's four-fold structure of intentionality lays out the process of human attentiveness, intelligence, rationality and responsibility as orientated to a person's self-fulfillment.<sup>543</sup> By being attentive, one is sensitive to one's world and those with whom one encounters. Through this attentiveness there emerges insights into the intelligibility of the world that can emerge spontaneously as insights or answers to questions. But, self-fulfillment is not satisfied with insights because experience quickly shows that insights are, as Lonergan

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<sup>542</sup> Ibid., p. 66. See also pg. 25 where Conn writes "...these psychological theories establish the normative *meaning* of self-transcendence in a concrete and especially illuminating fashion, and thus provide an integrated model of self-transcending subjectivity. (*italics in original*)" Lonergan, of course, provides the philosophical corollary, but note that Lonergan was also well aware of developmental psychology.

<sup>543</sup> See *ibid.*, p. 33-35, 112-121. Note that this short presentation of Lonergan's structure of intentionality is meant to be illustrative of a direction of argumentation which Conn follows not a precise articulation since it is not the aim of this thesis. For a clearer presentation of the significance of Lonergan's intentionality analysis for ethics see Kenneth R. Melchin, *Living With Other People* (Ottawa: Novalis, 1999).

famously said, 'a dime a dozen'. From intelligibility then emerges rationality that intends the truth of the situation through the act of judging. Self-fulfillment at this level is the act of determining the truth in the concrete. From the determination of truth there emerges the experience of responsibility that thrusts one into a situation of decision and action.

Through the intention of responsibility, the orientation of self-transcendence is to one's relationship with others. Conn's purpose in presenting Lonergan's four-fold structure is to show the normative dynamism of self-transcendence is oriented toward levels of self-fulfillment in becoming oneself in relation to one's world and those one encounters.

Through developmental psychology, whether the psychosocial theories of Erickson, the stage theories of Piaget, Kohlberg and Fowler or Kegan's integrating theory, self-fulfillment is a normative aspect of human existence that can be empirical grounded as well as philosophically defended.

Conn shows that a normative theory of transcendence can provide a foundation for an understanding of human dignity in the manner in which Richard McCormick proposes that the consideration of the transcendent is an essential consideration in the understanding of the human person. For McCormick, the relationship with the Divine, which is an essential aspect of wholeness for considering the human person, is expressed in the language of Christian theology. It is recognition that the Divine is the origin of the human person and the goal or the end to which the human person is called to grow or to develop. Integral to this recognition is the concept of development or moving beyond what one is today to become what one can be – or in the language of Christian theology what one is

called to become in fulfillment of one's nature and potential. For Conn, dignity is self-fulfillment. Self-fulfillment is an achievement of the struggle through the four-fold structure of human knowing and doing as these are concretely performed in the different stages of human development and in the many experiences one has as one lives in the world and with other people. Though Conn recognizes that the foundations of self-fulfillment cannot themselves provide an explicit policy basis for governments, we would suggest that they do provide criterion for policy development in relation to human dignity.<sup>544</sup> The levels of intentionality and the stages of human development can be operationalized in government policy and the lack of their operationalization can be shown to be a source of human suffering. Government policy on ethical issues such as genetic testing, reproductive cloning or research involving human subjects can be analyzed by a study that includes the foundations of self-fulfillment. For example, policy ought to promote the self-fulfillment and provide for the conditions of the four-fold structure of self-transcendence.<sup>545</sup>

The theory of transcendence offered by Conn moves the anthropology offered by McCormick beyond the bounds of the language and worldview in which it is expressed, in this case Christian theology, and makes the whole of the anthropology available to those who accept self-transcendence as normative for the human person. It makes it possible to translate it into other worldviews and supports our proposal of McCormack's anthropology of wholeness as a way forward in the public policy discussion surrounding the use of

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<sup>544</sup> See, for example, 158.

<sup>545</sup> Such a study could be a natural complement to this study.

genetic technologies.

While we do offer that the theological anthropology represented here from the work of Richard McCormick is a significant piece of the analytical methodology for understanding the concepts surrounding human dignity and its place in public policy development concerning the use of genetic technologies as a case in point, we do not propose that our presentation of McCormick's contribution is complete. This is partly because the material from McCormick is representative and not exhaustive, and partly because without that exhaustive examination of the work of McCormick and other theological anthropologies (for I do not believe that McCormick would contend his is the last word on the subject) the case cannot be closed. Nor do we contend that if there were complete and exhaustive examinations of theological anthropologies all of the issues or questions raised would be answered definitively. These issues are for another paper. That being said, we do propose that McCormick's anthropology, as presented here, represents a significant contribution to the policy development process in that it provides an avenue to make clear the anthropology that underlies the policy and thus overcomes the shortfalls of the presentation we found in the public documents where the key problem is this lack of certainty. McCormick also provides a more comprehensive anthropology than that offered in the works we examined from Kant and Rawls as well as a more explicitly inclusive perspective than that offered by those who critique Kant and Rawls.

#### **4.6 Impact of McCormick's Anthropology on the Public Policy Process**

Having recognized the limitations of using McCormick's work, particularly from the point of view of the explicitly Christian language and having proposed how this limitation can be overcome to make his work more available and influential in the public policy process, we turn now to considering the impact and effect that that the perspective of McCormick would have if it were to engage the public policy process. Continuing with the particular focus of this paper – using the expression 'human dignity' in public documents discussing genetics – we will propose, where possible, how the outcomes of a public policy process that allowed McCormick's theological anthropology to participate might be different from the outcomes of the processes that led to the public documents reviewed in this paper. For the purpose of illustration we will focus on the documents that discuss genetic testing. The possible or potential outcomes of a process influenced by McCormick's work will be assessed in three ways: 1) the actual recommendations; 2) the process for arriving at recommendations; and 3) the potential for acceptance of the results of the process.

##### **4.6.1 Implications for Recommendations in Policy Processes**

We begin by recalling the features of the public documents that we discussed in Chapter 2. The Canadian documents *Human Dignity and Genetic Heritage* takes a predominately deontological approach for determining their recommendations regarding genetic testing. Although as we shall see it is more moderate in its approach than the

American document, the importance given to autonomy and to a rights-based analysis is still obvious. The Report interprets a denial of rights, security and liberty as diminishing that individual's human dignity. At the same time, the Report is more receptive than the American document to a discussion animated by consequentialism, but even this is within a context of deontology. For example, the Report mentions the impact of genetic testing on mutualism, and the individual's place in family relationships. However, the discussion is framed in the context of an individual's duties and obligations to family members, rather than an analysis of the effect of genetic testing on the familial relationship *per se*.

In the American document, *Promoting Effective Genetic Testing in the United States*, there is a similar, although stronger statement of the deontological approach. As the title of the report suggests, it began with a view to ensuring that tests were conducted properly and not to question the practice itself. In making the determination of how this technological practice should be conducted beyond the issues of safety and laboratory practices, distinct primacy is given to autonomy, liberty, privacy and confidentiality of the persons seeking testing. The suggestion that there may be conflicts between the interests of individuals and the social consequences of genetic testing is not addressed.

Similarly, the French documents have a deontological focus for justifying their position on genetic testing. Informed consent, confidentiality, and equality of rights, dignity and solidarity for all humans are the key issues in this country's consultative body's recommendations. The CCNE's Opinion No.46 also recommends prohibiting genetic

testing for insurance or employment purposes to prevent discrimination that would impair an individual's liberty and self-determination.

The similarity of focuses of each country's report is evident – the individual, autonomy and rights are the terms used to provide content to human dignity. We recall that the critiques of a deontological justification of human dignity found in Habermas's expansion upon the perspective of Kant, in virtue ethics and the feminist perspective suggest that this justification is too narrow. Spiegelberg also called for expansions of this narrow scope when he said a full-fledged anthropology would be necessary to clarify the confusions over the use of the term human dignity such as were raised by Gotesky and Laszlo. The perspective of wholeness offered by McCormick expands the scope of the considerations of dignity by beginning with the person as individual, but at the same time equally considering the person as social and in relation to the transcendent. The question we now ask is will this change in perspective change the outcome, that is, with the perspective of wholeness offered by McCormick as a piece of the analysis, will the recommendations be significantly different?

At this point we cannot answer this question with certainty. We recall that in our review of the development of the American documents we noted the presence of the theological voice in the presentations to NBAC, but also noted that they did not figure in the conclusions or the recommendations of the Committee. This suggests that the presence of a perspective such as that offered by McCormick will not change outcomes merely by

being one of the voices in the presentation. If the impact of his anthropology is to be felt there must be a more fundamental incorporation into the process.

#### **4.6.2 Implications for the Process of Policy Development**

It is in the implications for the process of policy development that we propose the greatest impact and import of the incorporation of the anthropology of McCormick will be felt if it is allowed to engage and change the process. It is a contribution that will allow both the questions asked and the deliberations that follow to be contextualized within a conception of the whole person integrally and adequately considered – the whole person being individual, social and transcendent. It is also a perspective that provides a balance among these aspects of a person, which is not evident in the public documents discussed in this paper.

McCormick acknowledges the deontology presented in the public documents and its focus on the individual, autonomy, freedom, rules and processes. Reason is not excluded from the anthropology he presents. He does however, acknowledge the limits of deontology with its focus on particular acts and its inability to move towards recommending what should be done in a particular circumstance or with a particular practice. In *Corrective Vision*, we noted that McCormick contextualized freedom and autonomy beyond the individual act by drawing on his understanding of transcendental freedom expressed in fundamental options. Persons are not passive actors and their individual freedom is seen as impacting on the direction and meaning of life, on their relationship with the transcendent.

In this McCormick established his understanding of the relationship between freedom and autonomy and the consequence of the choices made. Again it is an exercise of contextualizing. Choices have consequences that impact their moral quality. These include consequences for the individual and for the social relationships in which the individual makes the choice. As an actor, this choice impacts on and is reflective of the individual's fundamental orientation – towards the creative, changing, becoming, and developing person directed by the good. This good acknowledges that the good sought is beyond the individual and includes the social. Again, using the comprehensive approach of McCormick as a model prevents the limits of consequentialism from replicating the situation we found with the deontological approach in the public documents. These limits, which include the absence of a judgement of the act, the difficulty of calculating costs and benefits, and the means to deal with a situation where values clash, are balanced by the inclusion of the more deontological consideration of the person as individual.

McCormick's work also acknowledges explicitly the importance of social relationships in judging the moral quality of acts and their consequences. The individual is part of a community and this reality impacts on the decision process. This community has a history with social ties, relationships, customs and values. Again this contextualizes individual rights within the reality of a social being in relationship with others. It points out the danger of absolutizing autonomy and failing to recognize the essential equality and other social values that provide the circumstance for exercising autonomy. It also points

out the need to have a balanced perspective that recognizes individual being and personal good have a relationship of dependence to the being and personal good of others.

Finally, the relationship to the transcendent that McCormick proposes as essential for considering the whole person is again important for context and balance. This teleology acknowledges the individual and the community of which the individual is part. It also serves to integrate these considerations at the larger level and invites a consideration of the connectedness of human persons in a way that is not at first evident. It does so by its demand of inclusiveness of persons and positions by virtue of the fact of our human connectedness, irrespective of gender, power, vulnerabilities and ensures the inclusion of the marginalized and the outsider. This is where there is a demand for the broadening of the participants and the perspectives in any public policy debate and where we see the reluctance of traditional policy methodologies, particularly incrementalism, challenged.

By providing a clear identification of the context of the question raised for public policy discussion and by providing for inclusion of multiple perspectives in the discourse changes the nature of the questions asked. Returning again to discussions on genetic testing, we observed that the questions and recommendations were framed deontologically and concerned safety, efficacy, autonomy, liberty and privacy. Using the framework of wholeness as McCormick suggests we would expand the number and the scope of the issues to be considered. McCormick suggests that the fundamental question to be asked is that of the impact of the act or practice on the whole person; is it promotive or undermining of the person as individual, as social, and as one becoming all that one can be in both

respects? For genetic testing, the detailed questions would be far ranging in addition to those suggested above. What is the purpose of the testing and how does this change the nature of the act? Is it pre-disease intervention, disease intervention, for enhancement, somatic or germ-line? Issues of cost and expense and who will bear them - is there equity in beginning this practice? Does the practice lead to a reductionist view of the human person and if so what are the consequences for those who are found to have genetic anomalies? Is there a question of this practice compromising our striving to become more than we are by limiting our development to that which is achievable by technology? What are the consequences for the groups in society who find their values privileged in the decision made and what are the consequences for the groups whose values are not?

The expanded questions that arise from the approach suggested by McCormick are part of the impact of this new method for developing public policy. So is the process of answering them. As the feminist thought warned, the privileging of values must be more than an exercise of power. The process must address each of the questions and answer them clearly and then draw out the consequences of privileging each one. This allows for a more transparent accounting of the decision and also allows for the opportunity for the decision makers to explain how they understood each value and why they chose to privilege one over another. This will avoid the situation we observed in the development of the American documents, where it appeared that multiple positions were allowed in presentation, but the decisions appeared pragmatic and justified almost exclusively deontologically.

From the discussion above we can see that the outcome of employing the wholeness of the human person as proposed by McCormick is evident in the process of reaching a decision. While more complex, it also addresses one of the major weaknesses of the public documents we reviewed – the absence of explicit consideration in the deontological approach of the expectations and considerations of what is wanted in the community. It addresses not only how to proceed, but also allows for a clearer understanding of what we are doing and its meaning for those who are implicated by the decisions made. The clarification and contextualization provided by following McCormick also have implications for the acceptance of decisions made.

#### **4.6.3 Implications for Acceptance of the Results of the Process**

We noted after reviewing the public documents and establishing their deontological perspective as similar to that of Kant and Rawls, that there were significant voices that did not accept this approach. These range from Habermas, who moved the deontological perspective forward by including a procedural aspect, through the virtue ethics school which advanced the consideration of social relationships and consequences, the feminist school which put forward the need for the consideration of relationships and a duty of care on par with rationality. While we recognize that there will always be those who do not agree with a decision made in a situation of competing or conflicting values, we propose here that the process outlined above as inclusive and deliberative will obtain a higher degree of acceptance than the current practice of listening but not demonstrably considering

and valuing diverse perspectives. This is a further reason to recommend the changed approach to public policy development that is recommended by following the deliberative process required in considering McCormick's anthropology.

#### **4.7 Conclusion - The Contribution of the Theological Voices to the Public Discourse**

We saw in our discussion of the public documents in Chapter 2, that the authors, in all three countries, used the expression human dignity as a valid consideration in determining the acceptable use of genetic technologies. We have noted we were not able to determine the content of the expression from the documents themselves nor were we able to address some of the questions regarding the relationship between the individual and the social meanings attached to human dignity. Our brief examination of possible philosophical roots for the context of human dignity bore some fruit, but it did not satisfy entirely the question of content and the individual/social relationship. In turning to an instance of the theological voice in the discussion we find a different situation.

The documents discussed in Chapter 2 began with a focus on new technology and asked new questions about the relationship of this technology to the persons with whom it was to be employed and secondly to the larger human society. Kant and Rawls began with questions of how individuals manifested their duty or circumscribed their relationships with reference to the autonomy. The documents and the philosophers began with the individual. The Feminist critique decried this but the concerns of Feminism as we outlined in Chapter 3, are not evident in the documents examined, save for the references to concerns for the

disadvantaged that were present in the Canadian documents. Similarly, we noted the differing perspective of those who espouse a more communitarian or virtue ethics approach which diverged from both the perspective of the public documents and the probably philosophical underpinnings found in Kant and Rawls. Finally we noted the divergence in what appears to be the intended approach that formed the basis for the Canadian *Charter* as communitarian and the interpretation of the *Charter* by the Supreme Court as more individualistic. We suggested the possibility that an anthropology would serve our project by supplying content to the expression human dignity and the theological anthropology found in the writings of Richard McCormick has provided that content. McCormick begins from a different perspective from the public documents and the schools of philosophy by focusing his anthropology not on the individual, nor the social relationships of individuals but upon the wholeness of the person integrally and adequately considered. This gives the person their due as an individual, but does not consider individuality apart from sociality and not sociality apart from individuality. McCormick also introduces a third aspect of wholeness that must be considered and that is the relationship with the transcendent.

In his presentation McCormick offers, not the answer, but a dimension of the answer to the question we have posed – what is this human dignity that we feel is important to respect? McCormick shows in his writing what this concept means for one tradition, in this case the Catholic Christian tradition, and what it implies for actions in the use of genetic technologies or other areas of human activity. The presentation of McCormick is more satisfying for our project, for here the concept of human dignity ‘makes sense’ in that

it is clearly grounded in the understanding of the human person as presented in this tradition. McCormick helps us see human dignity in its different faces in all three levels – the self, the other and the transcendent and suggests that to be faithful to each we need to understand how we answer to each level if we are to respect human dignity. As we noted above, the religious language of the relationship with the transcendent in McCormick’s work may be problematic for some. However it need not be. For McCormick, this is our relationship with the Christian God. For others it could be ‘that something which is other than the self’. This will suffice if we recall that as we noted above and one of the matters that recommended McCormick for our consideration in this project is his understanding of his work in moral theology as part of a dialogue and not the last words; as universalizing in its appeal; as modest and tentative; and as pluralistic. What McCormick offers is a framework to discuss the very important issues surrounding the use of genetic technologies and not the definitive answer to the questions. The Feminist critique pointed out that the issue of framework is important in that it has power over how we think of the issue, the questions we ask and how we frame our answers.

This framework is clear from the writings we have considered. McCormick shows the need to be clear about the operative anthropology in order to make sense of human dignity. To fail to do so is to have so many concepts, many ill defined, that in the end they mean little. Respect is what is all that is left – but for what? The work of McCormick makes a contribution to our understanding of how human dignity is understood in one tradition. He leaves us with a framework that suggests human dignity may be a ‘common’

concept and a useful concept for discussing the use of genetic technologies beyond his tradition – a discussion that may embody respect for human dignity if it is conducted within a framework such as the one he offers. This demonstrates both the distinctiveness of the voice of theology in this contemporary debate and the nature of the contribution that it can make – that of furthering the discussion with a revised and renewed process for considering the many values that impact on persons as individuals, as members of a community and as persons and communities striving to become all that we can be.

## CONCLUSION

This project began with questions about how the values held in a pluralistic society, values that may often conflict or suggest very different outcomes, are integrated, if at all, in the public policy process. We chose to examine these issues from the perspective of one aspect of the public policy process – the public documents from national groups in three countries with mandates to consider significant policy issues in the public forum. The documents all sought to propose a public policy response related to the use of genetic technologies – the need for a response suggested by the novel and far reaching implications of the rapidly evolving science of genetics. We focused our inquiry on one of the values that appeared consistently in the public documents discussing genetics – human dignity – and tried to determine what this value meant to the authors of the documents and how it was reflected in the document and what its impact was in the document as a value or parameter for the use of genetic technologies. This project was guided by two concerns – first, the misgiving that, following an initial read of such documents, there was no clear content that one was able to ascribe to the expression identifiable from the public documents and that this lack of clarity may limit the impact of the value upon the public policy process; and second that the discourse surrounding the documents be seen as to advance as ethical discourse by allowing for and engaging the pluralistic society in which it is developed. This, as we noted, entails acceptance of the multiplicity of values that surround issues, exploration of their meaning and import to those who hold them, implications for the community were one value to be privileged over another and cooperative decision-making by the community or accepted representatives.

We presented a brief overview of the science of genetics and the issues it raised in the public forum. We examined in detail representative public documents discussing genetics from Canada, France and the United States. This examination allowed us to conclude that the documents themselves do not provide clear meaning to the expression human dignity nor do the documents reference any bodies of work that would yield a clue to the meaning their authors attached to it. We found ourselves left with a series of questions that direct us to a broader search for the meaning of the expression human dignity. These questions were three: Is there a generally accepted understanding of the expression "human dignity" in use outside of documents discussion genetics--for example, is there a common presentation of the expression, or at least a dominant one in the schools of philosophy; How are we to understand the relationship between dignity and other terms such as autonomy, which figured prominently in the discussions in the documents; and while there appears to be a tension, which is unresolved, between the individual and the social meanings attached to human dignity in the documents, and we wondered if this could be resolved?

We attempted to respond to some of these questions by appealing to the influential philosophers Kant and Rawls whose thought we have suggested influences the authors of the public documents. Their work provided content for the expression human dignity and established a relationship between human dignity and autonomy but it proved to be somewhat unsatisfactory as the critique of Habermas, Virtue Ethics, and the Feminist philosophers showed. While Kant and Rawls and the thought they inspired provided content and made the link to autonomy, they do not adequately address the question of the individual and social meanings attached to human dignity. This demonstrated the

limitations of the deontological approach that characterized the documents and the work of Kant and Rawls in which we found similarities. We turned to the work of the theologian Richard A. McCormick as another possible source of answers to the questions raised that would more fully satisfy our requirements for ethical discourse in public policy development. McCormick's work was significant for our project in several ways. His work demonstrated that if one is to make sense of the expression human dignity, it is necessary to be clear about the operative anthropology that guides the use of the term. McCormick's theological anthropology requires us to consider human dignity from the perspective of 'wholeness' – the human person integrally and adequately considered – the self, the other and the transcendent.

The concept of human dignity is for McCormick something very different from that used in the public documents we considered and in this sense it challenges the public documents whose presentation of human dignity appears to be mostly based on the value of individualism. In this sense, McCormick also challenges the incrementalist model of public policy development that builds upon what is already in policy rather than engage a dialogue that addresses significant value conflicts. Yet the public documents we considered do not avoid the values discussion entirely as they consistently include human dignity as an issue that must be considered, although they do not specify its content. A detractor might suggest that the expression is included in these public documents and in public policy statements as a political pacifier or even a political flaw. Others may suggest that it is an expression of an ideal. We suggest here that it may be properly considered as an expression of something in our collective minds that is very significant; that our understanding of ourselves has aspects that we are not always able to specify, but that must

be counted in considerations of important issues. The challenge that flows from this is to provide content to this expression human dignity for the purpose of clarity and to advance the discourse.

We have observed in our examination of the philosophers considered that their work is only somewhat able to advance our understanding of what it is we mean when we invoke human dignity. We have found that the theological voice, in the instance considered here, is able to move the dialogue on in a much more satisfying way. This raises an important question – is modern and contemporary philosophy, that is a voice other than religion, able to propose an anthropology with a broader base than that of individualism? The answer is clearly yes if one considers the still formulating philosophy of the Feminist school cited in this paper as well as the more developed social philosophers that include such notable thinkers as Marx and Ricoeur. Their use of the expression human dignity is based on the notion of solidarity of persons. The impact of their use of human dignity is the subject of another project, but for our purpose here we note them to indicate that there are significant voices that explore human dignity from other than an anthropology based on individualism. Religion is an example of one of these other ways.

We noted that McCormick did not propose his work as the final word on any subject, but as part of a dialogue. In the same way we do not propose that this project has identified religion in general or as explored here through the work of Richard McCormick as the answer to all our questions about the meaning of human dignity. It is clear that there are many visions of the meaning and the import of the concept of human dignity as the public policy world, the world of philosophers and the world of experience suggests in our daily discourse. McCormick is not the only contributor to the discussions, nor is religion.

**This project suggests to us that in religion, through its presentation of a theological anthropology, there is a way of enlarging our vision, of expanding the content of the expression human dignity and consequently its impact in discussions concerning genetic technologies and other similarly significant issues where decision makers must establish parameters. The theological voice is useful in advancing the discourse through its original but complementary engagement of the exploration of the content of the expression human dignity when used in public documents discussing genetics. This original contribution may not change minds nor perhaps alter results but it contributes to the process that ensures the debates and the discourse are ethical in that they acknowledge the multiplicity of values that surround the issues related to the use of genetic technologies; allows a fuller exploration of their meaning and import to those who hold them; recognizes the implications for the community were the value to be privileged over another; and provides another voice in the process of cooperative decision-making by the broader community.**

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