JUST CARE: A RELATIONAL APPROACH TO AUTONOMY AND DECISION MAKING OF PARENTS COMMITTED TO RELIGIOUS OR INDIGENOUS TRADITIONAL PRACTICES

by

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Abstract

Hamilton Health Sciences Corp. v. D.H. and *B. (R.) v. Children's Aid Society of Metropolitan Toronto* tell important stories about people and relationships—and about parenthood; autonomy; religious believers and cultural communities; and the role of the state in family, culture, and religion. Their narratives were influenced by liberalism and emphasize a degree of individualism that is incongruous given the subject matter of parent-child relationships and their place within communities and the law. This thesis explores the application of relational theory and the integrated principles of justice and care to these issues. Ultimately, the stories these judicial opinions tell help to foster or undermine actual relationships, including between the law and other cultures. Legal actors persuaded of the inadequacy of such narratives are urged to find new ways of telling these stories and resolving the dilemmas they pose, and demonstrating thus the law's capacity to be both just and caring.

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Some time after I began work on this thesis—which, in many regards, is about parenthood—I became a mother myself. I am profoundly indebted to my supervisor, Professor Constance MacIntosh, for her patience, support, and insight in every aspect of this process. I also have Professor Diana Ginn to thank for introducing me to the subject of law and religion and for reading and commenting on a draft of the thesis. Thanks go to Professor Naiomi Metallic as well for acting as my examiner.

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Lastly, thank you to my friends and family, for everything. Aelia, I hope that one day you may understand why Mama was always so busy "playing" at the computer during those early years.

Chapter 1: Introduction

In my early days at law school, and somewhat counter to my initial expectations, I was agreeably taken aback by the discovery that I enjoyed reading judicial opinions. I felt like I was reading stories, and Nancy Cook's statement that "[t]he courts ultimately relate stories through judicial opinions"[1] resonated with me. The narratives could be highly engaging, holding the power to draw out visceral emotions, especially when they determined issues that matter a great deal to the way in which we lead and give meaning to our lives, in which case they could inspire a strong sense of hope, optimism, and belonging; or, contrariwise, arouse deep feelings of anger, resentment, and alienation.

Hamilton Health Sciences Corp. v. D.H.[2] and *B. (R.) v. Children's Aid Society of Metropolitan Toronto*,[3] the judicial opinions that planted the seeds of reflection for this thesis, are two such cases. They can be read as telling important stories about individuals and their relationships—as well as about parenthood; autonomy and agency; religious believers and cultural communities; the performance of commitments and beliefs; and the role of the state in matters of family, culture, and religion. These narratives, I will argue, were shaped by liberalism's influence on Canadian law and can be construed as emphasizing a degree of individualism that is somewhat incongruous given that they are fundamentally stories about parent-child relationships and how these relationships dovetail within larger communities, various cultural groups, the state, and the law. The objective of this thesis is to explain this argument and to explore how these narratives

[1] Nancy L Cook, "Outside the Tradition: Literature as Legal Scholarship" (1994) 63:1 U Cin L Rev 95 at 95.
[2] 2014 ONCJ 603, 123 OR (3d) 11 [*Hamilton*].
[3] [1995] 1 SCR 315, 21 OR (3d) 479 [*B (R)* cited to SCR].

might have unfolded differently had they taken into consideration certain insights afforded by relational theory.

After setting up the backdrop created by these cases in the following chapter, I will examine, in the third chapter, liberalism's conceptualization of the interests at issue and the value it places upon individualism; I will also analyze the justifications in family theory for parental authority and suggest reasons for moving away from a markedly individualistic conception of these interests. In the fourth chapter, I will explore the addition of a relational perspective, beginning with a general introduction to relational theory and its impact upon subjects such as law, family, and parental autonomy. I come to the realization that, alone, relational theory and its division of "care ethics" are not enough and must operate alongside justice principles. Finally, I will apply this theory and the integrated principles of justice and care to the issues at hand, with the help in particular of the work of Benjamin Berger. Ultimately, my sense is that the stories these judicial opinions tell about various relationships will themselves influence how members of different communities relate to one another, how parents conceive of their responsibilities towards their children, how the state behaves towards its citizens and autonomous groups, and how the law interacts with other cultural groups. I urge legal actors, if and when they are persuaded of the inadequacy of the narratives they tell, absorb, and retell, to do right by the law and those who come before the law, by finding new ways of telling these stories and resolving the dilemmas they pose, and demonstrating thus the law's capacity to be both just and caring.

Chapter 2: Context

On November 14, 2014, Justice Gethin B. Edward released the reasons for his judgment in *Hamilton Health Sciences Corp. v. D.H.*,[4] a decision that sparked a measure of public—albeit primarily muted—criticism.[5] In part owing to the media coverage and legal interest it elicited, this case reinvigorated the public debate surrounding the role of culture and religion in the decisions parents make regarding their children's health care.[6]

The case involved J.J., an 11-year-old girl from the Six Nations of the Grand River who had been diagnosed with acute lymphoblastic leukemia. In the opinion of her medical team, J.J. had a ninety to ninety-five percent cure rate with chemotherapy, and a zero percent chance of survival without the treatment. J.J. began chemotherapy, but her mother, D.H., later withdrew her consent for the continuation of the treatment, choosing to treat J.J. with traditional medicines. As a result of this decision, an application was made under s. 40(4) of the *Child and Family Services Act*[7] for a declaration that J.J. was a child was in need of protection.[8]

The substantive issue before Edward J. was therefore whether the court was satisfied that there were reasonable and probable grounds to believe that J.J. was a child in need of protection, the analysis of which usually hinges upon on an assessment of the

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[4] *Supra* note 2.

[5] Diana Ginn, "*Hamilton Health Sciences Corporation v DH et al*" (2015) 4 Oxford JL & Religion 526 at 529.

[6] See e.g. Andrew Row, "Life or death, and traditional medicine – primacy of indigenous rights in the Canadian case of Hamilton Health Sciences Corp", online: (2015) Māori L Rev <maorilawreview.co.nz/>; Asher Honickman, "A questionable judgment on 'traditional medicine'", *National Post* (21 November 2014), online: <news.nationalpost.com>; John Edmond, "Aboriginal right – or wrong?", *LawNow* (8 March 2015), online: <lawnow.org>; Yamri Taddese, "Cancer decision a shock to lawyers", *Law Times* (2 November 2014), online: <lawtimesnews.com>; Alyshah Hasham, "Aboriginal medicine ruling sparks instant controversy", *Toronto Star* (19 November 2014), online: <thestar.com>.

[7] RSO 1990, c C-11, as repealed by *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Schedule 1.

[8] *Hamilton*, *supra* note 2 at paras 1– 3, 8, 10, 12.

best interests of the child. On this question, however, the Six Nations Band invoked the protection of their Aboriginal rights under s. 35(1) of the *Constitution Act, 1982*,[9] heralding a somewhat novel approach, given that this provision had heretofore primarily been asserted in the context of disputes regarding the lawful application of natural resource laws to Aboriginal peoples.

Section 35(1) affirms that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Its purpose is to acknowledge and reconcile the pre-existence of distinctive Indigenous societies with the sovereignty of the Crown.[10] To establish a s. 35(1) right, an applicant must demonstrate that the activity in question is "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right",[11] examined in the context of "the period prior to contact between aboriginal and European societies".[12] The applicant must show continuity between the contemporary claimed right and the pre-contact practice,[13] and the court considers how the pre-contact practice supporting the claim might have evolved to its present-day form.[14] An "existing" right is one that was not extinguished by Parliament prior to the enactment of the *Constitution Act, 1982*, the Crown bearing the burden of establishing a clear and plain intention to extinguish the

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[9] Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[10] *R v Van der Peet*, [1996] 2 SCR 507 at paras 31, 43, 137 DLR (4th) 289 [*Van der Peet*].

[11] *Ibid*, at para 46; see also Patrick J Monahan, *Constitutional Law* (Toronto: Irwin Law, 2006) at 496–97; *R v Sappier; R v Gray*, 2006 SCC 54 at para 45, [2006] 2 SCR 686 [*Sappier;* Gray] ("[t]he use of the word 'distinctive' as a qualifier is meant to incorporate an element of aboriginal specificity. However, 'distinctive' does not mean 'distinct'").

[12] *Van der Peet*, *supra* note 10 at para 60.

[13] *Ibid* at para 63; see also Monahan, *supra* note 11 at 497.

[14] *Sappier; Gray*, *supra* note 11 at para 23.

right; furthermore, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit the evolution of the rights over time.[15]

Aboriginal rights protected under s. 35(1) cannot be unilaterally abrogated by the government.[16] Moreover, s. 35 is not located within Part I of the *Constitution Act, 1982*, which contains the *Canadian Charter of Rights and Freedoms*,[17] and is consequently not subject to the limitation under s. 1 of the *Charter.*[18] Nevertheless, Aboriginal rights are not absolute;[19] legislation that interferes with these rights may still be valid if it meets the justification test laid out by the Supreme Court of Canada in *Sparrow*,[20] a test that functions similarly to the analysis framework for determining whether a *Charter* violation can be justified under s. 1.[21] If an Aboriginal right is shown to exist, a court asks whether there has been a *prima facie* infringement of that right by examining whether the limitation is unreasonable; whether the regulation imposes undue hardship; and whether the regulation denies to the holders of the right their preferred means of exercising that right. If a *prima facie* infringement is found, the court considers whether the infringement can be justified. At this point, the Crown must demonstrate, first, that the infringement is related to a compelling and substantial legislative objective; and, second, that its actions

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[15] *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow* cited to SCR]; see also *Delgamuukv v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukv*].

[16] *Mitchell v MNR*, 2001 SCC 33 at para 11, [2001] 1 SCR 911 [*Mitchell*]; *Van der Peet*, *supra* note 10 at 28; *Sparrow*, *supra* note 15.

[17] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[18] Monahan, *supra* note 11 at 401, 461; see also *Hamilton*, *supra* note 2 at paras 61, 82.

[19] *Sparrow*, *supra* note 15 at 1109; see also e.g. Monahan, *supra* note 11 at 465.

[20] *Sparrow*, *supra* note 15; see also *Mitchell*, *supra* note 16 at para 11; *Van der Peet*, *supra* note 10 at para 28.

[21] See e.g. Halsbury's Laws of Canada (online), *Aboriginal Law* (2016 Reissue) at HAB-129 "Test for justifying infringement"; Thomas Isaac, "*Canadian Charter of Rights and Freedoms*: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002) 21 Windsor YB Access Just 431 at 439 [Isaac, "Individual and Collective Rights of Aboriginal People"]; Joshua Nichols, "Claims of Sovereignty - Burdens of Occupation: William and the Future of Reconciliation" (2015) 48 UBC L Rev 221 at 231.

are consistent with its fiduciary duty with respect to Indigenous peoples, the fulfillment of which usually requires meaningful consultation and, if appropriate, accommodation.[22]

Edward J. accordingly began his analysis in *Hamilton* by examining "whether D.H.'s decision, as J.J.'s substitute decision-maker, to pursue traditional medicine [was] in fact an aboriginal right to be recognized and affirmed."[23] On the basis of the evidence before him, Edward J. held that the Six Nations' practice of traditional medicine was integral to its distinctive culture today and that this practice arose during pre-contact times.[24] He affirmed that "D.H.'s decision to pursue traditional medicine for her daughter J.J. [was] her aboriginal right."[25] He further determined that D.H.'s right to practise traditional medicine had not been extinguished[26] and concluded that J.J. could not be found to be a child in need of protection when her substitute decision-maker had chosen to exercise her constitutionally protected right to pursue their traditional medicine over the hospital's recommended course of treatment.[27]

On April 24, 2015, Edward J. issued an "Endorsement," on a motion by the Attorney General of Ontario and a joint submission signed by all of the parties.[28] In their joint submission, the parties described how, after the release of the decision on November 14, 2014, the Government of Ontario chose respectful "dialogue and

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[22] *Sparrow*, *supra* note 15 at 1110; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; see also e.g. Monahan, *supra* note 11; Halsbury's Laws of Canada, *supra* note 21; John Borrows, *Aboriginal Legal Issues: Cases, Materials & Commentary* (Toronto: LexisNexis Canada, 2018).
[23] *Hamilton*, *supra* note 2 at para 62.
[24] *Hamilton*, *supra* note 2 at paras 72–79.
[25] *Ibid* at para 81.
[26] *Ibid* at para 82.
[27] *Ibid* at para 83.
[28] *Hamilton Health Sciences Corp v DH*, 2015 ONCJ 229 [Endorsement].

co-operation"[29] over further litigation, and started working with J.J.'s family "to expand the integrated health care team for J.J., . . . to provide Indigenous and non-Indigenous treatment."[30] They further explained that J.J.'s cancer had returned in March 2015 and that the family had decided to proceed with both chemotherapy and traditional Haudenosaunee medicine. The parties wished, going forward, to obtain some clarity on the position of the law, to which end they were asking the Court to elucidate its reasons given on November 14, 2014, in order to highlight the paramountcy of the best interests of the child and include the following clarification:

> [I]mplicit in this decision is that recognition and implementation of the right to use traditional medicines must remain consistent with the principle that the best interests of the child remain paramount. The aboriginal right to use traditional medicine must be respected, and must be considered, among other factors, in any analysis of the best interests of the child, and whether the child is in need of protection.[31]

After "considering both the facts of this case as expressed by the mother and the history as it relates to aboriginal peoples,"[32] Edward J. concluded that there was "no mischief in endorsing the joint submission"[33] and in recognizing the paramountcy of the best interests of the child, and accordingly ordered the amendment.[34]

This subsequent clarification made it clearer to legal observers that *Hamilton* remains "in line with parallel freedom of religion cases",[35] the foremost of which is the decision of the Supreme Court of Canada in *B. (R.) v. Children's Aid Society of*

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[29] *Ibid* (Joint Submission of the Parties) [JSP].
[30] *Ibid*.
[31] *Ibid*.
[32] Endorsement, *supra* note 28 at para 4.
[33] *Ibid* at para 6.
[34] *Ibid* at para 6.
[35] Ginn, *supra* note 5 at 529.

Metropolitan Toronto,[36] also examining the constitutionality of state interference with child-rearing decisions. In that case, baby Sheena's physicians determined that she might require a blood transfusion to treat potentially life-threatening congestive heart failure. Her parents, Jehovah's Witnesses, objected to blood transfusions for religious reasons, and the Children's Aid Society was granted a temporary wardship. The issue before the Court was whether the Ontario *Child Welfare Act*[37] denied parents a right to choose medical treatments for their children, contrary to the liberty interest protected by s. 7 of the *Charter*; or whether it infringed parents' freedom of religion as guaranteed under s. 2(*a*) of the *Charter*; and, if so, whether the infringement or infringements were justifiable under s. 1.[38]

With regard to the s. 2(*a*) question, the issue was more specifically the scope of religious freedom in the context of parental medical decision making.[39] La Forest J., writing for the majority, held that the right of parents to rear their children according to their religious beliefs, including that of choosing medical and other treatments, is a fundamental aspect of freedom of religion. Reiterating Dickson J.'s observations in *R. v.*

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[36] *Supra* note 3.

[37] RSO 1980, c 66, as repealed by *Child and Family Services Act, 1984*, SO 1984, c 55, s 208.

[38] These three provisions read as follows:

> 1. 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.
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> 2. Everyone has the following fundamental freedoms:
>
> (*a*) freedom of conscience and religion;
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> . . . .
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> . . .
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. [*Charter*, *supra* note 17]

[39] See also *Ciarlariello v Schacter*, [1993] 2 SCR 119, [1993] SCJ No 46 (the right to decide what is to be done to one's own body is a "concept of individual autonomy [that] is fundamental to the common law" at 135); *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331; *Malette v Shulman*, 72 OR (2d) 417, [1990] OJ No 450 ("people must have the right to make choices that accord with their own values, regardless of how unwise or foolish those choices may appear to others" at para 19); *NB v Hôtel-Dieu de Québec*, [1992] RJQ 361, 86 DLR (4th) 385.

Big M Drug Mart Ltd.,[40] La Forest J. nevertheless clarified that this freedom is not absolute and may be subject to "such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others".[41] He concluded that the *Child Welfare Act* seriously infringed the appellants' freedom guaranteed by s. 2(*a*) to choose medical treatment for their child in accordance with the tenets of their faith, but that this infringement was justified under s. 1 of the *Charter*. In his view, the state interest in protecting children at risk was a pressing and substantial objective; the process contemplated by the *Child Welfare Act* was far from arbitrary; and the restrictions it imposed on parental rights were amply justified.[42]

The appeal also raised "the more general question of the right of parents to rear their children without undue interference by the state."[43] Writing for a plurality of the Court, La Forest J. stated that the s. 7 right to liberty does not protect the integrity of the family unit as such, since the *Charter*, and s. 7 in particular, protects individuals. Moreover, he wrote, "[t]he concept of the integrity of the family unit is itself premised, at least in part, on that of parental liberty",[44] understood as "a *parental* right to enjoy family life and control various aspects of a child's life, free from unnecessary outside interference."[45] For him, "the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty

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[40] [1985] 1 SCR 295, 18 DLR (4th) 321 [*Big M* cited to SCR].
[41] *Ibid* at 337, cited in *B (R)*, *supra* note 3 at 368.
[42] *B (R)*, *supra* note 3 at 385–86.
[43] *Ibid* at 363.
[44] *Ibid*.
[45] *Ibid*, citing Nicholas Bala & J Douglas Redfearn, "Family Law and the 'Liberty Interest': Section 7 of the Canadian Charter of Rights" (1983) 15 Ottawa L Rev 274 at 281 [emphasis by Bala and Redfearn].

interest of a parent"[46] and constitute "an *individual* interest of fundamental importance to our society."[47] Indeed, he affirmed, "individuals have a deep *personal interest* as parents in fostering the growth of their own children."[48] La Forest J. acknowledged that parents do bear responsibilities towards their children but stressed that "they must enjoy correlative rights to exercise them"[49] and that to hold otherwise would be to ignore "the fundamental importance of *choice and personal autonomy* in our society."[50] In his view, although children obviously benefit from the protection of the *Charter*, "we must accept that parents can, at times, make decisions contrary to their children's wishes — and rights — as long as they do not exceed the threshold dictated by public policy".[51]

He clarified that state intervention represents a limitation on the constitutional rights of parents, rather than a vindication of the constitutional rights of children, given that the *Charter* serves to protect individuals from the state, not to justify the state's limitation of an individual's rights.[52] In any event, these rights must, "under s. 1, be balanced against the interests of others in a free and democratic society — in this particular case the right of their child."[53] A balancing exercise similarly occurs in the s. 7 analysis to determine whether the state interference in question conforms to the principles of fundamental justice.[54] Ultimately, La Forest J. held that the *Child Welfare Act* had

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[46] *B (R)*, *supra* note 3 at 370.
[47] *Ibid* at 371 [emphasis added].
[48] *Ibid* at 372 [emphasis added]. Consequently, the state may intervene only when such action is justified and necessary to safeguard the child's autonomy or health (*ibid*).
[49] *Ibid* at 318.
[50] *Ibid* [emphasis added].
[51] *Ibid* at 373.
[52] *Ibid*. La Forest J. also pointed out that the approach taken in this case resulted largely from the fact that the sole issue raised was the parents' assertion "that their constitutional rights" had been infringed (*ibid* at 387; emphasis in original).
[53] *Ibid*.
[54] *Ibid* at 374, 388.

deprived the appellants of their right to decide upon their child's medical treatment, thus violating their s. 7 parental liberty interest, but that the procedure required under the Act did not breach the principles of fundamental justice. The protection of a child's right to life and to health is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long as it also meets the requirements of fair procedure—which La Forest J. found to be the case.[55]

The specific rights invoked in each of these two cases differ, although they all act as constitutional shields protecting parental authority from state interference. But what is notable is the manner in which the courts in both cases described and conceived of parental rights, and, in particular, the pervasiveness of individualism in their approaches. With regard to *Hamilton*, even though Aboriginal rights may be exercised by individual members of the relevant community,[56] such rights have been characterized by the Supreme Court of Canada as unique "rights held by a collective and . . . in keeping with the culture and existence of that group."[57] Yet, overall, Edward J.'s analysis appears to give greater attention to the mother's beliefs and choice than to her community and the communal aspects of the practices in question. The discussion engaged primarily with D.H.'s faith in her culture and traditional medicines, the constitutional status of her decision to pursue traditional medicine for J.J., and her right to choose. Edward J.'s conclusion suggested that the mother's constitutional right was determinative of the finding that J.J. was not a child in need of protection.[58] The parties' subsequent joint

[55] *Ibid* at 374–81.
[56] See Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67 at 83 [Christie, "Law"].
[57] *Sparrow*, *supra* note 15at 1112.
[58] *Hamilton*, *supra* note 2 at para 54.

submission seemed to further underscore a certain unease or ambiguity created by this emphasis on D.H., in its request that the reasons explicitly state that "[t]he aboriginal right to use traditional medicine must be respected, and must be considered, *among other factors*, in any analysis of the best interests of the child, and whether the child is in need of protection."[59]

As for *B. (R.)*, La Forest J. mentions the rights and interests of children, but these references are heavily overshadowed by the prominence accorded to the rights and interests of parents. La Forest J. clearly stresses the deep personal interest that parents have in raising their children free of interference—an individual interest of fundamental importance—while endorsing a focus on parental rights rather than responsibilities, and accentuating the centrality of choice and personal autonomy in Canadian society.

These two judicial opinions highlight the momentousness of such decisions for parents who are committed to religious or Indigenous traditional beliefs and practices in the raising of their children. But these parents may find themselves distinctly unsettled by the courts' approaches and perceive a disconnect between the legal conceptualization of their interests and the way in which they themselves understand and live out their commitments to their personal aspirations, children, families, religions, traditions, and cultural communities.

In the remainder of this thesis, I will explain my proposition that the courts' approaches were the product of the liberal vision grounding Canada's legal system, flowing from a socio-historical construct that favours the values and concepts of individualism, rights, freedom, choice, and autonomy. Definitions of autonomy often

[59] JSP, *supra* note 29 at para 83a) [emphasis added].

evoke the notion of self-determination and the ability to choose one's own path. But can this ideal of self-determination truly apply to a decision that is in many ways other-determining, even if the "other" is one's own child? In this situation, what does it mean for a parent, particularly one committed to religious or Indigenous traditional practices, to act autonomously? In the following chapter, I will examine liberalism's influence on the analyses at issue and the primacy it accords to individualism; I will also reflect on some of the foundations in family theory for parental authority and give reasons for tempering strongly individualistic conceptions of such rights. The second half of this thesis will subsequently be devoted to an exploration of relational theory and the insights it offers to this discussion.

Chapter 3: Liberalism's Individualistic Conception of Rights

Each of the two judicial opinions, in its own manner, draws attention to concepts such as rights, freedom, and autonomy, with a focus on individual agency or identity. This approach is one rooted in liberalism, the core principles of which I will describe in the following section. I will explore how liberal values and principles are reflected in the courts' analyses and explain why I think a strongly individualistic paradigm is inapposite in the circumstances. I will conclude this third chapter by examining the foundations of parental authority and advancing further reasons for moving away from such an individualistic approach in this context.

3.1 Canadian Constitutional Law and Its Liberal Pedigree

Law, explains Winnifred Sullivan, is essentially "cultural discourse and practice".[60] Canadian law, Gordon Christie specifies, is a cultural "institution built on a bedrock of liberal values and principles".[61] By extension, Benjamin Berger adds, "the structure of Canadian constitutionalism is really only the vehicle for the transmission – or perhaps a symptom – of the more foundationally informing political culture of liberalism".[62]

Just what are these liberal values and principles? Kathleen Mahoney describes liberalism as having a "penchant for universalist descriptions and neutral, symmetrical, and abstract principles that do not permit contextualized approaches reflecting the

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[60] Winnifred Fallers Sullivan, *Paying the Words Extra: Religious Discourse in the Supreme Court of the United States* (Cambridge, Mass: Harvard University Press, 1994) at 6.

[61] Christie, "Law", *supra* note 56 at 72.

[62] Benjamin Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at 67. See also e.g. Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 215: "Law . . . is local knowledge; local not just as to place, time, class, and variety of issue, but as to accent—vernacular characterizations of what happens connected to vernacular imaginings of what can."

experiences of real people."[63] It is characterized by a number of interconnected core values: individualism; liberty or freedom (often linked to autonomy and choice); the private/public distinction and the limits of government intervention (including notions such as John Stuart Mill's harm principle); equality; rights; and the rule of law.[64]

First and foremost, the political culture of liberalism is "deeply committed to the primacy of the individual."[65] It views individuals as seeking, separately, to fulfill their personal vision of the good life and choosing freely to enter into relationships with others.[66] The quest for self-fulfillment requires freedom from interference by others,[67] the fear being that "interests individually desired"[68] may clash. At its core, liberalism is profoundly committed "to the goods of autonomy and individual liberty as the mechanism for human flourishing."[69] As Berger puts it, "[s]elf-realization is the goal, and autonomous choice is the mechanism."[70]

Individual autonomous choices must therefore be protected through the legal mechanism of rights, considered "[f]undamental to a liberal democracy".[71] Thus, each individual may remain sovereign over his or her life within this zone of private, protected

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[63] Kathleen E Mahoney, "The Limits of Liberalism" in Richard F Devlin, ed, *Canadian Perspectives on Legal Theory* (Toronto: Edmond Montgomery Publications Limited, 1991) 57 at 60.

[64] Marett Leiboff & Mark Thomas, *Legal Theories: In Principle* (Pyrmont, NSW: Lawbook Co, 2004) at 113–22. See also Adrian Pabst, "Liberalism" in Luigino Bruni & Stefano Zamagni, eds, *Handbook on the Economics of Reciprocity and Social Enterprise* (London: Edward Elgar, 2013) 217 at 218.

[65] Berger, *supra* note 62 at 67.

[66] Christie, "Law", *supra* note 56 at 74; Jo Bridgeman, *Parental Responsibility, Young Children and Healthcare Law* (Cambridge, UK: Cambridge University Press, 2007) at 10–11 [Bridgeman, *Parental Responsibility*].

[67] Christie, "Law", *supra* note 56 at 74; Bridgeman, *Parental Responsibility*, *supra* note 66 at 11.

[68] Bridgeman, *Parental Responsibility*, *supra* note 66 at 11.

[69] Berger, *supra* note 62 at 78.

[70] *Ibid*.

[71] Leon Trakman & Sean Gatien, *Rights and Responsibilities* (Toronto: University of Toronto Press, 1999) at 3.

activity, free from intrusion by others and by the state,[72] with the condition that "the private space of one individual ends where the space of another begins."[73] In other words, one's freedom is "limited only by the requirement that one does not harm others or interfere with their similar liberty."[74]

Linking together this web of characteristics is the notion of individual autonomy, considered by some to be the most important of liberalism's core values.[75] Autonomy can encompass individuality, freedom, choice, and privacy.[76] From these many facets,[77] Alasdair Maclean distills one core concept of autonomy, derived from its very etymology: "autonomy literally means self-rule".[78] One of the intrinsic values of the "individual right of autonomy [is that it] makes self-creation possible. It allows each of us to be responsible

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[72] Loren E Lomasky, *Persons, Rights and the Moral Community* (Oxford: Oxford University Press, 1987) at 11, 54.

[73] Trakman & Gatien, *supra* note 71 at 4.

[74] Mahoney, *supra* note 63 at 61 [footnote omitted]. The conception of such limits harks back to Mill's canonical contention that "[t]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others": John Stuart Mill, *On Liberty* (Kitchener: Batoche Books, 2001) at 13.

[75] See e.g. Bruce Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980) at 368, 369; John Von Heyking, "The Harmonization of Heaven and Earth?: Religion, Politics, and Law in Canada" (2000) 33 UBC L Rev 663 at 672.

[76] See e.g. Emily Jackson and Shelley Day Sclater, "Introduction: Autonomy and Private Life" in Shelley Day Sclater et al, eds, *Regulating Autonomy: Sex, Reproduction and Family* (Oxford and Portland: Hart Publishing, 2009) 1 at 1.

[77] See e.g. Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988) at 6:

> It is used sometimes as an equivalent of liberty (positive or negative in Berlin's terminology), sometimes as equivalent to self-rule or sovereignty, sometimes as identical with freedom of the will. It is equated with dignity, integrity, individuality, independence, responsibility, and self-knowledge. It is identified with qualities of self-assertion, with critical self-reflection, with freedom from obligation, with absence of external causation, with knowledge of one's own interests.

[78] Alasdair Maclean, *Autonomy, Informed Consent and Medical Law: A Relational Challenge* (Cambridge: Cambridge University Press, 2009) at 10. See also Suzanne Silk Klein, "Individualism, Liberalism, and the New Family Law" (1985) 43 U Toronto Fac L Rev 116 at 118–19, defining freedom "as self-determination and self-proprietorship over one's person and capacities".

for shaping our own lives".[79] Our choices make us who we are; we know ourselves best and normally have our own best interests at heart.[80] By extension, to value autonomy is to also acknowledge that we are not normally best placed to know the true desires and best interests of others.[81] Individualistic autonomy has been described as "rational (or anyway reasoning) individuals choosing goals and plans and projects for themselves, with those autonomous individuals then coming together, of their own volition, in pursuit of shared interests and common goals."[82] This description illustrates what Robert Goodin calls the "unencumbered self."[83]

This idea of "self-determination by an individual self"[84] is the most common manifestation of autonomy. However, liberalism's public/private distinction also extends the concept of autonomy to the entire family unit.[85] In this context, further versions of autonomy are possible, including that "of individuals *within* the family":[86]

> This way of thinking about autonomy separates out individuals from the family unit and asks that their interests be considered separately and protected even against other members of that family unit. This version of autonomy undermines the other two, in that the individual who is encroaching on the welfare or safety of another family member can find his autonomy compromised by the state's intervention on behalf of the person in danger (on the side of her autonomy as an individual independent from her place within the patriarchal family). In such contexts, the family is treated not as an autonomous and separate entity, but

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[79] Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Alfred A Knopf, 1993) at 224.
[80] Maclean, *supra* note 78 at 27.
[81] Kim Atkins, "Autonomy and the Subjective Character of Experience" (2000) 17:1 J Applied Philosophy 71.
[82] Robert E Goodin, "Review Article: Communities of Enlightenment" (1998) 28:3 British J Political Science 531 at 531.
[83] *Ibid* at 532.
[84] Marilyn Friedman, *Autonomy, Gender, Politics* (Oxford: Oxford University Press, 2003) at 4 [Friedman, *Autonomy*]; see also e.g. Wim JM Dekkers, "Autonomy and dependence: Chronic physical illness and decision-making capacity" (2001) 4 Medicine, Health Care & Philosophy 185 at185.
[85] Martha Albertson Fineman, *The Autonomy Myth* (New York: The New Press, 2004) at 21.
[86] *Ibid* [emphasis in original].

> merely as another societal institution subject to regulation and the imposition of norms generated from the outside.[87]

As with freedom, autonomy is not limitless, and interference may be justified to protect others.[88] In fact, Martha Fineman observes, "autonomy" is often used to describe "the relationship between the individual and the state. Autonomy in this regard is individual freedom from state intervention and regulation, the ability to order one's activities independent of state dictates."[89] Berger makes the link between individual autonomy, choice, privacy, and a negative conception of freedom by noting that, from the liberal perspective, "[f]reedom is secured when the individual can choose freely, and liberty inheres in being left alone."[90] Essentially, the liberal approach equates both autonomy and freedom with choice.

In Canadian law, such is the prevalence of these conceptualizations of rights, freedom, and autonomy that, in Christie's opinion, "the political morality of liberalism supplies the language of everyday legal discourse."[91] The Canadian legal rights paradigm is built upon "[n]otions of protection from social/legal intrusion, a classical concept of liberty",[92] Mary Ellen Turpel notes, and thus represents "a highly individualistic and negative concept of social life based on the fear of attack on one's 'private' sphere."[93]

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[87] *Ibid*.
[88] See e.g. Mill, *supra* note 74.
[89] Fineman, *supra* note 85 at 20.
[90] Berger, *supra* note 62 at 78.
[91] Christie, "Law", *supra* note 56 at 72.
[92] Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989) Can Hum Rts YB 3 at 16 [Turpel, "Interpretive Monopolies"].
[93] *Ibid* at 15.

And, woven throughout the fabric of Canadian constitutionalism, Berger argues, is this same "liberal political culture of autonomy and choice".[94]

In her concurring reasons in *R. v. Morgentaler*,[95] for instance, Wilson J. made the following connection between the *Charter*, the right to individual liberty, personal choice, autonomy, self-realization, and human dignity:[96]

> The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.[97]

In Wilson J.'s opinion, the right to liberty "grants the individual a degree of autonomy in making decisions of fundamental personal importance",[98] and guarantees "the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric — to be, in to-day's parlance, 'his own person' and accountable as such."[99]

Furthermore, in defining the content of the right to liberty, Wilson J. described as follows the conception of the social individual underpinning the *Charter*:

> An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are

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[94] Berger, *supra* note 62 at 79.
[95] [1988] 1 SCR 30, 63 OR (2d) 281 [*Morgentaler* cited to SCR].
[96] *Ibid* at 164.
[97] *Ibid* at 166.
[98] *Ibid*.
[99] *Ibid*. Wilson J.'s statements were endorsed by La Forest J. in *B (R)*: see *B (R)*, *supra* note 3 at 369.

> subordinated to those of the collectivity. The individual is a bit of both. The *Charter* reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control.[100]

Hester Lessard praises this description for its "acknowledgement of the interconnectedness of life within community."[101] It was a perspicacious account of the "self in context",[102] of individuals existing in social relations of interdependence. Yet on top of this image, Wilson J. jarringly superimposed a framework of property and boundaries: she insisted that "the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence."[103] It is this dénouement that Lessard criticizes, as "the fence metaphor presupposes an opposition between individual and community, between subjective freedom and objectively determinable constraints, between a private sphere of unlimited choice and a public sphere of obligation."[104] Indeed, Richard Moon points out, the entire "two-step structure of *Charter* adjudication assumes a bright line between the protected right or interest of the individual . . . and the conflicting interests or rights of other individuals or of the collective".[105] Ultimately, for Lessard, in equating *Charter* rights with fences, Wilson J. set forth "the classical liberal equation of freedom with exclusion,

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[100] *Morgentaler*, *supra* note 95 at 164.

[101] Hester Lessard, "Relationship, Particularity, and Change: Reflections on *R.* v. *Morgentaler* and Feminist Approaches to Liberty" (1991) 36:2 McGill LJ 263 at 269 [Lessard, "Relationship, Particularity and Change"].

[102] *Ibid* at 270.

[103] *Morgentaler*, *supra* note 95 at 164.

[104] Lessard, "Relationship, Particularity and Change", *supra* note 101 at 269.

[105] Richard Moon, "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on *Charter* Rights" (2002) 40:3 Osgoode Hall LJ 337 at 340 [Moon, "Justified Limits"]. See also e.g. Paul Horwitz, for whom the language of the s. 1 interpretative framework is essentially "the evaluative language of rational liberalism": Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54 U Toronto Fac L Rev 1 at 33.

boundaries, and individual sovereignty".[106] The result was that "[t]he category of 'decisions of fundamental personal importance' simply [became] another fortress of individual sovereignty",[107] accentuating autonomy as individuality, independence, separation, and choice.

In Berger's assessment, autonomy and choice are now firmly at the heart of the Supreme Court of Canada's conception of liberty.[108] In *Alberta v. Hutterian Brethren of Wilson Colony*,[109] having enumerated the *Charter* values of liberty, human dignity, equality, autonomy, and democracy, McLachlin C.J. "crowned choice as the first among equals, stating that '[t]he most fundamental of these values . . . is liberty – the right of choice on matters of religion.'"[110] Given the force of those core values, it is unsurprising to Berger that Canadian constitutionalism also shapes its conception of religion according to the same mould,[111] made up of three crucial and interrelated elements: "(1) religion as essentially individual, (2) religion as centrally addressed to autonomy and choice, and (3) religion as private."[112]

The Supreme Court's liberal approach to religion[113] is evident as early as *Big M*,[114] where it was first called upon to define freedom of religion. Linking religion to individual choice, Dickson J. affirmed that, henceforth, the *Charter* protects "the right of

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[106] Lessard, "Relationship, Particularity and Change", *supra* note 101 at 288.
[107] *Ibid* at 270.
[108] Berger, *supra* note 62 at 79.
[109] 2009 SCC 37, [2009] 2 SCR 567 [*Hutterian Brethren*].
[110] Berger, *supra* note 62 at 83, citing *ibid* at para 88.
[111] Berger, *supra* note 62 at 80.
[112] *Ibid* at 66. See also e.g. Horwitz, *supra* note 105 at 23: The failure of liberal democracy lies "in its inability to fully recognize that religion is (or, at least, may be) more than a mere *choice* on the individual's part. Rather, it is a radically different but equally valid mode of experiencing reality."
[113] *Hutterian Brethren*, *supra* note 109 at para 128.
[114] *Supra* note 40.

every Canadian to work out for himself or herself what his or her religious obligations, if any, should be".[115] For Horwitz, this is a "view of religion as belief or choice, and as an individual rather than a community experience."[116] Further characteristics of "liberal bias"[117] can be found in Dickson J.'s description of the limits to religious freedom, according to which every person is "free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own."[118] Later, in *Syndicat Northcrest v. Amselem*,[119] Iacobucci J. explained that the Court's approach "is consistent with a personal or subjective conception of freedom of religion, one that is integrally linked with an individual's self-definition and fulfilment and is a function of personal autonomy and choice, elements which undergird the right".[120]

Berger sees "the legal coming-of-age of a constitutional conception of religion based on autonomy and choice"[121] embodied in McLachlin C.J.'s assertion, in *Hutterian Brethren*, that "choice . . . lies at the heart of freedom of religion."[122] It is a judicial legacy that stretches to the present day, as reflected for instance in Rowe J.'s reasons, concurring

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[115] *Big M*, *supra* note 40 at 351.

[116] Horwitz, *supra* note 105 at 31. See also Von Heyking, *supra* note 75 at 663 (arguing that this conception represents a "peculiar kind of individualism"); and Berger, *supra* note 62 at 99 (this conception also relegated religion to the private sphere).

[117] Horwitz, *supra* note 105 at 31.

[118] *Big M*, *supra* note 40 at 346. See also *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at 759, 35 DLR (4th) 1 [*Edwards Books*]: the purpose of s. 2(*a*), Dickson C.J. maintained, "is to ensure that society does not interfere with [these] profoundly personal beliefs".

[119] 2004 SCC 47, [2004] 2 SCR 551.

[120] *Ibid* at para 42.

[121] Berger, *supra* note 62 at 82.

[122] *Hutterian Brethren*, *supra* note 109 at para 99.

in the result, in *Law Society of British Columbia v. Trinity Western University*.[123] In discussing s. 2(*a*), Rowe J. placed a particular "emphasis on the free choice of the believer",[124] reiterating how "our jurisprudence defines the protection of s. 2(*a*) as extending to the freedom of individuals to believe in whatever they choose and to manifest those beliefs."[125] Although he acknowledged the communal aspect of religion, he "[underscored] that religious freedom is premised on the personal volition of individual believers."[126] For him, the protection of s. 2(*a*) "remains predicated on the exercise of free will by individuals — namely, the choice of each believer to adhere to the tenets of his or her faith."[127]

La Forest J.'s observations in *B. (R.)* are consistent with this individualistic vision of freedom of religion. Lessard writes that "Justice La Forest's 'isolated' view portrays the individual in a fashion associated with classical liberalism, namely, as an abstract agent whose happiness consists of the unimpeded pursuit of subjectively defined preferences."[128] Chief among the liberalism-inspired elements are his characterization of the parental child-rearing interest as a significant individual and personal interest; his embrace of parental rights; the homage he paid to the importance of choice and personal autonomy in Canadian society; and the limits he placed on freedom of religion—namely, the rights, freedoms, and welfare of others. He also made it clear that the parental liberty

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[123] *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [*Trinity Western*].
[124] *Ibid* at para 214.
[125] *Ibid* at para 220.
[126] *Ibid* at para 219.
[127] *Ibid* at 220.
[128] Hester Lessard et al, "Developments in Constitutional Law: The 1994-1995 Term" (1996) 7 SCLR (2d) 81 at 120.

interest of "bringing up, nurturing and caring for a child"[129] is "an individual interest of fundamental importance to our society."[130] It is because of "the fundamental importance of choice and personal autonomy in our society"[131] that parents must be accorded rights in order to discharge their responsibilities towards their children, rights that are to be balanced against the interests of others.

In cases like *Hamilton*, the influence of liberalism may appear less evident, particularly with regard to the s. 35 analysis. After all, far from being individualistic, Aboriginal rights are generally described as collective in nature.[132] Moreover, the Supreme Court of Canada has held that these "rights cannot . . . be defined on the basis of the philosophical precepts of the liberal enlightenment. . . . They arise from the fact that aboriginal people are aboriginal."[133]

Yet the very fact that a Canadian court addresses Indigenous concerns or interests using the rights paradigm betrays the liberal bias in Canadian law. By its very nature, Marlee Kline reminds us, "Anglo-Canadian law is liberal in form. It is individualistic and abstract".[134] Jennifer Nedelsky also points out that "all contemporary systems of constitutional rights draw on a powerful legacy of liberal political thought in which rights are associated with a highly individualistic conception of humanity. . . . [T]he rights-bearing individual may be said to be the basic subject of liberal political

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[129] *B (R)*, *supra* note 3 at 318.
[130] *Ibid*.
[131] *Ibid*.
[132] See e.g. Halsbury's Laws of Canada, *supra* note 21 at HAB-123 "Definition of aboriginal peoples".
[133] *Van der Peet*, *supra* note 10 at para 19 [emphasis in original].
[134] Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations" (1992) 30:2 Osgoode Hall LJ 375 at 390 ["Child Welfare Law"].

thought."[135] And because Canadian legal discourse takes place in the language of liberalism, Christie observes, the translation of Indigenous claims into the framework of rights effectively liberalizes Indigenous societies.[136]

Sometimes, these claims are lost in translation and not even recognized as falling within the scope of Canadian law's protection, such as in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*.[137] That case involved the Ktunaxa First Nation, whose traditional territories include an area in British Columbia they call Qat'muk. The Ktunaxa consider Qat'muk a sacred site because it is home to Grizzly Bear Spirit, a principal spirit within their religious beliefs and cosmology. They raised concerns that the construction of a ski resort in Qat'muk would drive Grizzly Bear Spirit from that place, thereby irrevocably impairing their religious beliefs and practices, and argued that the Minister's decision to approve that project violated their freedom of religion guaranteed by s. 2(*a*), and breached the Crown's duty to consult and accommodate their Aboriginal rights under s. 35.

Their appeal was unsuccessful. The majority of the Supreme Court of Canada held that their s. 2(*a*) right had not been violated. Writing for the majority, the Chief Justice and Rowe J. stated that the Ktunaxa's "novel claim"[138] did not fall within the scope of s. 2(*a*), which "protects the freedom to worship"[139] but not "the object of beliefs".[140] Furthermore, in their view, the Minister's decision according to which the Crown had met

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[135] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) at 248 [Nedelsky, *Law's Relations*].
[136] Christie, "Law", *supra* note 56 at 72, 90–91. See also John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 260 [Borrows, *Canada's Indigenous Constitution*].
[137] 2017 SCC 54, [2017] 2 SCR 386.
[138] *Ibid* at para 70.
[139] *Ibid* at para 71.
[140] *Ibid* at paras 8, 70–71.

its duty to consult and accommodate, under s. 35, was reasonable.[141] In concurring reasons, Moldaver and Côté JJ. agreed that the Minister's conclusion regarding s. 35 was reasonable.[142] However, they would have found an infringement of s. 2(*a*), one that was nevertheless justified under s. 1. They understood from the Ktunaxa's arguments that the departure of Grizzly Bear Spirit brought about by the construction of the ski resort would render the Ktunaxa's sincerely held religious beliefs devoid of all religious significance and prevent them from acting in accordance with those beliefs, thus infringing their right to religious freedom.[143] Moldaver and Côté JJ. explained that the principle of state neutrality required that "courts must be alive to the unique characteristics of each religion, and the distinct ways in which state action may interfere with that religion's beliefs or practices."[144] The justices recognized how Indigenous religions may differ from Judeo-Christian faiths in the belief that land itself may be sacred, such that state action that affects that land can interfere with the ability to act in accordance with religious beliefs and practices.[145]

The outcome in *Ktunaxa* seems to bear out Borrow's declaration that "law is a liberal god that creates religion in its own image."[146] Despite the fact that the Ktunaxa's claim was translated into the language of Canadian constitutionalism, the majority's

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[141] *Ibid* at para 77.
[142] *Ibid* at para 117.
[143] *Ibid* at paras 117–18.
[144] *Ibid* at para 128.
[145] *Ibid* at para 127. See also e.g. John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 172; Natasha Bakht & Lynda Collins, "'The Earth is Our Mother': Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada" (2017) 62:3 McGill LJ 777; Lori G Beaman, "Defining Religion: The Promise and the Peril of Legal Interpretation" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: University of British Columbia Press, 2008) 192 [Beaman, "Defining Religion"] (arguing "that the law embodies a mainstream Christian view of religion such that all other religions are either implicitly or occasionally explicitly assessed from that vantage point" at 215, n 19).
[146] Borrows, *Canada's Indigenous Constitution*, *supra* note 136 at 249.

narrow delineation of the freedom to believe meant that the Constitution was of no help to the Ktunaxa.[147] Lori Beaman has argued that the narrow legal construction of what counts and should be protected as religious freedom in Canada is dominated by a mainstream Christian hegemony. As a result, Indigenous notions of spirituality, particularly those relating to sacred natural spaces and referenced in collective terms, fail to find a legal foothold.[148] In *Ktunaxa*, even s. 35 did not live up to its potential, as identified by Borrows, "for recognizing and affirming [Indigenous] spiritual beliefs and practices",[149] and ultimately also had "difficulty travelling beyond its own cultural commitments."[150]

Borrows further points out that, like those rights that "flow from the liberal enlightenment . . . [Aboriginal rights] likewise exist to restrain government action."[151] Otherwise put, s. 35 similarly operates to "[shield] native forms of life from federal or provincial intrusion".[152] Moreover, owing to the trajectory of the s. 35 case law, Aboriginal rights, although "described as collective,"[153] are "individualizable".[154] Christie explains that "[m]uch of the litigation over Aboriginal and treaty rights has involved traditional practices such as hunting and fishing".[155] In these cases, "while the right is held by communities, it is exercised by individual members of the community. Such rights can be contrasted to other collective rights, such as language rights, held by the

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[147] Borrows predicted that "the Constitution will have difficulty protecting [Indigenous] religious beliefs and practices if they are outside law's central commitments to individual choice, autonomy, privacy, and personal conviction": Borrows, *Canada's Indigenous Constitution*, *supra* note 136 at 249.
[148] Lori G Beaman, "Aboriginal Spirituality and the Legal Construction of Freedom of Religion" (2002) 44:1 J Church & State 135 at 144–46.
[149] Borrows, *Canada's Indigenous Constitution*, *supra* note 136 at 269.
[150] *Ibid*.
[151] John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 SCLR (2d) 351 at 365.
[152] Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill LJ 382 at 451–52.
[153] Christie, "Law", *supra* note 56 at 83.
[154] *Ibid*.
[155] *Ibid*.

group and only exercisable collectively."[156] More specifically, however, Aboriginal rights entail not only the (individualizable) right to engage in particular activities but also the relevant community's "right to regulate and control (or govern) the manner in which those activities are carried out."[157]

In a case like *Hamilton* involving Aboriginal rights, liberal idiosyncrasies feature less prominently than with a s. 2(*a*) analysis, and liberalism's potential for strong individualism is tempered. Notably, even though Edward J. made apparent the individualizable nature of s. 35 in his discussion of the mother's choice to exercise her right, he also indicated that the Six Nations Band had invoked the application of s. 35(1), participated throughout the proceedings, and supported D.H. and her family.[158]

Yet certain aspects of liberalism can still be discerned. First and foremost, the legal framework and discourse employed, and the resolution of the debate through rights claimed against the state, are derivations of that political culture. This "liberalization" of Indigenous claims occurs despite objections that the rights paradigm is alien to the traditions of most Indigenous cultures.[159] Furthermore, First Nations groups also dispute the legitimacy of the Canadian state's jurisdictional authority over their family law and child and family services.[160]

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[156] *Ibid*. See also e.g. Halsbury's Laws of Canada, *supra* note 21 at HAB–123 "Definition of aboriginal peoples".

[157] Monahan, *supra* note 11 at 468, citing *Van der Peet*, *supra* note 10 and *Delgamuukw*, *supra* note 15.

[158] *Hamilton*, *supra* note 2 at paras 6, 50, 60.

[159] Isaac, "Individual Versus Collective Rights", *supra* note 228 at 629; Turpel, "Interpretive Monopolies", *supra* note 92. See also e.g. Nedelsky, *Law's Relations*, *supra* note 135 at 243, n 60.

[160] See e.g. Pamela Gough, Cindy Blackstock & Nicholas Bala, "Jurisdiction and funding models for Aboriginal child and family service agencies", CECW Information Sheet #30E (Toronto: University of Toronto, 2005) (online) <cwrp.ca/infosheets>; Fiona MacDonald, "The Manitoba Government's Shift to 'Autonomous' First Nations Child Welfare: Empowerment or Privatization?" in Annis May Timpson, ed,

Also of note in *Hamilton* are the references to concepts such as choice, personal commitment, and belief. Edward J. pointed to D.H.'s "strong faith in her native culture"[161] and highlighted the fact that she was "deeply committed to her longhouse beliefs and her belief that traditional medicines work."[162] Her choice was to be respected and not subordinated to any one philosophy, in particular "the western medical paradigm."[163] Edward J. considered that D.H. had the right to decide to practise those beliefs as J.J.'s substitute decision-maker[164] and concluded that he could not "find that J.J. [was] a child in need of protection when her substitute decision-maker [had] chosen to exercise her constitutionally protected right".[165]

Last but not least was the relative abstractness of the analysis, to the extent that the evaluation of whether J.J. was a child in need of protection and the assessment of her best interests seemed to explicitly take into account only her mother's choice to exercise her constitutional right. The parties' subsequent proposed clarification more clearly contextualized that right, by placing it "among other factors . . . [to be considered] in any analysis of the best interests of the child, and whether the child is in need of protection."[166]

In the next section, I will explain why these approaches proceeding from the liberal heritage should be recalibrated so that conceptions of rights that focus

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First Nations, First Thoughts: The Impact of Indigenous Thought in Canada (Vancouver: UBC Press, 2009) 173.

[161] *Hamilton*, *supra* note 2 at para 58.

[162] *Ibid* at para 80; see also para 59.

[163] *Ibid* at para 81.

[164] *Ibid* at paras 62, 81.

[165] *Ibid* at para 83.

[166] JSP, *supra* note 29 at para 83a.

disproportionately on individuality may better account for the relational side of human nature, and so that abstract perspectives may give way to more contextualized ones.

3.2 Arguments for a More Balanced, Contextual Approach to Religious and Aboriginal Rights

To varying degrees, the interests at play in the cases discussed above were treated one-dimensionally or a-contextually. But even though individualism and abstraction may both be associated with the genealogy of liberalism, they are not inevitable. As Nedelsky points out, "[t]he best understandings of the nature of the human self and the way rights function are on the side of a realignment of the liberal tradition. Human beings are *both* uniquely individual and essentially social creatures. The liberal tradition has been not so much wrong as seriously and dangerously one-sided in its emphasis."[167] Additional nuance and contextualism seems desirable as a general rule in legal discourse, and surely so where the issues concern profoundly significant religious, spiritual, or traditional values.

The way in which legal actors conceptualize religion, in all its complexity, matters. As McLachlin C.J. observed, constitutional documents embody "the values that capture the ethos of the nation."[168] With regard to the *Charter*, Lori Beaman reminds us that it "is an important symbol of the way in which Canada, as a liberal democracy, encapsulates the public expression of values and norms. As with all symbols, though,

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[167] Nedelsky, *Law's Relations*, *supra* note 135 at 249 [emphasis in original]. See also e.g. Leon E Trakman, "Native Cultures in a Rights Empire: Ending the Dominion" (1997) 45 Buff L Rev 189 at 192, arguing that "[s]ociety is most liberal, then, when individuals are responsive to, not isolated from, the communal life of others."

[168] The Right Honourable Beverley McLachlin, "Unwritten Constitutional Principles: What is Going On?" (Lord Cooke Lecture, delivered in Wellington, New Zealand, 1 December 2005), <www.scc-csc.ca/judges-juges/spe-dis/bm-2005-12-01-eng.aspx>.

meaning and interpretation are fluid. It is the process of its interpretation that offers a window into the boundaries of religious freedom and reveals power relations."[169] In Beaman's opinion, "to describe the rights and freedoms articulated in the Charter as 'individual' is problematic and misses the relational aspect of social life".[170]

Religion is both deeply personal and "eminently social".[171] Religion is lived, Robert Orsi asserts, and "[l]ived religion cannot be separated from other practices of everyday life, . . . or from other cultural structures and discourses (legal, political, medical, and so on)."[172] Religious beliefs and practices foster connections with other individuals and communities. They function, in Orsi's words, "as media of engagement with the world."[173]

Lessard notes that *Charter* analysis has in fact accommodated a strong "counter theme of community", despite its "indebtedness to the individualist focus of liberalism".[174] Indeed, she writes, "[t]he vision of the individual person within Canadian constitutional discourse often presumes the social and communal aspect of self-determination and fulfillment"[175]—as illustrated by Wilson J.'s comment in *Operation Dismantle v. R.*[176] that "[t]he concept of 'right' as used in the *Charter*

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[169] Lori G Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (Vancouver: UBC Press, 2008) at 62 [Beaman, *Defining Harm*].
[170] *Ibid* at 65.
[171] LT Hobhouse, *Liberalism* (New York: Oxford University Press, 1964) at 20.
[172] Robert Orsi, "Is the Study of Lived Religion Irrelevant to the World We Live In?" (2003) 42:2 J for Scientific Study Religion 169 at 172.
[173] *Ibid* at 172.
[174] Lessard, "Relationship, Particularity and Change", *supra* note 101 at 286. See also e.g. Beaman, *Defining Harm*, *supra* note 169 at 68: "[T]he *Charter* is not intended to be an articulation solely of individual rights. Rather, it is an amalgam of individual and group rights."
[175] Lessard, "Relationship, Particularity and Change", *supra* note 101 at 286.
[176] [1985] 1 SCR 441, 18 DLR (4th) 481 [cited to SCR].

postulates the inter-relation of individuals in society".[177] In *Hutterian Brethren*, LeBel J. delivered dissenting reasons that regarded religious relationships and communities of faith as important aspects of religion.[178] Also dissenting, Abella J. observed "that freedom of religion has 'both individual and collective aspects'",[179] a statement with which the majority concurred.[180] The majority acknowledged that "[r]eligion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian."[181] In *Loyola High School v. Quebec (Attorney General)*,[182] Abella J. again referred to "both the individual *and* collective aspects of religious belief"[183] and stated that "[r]eligious freedom under the *Charter* must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions".[184] More recently, in *Trinity Western*, the majority noted that "[f]reedom of religion protects the rights of religious adherents to hold and express beliefs through both individual and communal practices."[185] Citing those earlier observations in *Hutterian Brethren* and *Loyola*, the majority held that "[a]lthough this Court's interpretation of freedom of religion reflects the notion of personal choice and

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[177] *Ibid* at 488.
[178] *Hutterian Brethren*, *supra* note 109 at para 182.
[179] *Ibid* at para 130.
[180] *Ibid* at para 31. The disagreement was over what stage in the analysis to take account of the community impact: see *ibid* at para 31.
[181] *Ibid* at para 89.
[182] 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*].
[183] *Ibid* at para 59 [emphasis in original].
[184] *Ibid* at para 60. However, the spectre of the individual continues to loom large. In his analysis of *Loyola*, Berger argues that "the nature and value of these collective dimensions are indexed to the individual. The collective aspects of religion are understood as 'manifestations' of individual religious belief, and the interests involved are framed as those of the members": Berger, *supra* note 62 at 77, n 52. Similarly, Turpel is not convinced that the *Charter* truly allows for collective rights: see Turpel, "Interpretive Monopolies", *supra* note 92 at 20.
[185] *Trinity Western*, *supra* note 123 at para 99.

individual autonomy and freedom, religion is about both religious beliefs and religious relationships".[186]

Richard Moon points out that because religion "ties the individual to a community of believers and is often the central or defining association in his life",[187] the Supreme Court of Canada has treated religion in equality decisions as "a personal characteristic that is [constructively] immutable or changeable only at unacceptable cost to personal identity."[188] For Moon, this melding of personal commitment and cultural (or communal) identity stems from the dyadic nature of religion:

> While religious commitment or belief is sometimes described as a personal choice or judgment made by the individual that is in theory revisable (individuals convert, lose their faith, and are born again), it is also, or sometimes instead, described as a central element of the individual's identity. I suggest that the significance or value of religion, from a public perspective, may depend on "its dual character – as both a *commitment* ... to certain truths or values and a deeply rooted part of her *cultural identity*."[189]

Freedom of religion therefore implicates not only the individual but also the community and public.[190] This is the "relational quality of freedoms",[191] one that poses

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[186] *Ibid* at para 64.

[187] Richard Moon, "Freedom of Conscience and Religion" (2013) 61 SCLR 2(d) 339 at 341 [Moon, "Freedom of Conscience and Religion"].

[188] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1.

[189] Richard Moon, "Introduction: Law and Religious Pluralism in Canada" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 1 at 18 [emphasis in original]; see also e.g. Moon, "Freedom of Conscience and Religion", *supra* note 187 at 412. But see Berger, *supra* note 62 at 87:

> When one moves to the next question about why we want to protect individuals from identity-based mistreatment or harm, the answer collapses the focus back onto conceptions of autonomy and choice. Just as the "identity" aspect of equality is often eclipsed by the concept of choice, the quality/identity aspect of religion is ultimately little more than a marker for a particularly valued manifestation of choice. In both cases – in equality and in religion – law's central concern is to treat the individual fairly as an autonomous choosing agent. Identity itself is valued because it is an expression of who the subject wants to be and to become; identity, on this view, is a function of choice.

[190] These categories of private/public, individual/community with regard to religion are also "modernist divisions": Beaman, *Defining Harm*, *supra* note 169 at 105. Beaman further reminds us that "even those 'private' moments in religious practice are, in some measure, public and connected": *ibid* at 105.

challenges for the s. 1 analysis: as Beaman explains, "if constitutional rights protect something more than individual liberty, if they protect the individual's connection or relationship with others, and are about the realization of self within community, judgments about their scope and limits may involve complex and economic considerations."[192]

This complexity may go some way to explaining the sense of dissatisfaction[193] that arises when decisions like *B. (R.)* oversimplify the analysis by presenting only the individual aspect of religious freedom. Horwitz for instance levies the following criticism against Iacobucci and Major JJ.'s view of religion as individual choice: "The result may be appropriate, by liberal standards; but it offers little consolation to religious families whose understanding of religion is as *social* in nature as it is individual, and who believe that God will judge their child according to its conduct, regardless of whether the child has made an autonomous choice."[194]

The emphasis on individual choice may appear to simplify matters, but of course these are hard cases, ones that Moon says "reflect our ambivalence about parental 'rights', and more deeply our complex understanding of religion as both a matter of cultural identity and personal judgment."[195] On the one hand, we may think it important to accord parents a degree of autonomy over the upbringing of their children as a matter of cultural preservation; on the other, "we also recognize that children who are denied necessary medical treatment because of their parents' religious beliefs, [may] never reach

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[191] *Ibid* at 105.
[192] *Ibid* at 105.
[193] See e.g. Shauna Van Praagh, "Faith, Belonging, and the Protection of 'Our' Children" (1999) 17 Windsor YB Access Just 154 at 164 [Van Praagh, "Faith"].
[194] Horwitz, *supra* note 105 at 45–46 [emphasis in original; footnotes omitted].
[195] Moon, "Freedom of Conscience and Religion", *supra* note 187 at 414.

an age at which they may be able to make their own judgments."[196] Thus, Moon concludes, "the debate about religious freedom in the family context exposes most starkly the central tension in the courts' understanding of religion as both a personal commitment and a cultural identity, and of religious freedom as either the right of the individual to make spiritual choices or the right of religious believers or communities to be treated with equal respect."[197]

Moreover, Shauna Van Praagh argues, such debates involve "not only a situation of 'parents of faith,'. . . but also one of 'children of faith'."[198] That is to say, community membership is a crucial component in the lives of families and children; when children are brought up among communities of shared heritage, faith, or culture, "[t]he beliefs, spirituality, and connection to the sacred of these children are firmly integrated into their sense of self, agency and responsibility."[199] These community ties may enrich children's lives, just as they may also inflict harm, and they merit consideration in any assessment of a child's welfare.[200]

Berger has shown how this singular focus on choice and the individual can be traced back to the foundations of Canadian constitutionalism and the law's ideological commitments to those very values.[201] The resulting rendering of religion by law is one that "has deep sympathies with certain Protestant understandings".[202] As evidenced by *Ktunaxa*, a narrow legal construction of religion singling out "the individual,

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[196] *Ibid* at 414.
[197] *Ibid* at 412.
[198] Van Praagh, "Faith", *supra* note 193 at 165.
[199] *Ibid* at 176 [footnotes omitted].
[200] *Ibid* at 165. Van Praagh extends her call for a richer portrayal of families and communities to other cultural communities, including First Nations: *ibid* at 165–66.
[201] Berger, *supra* note 62 at 100.
[202] *Ibid* at 101.

choice-centred, and private dimensions of human life"[203] increases the risk of conflict between law and religious cultures that deviate from this particular mould.[204] Such conflicts, Berger argues, can create significantly "negative impacts upon the very issue it seeks to resolve: the challenge of religious pluralism within liberal constitutionalism."[205]

Although the law treats as analytically distinct the parental right to religious freedom in *B. (R.)* and the Aboriginal right to pursue traditional healing practices in *Hamilton*, there are conceptual affinities between the two interests and the way in which jurists have envisioned their nature and value. The previous discussion on religious beliefs and practices, and how they permeate all aspects of an adherent's life and identity, likely strikes a familiar chord with parents such as D.H. who are deeply "committed traditional longhouse believers who integrate their culture into their day-to-day living"[206], who have a "strong faith in [their] native culture",[207] and whose "longhouse adherence is who they are".[208] Scholars like Moon, Van Praagh, and Bruce Ryder have recognized "that religious belief and affiliation are fundamental aspects of one's identity, [and are] closely connected to cultural membership."[209] Moreover, the Supreme Court of Canada has underscored the importance of the intergenerational transmission of Indigenous cultures and practices, notably in *R. v. Côté*.[210] Many of the attributes associated with religious beliefs and practices, including the significance they hold for both "parents of

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[203] *Ibid* at 100.
[204] *Ibid* at 101.
[205] *Ibid* at 150.
[206] *Hamilton*, *supra* note 2 at para 59.
[207] *Ibid* at para 58.
[208] *Ibid* at para 59.
[209] Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver, UBC Press, 2008) 87 at 92.
[210] [1996] 3 SCR 139, 138 DLR (4th) 385.

faith" and "children of faith;" the ties they nurture between individual practitioners and larger communities; and the role they play in sustaining the vitality of these communities, may well resonate with adherents of traditional Indigenous practices.

Like Berger, Christie observes that the issues the law deals with "are essentially problems it can define in liberal terms."[211] When these issues involve Indigenous concerns, the law converts them into problems defined and resolved using the language and structure of liberal theory.[212] The difficulty for Christie is that many of the premises regarding human nature that undergird liberal theory are incompatible with Indigenous world views.[213] Among the differences he points to are the fact that "Aboriginal peoples live within belief-systems that prioritize the community over individuals";[214] the fact that "[r]esponsibilities act to define a core of the identity of the [Aboriginal] individual, just as the existence of a society centred around responsibilities defines the identity of Aboriginal communities";[215] and the fact the "[r]easons liberal theorists advance for structuring society around the notion of a 'context of choice' are absent in Aboriginal communities."[216] Menno Boldt and J. Anthony Long describe the Indigenous conception of individuals within society "as cosmocentric rather than homocentric",[217] a perspective

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[211] Christie, "Law", *supra* note 56 at 89.

[212] *Ibid* at 90–91.

[213] *Ibid* at 74, 111, n 118. Here, I echo Manley-Casimir: although I recognize that Indigenous world views are varied and diverse, in the interests of maintaining some coherence within the constraints of this thesis, I will maintain a higher level of generality in discussing the cultures of Indigenous peoples [see Kirsten Manley-Casimir, *Reconceiving the Duty to Consult and Accommodate Aboriginal Peoples: A Relational Approach* (PhD Thesis, University of British Columbia Faculty of Graduate and Postdoctoral Studies, 2016) (Vancouver: University of British Columbia, 2016) at 10]. See also e.g. Turpel, "Interpretive Monopolies", *supra* note 92 at 6, 29.

[214] Christie, "Law", *supra* note 56 at 91.

[215] *Ibid* at 111.

[216] *Ibid* at 92 [footnotes omitted].

[217] Menno Boldt & J Anthony Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms" in Menno Boldt, J Anthony Long & Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 165 at 166.

that embraces the premise of "the interrelatedness of all life",[218] not just human lives, such that "[w]ithin this encompassing web of social relations the individual is characterized as the repository of responsibilities rather than as a claimant of rights."[219] Christie therefore asserts that the liberal foundation of Canadian law, with its formative vision of the autonomous individual in pursuit of the good life,[220] has difficulty accommodating either Indigenous philosophies or the collective nature of Aboriginal rights.[221]

The very concept of rights is a large factor in the "cultural dissonance"[222] dividing Canadian constitutionalism and Indigenous cultures. Turpel argues that "[t]he rights paradigm . . . is simply a historically and culturally specific mechanism for the resolution of disputes and the allocation of resources which is different from the procedures used in any of the various Aboriginal cultures."[223] It is, in her view, a regime that projects the law's "cultural imagery"[224] and that stands in diametrical opposition to the philosophies of First Nations Peoples.[225] The filtering of Indigenous concerns through the framework of liberal rights creates tensions between Indigenous world views and the "discourses of the state – discourses that are used to express the meaning and content of Aboriginal

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[218] *Ibid*.
[219] *Ibid.*
[220] Christie, "Law", *supra* note 56 at 79.
[221] *Ibid* at 89.
[222] Turpel, "Interpretive Monopolies", *supra* note 92 at 7.
[223] *Ibid* at 30.
[224] *Ibid* at 9.
[225] *Ibid* at 29.

rights, sovereignty, and nationhood",[226] using the language of "[t]he generic individualism of liberal political theory".[227]

Interwoven with such criticisms are objections concerning the application of individualistic values to Indigenous collective claims and interests.[228] Boldt and Long explain that when Indigenous communities invoke "constitutional protection from abuse by the larger society, they believe their security lies in laws protecting their collective rights, not their individual rights."[229] In particular, they "assert that the doctrine of individualism and inherent inalienable rights . . . is not part of their cultural heritage, serves no positive purpose for them, and threatens their integrity and survival as a unique people."[230]

Nevertheless, not all Indigenous legal scholars and actors take the position that individual rights have no place within their societies.[231] Isaac writes that "the notion of reconciling individual rights with group rights is not without support and understanding

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[226] Dale A Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 119.

[227] Boldt & Long, *supra* note 217 at 166.

[228] See e.g. Larry N Chartrand, "Re-Conceptualizing Equality: A Place for Indigenous Political Identity" (2001) 19 Windsor YB Access Just 243; Isaac, "Individual and Collective Rights of Aboriginal People", *supra* note 21; Thomas Isaac, "Individual Versus Collective Rights: Aboriginal People and the Significance of *Thomas v. Norris*" (1992) 21 Man LJ 618 at 630 [Isaac, "Individual Versus Collective Rights"].

[229] Boldt & Long, *supra* note 217 at 172.

[230] *Ibid* at 173.

[231] See e.g. Thomas Isaac & Mary Sue Maloughney, "Dually Disadvantaged and Historically Forgotten: Aboriginal Women and the Inherent Right of Aboriginal Self-Government" (1992) 21 Man LJ 453. At page 475, Isaac and Maloughney qualify their observation regarding the need for both individual and collective rights as follows:

> Perhaps the language of "individual and collective rights" is not the appropriate discourse to use. This may be so. But the purpose of the debate and its potential effects on Aboriginal societies is certainly noteworthy. The discourse may have to change to meet the needs of Aboriginal people, but the fundamental goals should remain, such as the protection, in some form, of Aboriginal women. The language of "rights" is liberal-democratic in nature and outside of traditional Aboriginal thought. However, the purpose of rights is not.

See also, making similar points, Wendy Moss, "Indigenous Self-Government in Canada and Sexual Equality under the *Indian Act*: Resolving Conflicts between Collective and Individual Rights" (1990) 15 Queen's LJ 279.

within the Aboriginal community."[232] In particular, Indigenous feminist scholars and activists have pressed for an approach that adequately addresses "the needs and concerns of Indigenous women at the intersection of individual and collective rights."[233] They see collective and individual rights as interrelated and mutually reinforcing, given that a group's collective subsistence depends on the well-being and survival of its individual members, and vice versa.[234]

Objections to a-contextual, isolationist approaches have also been raised with regard to the concept of autonomy as it applies to First Nations. For instance, Benedict Kingsbury cautions against theories of legal relations among sovereign states that are "grossly disconnected from economic, political and social relations as they existed in practice."[235] In reality, he writes, almost all "autonomy regimes which indigenous peoples operate or aspire to . . . presuppose extensive relations between the autonomous institutions and other government institutions of the state, and between indigenous people and other people within or outside the autonomous area."[236] Kingsbury concludes that the true focus of autonomy is on relationships and how they are to be defined.[237] In the same

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[232] Isaac at 628.

[233] Brigitte Pelletier Cisneros, *Indigenous Women's Appropriation and Redeployment of Human Rights: A Comparative Study of the Native Women's Association of Canada and K'inal Antsetik (Mexico)* (MA Thesis, University of Alberta, 2014) (University of Alberta Education and Research Archive), DOI: <10.7939/R3R08Q>, at 2. Moss also makes the observation that when groups invoke collective rights and Indigenous women invoke individual rights, they are both "essentially claiming a right of self-definition. Indigenous nations are claiming the right to define the group by determining its citizenship, while Indigenous women are claiming a right to define themselves first as Indigenous persons and second as Indigenous persons connected by descent to a particular clan, tribe, nation, or band" (Moss, *supra* note 231 at 288).

[234] Rauna Kuokkanen, "Self-Determination and Indigenous Women's Rights at the Intersection of International Human Rights" (2012) 34 Hum Rts Q 225 at 247–48.

[235] Benedict Kingsbury, "Reconstructing Self-Determination: A Relational Approach" in Pekka Aikio & Martin Scheinin, eds, *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku: Institute for Human Rights, Åbo Akademi University, 2000) 19 at 24.

[236] *Ibid* at 28.

[237] *Ibid* at 29.

vein, Fiona MacDonald urges us to recognize that "[t]he realities of multinational societies and an increasingly globalized world undermine"[238] any attempt to conceive of autonomy "in an either/or, zero-sum fashion".[239] Her position is that "[a]lthough indigenous 'groups' are distinct nations, they remain embedded in unavoidable relationships of all kinds with Canadian governments."[240]

In response to the charge that Indigenous concerns cannot be construed or resolved using the language and construct of Canadian law, I offer no ready answer or alternative within the confines of this thesis. Nevertheless, I rely on the idea, expressed as I understand it by authors such as Manley-Casimir and Turpel, that the path towards post-colonialism will not be a short one and will be established through many interlocking actions.[241] In the hopes of contributing to that larger conversation, I venture only to suggest that it would be appropriate, at the very least, to curtail any proclivity the liberal legal tradition may have for being, in Nedelsky's words, "dangerously one-sided in its emphasis."[242]

Before I move on to a discussion of relational theory and how it may contribute to a more nuanced analysis of the issues at hand, I would like to address one last point—namely, the "parental" aspect of these rights. In the present context, I identified as incongruous conceptions of autonomy that seem to lean heavily towards the abstract or

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[238] Fiona MacDonald, "Relational Group Autonomy: Ethics of Care and the Multiculturalism Paradigm" (2010) 25:1 Hypatia 196 at 207 [MacDonald, "Relational Group Autonomy"].
[239] *Ibid*.
[240] *Ibid* at 206.
[241] See e.g. Manley-Casimir, *supra* note 213 at 16; Mary Ellen Turpel, "Reflections on Thinking about Criminal Justice Reform," in eds Richard Gosse, James Youngblood Henderson & Roger Carter, *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994) 206. See also e.g. Nedelsky, *Law's Relations*, *supra* note 135 at 235 (on the global ubiquity of the language of rights, such that now "the practical issue is not *whether* but *how* the language of rights will be used" [emphasis in original]).
[242] Nedelsky, *Law's Relations*, *supra* note 135 at 249.

individualistic; yet that appraisal begs the question of whether there is something about parental rights in particular that might dictate such an approach. Consequently, in the following section, I will examine family theory and the justifications for parental child-rearing rights found in the legal traditions relied upon by Canadian courts in cases like *B. (R.)* and *Hamilton*.

3.3 Foundations of Parental Authority

Canada, according to the Supreme Court, "is a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity."[243] Some parental discretion in child rearing is thought to be a necessary corollary of the commitment made by liberal democracies to cultural and religious diversity, pluralism, and liberty:[244] "[t]he pluralism indissociable from a democratic society . . . depends on"[245] freedom of thought, conscience, and religion; it "allows communities with different values and practices to peacefully co-exist".[246] Brenda Hale posits that "[t]he whole idea that people are 'born free and equal in dignity and rights' is premised on difference. If we were all the same, we would not need to guarantee that individual differences should be respected."[247] This diversity is sustained when members

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[243] *Chamberlain v Surrey School District No 36*, 2002 SCC 86 at para 21, [2002] 4 SCR 710. See also e.g. *SL v Commission scolaire des Chênes*, 2012 SCC 7 at para 21, [2012] 1 SCR 235.

[244] See also e.g. Joseph Goldstein, "Medical Care for the Child at Risk: On State Supervention of Parental Autonomy" (1977) 86:4 Yale LJ 645 at 649.

[245] *Kokkinakis v Greece*, [1993] ECHR 2 at 17, cited in *Loyola*, *supra* note 182 at para 45.

[246] *Loyola*, *supra* note 182 at para 45.

[247] Brenda Hale, "Understanding Children's Rights: Theory and Practice" (2006) 44:3 Family Court Review 350 at 354. By contrast, authors such as Godwin criticize the "[constitutionalization of] property-like parental rights in the context of defending cultural pluralism and diversity." [Samantha Godwin, "Against Parental Rights" (2015) 47 Colum HRLR 1 at 64]

of different communities are able to pass on their beliefs to their children and when families are allowed to bring up their children in their own way.[248]

But this notion of parental rights is neither a-cultural nor incontrovertible. Debates like *Hamilton* and *B. (R.)* brought before Canadian courts take place specifically within the Western-liberal doctrine of human individual rights, a doctrine that developed in response to particular historical, political, and socio-economic circumstances within European states.[249] Even within the common law tradition itself, the notion of rights specifically accorded to parents is contentious. In comparing parental rights to other individual rights, a number of authors have concluded that child-rearing rights are aberrant and generally inconsistent with legal principles. James Dwyer, for instance, argues that the very fact that parents enjoy rights to control others is an anomaly and represents "the sole exception to the general rule that rights in our legal system are limited to self-determining safeguards, choices, and activities."[250] Otherwise put, "[o]utside the context of child rearing, the law and public morality categorically reject the notion that any individual is ever *entitled* to control the life of another person, free from outside interference, no matter how intimate the relationship between them."[251] As Dwyer sees it, rather than be given child-rearing *rights*, parents should simply be "*permitted* to carry out parental duties and make certain decisions on a child's behalf in accordance

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[248] *Loyola*, *supra* note 182 at para 64; Hale, *supra* note 247 at 354–55. See also Goldstein, *supra* note 244 at 650: "As *parens patriae* the state is too crude an instrument to become an adequate substitute for parents. . . . Even if the law were not so incapacitated, there is no basis for assuming that the judgments of its decisionmakers about a particular child's needs would be any better than (or indeed as good as) the judgments of his parents."

[249] See e.g. Boldt & Long, *supra* note 217 at 168.

[250] James G Dwyer, *Religious Schools v. Children's Rights* (Ithaca, NY: Cornell University Press, 1998) at 79.

[251] *Ibid* at 63 [emphasis in original].

with rights of the child."[252] This debate raises some fundamental questions: Where do such concepts of parental rights come from, and what is their scope? The answers, it appears, are not without ambiguity or controversy.

Jeffrey Blustein explains that in Western philosophical thought, "[t]he history of philosophy of the family is complex for a number of reasons."[253] Notably, the conceptions of family, duty, and familial relationships have differed throughout the ages and received varying degrees of attention, with children and their rights only very recently coming increasingly to the forefront.[254] Furthermore, as Andrew Hall indicates, "controversy about parental rights is also a function of historical social change",[255] with significant developments occurring in Western democracies over the last fifty years. Hall points to the common perception "that since approximately the mid-nineteenth century, we have been moving from a paradigm of the family that is so deferential to parental authority that children are treated almost like a form of property to one that is child-centered and is highly solicitous of children's independent interests and rights against their parents."[256] Such rights include protection from abuse, exploitation, and neglect, whereby the state assumes the role of *parens patriae*.[257]

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[252] *Ibid* [emphasis in original].
[253] Jeffrey Blustein, *Parents and Children: The Ethics of the Family* (New York: Oxford University Press, 1982) at 20 [Blustein, *Parents and Children*].
[254] *Ibid* at 21.
[255] Andrew Justus Hall, *Origins and Departures: Childhood in the Liberal Order* (PhD Thesis, Columbia University, Graduate School of Arts and Sciences, 2011) (New York: Columbia University, 2011) at 220.
[256] *Ibid*.
[257] *Ibid*.

For Samantha Godwin, current debates in this field feature a clash between the "children's liberation position"[258] and the "child protectionist position," the latter view holding that children lack the rationality and maturity to make important decisions and need competent adults to care for them;[259] under this view, children's rights are mostly conceptualized "in terms of what children need in order to develop successfully."[260] It is this second position that dominates in academia; it is also the one endorsed in the United Nations Convention on the Rights of the Child[261] and favoured by the Supreme Court of Canada. It is a legal arrangement "widely believed to have its basis in a parent's 'natural rights'",[262] whereby parents have guardianship and decision-making authority by default over their children at birth.[263] Nevertheless, the scope of such presumably "natural" rights is, as Samantha Godwin observes, "necessarily a matter of government policy and judicial recognition."[264] Parenting and laws thereon are essentially cultural constructs.[265]

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[258] This first position sees no moral justification for withholding from children rights equal to those enjoyed by adults: Godwin, *supra* note 247 at 6–7.

[259] *Ibid* at 10.

[260] *Ibid* at 7 [footnotes omitted].

[261] *Ibid*.

[262] *Ibid* at 11 [footnotes omitted].

[263] Goldstein, *supra* note 244 at 645, illustrates this setup through three basic propositions:

> To be a *child* is to be at risk, dependent, and without capacity or authority to decide what is "best" for oneself.
>
> To be an *adult* is to be a risktaker, independent, and with capacity and authority to decide and to do what is "best" for oneself.
>
> To be an *adult who is a parent* is to be presumed in law to have the capacity, authority, and responsibility to determine and to do what is good for one's children.

See also Bernard Dickens, "The Modern Function and Limits of Parental Rights" (1981) 97 LQ Rev 462 at 471: "If Goldstein's first postulate means that 'Children are not allowed to make mistakes,' and his second means that 'Adults are allowed to make mistakes,' the third postulate means that 'Parents are adults who are allowed to make mistakes regarding their children.'"

[264] Godwin, *supra* note 247 at 14 [footnotes omitted].

[265] *Ibid* at 52; Elaine M Chiu, "The Cultural Differential in Parental Autonomy" (2008) 41 UC Davis L Rev 1773 at 1793; Barbara Hall, "The Origin of Parental Rights" (1999) 13:1 Public Affairs Q 72 at 73; A Hall, *supra* note 255 at 352.

This vision of family intimacy and parental authority in Anglo-American law dates back to the Roman Empire and the concept of *patria potestas*, "a proprietary, magisterial and arbitrary power belonging to the father as *pater familias*."[266] With the advent of the early modern period and European philosophers such as Bodin through to Locke, a prolonged discussion ensued regarding the nature and justification of parental and political power, as well as the relation between the two.[267] The 1680 publication of Sir Robert Filmer's *Patriarcha*, defending the doctrine of the divine rights of monarchy,[268] further fueled the debate surrounding parental authority.[269] Filmer's theory was that royal power and "fatherly right" were both divinely granted.[270] This patriarchal justification of the duty to obey the state resonated with English political scholars at the time in part because "[t]he seventeenth-century English family 'was indeed an authoritarian institution that was well-suited to be the basis of an absolutist political doctrine . . .'."[271] Correlatively, the reverse analogy could also be made: "While the king claimed paternal authority, fathers claimed to be kings of their domains".[272] Musing on this subject in his *Two Treatises to Government* and relying on theology, Locke rejected the idea that parents own their children, since "human beings may not *use* one another as

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[266] Anne McGillivray, "Children's Rights, Paternal Power and Fiduciary Duty: From Roman law to the Supreme Court of Canada" (2011) 19 Intl J Child Rts 21 at 25. See also e.g. Godwin, *supra* note 247 at 31.
[267] Blustein, *Parents and Children*, *supra* note 253 at 24.
[268] Thomas I Cook, "Note on Sir Robert Filmer" in John Locke, *Two Treatises of Government*, Thomas I Cook, ed (New York: Hafner Publishing Co, 1947) at 309.
[269] A Hall, *supra* note 255 at 234.
[270] Rachel Weil, "The family in the exclusion crisis: Locke versus Filmer revisited" in Alan Houston & Steve Pincus, eds, *A Nation Transformed: England after the Restoration* (Cambridge: Cambridge University Press, 2001) 100 at 102.
[271] *Ibid* at 107.
[272] Su Fang Ng, *Literature and the Politics of Family in Seventeenth-Century England* (Cambridge: Cambridge University Press, 2007) at 1.

mere means."[273] Later secular versions of this argument, such as the one put forth by Rawls, presume "that human beings are morally equal in virtue of their common capacities to act rationally and reasonably, which is to say their capacities to pursue their own good and to act in accordance with moral principle."[274] Children, it was argued, enjoy the same basic moral status because they are endowed with the *potential* for rationality.[275]

In Canada, the Supreme Court has affirmed that "the law no longer treats children as the property of those who gave them birth".[276] Nevertheless, Andrew Hall is joined by a number of others in suggesting that the proprietary nature of parental rights has never truly been abandoned.[277] Notably, he explains, "[p]arents . . . continue to hold rights, not only against their children, but against third parties. And *in that sense*—as rights *in rem* over something external—parental rights do resemble property rights more than most other rights with which we are now familiar."[278]

However, an alternative conception of parental rights also endures, namely, Locke's highly influential fiduciary model. For Locke, the father's absolute power was linked "to the performance of parental duty".[279] More specifically, Hall writes, "Locke's rather elegant strategy is to argue that the child's *undeveloped potential for reason* is at once the basis of the child's moral equality with his parents and the basis for his

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[273] A Hall, *supra* note 255 at 251 [emphasis in original].
[274] *Ibid* at 255.
[275] *Ibid*.
[276] *Racine v Woods*, [1983] 2 SCR 173 at 174, 1 DLR (4th) 193. See also *B (R)*, *supra* note 3 at 318.
[277] See e.g. Edgar Page, "Parental Rights" (1984) 1:2 J Applied Philosophy 187; Godwin, *supra* note 247 at 3–5, 32; McGillivray, *supra* note 266.
[278] A Hall, *supra* note 255 at 264–65 [emphasis in original]. Under the new "voluntarist paradigm" approach, proponents theorized that parental authority derives either from the child's tacit (actual) consent or from the child's hypothetical or future consent (*ibid* at 267).
[279] McGillivray, *supra* note 266 at 27.

temporary subjection to their authority."[280] According to both Locke and Pufendorf, the birthright of children is to attain the state of full equality and reason, and certain adults have a duty to help them reach this state; parental rights over children are simply the means for fulfilling these duties.[281] Thus, Locke contrasts the notion of government against the idea of parental rights as property rights: "[g]overnment . . . is not a private right, but a *fiduciary trust*",[282] whereby power is exercised for the good of the governed (children), who also have rights against their parents.[283] In fact, as Hall observes, "Locke insists that, 'to speak properly,' the rights of parents over minor children are 'rather the privilege of children, and the duty of parents, than any prerogative of paternal power'".[284] However, Locke and Pufendorf both stipulate that parents have no general obligation to always sacrifice their own rights and interests for the sake of their children.[285] This justification of parental autonomy as a means of ensuring children's welfare (rather than as a reflection of the respect due to parents *per se*) is an approach taken by authors such as Elaine Chiu, Katherine Bartlett, Janet Leach Richards, and Joseph Goldstein.[286]

The Supreme Court of Canada seems to have adopted this fiduciary theory to a certain extent. In *M. (K.) v. M. (H.)*,[287] La Forest J. wrote that "[i]t is intuitively apparent that the relationship between parent and child is fiduciary in nature".[288] Observing that "society has imposed upon parents the obligation to care for, protect and rear their

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[280] A Hall, *supra* note 255 at 290 [emphasis in original].
[281] *Ibid* at 296.
[282] *Ibid* at 297 [emphasis in original].
[283] *Ibid* at 297–98, 303.
[284] *Ibid* at 303.
[285] *Ibid* at 308.
[286] Chiu, *supra* note 265 at 1790.
[287] [1992] 3 SCR 6, 96 DLR (4th) 289 [cited to SCR].
[288] *Ibid* at 61.

children",[289] he held that "[t]he inherent purpose of the family relationship imposes certain obligations on a parent to act in his or her child's best interests, and a presumption of fiduciary obligation arises."[290] Later, in *K.L.B.*, McLachlin C.J. revisited the issue of parental fiduciary duty and made it clear that "[p]arents should try to act in the best interests of their children."[291] In explaining why a failure to meet this goal could nevertheless not be an independent ground of liability at common law or equity, the Chief Justice drew attention to the complex nature of parental decision making:

> It is often unclear at the time which, among all of the possible actions that a parent could perform, will best advance a child's best interests. Different parents have different ideas of what particular actions or long-term strategies will accomplish this, all of which may be reasonable. And even once parents do sort this out, they may face the practical difficulty that what they can do for their children is limited by their resources, their energy, their abilities and the competing needs of their other children.[292]

Authors like Lainie Friedman Ross seem to fall in line with this view of parental fiduciary duty. In her view, "[w]hile the needs and interests of children ought to be central to the goals of the parents, to hold that the needs and interests of children must be given *absolute* priority *at all times and in all circumstances* is untenable."[293] She offers a model of parental autonomy whereby parents "have the freedom to consider their own needs and interests provided that they have ensured for the provision of their child's basic

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[289] *Ibid* at 62.

[290] *Ibid* at 65. In that case, involving an action against a father for incest, La Forest J. described the parental fiduciary duty narrowly as "simply to refrain from inflicting personal injuries upon one's child" (*ibid* at 67).

[291] *KLB v British Columbia*, 2003 SCC 51 at para 44, [2003] 2 SCR 403 [*KLB*].

[292] *Ibid* at para 46. In McLachlin C.J.'s view, "concern for the best interests of the child informs the parental fiduciary relationship" (*ibid* at para 49). More specifically, "the duty imposed is to act loyally, and not to put one's own or others' interests ahead of the child's in a manner that abuses the child's trust" (*ibid* at para 49). In another case, the Chief Justice wrote that "[t]he cases on the parental fiduciary duty focus not on achieving what is in the child's best interest, but on specific conduct that causes harm to children in a manner involving disloyalty, self-interest, or abuse of power — failing to act selflessly in the interests of the child." [*EDG v Hammer*, 2003 SCC 52 at para 23, [2003] 2 SCR 459]

[293] Lainie Friedman Ross, *Children, Families, and Health Care Decision Making* (Oxford: Clarendon Press, 1998) at 21 [emphasis in original].

needs."[294] Otherwise put, "[p]arental rights . . . accord parents certain freedoms and powers derived from their status as parents (i.e. the freedom to raise their children according to their own conception of the good life) as well as the rights to fulfill their non-parental interests",[295] as long as they meet the threshold minimum of the child's basic needs.

Others, like Dwyer and Page, are critical of what Page calls "the argument from necessity,"[296] according to which parents need rights to carry out their child-rearing responsibilities; it is an argument that fails, in their opinion, to account for the expansive scope of parental discretion and rights.[297] Furthermore, Dwyer argues, "[t]he fact that one person owes duties to another person certainly does not *logically* entail that the first person has any rights—not even rights that might be necessary to fulfill her duties."[298] Rights of office or fiduciary rights do not exist for the sake of the rights-holder, but rather allow the latter such freedom or authority as is necessary to discharge that person's obligations; these are what Andrew Hall terms "operational rights."[299] Ultimately, Hall concludes, "the fiduciary account fails to do justice to the notion that parents have fundamental individual rights—rights in their own name, not just rights of office—to raise their children."[300]

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[294] *Ibid* at 21.
[295] *Ibid*.
[296] Page, *supra* note 277 at 188.
[297] *Ibid* at 191; Dwyer, *supra* note 250 at 87.
[298] Dwyer, *supra* note 250 at 88. Dwyer holds up doctors' duty of care to their patients as an example, remarking that such a duty "does not itself imply that the doctor has any rights against her patients or against third parties" (*ibid* at 88).
[299] A Hall, *supra* note 255 at 324–25.
[300] *Ibid* at 321.

The Supreme Court does appear to contemplate something more than mere operational rights. La Forest J. seemed to suggest as much in *B. (R.)* when he described "parental liberty" as "a *parental* right to enjoy family life and control various aspects of a child's life, free from unnecessary outside interference."[301] This parental interest, he wrote, "is an individual interest of fundamental importance to our society",[302] and "individuals have a deep personal interest as parents in fostering the growth of their own children."[303] Parents must be accorded rights to fulfill their responsibilities towards their children because of "the fundamental importance of choice and personal autonomy in our society."[304]

In *Godbout v. Longueuil (City)*,[305] La Forest J., writing for L'Heureux-Dubé and McLachlin JJ., reiterated the view that the decisions of parents respecting their children's medical care fell within a narrow class of "matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence."[306] Such decisions are "quintessentially private decision[s] going to the very heart of personal or individual autonomy."[307]

In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*,[308] Lamer C.J. cited La Forest J.'s affirmation in *B. (R.)* that the parental interest in raising and caring for a child is "an individual interest of fundamental importance in our

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[301] *B (R)*, *supra* note 3 at 364.
[302] *Ibid* at 371.
[303] *Ibid* at 372.
[304] *Ibid* at 318.
[305] [1997] 3 SCR 844, 152 DLR (4th) 577 [cited to SCR].
[306] *Ibid* at para 66.
[307] *Ibid*.
[308] [1999] 3 SCR 46, 216 NBR (2d) 25 [*G (J)* cited to SCR].

society".[309] Lamer C.J. added that the parent-child relationship is "a private and intimate sphere"[310] and that "an individual's status as a parent is often fundamental to personal identity".[311] And, finally, in *Blencoe v. British Columbia (Human Rights Commission)*,[312] Bastarache J. listed the right to raise one's children among the interests that are the most compelling and basic to individual autonomy and dignity.[313]

Therefore whereas the narrower notion of operational rights may be less objectionable, the more contentious idea that parents have some personal, fundamental child-rearing right persists. Some academic commentators like William Galston maintain that parents are not mere caretakers, that there is something special about the parent-child relationship, and that there is a particular significance to "raising one's children, and raising them in a particular way".[314] Such views of parenthood fit uneasily with the fiduciary account of parental rights.[315] Importantly, Andrew Hall notes, the fiduciary paradigm fails to recognize "the personal stake that parents possess in having an intimate relationship with their children. The nature of that relationship, it will be argued, is very different from the sort of relationship a public office-holder has with the public, and it constitutes so fundamental an interest that it *does* make sense to say that parents have an individual right to rear their children."[316] From this point of view, parents have a

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[309] *Ibid* at para 61, citing *B (R)*, *supra* note 3 at 318.
[310] *G (J)*, *supra* note 308 at para 61.
[311] *Ibid*.
[312] 2000 SCC 44, [2000] 2 SCR 307.
[313] *Ibid* at para 86.
[314] A Hall, *supra* note 255 at 327; see also William A Galston, "Parents, Government, and Children: Authority over Education in the Liberal Democratic State" in Stephen Macedo & Iris Marion Young, eds, *Child, Family and State* (New York: New York University Press, 2003) 211 at 226; William A Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge, UK: Cambridge University Press, 2004) [Galston, *Liberal Pluralism*].
[315] A Hall, *supra* note 255 at 327.
[316] *Ibid* at 336 [emphasis in original].

profound and valid interest in establishing and maintaining an intimate relationship with their children, provided that the children's basic needs are met.[317] These perspectives, Hall writes, are among a number of "contemporary intimacy-based accounts of parental rights."[318]

Defending such an account, Ferdinand Schoeman argues that "moral and social philosophy have concentrated almost exclusively on abstract relationships among people, emphasizing either individual autonomy or general social well-being, [while] certain key aspects of our moral experience—those aspects [that] deal with intimate relationships—have been virtually ignored."[319] For Schoeman, intimate relationships define individuals; require privacy and autonomy to thrive;[320] and bring meaning to one's existence because of "the personal commitments to others which are constitutive of such relationships."[321]

Brighouse and Swift add to this narrative by describing the parent-child relationship as a "distinctive moral burden".[322] It is distinctive, Hall explains, because "being a parent requires the development and exercise of capacities that are not called for by any other pursuit and which open up possibilities of self-discovery that are unavailable in any other relationship."[323] Brighouse and Swift conclude that the "challenge of parenting is something adults have an interest in facing, and it is that interest that grounds

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[317] *Ibid* at 337–38. See also e.g. Ferdinand Schoeman, "Rights of Children, Rights of Parents, and the Moral Basis of the Family" (1980) 91:1 Ethics 6 at 10 [Schoeman, "Moral Basis of the Family"].
[318] A Hall, *supra* note 255 at 336.
[319] Schoeman, "Moral Basis of the Family", *supra* note 317 at 6.
[320] *Ibid* at 14–15.
[321] *Ibid* at 14.
[322] Harry Brighouse & Adam Swift, "Parents, Rights and the Value of the Family" (2006) 117 Ethics 80 at 94. For them, the parent-child relationship is a unique intimate relationship that can ground parents' rights, notably because of the unequal power dynamics, the child's unconditional love, and the challenge and responsibility of ensuring the child's development and well-being (*ibid* at 92–95). See also e.g. Ferdinand Schoeman, "Parental Discretion and Children's Rights: Background and Implications for Medical Decision-Making" (1985) 10:1 J Medicine & Philosophy 45 at 45–49 [Schoeman, "Parental Discretion"].
[323] A Hall, *supra* note 255 at 343.

fundamental parental rights over their children".[324] But these rights, they specify, are conditional and limited: they are justified only to the extent necessary to protect the special parent-child relationship.[325] They propose two types of operational rights in this context: those that allow parents to ensure their children's interests, and those that allow parents to maintain an intimate relationship with their children.[326] The latter, termed "associational rights,"[327] are contingent upon the child's basic needs being satisfied. As long as parents meet this threshold, they "are not under an obligation to be considering the child's best interests as they exercise these rights".[328] Where it is determined that the threshold has not been met, the "right of parental autonomy"[329] may be limited by the state, which, as *parens patriae*, "shares the tasks of parenting with individual parents"[330] and has an "interest in protecting the welfare of children".[331] Individual parents outrank the state in the hierarchy,[332] and "courts evaluate the *parens patriae* actions of the state against the privileged place of parents."[333]

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[324] Brighouse & Swift, *supra* note 322 at 96.
[325] *Ibid* at 81, 102.
[326] A Hall, *supra* note 255 at 344, 347.
[327] Brighouse & Swift, *supra* note 322 at 102.
[328] *Ibid* at 102.
[329] Chiu, *supra* note 265 at 1784.
[330] *Ibid* at 1786.
[331] *Ibid* at 1786.
[332] *Ibid* at 1788.
[333] *Ibid* at 1788. Canadian legislation recognizes in a number of different areas the importance of preserving family bonds and, in particular, parent-child relationships: see e.g. *Divorce Act*, RSC 1985, c 3 (2nd Supp); Julien D Payne & Marilyn A Payne, *Canadian Family Law* (Toronto: Irwin Law, 2017); *Immigration and Refugee Protection Act*, SC 2001, c 27; Rell DeShaw, "The History of Family Reunification in Canada and Current Policy" (2006) Canadian Issues 9; but see Bronwyn Bragg & Lloyd L Wong, "'Cancelled Dreams': Family Reunification and Shifting Canadian Immigration Policy" (2016) 14:1 J Immigrant & Refugee Studies 46.

The Supreme Court of Canada seems to appreciate the value of the parent-child relationship, for both parents and children. In *Hepton et al. v. Maat*,[334] for instance, Rand J. recognized the child's interest in remaining within his or her family:

> As *parens patriae* the Sovereign is the constitutional guardian of children, but that power arises in a community in which the family is the social unit. . . . The controlling fact in the type of case we have here is that the welfare of the child can never be determined as an isolated fact, that is, as if the child were free from natural parental bonds entailing moral responsibility—as if, for example, he were a homeless orphan wandering at large.
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> The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents; when through a failure, with or without parental fault, to furnish that protection, that welfare is threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds, justified in displacing the parents and assuming their duties.[335]

The Court has also recognized in decisions like *K.L.B.* the multiplicity of factors that parents may need to weigh in "attempting to decide which of an almost infinite number of combinations of potential actions toward one's child would best advance the child's interests."[336] It rejected the "proposition that everything that is not in a child's best interest"[337] would constitute a breach of the parental fiduciary duty.

Ultimately, these matters engage an intricate balancing of interrelated interests—of parents, children, and society, as represented by the state.[338] Parental rights are complex because of their very nature and the relationships they define. The Supreme Court's comments on parental authority reflect a multi-faceted conception, encompassing

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[334] [1957] SCR 606, 10 DLR (2d) 1 [cited to SCR].

[335] *Ibid* at 607–08. See also e.g. *G (J)*, *supra* note 308 (the Court confirming a parent's constitutional right to hearing and counsel where the state seeks custody of a child); *King v Low*, [1985] 1 SCR 87 at para 31, [1985] SCJ No 7. See also Dwyer, *supra* note 250 at 63, summarizing the justifications for parental rights (in short, the interests of children, parents, and society).

[336] *KLB*, *supra* note 291 at para 47.

[337] *Ibid* at para 47.

[338] Jeffrey Blustein, "On the Duties of Parents and Children" (1977) 15:4 Southern J Philosophy 427 at 427.

concerns relating to parental fiduciary duties, fundamental parental rights to autonomy and freedom, the interests of the child, and the role and responsibilities of the state as *parens patriae*. In the following section, I will explain in greater detail why this complexity militates against insufficiently nuanced conceptions of parental rights.

3.4 Arguments for More Balanced Notions of Parental Autonomy

The constitutional rights at issue in cases such as *B. (R.)* and *Hamilton* are not exclusive to parents. However, when those rights were examined in the context of parental decision making, they were interpreted as granting parents the authority to make certain decisions regarding not only themselves but also their children. The previous section introduced various positions defending the allocation of some parental discretion in child rearing, beyond what is required to meet minimum needs. Children's development, it is suggested, depends on more than the bare fulfillment of basic needs, and this development and the richness of their childhood will be shaped in part by the choices parents make. Moreover, some have argued, there is a special significance to parenthood, the parent-child relationship, and the act of raising one's children in one's own way—subject to limits such as the assurance of the child's basic welfare. The reasoning, then, is that certain fundamental rights, when exercised by parents, may be construed as protecting parental decisions regarding important aspects of child rearing. In making decisions on behalf of their children, parents will inevitably filter their judgment through the lens of deeply felt and earnestly lived cultural beliefs. The profound importance of those beliefs and their integrality to the parent's identity (not to mention their significance for the child and associated communities) may well justify their protection. In this manner, parents may have limited other-determining rights, not

necessarily or solely for their own sake, but in part because of the unique nature of the parent-child relationship. Assuming the validity of such rights, however, the courts' treatment of parental rights in the cases above sometimes seemed to belie the context in which they were exercised. These were parental rights that affected the intertwined lives and interests of parent *and* child.

La Forest J.'s remarks are particularly startling in their attribution of acutely personal and individualistic virtues to parental other-determining rights and decisions. How can one justify parental rights over children on the basis of a parent's freedom to develop and realize her *own* potential, to plan her *own* life to suit her *own* character, to be her *own* person?[339] Stephen Toope sees this focus on individual autonomy as being distinctly unhelpful in the context of family law, given that "[f]amilies are remarkably complex constructions in which we express needs for independence, but also needs for dependence and for support."[340] He suggests that "[i]f we adopt a contextual perspective and ask ourselves how we experience the complexity of our own family life, . . . we will not describe a bartering of autonomous interests."[341] For him, "a view of social relations which sets up the individual as a self-contained entity struggling to protect herself from any outside assaults upon her independence"[342] is an inappropriate, "caricatured and implausible description of the relationship between the individual and her several communities."[343] Furthermore, when individual autonomy is contemplated in isolation, "decisions are taken out of context and issues of responsibility and concern for others

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[339] See *R v Jones*, [1986] 2 SCR 284 at 318, 31 DLR (4th) 569 [*Jones*].
[340] Stephen J Toope, "Riding the Fences: Courts, Charter Rights and Family Law" (1991) 9 Can J Fam L 55 at 74.
[341] *Ibid*.
[342] *Ibid* at 75.
[343] *Ibid*.

become lost."[344] Indeed, Jackson and Sclater add, it is "precisely commitments, duties and relationships with others that give our lives meaning and character".[345]

Fundamentally, "[t]he rights paradigm – based as it tends to be on a liberal vision of 'the citizen' (liberalism's unencumbered individual) – does not apply easily to the family law field, where individual family members are encumbered with complex interdependencies, needs, and relations of care."[346] Children may benefit when viable familial bonds stay intact and parents are able to make decisions regarding their upbringing, but children are not "mere extensions of their parents, or characters in the story of their parents' lives".[347] Despite their interdependence, parents and children do not share identities, and their interests may not always be perfectly aligned.[348] The parent and child should not be subsumed into one entity, such that parents can always be assumed to speak decisively on behalf of an indivisible or amorphous family.[349]

In some cases, a particular child's interests may best be served when the state intervenes; where the parents' interest to be free from state intervention clashes with a child's welfare, the latter must come first.[350] And the state should not necessarily be viewed as an adversary. In child protection cases, the parent is not asserting her rights as against those of her child but rather invoking her constitutional rights as a shield against state intervention. But although the state does not strictly speaking automatically

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[344] Mary Donnelly, *Healthcare Decision-Making and the Law: Autonomy, Capacity and the Limits of Liberalism* (Cambridge: Cambridge University Press, 2010) at 34.
[345] Jackson & Sclater, *supra* note 76 at 2.
[346] Susan B Boyd, "The Impact of the Charter of Rights and Freedoms on Canadian Family Law" (2000) 17 Can J Fam L 293 at 297.
[347] Godwin, *supra* note 247 at 51.
[348] See e.g. Dwyer, *supra* note 250 at 66; *Catholic Children's Aid Society of Metropolitan Toronto v M (C)*, [1994] 2 SCR 165.
[349] See also e.g. Dwyer, *supra* note 250 at 66.
[350] See e.g. Chiu, *supra* note 265 at 1790.

"represent" the child, its actions are—at least in theory—grounded in a concern for the child's welfare and best interests. Wider communities are connected to the family and have an interest in ensuring that children fare well and thrive.[351] As Boyd points out, "in the context of the family, . . . the interests of parents, children, and government/community are often inter-related and/or all at stake in different ways."[352]

It is interesting to note that certain commentators gravitate towards the opposite extreme: the elimination of parental autonomy entirely. Godwin distinguishes parental rights—defined as "the special legal powers of parents to control major aspects of their children's lives"[353]—from those constitutional rights granted to all.[354] But her discussion seems to hint at practical difficulties that arise when we attempt to isolate purely "personal" decisions of parents from those that involve their children:

> Parents in the real world are additionally not consistently or exclusively motivated by their child's perceived best interests. Parents have their own needs, interests, and desires that are not identical to the best interests of their children. Furthermore, parents often have to weigh the interests of one child against another and may (intentionally or not) do so in an unequal fashion that does not serve the best interests of at least one child. Some non-negligible minority of parents may also simply not be especially driven to serve the best interests of their children, and may be far more concerned with other aims, consciously or otherwise. There is also a general tendency for people to interpret reality in ways biased towards their own wishes. Given that parental interests are thoroughly implicated in childcare decisions, parents are likely to interpret their children's interests in a manner consistent with their own wishes . . . . [However,] parental preferences . . . may or may not have anything to do with a child's best interests."[355]

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[351] See e.g. Shauna Van Praagh, "Religion, Custody, and a Child's Identities" (1997) 35:1 Osgoode Hall LJ 309 at 339–40 [Van Praagh, "Religion"].
[352] Boyd, *supra* note 346 at 297.
[353] Godwin, *supra* note 247 at 4.
[354] *Ibid*.
[355] *Ibid* at 26.

Likewise, Dwyer's position according to which "the other-determining rights parents alone enjoy"[356] are "distinct from the self-determining rights all competent adults enjoy"[357] assumes a deceptively clear line separating self- and other-determining decisions where parents and their children are concerned.[358]

Parents are not subordinated to the lives of their children, transforming with the advent of parenthood into mere conveyor belts producing future adults for the benefit of society. Godwin points to Eamonn Callan's view that, "while any moral theory that interprets a child's role as merely instruments of their parents would be objectionable, it would also be objectionable to view a parent's role in ways that reduce parents to mere instruments of their children's interests. Instead, parents should have discretion that does justice to their hopes and aspirations."[359] William Galson adds that "[a]s parent, I am more than the child's caretaker or teacher, and I am not simply a representative of the state delegated to prepare the child for citizenship. The hopes and sacrifices to which Callan refers reflect the intimate particularity of the parent-child bond, the fact that the child is in part (though only in part) an extension of ourselves."[360] If we assume that individuals who become parents retain some measure of individuality and do not lose their selfhood or distinctiveness,[361] we should not be too quick to discard wholesale the concept of parental autonomy.

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[356] Dwyer, *supra* note 250 at 65.
[357] *Ibid*.
[358] See also e.g. Schoeman, "Parental Discretion", *supra* note 322 at 59–60, on how parents may legitimately take into account factors other than the child's best interest.
[359] Godwin, *supra* note 247 at 48 [footnotes omitted], citing Eamonn Callan, *Creating Citizens: Political Education and Liberal Democracy* (Oxford: Oxford University Press, 1997) at 145.
[360] Galston, *Liberal Pluralism*, *supra* note 314 at 103.
[361] See e.g. Blustein, *Parents and Children*, *supra* note 253 at 11.

Beliefs and practices that are constitutionally protected are considered fundamentally important, deeply held, and constitutive of identities. For individuals who become parents, a commitment to such values will carry on colouring their decisions, including those that concern their children. Dickson C.J., in *Edwards Books*,[362] understood that the "profoundly personal beliefs [protected by s. 2(*a*)] govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices."[363] Recall also Orsi's observation about the impossibility of separating lived religion from all other aspects of everyday life.[364] Ultimately, Galston argues, "[w]e cannot detach our aspirations for our children from our understanding of what is good and virtuous."[365]

The struggle to capture the true complexity of parenthood also plays out in the reasons of the Supreme Court. Lessard identifies Wilson J.'s decisions as embodying "the greatest ambivalence"[366] between the liberal emphasis on the individual and "[t]he counter theme of community".[367] On the one hand, Lessard writes, "[i]t would be hard to find a clearer statement of the classical liberal equation of freedom with exclusion, boundaries, and individual sovereignty than her metaphorical description in *Morgentaler* of rights as fences".[368] Wilson J. extended this vision to her portrait of parental liberty in *Jones*, which takes as its "starting point . . . the aspirations of the restless and rebellious

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[362] *Supra* note 118.
[363] *Ibid* at para 97.
[364] Orsi, *supra* note 172 at 172.
[365] Galston, *Liberal Pluralism*, *supra* note 314 at 102.
[366] Lessard, "Relationship, Particularity and Change", *supra* note 101 at 288.
[367] *Ibid*.
[368] *Ibid*.

individual of classical liberalism",[369] who must be free "to plan his own life to suit his own character, to make his own choices for good or ill, to be . . . 'his own person' and accountable as such."[370]

On the other hand, Wilson J. also saw the s. 7 liberty right as comprising parents' rights to educate their children in accordance with their beliefs, which is for Lessard "a notion of self-realization that is dependent on social relationship".[371] Wilson J. wrote that "[t]he relations of affection between an individual and his family and his assumption of duties and responsibilities toward them are central to the individual's sense of self and of his place in the world."[372] In other words, Lessard summarizes, parenting is "a social activity which links the individual with community and through which both develop."[373]

Ultimately, the challenge remains to find a balanced vision of parental autonomy and rights that avoids two extremes: at the one extremity, a too-individualistic and self-interested conception; and, at the other, an account that denies that parents, although intimately connected to their children and their children's interests, retain a measure of individuality and autonomy. To this end, the second half of this thesis will explore a different account of the rights at issue, as seen from the perspective of relational theory and its "view of agency that is situated in the complex interconnectedness of human life".[374]

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[369] Hester Lessard, "Liberty Rights, The Family and Constitutional Politics" (2002) 6 Rev Const Stud 213 at 226 [Lessard, "Liberty Rights"].
[370] *Jones*, *supra* note 339 at 318.
[371] Lessard, "Relationship, Particularity and Change", *supra* note 101 at 288.
[372] *Jones*, *supra* note 339 at 319.
[373] Lessard, "Relationship, Particularity and Change", *supra* note 101 at 289.
[374] Beaman, *Defining Harm*, *supra* note 169 at 104.

Chapter 4: A Relational Perspective

4.1 General Introduction to Relational Theory

In this fourth chapter, I will survey some general principles of relational theory, before examining their application to the current discussion. In exploring the contribution of relational theory to the issues at hand, I come to the conclusion that, alone, the relational or care perspective is insufficient, and that an approach integrating both care and justice is the most promising path to take.

The previous chapter introduced liberalism's core tenets and, in particular, the value it places on autonomy. However, autonomy has been subject to a number of different conceptualizations, occupying "a continuum that spans from the extreme libertarian view of autonomy as atomistic, independent self-determination to the communitarian extreme in which the importance of the individual is subjugated to the needs and interests of the community."[375] Among detractors of the liberal individualistic account are communitarians, whose view is held up as "the ideological counterpoise to individualism".[376] Communitarians valorize the community, social obligations, and the common good over individual concerns, rights, and autonomy;[377] they adopt as their ethical starting point the community, rather than the individual, and consider that

[375] Maclean, *supra* note 78 at 11.

[376] JE Kingdom, *No Such Thing as Society? Individualism and Community* (Philadelphia: Open University Press, 1992) at 6, cited in Colin Bird, *The Myth of Liberal Individualism* (Cambridge, UK: Cambridge University Press, 2004) at 14.

[377] Amitai Etzioni, "Communitarianism revisited" (2014) 19:3 J Political Ideologies 241 at 244; Nicola Lacey & Elizabeth Frazer, "Communitarianism" (1994) 14:2 Politics 75; Tibor Machan, "Liberalism and Atomistic Individualism" (2000) 34 J Value Inquiry 227 at 238; Linda Barclay, "Autonomy and the Social Self" in Catriona Mackenzie & Natalie Stoljar, eds, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 2000) 52 at 67.

community attachments determine individual identities and obligations.[378] In short, communitarianism stands for "the thesis that the community, rather than the individual, . . . should be the focus – ontologically – of social analysis, and that community should be the basis – normatively – for our values and principles."[379]

Like communitarians, relational theorists express dissatisfaction at liberal approaches to autonomy that, taken to their extreme, portray individuals as abstract, insular, socially unencumbered, self-interested, and entirely self-sufficient.[380] However, relational theorists also reject the notion that people's identities and obligations are necessarily subsumed under or determined by any group or historical context in which they find themselves.[381] They see us as "defined by our connections with others at least as much as by our individuality",[382] and therefore find worth in both distinct individuals and relationships.[383] Consequently, relational theorists strive to balance this individual/collective duality and avoid the dichotomy[384] set up by liberal and communitarian perspectives that are insufficiently nuanced—that are, in Virginia Held's words, "for purposes of description, artificial abstractions from reality and, for purposes of evaluation, implausible recommendations".[385]

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[378] Kingdom, *supra* note 376 at 6; Goodin, *supra* note 82 at 551; Friedman, *Autonomy*, *supra* note 84 at 11.
[379] Lacey & Frazer, *supra* note 377.
[380] See e.g. Jocelyn Downie & Jennifer Llewellyn, "Relational Theory & Health Law and Policy" (2008) Health LJ 193 at 196.
[381] Virginia Held, *Feminist Morality: Transforming Culture, Society, and Politics* (University of Chicago Press: Chicago, 1993) at 190 [Held, *Feminist Morality*]; Marilyn Friedman, "Relational Autonomy and Individuality" (2013) 63:2 UTLJ 327 at 341 [Friedman, "Relational Autonomy"].
[382] Jackson & Sclater, *supra* note 76 at 1–2.
[383] Held, *Feminist Morality* at 189-90.
[384] Lacey & Frazer, *supra* note 377 at 80.
[385] Held, *Feminist Morality* at 190, *supra* note 381; see also *ibid* at 80.

Relational theory is predicated upon the inevitability of relational life[386] and sees the relational self as "socially connected, interdependent, socially encumbered, emotional, relationally constructed, socially constructed, and embodied."[387] The relational individual is "an entity that is produced through, and continually embedded in, relationships, but experienced as a (largely self-directing) individual".[388] Interestingly, the notion of the relational self quintessentially emerged from the parent-child relationship.[389] Adapting the concept of the relational self from its psychoanalytic origins, Carol Gilligan elaborated the moral perspective now known as a care ethic, one of "several connected and overlapping areas"[390] comprising relational theory. Care ethicists consider that individuals "are *always* selves-in-relationship"[391] and point to the fact that each person inevitably depends upon others for care and survival.[392] They also stress "that a relationship requires *two* selves, not one self in which the other is subsumed and consumed."[393]

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[386] Jonathan Herring, *Relational Autonomy and Family Law* (New York: Springer, 2014) at 11 [Herring, *Relational Autonomy*].

[387] Downie & Llewellyn, *supra* note 380 at 196 [footnotes omitted].

[388] Jane Ribbens McCarthy, "The powerful relational language of 'family': togetherness, belonging and personhood" (2012) 60:1 Sociological Rev 68 at 79.

[389] More specifically, it originated from the "mother-child" relationship. Feminist psychoanalysts, in particular Nancy Chodorow, established the notion of a relational self by theorizing about how young girls and boys develop differing constructions of the self in relation to the nurturing mother: see Eva Feder Kittay, "Searching for an overlapping consensus: a secular care ethics feminist responds to religious feminists" (2007) 4 U St Thomas LJ 468 at 474 [Kittay, "Overlapping Consensus"].

[390] Robert Leckey, *Contextual Subjects: Family, State and Relational Theory* (Toronto: University of Toronto Press, 2008) at 7. See also Calhoun's clarification of "ethics of justice" and "ethics of care":

> In referring to the 'ethics of justice' and the 'ethics of care', I do not assume that either one is some monolithic, unified theory; rather, I use these terms, as Gilligan suggests, to designate different orientations – loosely defined sets of concepts, themes, and theoretical priorities – which we understand sufficiently well to pick out who is speaking from which orientation, but which are not so rigid as to preclude a great deal of disagreement within each orientation. [Cheshire Calhoun, "Justice, Care, and Gender Bias" (1988) 85:9 J Philosophy 451 at 451, n 1]

[391] Kittay, "Overlapping Consensus", *supra* note 389 at 475.

[392] Leckey, *supra* note 390 at 7; Herring, *Relational Autonomy*, *supra* note 386 at 11.

[393] Kittay, "Overlapping Consensus", *supra* note 389 at 478 [emphasis in original].

It is in part because of this acknowledged potential for oppression, inequality, and exploitation in relationships[394] that relational theory distances itself from communitarianism and retains some of liberalism's elemental components, notably the primacy of individuals and their capacity for autonomy, for making choices and shaping their lives and relationships.[395] Nedelsky's relational approach, for instance, overlaps with liberalism[396] and seeks more specifically "to challenge liberal individualism."[397] Although, like liberalism, Nedelsky's position is equally committed to the equal worth and distinctiveness of each individual,[398] it is premised on the view that "liberalism is not so much wrong as incomplete"[399] in its failure to explicitly acknowledge relationships and their indispensability in helping individuals to foster their capacities.[400] Rather than rejecting the concept of autonomy, relational theory seeks to reconceptualize it.[401] Relational theorists renounce "the abstraction or character ideal of the 'autonomous man'",[402] an ideal that assumes that people could be—and therefore should also try to

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[394] See e.g. McCarthy, *supra* note 388 at 83. In the context of families specifically, McCarthy explains that it is "crucial to maintain attention to power and inequalities between family members, as well as between differently situated households, even as we may seek to elucidate the connectedness of family ties. Such dilemmas point to the need to take into account the social, material and political contexts in which 'the social person' may be most apparent" (*ibid* at 83).

[395] Leckey, *supra* note 390 at 10, 113. This position is contrasted with communitarianism: *ibid* at 113. See also Barclay, *supra* note 377 at 67, explaining that for feminists (and in contrast to communitarians), "the descriptive claim that selves are socially determined . . . carries with it a certain liberating potential, a denial that social roles need be fixed and a repudiation of the claim that selves have an immutable nature that determines their roles."

[396] Friedman, "Relational Autonomy", *supra* note 381 at 329.

[397] *Ibid*.

[398] Nedelsky, *Law's Relations*, *supra* note 135 at 86.

[399] Friedman, "Relational Autonomy", *supra* note 381 at 329.

[400] Nedelsky, *Law's Relations*, *supra* note 135 at 121.

[401] See e.g. Marian A Verkerk, "The care perspective and autonomy" (2001) 4 Medicine, Health Care & Philosophy 289 at 291–92.

[402] Catriona Mackenzie & Natalie Stoljar, "Introduction: Autonomy Reconfigured" in Catriona Mackenzie & Natalie Stoljar, eds, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 2000) 3 at 6.

be—self-sufficient and independent.[403] In their view, this ideal conflates autonomy with individualism. By contrast, relational autonomy reflects the "shared conviction . . . that persons are socially embedded and that agents' identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity."[404]

Flowing from this reconceptualization of autonomy is the contention that even though relationships may be constitutive, they are not necessarily determinative:[405] for relational theorists, "[t]he very concept of relational autonomy presupposes that autonomy is possible for relational selves; and if that is so, then relationships cannot determine who a person is or what she does or becomes."[406] Relational theory acknowledges the influence of others on one's autonomy, but relational autonomy means being able "to choose which of the myriad of influences in one's life to make 'one's own'."[407] Because relational theorists recognize that not all relationships may be good and that certain attachments may threaten one's autonomy, dignity, or security,[408] they strive to "reconceptualize autonomy while retaining it for its emancipatory power",[409] vital in "[enabling] people to extricate themselves from bad relationships as well as to transform the structures that shaped those relationships."[410]

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[403] *Ibid* at 6.
[404] Mackenzie & Stoljar, *supra* note 402 at 4.
[405] Nedelsky, *Law's Relations*, *supra* note 135 at 31; see also e.g. Van Praagh, "Religion", *supra* note 351 at 357–58.
[406] Nedelsky, *Law's Relations*, *supra* note 135 at 31.
[407] Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale JL & Feminism 7 at 58 [Nedelsky, "Reconceiving Autonomy"]; see also e.g. Barclay, *supra* note 377 at 68.
[408] Nedelsky, *Law's Relations*, *supra* note 135 at 32.
[409] MacDonald, "Relational Group Autonomy", *supra* note 238 at 204.
[410] Nedelsky, *Law's Relations*, *supra* note 135 at 32.

Relational autonomy can be understood as comprising two dimensions: the constitutive and the causal.[411] The constitutive component focuses "on the social constitution of the agent or the social nature of the capacity of autonomy itself";[412] in this sense, individuals are relational in that they conceive of themselves and their world in terms supplied by their various relationships.[413] As Nedelsky puts it, "'the content' of one's own law is comprehensible only with reference to shared social norms, values, and concepts."[414] The causal dimension focuses "on the ways in which socialization and social relationships impede or enhance autonomy"[415] and recognizes that the capacity for autonomy develops, not in isolation, but through supportive relationships with intimate others and within larger social structures.[416] Interestingly, Nedelsky perceives child rearing to be a striking metaphor for autonomy, so vividly does it illustrate how autonomy can emerge through relationships.[417]

In their rejection of the atomistic model of the self, and in their attempt to reconcile the individual with the collective, relational theorists also accord a greater role to responsibilities. To value relationships and view life as more than just the pursuit of personal goals is to understand "that meaningful lives can (and generally do) include

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411 Mackenzie & Stoljar, *supra* note 402.
412 Verkerk, *supra* note 401 at 292.
413 *Ibid*.
414 Nedelsky, "Reconceiving Autonomy", *supra* note 407 at 11.
415 Verkerk, *supra* note 401 at 292.
416 Nedelsky, "Reconceiving Autonomy", *supra* note 407 at 11; see also Mindy Chen-Wishart, "Undue Influence: Vindicating Relationships of Influence" (2006) 59:1 Current Leg Probs 231 at 241–42; and Grace Clement, *Care, Autonomy, and Justice: Feminism and the Ethic of Care* (Boulder, CO: Westview Press, 1996) at 24: "Other social conditions for autonomy can be understood as expansions of the psychological conditions previously discussed. An individual cannot be said to have control over his or her life without some degree of social power, or ability to carry out his or her decisions."
417 Nedelsky, "Reconceiving Autonomy", *supra* note 407 at 12. See also Chen-Wishart, *supra* note 416 at 241: "Anyone who makes it does so with the help of others. Development from infancy necessitates dependency on others."

forms of attachment that are authentic even though they cannot be easily be shed, such as parents' bonds to their children."[418] It is also to acknowledge the legitimacy of responsibilities—even those not chosen as such, given that relationships generate, "over time, obligations in excess of those devised by voluntary contractual undertakings".[419]

The relational claim therefore is that "[r]ecognising moral duties to take account of the interests of others is not antithetical to respect for autonomy."[420] In reconceptualizing autonomy, relational theorists seek to ease the tension between duty and autonomy. Instead of assuming that one's autonomy requires freedom from others and continual protection from the threat posed by "other (equally self-serving) individuals",[421] the relational perspective equates autonomy with the individual capacity for acting, "for defining, questioning, revising, pursuing one's interests and goals",[422] a capacity that exists through interaction with others.

Finally, their reconceptualization of the self also means that relational theorists have reassessed other concepts "in terms of the relations they structure—and how those relations can foster core values, such as autonomy."[423] In the following sections, I will briefly explore relational approaches to the subjects of law, family, and parental autonomy.

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[418] Joel Anderson & Axel Honneth, "Autonomy, Vulnerability, Recognition, and Justice" in John Christman & Joel Anderson, eds, *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge: Cambridge University Press, 2005) 127 at 130; see also e.g. Herring *Relational Autonomy*, *supra* note 386 at 13.

[419] Leckey, *supra* note 390 at 8.

[420] Donnelly, *supra* note 344 at 35.

[421] Lorraine Code, *What Can She Know?: Feminist Theory and the Construction of Knowledge* (Ithaca, NY: Cornell University Press, 1991) at 77.

[422] Downie & Llewellyn, *supra* note 380 at 198.

[423] Nedelsky, *Law's Relations*, *supra* note 135 at 5. However, Nedelsky warns us not to be misled by the apparent linear neatness of this summary, "because self, autonomy, and rights and law are each tied to each other—as a set of ideas, beliefs, practices and institutions" (*ibid* at 5).

4.1.1 Relational Theory and Law

Relational theorists distance themselves from the idea that autonomy is to be "achieved by erecting a wall of rights around the individual",[424] to protect against "intrusion by other individuals or by the state."[425] The concern, Elizabeth Kiss explains, is that to reduce rights to mere markers of boundaries is to ignore their various other functions:[426]

> As Hohfield showed, rights can serve to separate and protect us from others; this is, roughly, the function of liberty and immunity rights. But rights also confer claims on others and powers to alter normative relationships. Rights as claims entitle people to expect and demand the help of others in the form of goods and services (such as a right to a fair trial or to free public education). Rights as powers authorize people to alter legal and moral relationships – as in the right to vote, to marry or divorce, to form associations, or to enter contracts.[427]

In fact, Kiss concludes, "ascribing rights to someone implies a moral connection to her or him. Rights define a moral community; having rights means that my interests, aspirations, and vulnerabilities matter enough to impose duties on others."[428]

Relational theorists highlight this aspect of connection, viewing rights as less about walls or fences, and more "about relationship".[429] As Nedelsky argues, "what rights in fact do and have always done is construct relationships — of power, of responsibility, of trust, of obligation."[430] To understand that rights structure relationships is also to

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[424] Jennifer Nedelsky, "Law, Boundaries, and the Bounded Self" (1990) 30 Representations 162 at 167 [Nedelsky, "Bounded Self"].
[425] Jennifer Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 Rev Const Stud 1 at 7 [Nedelsky, "Reconceiving Rights"].
[426] Elizabeth Kiss, "Alchemy or Fool's Gold? Assessing Feminist Doubts about Rights" in Mary Lyndon Shanley & Uma Narayan, *Reconstructing Political Theory: Feminist Perspectives* (University Park, PA: Pennsylvania State University Press, 1997) 1 at 5.
[427] *Ibid* at 5.
[428] *Ibid* [footnotes omitted].
[429] McGillivray, *supra* note 266 at 24.
[430] Nedelsky, "Reconceiving Rights", *supra* note 425 at 13.

recognize that they can delineate and protect ties between individuals and communities. Some relational theorists therefore caution against dispensing altogether with "the boundary-marking features of rights",[431] which remain important in particular for vulnerable people.[432] In Kiss's words, "[t]he boundaries the law defines and enforces are a means of wielding power, of shielding power and of shielding from power."[433] In addition, "[v]ulnerable and stigmatized people often have the most to gain from the protection that abstract and impersonal frameworks of rights can provide, and from the strong images of integrity and self-assertion associated with rights."[434] Therefore the relational approach attempts to simultaneously acknowledge the importance of rights protections while rejecting the assumption that people always pose a threat to each other:

> First, an emphasis on the threats posed by (some) others does not entail a belief that all others are *nothing more than* threats to the self. . . . Second, the notion of protecting individuals from the threats of others does not presuppose that individuals are completely independent of all other individuals. Indeed, if individuals were completely independent of each other, they would not need any protections against each other. . . . Third, it is undeniable that people *sometimes* harm each other and stopping these harms is a legitimate purpose of the state.[435]

In short, for relational theorists, it is simplistic, unrealistic, and undesirable to treat autonomy simply as a shield against the threat of others,[436] because it is through interactions with others, rather than complete isolation, that autonomy develops.[437] The

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[431] Kiss, *supra* note 426 at 4.
[432] *Ibid*.
[433] Nedelsky, "Bounded Self", *supra* note 424 at 177.
[434] Kiss, *supra* note 426 at 6.
[435] Friedman, "Relational Autonomy", *supra* note 381 at 340.
[436] MacDonald, "Relational Group Autonomy", *supra* note 238 at 204.
[437] Nedelsky, *Law's Relations*, *supra* note 135 at 118; Leckey, *supra* note 390 at 11; Nedelsky, "Reconceiving Autonomy", *supra* note 407 at 12.

individual/collective tension does not fully dissipate, because "[t]he collective . . . is a source of . . . autonomy as well as a danger to it.'"[438]

When the role of the state is analyzed from this perspective, and when it is accepted that "freedom" in the sense of complete independence is illusory, the emphasis shifts. The objective, Nedelsky contends, is no longer about "protecting individual autonomy by keeping the state at bay. The problem is how to protect and enhance the autonomy of those who are *within* the (many) spheres of state power".[439] Given the blurring of the line between the individual and the collective, between the private and the public,[440] Nedelsky reminds us that "in a democracy we cannot simply think of the government in opposition to the people. . . . The boundary problems here are as complex as in the personal and group relationships".[441] Fiona MacDonald argues in particular that with regard to national groups like Canada's Indigenous peoples, the state's actions and policies must structure relations between individuals, groups, and sources of power so as to promote true group autonomy, understood in the relational sense as the capacity for agency,[442] and foster "relationships that are interdependent yet balanced in regard to power and agency during interaction."[443] The recognition of the state's role and continued influence in these relations means that the definition of autonomy for such groups must include their ability to hold others—including the state—to account.[444]

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[438] Nedelsky, "Reconceiving Autonomy", *supra* note 407 at 21.
[439] Nedelsky, *Law's Relations*, *supra* note 135 at 118.
[440] Nedelsky, "Reconceiving Autonomy", *supra* note 407 at 32.
[441] Nedelsky, "Bounded Self", *supra* note 424 at 174.
[442] See e.g. Nedelsky, "Reconceiving Rights", *supra* note 425 at 8.
[443] MacDonald, "Relational Group Autonomy", *supra* note 238 at 204.
[444] *Ibid* at 202.

Ultimately, Leckey considers that relational theorists can contribute generally to legal analysis by calling attention to the need for greater contextualism, advocating for relationships that promote autonomy, and revealing the normative assumptions that determine what counts as context.[445]

The first of these potential contributions, Leckey explains, is supplied by relational theory's contextual methodology, which advances "[t]he idea that the meaning of justice is to be worked out in a particular context".[446] Care ethicists insist on taking into account concrete situations rather than cleaving to formality and abstraction, because they see the danger in "applying general rules without regard for individuals and their specific needs."[447] Arguing that such danger arises when "highly principled men . . . sacrifice individuals for the sake of their principles",[448] they proffer as a paradigmatic example the willingness of Abraham to sacrifice his son Isaac for the sake of principles.[449]

Secondly, among relational theory's normative commitments is the promotion of "a vision of mutually interdependent relationships as the norm around which legal and ethical responses should be built."[450] The relational approach endorses attachment and

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[445] Leckey, *supra* note 390 at 22.
[446] *Ibid* at 121.
[447] Clement, *supra* note 416 at 76; see also e.g. Selma Sevenhuijsen, *Citizenship and the Ethics of Care: Feminist considerations on justice, morality and politics*, translated by Liz Savage (New York: Routledge, 1998) at 110.
[448] Clement, *supra* note 416 at 76.
[449] *Ibid*. See also e.g. Virginia Held, *The Ethics of Care* (New York: Oxford University Press, 2006) at 97 [Held, *Ethics of Care*]; Owen J Flanagan, Jr, "Virtue, Sex, and Gender: Some Philosophical Reflections on the Moral Psychology Debate" (1982) 92:3 Ethics 499 at 501. But see Christie, "Law", *supra* note 56 at 81: "[L]iberal theory rests on deep respect for the individual. . . . To sacrifice an individual in the name of some abstract notion as 'the greater good' is seen as misguided."
[450] Shazia Choudhry, Jonathan Herring & Julie Wallbank, "Welfare, rights, care and gender in family law" in Julie Wallbank, Shazia Choudhry & Jonathan Herring, eds, *Rights, Gender and Family Law* (New York, NY: Routledge, 2010) 1 at 20.

connection, relationships that promote autonomy, and responsibility and responsiveness to others, without requiring the sacrifice of one's autonomy.[451] Nedelsky asserts that of greater normative importance than rights *per se* are "the core values such as equality and autonomy that rights should promote in interpersonal relations."[452] In other words, "'core values are trumps.' They form 'foundational normative commitments' . . . for assessing rights practices and other relationships."[453]

Lastly, relational theory brings to the fore the intersection between contextualism and normativity: as Kim Lane Scheppele explains, "a story . . . only makes sense against a background that limits the range of things that might be said. To describe the whole truth is impossible; to describe a coherent partial truth means having some background standards for deciding what is relevant and what is not."[454] Therefore, when the contextual method is applied, "a key issue is often the boundary determining what does and does not legitimately count. This boundary often depends on controversial normative decisions."[455] Relational theory directs jurists to evaluate these decisions and make normative assessments by asking "what kinds of laws and norms help structure constructive relationships and which have helped generate the problems people are trying to solve."[456] Nedelsky adds that they can also examine how a particular right shapes relationships and, in turn, whether those relationships promote the specific values at stake. In short, she writes, "[s]ometimes a relational analysis will cut through

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[451] Leckey, *supra* note 390 at 277; Downie & Llewellyn, *supra* note 380 at 202; Verkerk, *supra* note 401 at 290; *ibid* at 25.
[452] Friedman, "Relational Autonomy", *supra* note 381 at 334–35.
[453] *Ibid* at 335, citing Nedelsky, *Law's Relations*, *supra* note 135 at 242.
[454] Kim Lane Scheppele, "The Re-Vision of Rape Law" (1987) 54:3 U Chicago L Rev 1095 at 1108; see also Leckey, *supra* note 390 at 22.
[455] Leckey, *supra* note 390 at 22.
[456] Nedelsky, *Law's Relations*, *supra* note 135 at 32.

individualistic logic that denies the relevance of context. Sometimes a relational analysis will reveal deep disagreements about underlying values."[457]

4.1.2 Relational Theory, Family, and Care

Adopting a relational perspective of the family, Susan Boyd argues that "[t]he rights paradigm – based as it tends to be on a liberal vision of 'the citizen' (liberalism's unencumbered individual) – does not apply easily to the family law field, where individual family members are encumbered with complex interdependencies, needs, and relations of care."[458] Similarly, Rollie Thompson asserts that "the use of 'rights' language within the family setting [is] quite inapposite, given the complex interweaving of dependency, altruism and autonomy in family relationships."[459] Relational theory and its account of the unique nature of parenthood may go some way to meeting these concerns.

According to Bridgeman, legal principles that start from an assumption of individualism "mean that parents are perceived as primarily self-interested."[460] In her opinion, although this understanding of people "may be appropriate for some situations, it fails to accord with the reality of the parent-child relationship, to support parents and professionals as they seek to do their best for the child or to guide judges when asked to adjudicate."[461] By contrast, the concept of individuals as being "primarily connected rather than primarily separate"[462] is more consistent with the nature of the parent-child relationship. Indeed, for relational theorists, this relationship is paradigmatic and typifies

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[457] *Ibid* at 249.
[458] Boyd, *supra* note 346 at 297.
[459] Rollie Thompson, "Why Hasn't the *Charter* Mattered in Child Protection?" (1989) 8 Can J Fam L 133 at 154.
[460] Bridgeman, *Parental Responsibility*, *supra* note 66 at 235.
[461] *Ibid*.
[462] *Ibid*.

the complex combination of both "connection *and* individuation"[463] at the heart of the theory. A parent or child "must be seen simultaneously as a distinct individual and as a person fundamentally involved in relationships of dependence, care, and responsibility."[464] Legal conceptions of rights, in particular parental rights, need to reflect these two sides of human nature.[465]

Relational theory views parental rights as the means by which parents seek to foster and protect their relationship with their children, as well as with larger communities. For Lessard, where a parent holds religious beliefs and invokes a right to rear his children according to those values, "his parental relationship becomes the basis of his commitment to other members in his community. His children are not claimed as property but are the link to others by which he defines himself and his contributions to the community."[466]

The emphasis on interdependence also refocuses the inquiry into the nature of the parent-state relationship: the question is no longer whether parents have a right to be free from state interference "but what power balance between state interference and parental privacy rights best serves children",[467] parents, and the parent-child relationship. As Laufer-Ukeles explains, "when it comes to caring for children, the state, parent, and child have interests that are very much intertwined."[468] States theoretically have an interest in

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[463] Tom Cockburn, "Children and the Feminist Ethic of Care" (2005) 12:1 Childhood 71 at 78 [emphasis in original].
[464] Martha Minow & Mary Lyndon Shanley, "Revisioning the Family: Relational Rights and Responsibilities" in Mary Lyndon Shanley & Uma Narayan, eds, *Reconstructing Political Theory: Feminist Perspectives* (Polity Press: Cambridge, 1997) 84 at 100.
[465] Nedelsky, "Reconceiving Rights", *supra* note 425 at 13.
[466] Lessard, "Relationship, Particularity and Change", *supra* note 101 at 289.
[467] Pamela Laufer-Ukeles, "The Relational Rights of Children" (2016) 48:3 Conn L Rev 741 at 772.
[468] *Ibid* at 777.

ensuring the protection and welfare of "their" children,[469] and to invariably categorize state action as violations "of individualistic liberty and privacy misses the ways that children are partially and potentially fully dependent on the state and how parental rights, state interest, and children's rights are interrelated."[470]

Correlatively, recognition of the state's presence within this network of intertwined responsibilities, dependencies, and influences also requires that the state be held to account for its deeds and failings, a reckoning that is consistent with the relational conceptualization of autonomy. In particular, the Canadian state has, in various ways and at different times, seriously failed in its duties towards Indigenous parents and children and, concomitantly, their families and communities. A relational approach to the autonomy of those parents and communities demands a closer look at the role of the state and its promotion or hindrance of those bonds and relationships.

4.1.3 Relational Theory and Parental Autonomy

In examining relational accounts of parental autonomy, I begin with the observations of Jonathan Herring, who argues that parenthood cannot be "seen simply as a project for self-realisation"[471] and that the "intertwining of identities and interests"[472] between parents and their children makes it impossible to separate their interests. Yet he insists rather too emphatically, in my opinion, on the assimilation of the identities and interests of people in relationships, through such statements as "[w]e do not break down

[469] *Ibid* at 776.
[470] *Ibid* at 778.
[471] Herring, *Relational Autonomy*, *supra* note 386 at 13.
[472] Jonathan Herring, *Caring and the Law* (Hart Publishing: Portland, 2013) at 73 [Herring, *Caring*].

into 'me' and 'you'";[473] "[t]here should be no talk of balancing the interests of 'the carer' and the person 'cared for'";[474] and "separating interests into individual rights is impossible and undesirable."[475] Surely, an intermingling of interests is not the same as an identity of interests. Although people in relationships should not conceive of themselves and their actions in isolation, the relational approach, as I understand it, views them as *distinct*, albeit interdependent, individuals. If there were no "you" and "me," we would all be one and the same, and there would be no issues to work through, no need to make "sacrifices",[476] and no talk of the "give and take"[477] that Herring refers to.

Perhaps this ambiguity proceeds from the tension inherent in the relational account of autonomy, given that the collective represents both a source of and potential threat to autonomy.[478] Friedman describes this recurring issue as "the feminist ambivalence . . . between thinking that autonomy should sometimes give way to relational values and thinking that autonomy is relational in itself."[479] She explains it thus:

> On the one hand, many feminists argue that interpersonal relationships contribute to personal autonomy, and, indeed, are necessary for its realization. On the other hand, many of these same feminists also suggest that the value of autonomy

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[473] *Ibid* at 60.
[474] *Ibid*.
[475] *Ibid*.
[476] Jonathan Herring, "The Human Rights Act and the welfare principle in family law – conflicting or complementary?" (1999) 11 Child & Fam L Q 223 at 233 [Herring, "Welfare Principle"].
[477] Herring, *Relational Autonomy*, *supra* note 386 at 47.
[478] Nedelsky "Reconceiving Autonomy", *supra* note 407 at 21. See also Martha Minow, "Rights for the Next Generation: A Feminist Approach to Children's Rights" (1986) 9 Harv Women's LJ 1 at 17: one concrete result of this tension is that "[a] woman's relationships, or potential relationships, with her children challenge the premise that she is a separate, autonomous person; and yet treating her as connected to others could disadvantage her in the workplace or seem to justify restrictions on her own choices."
[479] Friedman, *Autonomy*, *supra* note 84 at 94. See also Marilyn Friedman, "Autonomy and Social Relationships: Rethinking the Feminist Critique" in Diana Tietjens Meyers, ed, *Feminists Rethink the Self* (Boulder, CO: Westview, 1997) 40 at 56, in which Friedman seems to give no clear answer: "We need an account that explores how social relationships both promote and hinder the realization of autonomy. Representing these two sorts of effects with roughly accurate proportionality is, however, a formidable project. Matters of degree are notoriously difficult to specify philosophically."

> should not be emphasized at the expense of the values of interpersonal relationships—as if the two were really mutually exclusive.[480]

Another way of characterizing the tension, as Herring does, is that "[t]he more our relational nature is emphasised, the harder it is [to] define where the boundary [is] between being oppressed within a relationship to such an extent that one loses autonomy and where one is simply deeply embedded in relationship."[481]

The degree of tension varies depending on the account of relational autonomy being considered. Autonomy may be conceived of descriptively,[482] such as when it is seen as the capacity for agency, nurtured through and understood within social contexts. On such an account, a person exercising her autonomy may choose to "sever some particular relationships and thus no longer have as one of her ends a commitment to the needs and interests of a particular other."[483] Such a procedural, content-neutral notion of autonomy[484] helps to dissipate some of the tension between individual autonomy and attachments to others,[485] notably because it offers no framework for critiquing "substantively *independent* behavior, such as isolation, narcissistic self-absorption, and indifference to the needs and desires of those to whom one is closely related. . . . It neither condones nor condemns such behavior."[486]

By contrast, other accounts of autonomy make both descriptive and normative claims and question whether an isolationist self is actually "to be *valued* and

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[480] Friedman, *Autonomy*, *supra* note 84 at 84.
[481] Herring, *Relational Autonomy*, *supra* note 386 at 23.
[482] Barclay, *supra* note 377 at 58.
[483] *Ibid* at 61.
[484] See e.g. *ibid* at 53; Friedman, *Autonomy*, *supra* note 84 at 92.
[485] Barclay, *supra* note 377 at 59–60.
[486] Friedman, *Autonomy*, *supra* note 84 at 93.

promoted."[487] Proponents of such accounts reject the descriptive and normative claim that human beings are presumably individualistic and contend "that the self is motivationally social",[488] that the recognition that people do not live in isolation forces us to consider how our decisions affect our intimates at the very least.[489] In other words, Herring asserts, "our decisions are not just 'ours'".[490] Sevenhuijsen notes that from the point of view of a care ethicist, "the moral subject in the discourse of care always already lives in a network of relationships, in which s/he has to find balances between different forms of responsibility (for the self, for others and for the relationships between them)."[491] This approach, for Keller, "presupposes . . . the compatibility of one's contrasting desires for intimacy and for independence".[492]

To incorporate normative principles into the conception of autonomy is to build into the model "an internal system of morality";[493] but on what basis can such substantive moral standards be elaborated and justified? After all, as Colin Gavaghan points out, the relational theorists' "recognition that emotions, relationships and perceived obligations often play a part in decision-making is important. But such recognition that something *often* happens is quite different from the insistence that it *ought* to happen. . . . It is

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[487] Barclay, *supra* note 377 at 58 [emphasis in original].
[488] *Ibid* at 59.
[489] Maclean, *supra* note 78 at 21.
[490] Herring, *Relational Autonomy*, *supra* note 386 at 12.
[491] Sevenhuijsen, *supra* note 447 at 10.
[492] Evelyn Fox Keller, *Reflections on Gender and Science* (New Haven, Conn: Yale University Press, 1995) at 100.
[493] John Goccon, Book Review of *Autonomy, Consent and the Law* by Sheila AM McLean, (2010) 6:1 Genomics, Society & Policy 80 at 85.

possible to recognise, accept and make provision for a particular view or feeling, without making it a universalisable moral imperative."[494]

One such substantive account is Anne Donchin's "relational approach to moral responsibility",[495] whereby she reasons that "what we *want* for ourselves may not enhance our autonomy if it can be attained only by dodging responsibilities toward others who depend on us. Respect for their interests and their autonomy may require us to relationalize our own autonomy in the course of advancing our plans and goals."[496] Drawing on the work of Donchin, among others, Michelle Taylor-Sands argues that family members have obligations to one another because of the advantages they derive from the relationship[497] and that the value of intimacy "justifies compromising some interests of individual members for the benefit of the family as a whole."[498]

Also relying on Donchin's and Nedelsky's approaches, Herring contends that there is value in relational obligations "because we continue to need each other and

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[494] Colin Gavaghan, "Saviour siblings: no avoiding the hard questions" (2015) 41:12 J Medical Ethics 931 at 931 [emphasis in original]. But see Bridgeman, *supra* note 66 at 35–36: "what parents ought to do with regard to the care of their children's health should be informed by guidelines developed through consideration of what parents do in caring for their children's health."

[495] Michelle Taylor-Sands, *Saviour Siblings: A Relational Approach to the Welfare of the Child in Selective Reproduction* (New York: Routledge, 2013) at 87 [Taylor-Sands, *Saviour Siblings*].

[496] Anne Donchin, "Autonomy and Interdependence: Quandaries in Genetic Decision Making" in Catriona Mackenzie & Natalie Stoljar, eds, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 2000) 236 at 246 [italics in original; underlining added]. I note, again, the potential for tension, occurring upon the juxtaposition of the view that (a) interpersonal relationships are necessary for the realization of one's autonomy with the view that (b) one may need to modify the exercise of one's autonomy to avoid harming those towards whom one has responsibilities. Put another way, either relational autonomy encompasses and requires internal limits, or such limits—albeit necessary—remain external to and impinge upon autonomy; either relational autonomy includes—and therefore is not threatened by—the necessity of taking others into account, or there is a loss of autonomy when one must consider others' interests. Ultimately, it may be a matter of degree—see *ibid* at 247: "[P]ersonal autonomy is not incompatible with adapting one's personal projects to the needs or preferences of others as long as no one's autonomy is trampled on. Respect for everyone's autonomy, however, requires long-term reciprocity and the equitable balancing of power relations." See also e.g. Clement, *supra* note 416 at 26; Herring, *Relational Autonomy*, *supra* note 386 at 17.

[497] Michelle Taylor-Sands, "*Saviour Siblings*: reply to critics" (2015) 41:12 J Medical Ethics 933 at 934 [Taylor-Sands, "Reply to critics"].

[498] *Ibid* at 934; Taylor-Sands, *Saviour Siblings*, *supra* note 495 at 82.

because we establish meaningful relationships through taking responsibility for each other."[499] His proposed approach, called "relationship-based welfare",[500] assesses a child's best interests contextually. Like Taylor-Sands and Schoeman,[501] he argues that children may at times need to make compromises and sacrifices because "[a] relationship based on unacceptable demands on a parent is not furthering a child's welfare."[502] At the same time, Blustein adds, parents "must adjust their individual needs and personal goals to the needs and legitimate demands of their children."[503]

In short, for these authors, relationships are valuable and require a certain give and take, a "relationalizing" of one's autonomy. One actual instance of such "relationalization" can be found in the following discussion among parents participating in a study:

> Our participants were saying that good parents must give up some ways of exerting control over their children, even when such control is in principle possible. A conventional evaluation would see this as a loss of the ability to make choices that are self-determining (such as, "I choose to be the parent of a girl, not of a boy"), and hence a loss of autonomy. But we think the participants were claiming something more than that having children places constraints on a person's freedom, or even that cultural expectations of how parents should behave places constraints on their choices. They were saying that certain kinds of choice that would be legitimate in another context are not merely *inappropriate* if exercised by a parent: they are incompatible with the nature of the good parent-child relationship, as they understood it. The identity of the good parent is constituted by this voluntary self-limitation. Parental autonomy can only operate within the limits set by this framework. Otherwise the choices, however freely

[499] Polona Curk, "Passions, Dependencies, Selves: A Theoretical Psychoanalytic Account of Relational Responsibility" in Craig Lind, Heather Keating & Jo Bridgeman, eds, *Taking Responsibility, Law and the Changing Family* (Burlington, VT: Ashgate Pub, 2010) 51 at 51, cited in Herring, *Caring*, *supra* note 472 at 62.
[500] See e.g. Herring, "Welfare Principle", *supra* note 476.
[501] Schoeman, "Parental Discretion", *supra* note 322 at 57.
[502] Herring, "Welfare Principle", *supra* note 476 at 233.
[503] Blustein, *Parents and Children*, *supra* note 253 at 11.

made or in line with the individual's life goals, do not foster the autonomy of a good parent, but of an individual failing to be an adequate one.[504]

The question now is whether relational theory provides parents with guidelines on *how* to "relationalize" their autonomy and assess their child's interests. As Gavaghan puts it, if a child's obligations must "be carefully balanced against the child's individual interests, . . . that brings us back to the undeniably speculative and uncertain business of identifying and quantifying those interests."[505]

Eva Kittay proposes her "idea of a *transparent* self—a self through whom the needs of another are discerned, a self that, when it looks to gauge its own needs, sees first the needs of another."[506] This transparent self "does not allow its own needs to obscure its perception of another's needs nor to have its own needs offer a resistance to its response to another."[507] It is a standard—particularly crucial where young children are concerned—whereby "[t]he perception of and response to another's needs are neither blocked out nor refracted through our own needs."[508] However, Kittay's "transparent self" is objectionable to those for whom "mothering does not 'require self erasure'".[509] Sara Goering, for example, argues that an individual who becomes a parent "doesn't so

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[504] Jackie Leach Scully, Sarah Banks & Tom W Shakespeare, "Chance, choice and control: Lay debate on prenatal social sex selection" (2006) 63 Social Science & Medicine 21 at 29–30 [italics in original; underlining added].

[505] Gavaghan, *supra* note 494 at 931 [emphasis in original]. Gavaghan adds: "But the notion that this gives rise to a universal duty to prioritise family members seems to require some additional steps, which are not spelt out" (*ibid* at 931).

[506] Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* (Routledge: New York, 1999) at 51 [emphasis in original; Kittay, *Love's Labor*].

[507] *Ibid*.

[508] *Ibid*.

[509] Amber E Kinser, "Mothering as Relational Consciousness" in Andrea O'Reilly, *Feminist Mothering* (Albany, NY: State University of New York Press, 2008) 123 at 125. See also Kittay's subsequent clarification: Kittay, "Overlapping Consensus", *supra* note 389.

much fade to transparency; rather, herself is expanded to include the child."[510] In this transformation "from 'I' to 'we'",[511] Goering envisions a "plural subject . . . [that] "intentionally [chooses] together on the basis of shared interests, aims, or values."[512] Accordingly, "[i]n managing the expanded self, mothers have to negotiate competing demands and interests in the service of achieving what is good for the 'we' that includes child and mother."[513]

Interestingly, a common thread that appears to traverse much of the guidance provided is the theme of perceptual clarity. To become the transparent self, one must ensure that one's "perception of and response to another's needs are neither blocked out nor refracted through [one's] own needs."[514] Sara Ruddick suggests that one must "see *the child's* reality with the patient, loving eye of attention".[515] Held advises that "[m]othering persons cannot lose sight of the particularity of the child being mothered nor of the actuality of the circumstances in which the activity is taking place."[516] Michael Slote's notion of empathy "involves seeing or feeling things from the standpoint of others";[517] Slote, like others, nevertheless cautions that empathy does not involve the merging of identities and interests.[518]

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[510] Sara Goering, "Mothers and Others: Relational Autonomy in Parenting" in Leslie Francis, ed, *The Oxford Handbook of Reproductive Ethics* (New York: Oxford University Press, 2017) 285 at 288.
[511] *Ibid*.
[512] *Ibid*.
[513] *Ibid* at 289.
[514] Kittay, *Love's Labor*, *supra* note 506 at 52.
[515] Sara Ruddick, "Maternal Thinking" (1980) 6:2 Feminist Studies 342 at 358 [emphasis in original].
[516] Held, *Feminist Morality*, *supra* note 381 at 210.
[517] Michael Slote, "Autonomy and Empathy" (2004) 21:1 Social Philosophy & Policy 293 at 300; Slote distinguishes "empathy" from "caring": *ibid* at 295–96.
[518] *Ibid* at 300. See also e.g. Jennifer Nedelsky, "Legislative Judgment and the Enlarged Mentality: Taking Religious Perspectives" in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006) 93 at 93–98; Sheila Mullett, "Shifting perspectives: A new approach to ethics" in Christine Overall, Sheila Mullett &

In the context of medical decision making, Bridgeman argues that parents should not allow their religious convictions to prevent them from considering all factors pertinent to the determination of the best interests of their child; for their part, courts must also avoid "relying exclusively upon medical evidence."[519] Courts must address, if relevant, considerations such as "the fact that the child has been born to parents (who as far as we know are loving, caring parents) adhering to the tenets of their chosen religion",[520] as well as "the infringement of their genuinely held beliefs about the wider best interests of their child".[521] For Bridgeman, "those responsible for the future medical treatment of the child [must] consider the child as an individual and not an extension of his or her parents or a medical object. For the parents this entails appreciating that their child, whilst being dependent upon their care, is an individual – both connected to them but separate from them."[522] For others involved, this means considering factors such as the parents' arguments, the history of care, the context of the parents' decision, any circumstances in which the parents might deem the treatment acceptable, and what support or pressure may be coming from the parents' community.[523]

Bridgeman puts forward the U.K. case *Poynter v. Hillingdon Health Authority*[524] as an instance in which the parents' ardent spiritual beliefs influenced their decision without blinding them to other factors to be considered: "His mother explained that her spiritual beliefs would have been sufficient for her to refuse consent for herself but that

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Lorraine Code, eds, *Feminist Perspectives: Philosophical Essays on Method and Morals* (Toronto: University of Toronto Press, 1988) 109 at 122.

[519] Bridgeman, *Parental Responsibility*, *supra* note 66 at 146.

[520] *Ibid*.

[521] *Ibid*.

[522] *Ibid* at 147.

[523] *Ibid*.

[524] 37 BMLR 192 (QBD).

the decision was for her son, not for her. As his father said: 'We agreed to the transplant because we thought it wrong to impose our views on Matthew.'"[525] In another case,[526] one in which the parents rejected the medical treatment proposed, Bridgeman describes how the parents' "religious beliefs were one of the factors leading to their decision to refuse the separation surgery"[527] recommended for their conjoined twins.

Finally, Bridgeman observes that "[r]esponsibilities arise out of relationships and are determined by need and individual interpretation".[528] However, she notes, "interpretation of needs occurs within a social context which has to be examined."[529] Indeed, it is precisely because parental decision making happens not in isolation but rather in various social contexts that different tensions arise, including within the parents themselves. As Amber Kinser remarks, "[m]othering practices intersect the multiple relationships of which I am part, the multiple selves I embody at home, at work, and in my community, the multiple family subsystems and suprasystems that overlap in my life."[530] For Kinser "all of these selves overlap with, crash into, inform, undermine, strengthen, and create friction for each other."[531]

Conflict and social context are part of Sara Ruddick's reflections on maternal thinking, and she theorizes that "[i]n their practices, people respond to a reality that appears to them as given, as presenting certain *demands*. The response to demands is

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[525] Bridgeman, *Parental Responsibility*, *supra* note 66 at 149, citing *ibid* at 207.
[526] *Re A (Children) (Conjoined Twins: Surgical Separation)*, [2000] EWCA Civ 254, [2001] 2 WLR 480.
[527] Bridgeman, *Parental Responsibility*, *supra* note 66 at 148.
[528] *Ibid* at 149.
[529] *Ibid*.
[530] Kinser, *supra* note 509 at 124.
[531] *Ibid*.

shaped by *interests*",[532] which are "always and only expressed as interests of people in particular cultures and classes of their cultures, living in specific geographical, technological, and historical settings."[533] Using the example of childcare, Ruddick reasons that "agents of maternal practice"[534] act in response to their children's demands "that their lives be preserved and their growth be fostered",[535] in addition to their social group's "'demands' that their growth be shaped in a way acceptable to the next generation."[536] The satisfaction of these demands will be governed by certain interests,[537] including that of acceptability—that is, the requirement that the parent raise her child to become "a sort of adult that she can appreciate and others can accept."[538]

But tensions inevitably arise, Ruddick predicts, because these various interests "are frequently and unavoidably in conflict." [539] Moreover, "[t]he interest acceptability will always . . . provoke mothers to affirm and announce *some* values, their own or others."[540] In the end, Ruddick does not provide a solution to these tensions, concluding only that "[a]lthough some mothers will deny or be insensitive to the conflict and others will be clear about which interest should take precedence, mothers typically will know that they cannot secure each interest, will know that goods conflict, will know that unqualified success in realizing interests is an illusion."[541]

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[532] Ruddick, *supra* note 515 at 347 [emphasis in original].
[533] *Ibid*.
[534] *Ibid* at 348.
[535] *Ibid*.
[536] *Ibid*.
[537] *Ibid*.
[538] *Ibid* at 349.
[539] *Ibid*.
[540] *Ibid* at 357 [emphasis in original; footnotes omitted].
[541] *Ibid* at 349. See also Schoeman, "Parental Discretion", *supra* note 322 at 54 (on other sources of potential conflict); Edwina Barvosa-Carter, "Mestiza Autonomy as Relational Autonomy: Ambivalence &

4.1.4 Relational Theory: Not Enough?—an Integration of Care and Justice

This brief exploration of the relational account of parental autonomy has left a number of issues unresolved. We have seen the position that parents, in making decisions, should "relationalize" their autonomy in some manner. On becoming parents, they might see themselves as a "plural subject" or an "expanded self," negotiating different and sometimes conflicting demands and interests. They might be empathetic, attempting to see things from their children's perspective. They might become a "transparent self" and avoid being blinded to all relevant factors when assessing their child's best interests.

Yet none of these suggestions seems to go much further in helping parents to evaluate those interests and work out potential conflicts. As Leckey puts it, the problem is that adopting a contextual approach "may reframe conflicts, but . . . it does not indicate how to resolve them."[542] The evaluation of interests remains subjective, and different values and interests may collide. Although relational theorists acknowledge that "intimacy impedes choice",[543] the relational model seems to have few internal parameters for defining those limits. How would theorists approach a scenario, for instance, in which caring parents make a decision within a certain social context, a decision that conforms to the dictates of their conscience and values, and guarantees some of their child's interests but at the expense of other critical ones? An emphasis on the interconnected nature of parents and children may make it harder to "define where the boundary [is] between being oppressed within a relationship . . . and where one is simply deeply embedded in

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the Social Character of Free Will" (2007) 15:1 J Political Philosophy 1 (on "mestiza autonomy," ambivalence and intersectional identities); Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass: Harvard University Press, 2003) at 104 (on "[t]he moral dilemma, arising inevitably out of a conflict of truths").

[542] Leckey, *supra* note 390 at 130.

[543] Taylor-Sands, *Saviour Siblings*, *supra* note 495 at 86.

relationship",[544] but surely there must be limits—if not internal, then at least external—to the sacrifices demanded, particularly of children.

Care ethicists do acknowledge that "care of (the unique) 'self' is also important."[545] Herring specifies that a child is expected to be altruistic only "to a limited extent".[546] Similarly, Schoeman states that parents may "compromise the child's interests for ends related to family welfare",[547] but without sacrificing "their children's lives or welfare".[548] He recognizes that even though "[i]t is difficult to set explicit limits on what parents may decide for their children when such a decision does not accord well with accepted public standards",[549] limits must nevertheless be set. However, he adds an important caveat: "an effort must be [made] to appreciate the meaning of such practices for those involved."[550]

For Taylor-Sands, "[t]he nature and extent of compromise required within a particular family will vary according to the individual circumstances of that family".[551] Although she considers it "particularly difficult to draw the line on the types of risks to which parents should be allowed to expose their children in the context of religious or cultural identification, when the decision conflicts with accepted public standards relating

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[544] Herring, *Relational Autonomy*, *supra* note 386 at 23.
[545] McCarthy, *supra* note 388 at 79.
[546] Herring, "Welfare Principle", *supra* note 476 at 233.
[547] Schoeman, "Parental Discretion", *supra* note 322 at 57.
[548] *Ibid*.
[549] *Ibid* at 58.
[550] *Ibid*.
[551] Taylor-Sands, "Reply to critics", *supra* note 497 at 934. See also Taylor-Sands, *Saviour Siblings*, *supra* note 495 at 87, 90; Schoeman, "Parental Discretion", *supra* note 322 at 57: "[I]t is the role as a member of a family unit that defines an individual's responsibilities and rights, at least as much as does his level of mature capacities."

to education or bodily integrity",[552] she does accept "that parents should not be able to sacrifice the basic interests of the child . . . for the sake of the family as this would amount to exploitation, abuse and/or neglect."[553] Relationships may require a certain give and take, but there are "limits to what parents can require of their children in order to promote collective family interests."[554]

These comments suggest that external limitations on relational autonomy may be warranted. Perhaps the takeaway, then, is that relational theory may not always be enough. After all, as Kaylee McNeil pithily remarks, while parents may be caring, "caring alone is important but not entirely sufficient."[555] Ultimately, Kiss concludes, care ethics cannot constitute "a comprehensive moral alternative":[556] it requires principles that can identify when care becomes detrimental.[557] People must, Kiss explains, be "protected from harm and guaranteed the capacity to exercise some control over their lives and to make certain claims on one another – precisely the kind of moral work which rights do."[558] In other words, it is the work of the ethics of justice.

Commentators who agree on the need for justice alongside care include McNeil, who states that "family relationships require respect for the autonomy and bodily integrity of others in order to be *just*, meaning that there must be a *limit* on the intrusion that one makes into the decision-making of others such that one does not dominate other members

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[552] Taylor-Sands, *Saviour Siblings*, *supra* note 495 at 81.
[553] *Ibid* at 85.
[554] *Ibid* at 81. See also e.g. Herring, "Welfare Principle", *supra* note 476 at 233: a child is expected to be altruistic only "to a limited extent".
[555] Kaylee A McNeil, *The Anti-Vaccination Movement and the Ethics of Care in Parenthood* (MA Thesis, George Washington University, 2016) (Ann Arbor, MI: Proquest, 2017) at 19.
[556] Kiss, *supra* note 426 at 10.
[557] *Ibid*. See also Donchin, *supra* note 496 at 242–43; Herring, *Caring*, *supra* note 472 at 65.
[558] Kiss, *supra* note 426 at 10.

of their family."[559] Kira Tomsons and Susan Sherwin argue that we can acknowledge that a parent's "decision was apparently motivated by beneficence and love, yet we understand that the caring relationships in which we are embedded are subject to questions of justice and morality."[560] From this perspective, we might judge for instance that parents who refuse life-saving care for their children "may be acting in the interests of *care* in their role as parents, but may fail to be *just* in familial relationships in that they may arguably misuse their asymmetrical positioning to their children in order to make decisions that are ultimately not beneficial to their children from a medical perspective."[561]

Held further observes that because care usually involves power imbalances and vulnerability, "the person cared for may find the relation more satisfactory in various respects if both persons, but especially the person caring, are guided to some extent by principles concerning obligations and rights."[562] Likewise, for Taylor-Sands, "[a]dopting a relational model does not necessarily entail abandoning all of the protections offered by liberal or rights-based theories".[563] In the family context, such "generalised accounts of morality can be helpful for . . . drawing limits on what an intimate family can require of individual members."[564] As Herring summarizes it, "[w]ithout justice care can become abuse and without care justice loses its heart."[565]

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[559] McNeil, *supra* note 555 at 31 [emphasis added].
[560] Kira Tomsons & Susan Sherwin, "Feminist Reflections on Tracy Latimer and Sue Rodriguez" in Michael Stingl, ed, *The Price of Compassion* (Broadview Press: Peterborough, 2010) 219 at 243.
[561] McNeil, *supra* note 555 at 31 [emphasis added].
[562] Held, *Feminist Morality*, *supra* note 381 at 75.
[563] Taylor-Sands, *Saviour Siblings*, *supra* note 495 at 87.
[564] *Ibid*.
[565] Herring, *Caring*, *supra* note 472 at 68.

Some fusion of care and justice therefore seems necessary. But how would such an amalgamation play out? Clement argues that reconciling the two and achieving a fuller account of moral reasoning and autonomy[566] "requires moving beyond these ideal types and finding the right balance between the connections and separations between individuals."[567] This balance is found somewhere within the notion of the relational self and an understanding of care and justice that does not view the two ethics as being mutually exclusive.[568] More specifically, Clement writes, the two should be relied on simultaneously in any given situation and must function interdependently in the sense "that each of the ethics provides conditions necessary to a morally adequate version of the other ethic."[569]

In essence, both ethics share similar elements, namely, their "relative abstractness or concreteness, their priorities, and their conceptions of the self."[570] The ethic of care prioritizes contextual decision making, the maintenance of relationships, and the social nature of the self.[571] The ethic of justice emphasizes abstract decision making, equality, and individualism.[572] But really, Clement argues, the difference between the two "is a difference in emphasis, not in kind."[573]

Each ethic acts as a necessary check upon the other and helps to identify better or worse versions of the other;[574] in the absence of one, the other "tends to take on

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[566] Clement, *supra* note 416 at 5, 42.
[567] *Ibid* at 43.
[568] *Ibid* at 90.
[569] *Ibid* at 110, 118.
[570] *Ibid* at 5.
[571] *Ibid*.
[572] *Ibid*.
[573] *Ibid* at 76.
[574] *Ibid* at 5, 90.

exaggerated, distorted forms by focusing on only one of two interrelated sets of features."[575] On the one hand, an individualistic approach may fail to capture the ways "in which care requires connection between individuals."[576] On the other hand, the care orientation risks fusing identities and interests, treating two people as being "so connected that their well-beings are inseparable, when in fact they are to some degree distinct."[577] In other words, whereas we must not assume an "individualism of interests," we may presuppose "the non-identity of interests".[578] The emphasis on the individual in the ethic of justice is useful in that it "demonstrates the ways in which genuine care requires separation between individuals."[579] Otherwise, care can become distorted if "the carer identifies so completely with the recipient that she loses her critical perspective",[580] if the carer "denies the recipient's individual identity",[581] or if the carer sees only her own perspective and consequently "stifle[s] diversity and otherness".[582]

In sum, we should understand that "the ethic of justice requires not just abstract principles but contextual details as well. Likewise, the ethic of care requires not only contextual details but general principles as well."[583] Each one is dependent on the other, Clement explains, because "[a]ttention to detail helps us formulate, select, and apply general principles, which in turn put the details in moral perspective and thus help us

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[575] *Ibid* at 110.
[576] *Ibid* at 43.
[577] *Ibid*.
[578] *Ibid* at 34.
[579] *Ibid*.
[580] *Ibid* at 43.
[581] *Ibid*.
[582] Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993) at 161.
[583] Clement, *supra* note 416 at 76.

select which details are relevant for our consideration."[584] Neither ethic is adequate alone.[585]

Two final observations are in order. Held points out that the exact manner in which "care and justice are to be meshed without losing sight of their differing priorities is a task still being worked on."[586] Clement also cautions that the conclusions yielded by each of the two ethics may sometimes clash and lead to unresolvable tensions.[587] In fact, she notes, "justice considerations alone often conflict, such as in rights conflicts, and there is often no metaprinciple that allows us to reconcile these conflicts. Attention to the ethic of care adds to our considerations, and thus to the potential conflicts we face."[588] In the end, she concludes, "[a]dequate moral reasoning will not necessarily yield simple answers, but it will consider all relevant considerations, and both the ethic of justice and the ethic of care direct us to relevant considerations."[589]

We are therefore still left wondering how these principles may be translated into practice. In the following and final section of this chapter, I will re-examine the matters at hand from a more relationally inclined perspective and propose an approach that integrates care and justice considerations with the help of Berger's reflections on the adjudicative virtues of fidelity and humility.

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[584] *Ibid* at 77.
[585] *Ibid*. Put slightly differently: Kiss tells us that in addition to identifying the right principles, we must also be capable of "examining the moral dispositions and capacities people need to sensitively and imaginatively live by those principles" (Kiss, *supra* note 426 at 11).
[586] Held, *Ethics of Care*, *supra* note 449 at 17.
[587] Clement, *supra* note 416 at 121.
[588] *Ibid*.
[589] *Ibid*.

4.2 From Theory to Case Law

4.2.1 A More Relational Perspective of Religious Freedom

Lessard detects some ambivalence within the reasons in *B. (R.)*, just as with Wilson J.'s dissent in *Jones*. Although she praises Wilson J.'s approach for its inclusion of a more relational perspective, Lessard cautions that it may nevertheless perpetuate individualism, insofar as it also "permits a portrayal of familial attachments and responsibilities as merely instrumental in the self-fulfilment of the choosing, planning individual".[590] In Lessard's opinion, both *Jones* and *B. (R.)* show deep divisions within the Court in its vision of the dynamics between individual rights protections and family relationships and, more specifically, in its attempt to reconcile, with difficulty, the *Charter*'s liberal, individual rights framework with conservative family values.[591] In *B. (R.)*, the plurality resolved this predicament through what she calls "a neoconservative synthesis",[592] by "somewhat awkwardly [fusing] conservative conceptions of the family onto the fundamentally liberal design of the liberty rights protection."[593]

Lessard explains that, in marked contrast to Wilson J.'s "indirect sanctioning of the traditional family"[594] in *Jones*, the *B. (R.)* plurality showed a "willingness to more

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[590] Lessard, "Liberty Rights", *supra* note 369 at 227.

[591] *Ibid* at 215.

[592] *Ibid*. Lessard defines her use of "neoconservatism" thus:

> I use the term neoconservativism to indicate the resurgence of traditional social and moral values, leaving the term neoliberalism to refer to the rehabilitation of nineteenth-century classical economic theories, in particular the notion that a market unimpeded by the state is both efficient and self-sustaining. In popular and political discourse, the two dimensions—the moral and the economic—are often presented as complementary and intertwined . . . . [*Ibid* at 242–43]

[593] *Ibid* at 215.

[594] *Ibid* at 248.

clearly and explicitly entrench conservative values as constitutional values."[595] In her view, the plurality "endorsed a specific notion of parent-child relations in accordance with which children are only notionally present as legal persons and rightsholders"[596] and wherein "an individual parent's rights include the right to 'choose' to have a family and maintain (naturally) authoritative parental relationships."[597] This vision of the family is, for Lessard, "deeply and explicitly conservative".[598] She concludes that La Forest J. essentially "[constitutionalized] the traditional structure of the family by stating that the individual right to liberty directly translates into society's customary privileging of parental authority to bring up and make choices for children."[599]

Lessard's observations afford us new angles from which to view *B. (R.)*, notably in light of Leckey's assertion that relational theorists can contribute to legal analysis by advocating for contextualism and calling attention to the oftentimes controversial norms that determine the boundaries of the context.[600] Diana Majury and Anne Quéma add that advocacy for contextualism "is not so much about introducing contextualizing methods as about exposing the normative nature of what has always been done."[601] By unearthing those norms, we can go "beyond the cleavage between an acontextual and a contextual method."[602] In this sense, we need not assume that the apparently individualistic portrait

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[595] *Ibid* at 248. In fact, for Lessard, La Forest J.'s reasons contain an "explicit acceptance of the way in which firm recognition of individual rights often protects the rights of those who are structurally and socially privileged" (*ibid*).
[596] *Ibid* at 249.
[597] *Ibid*.
[598] *Ibid* at 250.
[599] *Ibid* at 249.
[600] Leckey, *supra* note 390 at 22.
[601] Diana Majury & Anne Quéma, Book Review of *Contextual Subjects: Family, State, and Relational Theory* by Robert Leckey, (2010) 25 CJLS 246 at 248–49.
[602] *Ibid* at 248.

of parents in *B. (R.)* resulted from a lack of contextualization.[603] As Lessard explains, "[t]he currency of discourse is still abstract individualism",[604] but "the purportedly universal parent who stands at the centre of the first part of the liberty analysis is, in effect, a person whose understanding and practice of parenting conforms to dominant cultural norms."[605] From this perspective, we might see that this conceptualization of individuals, parents, and relationships "masked the contextualizing method at work in the courts' assessments: these [universalized] figures legitimized cultural, gender, and economic norms that constituted the normative context of the historical period."[606] The plurality's reasons were not a-contextual, to the extent that the chosen context was that of "well-established and customary social hierarchies."[607]

Alongside Lessard's argument that *B. (R.)* blends individualistic and conservative values, we can add the following observation by Macleod: the notion that "[t]he parental right of self-determination . . . [implies] a right of child-determination"[608] is a "conservative conception [that] rests partly on collapsing the distinction between parent and child. The child is viewed as 'an extension of the self,' and there is consequently an 'identity between chooser and chosen for'",[609] as well as between their interests.[610] Echoing Lessard, Macleod notes that the conservative view of children "as mere ingredients in their parents' life plans"[611] fails to properly recognize the children's distinct

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603 *Ibid*.
604 Lessard et al, *supra* note 128 at 110.
605 Lessard, "Liberty Rights", *supra* note 369 at 251.
606 Majury & Quéma, *supra* note 601 at 248.
607 Lessard, "Liberty Rights", *supra* note 369 at 249.
608 Colin M Macleod, "Conceptions of Parental Autonomy" (1997) 25:1 Politics & Society 117 at 123.
609 *Ibid* at 123 [footnotes omitted].
610 *Ibid*.
611 *Ibid* at 124.

moral status. Macklin adds that if the identity-of-interests assumption is taken to its logical extreme, "it would be hard to rebut the contention that the interest of children of Jehovah's Witnesses is precisely what their parents deem it to be."[612] This fusion of identities and interests is one of the risks inherent in the ethic of care, and one that may be counterbalanced by the integration of the justice perspective.

Also noteworthy in La Forest J.'s delineation of religious freedom and parental autonomy was the exclusion of internal constraints. As Beaman explains, the Court was essentially asking itself "[W]hat is freedom? Does it have 'internal limits' that comprise part of our understanding of what it means to talk about being free?"[613] Beaman argues that the freedom of a citizen in a democracy "is bounded by the citizen herself, who makes . . . 'responsibilized choices' within the context of that freedom."[614] If we accept the necessity of "responsibilized" or "relationalized" choices in the exercise of parental autonomy, this would suggest the imposition of certain internal constraints upon autonomy—a path La Forest J. apparently did not take.

To be sure, the Court has never conceived of religious freedom as being limitless. In *Ross v. New Brunswick School District No. 15*,[615] for instance, La Forest J. recalled that freedom of religion is not unlimited "and is restricted by the right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others. Freedom of religion is subject to such limitations as are necessary to protect public safety, order, health or morals and the

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[612] Ruth Macklin, "Return to the Best Interests of the Child" in Willard Gaylin & Ruth Macklin, eds, *Who Speaks For The Child: The Problems of Proxy Consent* (New York: Plenum Press, 1982) 266 at 287–88.
[613] Beaman, *Defining Harm*, *supra* note 169 at 68.
[614] *Ibid* at 68.
[615] [1996] 1 SCR 825, 171 NBR (2d) 321 [*Ross* cited to SCR].

fundamental rights and freedoms of others."[616] La Forest J. was moreover acutely aware of the importance of context and its place in the analysis. He cited Wilson J.'s approach in *Edmonton Journal*, "where she speaks of the danger of balancing competing values without the benefit of a context."[617] Such balancing, he acknowledged, could occur within the delineation of the right, and "one could avoid the dangers of an overly abstract analysis simply by making sure that the circumstances surrounding both the use of the freedom and the legislative limit were carefully considered."[618] However, he preferred reconciling rights conflicts and justifying limits under s. 1, as it "places the burden of justifying limits on the state and preserves religious freedom more effectively than would trying to define religion".[619]

Be that as it may, one of the consequences of this approach is the now-familiar criticism that "Justice La Forest's 'isolated' view portrays the individual in a fashion associated with classical liberalism, namely, as an abstract agent whose happiness consists of the unimpeded pursuit of subjectively defined preferences."[620] According to Lessard, this view gives the impression that religious freedom "must be at least presumptively unqualified by any consideration for the relational dimension of individual selfhood, even when the text of the Constitution itself would seem to demand acknowledgement of a more complex and interconnected social landscape."[621]

By contrast, the minority's reasons appear to some commentators to be more contextualized, given their reference to other rights holders and the social nature of

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616 *Ibid* at para 72.
617 *B (R)*, *supra* note 3 at 384.
618 *Ibid*.
619 *B (R)*, *supra* note 3 at 383–84; see also e.g. *Ross*, *supra* note 615; Von Heyking, *supra* note 75 at 687.
620 Lessard et al, *supra* note 128 at 120.
621 *Ibid*.

peoples' lives.[622] Lessard lauds Iacobucci and Major JJ. for their ostensibly relational approach, according to which "parental liberty can be given a meaning that incorporates the obviously relational nature of parenting rather than casting children as potentially hostile interests which might provide, either reasonably or unreasonably, a basis for the state to constrain parenting choices."[623] Yet this approach is not without its own problems, including a paradoxically individualistic interpretation of parents, children, communities, and religion. Iacobucci and Major JJ. declined to rely on s. 1 and stated that religious freedom must be limited internally such that its definition excludes harm to others. The problem, in Von Heyking's opinion, is that "they leaned toward an extreme individualistic definition when they treated the freedom of religion of the infant, Sheena".[624] In particular, their response to the parents' assumption that Sheena shared their religion "asserts a peculiar individualistic vision"[625] of religious freedom:

> Sheena has never expressed any agreement with the Jehovah's Witness faith, nor, for the matter, with any religion, assuming any such agreement would be effective. There is thus an impingement upon Sheena's freedom of conscience which arguably includes the right to live long enough to make one's own reasoned choice about the religion one wishes to follow as well as the right not to hold a religious belief.[626]

In answer to La Forest J.'s preference for examining limits under s. 1, Iacobucci and Major JJ. countered that "[s]uch an approach elevates choosing to refuse one's child necessary medical care on account of one's personal convictions to the level of constitutionally protected activity."[627] But in taking this position, they largely bypassed

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[622] *Ibid*.
[623] *Ibid*.
[624] Von Heyking, *supra* note 75 at 688.
[625] *Ibid*.
[626] *B (R)*, *supra* note *3* at 437.
[627] *Ibid* at 438.

any discussion into the nature of the harm and the reasonableness of the state's intervention. As Van Praagh argues, "[i]n making the assertion that the Bs must not act contrary to their child's rights to life, security, and safety, . . . they appeared to link those rights to Sheena B.'s needs as defined by doctors and child protection officials."[628] Van Praagh states that by automatically deferring to those officials, the minority judgment "failed to recognize the value and importance of Sheena's family to her."[629]

> Not only was Sheena B. not understood as a member of her family in the picture of children's rights offered by Iacobucci and Major JJ., but her community affiliations played absolutely no role. . . . As we have seen, children may be nurtured and may flourish within their religious communities; they can also be seriously hurt in a way connected to religious principles or practices. Without any acknowledgement of the complex matrix of relationships and influences within which children exist and develop their autonomy, a picture of children's rights seems somewhat empty.[630]

Furthermore, in their application of the best interests test, Iacobucci and Major JJ. held that "[t]he nature of the parent-child relationship is . . . not to be determined by the personal desires of the parent, yet rather by the 'best interests' of the child"[631]—as if one necessarily precluded the other. Any concept of children's rights, Van Praagh observes, must factor in children's reliance on others—adults, communities, and states—for their care and development.[632] This dependence is difficult to square with an account of individual rights and autonomy as freedom from others, including from the state.[633] The contemporary state does concern itself with children's well-being, Van Praagh adds, and "'[i]ntervention' in families and the lives of children is implied in many aspects of the

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[628] Van Praagh, "Faith", *supra* note 193 at 190.
[629] *Ibid* at 191.
[630] *Ibid* at 191–92.
[631] *B (R)*, *supra* note 3 at 433.
[632] Van Praagh, "Faith", *supra* note 193 at 192.
[633] *Ibid*.

relationship between a state and its citizens."[634] She therefore finds it ironic that the minority's focus on children actually "makes less room for considering the implications of child welfare decisions for diverse communities and their young members."[635]

Horwitz likewise takes the minority to task for its treatment of the child's interests, just as he criticizes La Forest J. for his comment that "[w]hile it may be conceivable to ground a claim on a child's own freedom of religion, the child must be old enough to entertain some religious beliefs in order to do so."[636] He sees such opinions as indicative of "the Court's continuing inclination to view religion not as a cultural phenomenon or (at least for some adherents) communitarian activity, but as a matter of individual choice."[637]

Therefore, whereas La Forest J. focused on parental rights and downplayed the role of children and communities, Iacobucci and Major JJ. preferred a child-centric analysis that equally obscured parental and communal ties. Whereas La Forest J. took an identity of interests for granted, Iacobucci and Major JJ. assumed a clash. And in wishing to distance themselves from La Forest J.'s purportedly "isolated" view of parental rights, Iacobucci and Major JJ. ultimately adopted a strangely individualistic portrait of childhood, one that includes parents but seems to presume conflict. As Leckey notes, "[i]t is striking how rapidly an ostensibly contextual approach manifests the imprint of presumptions and prior models."[638]

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[634] *Ibid* at 159.
[635] *Ibid* at 192.
[636] *B (R)*, *supra* note 3 at 381.
[637] Horwitz, *supra* note 105 at 45–46.
[638] Leckey, *supra* note 390 at 112.

Such presumptions are also evident in the framing of the constitutional question. Iacobucci and Major JJ. were "of the view that the constitutional question should be: to what extent can an infant's right to life and health be subordinated to conduct emanating from a parent's religious convictions?"[639] This question has the benefit of highlighting the dynamics between the exercise of parental autonomy and its consequences for children, but it also leads with a presumption of harm or excess, and denormalizes the parents' religion. And "[f]ramed as such, the answer followed that s. 2(a) of the *Charter* does not include the imposition on children of religious practices which threatened their safety, health or life."[640]

By comparison, the constitutional question with regard to freedom of religion as addressed by La Forest J. was whether the statutory provision depriving the parents "of the right to refuse medical treatment for their infant on religious grounds, violates their freedom of religion guaranteed by s. 2(*a*) of the *Charter*."[641] When the issue is framed in this manner, Van Praagh explains, "state intervention in response to danger or harm to children appears to have serious implications only for the parents involved."[642] In fact, La Forest J. specifically adds that "[w]hile it may be conceivable to ground a claim on a child's own freedom of religion, the child must be old enough to entertain some religious beliefs in order to do so."[643] This comment, together with Iacobucci and Major JJ.'s position that Sheena's religious identity was not at issue because "Sheena has never

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[639] *B (R)*, *supra* note 3 at 435.
[640] Joan Small, "Parents and Children: Welfare, Liberty, and *Charter* Rights" (2005) 4 JL & Equality 103 at 109.
[641] *Ibid* at 381.
[642] Van Praagh, "Faith", *supra* note 193 at 187–88.
[643] *B (R), supra* note 3 at 381.

expressed any agreement with the Jehovah's Witness faith,"[644] tends to illustrate Moon's theory about the dual nature of religion—as both personal commitment and cultural identity—and how this duality is particularly evident in the hard cases presented by parental rights and medical decision making for children.[645]

Speaking to the Supreme Court's "roundly criticized"[646] emphasis on individualism in *B. (R.)*, Van Praagh suggests that a shift in "focus from individual rights to the relationship among children, families, communities and the state"[647] would tell a more complete story. The parents' values and actions might then be understood to "stem from their membership in a community of persons who share the same beliefs, and from a community-shared sense of obligation or accountability to their God",[648] rather than be seen as a choice made in isolation or under the threat of others. Moreover, religious faith and cultural membership can both be construed as articulations of autonomy.[649] Emily Gill posits that "belief and conscience may both be viewed as aspects of identity that are constitutive, yet also operate as expressions of autonomy."[650] This is what she terms "constitutive choice": "because meaning is not self-defining or self-interpreting",[651] people may still need to "decide for themselves the claims of their particularistic identities *or* faiths, working out their meanings over time".[652]

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[644] *Ibid* at 437.
[645] Moon, "Freedom of Conscience and Religion", *supra* note 187 at 412, 414.
[646] Van Praagh, "Faith", *supra* note 193 at 163.
[647] *Ibid* at 164.
[648] *Ibid* at 168 [footnotes omitted].
[649] Emily R Gill, *Becoming Free: Autonomy and Diversity in the Liberal Polity* (Lawrence, Kansas: University Press of Kansas, 2001) at 142.
[650] *Ibid*.
[651] *Ibid*.
[652] *Ibid* [emphasis in original].

A more relational account might also recognize that, for "children of faith," religion and religious communities play a large role in their personal development[653] and are "firmly integrated into their sense of self, agency and responsibility."[654] Concomitantly, the children's membership is crucial for the vitality and survival of those communities.[655] In this regard, religious communities are always implicitly implicated in the scope of parental rights and affected by limitations thereto.[656]

But an added emphasis on relationship, responsibility, and context cannot by itself resolve all difficulties. As Van Praagh observes, religious communities can be a source of both good and harm in children's lives.[657] Parents themselves may belong to many relationships and communities, and may embody multiple and conflicting selves.[658] They may be unable to work out these tensions. Faced with a situation in which their child's interests collide, they may make a decision that satisfies their conscience and their values but that also jeopardizes certain of the child's interests while fulfilling others. Even the ostensibly individualistic approach in *B. (R.)*, upon further analysis, reveals an arguably relational perspective, but one that privileges a certain *kind* of parent-child relationship resting on a particular view of parental authority and fused parent-child identities. This is a conception that reflects one of the risks of care ethics, namely, the identity of interests between carer and cared-for. Just as relational theorists recognize that a child may be a cared-for "child of faith," so too do they acknowledge that caring relationships "can be

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653 Van Praagh, "Faith", *supra* note 193 at 165, 177.
654 *Ibid* at 176.
655 *Ibid* at 156, 169. See also e.g. *Loyola*, *supra* note 182 at para 64.
656 Van Praagh, "Faith", *supra* note 193 at 187–88
657 *Ibid* at 164–66.
658 Kinser, *supra* note 509 at 124.

sites of inequality"[659] and that justice must set some limits to protect children from serious harm.[660] So how might the principles of care and justice interact and be applied in these circumstances? At this point, I turn to Berger, in whose work I see a deft illustration of how the theory might function in practice.

Berger views s. 2(*a*) as the site where law formally encounters religion and demonstrates its attitude of "liberal *modus vivendi* tolerance."[661] In actuality, he explains, law simply "tolerates that which is different only so long as it is not *so different* that it challenges the organizing norms, commitments, practices, and symbols of the Canadian constitutional rule of law."[662] If a particular conduct or belief is deemed "intolerable," the analysis moves to s. 1 to assess "whether the limit on legal tolerance is justified"[663] in light of "the values, assumptions, and symbolic commitments of the culture of Canadian constitutionalism itself."[664] In the end, Berger concludes, "the courts will either deem the conduct intolerable and require the religious group or individual to conform to the norms and commitments of Canadian constitutionalism, or the courts will conclude that the state was wrong in limiting this instance of religious diversity because this expression of cultural pluralism is itself consistent with those values and commitments."[665]

Berger takes pains to specify that he is claiming "neither that law merely 'has it wrong,' nor that its conception of religion must change."[666] In his view, "[t]he framing

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[659] Kiss, *supra* note 426 at 10.
[660] See e.g. *ibid* at 10; McNeil, *supra* note 555 at 19.
[661] Berger, *supra* note 62 at 116; "*modus vivendi*" meaning "an arrangement between people who agree to differ" (*Canadian Oxford Dictionary*, 2nd ed, *sub verbo* "modus vivendi").
[662] Berger, *supra* note 62 at 119 [emphasis in original].
[663] *Ibid* at 117.
[664] *Ibid*.
[665] *Ibid* at 120.
[666] *Ibid* at 103.

intuitions, symbolic commitments, and interpretive practices that inform Canadian constitutional law's understanding of religion are no more or less mutable than those that comprise a religious culture."[667] Consequently, he argues, it is not "that law has *misunderstood* religion. Law has *understood* religion; it has simply done so in keeping with the culture of Canadian constitutionalism."[668] Once an issue appears before the courts, he explains, the debate necessarily takes place in the discourse of liberal legal culture, using "the language of rights constitutionalism, privileging the terms *autonomy*, *equality*, and *choice*. The salient concepts are those of the public and the private, jurisdiction, and standing. The ways become the way of legal process, and the matter is firmly set within the institutions and traditions of interpretation of the culture of law's rule."[669] Therefore, when law encounters religion, the result is a "complicated intercultural encounter",[670] with law retaining its own symbolic commitments rather than acting as a neutral referee above the cultural fray.[671]

But Berger reassures us that judges need not become indifferent relativists upon acknowledging law's lack of neutrality.[672] To the contrary, "[e]very cultural form has its peculiar gifts, and the judge has a special role in cultivating and caring for the public gifts of a liberal constitutional culture, of which there are many."[673] So what are judges to do? Berger suggests that they adopt a particular "adjudicative sentiment"[674] or "ethos",[675] one

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667 *Ibid* at 103–04.
668 *Ibid* at 104 [emphasis in original].
669 *Ibid* at 140 [emphasis in original].
670 *Ibid* at 106–07.
671 *Ibid*.
672 *Ibid* at 171.
673 *Ibid*.
674 *Ibid* at 170.
675 *Ibid*.

that combines "a kind of *fidelity* to the culture of the constitutional rule of law"[676]—in other words, justice—together with "a kind of *humility*"[677]—in other words, care.

Firstly, Berger explains, fidelity stands for the way in which it is both necessary and proper for a judge in a liberal constitutional order "to manifest fidelity to the terms, projects, and goods of Canadian constitutionalism",[678] to respect its values of "liberty, human dignity, equality, autonomy, and the enhancement of democracy."[679] The judge "appreciates . . . that each act of judgment necessarily participates in and draws integrity from a unique and rich web of meanings and ways of framing experience."[680] This virtue, in my view, represents the practical application of the ethic of justice.

Secondly, humility emerges from the recognition that Canadian constitutionalism is "a cultural form",[681] one that "is always in competition with other cultures, other compelling and rich ways of generating meaning and giving structure to experience."[682] I see this virtue as incorporating care insights regarding openness to others' perspectives. Notably, Berger writes that a sense of humility "arises from an appreciation of the role that religious culture can play in identity, belonging, and the narration of a meaningful and authentic story about one's life. At the same time, this ethic is inspired by an awareness of the limits of adjudication".[683] That is to say, it results from the recognition that, "[e]ssential though their role may be, courts are never the only – and rarely the best – institutional and social settings for appreciating and attending to the richness of the

[676] *Ibid* [emphasis in original].
[677] *Ibid* [emphasis in original].
[678] *Ibid* at 172.
[679] *Hutterian Brethren*, *supra* note 109 at para 88, cited in *ibid* at 118.
[680] Berger, *supra* note 62 at 170.
[681] *Ibid* at 172.
[682] *Ibid*.
[683] *Ibid* at 173.

interests, subtleties of power, and need for creative solutions raised by issues of religious identity, belonging, and difference."[684]

Berger further breaks down the virtue of humility into "a triune: a humility about the potential universality of law's culture, about the capacity of law to understand other cultural forms, and about the ultimate contingency of the privilege enjoyed by law's culture."[685] He associates such humility with "the sentiment that Cover hoped would install itself in the judge who saw that the act of adjudication involves violence to other rich worlds of meaning."[686] He points to Judith Resnick's explanation that Cover wanted judges and legal commentators "to be uncomfortable in their knowledge of their own power, respectful of the legitimacy of competing legal systems, and aware of the possibility that multiple meanings and divergent practise ought sometimes to be tolerated, even if painfully so."[687] Humility incites legal actors to scrutinize the law's symbolic and normative assumptions, perceive power dynamics, and appreciate the law's impact on—and power over—other cultures and sources of law.[688]

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[684] *Ibid*.
[685] *Ibid*.
[686] *Ibid*, citing Robert M Cover, "Foreword: *Nomos* and Narrative" (1983) 97:1 Harv L Rev 4 [Cover, "*Nomos* and Narrative"].
[687] Judith Resnick, "Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover" (2005) 17:1 Yale JL & Human 17 at 25, cited in Berger at 173-74. See also James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990) at 223 [White, *Translation*], on how humility and openness to different perspectives "leads us in the direction of seeing our own language, our own assumptions, as cultural and not natural—as the proper object of criticism."
[688] Berger, *supra* note 62 at 137–38; Resnick, *supra* note 687 at 25–26. See also Dillon, *supra* note 835 at 128: "Because respect is something we can refuse to give, even while recognizing that it is called for, there is with regard to respect always a question of power: the power to recognize or not and hence the power to make or unmake others as persons, and the power to foster or subvert self-respect. Care respect demands that we take this power seriously and exercise it care-fully."

According to Clement, the ethical virtues of justice and care may at first glance seem antithetical, but their "value arises precisely out of the tension between them."[689] And just as Clement posits that justice and care must act as mutual counterbalances, Berger finds his "bicameral ethos"[690] useful because "[t]he presence of both sentiments means that neither aspect of this ethos of adjudication is permitted to run to its natural extreme. Humility checks the risk that fidelity will turn to unreflective universalism. Fidelity staves off a debilitating relativism of excess humility."[691]

And that bicameral ethos, Berger continues, will in turn help judges to actively cultivate indifference or tolerance,[692] an endeavour that is "neither simple nor without virtue."[693] Given that issues must be resolved within the constraints created by the power, language, commitments, and limits of the law, Berger argues that, at times, "perhaps we can do no better than to work to expand the borders of our indifference."[694]

At the s. 1 analysis, for instance, courts may sometimes have difficulty weighing the significance of a religious practice as it is valued by the adherent.[695] Although courts may not "understand" religion as its believers do, they can nevertheless "[seek] to create space for religious practices at the margins of law".[696] The hope, Berger explains, is "that those cultural manifestations one initially sees as foreign, objectionable, or intolerable

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689 Berger, *supra* note 62 at 170.
690 *Ibid* at 177.
691 *Ibid*.
692 *Ibid*.
693 *Ibid* at 129.
694 *Ibid* at 144.
695 See Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014) at 131–32 [Moon, *Freedom of Conscience and Religion*].
696 *Ibid* at 132.

might, with effort and reflection, be understood as untroubling to the law."[697] To make room for the coexistence of other cultures, courts need to "carefully consider whether the religious expression that is producing the apparent conflict can actually be satisfyingly digested within the values and commitments of the rule of law."[698] Resnick expresses a similar position when she writes that "judges have to rethink and recommit themselves to their own understandings of foundational legal obligations. . . . [J]udges have to . . . shape interpretations of the nation-state's law that permit competing nomoi to live their visions of obligation or to decide that the particular conflict requires a singular commitment and conflicting legal regimes must be squelched."[699]

In essence, Berger points out, "[l]aw asks itself to reconsider and reconfigure the geography of indifference using its own categories, like the private/public, and its own values, like autonomy and choice."[700] Therefore, he reasons, we are really only asking a judge "to discharge his or her traditionally understood responsibility: to interpret. This interpretation occurs as all interpretation does: by confronting what is unfamiliar and seeking to understand it within a familiar conceptual framework, often through analogy and metaphor."[701] A judge can find space for the religious belief or practice within the law even "when the judge must furrow his or her brow in non-comprehension of the religious culture but is, nevertheless, able to turn an unconcerned shoulder, satisfied that

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[697] Berger, *supra* note 62 at 178.
[698] *Ibid* at 129.
[699] Resnick, *supra* note 687 at 33.
[700] Berger, *supra* note 62 at 129.
[701] *Ibid* at 178.

the practice or commitment at stake simply does not offend the culture of Canadian constitutionalism."[702]

Even if a judge concludes that a particular limit is justified, Berger's bicameral ethos leads to other significant consequences. Berger seeks "to re-narrate"[703] the conventional public story about the interaction between religion and Canadian constitutionalism,[704] according to which the law is neutral and autonomous from culture.[705] Berger asserts that this depoliticized[706] narrative has proven to be inadequate and disaffecting. For one thing, the conventional, "non-partisan, non-historical, *non-cultural*"[707] account of the law "[trades] in the currency of reasonableness."[708] That is, it presents the law as being "based on some sense of what reasonable people would view as fair and just"[709] and conveys the impression that unsuccessful claimants are simply unable to "see things reasonably".[710] For instance, Lessard argues that in *B. (R.)*, "[t]he norms of reasonableness invoked to justify the rejection of the B.'s claim consistently presented dominant values as objective truths and the practices of established

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[702] *Ibid* at 181. See also Young's theory on "[u]nderstanding across difference" which requires "the moral humility to acknowledge that even though there may be much I do understand about the other person's perspective . . . , there is also always a remainder, much that I do not understand" (Iris Marion Young, "Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought" (1997) 3:3 Constellations 340 at 354–55).
[703] Berger, *supra* note 62 at 147.
[704] *Ibid*.
[705] *Ibid*.
[706] *Ibid* at 150.
[707] *Ibid* at 157 [emphasis in original].
[708] *Ibid*.
[709] *Ibid*.
[710] *Ibid*.

institutions as politically neutral technical expertise. Thus the result in the case appeared inevitable and sensible without compromising the central value of individual liberty."[711]

Berger describes as follows the pernicious effect of this narrative on religious claimants:

> The special alienation suffered by the religious claimant lies in the fact that, by hiding the cultural nature of the rule of law, the conventional account denies a salient reason for that loss. As a religious claimant, I lost not because the law has cultural commitments that are at odds with mine – a result that might lead me to politically engage and contest the partisan legal culture. Instead, neither my culture nor that of the law was a factor in the legal result. Worse than disputed or rejected, my culture is deemed immaterial. It is, of course, material to me; I am conscious of its ineluctable influence on the structure of my experience of the world and my sense of the good and true. Yet the conventional story precludes a legal debate about those stakes, about culture. This severs me from the law as a forum for public debate about what most concerns me and, hence, from an important source of political community and social cohesion.[712]

Even victories become slightly bittersweet under the conventional account because ultimately "culture was irrelevant to the legal conclusion."[713] Berger explains the claimant's perspective thus: "If my position is legally acceptable, it is so *despite* my cultural commitments and only to the extent that I was capable of stripping my claims of the terms that make it meaningful to me in the first place. . . . I am forced to reframe my claim as one about reason and right, not about culture."[714]

Berger argues that the conventional story also leads to "proxy debates",[715] when the legal analysis obscures what is really at issue and results in "a form of sanitized legal

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[711] Lessard et al, *supra* note 128 at 127.
[712] Berger, *supra* note 62 at 157–58.
[713] *Ibid* at 158.
[714] *Ibid* at 158–59.
[715] *Ibid* at 164.

discourse".[716] Common pitfalls include the s. 1 proportionality review, the evaluation of the best interests of the child, and the assessment of harm.[717] Berger does not claim that courts should forego such analyses where they are relevant.[718] What he denounces are assessments that fail to "engage deeply with what is truly at stake on either side."[719] For him, such impoverished and evasive "proxy debates become a normative shell game, surreptitiously shifting around the more perplexing and fundamental questions raised by the interaction of law and religion".[720]

All in all, Berger summarizes, the conventional story can be deeply alienating.[721] By contrast, a re-narrated and re-politicized story, animated by the virtues of fidelity and humility, better maintains the relationship between law and different cultures, even if this relationship may at times be characterized by discord. Berger argues that the more transparent story "keeps the religious individual engaged in a part of the common social practice of political debate and contestation."[722] Quoting Chantal Mouffe, he explains that "it is better to have the religious actor as an 'adversary' rather than an alienated 'enemy,' cast outside the common social practices. Crucially, as adversaries, 'while in conflict, they see themselves as belonging to the same political association.'"[723] His argument is also consistent with Horwitz's contention that citizens' loyalty to the state and willingness

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[716] *Ibid* at 165.
[717] *Ibid* at 167.
[718] *Ibid* at 166.
[719] *Ibid* at 167.
[720] *Ibid* at 168.
[721] *Ibid* at 160, 168.
[722] *Ibid* at 160.
[723] *Ibid*, citing Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000) and Chantal Mouffe, *On the Political* (New York: Routledge, 2005) at 20 [footnotes omitted].

to contribute to society are affected by the manner in which the state treats them.[724] Horwitz reminds us that religious adherents may find themselves caught between the "desire to be a good citizen and the ineluctable call to religious duty and obedience."[725] He reasons that "[i]f the language of the courts indicates a measure of indifference toward, or lack of comprehension of, religion and its value, the courts will cease to command the respect or obedience of many who would otherwise be valuable citizens."[726] Therefore, regardless of the actual outcome of any particular case, judicial reasons that show respect for religion will help to create and sustain stronger and healthier societies.[727]

Berger's bicameral ethos would, I believe, play a particularly compelling role at the s. 1 stage, where the court's analysis—while continuing to operate upon certain normative assumptions[728]—becomes the most overtly contextual, as it attempts to balance competing interests and examines the justification for restrictions. It seems to me that the parent portrayed in La Forest J.'s reasons, one who makes "autonomous" decisions and holds non-controversial religious beliefs, is an example of the normative approach identified by Majury and Quéma, one that raises a category of individual "to a universal level",[729] thereby legitimizing certain norms and marginalizing others.[730] I see La Forest J.'s analysis as initially delineating religious liberty against the backdrop of

[724] Horwitz, *supra* note 105 at 61.
[725] *Ibid* at 54 [footnotes omitted].
[726] *Ibid* at 61.
[727] *Ibid*.
[728] See e.g. Beaman, "Defining Religion", *supra* note 145 at 209. See also e.g. Lessard et al, *supra* note 128 at 121–22; Leckey, *supra* note 390 at 83.
[729] Majury & Quéma, *supra* note 601 at 248.
[730] *Ibid*.

"the traditional structure of the family"[731] and "well-established and customary social hierarchies",[732] before excluding Sheena B.'s family from these categories by finding their customs to be harmful and excessive and therefore subject to limits under s. 1.

Yet harm or risk of harm is a notoriously fluid concept.[733] As Beaman points out, harm is "a 'joker card' that can be played by anyone in any context, and is being deployed more and more frequently as a limiting mechanism for rights and freedoms in Charter litigation."[734] Harm is also linked to children's welfare and integrity, the conception of which similarly "shifts over time and across value structures",[735] according to Van Praagh. A court's assessment of harm or excess, Beaman asserts, "is not an objective exercise, despite the language of objectivity used to demarcate it."[736] In cases like *B. (R.)*, the various legal, medical, religious, and social interpretations of harm intersect[737] and "expose a clash of norms."[738] Thus, Berger summarizes, "what 'counts' as harm depends upon one's normative system. . . . As such, the harm principle veils cultural conflict; it holds off normative and interpretive questions by burying them under the second-order issue of what qualifies as harm."[739] Consequently, recourse to the harm principle in the assessment of limits must, in Beaman's view, be accompanied by "the revelation of moral assumptions about what is good, or right, or desirable."[740] The analysis must avoid

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[731] Lessard, "Liberty Rights", *supra* note 369 at 249.
[732] *Ibid* at 249.
[733] Beaman, *Defining Harm*, *supra* note 169 at 67; 86.
[734] *Ibid* at 86.
[735] Van Praagh, "Religion", *supra* note 351 at 360 [footnotes omitted].
[736] Beaman, *Defining Harm*, *supra* note 169 at 86.
[737] *Ibid*.
[738] Van Praagh, "Faith", *supra* note 193 at 185.
[739] Berger, *supra* note 62 at 165.
[740] Beaman, *Defining Harm*, *supra* note 169 at 86.

"formalist and naturalizing subterfuge",[741] in Majury and Quéma's words, and expose its normative premises.[742]

Berger's adjudicative virtues ask judges to eschew approaches that belie the existence of normative clashes and that frame the context so as to exclude non-mainstream groups, dismissing their beliefs as obviously harmful and minimizing the effect of limitations. Judges should also be aware that, from the outset, "the secular nature of s. 1 of the *Charter* privileges the state by requiring it to judge religion from the perspective of secular interests and rationality."[743] In fact, Horwitz argues, the very "language of s. 1, as expressed in the definitive case of *R*. v. *Oakes*, is the evaluative language of rational liberalism. It focuses substantially on the reasonableness of the state's goals".[744] Parents with religious views, particularly non-mainstream ones, may worry that a judge's reasoning might be "informed by simple rationalist skepticism about the very validity"[745] of their claims, that the judge might too easily dismiss their beliefs "as being less than rational in the light of clinical judgment",[746] and that the judge might portray those beliefs as unreasonable and selfish.[747] The fear is that a judge unable to

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[741] Majury & Quéma, *supra* note 601 at 248.
[742] *Ibid* at 249.
[743] Von Heyking, *supra* note 75 at 682. See also Stanley Fish, "Liberalism Doesn't Exist" (1987) Duke LJ 997 at 997: "[L]iberalism is informed by a faith (a word deliberately chosen) in reason as a faculty that operates independently of any particular world view . . . The one thing liberalism cannot do is put reason *inside* the battle where it would have to contend with other adjudicative principles and where it could not succeed merely by invoking itself because its own status would be what was at issue." [Emphasis in original]
[744] Horwitz, *supra* note 105 at 33.
[745] *Ibid* at 44.
[746] Hagger, *supra* note 770 at 193.
[747] Lessard et al, *supra* note 128 at 122.

ascribe to religion its value from the believer's perspective might more readily support the state's ostensibly rational goals over the claimant's religious commitments.[748]

"Humble" judges should therefore resist "viewing religion through the lens of the unbeliever and treating it as a mysterious and threatening force that cannot be understood by rational, secular reasoning and so must give way to the state's rational goals."[749] To avoid alienating believers and truly engage with the interests at stake, they should seek to appreciate the meaning and value of such practices from the believers' perspective and strive to fairly and accurately describe the claims in the believers' own terms.[750]

It may not always be easy to accord a belief its full value as seen from the claimant's point of view; for instance, "it may be difficult to give full credit to the concept of damnation, because it could become an automatic exemption from any further consideration of the importance of the state's goals."[751] And as Diana Ginn observes, courts are in no position to assess the "truth" of a religious claim "or to predict the future spiritual direction of the child. Courts are, therefore, right to work with the evidence available to them—the seriousness of the medical condition and the impact of the proposed treatment."[752] But they should remember that the way in which they treat such claims matters, and that case law "not based upon an understanding of the values

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[748] Horwitz, *supra* note 105 at 35. See also Beaman, *Defining Harm*, *supra* note 169 at 149: "But what is the rational standard? The very use of the phrase . . . reifies the idea that there actually is a single rationality."

[749] Horwitz, *supra* note 105 at 47.

[750] Beaman, *Defining Harm*, *supra* note 169 at 89; Lessard, "Liberty Rights", *supra* note 369 at 256; Schoeman, "Parental Discretion", *supra* note 322 at 58; Horwitz, *supra* note 105 at 56–57.

[751] Horwitz, *supra* note 105 at 57. See also Moon, "Freedom of Conscience and Religion", *supra* note 187 at 382: "[I]t is said that the court should take no position concerning the value of such practice. The practice matters only because it is important to the individual, but there is no way to 'balance' this against the purpose or value of the restrictive law."

[752] Ginn, *supra* note 5 at 529. See also Dwyer, *supra* note 250 at 82; Moon, *Freedom of Conscience and Religion*, *supra* note 695 at 11ff; Eekelaar at 186–87.

involved is likely to be perceived as shallow, inconsistent, and nonpersuasive."[753] A judge might therefore give reasons why the state cannot endorse a particular belief or practice, while nonetheless recognizing its significance for the believer.[754]

Like Berger, Lessard believes that there is a heavy price to the oversimplification of the stakes at play; in her opinion, "to the extent that complexities were simplified, diverse conceptions of community rendered invisible, and deeply held values dismissed as foolhardy or irrational, the *R.(B.)* decision represents a defeat for all members of the Canadian polity in terms of the impoverishment of our political discourse."[755] By contrast, Van Praagh asserts, a more complete picture would reflect "[t]he impact, both positive and enriching, and negative and harmful, of religious communities on their children."[756] In fact, Moon argues, the value and harm of a right like religious freedom are not polar opposites but rather two sides of the same coin, resulting from the relational nature of religion.[757] When a court assesses the impact of religion, it "is not simply balancing the distinct interests of separate individuals";[758] instead, it is "making a contextual judgment about the relative value/harm"[759] of religion, "or about the character or quality of the . . . relationship."[760]

Consequently, judges should conduct harm assessments from multiple angles.[761] They might for instance acknowledge that, for a parent, religion is not just about choice

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[753] William P Marshall, "Truth and the Religion Clauses" (1994) 43 DePaul L Rev 243 at 243.
[754] Van Praagh, ""Faith", *supra* note 193 at 200.
[755] Lessard et al, *supra* note 128 at 127.
[756] Van Praagh, "Faith", *supra* note 193 at 189
[757] Moon, "Justified Limits", *supra* note 105 at 343.
[758] *Ibid* at 341, 343, 365.
[759] *Ibid* at 343.
[760] *Ibid*.
[761] See e.g. Beaman, *Defining Harm*, *supra* note 169 at 65.

and self-realization; it also creates bonds between parents, children, families, and communities, and nourishes communities. The parents' invocation of their right "is intertwined with the resistance of the religious body"[762] and community as a whole. Judges might also recognize the distress that the state-mandated treatment causes to the child, parents, and their relationship;[763] the spiritual harm inflicted upon the child in the eyes of believers (including the child as a potential adult adherent); the community's inability to practise its beliefs;[764] as well as the community's "position in society generally as a minority religious group".[765] They might be mindful of the extent to which "children's sense of religious affiliation and identity develops through their relationships with their parents and religious communities"[766] and note the potential loss of connections[767]—among child, family, and community—resulting from state intervention. They might consider, in addition to the medical risk, "other interests such as the child's psychological well-being, the impact of the medical decision on the life of the child as a whole, and its impact on family relations or on third parties".[768] Bridge advises judges to perceive "[p]arental religious and cultural freedoms and the value these represent for the child . . . as contributing towards but not ultimately constituting best interests."[769]

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[762] *Ibid* at 28.

[763] See e.g. Laufer-Ukeles, *supra* note 467 at 807.

[764] Beaman, *Defining Harm*, *supra* note 169 at 65–66, 89.

[765] *Ibid* at 65.

[766] Van Praagh, "Religion", *supra* note 351 at 351.

[767] See e.g. James Boyd White, *From Expectation to Experience: Essays on Law and Legal Education* (Ann Arbor: University of Michigan Press, 1999) at 138 [White, *Expectation*].

[768] Beaman, *Defining Harm*, *supra* note 169 at 89. Van Praagh argues that "identity interests can and do play a role in defining children's integrity and deserve to be considered in any assessment of harm to the child" (Van Praagh, "Religion", *supra* note 351 at 360). She adds that "integrity interests can coincide with identity interests: breaking apart valuable affiliations with a community clearly holds the potential for damaging the integrity of the child" (*ibid* at 361).

[769] Caroline Bridge, "Religion, culture and conviction – the medical treatment of young children" (1999) 11:1 Child & Fam LQ 1 at 9.

A "humble" judge might also be aware that judicial reasoning, as Lynn Hagger points out, often portrays the interests of parents and children as being in conflict with each other.[770] Courts should therefore attempt to reflect in their reasons a more nuanced portrait of family relations, one that acknowledges parents' concurrent commitments to their religious beliefs *and* to their child.[771] In *B. (R.)*, Van Praagh argues, the assumption of conflicting interests sent the parents the message "that they had to choose between those commitments; they were then told they had chosen wrongly."[772] Because of their religious commitments, the parents "became, in the eyes of the law, a large part of the risk to their baby's health and life."[773] However, Van Praagh reminds us, it was not that they "chose" death for their child; it was that they believed that Sheena would suffer a worse harm if she had the transfusion; in the parents' view, the Court simply "substituted its opinion of Sheena's best interests for their own".[774] Even when courts are persuaded by the state's arguments, they should not fail to recognize, where appropriate, "the parents' genuinely held beliefs that they are acting in the child's best interests".[775] Bridgeman suggests that "it would be instructive to listen to the parents of sick children, health care professionals and lawyers acting in partnership in order to secure the well-being of the child"[776] and to hear "the 'different voice' . . . in what they say".[777]

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[770] Lynn Hagger, "Parental Responsibility and Children's Health Care Treatment" in Rebecca Probert, Stephen Gilmore & Jonathan Herring, eds, *Responsible Parents and Parental Responsibility* (Portland, Hart Publishing, 2009) 185 at 193.
[771] Van Praagh, "Faith", *supra* note 193 at 167 [emphasis in original].
[772] *Ibid*.
[773] *Ibid*.
[774] *Ibid* at 168. As Beaman points out, "[True Christians] want to live but they will not try to save their life by breaking God's laws" (Beaman, *Defining Harm*, *supra* note 169 at 26).
[775] Hagger, *supra* note 770 at 194.
[776] Jo Bridgeman, "Because We Care? The Medical Treatment of Children" in Sally Sheldon & Michael Thomson, eds, *Feminist Perspectives on Health Care Law* (London: Cavendish, 1998) 97 at 113–14.
[777] *Ibid* at 114.

Rather than approaching the best-interests assessment as "an adversarial battle",[778] courts should acknowledge "the shared endeavour of parents, professionals and the judges to do what is best for the child."[779]

Berger's bicameral ethos may also inspire more creative and just remedies. Lessard argues that La Forest J.'s vision of family relationships "distorts and limits the creative and remedial potential of the law."[780] Likewise, Van Praagh sees in *B. (R.)* a "failure to find creative remedies",[781] given that even "[t]hough the threat to her health came from her parents' refusal to consent to the blood transfusion, the state's response was to suspend, for the period of the wardship, *all* the ties between Sheena, her parents, and by extension, her community."[782]

Horwitz contends that, by contrast, judges who take the value of the religious belief seriously will "seek the least restrictive means of interference with religion".[783] When they make efforts to minimize the perceived incompatibility between law and religion, they may create a larger space of toleration within which both can coexist. Van Praagh adds that "[j]ust as a spectrum of remedies under the rubric of intervention can be imagined and encouraged, so can a spectrum of interactions among normative orders in people's lives."[784] Judges should not assume that the commitments of the religious believer are irreconcilable with those of Canadian constitutionalism.[785] Moreover, Van Praagh notes, norms "are constantly shifting and interacting and

[778] Bridgeman, *supra* note 66 at 155.
[779] *Ibid* at 155.
[780] Lessard et al, *supra* note 128 at 122.
[781] Van Praagh, "Faith", *supra* note 193 at 195.
[782] *Ibid* at 195.
[783] Horwitz, *supra* note 105 at 58.
[784] Van Praagh, "Faith", *supra* note 193 at 199–200.
[785] *Ibid* at 199.

evolving",[786] as evidenced by attempts made by health professionals to consider options that avoid blood transfusions (thereby lessening the frequency of conflict between families and child protection officials)[787] and their attempts to involve religious leaders in discussions in search of a consensus regarding treatment.[788] It is, Van Praagh observes, "in imagining a continual interaction among sets of norms and expectations, values and practices that the definition of child well-being can slowly be worked out."[789]

A relational approach to remedies would acknowledge the potential for both perceived good and harm to come out of attachments, and consider the possibility that "[r]esponsive remedies may require co-operation from the very communities within which harm is inflicted upon children".[790] More specifically, Van Praagh writes, "[t]he form of intervention should reflect the law's best attempt to hold on to and foster the positive links, while targeting and trying to change the negative."[791] She suggests for instance that a more appropriate response in *B. (R.)* might have been "to think about some kind of 'cooperative venture,' where the Bs would retain the other responsibilities, connections and rights of parenting, but the Children's Aid Society would have the ability to consent to the medical treatment."[792]

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[786] *Ibid*.

[787] *Ibid* at 200.

[788] Douglas S Diekema, "Parental refusals of medical treatment: the harm principle as threshold for state intervention" (2004) 25:4 Theoretical Medicine & Bioethics 243 at 255.

[789] Van Praagh, "Faith", *supra* note 193 at 201.

> If religion constitutes a significant authority in the lives of adherents, then it is both the target of decisions that label religiously-motivated practices harmful, and the ideal partner in finding ways to adjust the links between those practices and the children who live with them. Sometimes, the practices will be redefined as non-harmful, sometimes they will be explicitly condemned, sometimes they will adapt and change at the same time that their secular counterparts do so. [*Ibid*]

[790] *Ibid* at 195.

[791] *Ibid* at 194.

[792] *Ibid* at 195. See also Hagger, *supra* note 770 at 194, on "examples of good practice where NHS Trusts engage in constructive dialogue with the Jehovah's Witness community through their hospital liaison

Recognition of the interconnected nature of families, communities, and the state raises a further point with regard to remedies and intervention. As Van Praagh observes, the real concern in cases like *B. (R.)* was not "the 'intervention or not' problem".[793] Even though the issue was framed as "decision-making formally couched in the language of parental rights",[794] the case was really about "*how* the state can and should intervene."[795] La Forest J. sketched a portrait of the family wherein the interests of children were deemed to coincide with those of the decision-maker, whose right to freedom or autonomy acted as a shield against state interference. The traditional qualities of this neoconservative synthesis, as identified by Lessard, hark back to an era where the family was consigned to the purely private domain.[796] But relational theory blurs the line between the private and the public, and between the individual and collective, and helps to show how "the interests of parents, children, and government/community are often inter-related and/or all at stake in different ways."[797] A relational approach would recognize that children are members of "overlapping communities"[798] and that "the state and parent are jointly responsible for a child's well-being."[799] Consequently the focus shifts from individual protection against state interference towards the state's positive

committees, which have resulted in useful guidance for health professionals dealing with children from such families. . . The reaction of the religious community has been a key influence on parents in this situation."

[793] Van Praagh, "Faith", *supra* note 193 at 194.

[794] *Ibid*.

[795] *Ibid* [italics in original].

[796] See e.g. Herring, *Relational Autonomy*, *supra* note 386 at 14: "The assumption behind the traditional autonomy approach is that family decisions are private and do not impact on society more broadly. People should therefore be left alone to make decisions about family life."

[797] Boyd, *supra* note 346 at 297.

[798] Van Praagh, "Faith", *supra* note 193 at 155.

[799] Laufer-Ukeles, *supra* note 467 at 769.

duties to promote healthy relationships throughout its interactions with individuals, families, and communities.[800]

These relational premises explain why I find problematic Iacobucci and Major JJ.'s view that there was no need to balance (under s. 1) "the interests of the state against the rights violation of the aggrieved individual".[801] In their opinion, the only interests at stake were "Sheena's right to life and security of the person and her parents' right to freedom of religion."[802] From this angle, the case did not "involve conflicts between individual rights and state interests"[803] and thus did not necessitate a broad definition of the liberty interest and recourse to s. 1 for justification of the limits. Even the majority's acceptance that it is "inappropriate to allow an agency of the state to invoke the *Charter of Rights* to limit the rights of citizens"[804] overlooks the intertwined nature of the various interests and the joint responsibility of the state and parents to ensure a child's well-being.[805] As Joan Small points out, in certain cases involving a child's welfare, "absent state intervention, the infant's rights remain illusory at best."[806] Surely, she argues, "the state has an obligation to act",[807] to safeguard *Charter* rights, and to speak for the child, where necessary.[808] The state's interest becomes especially evident at s. 1, where, in protection cases, "the agency can advance its 'interest' in protecting

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[800] *Ibid* at 781. See also Minow & Shanley, *supra* note 464 at 6.
[801] *B (R)*, *supra* note 3 at 438.
[802] *Ibid*.
[803] *Ibid*.
[804] *B (R)*, *supra* note 3 at 373.
[805] Laufer-Ukeles, *supra* note 467 at 768–69. See also e.g. Bridgeman, *supra* note 66 at 142.
[806] Small, *supra* note 640 at 111.
[807] *Ibid*.
[808] *Ibid*.

children in answer to parental claims".[809] Consequently, any analysis of the limits imposed on parental rights to liberty and religious freedom "should incorporate and balance individuals, communities and state in the context of a shared commitment to 'our' children and future."[810]

Ultimately, s. 1 plays an important role in recognizing the impact of legal decisions on communities.[811] When judges balance different interests and assess harm under s. 1, they "incorporate the normative conflicts between the state and religious communities."[812] How they treat beliefs and practices in their judicial opinions has a correspondingly significant impact on adherents and communities: Van Praagh argues that "the 'legal consciousness' of adults and children changes; they perceive of their lives and relations in a new way, informed by the judgment of the state."[813] If a court orders "medically prescribed treatment . . . for children *without regard* for the perceived negative impact on their souls, the message is clear to the affected religious communities. Their authority is overruled and the children who belong to them in a meaningful way are claimed by outsiders guarding against the detrimental effects of community affiliation."[814]

By contrast, a court that is more "humble" and "caring"—and therefore more just—sends a different message to communities. When courts give voice to those communities' beliefs and show that they are open to trying to understand religion on its own terms, the law shows that it will strive to "contemplate and make room for religious

[809] R Thompson, *supra* note 459 at 157; see also Van Praagh, "Faith", *supra* note 193 at 165.
[810] Van Praagh, "Faith", *supra* note 193 at 201.
[811] *Ibid* at 189.
[812] *Ibid* at 188.
[813] *Ibid* at 193 [footnotes omitted].
[814] *Ibid* at 187 [emphasis added].

identity and affiliation in the everyday lives of its subjects and, in doing so, co-exists with multiple alternative normative systems."[815] And, Van Praagh writes, "[i]f the adherents to a religion are taken seriously by the *Charter*, then their religious communities are indirectly recognized. Recognizing 'individuals' as opposed to 'communities' is not the strict dichotomy it might at first seem."[816] Allowing for a more complex portrait of the role of religion in the "multi-faceted relationship among children, parents, communities, and the state"[817] is one more way in which courts can "acknowledge the inherent tension between the collective and the individual and find means of mediating as well as sustaining the tension."[818]

Greater insistence upon attachments, contextualism, transparent normative premises, humility, and empathy can alter the tone of the judicial narrative—and, by extension, shape public perception of the communities being written about and their relationship with the state. Berger highlights one field of study in particular that, at its core, centres on "the dynamics of cross-cultural encounter and the cultural force of state law":[819] Indigenous legal scholarship. Indeed, he writes, "[s]titched into the very fabric of this scholarship is the insistence that constitutional analysis must grapple with what it means to take culture seriously."[820] For this reason, Berger is inspired by the "conceptual allegiances"[821] between ss. 2(*a*) and 35(1) and by what the study of law and religion can learn from Indigenous legal scholarship, given the latter's "insistent focus on the quality

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[815] *Ibid* at 188.
[816] *Ibid*.
[817] *Ibid* at 165.
[818] Nedelsky, "Reconceiving Autonomy", *supra* note 407 at 35.
[819] Berger, *supra* note 62 at 194.
[820] *Ibid* at 193–94.
[821] *Ibid* at 194.

of relationships between and among groups as the controlling question of constitutional law, rather than the distracting question of law's fidelity to its own abstractions."[822]

In turn, Berger's bicameral adjudicative virtues and the integration of justice and care may offer Indigenous legal scholars some food for thought. These concepts call attention to the power of "the normative rules that structure contextual approaches"[823] and caution against "defining the otherness of marginalised people."[824] Relational theory can promote a more meaningful definition of autonomy, one that underscores the role of relationship[825] and "the sociopolitical situatedness of autonomous groups".[826]

4.2.2 A More Relational Perspective of Aboriginal Rights

The Supreme Court of Canada, as we have seen, has held that "aboriginal rights . . . arise from the fact that aboriginal people are aboriginal."[827] More specifically, they arise from the fact that "when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries."[828] From this premise, Manley-Casimir posits that Aboriginal rights can generally "be understood as embodying the concept of respect for difference".[829] This notion of intercultural respect tallies with Turpel's view that when Indigenous people make rights claims, "they are using the discourse of human rights . . .

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[822] *Ibid*.
[823] Leckey, *supra* note 390 at 81.
[824] Heather McDonald, "Culture in Health Research and Practice" in Ian Anderson, Fran Baum & Michael Bentley, eds, *Beyond Bandaids: Exploring the Underlying Social Determinants of Aboriginal Health* (Darwin, Australia: Cooperative Research Centre for Aboriginal Health, 2007) 255 at 259.
[825] *Ibid* at 205.
[826] *Ibid* at 200.
[827] *Van der Peet*, *supra* note 10 at para 19 [emphasis in original].
[828] *Ibid* at para 30.
[829] Manley-Casimir, *supra* note 213 at 164.

as an instrument for the recognition of historical claims of cultural difference."[830] She sees these rights claims as "requests for the recognition by the dominant (European) culture of the existence of another, and for toleration of, and respect for, the practical obstacles that the request brings with it."[831]

According to Christie, the "condition of difference"[832] that Turpel describes requires that non-Indigenous people stop trying "to impose universal visions of the nature of knowledge, the self and its relation to community".[833] In particular, Manley-Casimir argues, the future of Indigenous and non-Indigenous relationships depends upon a form of respect characterized by care principles: "care respect"[834] entails "valuing and responding to others in their concrete particularity;"[835] "coming to understand them in light of their own self-conceptions and trying to see the world from their point of view;"[836] and "caring for others by responding to their needs, promoting their well-being, and participating in the realization of their selves and their ends."[837]

I see compatibility between these attitudes and Berger's virtue of humility "about the potential universality of law's culture, about the capacity of law to understand other cultural forms, and about the ultimate contingency of the privilege enjoyed by law's

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[830] Turpel, "Interpretive Monopolies", *supra* note 92 at 33.

[831] *Ibid* [emphasis in original]. See also *ibid* at 29: "The risks inherent in formulating an appeal for recognition of cultural difference in terms acceptable to the rights paradigm of the Canadian constitution are high. This is a question of strategy and choice which I am certainly not in a position to resolve."

[832] Christie, "Law", *supra* note 56 at 113.

[833] *Ibid*.

[834] See Manley-Casimir, *supra* note 213 at 153ff.

[835] Robin S Dillon, "Respect and Care: Toward Moral Integration" (1992) 22:1 Can J Philosophy 105 at 115, cited in Manley-Casimir, *supra* note 213 at 153.

[836] Dillon, *supra* note 835 at 115, cited in Manley-Casimir, *supra* note 213 at 153.

[837] Dillon, *supra* note 835 at 116, cited in Manley-Casimir, *supra* note 213 at 153.

culture."[838] Legal actors who are humble may open themselves to being "uncomfortable in their knowledge of their own power, respectful of the legitimacy of competing legal systems, and aware of the possibility that multiple meanings and divergent practise ought sometimes to be tolerated, even if painfully so."[839] Such sentiments of discomfort, respect, and awareness may be useful, I believe, in allaying some of the apprehensions expressed by Turpel and Christie.

But Turpel also asks whether a judge can really "*know* a value which is part of an Aboriginal culture and not of her own"[840]—or, indeed, whether "anyone can *know* the basic differences as opposed to identifying difference".[841] In her opinion, "[s]ensitivity to cultural difference is sensitivity to the limitation of the capacity to know."[842]

If called upon to adjudicate Aboriginal rights claims, judges working within the framework of Canadian constitutionalism may engage in what Berger calls "interpretation-as-translation":[843] "a strong form of understanding whereby the judge is able to re-describe the practice or commitment in terms that make it consistent with or familiar to the culture of the law."[844] Berger sees examples of this process occurring in certain spheres of Indigenous law; he notes how "John Borrows has persuasively shown the manner in which translation, close listening, and conceptual agility can help to make

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[838] Berger, *supra* note 62 at 173.
[839] Resnick, *supra* note 687 at 25.
[840] Turpel, "Interpretive Monopolies", *supra* note 92 at 24 [emphasis in original].
[841] *Ibid* [emphasis in original].
[842] *Ibid* at 25.
[843] Berger, *supra* note 62 at 179.
[844] *Ibid*.

Indigenous legal practices and concepts comprehensible and acceptable to non-Indigenous Canadian law."[845]

But Berger has also clarified that such translation is not strictly necessary for the cultivation of indifference. A judge who is simply able to interpret a foreign practice in a manner that "does not trouble or challenge the law's constitutive commitments, intuitions, or practices"[846] will be able to "[stay] the culturally forceful hand of the law"[847] and create space for that practice, even "when the judge must furrow his or her brow in non-comprehension of the religious culture".[848]

Through his theory of justice as translation, James Boyd White, too, addresses the impossibility—for law, as for all languages—of ever fully understanding a different language, culture, or experience. He suggests that jurists should acknowledge this limitation and strive to "respect those differences even when we can only dimly perceive them."[849] He theorizes that all human interaction inevitably involves translation, "the art of . . . confronting unbridgeable discontinuities between texts, between languages, and between people."[850] Translation therefore requires that one recognize the other "as a center of meaning apart from oneself";[851] appreciate that one's response will never accurately represent the other; and acknowledge that inadequacy in what one says.[852] Translation is relational, a way of attempting "to be oneself in relation to an always

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[845] *Ibid*, citing John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41:2 McGill LJ 629 [Borrows, "With or Without You"]. See also John Borrows, "Listening for a Change: The Courts and Oral Tradition" (2001) 39:1 Osgoode Hall LJ 1.
[846] Berger, *supra* note 62 at 181.
[847] *Ibid*.
[848] *Ibid*.
[849] White, *Expectation*, *supra* note 767 at 140.
[850] White, *Translation*, *supra* note 687 at 257.
[851] *Ibid*.
[852] *Ibid* at 257, 258.

imperfectly known and imperfectly knowable other who is entitled to a respect equal to our own."[853] For White, this "ethic of the translator"[854] provides a useful framework for judging.[855]

The difficulty that Berger and White grapple with—the construction and affirmation of another's distinctiveness through the vehicle of one's own language—is a point of contention for a number of Indigenous legal scholars. Berger identifies the problem broadly as "one of the conundrums of cross-cultural adjudication: it demands engaging with and seeking to interpret the cultural other but necessarily from within, and in a manner intelligible to, the culture of law."[856] Religious applicants may discover that claims lose their meaning if transposed inadequately into a liberal legal terminology of "reason and right".[857] Indigenous communities also find themselves compelled to refashion their concerns and demands using the language of Canadian constitutionalism, even though its terms "may distort or misdescribe the claim they would wish to make if it were expressed in their own languages."[858] But for commentators like Turpel working within the unique context of Aboriginal rights, the "conundrum" assumes the form of a particularly grievous contradiction between, on the one hand, the Canadian state's intention of recognizing Indigenous peoples as distinct peoples and, on the other hand, its

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[853] *Ibid* at 258.
[854] *Ibid* at 268.
[855] *Ibid* at 264.
[856] Berger, *supra* note 62 at 179.
[857] *Ibid* at 158–59.
[858] See also James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, UK: Cambridge University Press, 1995) at 39 [Tully, *Strange Multiplicity*].

requirement that the "distinctness be expressed through something called Aboriginal *rights* defined by Canadian law".[859]

For Joshua Nichols, this paradox underscores the importance of the space that lies beyond translation. He views the principle of reconciliation as having evolved to recognize "a multiplicity of sovereignties";[860] at least two voices must now be heard in any assessment of the law's validity, the "single imperial voice" [861] no longer sufficing. If it is to become a truly mutual process,[862] he argues, reconciliation requires more than the exclusive reframing of "the aboriginal perspective"[863] into "terms cognizable to the Canadian legal and constitutional structure."[864] Courts cannot rely "solely on translation"[865] and must favour approaches that allow the law to be crafted "in and through a lateral process of communication."[866] Nichols senses promise in a judicial approach that "relies heavily upon evidence and judicial discretion"[867] in such a way as to "[open] up a space for the Aboriginal perspective to be heard."[868]

Berger's adjudicative virtues and White's ethic of the translator may allow for more situations in which the capacity to identify and respect difference, without fully understanding it, may be enough. They might, in this sense, begin to answer Christie's call for a "[theory] of respect and tolerance grounded in acknowledgment of [its] own

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[859] Turpel, "Interpretive Monopolies", *supra* note 92 at 37 [emphasis in original].
[860] Nichols, *supra* note 21 at 225 [footnotes omitted].
[861] *Ibid*.
[862] *Ibid* at 233.
[863] *Van der Peet*, supra note 10 at para 49.
[864] *Ibid*.
[865] Nichols, *supra* note 21 at 256.
[866] *Ibid*.
[867] *Ibid*.
[868] *Ibid*.

cultural limits and the potential danger posed by ignoring such limits".[869] The trajectory of the Supreme Court's case law has proven deeply unsatisfactory to Christie, who is highly critical of what he sees as the Court's perpetuation of a "colonial narrative"[870] in its construction of Aboriginal rights, one that fails to include Indigenous perspectives or capture the true essence of their interests. Christie declares that moving forward, Canadian courts must cease imposing their visions upon Indigenous peoples. To the extent that these courts continue to adjudicate such disputes, they should be steered by the principles of reconciliation, care, and justice towards approaches that prioritize dialogue, accord value and space to Indigenous voices, and avoid the distortion of Indigenous self-defined needs and demands.

The addition of a relational perspective to an analysis of parental autonomy in the Aboriginal rights context creates further nuances. Section 35 constitutes a particularly vivid illustration of the dual individual-collective nature of rights, and parental decision making about medical care can correspondingly be viewed as "a microcosm with macro-implications."[871] That is to say, *Hamilton* might be seen as emphasizing one First Nations mother's right to choose traditional medicines for her child, but that narrative is but one strand woven within a larger story about group autonomy and jurisdiction.

Macklem makes the connection between s. 35(1) and autonomy in proposing that s. 35(1) be read "as affirming a sphere of autonomy for native people over those matters

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[869] Christie, "Law", *supra* note 56 at 101.

[870] Gordon Christie, "A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*" (2005) 23 Windsor YB Access Just 17 at 46 [Christie, "Colonial Reading"].

[871] Jocelyn Downie, "A Choice for K'aila: Child Protection and First Nations Children" (1994) 2 Health LJ 99 at 104.

that are central to their individual and collective self-definition."[872] Fiona MacDonald acknowledges that a number of Indigenous scholars continue to issue "strong and perhaps prominent calls for indigenous autonomy defined as separation, or 'turning away' from the Canadian state";[873] nevertheless, she observes, certain others, most notably John Borrows and Dale Turner, are of the opinion that "an autonomous Aboriginal nation would encounter a geography, history, economics and politics that requires participation with Canada and the world to secure its objectives."[874]

However, "separation" is not necessarily antithetical to the concept of autonomy if the relational account indeed allows agents to "extricate themselves from bad relationships as well as to transform the structures that shaped those relationships."[875] From this perspective, D.H.'s leaving of the jurisdiction with her daughter prior to the hearing of the case[876] might be interpreted as a deployment of relational autonomy's "emancipatory power"[877] if the departure was prompted by a belief that the Canadian legal system represented a threat to her parental autonomy or the view that the state's authority over Indigenous autonomy in child welfare matters was illegitimate, oppressive

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[872] Macklem, *supra* note 152 at 451. See also Christie, "Law", *supra* note 56 at 98: Without the power to define themselves, Indigenous communities become "a people being constructed by another. . . . [T]hey effectively become 'another.'"

[873] MacDonald, "Relational Group Autonomy", *supra* note 238 at 207, citing Turpel, *supra* note 92; Patricia A Monture, *Journeying Forward: Dreaming First Nations' Independence* (Halifax, NS: Fernwood, 1999); Alfred Taiaiake & Jeff Corntassel, "Being Indigenous: Resurgences against Contemporary Colonialism" (2005) 40:4 Government & Opposition 597; Glen Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition in Canada" (2007) 6:4 Contemporary Political Theory 437.

[874] John Borrows, "Landed Citizenship: Narratives of Aboriginal Political Participation" in Will Kymlicka & Wayne Norman, eds, *Citizenship in Diverse Societies* (New York: Oxford University Press, 2000) 326 at 330. See also Turner, *supra* note 226. See also e.g. Napoleon, arguing that an account of freedom in which "the world power structure is not explicitly acknowledged and indigenous peoples are represented as free agents within it" is a narrow, colonialist vision of freedom: Val Napoleon, "Aboriginal Self Determination: Individual Self and Collectives Selves" (2005) 29:2 Atlantis 31 at 34.

[875] Nedelsky, *Law's Relations*, *supra* note 135 at 32. This is assuming that relational autonomy is not merely descriptive, and pending a definitive formulation of the content of relational autonomy.

[876] *Hamilton*, *supra* note 2 at para 6.

[877] MacDonald, "Relational Group Autonomy", *supra* note 238 at 204.

or unjust.[878] The reconceptualization of autonomy to include a social element does not foreclose the possibility that one's autonomy may be jeopardized in some cases by others' individual or collective choices.[879] And, according to Nedelsky, the capacity to be autonomous cannot exist "in the absence of the feeling or experience of being autonomous."[880] That is to say, autonomy can be destroyed by the feeling of powerlessness,[881] by subjection "to the arbitrary and damaging power of others."[882] But if justice is to set limits to protect parties in relationships from harm and ensure their capacity to be autonomous, in the context of Indigenous law, the underlying question persists: *whose* justice is to set these limits?

Indigenous people have had good reason to fear state oppression and injustice. As Marlee Kline points out, the "long and continuing struggle by many First Nations to regain control over child protection"[883] must be situated "within the context of the historically specific and disproportionately destructive impact that dominant child welfare regimes have had on First Nations people and communities".[884] First Nations autonomy with regard to child and family services will remain unsatisfactory, she predicts, as long

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[878] Constance MacIntosh, "The Governance of Indigenous Health" in Joanna N Erdman, Vanessa Gruben & Erin Nelson, eds, *Canadian Health Law and Policy* (Toronto: LexisNexis Canada, 2017) 135 at 139.
[879] Nedelsky, "Reconceiving Autonomy", *supra* note 407 at 36.
[880] *Ibid* at 24.
[881] *Ibid*.
[882] *Ibid*. In this sense, it has both an external and an internal component: it "is a capacity that exists only in the context of social relations that support it and only in conjunction with the internal sense of being autonomous" (*ibid* at 25).
[883] Marlee Kline, "Tory Tactics and Privatization of Child Welfare in Alberta" in Susan B Boyd, ed, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 330 at 339.
[884] *Ibid*. The struggle for autonomy in such matters should also be viewed in the context of Article 4 of the United Nations Declaration on the Rights of Indigenous Peoples, which states that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions" (UNGA, United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, A/RES/61/295).

as those past and present colonialist practices that contribute to the need for such services are not also addressed. In this sense, she concludes, "the welfare of First Nations children cannot be separated from the more general welfare of First Nations."[885]

Relational theory stresses the relation-structuring function of rights,[886] and MacDonald suggests that group autonomy should be understood as demanding the exposure of "relations of power"[887] and the effective empowerment of entities in their interactions with one another.[888] In particular, she writes, "the ability to act autonomously must include not only being accountable for oneself but also the ability to hold others to account."[889] Testifying to the continued need to hold the Canadian state to account, for instance, a 2016 decision of the Canadian Human Rights Tribunal concluded that Aboriginal Affairs and Northern Development Canada had discriminated against First Nations children and families living on reserve and in the Yukon in the provision of child and family services and, more specifically, in the provision of inequitable and insufficient funding for those services.[890] In its decision, the Tribunal explicitly recognized that First Nations children and families are and "have been adversely impacted by the Government of Canada's past and current child welfare practices on reserves."[891]

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[885] Kline, "Child Welfare Law", *supra* note 134 at 425.

[886] See e.g. Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 25.

[887] MacDonald, "Relational Group Autonomy", *supra* note 238 at 200.

[888] *Ibid* at 204.

[889] *Ibid* at 202. Interestingly, Bovens and his colleagues point out that "[a]ccountability is then a relational concept, linking those who owe an account and those to whom it is owed. Accountability is a relational concept in another sense as well, linking agents and others for whom they perform tasks or who are affected by the tasks they perform": Mark Bovens, Thomas Schillemans & Robert E Goodin, "Public Accountability" in Mark Bovens, Robert E Goodin & Thomas Schillemans, eds, *The Oxford Handbook of Public Accountability* (Oxford: Oxford University Press, 2014) 1 at 6. See also *ibid* at 3.

[890] *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2.

[891] *Ibid* at para 467.

Kline has identified how Canadian courts, "as institutions of the dominant society,"[892] have also committed injustices against Indigenous peoples in employing "dominant ideological representations of First Nations"[893] that devalue Indigenous practices. At times courts have attempted to adopt flexible, contextual approaches to the recognition of differences, thereby apparently challenging "certain devaluative representations of First Nations ways of life by recognizing their equal validity with those of the dominant society."[894] However, Kline and Patricia Monture warn that a court purporting to take a contextual approach must avoid actually misconstruing "the issue as one of *cultural* difference"[895] using "ethnocentric stereotypes . . . to shape the definition of 'community differences.'"[896] Kline asserts that, to truly promote these communities' autonomy in a respectfully contextual manner, courts must, where relevant, directly recognize the colonialist roots of a particular issue, and ensure that the communities are supported as needed "to confront and develop solutions to contemporary conditions and circumstances rooted in colonialist policies and practices of the past."[897]

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[892] Marlee Kline, "The Colour of Law: Ideological Representations of First Nations in Legal Discourse" (1994) 3 Soc & Leg Stud 451 at 468 [Kline, "Colour of Law"].

[893] *Ibid*.

[894] *Ibid* at 463.

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

[896] Patricia A Monture, "A Vicious Circle: Child Welfare and the First Nations" (1989) 3 CJWL 1 at 14.

[897] Kline, "Colour of Law", *supra* note 892 at 463. See also Kuokkanen, *supra* note 234 at 247:

> [T]here is a need for caution when using culture as justification for certain sets of rights (and not others). Cultural practices and customary contexts are also contested sites . . . especially in contemporary settings, characterized by systems of power relations and internal hierarchies of gender and status, among others. . . . [W]ithout examining various systems of hierarchy and contestation within indigenous communities, "analyses can run the risk of an idealized cultural determinism, especially if they focus exclusively on the semantics of cultural translation and provide wholly cultural answers to what are fundamentally political questions."

In her reading of Indigenous child welfare cases, Kline further detects "individualizing and obfuscating effects"[898] within the dominant ideology of motherhood and the liberal discourse of "choice;" as a result, "choice" is often "presented in abstract and simplified terms"[899] and constraints in women's lives overlooked, making options "appear viable."[900] She contends that a change in ideology can come about only with improvements to "the material conditions and power relations responsible for its production and reproduction."[901]

In his own work, Berger has also shown how assessments of harm or the best interests of a child can result in proxy debates. In some cases, "harm" or "best interests of the child" has been used as "a normative placeholder that offers a safe ground for resolving the issue".[902] Such an approach camouflages cultural and ideological disagreements over what really counts as a "cognizable 'interest'"[903] for a specific child, and Kline has denounced its use in the context of First Nations child welfare, calling attention to the damage wrought by reliance on a decontextualized, "universal"[904] best interests standard that views "the child as an abstracted individual whose interests are severable from those of her extended family, community, and First Nation."[905] In her opinion, this "liberal ideological form of the best interests standard has served to . . . minimize, and even negate in some instances, the relevance and importance of

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[898] Marlee Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women" (1993) 18 Queen's LJ 306 at 329.
[899] *Ibid* at 330.
[900] *Ibid* at 329.
[901] Kline, "Child Welfare Law", *supra* note 134 at 424.
[902] Berger, *supra* note 62 at 167.
[903] *Ibid*; see also Kline, "Child Welfare Law", *supra* note 134 at 395.
[904] Kline, "Child Welfare Law", *supra* note 134 at 415; see also Leckey, *supra* note 390 at 81–82.
[905] Kline, "Child Welfare Law", *supra* note 134 at 407.

maintaining a child's First Nations identity and culture",[906] thereby making the removal of the child appear more "natural, necessary, and legitimate".[907]

In addition to drawing attention to hidden normative assumptions, Berger's adjudicative virtues enjoin judges to be humble about the limits of law's culture, to be wary of law's power, to be respectful of other cultures, and to be "aware of the possibility that multiple meanings and divergent practise ought sometimes to be tolerated, even if painfully so."[908] Manley-Casimir's discussion of "care respect" in the context of Aboriginal rights seems to coincide with Berger's notion of humility. In particular, care respect encourages judges to create "space for Indigenous storytelling within courts",[909] so as to honour, listen to, and learn from Indigenous peoples. Indigenous claimants should be afforded the opportunity and agency to establish their identity on their own terms, and judges should avoid "[taking] on themselves the task of defining the otherness"[910] of Indigenous people.

Care respect also means not discounting the value of emotion and affect in decision making.[911] Just as Berger makes a link between humility and discomfort, Manley-Casimir asserts that in order to truly hear others' stories, empathetic judges must be open to their own emotions and unease, and avoid "silencing Indigenous peoples by failing to recognize the relevance of their pain to the issues in dispute, reinforcing

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[906] *Ibid* at 396.
[907] *Ibid* at 394. Kline has identified this narrative pattern more generally in Aboriginal rights cases, arguing that law's ideological form, grounded in liberalism and "often abstract and indeterminate[,] . . . facilitates the judicial importation of racist ideological thought . . . into the legal interpretive process" (Kline, "Colour of Law", *supra* note 892 at 452).
[908] Resnick, *supra* note 687 at 25.
[909] Manley-Casimir, *supra* note 213 at 352.
[910] McDonald, *supra* note 824 at 259.
[911] See e.g. Manley-Casimir, *supra* note 213 at 351.

unequal power relations, and preventing non-Indigenous people, including judges, from engaging in creative acts that are deeply transformative."[912] Moreover, judges must be sensitive to the emotions Indigenous peoples express, given that feelings of autonomy are essential for the capacity to be autonomous, and given that a focus on such feelings acknowledges "as authoritative the voices of those whose autonomy is at issue"[913] and helps judges to effectively support and protect Indigenous autonomy.

Additionally, Manley-Casimir calls on judges to "engage their moral imagination in making decisions involving Aboriginal claims."[914] In doing so, they may be able "to imagine that multiple realities and worldviews can exist simultaneously without the need to impose colonial views on Indigenous peoples."[915] Similar to the value and tension created by the integration of fidelity and humility, the moral imagination might "enable a Canadian judge to question the basis and legitimacy of the Canadian state's assertion of sovereignty without requiring the corresponding dismantling of the state."[916] It might lead, Manley-Casimir suggests, "to the creation of mutually agreed dispute resolution mechanisms that create dialogue and transform Indigenous/non-Indigenous relationships from those based on violence and coercion to those based on mutual respect."[917]

Borrows points to examples of creative and respectful mechanisms in Canadian jurisdictions where "traditional Aboriginal practices regarding justice [have been] modified to interact with courtroom procedures."[918] In his opinion, the incorporation of

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[912] *Ibid* at 351.
[913] Nedelsky, "Reconceiving Autonomy", *supra* note 407 at 25.
[914] Manley-Casimir, *supra* note 213 at 355.
[915] *Ibid* at 355-56.
[916] *Ibid* at 356.
[917] *Ibid*.
[918] Borrows, "With or Without You", *supra* note 845 at 655.

First Nations laws and practices into Canadian law represents a valuable contribution and helps to counteract the biases and clout of non-Aboriginal laws,[919] making "the law truly Canadian and, as a result, more equitable and fair."[920] Notably, Borrows suggests that a greater awareness of Indigenous law may also assist judges in engaging with Indigenous "spirituality on its own terms and could help the courts take a more self-reflexive and self-conscious stance in their work"[921]—in other words, show more humility.

In the medical decision-making context, judges who adopt the virtue of humility might afford Indigenous people greater space to define their own identities. By embracing such accounts and using their moral imagination, judges might recognize that health systems and the biomedical model of illness are not a-cultural;[922] they might envisage the existence of multiple world views and "alternative modernities"[923] in a way that avoids making "Indigenous people . . . strangers to their experiences of sickness and health".[924]

With the respect he showed to D.H.'s practices and his refusal to subordinate her views to "the western medical paradigm",[925] Edward J. seemingly avoided the "devaluative"[926] ideological representations that Kline condemns. His Endorsement further showcases an instance in which multiple world views and modernities were allowed to coexist. The Government of Ontario listened to the family and community, choosing respect, dialogue, and cooperation over further conflict, with all parties working

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[919] *Ibid* at 642.
[920] *Ibid* at 654. Borrows points out that the Supreme Court's definition of Aboriginal rights allows for the harmonization of First Nations and European legal systems, making these unique rights "truly indigenous" (*ibid* at 634).
[921] Borrows, *Canada's Indigenous Constitution*, *supra* note 136 at 411, n 75.
[922] McDonald, *supra* note 824 at 256 and 258.
[923] *Ibid* at 259.
[924] *Ibid* at 256.
[925] *Ibid* at para 81.
[926] Kline, "Colour of Law", *supra* note 892 at 455.

together to offer J.J. the best treatment possible.[927] The approach they took "recognizes the province's acceptance of the family's right to practice traditional medicine and the family's acceptance western medicine will most certainly help their daughter."[928] The amended reasons now also confirm the child's distinct (but interdependent) identity and interests, and explicitly acknowledge that "[t]he aboriginal right to use traditional medicine must be respected, and must be considered, *among other factors*, in any analysis of the best interests of the child, and whether the child is in need of protection."[929] As such, the reasons are consistent with Bridgeman's position that courts, just as much as parents, must "undertake full consideration of the best interests of [a] particular child"[930] and avoid focusing on one aspect of the child's well-being to the exclusion of others.

However, the initial assessment of whether D.H.'s decision made J.J. a child in need of protection was never fully fleshed out. Edward J.'s question (which he answered in the affirmative) was "whether D.H.'s decision, as J.J.'s substitute decision-maker, to pursue traditional medicine is in fact an aboriginal right to be recognized and affirmed."[931] But that question is not quite the same as asking whether D.H. had a "constitutionally protected right to pursue their traditional medicine *over the applicant's stated course of treatment of chemotherapy*",[932] as it was phrased in the conclusion. The constitutional right to use one type of medicine does not necessarily preclude the simultaneous need for another treatment; the administration of the latter treatment does not automatically constitute an infringement of the right. And the question of what a child

[927] JSP, *supra* note 29; *ibid* at 5.
[928] *Endorsement*, *supra* note 28 at 5.
[929] JSP, *supra* note 29 at para 83a [emphasis added].
[930] Bridgeman, *Parental Responsibility*, *supra* note 66 at 146.
[931] *Hamilton*, *supra* note 2 at 62.
[932] *Ibid* at 83 [emphasis added].

needs is not automatically answered by a determination of what her parent's rights are. From the relational perspective, it would be premature to terminate an inquiry into a child's best interests following a conclusion that her parent or community had a right, even a right to autonomy, if autonomy is to be understood as the capacity for agency within social relations.

For the sake of discussion, let us suppose that a court holds that it is in a child's best interests to receive a particular treatment, the child's parents have an Aboriginal right to use traditional medicines, and that right has been infringed. What might constitute a legitimate limit to such a right? Any government regulation that infringes upon an Aboriginal right must be justified, so as to reconcile the state's legislative power with its duty towards Indigenous peoples, and reconcile "Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship".[933]

In her thesis, Manley-Casimir applies a relational framework to the duty to consult and accommodate, with the aim of helping judges and government actors pursue the goal of reconciliation. Judges, she suggests, can promote more creative remedies and dialogue by "supporting the operation of flexible platforms to facilitate the resolution of disputes involving Indigenous/non-Indigenous disputes."[934] They can "examine with care the way in which the consultation processes were designed and the extent to which such processes were the result of collaborative efforts between the affected Indigenous community, government, and industry."[935]

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[933] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10, [2010] 3 SCR 103.
[934] Manley-Casimir, *supra* note 213 at 354.
[935] *Ibid* at 356.

The consulting parties should have been able to consider government accommodations to redress any historical grievances;[936] this process contextualizes the process and "supports a constructive consideration of the past in shaping present and future relationships."[937] The state must recognize that power imbalances require rectification and "opportunities for dialogue . . . in which autonomous groups can continually address the medium of their autonomy as well as any ongoing or new obligations and responsibilities that arise between agents."[938]

A court might also "consider whether the consultation process provided opportunities for community members to tell their stories and interact directly with government and industry officials."[939] State officials should have made efforts "to enter into relationship with Indigenous leaders and community members and attempt[ed] to genuinely understand the harms from their perspectives."[940] The emphasis, Manley-Casimir writes, "is on creating personal, empathetic connections between the parties so that each parties' concerns and perspectives are shared and inform the process and decision-making."[941] These "positive obligations on the Canadian government to engage in dialogue with Indigenous peoples"[942] are consistent with the principle of reconciliation[943] and the need for case law made "in and through a lateral process of communication."[944]

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[936] *Ibid* at 357.
[937] *Ibid*.
[938] MacDonald, "Relational Group Autonomy", *supra* note 238 at 209; see also e.g. *ibid* at 359.
[939] Manley-Casimir, *supra* note 213 at 358.
[940] *Ibid* at 88.
[941] *Ibid* at 359.
[942] *Ibid* at 80.
[943] *Ibid*.
[944] Nichols, *supra* note 21 at 256.

Ultimately, the issue in *Hamilton* seems to have been resolved in an exemplary manner, reflecting an approach that ostensibly illustrates many of the qualities discussed, such as respect, cooperation, dialogue, and the integration of multiple practices and world views. The parties' interactions suggest that efforts were made to build relationships, maintain ties, involve community members, listen to different perspectives, and create empathetic connections. The parties' apparent willingness to come together, engage the moral imagination, and make possible the coexistence of world views resulted in a solution that seems to have allowed the Government of Ontario to discharge its responsibilities while respecting the exercise of D.H.'s and her community's rights. An optimistic observer might consider that the approach ultimately joined together members of different groups, including health professionals and state representatives, "in a community of mutual concern and mutual aid, through an appreciation of individuality and interdependence."[945]

Finally, in its dealings with Indigenous peoples, the state should remember that its attitude towards a community will be revealed through its treatment of that community's children,[946] and intervention in the lives of children, parents, and communities without consideration of their perspective sends the message that "[t]heir authority is overruled and the children who belong to them in a meaningful way are claimed by outsiders guarding against the detrimental effects of community affiliation."[947] In fact, Van Praagh notes, "[t]he most stark example"[948] of this link between children and a community's

[945] Dillon, *supra* note 835 at 129.
[946] Van Praagh, "Faith", *supra* note 193 at 187.
[947] *Ibid* at 187. See also *ibid* at 166: "readers are invited to contemplate the analogous community-related possibilities for the meaning of aboriginal rights, recognition of which is found in the *Charter*."
[948] *Ibid* at 187.

survival lies in Canada's history of residential schools.[949] It is a dark legacy that bares truth to the intertwined nature of individual and collective interests[950] and the connection between the vitality of Indigenous communities and their effective exercise of autonomy, understood as the ability to define their own identities and live by that definition. Children are members of many different communities, each of which plays a role in contributing to their well-being. In the case of Indigenous children and parents, a relational account of autonomy demands scrupulous scrutiny and full accounting of the manner in which the state exercises its authority and honours its obligations to their communities.

[949] *Ibid*.

[950] See e.g. Bernd Walter, Janine Alison Isenegger & Nicholas Bala, "'Best Interests' in Child Protection Proceedings: Implications and Alternatives" (1995) 12 Can J Fam L 367 at 405; Kline, "Child Welfare Law", *supra* note 134 at 424-25.

Chapter 5: Conclusion

For many of the authors examined above, the ultimate significance of a judicial opinion lies not in any specific ruling, although results evidently matter a great deal. In this regard, the theme recurring throughout this thesis—encompassing the notion of the relational self, the integration of care and justice, and Berger's bicameral ethos—resonates at multiple levels. *Hamilton* and *B. (R.)* were chosen as the backdrop to this thesis not necessarily to emphasize their outcomes, pronounce upon the legitimacy of state action in any particular case, or contrast the doctrinal analyses of ss. 2(*a*) and 35(1). Rather, they serve to highlight the importance of the underlying text and the manner in which it treats and conceptualizes its subjects.[951] White contends that of greater value than the outcome arrived at is the question of whether "the opinion establishes an appropriate relation with the prior texts to which it owes fidelity, with the reader, and with those other people that it talks about".[952] He urges readers to evaluate an opinion, determine the meaning of justice, and locate law's authority in terms of conversation, voice, attitude, character, and relations—that is, "who we are to each other in our talk and in our lives."[953] He argues that law is fundamentally about "voices and relations: what voices does the law allow to be heard, what relations does it establish among them? With what voice, or voices, does the law itself speak?"[954] In his view, the law's treatment of those it talks about will reflect—poorly or favourably—upon the law itself.[955] Horwitz similarly ties the authority and legitimacy of the law to the relationship it establishes with

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[951] Van Praagh, "Faith", *supra* note 193 at 202; White, *Translation*, *supra* note 687 at 217, 222; James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, Wis: University of Wisconsin Press, 1985) at 107 [White, *Heracles' Bow*].
[952] White, *Translation*, *supra* note 687 at 222.
[953] *Ibid* at 217, 121; *Heracles' Bow*, *supra* note 951 at 47, 134.
[954] White, *Heracles' Bow*, *supra* note 951 at 42.
[955] White, *Expectation*, *supra* note 767 at 40–41; see also *ibid* at 107–08.

its readers, such that its treatment of people's deeply cherished values and commitments will affect their loyalty to the state and desire to contribute to society.[956] Ultimately, for White, "the heart of justice is . . . relational",[957] to be found in the way we "regard and speak to one another".[958]

The importance of voice and attitude extends to the way in which the law talks about itself and its relationship with citizens, groups, and other cultures. One leitmotif throughout this thesis has been the theme of stories and myths: the "myth" of liberal individualism;[959] the "autonomy myth";[960] the "critique of the myth of the 'isolated individual'";[961] "the myth of the self-made man";[962] and the conventional story about law's autonomy from culture,[963] criticized by Berger and labelled a "mythological narrative" by Sullivan, Yelle, and Taussig.[964]

The label of "myth" may, at one level, be understood as denoting "a false statement, an opinion popularly held"[965] but shown by experts to be inaccurate. However, the concept of myth involves several levels of meaning,[966] not the least of which is, according to Robert Taylor, the portrayal of "images, metaphors and symbol systems

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[956] Horwitz, *supra* note 105 at 61.
[957] James Boyd White, "Law and Literature: 'No Manifesto'" (1988) 39 Mercer L Rev 739 at 751.
[958] White, *Heracles' Bow*, *supra* note 951 at 137.
[959] Bird, *supra* note 376.
[960] Fineman, *supra* note 85.
[961] Cockburn, *supra* note 463 at 72.
[962] Friedman, *Autonomy*, *supra* note 84 at 103.
[963] Berger, *supra* note 62 at 147.
[964] Winnifred Fallers Sullivan, Robert A Yelle & Mateo Taussig-Rubbo, "Introduction" in Winnifred Fallers Sullivan, Robert A Yelle & Mateo Taussig-Rubbo, eds, *After Secular Law* (Stanford: Stanford Law Books, 2011) 1 at 6. See also Cover, "*Nomos* and Narrative", *supra* note 686; Peter Fitzpatrick, *The Mythology of Modern Law* (New York: Routledge, 1992).
[965] William Irwin Thompson, *The Time Falling Bodies Take to Light: Mythology, Sexuality, and the Origins of Culture* (New York: St. Martin's, 1981) at 5.
[966] JC Smith, "The Sword and Shield of Perseus: Some Mythological Dimensions of the Law" (1983) 6 Intl J L & Psychiatry 235 at 239; *ibid*.

which comprise the stories or narrative accounts by which we direct our lives".[967] Colin Grant, too, describes myths as comprehensive stories and perspectives that shape life and define reality, often at a level so fundamental as to go unnoticed.[968] Hence, "[a]ny world view . . . is a mythic structure."[969] Myths function to some extent like glasses, Grant suggests, enabling us to see and make sense of the world,[970] and "[t]o identify something as myth is . . . to have stepped outside of its own perspective"[971]—in other words, to have removed one's glasses.[972] But the conundrum of course is that "[t]here is no view from no where",[973] and "[w]e are always looking out from some perspective",[974] some mythological structure.

If these stories—such as those that tell of the meaning of autonomy, the value to be accorded to different practices, or the nature of relationships—turn out to be inadequate, Berger argues, they must be retold, for "[t]hey have implications for the way in which society is shaped. Equipped with these narratives that lend a particular significance or meaning to the phenomena of social life, we are led to act in particular ways, judge in particular fashions, and thus to create particular political realities."[975] In light of these tangible effects created by stories, the commentators surveyed throughout this thesis urge jurists not only to make judicious choices in the narratives they absorb and retell, but also to take care in the telling of their own stories.

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[967] Robert D Taylor, "Reclaiming Our Roots: Law and Mythology" (1991) 29 Duq L Rev 271 at 272–73.
[968] Colin Grant, *Myths We Live By* (University of Ottawa Press, 1998) at 1, 13.
[969] Smith, *supra* note 966 at 236.
[970] Grant, *supra* note 968 at 13.
[971] *Ibid* at 4.
[972] *Ibid* at 13.
[973] Tully, *Strange Multiplicity*, *supra* note 858 at 56.
[974] Grant, *supra* note 968 at 14.
[975] Berger, *supra* note 62 at 146–47.

It seems to me that judicial opinions can themselves be read as myths; the issues they examine are "stated within a legal context but ultimately point beyond to the realm of world view."[976] Law is about storytelling,[977] about a "complex of characterizations and imaginings, stories about events cast in imagery about principles".[978] Through judicial decision making, courts "participate in an intensely practical and multilayered discourse about what society should be like . . . [and] . . . can make a special contribution to the public struggle for meaning and identity."[979] They strive to voice narratives that we believe in and that express society's collective choices and values, established through public debate and dialogue.[980] Law is built upon symbols, "a way of talking of one thing in terms of another, of life in terms of law".[981] Among these powerful symbols are the concept of rights, which Nedelsky argues are essentially "terms for capturing and giving effect to what judges perceive to be the values and choices that 'society' has embedded in the 'law.'"[982]

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[976] John D Loftin, "Anglo-American Jurisprudence and the Native American Tribal Quest for Religious Freedom" (1989) 13:1 American Indian Culture & Research J 1 at 35. See also James Boyd White, *The Legal Imagination*, abridged ed (Chicago: University of Chicago Press, 1985) at 246 [White, *Legal Imagination*].

[977] See e.g. Thomas Ross, "The Richmond Narratives" (1989) 68 Tex L Rev 381 at 385; White, *Legal Imagination*, *supra* note 976.

[978] Geertz, *supra* note 62 at 215.

[979] Sullivan, *supra* note 60 at 7.

[980] Nedelsky, "Reconceiving Rights", *supra* note 425 at 4; Robert C Post, "Who's Afraid of Jurispathic Courts: Violence and Public Reason in *Nomos* and Narrative" 17 Yale JL & Human 9 at 15.

[981] White, *Legal Imagination*, *supra* note 976 at 223–24. Many like Taylor have pointed out that the legal profession "surrounds itself with, and indeed even drapes itself in, mythological symbols" (Taylor, *supra* note 967 at 282). Taylor argues that the legitimacy of the law rests upon mythological structures (*ibid* at 285). See also Fitzpatrick, *supra* note 964 (on law as mythology); Bill Moyers, "Introduction" in Joseph Campbell, *The Power of Myth* (New York: Anchor Books, 1988) at xiii (on Campbell's view of the mythologizing of the power of the judge); White, *Legal Imagination*, *supra* note 976 at 224 (on the "idea of judicial ritual which lies behind the opinion").

[982] Nedelsky, "Reconceiving Rights", *supra* note 425 at 4. For example, Nedelsky explains, constitutional rights "define basic ways we must treat each other as equals as we make our collective choices" (*ibid* at 21).

To view judicial opinions as myths depicting particular world views and values is also, perhaps, to understand how we "experience narratives as moralizing discourse."[983] Law and myth are related, in Smith's view, insofar as "[t]he mythic structure furnishes the link between the normative and the natural, between what is and what ought to be."[984] Narratives connect reality with social systems of morality.[985] Perhaps we need this link to be made, Thomas Ross theorizes, because "only in a fully realized story can we understand the moral teaching."[986] General principles remain "an abstraction without force until the storyteller provides additional perspective".[987] In other words, "[n]arrative, which is contextualized writing, makes 'an abstract claim more tangible.'"[988] This connection between principles and context is mirrored in the conviction that justice and care and must be integrated, since, as Clement argues, "attention to details . . . is not just the nonmoral preliminary to the distinctively moral process of applying an abstract principle, but is itself a moral process. A truly just person, not just a caring person, is one whose judgments arise out of close attention to contextual details. Deciding which principles are relevant and what priority to give them requires full attention to context."[989] This is the intersection of contextualism and normativity that Leckey identifies.[990]

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[983] Ross, *supra* note 977 at 384.
[984] Smith, *supra* note 966 at 239.
[985] Hayden White, "The Value of Narrativity in the Representation of Reality" (1980) 7:1 Critical Inquiry 5 at 5, 18-19.
[986] Ross, *supra* note 977 at 384.
[987] *Ibid*.
[988] N Cook at 114, *supra* note 1.
[989] Clement, *supra* note 416 at 77.
[990] Leckey, *supra* note 390 at 278.

To attend to context is to make normative evaluations and choices[991]—as White explains it, "[a]s soon as you start off on a story, you face a choice as to how to tell it."[992] Essentially, White summarizes, "[t]he judge is always a *person* deciding a case the story of which can be characterized in a rich range of ways; and he (or she) is always responsible both for his choice of characterization and for his decision."[993] Ross views the judicial opinion as a story that explains the judge's choice;[994] we can therefore "explore the responsibility of judges as storytellers",[995] recognizing, as Lewis H. LaRue does, that some stories "are better than others."[996]

To acknowledge the choices that judges make between various possibilities—"various ways in which stories can be told, claims made, and values characterized"[997]—is also to recognize that "[t]he law builds itself, over time, by discarding possibilities for speech and thought as well as by making them; and what it discards is for some person or people a living language, a living truth."[998] Legal actors should take responsibility for these lost possibilities[999] and remember that the obligation of accountability "gives rise to story-telling in a context of social (power) relations".[1000] A properly written judicial opinion, for White, needs to "be a force for multivocality"[1001] and "reflect the competing

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[991] *Ibid* at 97–98. See also White, *Heracles' Bow*, *supra* note 951 at 175.
[992] White, *Legal Imagination*, *supra* note 976 at 238. We see, for example, "[h]ow differently the dissent and majority in case after case tell the story" (*ibid*).
[993] White, *Heracles' Bow*, *supra* note 951 at 123 [emphasis in original].
[994] Ross, *supra* note 977 at 386. "Judges, as storytellers, tell their audiences that something happened. The 'something' that happened is the process of choice" (*ibid*).
[995] *Ibid* at 411.
[996] LH LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (University Park, PA: Pennsylvania State University Press, 1995) at 14. See also White, *Expectation*, *supra* note 767 at 41.
[997] White, *Heracles' Bow*, *supra* note 951 at 124.
[998] White, *Translation*, *supra* note 687 at 262.
[999] *Ibid* at 263.
[1000] Bovens, Schillemans & Goodin, *supra* note 889 at 3.
[1001] White, *Translation*, *supra* note 687 at 267.

voices and languages that define the case before it (including those that it ultimately disregards or silences) and thus expose the ground upon which its own result, its own achievement, can be qualified and criticized."[1002]

Legal actors walk a fine line between fidelity to law's culture and humility before the possibilities of other conventions; between defence of law's values and respect for others'; between commitment to an intellectual tradition and the responsible exercise of one's autonomy; between general principles of justice and contextual details; "between narrative and theory, between fact and law".[1003] In the metaphor of myths as glasses, openness to other perspectives might help with the conundrum of how to examine the "glasses we normally wear . . . without the benefit of the glasses themselves."[1004] We might improve our formative perspectives if we "decide that it is time we had our eyes checked,"[1005] if we take off our glasses, try on a new pair, look at our glasses, "even clean them, and put them on again."[1006]

In listening to and responding respectfully to community members, courts establish conversations and relationships with readers and those they write about. We can explore the "ethical character"[1007] of these relations and ask how the speaker's narrative, tone, and demeanour help to create, sustain, or undermine relationships with audiences. We may judge the quality of a narrative by assessing its treatment of those who hold

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[1002] *Ibid* at 263. Multivocality is part of the art of translation, which White analogizes to the practice of law (*ibid* at 223, 246).

[1003] White, *Legal Imagination*, *supra* note 976 at 244. See also Cover, "*Nomos* and Narrative", *supra* note 686 at 5: "In [the] normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse — to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral." [Footnotes omitted]

[1004] Grant, *supra* note 968 at 13.

[1005] *Ibid* at 16–17.

[1006] *Ibid* at 16.

[1007] White, *Translation*, *supra* note 687 at 216.

different values—whether it denies or accords them respect,[1008] whether it leaves room for distinct and differing voices to be heard,[1009] and whether certain voices have been "left out or objectified".[1010] It is, Van Praagh writes, "[w]hen community members tell their stories of affiliation, when those stories change shape as they mingle with those of other communities and their members, when they are listened to, absorbed and retold by the state, . . . [that] the law truly grapples with the multiple identities and shifting definitions of integrity that exist for its subjects."[1011] If courts can incorporate these subjects' stories and voices into their judicial narratives, then Canadian constitutional law "may truly reflect the complexities of our lives and connections"[1012] and demonstrate "the possibility for toleration of differences and the recognition of autonomous or incommensurable communities."[1013]

We can also judge the quality of a judicial opinion by the type of reader (and community) it aspires to create and with whom it establishes relationships. White envisions an "Ideal Reader, the version of himself or herself that it asks each of its readers to become".[1014] Such readers open their minds and hearts; they struggle to better themselves, to grasp other perspectives, to question what narratives or stories are not being told.[1015] For White, judicial opinions are "socially constitutive":[1016] they are "produced by actual speakers in actual social contexts, addressing actual audiences whom

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[1008] LaRue, *supra* note 996 at 26.
[1009] White, *Translation*, *supra* note 687 at 121.
[1010] *Ibid* at 223.
[1011] Van Praagh, "Faith", *supra* note 193 at 203.
[1012] *Ibid*.
[1013] Turpel, "Interpretive Monopolies", *supra* note 92 at 45.
[1014] White, *Translation*, *supra* note 687 at 100.
[1015] *Ibid* at 101; Ross, *supra* note 977 at 412.
[1016] White, *Heracles' Bow*, *supra* note 951 at 131; see also Geertz, *supra* note 62 at 218.

they wish to persuade or influence".[1017] They create "a community and a culture of a certain kind"[1018] and "a sense of the facts of the world and what counts as reason within it."[1019] We may assess judicial opinions according to the narratives they tell about what society is and should be like, and whether these narratives truly reflect our own stories. Because the culture of law is constantly being remade by legal actors, these participants bear a responsibility for the myths and narratives they tell, and "for the nature of that culture and the world it creates",[1020] which are no less important than the legal principles and outcomes established by the judicial opinions.[1021]

In the end, White advises us to judge a judicial opinion according to how true it is to the relational heart of justice.[1022] Justice lies in the manner in which we "regard and speak to one another".[1023] Through persuasion and exemplification, a judicial opinion should show us how to lead relational lives, "to be distinctively ourselves in a world of others: to create a frame that includes both self and other, neither dominant, in a[n] image of fundamental equality",[1024] recognizing "the equal value of each person as a center of

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[1017] White, *Heracles' Bow*, *supra* note 951 at 130–31.

[1018] White, *Translation*, *supra* note 687 at 91.

[1019] White, *Heracles' Bow*, *supra* note 951 at 130–31.

[1020] Sullivan, *supra* note 60 at 16. As John Ralston Saul also remarks, "'[t]he narrative is how you think of things.' And how you think of things will shape much of what you do or what you want to do or how you understand what you shouldn't do": John Ralston Saul, *A Fair Country: Telling Truths About Canada* (Toronto: Viking, 2008) at 21.

[1021] White, *Heracles' Bow*, *supra* note 951 at 35; Sullivan, *supra* note 60 at 7. See also Sullivan, *supra* note 60 at 163: "How the courts talk about religion is critical, because the texture of the public discourse about religion creates a culture about religion. People's lives are given meaning in the spaces created by words. If the courts distort American religion when they talk about it, they both do violence to people's experiences and undermine their own authority." And see Christie, "Colonial Reading", *supra* note 870 at 52: "Unquestionably, the colonial courts of Canada have played a key role in the development, maintenance and strengthening of a particular sort of truth-generating narrative, for they have made, and continue to make, essentially important choices that go directly to forming the very identity of the nation-state of which they are an extension."

[1022] White, "No Manifesto", *supra* note 957 at 751.

[1023] White, *Heracles' Bow*, *supra* note 951 at 137; see also *ibid*.

[1024] White, *Translation*, *supra* note 687 at 264.

worth and meaning, as one who lives in a perpetual process of reciprocal interaction with nature, language, and other people, by which he is made and through which he makes himself."[1025]

All relational selves inhabit a middle ground "[b]etween two nonexistent opposites—total freedom and total constraint":[1026] parents making decisions for their children; adherents living their religion; members of cultural communities interpreting and re-interpreting their traditions in light of new contexts; legal actors working out the appropriate relationship between law and other cultures, between principles and facts. Geertz tells us that once we accept the premise that the isolated self is illusory, the question becomes "not whether everything is going to come seamlessly together or whether, contrariwise, we are all going to persist sequestered in our separate prejudices. It is whether human beings are going to continue to be able . . . through law . . . to imagine principled lives they can practicably lead."[1027] The question, then, is whether the law can show us to the equilibrium at the heart of relational autonomy: the capacity to lead lives and make decisions that are at once principled and caring.

[1025] *Ibid* at 269.
[1026] *Ibid* at 265.
[1027] Geertz, *supra* note 62 at 234.

Bibliography

LEGISLATION

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Child and Family Services Act, RSO 1990, c C-11, as repealed by *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Schedule 1.

Child Welfare Act, RSO 1980, c 66, as repealed by *Child and Family Services Act, 1984*, SO 1984, c 55, s 208.

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Divorce Act, RSC 1985, c 3 (2nd Supp).

Immigration and Refugee Protection Act, SC 2001, c 27.

JURISPRUDENCE: CANADA

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567.

Beckman v Little Salmon/Carmacks First Nation, 2010 SCC 53, [2010] 3 SCR 103.

Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 SCR 307.

B (R) v Children's Aid Society of Metropolitan Toronto, [1995] 1 SCR 315, 21 OR (3d) 479.

Carter v Canada (Attorney General), 2015 SCC 5, [2015] 1 SCR 331.

Catholic Children's Aid Society of Metropolitan Toronto v M (C), [1994] 2 SCR 165.

Chamberlain v Surrey School District No 36, 2002 SCC 86, [2002] 4 SCR 710.

Ciarlariello v Schacter, [1993] 2 SCR 119, [1993] SCJ No 46.

Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203, 173 DLR (4th) 1.

Delgamuukv v British Columbia, [1997] 3 SCR 1010, 153 DLR (4th) 193.

EDG v Hammer, 2003 SCC 52, [2003] 2 SCR 459.

First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2.

Godbout v Longueuil (City), [1997] 3 SCR 844, 152 DLR (4th) 577.

Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511.

Hamilton Health Sciences Corp v DH, 2014 ONCJ 603, 123 OR (3d) 11.

Hamilton Health Sciences Corp v DH, 2015 ONCJ 229.

Hepton et al v Maat, [1957] SCR 606, 10 DLR (2d) 1.

King v Low, [1985] 1 SCR 87, [1985] SCJ No 7.

KLB v British Columbia, 2003 SCC 51, [2003] 2 SCR 403.

Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations), 2017 SCC 54, [2017] 2 SCR 386.

Law Society of British Columbia v Trinity Western University, 2018 SCC 32.

Loyola High School v Quebec (Attorney General), 2015 SCC 12, [2015] 1 SCR 613.

Malette v Shulman, 72 OR (2d) 417, [1990] OJ No 450.

Mitchell v MNR, 2001 SCC 33, [2001] 1 SCR 911.

M (K) v M (H), [1992] 3 SCR 6, 96 DLR (4th) 289.

NB v Hôtel-Dieu de Québec, [1992] RJQ 361, 86 DLR (4th) 385.

New Brunswick (Minister of Health and Community Services) v G (J), [1999] 3 SCR 46, 216 NBR (2d) 25.

Operation Dismantle v R, [1985] 1 SCR 441, 18 DLR (4th) 481.

Racine v Woods, [1983] 2 SCR 173, 1 DLR (4th) 193.

Ross v New Brunswick School District No. 15, [1996] 1 SCR 825, 171 NBR (2d) 321.

R v Big M Drug Mart Ltd, [1985] 1 SCR 295, 18 DLR (4th) 321.

R v Côté, [1996] 3 SCR 139, 138 DLR (4th) 385.

R v Edwards Books and Art Ltd, [1986] 2 SCR 713, 35 DLR (4th) 1.

R v Jones, [1986] 2 SCR 284, 31 DLR (4th) 569.

R v Morgentaler, [1988] 1 SCR 30, 63 OR (2d) 281.

R v Sappier; R v Gray, 2006 SCC 54, [2006] 2 SCR 686.

R v Sparrow, [1990] 1 SCR 1075, 70 DLR (4th) 385.

R v Van der Peet, [1996] 2 SCR 507, 137 DLR (4th) 289.

SL v Commission scolaire des Chênes, 2012 SCC 7, [2012] 1 SCR 235.

Syndicat Northcrest v Amselem, 2004 SCC 47, [2004] 2 SCR 551.

JURISPRUDENCE: FOREIGN

Kokkinakis v Greece, [1993] ECHR 2.

Poynter v Hillingdon Health Authority, 37 BMLR 192 (QBD).

Re A (Children) (Conjoined Twins: Surgical Separation), [2000] EWCA Civ 254, [2001] 2 WLR 480.

Ackerman, Bruce. *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980).

Beaman, Lori G. *Defining Harm: Religious Freedom and the Limits of the Law* (Vancouver: UBC Press, 2008).

Berger, Benjamin. *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015).

Bird, Colin. *The Myth of Liberal Individualism* (Cambridge, UK: Cambridge University Press, 2004).

Blustein, Jeffrey. *Parents and Children: The Ethics of the Family* (New York: Oxford University Press, 1982).

Borrows, John. *Aboriginal Legal Issues: Cases, Materials & Commentary* (Toronto: LexisNexis Canada, 2018).

———. *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

———. *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016).

Bridgeman, Jo. *Parental Responsibility, Young Children and Healthcare Law* (Cambridge, UK: Cambridge University Press, 2007).

Callan, Eamonn. *Creating Citizens: Political Education and Liberal Democracy* (Oxford: Oxford University Press, 1997).

Clement, Grace. *Care, Autonomy, and Justice: Feminism and the Ethic of Care* (Boulder, CO: Westview Press, 1996).

Code, Lorraine. *What Can She Know?: Feminist Theory and the Construction of Knowledge* (Ithaca, NY: Cornell University Press, 1991).

Donnelly, Mary. *Healthcare Decision-Making and the Law: Autonomy, Capacity and the Limits of Liberalism* (Cambridge: Cambridge University Press, 2010).

Dworkin, Gerald. *The Theory and Practice of Autonomy* (Cambridge, UK: Cambridge University Press, 1988).

Dworkin, Ronald. *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Alfred A Knopf, 1993).

Dwyer, James G. *Religious Schools v. Children's Rights* (Ithaca, NY: Cornell University Press, 1998).

Fineman, Martha Albertson. *The Autonomy Myth* (New York: The New Press, 2004).

Fitzpatrick, Peter. *The Mythology of Modern Law* (New York: Routledge, 1992).

Friedman, Marilyn. *Autonomy, Gender, Politics* (Oxford: Oxford University Press, 2003).

Galston, William A. *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge, UK: Cambridge University Press, 2004).

Geertz, Clifford. *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983).

Gill, Emily R. *Becoming Free: Autonomy and Diversity in the Liberal Polity* (Lawrence, Kansas: University Press of Kansas, 2001).

Gilligan, Carol. *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass: Harvard University Press, 2003).

Grant, Colin. *Myths We Live By* (University of Ottawa Press, 1998).

Held, Virginia. *The Ethics of Care* (New York: Oxford University Press, 2006).

———. *Feminist Morality: Transforming Culture, Society, and Politics* (University of Chicago Press: Chicago, 1993).

Herring, Jonathan. *Caring and the Law* (Hart Publishing: Portland, 2013).

———. *Relational Autonomy and Family Law* (New York: Springer, 2014).

Hobhouse, LT. *Liberalism* (New York: Oxford University Press, 1964).

Keller, Evelyn Fox. *Reflections on Gender and Science* (New Haven, Conn: Yale University Press, 1995).

Kingdom, JE. *No Such Thing as Society? Individualism and Community* (Philadelphia: Open University Press, 1992).

Kittay, Eva Feder. *Love's Labor: Essays on Women, Equality, and Dependency* (Routledge: New York, 1999).

LaRue, LH. *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (University Park, PA: Pennsylvania State University Press, 1995).

Leckey, Robert. *Contextual Subjects: Family, State and Relational Theory* (Toronto: University of Toronto Press, 2008).

Leiboff, Marett & Mark Thomas. *Legal Theories: In Principle* (Pyrmont, NSW: Lawbook Co, 2004).

Lomasky, Loren E. *Persons, Rights and the Moral Community* (Oxford: Oxford University Press, 1987).

MacIntosh, Constance. "The Governance of Indigenous Health" in Joanna N Erdman, Vanessa Gruben & Erin Nelson, eds, *Canadian Health Law and Policy* (Toronto: LexisNexis Canada, 2017) 135.

Macklem, Patrick. "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill LJ 382.

Macklin, Ruth. "Return to the Best Interests of the Child" in Willard Gaylin & Ruth Macklin, eds, *Who Speaks For The Child: The Problems of Proxy Consent* (New York: Plenum Press, 1982) 266.

Maclean, Alasdair. *Autonomy, Informed Consent and Medical Law: A Relational Challenge* (Cambridge, UK: Cambridge University Press, 2009).

McCarthy, Jane Ribbens. “The powerful relational language of ‘family’: togetherness, belonging and personhood” (2012) 60:1 Sociological Rev 68.

Mill, John Stuart. *On Liberty* (Kitchener: Batoche Books, 2001).

Monahan, Patrick J. *Constitutional Law* (Toronto: Irwin Law, 2006).

Monture, Patricia A. *Journeying Forward: Dreaming First Nations’ Independence* (Halifax, NS: Fernwood, 1999).

Moon, Richard. *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014).

Mouffe, Chantal. *The Democratic Paradox* (London: Verso, 2000).

———. *On the Political* (New York: Routledge, 2005).

Nedelsky, Jennifer. *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011).

Ng, Su Fang. *Literature and the Politics of Family in Seventeenth-Century England* (Cambridge: Cambridge University Press, 2007).

Payne, Julien D & Marilyn A Payne. *Canadian Family Law* (Toronto: Irwin Law, 2017).

Ross, Lainie Friedman. *Children, Families, and Health Care Decision Making* (Oxford: Clarendon Press, 1998).

Saul, John Ralston. *A Fair Country: Telling Truths About Canada* (Toronto: Viking, 2008).

Sevenhuijsen, Selma. *Citizenship and the Ethics of Care: Feminist considerations on justice, morality and politics*, translated by Liz Savage (New York: Routledge, 1998).

Sullivan, Winnifred Fallers. *Paying the Words Extra: Religious Discourse in the Supreme Court of the United States* (Cambridge, Mass: Harvard University Press, 1994).

Taylor-Sands, Michelle. *Saviour Siblings: A Relational Approach to the Welfare of the Child in Selective Reproduction* (New York: Routledge, 2013).

Thompson, William Irwin. *The Time Falling Bodies Take to Light: Mythology, Sexuality, and the Origins of Culture* (New York: St. Martin’s, 1981).

Trakman, Leon & Sean Gatien. *Rights and Responsibilities* (Toronto: University of Toronto Press, 1999).

Tronto, Joan. *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993).

Tully, James. *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, UK: Cambridge University Press, 1995.

Turner, Dale A. *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006).

White, James Boyd. *From Expectation to Experience: Essays on Law and Legal Education* (Ann Arbor: University of Michigan Press, 1999).

———. *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, Wis: University of Wisconsin Press, 1985).

———. *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990).

———. *The Legal Imagination*, abridged ed (Chicago: University of Chicago Press, 1985).

Young, Iris Marion. *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990).

SECONDARY MATERIAL: ARTICLES

Anderson, Joel & Axel Honneth. "Autonomy, Vulnerability, Recognition, and Justice" in John Christman & Joel Anderson, eds, *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge: Cambridge University Press, 2005) 127.

Atkins, Kim. "Autonomy and the Subjective Character of Experience" (2000) 17:1 J Applied Philosophy 71.

Bakht Natasha & Lynda Collins. "'The Earth is Our Mother': Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada" (2017) 62:3 McGill LJ 777.

Bala, Nicholas & J Douglas Redfearn. "Family Law and the 'Liberty Interest': Section 7 of the Canadian Charter of Rights" (1983) 15 Ottawa L Rev 274.

Barclay, Linda. "Autonomy and the Social Self" in Catriona Mackenzie & Natalie Stoljar, eds, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 2000) 52.

Barvosa-Carter, Edwina. "Mestiza Autonomy as Relational Autonomy: Ambivalence & the Social Character of Free Will" (2007) 15:1 J Political Philosophy 1.

Beaman, Lori G. "Aboriginal Spirituality and the Legal Construction of Freedom of Religion" (2002) 44:1 J Church & State 135.

———. "Defining Religion: The Promise and the Peril of Legal Interpretation" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: University of British Columbia Press, 2008) 192.

Blustein, Jeffrey. "On the Duties of Parents and Children" (1977) 15:4 Southern J Philosophy 427.

Boldt, Menno & J Anthony Long. "Tribal Philosophies and the Canadian Charter of Rights and Freedoms" in J Anthony Long & Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 165.

Borrows, John. "(Ab)Originalism and Canada's Constitution" (2012) 58 SCLR (2d) 351.

———. "Landed Citizenship: Narratives of Aboriginal Political Participation" in Will Kymlicka & Wayne Norman, eds, *Citizenship in Diverse Societies* (New York: Oxford University Press, 2000) 326.

———. “Listening for a Change: The Courts and Oral Tradition” (2001) 39:1 Osgoode Hall LJ 1.

———. “With or Without You: First Nations Law (in Canada)” (1996) 41:2 McGill LJ 629.

Bovens, Mark, Thomas Schillemans & Robert E Goodin. “Public Accountability” in Mark Bovens, Robert E Goodin & Thomas Schillemans, eds, *The Oxford Handbook of Public Accountability* (Oxford: Oxford University Press, 2014).

Boyd, Susan B. “The Impact of the Charter of Rights and Freedoms on Canadian Family Law” (2000) 17 Can J Fam L 293.

Bragg, Bronwyn & Lloyd L Wong. “‘Cancelled Dreams’: Family Reunification and Shifting Canadian Immigration Policy” (2016) 14:1 J Immigrant & Refugee Studies 46.

Bridge, Caroline. “Religion, culture and conviction – the medical treatment of young children” (1999) 11:1 Child & Fam LQ 1.

Bridgeman, Jo. “Because We Care? The Medical Treatment of Children” in Sally Sheldon & Michael Thomson, eds, *Feminist Perspectives on Health Care Law* (London: Cavendish, 1998) 97.

Brighouse, Harry & Adam Swift. “Parents, Rights and the Value of the Family” (2006) 117 Ethics 80.

Calhoun, Cheshire. “Justice, Care, and Gender Bias” (1988) 85:9 J Philosophy 451.

Chartrand, Larry N. “Re-Conceptualizing Equality: A Place for Indigenous Political Identity” (2001) 19 Windsor YB Access Just 243.

Chen-Wishart, Mindy. “Undue Influence: Vindicating Relationships of Influence” (2006) 59:1 Current Leg Probs 231.

Chiu, Elaine M. “The Cultural Differential in Parental Autonomy” (2008) 41 UC Davis L Rev 1773.

Choudhry, Shazia Jonathan Herring & Julie Wallbank. “Welfare, rights, care and gender in family law” in Julie Wallbank, Shazia Choudhry & Jonathan Herring, eds, *Rights, Gender and Family Law* (New York, NY: Routledge, 2010) 1.

Cockburn, Tom. “Children and the Feminist Ethic of Care” (2005) 12:1 Childhood 71.

Cook, Nancy L. “Outside the Tradition: Literature as Legal Scholarship” (1994) 63:1 U Cin L Rev 95.

Coulthard, Glen. “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition in Canada” (2007) 6:4 Contemporary Political Theory 437.

Cover, Robert M. “Foreword: *Nomos* and Narrative” (1983) 97:1 Harv L Rev 4.

Christie, Gordon. “Law, Theory and Aboriginal Peoples” (2003) 2 Indigenous LJ 67.

———. “A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*” (2005) 23 Windsor YB Access Just 17.

Curk, Polona. “Passions, Dependencies, Selves: A Theoretical Psychoanalytic Account of Relational Responsibility” in Craig Lind, Heather Keating & Jo Bridgeman, eds, *Taking Responsibility, Law and the Changing Family* (Burlington, VT: Ashgate Pub, 2010) 51.

Dekkers, Wim JM. “Autonomy and dependence: Chronic physical illness and decision-making capacity” (2001) 4 Medicine, Health Care & Philosophy 185.

DeShaw, Rell “The History of Family Reunification in Canada and Current Policy” (2006) Can Issues 9.

Dickens, Bernard. “The Modern Function and Limits of Parental Rights” (1981) 97 LQ Rev 462 at 471.

Diekema, Douglas S. “Parental refusals of medical treatment: the harm principle as threshold for state intervention” (2004) 25:4 Theoretical Medicine & Bioethics 243.

Dillon, Robin S. “Respect and Care: Toward Moral Integration” (1992) 22:1 Can J Philosophy 105.

Donchin, Anne. “Autonomy and Interdependence: Quandaries in Genetic Decision Making” in Catriona Mackenzie & Natalie Stoljar, eds, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 2000) 236.

Downie, Jocelyn. “A Choice for K’aila: Child Protection and First Nations Children” (1994) 2 Health LJ 99.

Downie, Jocelyn & Jennifer Llewellyn. “Relational Theory & Health Law and Policy” (2008) Health LJ 193.

Etzioni, Amitai. “Communitarianism revisited” (2014) 19:3 J Political Ideologies 241.

Fish, Stanley. “Liberalism Doesn’t Exist” (1987) Duke LJ 997.

Flanagan, Owen J, Jr. “Virtue, Sex, and Gender: Some Philosophical Reflections on the Moral Psychology Debate” (1982) 92:3 Ethics 499.

Friedman, Marilyn. “Autonomy and Social Relationships: Rethinking the Feminist Critique” in Diana Tietjens Meyers, ed, *Feminists Rethink the Self* (Boulder, CO: Westview, 1997) 40.

———. “Relational Autonomy and Individuality” (2013) 63:2 UTLJ 327.

Galston, William A. “Parents, Government, and Children: Authority over Education in the Liberal Democratic State” in Stephen Macedo & Iris Marion Young, eds, *Child, Family and State* (New York: New York University Press, 2003) 211.

Gavaghan, Colin. “Saviour siblings: no avoiding the hard questions” (2015) 41:12 J Medical Ethics 931.

Ginn, Diana. “*Hamilton Health Sciences Corporation v DH et al*” (2015) 4 Oxford JL & Religion 526.

Goccon, John. Book Review of *Autonomy, Consent and the Law* by Sheila AM McLean, (2010) 6:1 Genomics, Society & Policy 80.

Godwin, Samantha. "Against Parental Rights" (2015) 47 Colum HRLR 1.

Goering, Sara. "Mothers and Others: Relational Autonomy in Parenting" in Leslie Francis, ed, *The Oxford Handbook of Reproductive Ethics* (New York: Oxford University Press, 2017) 285.

Goldstein, Joseph. "Medical Care for the Child at Risk: On State Supervention of Parental Autonomy" (1977) 86:4 Yale LJ 645.

Goodin, Robert E. "Review Article: Communities of Enlightenment" (1998) 28:3 British J Political Science 531.

Gough, Pamela, Cindy Blackstock & Nicholas Bala. "Jurisdiction and funding models for Aboriginal child and family service agencies", CECW Information Sheet #30E (Toronto: University of Toronto, 2005) (online) <cwrp.ca/infosheets>.

Hagger, Lynn. "Parental Responsibility and Children's Health Care Treatment" in Rebecca Probert, Stephen Gilmore & Jonathan Herring, eds, *Responsible Parents and Parental Responsibility* (Portland, Hart Publishing, 2009) 185.

Hale, Brenda. "Understanding Children's Rights: Theory and Practice" (2006) 44:3 Family Court Review 350.

Hall, Barbara. "The Origin of Parental Rights" (1999) 13:1 Public Affairs Q 72.

Herring Jonathan. "The Human Rights Act and the welfare principle in family law – conflicting or complementary?" (1999) 11 Child & Fam L Q 223.

Isaac, Thomas. "*Canadian Charter of Rights and Freedoms*: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002) 21 Windsor YB Access Just 431.

———. "Individual Versus Collective Rights: Aboriginal People and the Significance of *Thomas v. Norris*" (1992) 21 Man LJ 618.

Isaac, Thomas & Mary Sue Maloughney. "Dually Disadvantaged and Historically Forgotten: Aboriginal Women and the Inherent Right of Aboriginal Self-Government" (1992) 21 Man LJ 453.

Jackson, Emily and Shelley Day Sclater. "Introduction: Autonomy and Private Life" in Shelley Day Sclater et al, eds, *Regulating Autonomy: Sex, Reproduction and Family* (Oxford and Portland: Hart Publishing, 2009) 1.

Kingsbury, Benedict. "Reconstructing Self-Determination: A Relational Approach" in Pekka Aikio & Martin Scheinin, eds, *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku: Institute for Human Rights, Åbo Akademi University, 2000) 19.

Kinser, Amber E. "Mothering as Relational Consciousness" in Andrea O'Reilly, *Feminist Mothering* (Albany, NY: State University of New York Press, 2008) 123.

Kiss, Elizabeth. "Alchemy or Fool's Gold? Assessing Feminist Doubts about Rights" in Mary Lyndon Shanley & Uma Narayan, *Reconstructing Political Theory: Feminist Perspectives* (University Park, PA: Pennsylvania State University Press, 1997) 1.

Kittay, Eva Feder. “Searching for an overlapping consensus: a secular care ethics feminist responds to religious feminists” (2007) 4 U St Thomas LJ 468.

Klein, Suzanne Silk. “Individualism, Liberalism, and the New Family Law” (1985) 43 U Toronto Fac L Rev 116.

Kline, Marlee. “Child Welfare Law, ‘Best Interests of the Child’ Ideology, and First Nations” (1992) 30:2 Osgoode Hall LJ 375.

———. “The Colour of Law: Ideological Representations of First Nations in Legal Discourse” (1994) 3 Soc & Leg Stud 451.

———. “Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women” (1993) 18 Queen’s LJ 306.

———. “Tory Tactics and Privatization of Child Welfare in Alberta” in Susan B Boyd, ed, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 330.

Kuokkanen, Rauna. “Self-Determination and Indigenous Women's Rights at the Intersection of International Human Rights” (2012) 34 Hum Rts Q 225.

Lacey, Nicola & Elizabeth Frazer. “Communitarianism” (1994) 14:2 Politics 75.

Laufer-Ukeles, Pamela. “The Relational Rights of Children” (2016) 48:3 Conn L Rev 741.

Lessard, Hester. “Liberty Rights, The Family and Constitutional Politics” (2002) 6 Rev Const Stud 213.

———. “Relationship, Particularity, and Change: Reflections on *R.* v. *Morgentaler* and Feminist Approaches to Liberty” (1991) 36:2 McGill LJ 263.

Lessard, Hester et al, “Developments in Constitutional Law: The 1994-1995 Term” (1996) 7 SCLR (2d) 81.

Loftin, John D. “Anglo-American Jurisprudence and the Native American Tribal Quest for Religious Freedom” (1989) 13:1 American Indian Culture & Research J 1.

MacDonald, Fiona. “The Manitoba Government’s Shift to ‘Autonomous’ First Nations Child Welfare: Empowerment or Privatization?” in Annis May Timpson, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (Vancouver: UBC Press, 2009) 173.

———. “Relational Group Autonomy: Ethics of Care and the Multiculturalism Paradigm” (2010) 25:1 Hypatia 196.

Machan, Tibor. “Liberalism and Atomistic Individualism” (2000) 34 J Value Inquiry 227.

Mackenzie, Catriona & Natalie Stoljar. “Introduction: Autonomy Reconfigured” in Catriona Mackenzie & Natalie Stoljar, eds, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 2000) 3.

Macleod, Colin M. “Conceptions of Parental Autonomy” (1997) 25:1 Politics & Society 117.

Mahoney, Kathleen E. "The Limits of Liberalism" in Richard F Devlin, ed, *Canadian Perspectives on Legal Theory* (Toronto: Edmond Montgomery Publications Limited, 1991) 57.

Majury, Diana & Anne Quéma. Book Review of *Contextual Subjects: Family, State, and Relational Theory* by Robert Leckey, (2010) 25 CJLS 246

Marshall, William P. "Truth and the Religion Clauses" (1994) 43 DePaul L Rev 243 at 243.

McGillivray, Anne. "Children's Rights, Paternal Power and Fiduciary Duty: From Roman law to the Supreme Court of Canada" (2011) 19 Intl J Child Rts 21.

McDonald, Heather. "Culture in Health Research and Practice" in Ian Anderson, Fran Baum & Michael Bentley, eds, *Beyond Bandaids: Exploring the Underlying Social Determinants of Aboriginal Health* (Darwin, Australia: Cooperative Research Centre for Aboriginal Health, 2007) 255.

Minow, Martha. "Rights for the Next Generation: A Feminist Approach to Children's Rights" (1986) 9 Harv Women's LJ 1.

Minow, Martha & Mary Lyndon Shanley. "Revisioning the Family: Relational Rights and Responsibilities" in Mary Lyndon Shanley & Uma Narayan, eds, *Reconstructing Political Theory: Feminist Perspectives* (Polity Press: Cambridge, 1997) 84.

Monture, Patricia A. "A Vicious Circle: Child Welfare and the First Nations" (1989) 3 CJWL 1.

Moon, Richard. "Freedom of Conscience and Religion" (2013) 61 SCLR 2(d) 339.

———. "Introduction: Law and Religious Pluralism in Canada" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 1.

———. "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on *Charter* Rights" (2002) 40:3 Osgoode Hall LJ 337.

Moss, Wendy. "Indigenous Self-Government in Canada and Sexual Equality under the *Indian Act*: Resolving Conflicts between Collective and Individual Rights" (1990) 15 Queen's LJ 279.

Mullett, Sheila. "Shifting perspectives: A new approach to ethics" in Christine Overall, Sheila Mullett & Lorraine Code, eds, *Feminist Perspectives: Philosophical Essays on Method and Morals* (Toronto: University of Toronto Press, 1988) 109.

Napoleon, Val. "Aboriginal Self Determination: Individual Self and Collectives Selves" (2005) 29:2 Atlantis 31.

Nedelsky, Jennifer. "Law, Boundaries, and the Bounded Self" (1990) 30 Representations 162.

———. "Legislative Judgment and the Enlarged Mentality: Taking Religious Perspectives" in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006) 93.

———. “Reconceiving Autonomy: Sources, Thoughts, and Possibilities” (1989) 1 Yale JL & Feminism 7.

———. “Reconceiving Rights as Relationship” (1993) 1 Rev Const Stud 1.

Nichols, Joshua. “Claims of Sovereignty - Burdens of Occupation: William and the Future of Reconciliation” (2015) 48 UBC L Rev 221.

Orsi, Robert. “Is the Study of Lived Religion Irrelevant to the World We Live In?” (2003) 42:2 J for Scientific Study Religion 169.

Pabst, Adrian. “Liberalism” in Luigino Bruni & Stefano Zamagni, eds, *Handbook on the Economics of Reciprocity and Social Enterprise* (London: Edward Elgar, 2013) 217.

Page, Edgar “Parental Rights” (1984) 1:2 J Applied Philosophy 187.

Post, Robert C. “Who’s Afraid of Jurispathic Courts: Violence and Public Reason in *Nomos* and Narrative” 17 Yale JL & Human 9.

Resnick, Judith. “Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover” (2005) 17:1 Yale JL & Human 17.

Ross, Thomas. “The Richmond Narratives” (1989) 68 Tex L Rev 381.

Ruddick, Sara. “Maternal Thinking” (1980) 6:2 Feminist Studies 342.

Ryder, Bruce. “The Canadian Conception of Equal Religious Citizenship” in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver, UBC Press, 2008) 87.

Scheppele, Kim Lane. “The Re-Vision of Rape Law” (1987) 54:3 U Chicago L Rev 1095.

Schoeman, Ferdinand. “Parental Discretion and Children’s Rights: Background and Implications for Medical Decision-Making” (1985) 10:1 J Medicine & Philosophy 45.

———. “Rights of Children, Rights of Parents, and the Moral Basis of the Family” (1980) 91:1 Ethics 6.

Scully, Jackie Leach, Sarah Banks & Tom W Shakespeare. “Chance, choice and control: Lay debate on prenatal social sex selection” (2006) 63 Social Science & Medicine 21.

Slote, Michael. “Autonomy and Empathy” (2004) 21:1 Social Philosophy & Policy 293.

Small, Joan. “Parents and Children: Welfare, Liberty, and *Charter* Rights” (2005) 4 JL & Equality 103.

Smith, JC. “The Sword and Shield of Perseus: Some Mythological Dimensions of the Law” (1983) 6 Intl J L & Psychiatry 235.

Sullivan, Winnifred Fallers, Robert A Yelle & Mateo Taussig-Rubbo. “Introduction” in Winnifred Fallers Sullivan, Robert A Yelle & Mateo Taussig-Rubbo, eds, *After Secular Law* (Stanford: Stanford Law Books, 2011) 1.

Taiaiake, Alfred & Jeff Corntassel. “Being Indigenous: Resurgences against Contemporary Colonialism” (2005) 40:4 Government & Opposition 597.

Taylor, Robert D. “Reclaiming Our Roots: Law and Mythology” (1991) 29 Duq L Rev 271.

Taylor-Sands, Michelle. "*Saviour Siblings*: reply to critics" (2015) 41:12 J Medical Ethics 933.

Thompson, Rollie. "Why Hasn't the *Charter* Mattered in Child Protection?" (1989) 8 Can J Fam L 133.

Tomsons, Kira & Susan Sherwin. "Feminist Reflections on Tracy Latimer and Sue Rodriguez" in Michael Stingl, ed, *The Price of Compassion* (Broadview Press: Peterborough, 2010) 219.

Toope, Stephen J. "Riding the Fences: Courts, Charter Rights and Family Law" (1991) 9 Can J Fam L 55.

Trakman, Leon E. "Native Cultures in a Rights Empire: Ending the Dominion" (1997) 45 Buff L Rev 189.

Turpel, Mary Ellen. "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989) Can Hum Rts YB 3.

———. "Reflections on Thinking about Criminal Justice Reform," in eds Richard Gosse, James Youngblood Henderson & Roger Carter, *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994) 206.

Van Praagh, Shauna. "Faith, Belonging, and the Protection of 'Our' Children" (1999) 17 Windsor YB Access Just 154.

———. "Religion, Custody, and a Child's Identities" (1997) 35:1 Osgoode Hall LJ 309.

Verkerk, Marian A. "The care perspective and autonomy" (2001) 4 Medicine, Health Care & Philosophy 289.

Von Heyking, John. "The Harmonization of Heaven and Earth?: Religion, Politics, and Law in Canada" (2000) 33 UBC L Rev 663.

Walter, Bernd, Janine Alison Isenegger & Nicholas Bala. "'Best Interests' in Child Protection Proceedings: Implications and Alternatives" (1995) 12 Can J Fam L 367.

Weil, Rachel. "The family in the exclusion crisis: Locke versus Filmer revisited" in Alan Houston & Steve Pincus, eds, *A Nation Transformed: England after the Restoration* (Cambridge: Cambridge University Press, 2001) 100.

White, Hayden. "The Value of Narrativity in the Representation of Reality" (1980) 7:1 Critical Inquiry 5.

White, James Boyd. "Law and Literature: 'No Manifesto'" (1988) 39 Mercer L Rev 739.

Young, Iris Marion. "Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought" (1997) 3:3 Constellations 340.

OTHER MATERIALS

Cisneros, Brigitte Pelletier. *Indigenous Women's Appropriation and Redeployment of Human Rights: A Comparative Study of the Native Women's Association of Canada*

and K'inal Antsetik (Mexico) (MA Thesis, University of Alberta, 2014) (University of Alberta Education and Research Archive) DOI: < 10.7939/R3R08Q>.

Cook, Thomas I. "Note on Sir Robert Filmer" in John Locke, *Two Treatises of Government*, Thomas I Cook, ed (New York: Hafner Publishing Co, 1947).

Edmond, John. "Aboriginal right – or wrong?", *LawNow* (8 March 2015), online: <lawnow.org>.

Hall, Andrew Justus. *Origins and Departures: Childhood in the Liberal Order* (PhD Thesis, Columbia University, Graduate School of Arts and Sciences, 2011) (New York: Columbia University, 2011).

Halsbury's Laws of Canada (online), *Aboriginal Law* (2016 Reissue).

Hasham, Alyshah. "Aboriginal medicine ruling sparks instant controversy", *Toronto Star* (19 November 2014), online: <thestar.com>.

Honickman, Asher. "A questionable judgment on 'traditional medicine'", *National Post* (21 November 2014), online: <news.nationalpost.com>.

McNeil, Kaylee A. *The Anti-Vaccination Movement and the Ethics of Care in Parenthood* (MA Thesis, George Washington University, 2016) (Ann Arbor, MI: Proquest, 2017).

Manley-Casimir, Kirsten. *Reconceiving the Duty to Consult and Accommodate Aboriginal Peoples: A Relational Approach* (PhD Thesis, University of British Columbia Faculty of Graduate and Postdoctoral Studies, 2016) (Vancouver: University of British Columbia, 2016).

McLachlin, The Right Honourable Beverley. "Unwritten Constitutional Principles: What is Going On?" (Lord Cooke Lecture, delivered in Wellington, New Zealand, 1 December 2005), <www.scc-csc.ca/judges-juges/spe-dis/bm-2005-12-01-eng.aspx>.

Row, Andrew. "Life or death, and traditional medicine – primacy of indigenous rights in the Canadian case of Hamilton Health Sciences Corp", online: (2015) Māori L Rev <maorilawreview.co.nz/>

Taddese, Yamri. "Cancer decision a shock to lawyers", *Law Times* (24 November 2014), online: <lawtimesnews.com>.

UNGA, United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, A/RES/61/295.