Law, Theory, and the High Road

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And you may ask yourself, "Well...How did I get here?" – Talking Heads

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Current discourse concerning the proper role of courts in constitutional cases essentially amounts to a continuum of (sometimes buried) theoretical disputes. The nature of the dispute rests on the manner in which one sets up the issue. One can cast the matter as a question of legal philosophy; that is, as a discussion which aims to decide whether one can characterize legislation, running contrary to certain moral values, as law at all, such that it deserves deference by adjudicative bodies. One can frame the question as one of political philosophy by asking what political morality requires of legal institutions; *i.e.*, whether a just society can permit unelected institutions to strike down democratically created legislation. Lastly (though this is by no means an exhaustive list), one may understand this issue as one of constitutional theory – as a debate over what a particular constitutional regime requires of courts.

By talking about 'judicial activism' in the first place, one raises a host of theoretical concerns. Yet, oddly, one encounters little scholarly activity concerning how courts themselves should deal with theoretical arguments used in support of constitutional claims. A wide selection of law review articles and monographs present some sort of working theory that their respective authors implicitly claim the courts should use to settle constitutional litigation. They do not, however, explicitly say what makes (or should make) one theory more or less attractive to a court when competing theories are brought before it. In cases where that happens, the court can choose to 'defer' to one party's theory of the Constitution – for instance, that offered by the Crown in support of a section 1 justification – or it can choose to disregard that theory as

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untenable. In a sense, this is a meta-decision in the judicial activism debate. Depending on the meta-theory the Supreme Court adopts, it will apply a different political/legal/constitutional theory of deference (which in turn will affect its decision to uphold or strike down a given piece of legislation).

This paper seeks to accomplish two tasks. First, it discusses briefly why the use of theory in litigation has recently become an interesting issue. Second, it explains why the Court cannot adopt a wholly deferential approach to theories advanced in the course of constitutional litigation; and, in particular, cannot accept positivist theories of Canadian law. Its point of departure, with respect to the second issue, will be the Supreme Court's 2002 decision in *Sauvé v. Canada*.[1]

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In *Campbell*, a majority of the Supreme Court suggested that the Canadian Constitution contains "underlying, unwritten, and organizing principles";[2] that the formal provisions of the Constitution reflect an overarching "political theory" – a theory of the good society.[3] By entrenching the rules contained in the Constitution, the 'framers' gave legal effect not only to those rules, but to the principles that animated them. The Constitution, then, can have something to say on legal questions though it features no written provision formally addressing them. Provided that one can find a plausible theory to explain the Constitution's written components, one can infer from that theory an array of implied constitutional rights and jurisdictional limitations. As Lamer C.J. states:

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[1] *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 218 D.L.R. (4th) 577 [*Sauvé*].

[2] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Ekmecic; R. v. Wickman; Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3 at para. 107 [*Campbell*].

[3] *Ibid.* at para. 95, citing *Switzman v. Elbling*, [1957] S.C.R. 285 at 306 (per Rand J.).

> [The preamble to the Constitution Act, 1867] recognizes and affirms the basic principles which are the very source of the substantive provisions of the Constitution Act, 1867. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, the preamble is not only a key to construing the express provisions of the Constitution Act, 1867, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.[4]

Before *Campbell*, the Court had occasionally relied on this idea of an unwritten Constitution to strike down provincial legislation it found incompatible with an intention to create a federal state.[5] *Campbell*, however, was a watershed. A majority of the Court not only declared certain practices unconstitutional, it used a theoretical analysis of constitutional democracy to infer that the provinces had a positive obligation to take certain steps to ensure the independence of provincial court judges.[6] The Court, in doing so, made a bold statement about the extent to which

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[4] *Campbell*, *ibid.* See also Ivan Rand, "The Role of an Independent Judiciary In Preserving Freedom" (1951) 9 U.T.L.J. 1 at 2 ("[U]nderlying all systems of social law are shadowy provisional postulates of a transcendental nature. Our lives are said to be rounded with a sleep and a forgetting, but they are couched also in assumptions").

[5] For example, in *Winner v. SMT (Eastern) Ltd.*, [1951] S.C.R. 887 at 919, Rand J. held that, as citizens in a federal state, Canadians had an "inherent and constitutive" right to move from one province to another; and that provinces could not enact legislation that would effectively deprive citizens of access (for instance, by denying certain kinds of employment to particular classes of people). See also *Union Colliery Company of British Columbia v. Bryden*, [1899] A.C. 580; *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591. In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, the Court found that – owing to the framers' implied intention to create a federal state – provinces ordinarily have a constitutional obligation to enforce court judgments made in other provinces. See also *Beals v. Saldanha*, 2003 SCC 72 (per LeBel J., dissenting); *Hunt v. T & N PLC*, [1993] 4 S.C.R. 289. For an interesting discussion, see Rebecca Johnson & Thomas Kuttner, "Treading on Dicey Ground: Citizenship and the politics of the rule of law" in Carl Stychin & Didi Herman, eds., *Law and Sexuality: The Global Arena* (Minneapolis: University of Minnesota Press, 2001); Rebecca Johnson, "Justice La Forest, Sexual Orientation and Citizenship" in Rebecca Johnson & John P. McEvoy with Thomas Kuttner & Wade MacLauchlan, eds., *Gerard V. La Forest at The Supreme Court of Canada 1985-1997* (Supreme Court of Canada Historical Society, 2000).

[6] Although I cite *Campbell*, *supra* note 2, for the proposition that theory matters, I do not necessarily endorse the result in *Campbell*. Specifically, while I agree with Lamer C.J.'s view that, accepting the existence of unwritten principles, judicial independence must be one of them, I do not agree that this means that the government is constitutionally required to create independent commissions if some other equally effective means of protecting judicial independence were devised. The requirement of a commission, I would submit, is a prophylactic rule – not a constitutional rule. For much the same reason, I have doubts that legislative privilege is actually required as an unwritten principle of the Constitution; though it protects Parliamentary debate, it may be only one of several possible means of providing such protection. But see *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House)*, [1993] 1 S.C.R. 319; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876.

it would rely on theoretical arguments.[7] When the Court again used unwritten principles to address an issue no less important than Quebec's right to secede,[8] it might well have seemed that theory would come to dominate legal discourse – or, at least, that the legal community had finally come to show a sustained interest in it.[9]

Having committed itself in principle to philosophical debates in the courtroom, however, the Court left open the question of how it should resolve them; *i.e.*, which theories should command the respect of judges. If the Constitution is unified by a common design – by a common political theory – the Supreme Court cannot give *every* theory of Canadian law equal credence. Yet, at the same time, it does not want to simply declare by fiat the 'correctness' of a single theory, since doing so would have implications too far-reaching and unpredictable.[10] Some theories warrant greater deference than others, but the Court steps into a minefield if it explicitly throws its weight behind one theory in particular. Once it does that, the Court casts aside any pretensions it might have as a politically disinterested institution. That may or may not be a bad thing – as much of this paper will argue, one cannot extricate law from moral or political considerations. If the Court makes that move, however, it should wait until it can confidently say which political theory is best, given the Canadian constitutional landscape as a whole. In the meantime, parties may well wonder which theories are worth presenting to the Court and which

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[7] A little too bold for some: see Jacob Ziegel, "The Supreme Court Radicalizes Judicial Compensation" (1998) 9:2 Const. Forum 31.

[8] See *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 49 (identifying "federalism, democracy, constitutionalism and the rule of law, and respect for minority rights" as "four foundational constitutional principles").

[9] See Sujit Choudry & Robert Howse, "Constitutional Theory and the Quebec Secession Reference" (2000) 13 Can. J. L. & Jur. 143 at 144-5 (remarking that, until the *Quebec Secession Reference*, there was little academic interest in developing a Canadian constitutional theory). For insight as to the indifference or hostility shown to theory, by the legal profession, for much of the latter's history, see Neil MacCormick, *H.L.A. Hart* (Stanford University Press, 1981) at 19; Ivan C. Rand, "Legal Education in Canada" (1954) 32 Can. Bar Rev. 387 at 400-10; Michael Lobban, *The Common Law and English Jurisprudence 1760-1850* (Oxford: Clarendon Press, 1991) at ch. 3; Christopher W. Brooks, *Lawyers, Litigation and English Society Since 1450* (London: Hambledon, 1998). Just twenty years ago, one heard suggestions that law faculties should be divided by a kind of academic wall, separating the practitioner-educators from the legal theorists, lest one corrupt the other: see *Law and Learning: Report to the Social Sciences and Humanities Research Council by the Consultative Group on Research and Education in Law* (Ottawa: Social Sciences and Humanities Research Council of Canada, 1983) at 137.

[10] See Cass R. Sunstein, "Foreword: Leaving Things Undecided" (1996) 110 *Harv. L. Rev.* 6; Alexander M. Bickel, "Foreword: The Passive Virtues" (1961) 75 *Harv. L. Rev.* 40.

are dead in the water. On this point, Gonthier J.'s dissenting opinion in *Sauvé v. Canada* makes for interesting reading. There, he remarked:

> [T]here is copious expert testimony in the nature of legal and political philosophy. I do not think that the Court need necessarily defer to this second type of expertise, or take into account the "skill" and "reputation" of the experts in weighing this evidence ... [L]egal theory expert testimony in this context essentially purports to justify axiomatic principles. Therefore, these arguments are either persuasive or not. In this context, it is appropriate for courts to look not only to such theoretical arguments but also beyond, to factors such as the extent of public debate on an issue, the practices of other liberal democracies and, most especially, to the reasoned view of our democratically elected Parliament.[11]

No doubt Gonthier J. is correct to a point. The intuitions of the Canadian public and Members of Parliament, as well as those of people in other democratic countries, surely matter when one devises a legal or political theory.[12] There is something troubling, however, about the idea that, when debating questions of legality, one can find nothing to choose between different legal philosophies on their own terms. In a way, it seems radically democratic: anyone can have an opinion and everyone's opinion 'counts'.[13] And, to be fair, just saying that a country is democratic, or that it abides by the rule of law, does not settle much. With that broad starting point, one can find a great deal of room for reasonable disagreement.[14] In that sense, Gonthier J. is right to comment:

> There is a flaw in an analysis which suggests that because one social or political philosophy can be justified, it necessarily means that another social or political philosophy is not justified: in other words, where two social or political philosophies exist, it is not by

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[11] *Sauvé*, *supra* note 1 at para. 101.

[12] See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999), for the proposition that when creating a theory of justice one should employ a 'reflective equilibrium'.

[13] As Mark Kingwell points out, modern Western culture may tend to make intellectuals of everyone: see *Practical Judgments: Essays in Culture, Politics, and Interpretation* (University of Toronto Press, 2002) at 78-9.

[14] See P.P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press, 1990) at 4-5; R. M. Dworkin, "What is Equality? Part 4 – Political Equality" (1987-88) 22 U. S. F. L. Rev. 1 at 2.

> approving one that you disprove the other. Differences in social or political philosophy, which result in different justifications for limitations upon rights, are perhaps inevitable in a pluralist society. That having been said, it is only those limitations which are not reasonable or demonstrably justified in a free and democratic society which are unconstitutional. Therefore, the most significant analysis in this case is the examination of the social or political philosophy underpinning the justification advanced by the Crown. This is because it will indicate whether the limitation of the right to vote is reasonable and is based upon a justification which is capable of being demonstrated in a free and democratic society. If the choice made by Parliament is such, then it ought to be respected. The range of choices made by different legislatures in different jurisdictions, which I will review below, supports the view that there are many resolutions to the particular issue at bar which are reasonable; it demonstrates that there are many possible rational balances.[15]

One has good reason to think that many different theories could plausibly underpin a "free and democratic society" and that, in principle, any one of them could justify state action infringing a *Charter* right. One must, however, read section 1 in the context of the entire Constitution,[16] a body of law designed to create not just any free and democratic society, but one of a very particular kind.[17] Parliament may devise any number of policies or initiatives consistent with democracy broadly understood, but if they do not conform to the uniquely Canadian vision of democracy reflected in the Constitution, it cannot implement them. And the Constitution contains far more than a bare reference to those values to which the Supreme Court alludes in *Campbell* or the *Quebec Secession Reference*. Any first-year law student, studying for her mid-term and final examinations, knows all too well that the Constitution contains hundreds of written provisions, each of which offers an insight into that uniquely Canadian conception of democracy. When the Crown seeks to justify its conduct under section 1 of the *Charter*, any justificatory theory it provides must conform to that body of law as a whole. That requirement substantially narrows the number of possible theories available to the Crown. (One suspects that

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[15] *Sauvé*, *supra* note 1 at para. 97.

[16] See *Campbell*, *supra* note 2 at para. 107 ("the Constitution is to be read as a unified whole"); *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148 at 1206.

[17] But see *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 67.

theorists find so daunting the task of crafting a unified Canadian constitutional theory not because they have so little with which to work – philosophers have no fear of fashioning theories from whole cloth – but because they have so much to synthesize.) With that in mind, it may well be that, in the vast number of cases, one can disprove one theory by simply giving the nod to another; that only a very few number of theories can emerge as viable contenders.

The better part of this paper does not attempt to sort out what specific kind of theory would best fit the Canadian constitutional landscape – in not doing so, it honours a longstanding intellectual convention.[18] Instead, it attempts to show why a certain kind of theoretical argument – namely, the type grounded in the positivist tradition – *cannot* succeed as a justification for state action in constitutional cases. In making that argument, it traces the Supreme Court's decision in *Sauvé*.

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In *Sauvé*, the Supreme Court struck down federal provisions disenfranchising individuals sentenced to a term of imprisonment of two years or more for the duration of their respective sentences.[19] A thin majority of the Court held that the Crown failed to justify, under section 1 of the *Charter*,[20] Parliament's infringement of inmates' *Charter* right to vote.[21] The government enunciated two objectives ostensibly served by the disenfranchisement of prisoners. First, the

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[18] See Choudry and Howse, *supra* note 9 at 144-5.

[19] *Canada Elections Act*, R.S.C. 1985, c. E-2, s. 51(e).

[20] Section 1 of the *Charter* "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." See *Constitution Act, 1982* (79), enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11. The Crown bears the burden of establishing the reasonableness of a statute limiting a *Charter* right. See *R. v. Oakes*, [1986] 1 S.C.R. 103. See also *Sauvé*, *supra* note 1 at paras. 12-14 (observing that, in the absence of justification for the limiting of a right, section 1 provides no protection for the infringing statute), para. 18. The Crown will discharge its burden, under section 1, where it shows *inter alia* that the limiting statute has an objective rationally connected to the limitation of the right. In addition, the Crown must establish that the limiting statute impairs the right only to the extent necessary to fulfill its objective; and that the adverse effects, stemming from the limitation of the right, do not disproportionately outweigh the benefits of fulfilling the objective of the limiting statute.

[21] The Crown conceded that the statutory provisions infringed section 3 of the *Charter*. *Sauvé*, *ibid.* at para. 6.

provision in question "enhance[s] civic responsibility and respect for the rule of law."[22] Second, it serves the denunciatory and deterrent goals of sentencing.[23] Of these objectives, the majority's analysis of only the first matters here. The government claimed that "depriving penitentiary inmates of the vote sends an 'educative message' about the importance of respect for the law";[24] that disenfranchising serious criminal offenders teaches the public that the rights accompanying Canadian citizenship imply obligations to obey the law.

In making that argument, the government relied upon a conception of democracy as a simple *quid pro quo* contractual arrangement;[25] *i.e.*, as an agreement among citizens that each cede to the others some measure of control over policies affecting her life (in the form of a right to vote) in exchange for obedience to the laws created pursuant to that vote. It follows that when a citizen commits a serious criminal offense, the community may disenfranchise her. The offender's particular reasons for committing the offense do not matter; by committing the offense, the offender relinquishes any entitlement to participate in the electoral process. As the dissent said:

> Permitting the exercise of the franchise by offenders incarcerated for serious offences undermines the rule of law and civic responsibility because such persons have demonstrated a great disrespect for the community in their committing serious crimes: such persons have attacked the stability and order within our community. Society therefore may choose to curtail temporarily the availability of the vote to serious criminals both to punish those criminals and to insist that civic responsibility and respect for the rule of law, as goals worthy of pursuit, are prerequisites to democratic participation.[26]

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[22] *Ibid.* at para. 21.
[23] *Ibid.*
[24] *Ibid.* at para. 29.
[25] I rely, here, on the dissenting opinion's analysis of the government's argument. See *Sauvé*, *ibid.* at para. 115: "The social contract is the theoretical basis upon which the exercise of rights and participation in the democratic process rests."
[26] *Ibid.* at para. 116 [emphasis added].

McLachlin C.J., writing for the majority, disagreed that the government's interest in educating the public about the "importance of respect for the law" could have a rational connection to any statute limiting the right to vote.[27] She took that position in large part because she simply did not think that the theory propounded by the Crown – and adopted *arguendo* by the dissent – could convince anyone that democratically made laws have moral legitimacy. The majority stated:

> The "educative message" that the government purports to send by disenfranchising inmates is both anti-democratic and internally self-contradictory. Denying a citizen the right to vote denies the basis of democratic legitimacy. It says that delegates elected by the citizens can then bar those very citizens, or a portion of them, from participating in future elections. But if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government's power flows.[28]

The dissenting opinion would have deferred to Parliament in its judgment that disenfranchisement could educate Canadians about the importance of obeying the law; that the theory upon which Parliament relied could reasonably establish a connection between the importance of the right to vote in a democratic country and the obligation of its citizens to obey laws democratically made. The Court splits on this point because they disagree about whether the Crown's argument really lacks internal coherence. If it does not, the majority has no reason to doubt its consistency with Canadian constitutional principles – at least it offers nothing resembling a thorough philosophical analysis of democratic law-making with which it might rebuke the Crown's theory. The dissent's own analysis has far more depth. One ventures that, by the conclusion of his opinion, Gonthier J. has made a compelling case that one *can* explain democratic institutions with reference to nothing more than a bare contractual relationship between oneself and one's community.[29] Nonetheless, the majority's judgment ultimately has more persuasive force, not because it presents a fuller, richer theory of democratic law-making,

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[27] *Ibid.* at para. 29.
[28] *Ibid.* at para. 32.
[29] The dissenting opinion is grounded in a deferential posture, so one cannot say whether some or all of the dissenting judges would claim that legal obligations in Canadian democracy ought to be explained in this way.

but because it reflects a better understanding of what sort of theory cannot hold sway in a democratic country.

The difficulty with the Crown's theory, to which the majority alluded, follows from the claim that democratic legitimacy stems from a *quid pro quo* contractual relationship. That sort of explanation, though superficially appealing, does not account for why people should agree to 'contract into' a democratic state in the first place. Assuming that citizens do indeed have an obligation to obey the law, the Crown must explain the source of that obligation if it wants to 'educate' them. It cannot say that one must obey the law simply because it is the law; such an appeal could not resonate with anyone not already predisposed to obeying the law. Nor can it plausibly say that people should obey the law only because, if they do not, they will suffer punishment; that argument would have trivial persuasive force in situations where one can see little risk of apprehension. Surely, the Crown wants citizens to feel their obligations even when they could get away with criminal offenses. Indeed, one would think that an 'educational' project, such as that impugned in *Sauvé*, is designed precisely to make it unnecessary for the state to watch citizens all the time; to encourage citizens to exercise self-discipline in recognition of their obligations as citizens.[30] If the Crown wants to say that citizens have an obligation to obey the law, it must say that such an obligation is moral; that they should obey the law because doing so is right, even if they disagree with the law's substantive content.[31]

Any social contract theory upon which the Crown relies must explain why citizens have a moral obligation to obey the law. The theory advanced by the Crown does not do that. It merely

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[30] H.L.A. Hart observed that one cannot make sense of an obligation created solely by the threat of force. See H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Oxford University Press, 1997).

[31] See *Quebec Secession Reference*, *supra* note 8 at para. 33: "In our constitutional tradition, legality and legitimacy are linked." See also *ibid.* at para. 67:

> [A] system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave

describes the circumstances under which one of the parties may cease to enjoy the benefits of the social contract – that is, when she fails to obey a legal rule. On the bare terms of the Crown's theory, the individual citizen may have an obligation to obey the law, but only if she wants to remain a party to the contract. At the same time, it provides no moral reason why that citizen should or would choose to remain a party. Presumably, people opt into the contractual arrangement for some reason, but the Crown never bothers to identify it. If people contract into society for entirely non-moral reasons – for instance, if they do so only because they worry about what others will think of them if they do not; or if they do so not because they think it is right to join the contract but because it is in their best interests (*e.g.*, financially) to do so[32] - one wonders why a party should feel obligated by that contract if (to continue the above examples) she no longer cares what her law-abiding peers think of her; or if the cost of compliance exceeds the cost of disobedience. The Crown cannot explain to the public how it has an obligation to obey the law just by explaining that a social contract exists. Since the legitimacy of law ostensibly flows from the contract, merely telling people they should obey law because there is a contract amounts to saying they should obey law because it is law.

Furthermore, the Crown runs into trouble once its theory raises the prospect that some people may not be obligated to comply, because it must then attempt to explain, first, why *anyone* should remain party to the contract if others choose to 'defect';[33] and, second, where it finds the authority to punish defectors who have broken the law. Whether one joins the contract for moral or non-moral reasons, she does so with the expectation that others will to some extent subordinate their desires to the dictates of legal rules created under the contractual arrangement. If others do not meet that expectation – or if one detects a reasonable prospect that they will not – there seems little point in adhering to the agreement; that is, in limiting one's own freedom to act purely out of self-interest while others remain unconstrained. On the other hand, though the

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mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.

[32] This example assumes that one does not adopt a rational egoist model of morality – a model I find difficult to take seriously.

[33] I purposely use, here, the language of 'game theory'. For a discussion of the classic problem, posed by the 'prisoners' dilemma', see Jan Narveson, *The Libertarian Idea* (Philadelphia: Temple University Press, 1988) at ch. 12.

state cannot seriously consider the possibility of citizens' 'opting out' of the law, it has trouble explaining the basis of its moral authority to punish defectors. It would seem that ultimately the Crown's claim to authority is premised largely (if not exclusively) upon its ability to force people to comply – and not on any claim of moral entitlement.

If one looks at the Crown's theory in this light, one can see why the *Sauvé* majority rejected it as a sound means of educating citizens about the need to respect the law – why McLachlin C.J. disparaged it as "bad pedagogy".[34] Its problems stem not from any inherent implausibility – one can envision a theory of democracy that grounds legal authority in force alone – or that makes no claim about the moral legitimacy of legal rules created through democratic processes. Any such theory, however, would lose its power to persuade people to respect, and comply with, legal rules that have a content with which they do not agree. That kind of theory could interest only academics; to anyone who wants a theory of law that actually presents law as a respectable institution – for instance, the Crown – only a conception of law bound up with the idea of moral duty will suffice. For precisely this reason, McLachlin C.J. rejects the idea that any useful theory of democracy could claim that the state has the power to disenfranchise people on the basis of 'moral worthiness'.[35] The state has the authority to create new moral obligations – in the sense that it has authority to create new laws that people have a moral obligation to obey – to the extent that people make the moral choice to opt into (and remain a part of) a social contract. The capacity of citizens to make moral choices therefore lies at the foundation of any successful justificatory theory of law; it is logically prior to the existence of a legitimate law-making process. It follows that the law cannot have legitimate authority to declare persons (or classes of persons) unfit to make moral judgments (or 'correct' moral

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[34] *Sauvé*, *supra* note 1 at para. 30.

[35] *Ibid.* at para. 37:

> the government is making a decision that some people, whatever their abilities, are not morally worthy to vote -- that they do not "deserve" to be considered members of the community and hence may be deprived of the most basic of their constitutional rights. But this is not the lawmakers' decision to make. The *Charter* makes this decision for us by guaranteeing the right of "every citizen" to vote and by expressly placing prisoners under the protective umbrella of the *Charter* through constitutional limits on punishment. The *Charter* emphatically says that prisoners are protected citizens, and short of a constitutional amendment, lawmakers cannot change this.

judgments), since such a finding effectively removes the labeled class of persons from the sphere of people over whom the Crown could have authority of the scope and kind it wants. In so doing, the Crown weakens the obligation-creating power of the contract generally. As McLachlin C.J. observed:

> The right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features, underpins the legitimacy of Canadian democracy and Parliament's claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardizes its claim to representative democracy, and erodes the basis of its right to convict and punish law-breakers.[36]

Sauvé stands for the proposition that theory matters – not just in the classroom, but in the courtroom and in the House of Commons. Some theories, however, are simply not eligible for consideration inasmuch as they cannot do what theory needs to do to keep legal institutions vibrant and authoritative. Positivist theories of law, in particular, are ill suited.[37] Positivists claim there is no necessary connection between law and morality. They claim that, rather than discern the law through reference to moral arguments, one distinguishes legal rules from other kinds of rules by looking to their pedigree.[38] But that sort of argument has limited appeal to anyone who thinks that, although a formal chain of authority is important for the sake of stability, the 'plain fact' that a legal rule was created according to formal procedures laid down by a body or institution charged with creating law does not pre-empt one's own judgment about the content of that rule; and particularly one's moral judgment about that rule. Indeed, it is hard to say who – in

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[36] *Ibid.* at para. 34.

[37] Again, this is not to say that some theories of law grounded in morality cannot also be ruled out as viable contenders. A theory of law grounded in the tenets of national socialism, for instance, would seem foredoomed to provoke a crisis of legitimacy.

[38] This claim may be weaker or stronger depending on the kind of positivism about which one speaks. A 'hard' or exclusive legal positivist will claim that there is necessarily no connection between law and morality – that a law discernible only through moral argument amounts to no law at all. A 'soft' or inclusive legal positivist will argue that there is no necessary connection between law and morality – that a legal system may have legal rules discoverable through moral argument, but that a legal system need not do so in order to count as a legal system. See, for a discussion, Jules L. Coleman, "Negative and Positive Positivism" (1982) 11 J. Legal Stud. 139.

a democratic society, at any rate – actually *does* think in the way that positivists suppose.[39] When Parliament creates new law, Canadian citizens do not think themselves bound to obey it (still less to respect it) just because Parliament created it. They think themselves entitled to scrutinize the content of that law, to decide for themselves whether or not Parliament has overstepped its authority to morally obligate them.[40] The Supreme Court has recognized that its own authority, and that of other courts, does not rest entirely (perhaps even predominantly) upon its formal status. Judicial authority depends in large part upon courts providing reasons for their decisions and thereby opening up their rulings to public scrutiny.[41] In *Baker*,[42] the Court suggests that certain executive decisions must be accompanied by reasons. Though the Court qualified this duty, it held that reasons would be required in any case "where the decision has important

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[39] See Ronald Dworkin, "Thirty Years On", Book Review of *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* by Jules L. Coleman (2002) 115 Harv. L. Rev. 1655 at 1672 (referring to a hard positivist conception of authority):

> It is a coherent account of the point of authority. It presupposes, however, a degree of deference toward legal authority that almost no one shows in modern democracies. We do not treat even those laws we regard as perfectly valid and legitimate as excluding and replacing the background reasons the framers of that law rightly considered in adopting it. We rather regard those laws as creating rights and duties that normally trump those other reasons. The reasons remain, and we sometimes need to consult them to decide whether, in particular circumstances, they are so extraordinarily powerful or important that the law's trump should not prevail.

See also Scott Hershovitz, "Legitimacy, Democracy, and Razian Authority" (2003) 9 Legal Theory 201; Michael C. Plaxton, "The Formalist Conception of the Rule of Law and the *Marshall* Backlash" (2003) 8 Rev. Const. Stud. 66.

[40] See Dworkin, *ibid.*

[41] See *R. v. Sheppard*, [2002] 1 S.C.R. 869 at para. 5: "At the broadest level of accountability, the giving of reasoned judgments is central to the legitimacy of judicial institutions in the eyes of the public. Decisions on individual cases are neither submitted to nor blessed at the ballot box. The courts attract public support or criticism at least in part by the quality of their reasons. If unexpressed, the judged are prevented from judging the judges." See also *ibid.* at para. 15:

> Reasons for judgment are the primary mechanism by which judges account to the parties and to the public for the decisions they render. The courts frequently say that justice must not only be done but must be seen to be done, but critics respond that it is difficult to see how justice can be *seen* to be done if judges fail to articulate the reasons for their actions. Trial courts, where the essential findings of facts and drawing of inferences are done, can only be held properly to account if the reasons for their adjudication are transparent and accessible to the public and to the appellate courts.

For a discussion of this case, see Michael C. Plaxton, "Thinking About Appeals, Authority and Judicial Power After *R. v. Sheppard*" (2003) 47 C.L.Q. 59.

[42] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, 243 N.R. 22. For a situation where the legislative branch must provide reasons for judgment, see *Campbell*, *supra* note 2 at paras. 180-1.

significance for the individual."[43] The majority opinion, penned by L'Heureux-Dubé J., noted that the provision of reasons ensures that the decision-maker "carefully" considers all the relevant issues; and that the public knows that the decision-maker has done so.[44] In the absence of positive evidence that the legal decision-maker has weighed all the relevant moral considerations, the public will not blindly accept that she has done so.[45] One can see the section 1 test itself as a means of guaranteeing public accountability for Crown incursions on *Charter* rights.[46]

One suspects that ordinary Canadians would find it impossible to accept positivist claims about the nature of legal authority – and, accordingly, the nature of legal obligations.[47] The positivist scholar may not care about that. After all, one does not settle questions of philosophy by referendum (though, as Hart himself observed, one struggles to imagine a coherent theory of legal obligations that does not make some reference to the 'internal point of view').[48] Politicians, civil servants, judges – or anyone who has a professional stake in law – should care, however, if they act in a manner that citizens think does not reflect the true nature of their relationship with legal institutions. This is especially true if, by acting in a manner that implicitly grounds legal authority in force or social convention, they unwittingly manage to convince people that legal obligations are not quite so obligatory.

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There remains something novel about the notion that lawyers need to think about 'high theory' when they consider questions of constitutionality. The profession continues to regard itself as

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[43] *Baker*, *ibid.* at para. 43.
[44] *Ibid.* at para. 39.
[45] For a discussion of *Baker*, see David Dyzenhaus and Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" (2001) 51 U.T.L.J. 193.
[46] See *Sauvé*, *supra* note 1 at para. 23: "At the end of the day, people should not be left guessing about why their *Charter* rights have been infringed."
[47] See David Dyzenhaus, "Positivism's Stagnant Research Programme", Book Review of *In Defense of Legal Positivism: Law Without Trimmings* by Matthew Kramer (2000) 20 *Oxford J. Legal Stud.* 703.
[48] Hart, *supra* note 29.

one predominantly unconcerned with philosophy; as a body wrapped up in more 'practical' affairs. That division no longer appears stable (if it ever did). Canadian constitutional law, today, cannot be divorced from issues of political theory. Lawyers who avoid thinking about meta-constitutional issues risk making an argument that the Court will refuse to recognize; or, if the text of the Constitution falls silent in a given case, no argument at all. It may be time to start thinking about what makes law worth having and worth practicing.

Perhaps it is unsurprising that, in this 'new' Canadian constitutional landscape, positivism should find itself a drifter, a theory cut off from its surroundings like a man in an existential nightmare. After all, a hard positivist will think the whole idea of an unwritten constitution nonsense. To the positivist there is no landscape – just a hub; a few scattered satellites; and lonely roads, each abutting deep space, all leading her to or from the center. She spends her life tracing her own footsteps, pacing back and forth, muttering to herself (for no one else will listen) about 'pedigree', while others walk freely and do their best to delicately ignore her. No matter what others say, the positivist refuses to entertain the notion that there is anything to the world but the ground beneath her next step, for fear that by looking up she will lose her balance and fall off.[49]

[49] I bear in mind (as a counter-point) the classic Greek parable of Thales the philosopher who, while pondering the sky, fell into a well.