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Michael McAuley

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# JURIDICAL PERSONALITY AND INTIMACY

Michael McAuley\*

*You will take him in your arms, embrace and caress him the way a man caresses his wife. He will be your double, your second self, a man who is loyal, who will stand at your side through the greatest dangers. Soon you will meet him, the companion of your heart.*

Gilgamesh<sup>†</sup>

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\* Michael McAuley is an advocate and practices in Montreal. This paper wants to be adventurous and unorthodox. All *law* sources, formal and informal, are treated on a horizontal plane. All *non-law* sources are treated as having legal value. This paper does not specify a particular time or place although it has been written for the traditions and systems of the West. It also endeavours to reinforce the idea that any discussion of a legal conception necessarily involves some definition of *law*, as well as some agreement on how the word *law* is used and what notions it embraces. This paper has been designed to be accessible to a wide range of educated citizens. Accordingly, with a view to promoting efficient reading, all material that does not add to the argument is relegated to the footnotes.

<sup>†</sup> See GILGAMESH 83-84 (Stephen Mitchell trans., Free Press, New York, 2004). The earliest surviving texts relating legends of Gilgamesh date from 2100 BCE. *Id.* at 3. The Standard Version of the Epic of Gilgamesh dates from about 1200 BCE. *Id.* at 6. The story of Gilgamesh is his relationship with Enkidu with whom Gilgamesh has a homoerotic and, perhaps, homosexual bond. *Id.* at 13. Yet, his physical bond, as this text indicates, nourishes *fides*—the fidelity of a loyal and intimate companion. The battle of these heroes is “an entrance into intimacy, and as close to lovemaking as to violence.” *Id.* at 23.

## I. INTRODUCTION: PERSONS AND PERSONALITY

It is best to begin boldly.

What is the law? Is it nothing more than a particular system of principles, rules, and standards, enacted by a constituted authority, that govern people at a particular time and in a particular place? On Main Street, people may think of the law as such, as a set of sovereign pronouncements without ethical direction. Or, like many private-law practitioners, they may think of the law as a random scheme of rules of allocative efficiency and maximization of wealth.

Thoughtful citizens, however, know that the law's empire is more than a grouping of prescriptions and sanctions. Throughout the ages, they have talked about the law as a complex of truthful ideas and moral propositions of ways to regulate the conduct of people in society amongst themselves, in their relations to things, and in their dealings with the sovereign. Thus, it is only in a highly limited, indeed unnatural, sense that the law, as a topic and as a system of rules, can be said to be purely positivistic<sup>1</sup> and value-free.<sup>2</sup>

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1. Positivism is popularly perceived both as a denial that equity, justice and reason form part of an imperative *ius commune* and as an assertion that there are no supereminent principles to which legislation must conform. Yet, positivism does admit that there *may* be some moral and ethical content to law or, at the very least, that positive laws make moral norms effective. See Brian H. Bix, *Natural Law: The Modern Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 60, 95-98 (Jules Coleman & Scott Shapiro eds., Oxford University Press, 2002) (summarizing the modern tradition of the natural law theory and its relation to positivism). As Bix notes, the positive law school has two major approaches (inclusivism and exclusivism) to the treatment of moral and ethical matters. *Id.* at 7-8. Even where it is admitted that law may have some moral and ethical content, positivism, at first blush, would seem open to a plurality of moral and ethical standards or at least open to as many such standards as there are systems. Can many moralities be compared? For an assessment of positivism within the context of comparative law, see Catherine Valcke, *Comparative Law as Comparative Jurisprudence—The Comparability of Legal Systems*, 52 AM. J. COMP. L. 713, 724-731 (arguing that positivism, by reason of the plurality of approaches, does not allow for comparison of legal systems).

2. Finnis has an appealing definition of law that refers to both enacted rules but also to un-enacted, community-regulating norms that are not (or have not yet been) recognized by the constituted authority. Although the thrust of his definition seems highly positivistic, the reference to the “common good” as the *telos* of the law is the definition's focus and is, of course, the definition's contentious core. See generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 276-281 (Oxford University Press, 2000). His definition is:

As it happens, earnest debate on the nature of the law gives every indication that the law is ethically ambitious and that it aspires, in very practical ways, to put in place love-based<sup>3</sup> rules for good social order. Good law does not adopt single-value approaches. It harkens for a healthy relativism attuned to the community. It accepts the pluralism of moral values, and it acknowledges that the source of these values is likely both secular and theological.<sup>4</sup> Thus, good law is polycentric, facilitative, and responsive to personal autonomy.<sup>5</sup>

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[The law] refer[s] primarily to rules made, in accordance with regulative legal rules, by a determinate and effective authority (itself identified and, standardly, constituted as an institution by legal rules) for a 'complete' community, and buttressed by sanctions in accordance with the rule-guided stipulations of adjudicative institutions, this ensemble of rules and institutions being directed to reasonably resolving any of the community's co-ordination problems (and to ratifying, tolerating, regulating, or overriding co-ordination solutions from any other institutions or sources of norms) for the common good of that community, according to a manner and form itself adapted to that common good by features of specificity, minimization of arbitrariness, and maintenance of a quality of reciprocity between the subjects of the law both amongst themselves and in their relations with the lawful authorities.

*Id.* at 276-277.

3. See HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 313-318 (1993). "I would contend that law, understood in a Christian perspective, is a process of creating conditions in which sacrificial love, the kind of love personified by Jesus Christ, can take root in society and grow." *Id.* at 313. Sacrificial love is *agape*. Again, from a Christian viewpoint, it is by loving our fellow men and women that we know God. To love is to cooperate.

4. See generally George P. Fletcher, *What Law is Like*, 50 S.M.U.L. REV. 1599, 1610-1612 (1997). "The law is more like religion than the practitioners of either are likely to recognize." *Id.* at 1611. "But lawyers and theologians share a pursuit of ultimate truth in the context of culture-specific traditions. They must mediate between the demands of universal reason and their localized respect for particular sources." *Id.* "Because their authorities are not always moral, both law and religion end up endorsing views that sensitive free-thinkers find abhorrent." *Id.*

5. Polycentricity looks at legal relationships as relationships between the normative orders of a particular society. It seeks the recognition of these relationships within the legal system of that society. See generally SURYA PRAKASH SINHA, *LEGAL POLYCENTRICITY* 1-17 (1996). Legal polycentricity accepts the pluralism of moral values. *Id.* at 6. It does not accept that "... conflicting values are reconcilable under one truth." *Id.* at 3. Legal polycentricity "provides facilities to persons for realizing their particular objectives." *Id.* at 13. It accommodates personal autonomy. *Id.* The Law Reform Commission of New Zealand acknowledges law's facilitative function. See generally *The Law Reform Commission of New Zealand, Recognising Same-Sex Relationships*, Study Paper 4 (Dec. 1999). "The history of mankind

So, the law in motion endeavors to bring about the common and actually<sup>6</sup> moral good, as this good is tentatively and modestly understood and experienced in today's context. In this regard, the law is meekly cognizant of its own forward-looking—indeed, one might say—its own eschatological dimensions.<sup>7</sup>

One of the subject matters of the law is personhood. “[A] person in law is one who can play a part in the life of the law.”<sup>8</sup> The law asks: who is a person, and what is her condition? It addresses this question by considering the essential qualities of a

demonstrates that one of the ways in which human sexuality manifests itself is in the formation of publicly avowed and socially recognised relationships intended to be enduring. The legal code of a state properly responsive to the aspirations of its citizens will make provision for such relationships be they heterosexual or homosexual.” *Id.* at 9.

6. “Actually” means a “good” rooted in actual persons’ desires and experiences. See Steven D. Smith, *Natural Law and Contemporary Moral Thought: A Guide from the Perplexed*, 42 AM J. JURIS. 299, 316-330 (1997) (book review) (questioning the value of the “objective” account of sexual morality, and advocating a discourse of “good” where “good” is personal and subjective in some important sense). “[T]he natural lawyer severs goods from our language and understanding, in which things are “good” *to and for persons* and *as experienced by persons* . . . . To put the point differently, *our* moral discourse is conducted by *us*, for better or worse, for *our* purposes and subject to *our* understandings.” *Id.* at 320.

7. See Michael McAuley, *The Gay Man and His Civil Code*, 64 LA. L. REV. 443, 449 (2004) (stating that culturally constructed identities will not survive the grave and that the eschatological vocation of a good civil code means that people must learn to live with each other here and today). See also GARETH MOORE OP, *THE BODY IN CONTEXT—SEX AND CATHOLICISM 2-3* (Continuum, London, 2001) (1992). “To be fit to live in the kingdom is to live with others in a particular way or range of ways. If a Christian ethic may be seen as eschatological, it is also social. It is about learning to be with each other.” *Id.* at 3. On the relationship of eschatology and ethics, and on “action for the world’s betterment,” see Kathryn Tanner, *Eschatology and Ethics*, in *THE OXFORD HANDBOOK OF THEOLOGICAL ETHICS* 41, 52-56 (Gilbert Meilaender & William Werpehowski eds., Oxford, 2005). See also Margaret A. Farley, *New Patterns of Relationship: Beginnings of a Moral Revolution*, 36 THEOLOGICAL STUDIES 627 (1975).

If the ultimate normative model for relationships between persons is the very life of the Trinitarian God, then a strong eschatological ethic suggests itself as a context for Christian justice. That is to say, interpersonal communion characterized by equality, mutuality, and reciprocity may serve not only as a norm against which every pattern of relationship may be measured but as a goal to which every pattern of relationship is ordered.

*Id.* at 645-646. It should be noted that Farley’s observations focus on male-female relationships.

8. H., J., AND L. MAZEAUD, *LEÇONS DE DROIT CIVIL*, t. 1, v. 2, no. 438 (trans.) (7th ed., Montchrestien, Paris, 1986), cited in *QUEBEC CIVIL LAW: AN INTRODUCTION TO QUEBEC PRIVATE LAW* 203 (John E.C. Brierley and Roderick A. Macdonald, eds., Emond Montgomery, Toronto, 1993).

person under a topic called *personality*. When talking about personality, the law calls persons *actors* or *subjects* and says that they must be free in order to have full personality since the law has had, at times, relatively developed notions of deprivation or absence of personality.<sup>9</sup>

Each citizen is one-of-one, but each is also one-of-many since all citizens belong to political, social and economic communities. In one sense, a person is a citizen because she belongs to one of these communities, and her rights and duties are specified by that community. In another sense, her citizenship is coextensive with her personhood and extends beyond national boundaries. Her citizenship reflects her participation in communities and her implication in their life.

In these communities, citizens are called to cooperate with each other.<sup>10</sup> The nature and scope of the right-owning and duty-owing attributes of a citizen's personality are determined on the basis of her status (or statuses) in these communities. Across the board, family status largely determines a person's capacity to enjoy and exercise rights in the society where she lives.

In civil society,<sup>11</sup> in contemporary<sup>12</sup> private law,<sup>13</sup> and in the West,<sup>14</sup> the family is the benchmark that indicates people's

9. At times, the attributes of personality have not been extended to non-citizens, outlaws, the imprisoned, and the enslaved. Personality has also been interested in human physiology. For example, in Roman law and in the *ancien droit* of France, *monstres* (monsters, in the sense of deformed neonates) had no personality. See AUBRY & RAU, 1 DROIT CIVIL FRANÇAIS 363 n.10 (7th ed., André Ponsard ed., Paris, 1964).

10. In the context of property law, see JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD-LESSONS ON THE OBLIGATIONS OF OWNERSHIP 20-25 (Beacon Press, Boston, 2000). "Rights must be limited to protect rights. This paradox arises because we do not live alone. The law—including the law of property – recognizes that our fate is tied to the fate of others. Moreover, the law does not exist only to protect our interests; it exists also to promote liberty and justice. These goals cannot be realized unless we act in ways that respect the interests of others." *Id.* at 20.

11. Civil society is a society governed by civil law—*ius civile*. In this sense, the civil law means the secular law applicable to citizens of a particular place that regulates their public and private lives and that accords to them certain civil rights and freedoms. On the history of the meaning of civil law, see generally Alain Sériaux, *Droit civil*, in DICTIONNAIRE DE LA CULTURE JURIDIQUE 435 (Denis Alland & Stéphane Rials eds., Presses universitaires de France, Paris, 2003).

12. Roland Barthes asks: "De qui suis-je le contemporain? Avec qui est-ce que je vis?" (Who is my contemporary? With whom do I live?). See ROLAND BARTHES, COMMENT VIVRE ENSEMBLE—NOTES DE COURS ET DE SEMINAIRES AU COLLEGE DE FRANCE, 1976–1977 36 (Éditions du Seuil 2002). Barthes states that contemporaneity is a very complex and little examined topic. *Id.*

personal status, and the rights and duties related to that status. Accordingly, personality usually is discussed in a traditional family context,<sup>15</sup> dominated by the metanarrative of marriage<sup>16</sup> as

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13. Private law is the ensemble of legal rules governing relations among persons and, sometimes, between individuals and public bodies. Private law usually encompasses civil law, commercial law and, perhaps, judicial law. See the entry for “private law” in PRIVATE LAW DICTIONARY AND BILINGUAL LEXICONS 339 (2d ed., Les Éditions Yvon Blais, Cowansville, 1991). See also *Introduction*, in 1 ENGLISH PRIVATE LAW xxxvi (Peter Birks ed., Oxford University Press, 2000). “The whole of the law is either public law or private law. There is no need to pause on this, nor to investigate the boundary disputes. Our present business is only with private law. *English Public Law* will deal with the other side. It will deal with constitutional law, human rights, administrative law, and criminal law.” *Id.* *English Public Law* seems to take the position that the sources of fundamental rights are found either in constitutional documents, statutes or case-law. In the absence of a written constitution, as is the case for England, judges have exclusive control over the sources for legal justifications. See Evelyn Ellis, *Constitutional Fundamentals: Sources of Law and the Hierarchy of Norms*, in ENGLISH PUBLIC LAW 3, 44-45 (David Feldman ed., Oxford University Press, 2004). *Quaere*, where do judges find their sources? From a certain perspective, the British inability to protect fundamental rights (owing to the absence of written constitutional documents) has been somewhat mitigated by the Human Rights Act 1998. Under the terms of this Act, specified rights were adopted into municipal law. Presumably on account of the parliamentary adoption of certain provisions of the European Convention, Ellis’ co-contributor and the volume’s general editor, David Feldman, deals with the topic of privacy, lifestyle, personal integrity, status, gender, sexuality, and family life solely under the Convention and the Act. See David Feldman, *Rights to Life, Physical and Moral Integrity, Freedom of Lifestyle and Religion or Belief*, in ENGLISH PUBLIC LAW, *supra* at 471-479. Feldman does not discuss the topic of the origin of the rights or the notion that human rights might be innate in the *persona* (personhood) of the human person (and not conferred by the sovereign or otherwise formally justified).

14. Where is the West? It is a hemisphere. It indicates a direction on a compass, but also a metaphorical direction: “Go West, young man.” However, the West, in the law, might be taken to mean all those traditions and systems that have a like approach to issues and that have a common *mentalité* (mental, or intellectual, disposition) characterized by their attention to personalism (individual freedom and social duty), legalism (the need to base decisions on a general rule of law), and intellectualism (conceptual and systematic legal methodology). See Franz Wieacker, *Foundations of European Legal Culture*, 38 AM. J. COMP. L. 1, 19-27 (1990). See also BERMAN, *supra* note 3 at 23-33 (describing the characteristic elements of the Western legal tradition). On modern perspectives of the nature of a legal tradition, see Ugo Mattei & Anna di Robilant, *The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe*, 75 TUL. L. REV. 1053, 1071-1077 (2004). “Membership in one legal tradition is not exclusive, because tradition is not an ontological entity; rather, it is an interpretive entity largely defined by a sense of belonging and identity.” *Id.* at 1072.

15. “Tradition” and “traditional” are unsafe words, especially in the domain of intimate personal relationships. One might sensibly propose the following definition. “Tradition” is a complex of customs and practices handed down from one living generation to another living generation, the elements of

related by its mythweavers.<sup>17</sup> This is so notwithstanding modern disestablishment of the conventional marriage model.<sup>18</sup>

The personality in the law, or juridical personality, of the human person is a personality of a person who has human self-consciousness, self-identity, and center of reference.<sup>19</sup> It deals with

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which can be found in the actual experience of a living generation or the accurate memory of a living generation of the historically verified experience of a former generation or generations. Can “tradition” mean anything more than this? Today’s lawmakers and popular media use “traditional marriage” in the sense of marriage as experienced everywhere since the beginning of time and, of course, as linked to the “intelligent design” of human existence. The tedious and mantric repetition of “traditional marriage” (and its imagined, immemorial incidents and effects) constitutes not only a mistaken reality but a clearly invented tradition. On the nature of an invented tradition, *see generally* Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1-14 (Eric Hobsbawm & Terence Ranger eds., Cambridge University Press, 1983). Hobsbawm states:

‘Invented tradition’ is taken to mean a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past. In fact, where possible, they normally attempt to establish continuity with a suitable historic past.

*Id.* at 1.

It is the contrast between the constant change and innovation of the modern world and the attempt to structure at least some parts of social life within it as unchanging and invariant, that makes the ‘invention of tradition’ so interesting for historians of the past two centuries.

*Id.* at 2.

16. Fineman discusses social and cultural “narratives” about the family and marriage as an institution. *See* MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 145-176 (1995).

17. For the word “mythweaver”, *see* IF NOT, *WINTER—FRAGMENTS OF SAPPHO* 353, 382 (Ann Carson trans. 2002).

18. Cott summarizes various reasons for the disestablishment, dejuridification, delegalization, and privatization of marriage in the United States. *See generally*, Nancy F. Cott, *PUBLIC VOWS—A HISTORY OF MARRIAGE AND THE NATION* 200-227 (2000). For the use of disestablishment and its synonyms, *see id.* at 283, n.17. Most of the reasons are economic. They include: two-earner families; households of unrelated groups; cohabiting couples; more than one generation living together; single-person households; single mothers and fathers; *transgressive* (italics added) sexuality; and enforcement of support obligations outside of the marital bond. *Id.* at 214-215. When Cott uses the word “transgressive,” does she mean sinful sexuality or sexuality not conformable with certain societal expectations?

19. *See* GERALD O’COLLINS, S.J., *CHRISTOLOGY—A BIBLICAL, HISTORICAL, AND SYSTEMATIC STUDY OF JESUS* 224-249 (Oxford University Press, 1995) (discussing the divine and human natures of Christ). “The ego of his human consciousness is also the Word of God as humanly conscious and self-conscious, that is, as operating in and through *this* human awareness. God the

her existence, her voluntary action, and her rights and obligations.<sup>20</sup> It is the free action of the citizen and her free access to legal institutions. Juridical personality is also her free enjoyment and exercise of civil rights, and her freely assumed obligation to undertake and discharge her civil duties. She has a patrimony<sup>21</sup> and, in the private law, rights and duties relate either to her patrimonial assets and debts or to her extrapatrimonial rights (and concomitant duties) to the respect of her personal dignity, integrity and privacy, as well as to the respect of her other civil rights and fundamental freedoms.<sup>22</sup> In public law she also has a patrimonial stake in property that belongs to the community whether local, regional or international. She and all others are stakeholders and are entrusted to preserve and safeguard the common patrimony for transmission from generation unto generation.<sup>23</sup>

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Son takes as his own this human self-consciousness, self-identity, and centre of reference." *Id.* at 247.

20. The law is interested in a person's existence, identity (name, domicile or residence, civil and family status, and sex), and her attributes (subjective rights). *See generally* JEAN CARBONNIER, *DROIT CIVIL 1: LES PERSONNES* 15, 19-177 (21st ed., Presses Universitaires de France, Paris, 2000). The objective law attributes subjective rights. *Id.* at 15. Modern French scholarship still adheres to a formal definition of law. Law is a series of prescriptive rules for social conduct that are sanctioned by a public authority. The French carefully distinguish legal and moral rules: their objectives are different. *See generally* JEAN-LOUIS BERGEL, *THEORIE GENERALE DU DROIT* 42-52 (4th ed., Dalloz, Paris, 2003).

21. A patrimony is the aggregate of a person's rights and obligations determined or determinable in economic or pecuniary terms. "Extrapatrimonial" primarily refers to rights that are "out of commerce" and have no monetary value. *See generally* the entries for "patrimony", "extrapatrimonial", and "extrapatrimonial right", *supra* note 13, *PRIVATE LAW DICTIONARY AND BILINGUAL LEXICONS* at 157, 311-312. A breach of an extrapatrimonial right has patrimonial implications.

22. "Civil rights," "civil freedoms," "fundamental freedoms," "civil liberties" and other terms of like ilk are often used interchangeably. As used in this paper, "civil rights" refers to those "rights" recognized explicitly or implicitly by the private law, and "fundamental freedoms" to those "rights" formally or informally present in the public law and, in particular, in the constitutions, written or unwritten, of sovereign bodies. Of course, there is considerable travel between the private and public spheres of the law, and it is often difficult to determine whether the private law or the public law first recognized any particular right. For a short, readable account of the various senses of "rights", *see* MAURICE CRANSTON, *WHAT ARE HUMAN RIGHTS?* 19-24 (The Bodley Head, London, 1973).

23. The notion of "*patrimoine commun*" (common patrimony) is particularly useful in connection with environmental protection issues. *See generally* Marie-José Del Rey, *La notion controversée de patrimoine commun*, *D.* 2006, No. 6, 388. As a juridical conception, the idea of common patrimony promotes awareness that every individual is a stakeholder. *Id.* at 389. Although

This paper examines intimate association, under the rubric of intimacy, as the actual, aspiringly good experience of people in the law. In this paper, intimate association is unmoored from legal abstractions of an ideal or canonically imagined society of robotic citizens and released from any pre-existing or pre-conceived morality that militates in favor of a single form of intimate association. It is transsystemic<sup>24</sup> and cross-disciplinary in that it is interested in the *best* approach to intimacy in Western legal traditions and systems<sup>25</sup> and in the social sciences. The *best* approach is supranational and is fashioned from a *ius commune* that is a “shared international fund of private law [thinking].”<sup>26</sup>

Accordingly, this paper first discusses the relationship between juridical personality and intimacy. It then sets out to identify the contours of juridical personality and further define its attributes. Third, it looks at the right of intimacy, considered as an attribute of

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touted as a novel conception in civil law scholarship, its notions are similar to those that have long been known to underscore the chthonic legal tradition. *See generally* H.P. GLENN, *LEGAL TRADITIONS OF THE WORLD—SUSTAINABLE DIVERSITY IN THE LAW* 59-91 (2d ed., Oxford University Press, 2005).

24. On the meaning of the word “transsystemic” as a way of knowing the law, *see generally* Nicholas Kasirer, *Bijuralism in Law’s Empire and in Law’s Cosmos*, 52 *J. LEG. EDUC.* 29 (2002).

25. The notion of a legal system is roughly understood as an interconnected and interrelated body of institutions, rules and norms that formally or informally govern society in a particular place. A University of London student subject guide nicely describes a legal system as “a complex of operations, processes, human actions, institutions and ideals.” *See* WAYNE MORRISON ET AL., *COMMON LAW REASONING AND INSTITUTIONS* 26 (Publications Office, The External Programme, University of London 2004). A legal tradition has been well defined by Merryman. *See* John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 1-4*, in *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICAN, AND EAST ASIA—CASES AND MATERIALS* 3 (John Henry Merryman et al. eds., The Michie Company, Charlottesville, 1994, 2000 repr.).

[A legal tradition] is a set of deeply rooted, historically conditioned attitudes about the nature of the law, about the role of law in society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught.

*Id.* at 3-4.

26. *See* FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 193 (Martinus Nijhoff Publishers, The Netherlands, 1993). Juenger proposes a new methodological pluralism for the resolution of choice-of-law issues in American conflicts law. *Id.* at 191-194. For the use of the word “best” and for a methodological approach similar to Juenger’s proposal, *see generally* L. McDougall III, *Toward Application of the Best Rule of Law in Choice of Law Cases*, 35 *MERCER L. REV.* 483 (1984) (advocating that courts should apply the best rule of law in choice-of-law cases).

juridical personality and as a private-law right of intimate association. It endeavors to locate the formal and informal sources of intimacy in close, personal relationships. The paper next tries to specify intimate associations. By way of conclusion, it restates the nature of juridical personality and its intimate components.

## II. JURIDICAL PERSONALITY AND INTIMACY

Juridical personality recognizes that the citizen has important rights of intimacy in her life and at home. These rights include the right of intimacy, expressed as a right at large, and particular rights of intimacy. Particular rights, for example, relate to the protection of her physical and intellectual intimacy, the intimacy of her appearance, image and reputation, the protection of her intimate private life against undue public scrutiny, her intimacy as an expectant mother concerning the circumstances of conception and birth, and the intimacy relating to her personal health, especially her decisions for final care.<sup>27</sup>

There is no set classification of rights. However, in this list of particularized rights, there are rights that might be recognized as rights of privacy; there are also other rights, sometimes referred to as personality rights, e.g. privacy-based and property-based protection of her image, and the protection of her reputation; and, there are rights that relate to her physical integrity, e.g. the intimacy of her body and the circumstances of conception. Indeed, intimacy, privacy, and integrity often are used synonymously.<sup>28</sup>

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27. The discussion draft of the Civil Code of Puerto Rico refers to the right of intimacy (*intimidad*) as a fundamental right (*derecho esencial*) in the text of its art. 8 of Book One (Jural Relations). See Comisión Conjunta Permanente para la Revisión y Reforma del Código Civil de Puerto Rico, Memorial Explicativo, Código Civil de Puerto Rico (Borrador para discusión) (revised March 5, 2003) 14, available at <http://www.oslpr.org> (last visited February 21, 2011). See also the comments on various rights of intimacy. *Id.* at 9, 10, 11, 20, 33, 39, 41 and 42. Both dignity (*dignidad*), joined to the concept of honor (*honor*), and physical and moral integrity (*integridad física y moral*) are specified rights in art. 8. *Id.* at 14. Dignity and intimacy are used to describe the rights of an expectant mother. *Id.* at 10. Respect of dignity and integrity is required for autopsies and for the disposal of remains and bodily parts. *Id.* at 37.

28. There are language problems when talking about intimacy. Although intimacy, in English and Spanish, embody similar notions of close friendship and sexual relations, the words “*privacidad*” and “*intimidad*,” in Spanish, both express the idea of “privacy” in English. See THE OXFORD SPANISH DICTIONARY 1593 (3d ed., Oxford University Press, 2003). The French Civil Code relates the concept of “*intimité*” (intimacy) to the concept of “*vie privée*” (private life). See art. 9, Code Civil 2010 (Éditions Dalloz, Paris, 2009).

They are all attached to the general notion of dignity,<sup>29</sup> and dignity is itself identified both as a separate attribute of the person and an overarching notion of the human condition. Indeed, dignity-at-large patently requires a high level of respect for the way by which a person fashions her private life and the degree to which her private life is, aptly and fortunately, strange. It is her *étrangeté* that announces not only her diversity and her choice of intimacy, but also her enigma and her *mysterium*.<sup>30</sup>

Yet, in a person's private life, intimacy is not limited to her emotions or sentiments or to her privacy. Nor is it limited to her right of privacy of sexual intimacy. It goes beyond her sexuality and sexual conduct.<sup>31</sup> Its expression, in general terms, as a right, embraces a right of intimate association between adults and a right of choice of a close personal, economic, social, and sexual relationship<sup>32</sup> with another person. It also refers to other close or

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29. The Supreme Court of Canada has defined "dignity." See *M. v. H.*, [1999] 2 S.C.R. 3, para. 261 (Supreme Court of Canada). "The central purpose of the equality guarantee in s. 15(1) of the *Charter* is the protection and promotion of human dignity. The concept of human dignity is concerned with the autonomy, self-worth, and self-respect of individuals. As Iacobucci J. points out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, . . . "[h]uman dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits." *Id.* Iacobucci, J.'s conception of human dignity would seem to reflect the thin meaning of this term. See Doron Shultziner, *Human Dignity—Functions and Meanings*, GLOBAL JURIST TOPICS 1, 12-16 (vol. 3, issue 3, article 3) (2003) (defining the thin meaning of human dignity as a meaning related to humiliation and self-worth). Shultziner explains how the thin meaning relates to other meanings:

Whereas rights and duties, and honor, are contained within the upward wide moral view that is meant to harmonize human moral worth and one's proper social-political relation with other human beings, the thin meaning is contained within a thin moral view that is focused on the crude violation of that basic moral worth.

*Id.* at 12.

30. Didier Eribon quotes the French poet René Char (1907–1988) as saying: "Développez votre *étrangeté légitime*." See DIDIER ERIBON, REFLEXIONS SUR LA QUESTION GAY 486 (Fayard, Paris, 1999). The French word "*étrangeté*" embraces, as perhaps the English "strangeness" does, meanings of singularity, originality and, of course, eccentricity. See also *M. v. H.*, *supra* note 29 at para. 260 (Gonthier J.) "It is important to note that it is not a denial of human dignity to recognize difference; to the contrary, acknowledging individual personal traits is a means of fostering human dignity. By recognizing individuality, and rejecting forced uniformity, the law celebrates differences, fostering the autonomy and integrity of the individual." *Id.* at para. 262.

31. See *infra* Part. III & IV.

32. For the right of choice of a sexual relationship, see, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting). "The fact that

intimate associations that encompass most, but not necessarily all, of these relational aspects. These associations involve living together.<sup>33</sup> They do not imply and are not predicated on sexual relations, although access to state-administered benefits may require some sort of sexual relationship.<sup>34</sup> This right of intimate association might be said to belong to a new category of private-law rights—civil equality rights. These rights are linked to notions of equality before the law and to protection against unlawful discrimination.<sup>35</sup> The notion of civil equality rights relates to the following question and answer. Who is entitled to civil rights? Everyone.

The right of intimacy, at large, relates to status and to the capacity to perform specific activities. Status is understood to have two classic components: *status civitatis* (nationality) and *status familiae* (family status) although other notions of status, such as a person's age, health, profession, or occupation, have surfaced.<sup>36</sup> Status answers the questions: who is a legal subject, and who possess rights? In the 19<sup>th</sup> century, non-nationals had limited civil rights in many legal systems. In modern law, the concept of nationality as a portal to capacity has been largely displaced by

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individuals define themselves in a significant way through their sexual relationships suggests...that much of the richness of a relationship will come from the freedom to *choose* the form and nature of these intensely personal bonds." *Id.*

33. On the rational and sentimental meaning of "living together", see generally Nicholas Kasirer, *What Is Vie Commune? Qu'est-ce que living together?*, in MELANGES PAUL-ANDRE CREPEAU 487 (Cowansville, Yvon Blais, 1997).

34. For example, private-law and public-law benefits and obligations, in Canada, under the federal authority and administered by that authority, have been extended to ". . . all couples who have been cohabiting in a conjugal relationship for at least one year, in order to reflect values of tolerance, respect and equality, consistent with the *Canadian Charter of Rights and Freedoms*." See Summary, *An Act to modernize the Statutes of Canada in relation to benefits and obligations*, S.C. 2000, c.12 (Bill C-23). What is "a conjugal relationship"? It has long been presumed that this type of relationship must be marriage-like and involve sexual relations. For a discussion of conjugality and non-conjugality, see generally Brenda Cossman and Bruce Ryder, *What is Marriage-Like Like?*, 18 CAN. J. FAM. L. 269 (2001). The Supreme Court of Canada has observed that a conjugal relationship may exist even in the absence of a sexual relationship. *Id.* at 291-300 (discussing the Court's views of conjugality in the context of a same-sex relationship).

35. See Carbonnier, *supra* note 20, at 158-163, 174-177.

36. But see Aubry & Rau, *supra* note 9, at 355-357 (arguing that notions of the physical state of a person, her age, health, social position, religion, profession or occupation, are not status matters).

domicile. Today, status is mostly concerned with acts of civil status that identify the person as born,<sup>37</sup> married, or dead, provide her with a name, fix her domicile, and sometimes identify her ethnic or cultural group.<sup>38</sup> Capacity answers the questions: who is able to enjoy civil rights, and who can exercise these rights?<sup>39</sup>

The right of intimacy has patrimonial and extrapatrimonial consequences in that, patrimonially, an intimate association refers to a person's voluntary undertakings to acquire assets and assume liabilities in the close presence of another (and to that person's profit or detriment) and, extrapatrimonially, intimacy relates to her right of privacy of the personal, economic, social and sexual aspects of her intimate association (and the duties of recognition of others' intimacy). Her rights commit her to the discharge of her duties. The respect of her intimacy is companion to her respect of the intimacy of others in whose favor her rights are impressed with a trust.<sup>40</sup>

For the most part, the meaning of *intimacy* has been understood either in terms of fundamental freedoms and the public law's approval or disapproval of intimate sexual relations, or in terms of

37. The act of birth will be the first act of civil status to indicate a person's sex: male or female. However, there are intersexual children, and there is a wide range of intersexual states. Chau and Herring have recently examined the topic and advocate a legal definition of sex that recognizes a scale of sexual identity or a sexual continuum. They admit that this has obvious consequences for marriage. See Pak-Lee Chau and Jonathan Herring, *Men, Women, People: The Definition of Sex*, in *SEXUALITY REPOSITIONED—DIVERSITY AND THE LAW* 187 (Brooks-Gordon et al. eds., Hart Publishing, Oxford-Portland, 2004). As a result, the law will no longer place any legal significance on sexual differences. *Id.* at 206. "Instead of talking of men and women the law will treat each individual as a person..." *Id.* at 207.

38. On the interdependence of culture and national law, see Marie-Noël Capogna, *Identité juridique et identité culturelle de la personne physique: quels rapports?*, in *L'IDENTITE DE LA PERSONNE HUMAINE—ÉTUDE DE DROIT FRANÇAIS ET DE DROIT COMPARE* 911, 919-922 (J. Pousson-Petit ed., Bruyant, Brussels, 2002).

39. The capacity to enjoy civil rights is sometimes referred to as "aptitude." See CIVIL CODE REVISION OFFICE, REPORT ON THE QUEBEC CIVIL CODE—VOLUME II—COMMENTARIES—Tome 1, Books 1 to 4 (Éditeur officiel, Quebec, 1977). *Id.* at 23. See also Aubry & Rau, at 357. "[La] capacité juridique est l'aptitude à devenir le sujet de droit et d'obligations et à les exercer." *Id.* Important, however, is the distinction between status and capacity. *Id.* 357-358, note 13.

40. See John Finnis, *Natural Law: The Classical Tradition*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW*, *supra* note 1 at 1, 51-2 (discussing the philosophy of property law and its moral content). "[A]t the same time [property rights] are morally subject to a kind of inchoate trust, mortgage, lien, or usufruct in favour of *all other persons*." *Id.* at 51.

marriage and the private law's disapproval of non-marital relations and its sole regard for marriage as generative of the family and, hence, of the personal status of a citizen and home of her juridical personality.<sup>41</sup> The law imagines and images intimacy horizontally.<sup>42</sup> Therefore, it is no surprise that the institutions of marriage and the husband-wife-child family, in much of the secular positive law of the West, have been classically considered as the ideal, if not sole, repositories for husband-wife sexual action.<sup>43</sup> Indeed, historically and in the Common Era, the secular West has considered the disembodiment of sexual action from the institution of marriage as dystopian.

Until recently, the sexual action of marriage has been an *idée fixe* underscoring the private law of persons. It has been framed as “an act which in its intentions and kind is apt to actualize, express, and allow the spouses to experience their friendship, commitment, and openness to procreation of offspring.”<sup>44</sup>

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41. See also Fineman, *supra* note 16 at 145-147. Moreover, Borrillo states that early Christian thinkers originally considered the sexual action of marriage as a necessary sin; it was necessary to contain *luxuria* (lust, wantonness or concupiscence)—and, of course, to direct it to propagation. See generally Daniel Borrillo, *La luxure-L'orthodoxie matrimoniale comme remède contre les errances de la passion*, in LES SEPT PECHES CAPITAUX ET LE DROIT PRIVE (Fortin et al. eds., Éditions Thémis, Montreal, 2007).

42. See Fineman, *id.*, at 145-146.

. . . the family is experienced as an institution of primarily “horizontal” intimacy, founded on the romantic sexual affiliation between one man and one woman. The dominant paradigm, however, privileges the couples as foundational and fundamental. . . . Intergenerational relationships—vertical lines of intimacy—may be temporarily accommodated . . . Children achieve adulthood and go on to form their own discrete, primary, horizontal and sexual connections . . .

*Id.* at 146.

The image of horizontally organized intimacy is a crucial component of contemporary patriarchal ideology in that it ensures that men are perceived as central to the family.

*Id.* at 147.

43. Fineman proposes the re-orientation of the concept of the husband-wife-child family (and the constitutional and common-law protection of its privacy) towards a core family unit of mother-child. See Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV 955 (1991). “Family and sexuality would not be confluent, rather, mother-child formation would be the “natural” or core family unit; it would be the base entity around which social policy and legal rules are fashioned. The intergenerational, nonsexual organization of intimacy is what would be protected and privileged in law and policy.” *Id.* at 971.

44. See Finnis, *supra* note 40 at 42. Finnis discusses the meaning of *fides* in Thomas Aquinas as one of marital friendship. “This positive *fides* is the willingness and commitment to belong to, and be united in mind *and body* with,

This rigid conception is, for all intents and purposes, the idea of the sexual action of marriage prevalent both in the secular tradition of the West and in the catechetical tradition of most of the Christian West.<sup>45</sup> From a certain perspective, marriage is a truth claim—a claim, like all truth claims, that is a “compelling story told by persons in positions of power in order to perpetuate their way of seeing and organizing the natural and social world.”<sup>46</sup> Today, powerful marriage-narrators are inciting people to attribute social ills and to project the failures of marriage onto other intimate associations. In this way and as René Girard might say, people mimetically channel the deficiencies of marriage onto legally vulnerable relationships. These relationships become institutional scapegoats.<sup>47</sup>

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one’s spouse in the distinct form of *societas* and friendship which we call marriage.” See John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS. 97, 108 (1997). *Fides* is “the whole justice, usefulness, pleasure . . . , and delight . . . in shared virtue which can be found in a good marriage with its division of complementary roles.” *Id.* at note 40. For Finnis, sexual acts are not unitive unless they are marital, and they are not marital unless they involve *fides* and procreation. Marital sexual acts have “procreative significance” because they are “. . . actualizations, so far as the spouses then and there can, of the reproductive function in which they are biologically and thus personally one.” See John Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, 1067 (1994).

45. There are said to be two ethical traditions in the Christian West: Catholic and Protestant. See ERIC FUCHS, *SEXUAL DESIRE & LOVE* 149-167 (Marsha Daigle trans., 1983). “. . . Catholic ethics remain faithful to the patristic tradition: sexuality belongs to the order of impurity having no justification other than procreation. . . .” *Id.* at 150. The Protestant tradition focuses on the couple. Each owes the other affection and tenderness, *Id.* at 161. “Thus begins a reflection on the couple, which aims more and more at bringing out its value, by going beyond the traditional notion of procreation as the primary justification for conjugal life.” *Id.* For Fuchs, the West does not appear to include the East, that is to say, the Eastern and Oriental Churches, notwithstanding the Eastern ecclesiastical tradition of some European countries, e.g., Bulgaria, Romania, and Greece. Moreover, it is altogether unclear whether the Latin and Greek patristic traditions are identical on the topic of marriage and procreation.

46. See Kevin J. Vanhoozer, *Theology and the Condition of Postmodernity: A Report on Knowledge (of God)*, in THE CAMBRIDGE COMPANION TO POSTMODERN THEOLOGY 11 (Kevin J. Vanhoozer ed., Cambridge University Press, 2003) (discussing postmodernism in truth and history).

47. See Austen Ivereigh et al., *In Conversation—Scapegoats and Saviours*, THE TABLET, Oct. 16, 2004 at 8 (summarizing Girard’s thinking). “We learn from one another what it is we desire, he [Girard] argues, and then desire it, imitating one another. This “mimetic desire then encourages us to channel our violence towards vulnerable people (the scapegoats) at times of crisis, as if this resolves the problem.” *Id.* See also René Girard, *Mimesis and Violence*, in THE

Very important economic and social benefits flow from this sexual action. Does the sexual profile of marriage (whether procreative intercourse and marital friendship, procreation alone, or discouragement of promiscuity and concupiscence) sufficiently justify a disregard of the sexual action (if there are sexual relations), commitment, and friendship of other intimate associations in modern society?

The sexual profile of this elite institution<sup>48</sup> does not justify this disregard and does not adequately sustain its claim to self-appropriation of substantially all economic aspects of intimate bonds, as is the case in many Western systems. Nor is the affective profile of a person (her emotions, her psyche, and her spirit) delimited by the nuptial profile of the human body, as it appears to be in a certain ecclesial tradition.<sup>49</sup> Indeed, the assertion that “[marriage] is an *intrinsic* good, with two constitutive and mutually supportive aspects, friendship and procreation”<sup>50</sup> does not provide a full and rational account for the objectives of legal rules and institutions that are disinterested (or only marginally interested) in marital friendship and procreation,<sup>51</sup> such as

GIRARD READER 9-19 (James G. Williams ed., 1996) (summarizing his mimetic model).

48. See Barbara Dafoe Whitehead, *For Love & Money: Has Marriage Become an Elite Institution*, COMMONWEALTH, Dec. 2, 2005, at 6 (discussing today’s marriage as a privilege reserved to the well-educated and wealthy).

49. See Post-Synodal Apostolic Exhortation *Pastores Dabo Vobis* to the Bishops, Clergy and Faithful on the Formation of Priests in the Circumstances of the Present Day, March 25, 1992, para. 44. The Exhortation tells us that “affective maturity presupposes an awareness that love has a central role in human life.” *Id.* Moreover, “[m]an cannot live without love. He remains a being that is incomprehensible for himself; his life is meaningless if love is not revealed to him, if he does not encounter love, if he does not experience it and make it his own, if he does not participate intimately.” *Id.* The text then states: “. . . we are speaking of a love that involves the entire person, in all his or her aspects—physical, psychic and spiritual—and which is expressed in the “nuptial meaning” of the human body, thanks to which a person gives oneself to another and takes the other to oneself.” *Id.* Affective maturity brings to celibate priests “serene friendship and deep brotherliness.” *Id.*

50. Finnis, *supra* note 40, at 43.

51. Apart from the rational disjunction, in very many cases, between procreation and governmental rules and policies regulating the economic consequences of intimate associations, is it not a reasonable proposition that global population growth and, for example, the chronic poverty, disease, and burgeoning populations of sub-Saharan Africa, militate against institutional policies favoring procreation? These policies would appear irresponsible, even in the West. For a readable overview discussing population growth over the next 50 years, see Joel E. Cohen, *Human Population grows up*, SCI. AM., Sept. 2005 at 48-55 (outlining problems relating to population growth) and Jeffrey D. Sachs,

retirement pensions, spousal survivorship benefits, and access to public housing. Should two intimates' entitlement to homestead protection conform to the sexual strictures of St. Paul?

Investigations into the functional underpinning of rules and institutions, especially of public authorities, should not be reserved to the scrutiny of the sexual and affective profiles of same-sex couples. Indeed, the notion of an intimate association extends to a great number of people who are unmarried, divorced, widows or widowers. Stories of these intimates are not stories, in the sense of fables, but stories, in the sense of real experiences.<sup>52</sup>

Now, what is the content of juridical personality and how does it relate to the right of intimacy?

### III. ATTRIBUTES OF JURIDICAL PERSONALITY

Juridical personality<sup>53</sup> is also known as *legal personality*, and sometimes as *legal personhood*. In the civil law tradition—a

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*Can Extreme Poverty be eliminated?*, *id.* at 56-65 (discussing poverty and proposing solutions).

52. Roderick Macdonald, first President of the Law Commission of Canada, tells the story of the fiftieth wedding anniversary of his wife's parents. The anniversary celebration included only a small number of actually married couples. See RODERICK ALEXANDER MACDONALD, *LESSONS OF EVERYDAY LAW* 59–63 (McGill-Queen's University Press, 2002). Macdonald relates:

There were an elderly brother and sister (a widower and widow) who had been sharing an apartment for five years. There were two sisters who had never married and who had lived in the same house for over 40 years. There were two air force friends of my father-in-law (one widowed, one divorced) who also were sharing an apartment. There were three unmarried couples in their forties and fifties who had each been living together for more than a decade after their respective divorces. There were single fathers and single mothers trying to re-establish a relationship with a new partner. There were never-married guests currently living alone who had in the past been involved in a longterm relationship. And there was one same-sex couple. The obvious diversity of these domestic situations caused me to realize just how few long-married, never-divorced couples such as my wife's parents there really were, and just how many other forms of a stable domestic relationship now exist.

*Id.* at 60.

53. Juridical personality is known under many names. In the structured environment of civil codes of the civil law tradition, the term "juridical personality" (*personalité juridique*) is used in the Civil Code of Québec (*see, e.g., C.C.Q. art. 1*) for both human beings, "natural persons" (*personnes physiques*), and "legal persons" (*personnes morales*) (corporations and other entities constituted by law) (*see e.g. C.C.Q., art. 3083*). The Civil Code of Chile employs "juridical personality" (*personalidad jurídica*) (*see e.g. art. 54*) but

tradition noted for its scientific approach to these matters—the *personality* or *civil personality* of human beings is often contrasted with the *juridical personality*, *legal personality*, or the *moral personality* of entities. In that legal tradition, human persons are *natural persons* or *physical persons*, and entities are *juridical persons*, *legal persons*, or *moral persons*. In the common law tradition—a tradition that is said to know little and to care less for the construct of *personality*—there are sightings of *artificial personality*, *artificial persons*, and *juristic persons*.<sup>54</sup> Generally

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reserves its use to entities. The Louisiana Civil Code uses “natural personality” for human beings (*see e.g.* C.C. art. 25). The term “civil personality” (“*personalidade civil*”) is used in the new Brazilian Civil Code of 2002 (*see e.g.* C.C. art. 2) and in the Spanish Civil Code (*see e.g.* C.C. art. 32) for human beings. “Juridical personality” makes a civil law appearance in the English language version of the draft Québec Civil Code (1977) (*see e.g.* art. 1) although the English language version of the 1976 committee report for this draft Code uses the word “legal personality.” Human beings are known as natural persons (Québec, Chile, Louisiana, Brazil, and Spain) and entities are called either juridical persons (Chile, Louisiana, Brazil, and Spain) or legal persons (in the English version of the Civil Code of Québec). In Louisiana, an in vitro fertilized human ovum is a “juridical person” (*see e.g.* R.S. 9:124). French doctrinal writing uses “juridical personality” for both persons and entities, but often “*personalité juridique*” appears as a term reserved for entities. In the French Civil Code, the terms “moral personality” (*personalité morale*) and “moral person” (*personne morale*) make a showing (*see e.g.* C.C. art. 1842, 1844-1845). The Civil Code of Argentina distinguishes between *personas de existencia visible* and *personas de existencia ideal* also called *personas jurídicas* (*see e.g.* art. 32). For an extensive list of persons with their attributes, see the entries under “Persona” in MANUEL OSSORIO, *DICCIONARIO DE CIENCIAS JURÍDICAS, POLÍTICAS Y SOCIALES* (31st ed., Heliasta, Buenos Aires, 2005). Finally, it should be noted that the English language commonly uses one word, “legal”, as a descriptive for matters of *ius* and *lex*. Moreover, when civil law terms are expressed in English, there are obvious challenges of translation.

In the common law, the term “legal personality” is much preferred, but is most often limited to “legal persons”, “artificial persons”, or “juristic persons”, such as corporations and associations. The term “legal personality” is not used to describe an overarching concept of the person, embracing natural and juristic persons. *But see* W. M. Geldart, *Legal Personality*, 27 L.Q. REV. 90, 95 (1911). There are sightings of “artificial personality” especially for public bodies, religious bodies, foreign states and international organizations.

In American legal writing, the use of “juridical personality” as applicable to the rights of individuals is rare. *But see, e.g.*, Gary A. Ahrens, *Privacy and Property: Can They Remain After Juridical Personality is Lost?*, 11 CREIGHTON L. REV. 1077, 1079, 1132, 1134, 1136 (1977-1978). In the social sciences, there are references to both the juridical and the legal personality of human persons.

54. On the topic of persons and personality in English law, *see generally* William Swadling, *Property: General Principles*, in 1 ENGLISH PRIVATE L. 141-155 (Peter Birks ed., Oxford University Press, 2000). The English courts are said to have no use for “personality.”

Questions of this sort do not often strike the English courts as having a practical bearing on the cases which they must decide,

speaking, in the common law, human persons are persons, *tout court*.

In this paper, “juridical personality” expresses the right-owning and duty-owing status of human persons.

Every natural person has juridical personality, and every entity has juridical personality to the extent allowed by law.<sup>55</sup> The juridical personality of the natural person does not depend on the sovereign; that of the entity largely does.

The personality of a natural person vests at birth<sup>56</sup> although it may, in certain cases, exist at the moment of conception or at some intermediate time between conception and birth, whether or not a viable birth. The boundary posts separating the fertilized ovum or the fetus, as a potential human being (but, in law, often still considered a thing or entity), from the right-owning-duty-owing human person, frequently shift in the minds of lawmakers, judges, and scholars. Yet, identification of viable human existence is crucial to the exercise of important rights.

Simply put, juridical personality is the enjoyment of rights and the capacity to exercise these rights. It is also expressed as the capacity for jural relations (or legal relations).<sup>57</sup> It is *real* law, especially in most of the civil law tradition, because it has a legislative expression. Moreover, in the civil law, where scholarly

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and even when they declare themselves to be ‘concerned with abstract jurisprudential concepts [so far as these] assist towards clarity of thought’, they generally recoil from discussing them in any detail.

*Id.* at 144.

55. Dias summarizes Kelsen as arguing that the “biological character of human beings is outside the [law]’s province” and that, moreover, there is no distinction in law between “natural” and “legal” persons. *See* R. W. M. DIAS, *JURISPRUDENCE* 267 (5th ed., Butterworths, London, 1985). The importance of juridical personality, as a legal construct, is disputed. For example, there has been considerable debate on the necessity of this construct for legal entities and, even if necessary, its nature and scope. Dias outlines the theories. *Id.* at 265-269.

56. For some, a “human being” may arguably exist on or about the time of conception, and a human being might become a “human person” sometime thereafter. An ecclesiological conception of personality might be based on yet another event, for example baptism. In the Roman Catholic Church, it is at baptism that a person is the subject of rights and duties and, therefore, is conferred with canonical legal personality. *See* 1983 Code c. 96. Spiritual personality is another concept. *See* 1983 Code c. 204, § 1.

57. Smith cites Salmond as defining a “legal” person as “any being to whom the law attributes a capacity of interests and, therefore, of rights, of acts and, therefore, of duties.” *See* Salmond, *Jurisprudence* 273 (5th ed., 1916) *cited in* Bryant Smith, *Legal Personality*, 37 *YALE L. J.* 283, 284 (1927-1928). This definition conflates the two concepts of enjoyment of rights and exercise of rights.

writing is considered a source of the law, albeit a secondary source, juridical personality has an important doctrinal expression. In the West, juridical personality is also *abstract* law. To study it, as a conception, is a way of understanding the nature of rules governing the general conduct of a person and his relations to other persons and to things.<sup>58</sup> Its finality is to correctly structure capacity for jural relations. It does so from two very real and practical perspectives. First, the exercise of rights and duties may be limited, such as in cases of minority or incompetence, as but two examples. Second, although the enjoyment of civil rights and fundamental freedoms may never be renounced, the exercise of some of these rights may be waived under certain circumstances.

Jural relations are relations between people and between people and things that have consequences in the law. Not all intimate relations between persons are jural relations because the law does not have a rule (or does not care to have a rule) to regulate all possible intimacies. By like token, not all aspects of intimate associations and not all their commonplace events interest the law. However, to the extent that the law is sufficiently interested or intrigued by the daily routine and experience of intimates,<sup>59</sup> it provides rules for the coordination of jural relations.

These rules or “sorts of law” are described by Honoré: rules of existence, categorizing rules, rules of scope, position-specifying rules, and directly normative rules.<sup>60</sup> Various aspects of juridical

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58. A lawyer’s collection of books can indicate the contours of his juridical personality. His law books may act as guides and pointers to the sorts and qualities of his relationships with family, friends, colleagues, and other legal actors or subjects. In this regard, see Angela Fernandez, *Albert Mayrand’s Private Law Library: An Investigation of the Person, the Law of Persons, and ‘Legal Personality’ in a Collection of Law Books*, 53 UNIV. OF TORONTO L.J. 37 (2003).

59. The topic of “everyday” law is examined by Macdonald. See generally Macdonald, *supra* note 52 at 1–12. Macdonald states that experience, wisdom, and good judgment provide the authority for everyday law and that this everyday law makes official law possible. *Id.* at 6–7.

60. See generally A. M. Honoré, Real Laws, in *LAW, MORALITY AND SOCIETY—ESSAYS IN HONOUR OF H. L. A. HART* 99 (Clarendon Press, Oxford, 1977).

1. *Existence* laws create, destroy, or provide for the existence or non-existence of entities . . . 3. *Categorizing rules* explain how to translate actions, events, and other facts into the appropriate categories. 4. *Rules of scope* fix the scope of other rules. 5. *Position-specifying rules* set out the legal position of persons or things in terms of rights, liabilities, status, and the like. 6. *Directly normative rules* . . . guide the conduct of the citizen as such.

personality can be assigned to one or another of these classes of rules; however, juridical personality is really about status and the capacity to enjoy and exercise rights related to that status; accordingly, the rules are, in large part, position-specifying.

Civil rights and fundamental freedoms are extrapatrimonial rights. The law provides recourses for undue interference with them. When there has been actionable interference with these rights, they are patrimonialized because damage claims have a monetary value.

How many rights and freedoms are there? They certainly include the right to sue in court, the right to acquire, own, and dispose of property, the right to life, the right to personal and physical integrity, the right to the safeguard of one's reputation, and the right of privacy. Examples of rights of privacy might include a right to prevent unlawful interception of private correspondence and a right to prevent the disclosure of personal information. Codes and statutes specify seemingly innumerable rights: the right to refuse specimen taking or tissue removal, the right to alienate a body part, the right of a child to the protection, security and attention of his parents, and the list goes on. Civil codes in the civil law list these rights but the list of any particular civil code is a function of the time and place of its writing and whether the lawmaker at the time considered it expedient to formally express these rights. Today, the rights to make healthcare decisions and to protect private personal and financial information are topical; tomorrow, intimacy of association may be the order of the day.

The Civil Code of Québec<sup>61</sup> provides an example of a recent approach to the architecture and enumeration of rights. After a preliminary title on the enjoyment and exercise of civil rights in its book on persons, the code has a second title on personality rights. The first chapter of the second title announces the integrity of the person ("Every person is inviolable and is entitled to the integrity of his person . . .") in a single article.<sup>62</sup> That chapter then proceeds to its first section on the care of the person<sup>63</sup> and its second section

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*Id.* at 112. His second class, "rules of inference," relates to proof and evidence.

61. See CIVIL CODE OF QUÉBEC (18th ed., Jean-Maurice Brisson & Nicholas Kasirer eds., 2010-2011) (hereinafter C.C.Q.).

62. *Id.* at art.10.

63. *Id.* at art. 11-25.

on confinement in an institution and psychiatric assessment.<sup>64</sup> Its second chapter provides for children's rights.<sup>65</sup> Its third chapter deals with the respect of a person's reputation and privacy.<sup>66</sup> Its final chapter provides for the respect of the body after death.<sup>67</sup> Much of the rest of the book is devoted to particulars of status (name, change of name, change of designation of sex, records of civil status, etc.)<sup>68</sup> and capacity (majority, minority, emancipation, and various form of protective supervision for incapables).<sup>69</sup> The draft Civil Code of Puerto Rico has a more extensive list of rights, including the right of intimacy and physical and moral integrity, in its principal article (article 8) on the enjoyment of *derechos esenciales* (fundamental rights), but fewer specific details than the Quebec code, save in connection with the integrity and care of the person.<sup>70</sup>

Rights pre-exist their restatement in formal constitutions and statutes, but the understanding of rights occurs in the legal and social environment where their pre-existing nature is first (or again) debated. In this regard, it might be stated—and unequivocally so—that the sovereign authority, through its legislative bodies and courts, merely recognizes rights that arise from the particular actions and conduct of people at particular times. How could it be otherwise? Does it seem credible to assert that rights, including rights of intimacy, spring as spontaneously in formal law (because the formal law purports to have created them) as sprung Venus from Neptune's life-giving froth? Formal law and public law do not create rights; they specify them.<sup>71</sup>

Indeed, the thrust of the 1948 Universal Declaration of Human Rights is that the human rights noted in the Universal Declaration are innate and that their pre-existence is simply made textually explicit in that declaration; accordingly, formal expression of all rights, including the general right of intimacy, occurs in contexts of place and time. Formal law hopes (but can do no more than hope) that it has expressed the rights according to the best contemporary (and informed) understanding of their inherent nature. As often

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64. *Id.* at art. 26-31.

65. *Id.* at art. 32-34.

66. *Id.* at art. 35-41.

67. *Id.* at art. 42-49.

68. *Id.* at art. 50-152.

69. *Id.* at art. 153-297.

70. *See supra* note 27.

71. *See supra* note 13 for the position in English public law.

happens, rights are made juridic—juridified as it were—in a single, static form. In these cases, the challenge lies in re-establishing the connection with the human person.

The right of intimate association as a real (and not supposed) civil right and fundamental freedom in cosmopolitan private law is, indeed, contextual because it is a good to and for persons and because it is experienced by persons living, as they do, at a particular time and in a particular place in the West.<sup>72</sup> In other words, its content is historically conditioned and, on account of this historical mediation, intimate association can be objectively assessed. Its intrinsic goodness can be concretely and specifically understood.

In sum, the legal content of intimacy is not the private transcendent experience of any one individual (or lawmaker).<sup>73</sup> The intimacy and dignity of “inclusive moral citizenship”<sup>74</sup> is adverse to platitudes of family and sexual morality that do not take account of the social and economic life of every individual in the community. Intimacy is readily plastic. It is predicated on the good experience of the living. Since this is so, intimacy cannot be delimited; it cannot be restricted to a particular set of human experiences, especially those sourced in invented traditions. Recognition of intimate associations will not entice people away from marriage. Indeed, even if all heterosexual and homosexual intimate associations, other than marriage, are adjudged morally

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72. Beyond the formal law and constitutional framework of any particular system, there are supranational and global communitarian aspects to human rights. *See generally* Carl F. Stychin, *Same-Sex Sexualities and the Globalization of Human Rights Discourse*, 49 MCGILL L. J. 951 (2004) (discussing the use of universal human rights by local gay rights activists and arguing that rights struggles will be successful when based on international human rights standards and global, communitarian political debate).

73. The law can be understood in a manner not dissimilar to the theological phenomenon of revelation. Roger Haight says that revelation is experiential and that, as religious experience, it is historically mediated. *See* ROGER HAIGHT, *DYNAMICS OF THEOLOGY* 51-67 (2001) (discussing the structure of revelation). Haight discusses (and argues against) transcendental analysis. *Id.* at 6-7. For the theologian Haight and for the legal scholar Sinha, man belongs to his history. *See* Sinha, note 5 at 3.

74. For the use of the phrase “inclusive moral citizenship,” *see* Fourie and Bonthuis v. Minister of Home Affairs, case no 232/2003 (Supreme Court of Appeal of South Africa, 2004) at 10. This South African case recognized same-sex marriage as valid.

destructive to the institution of marriage, surely these associations cannot be any more destructive than divorce and remarriage.<sup>75</sup>

The narrative of intimacy (together with its happy post-modern disorder!<sup>76</sup>) is next discussed.

#### IV. SOURCES OF INTIMACY

Pure reason—the practical reason of natural law philosophers—is neither a satisfactory nor a truly rational method of examining intimacy. It presupposes that there is but a single, correct reason for human conduct. It ignores the here-and-now factual situations that meaningfully contextualize reason. Pure reason disregards the plurality of rational and sentient ways of defining intimate associations, in the East and the West. It takes no stock of different logics and reasonings that are predicated on different community realities and values. In this light, it would seem that the proponents of natural law approaches reckon social anthropology as a useless science vacant of any forward-looking *telos*. Only theological anthropology would seem deserving.<sup>77</sup> Nonetheless, even unkind

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78. See Charles E. Curran, *Sexual Orientation and Human Rights in American Religious Discourse: A Roman Catholic Perspective*, in *SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* 85, 97-98 (Saul M. Olyan & Martha C. Nussbaum eds., Oxford University Press, 1998). “Thus one could maintain that the provision of domestic partnership laws does less harm to marriage and the family than do the existing laws about divorced and remarried people.” *Id.* at 98. Importantly, domestic partnership laws respond to human economic and social needs. See also Margaret A. Farley, *Response to James Hanigan and Charles Curran*, in *SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE*, *supra* at 101, 108 (stating that domestic partnerships respond to needs for psychic security, economic security, and sometimes physical safety). Farley understands domestic partnerships in the sense of legal unions reserved to gays and lesbians. *Id.* at 106-108.

76. Disorder and post-modernism are neatly (and nicely) associated in Roderick A. Macdonald, *Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism*, 15 *ARIZ. J. INT’L & COMP. L.* 69, 71 (1998). “If, as a conception of social organization, modernism was primarily about rationalism, universalism, certainty and order, post-modernism seems to be about empiricism, particularism, indeterminacy and disorder.” *Id.* at 71.

77. On account of fallen human nature, the need for redemption and the doctrines of original sin, judgment and atonement, legal theory may not be split from theological doctrine. See John J. Coughlin, *Canon Law and the Human Person*, 19 *J. OF L. & REL.* 1, 56 (2003-2004). Coughlin discusses the secular and theological doctrines of human will and freedom. *Id.* at 53. Mainstream legal theory has a negative concept of freedom, i.e. an absence of constraint and an over-emphasis of autonomy and subjective preferences. This negative theory leads to an inability to act for human good and an inability to understand that

critics of natural law agree that its suppositions and theories must be carefully considered. Natural law, therefore, remains a vital trampoline for discussion and debate.

A diversity of intimate associations necessitates a method for the determination of their legal parameters. How do we know what we know about personal associations? Is there a strict methodological path, or is there a multiplicity of paths? Does a hierarchical disorder of relevant sources lead to approaches that are too relaxed for any practical and useful understanding of the topic?

Legal methodology may be defined as the study of legal know-how. It is the study of those legal methods and techniques that allow the law to be known and understood (fundamental methodology) as well as implemented (applied methodology). The topic of sources is essential to legal methodology. This topic is interested in answering the questions: "Where do I find the law?" and "Where is the essence, cause or origin of the law?" In this way, the discovery of sources tries to offer a tentative answer to the general question: "What is it to have knowledge of the law."<sup>78</sup>

The word *sources* is used in two different senses. Sometimes *sources of law* means *material sources*, that is to say, "where lawyers look in order to find out what the law is."<sup>79</sup> Sometimes *sources of law* means the *sources of legal justifications* or *formal reasons*, that is to say, the grouping of ". . . legally authoritative reasons on which judges and others are empowered or required to base a decision or action . . ."<sup>80</sup> There are numberless sources that might constitute sufficient authority for legal decisions relating to intimacy and intimate associations. The identification of these sources is not difficult. It is the classification and ranking of these sources as, say, primary or secondary, or authoritative or persuasive, and the determination whether they are, for example, obligatory, prudential, hortatory, or illustrative, that is highly problematic.

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transcendence of self-interest is necessary for genuine human fulfillment. *Id.* at 53-57.

78. GEOFFREY SAMUEL, *EPISTEMOLOGY AND METHOD IN LAW* 6 (2003) (asking: what is it to have knowledge of the law?).

79. See John Bell, *Sources of Law*, in 1 *ENGLISH PRIVATE LAW* 3 (Peter Birks ed., Oxford University Press, 2000).

80. See P.S. ATIYAH AND ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 2 (Oxford, 1987).

In these matters, Western courts have latched onto different approaches.

In *Goodridge v. Department of Public Health*,<sup>81</sup> the Massachusetts Supreme Judicial Court reformulated the definition of marriage to include same-sex couples. The Court cited case-law and statute law, with very occasional references to law books.<sup>82</sup> The Court's psychological and sociological observations were unsupported.

On the other hand, the Supreme Court of Canada made use of a catholic selection of materials in *M. v. H.*<sup>83</sup> In that case, two women, M. and H., lived together in a same-sex relationship. They had a home and started a business. After ten years, M. left the common home and sought an order for partition and sale of the house and, importantly, claimed support. The Supreme Court of Canada reviewed the relevant Ontario statutory provisions and extended to same-sex couples in Ontario the right to claim support upon termination of an intimate relationship.<sup>84</sup>

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81. *Goodridge v. Department of Public Health*, 798 N. E. 2d 941 (Mass. 2003).

82. *See e.g. id.* at 952, 967.

83. *M. v. H.*, 2 S.C.R. 3 (1999) (Supreme Court of Canada).

84. In *M. v. H.* intimacy is associated with economic dependence. The Supreme Court delineated the notion of "intimacy" as follows:

Section 29 [of the Family Law Act, 1986] refers to individuals who have "cohabited". Section 1(1) . . . defines "cohabit" as "to live together in a conjugal relationship, whether within or outside marriage". The accepted characteristics of a conjugal relationship, as outlined by Cory J. at para. 59, go to the core of what we would generally refer to as "intimacy."

*Id.* at para. 99.

Cory, J. states:

*Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many other "conjugal" characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal."

*Id.* at para. 59.

The Court's written reasons indicate that sources as diverse as statistical surveys, behavioral and psychological studies, and law reform commission reports, were treated as persuasive materials and listed under the rubric "Authors Cited," together with hornbooks, law review articles and sundry doctrinal materials. Statutes and case-law, that is to say, primary sources in the common law tradition of Ontario, were separately identified. Some of these *authors-cited* sources—helpful but informal, from a traditional legal viewpoint, yet formal and authoritative in their respective social science disciplines—must have influenced the court. By way of example, the court expressly referred to (and appeared to have critically examined) several studies on the nature of lesbian relationships.<sup>85</sup> Reference to these sources tells us that some courts are prepared to position social science materials directly—and not cleansed or filtered through law review articles and comments—somewhere (and somewhere important) in the hierarchy of sources. These materials provide some of the best elements of legal discussions and proceedings relating to intimate

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85. See, e.g., the remarks of Cory and Iacobucci, JJ:

Although there is evidence to suggest that same-sex relationships are not typically characterized by the same economic and other inequalities which affect opposite-sex relationships (see, e.g., M. S. Schneider, "The Relationships of Cohabiting Lesbian and Heterosexual Couples: A Comparison", *Psychology of Women Quarterly*, 10 (1986), at p. 237, and J. M. Lynch and M. E. Reilly, "Role Relationships: Lesbian Perspectives", *Journal of Homosexuality*, 12(2) (Winter 1985/86), at pp. 53-54, 66), this does not, in my mind, explain why the right to apply for support is limited to heterosexuals.

*Id.* at para. 110.

See also this statement:

Studies presented to this Court demonstrate that when men are in such a position, they expect less from their partner in housework: P. Blumstein and P. Schwartz, *American Couples* (1983), at p. 151. In other words, the dynamic of dependence also exists for men in opposite-sex relationships, as a type of "division of labour" is created, where the man will often assume additional duties at home while his partner is at work: M. S. Schneider, "The Relationships of Cohabiting Lesbian and Heterosexual Couples: A Comparison", *Psychology of Women Quarterly*, 10 (1986), at p. 234. Other evidence submitted to this Court demonstrate other forms of dependency that are similarly unique to individuals in opposite-sex relationships: J. M. Lynch and M. E. Reilly, "Role Relationships: Lesbian Perspectives", *Journal of Homosexuality*, 12(2) (Winter 1985/86), at p. 53.

*Id.* at para. 239.

relationships.<sup>86</sup> Moreover, firsthand accounts,<sup>87</sup> interviews,<sup>88</sup> personal sentiment,<sup>89</sup> polemics,<sup>90</sup> and literature<sup>91</sup> also usefully

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86. Is the “law” blind to its historical and social contexts? Do legal actors adequately understand the various factors that influence and fashion their decisions. Nelken discusses these issues. *See generally*, David Nelken, *Blinding Insights?—The Limits of a Reflexive Sociology of Law*, 25 J. OF L. AND SOCIETY 407 (1998).

87. *See generally* KEVIN BOURASSA AND JOE VARNELL, *JUST MARRIED—GAY MARRIAGE AND THE EXPANSION OF HUMAN RIGHTS* (2002). Bourassa’s and Varnell’s chatty personal account of the circumstances surrounding their 2001 marriage in Ontario was published prior to the decision of *Halpern v. Attorney General of Canada*, (2003) 65 O.R. (3d) 161; (2003) 225 D.L.R. (4th) 529 (Court of Appeal for Ontario). That decision reformulated the common law definition of marriage to read: “the voluntary union for life of two persons to the exclusion of all others.” *Id.* at para. 156. It also ordered the Province to register Bourassa’s and Varnell’s, together with other parties’, marriages. *Id.*

88. *See* Cece Cox, *To Have and To Hold-Or Not: The Influence of the Christian Right on Gay Marriage Laws in the Netherlands, Canada, and the United States*, 14 L. & SEX. 1 (2005) at note 39, where Cox refers the reader to an interview by Kevin Bourassa and Joe Varnell with Kees Waaldijk of Leiden University. Bourassa and Varnell published the interview on their website: [www.samesexmarriage.ca/advocacy/turin/KeesWaaldijk2002.htm](http://www.samesexmarriage.ca/advocacy/turin/KeesWaaldijk2002.htm) (last visited Feb. 21, 2011).

89. *See Halpern, supra* note 87 at para. 9-12. For example, the Court reported the following:

Two couples, Kevin Bourassa and Joe Varnell and Elaine and Anne Vautour, decided to be married in a religious ceremony at MCCT. In an affidavit, Elaine and Anne Vautour explained their decision:

We love one another and are happy to be married. We highly value the love and commitment to our relationship that marriage implies. Our parents were married for over 40 and 50 years respectively, and we value the tradition of marriage as seriously as did our parents.

*Id.* at para. 12.

90. For an example of polemical legal writing in France written for general public, the scholarship of Daniel Borrillo (of the University of Paris X–Nanterre) is representative. Borrillo argues for (and on behalf of) the gay community on personal, social and economic issues throughout the European community. For typical Borrillo thinking, *see* McAuley, *supra* note 7 at notes 33-34. The scholarship of Michael Mello of the University of Vermont is a recent example of American polemical writing reviewing Vermont’s civil union legislation and arguing for gay marriage. *See generally* MICHAEL MELLO, *LEGALIZING GAY MARRIAGE* (2004). Mello’s book has impressive endnotes drawing on traditional legal materials—law review articles and similar kinds of scholarship—as well newspaper articles and letters to the editor. *Id.* at 197–256. His source materials have been called “heterodox.” *See* Times Literary Supplement, May 20, 2005, at 7 (book review).

91. *See generally* THE M WORD—WRITERS ON SAME-SEX MARRIAGE (KATHY PORIES, ED., 2004). The front flap of this collection of stories and essays states:

As it heads through the courts, dividing the nation and shaping the political landscape, the issue of same-sex marriage is becoming one of the major civil rights battles of our generation. Now, some

inform courts, again directly or indirectly. They have a place in the hierarchy of persuasive authority, however horizontal that hierarchy may appear to be. In fact, the history of privacy and intimacy is most convincingly illustrated by lively narratives and spirited monographs on discrete aspects of intimate relationships.<sup>92</sup> Once again,<sup>93</sup> stories are the stuff of intimate bonds. If marriage is the institutionalization of the ways that people drink, eat and sleep together—*Boire, manger, coucher ensemble, est mariage, ce me semble*—then narratives of intimacy demonstrate the striking similarity of many relationships.<sup>94</sup>

These informal narratives are subsequently formalized. For example, law reform commissions are usually attentive to canvassing the citizenry and collecting evidence of popular opinion, whether at public hearings or on the web.

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of the country's finest writers, gay and straight, explore the nuances of one of the most complicated issues of our time.

THE MCGILL SHAKESPEARE MOOT PROJECT ([www.mcgill.ca/shakespearemoot/](http://www.mcgill.ca/shakespearemoot/)) (last visited Feb. 21, 2011), a remarkable interdisciplinary project, in which the body of legal knowledge consists solely of the complete works of Shakespeare, has debated same-sex marriage. In the case of Attorney General of Canada v. Peter Pears, Ben Britten and Others, 2 C. of Sh. 1 (2004), some of the Court of Shakespeare's judgments have been published. See generally Desmond Manderson and Paul Yachnin, *Love on Trial: Nature, Law, and Same-Sex Marriage in the Court of Shakespeare*, 49 MCGILL L. J. 475 (2004).

92. See generally LAWRENCE M. FRIEDMAN, PRIVATE LIVES—FAMILIES, INDIVIDUALS, AND THE LAW (2004). Friedman has an admirable blend of scholarly sources: case-law, law review articles, psychiatry, sociology, statutes, general books on family law topics, etc., all of which are marshalled, in no specific hierarchical order, to support his account of modern American family law issues. Using another approach, the Law Commission of Canada listed the source materials for its report on adult relationships under headings, e.g. discussion documents, background research papers, reports, books, journals, and research studies. The Commission also consulted the reports of other reform bodies, such as the Australian Law Reform Commission and the law commissions and institutes of a number of Canadian provinces. See LAW COMMISSION OF CANADA, BEYOND CONJUGALITY-RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS 147-172 (2001).

93. See *supra* note 52.

94. This is Antoine Loisel's adage. Loisel was a Paris lawyer whose *Institutes coutumières* were published in 1607. See Alain-François Bisson, *Sur un adage trompeur : «En mariage, il trompe qui peut»*, in LE FAUX EN DROIT PRIVE 155, 158 (Nicholas Kasirer ed., Les Éditions Thémis, 2000). The adage in full reads: *Boire, manger, coucher ensemble, est mariage, ce me semble: mais il faut que l'église y passe*. The full text, therefore, speaks to the requirement of a public ceremony *in facie Ecclesiae*. *Id.* at 159. The necessity of a church ceremony has (totally?) disappeared in the West although, of course, a church marriage, in some Western systems, may suffice for civil purposes.

## V. INTIMATE ASSOCIATIONS

There are formal incidents and effects arising from the emotionality and conviviality of couples' lives and consequent upon their sleeping-place. These incidents and effects have been surveyed for European countries,<sup>95</sup> and the findings compared in five "dimensions," that is to say, "the dimensions of marriage, registered partnership and cohabitation, between different-sex and same-sex partners, between different areas of private and public law, between different countries, and between now and previous years or decades."<sup>96</sup>

This survey clearly illustrates (as do other similar surveys<sup>97</sup>) that the number and variety of intimate associations are almost

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95. See generally Kees Waaldijk and others, *More or less together: Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners: A comparative study of nine European countries* (Document de travail 125) (Institut National d'Études Démographiques, Paris, 2005) (available at <http://www.ined.fr>) (last visited Feb. 21, 2011). A survey of the incidents and effects of same-sex intimate relationships in Europe, together with essays and comments on these relationships, was published in 2004 and used by Waaldijk and his team to prepare their 2005 findings. See generally *Same-sex couples, same-sex partnerships & homosexual marriages: A focus on cross-national differences* (Document de travail 124) (Marie Digoix & Patrick Festy eds., Institut National d'Études Démographiques, Paris, 2004) (available at <http://www.ined.fr>) (last visited Feb. 21, 2011).

96. Waaldijk, *supra* 95 at 3. Waaldijk and his team's survey compared "levels of legal consequences" in private and public law. Comparative analyses were made for parenting consequences (*id.* at 12), "material" consequences (such as allocation and redistribution of property and debts on dissolution of the relationship, and payment of alimony) (*id.* at 16), "positive material" consequences in public law (such as lower property and income tax rates, access to public health insurance, and exemption from inheritance tax) (*id.* at 20), "negative material" consequences in public law (such as higher property or income tax rates) (*id.* at 24), and other consequences (such as residency and citizenship, testimony in criminal proceedings, and use of surnames) (*id.* at 28). The reporters for each of the countries compared the consequences for same and opposite-sex marriage, registered partnerships, and informal cohabitation on other discrete topics, e.g. insurance, medically-assisted insemination, workmen's compensation survivorship benefits, organ donations, and the legal duty to have sexual relations (*id.* at 58, 60). The templates were structured to compare marriage, partnership, and *informal* cohabitation even though Belgium has a distinct legal regime of rights and benefits for each of *de iure* and *de facto* cohabitation.

97. See e.g. AMERICAN BAR ASSOCIATION, A WHITE PAPER: AN ANALYSIS OF THE LAW REGARDING SAME-SEX MARRIAGE, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS (2004). The report reviews legal developments on the topics of sexual orientation, gender identity, same-sex marriage, statutory protections for same-sex couples, and other related issues. The disparate rights and duties in each state that are attached to same-sex relationships are outlined.

beyond reckoning. Surveys illustrate that there are numerous and divergent manners of arrangement of the economic and social consequences of living-together and *vie commune*.

Different types of marriage,<sup>98</sup> registered or domestic partnerships or pacts, civil unions, civil partnerships, and countless modes of *de iure* and *de facto* cohabitation exist in the West.<sup>99</sup> These associations can occur (or not occur) cumulatively, co-extensively, or co-equally.<sup>100</sup> Moreover, one-way travel between co-equal associations, say, from civil union to marriage, is possible in at least one jurisdiction.<sup>101</sup>

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*Id.* at 22-29. A casual reader might think that different social and cultural realities are described whereas the nature of same-sex intimacy is *grosso modo* similar from state to state in the United States. The report does not outline every right and duty. Its authors state: “Four states provide between sixteen and several hundred statutory protections and rights to same-sex couples. Ten states provide benefits to some state employees in same-sex relationships. Several other states provide between one and a few hundred rights or protections for same-sex couples, and those rights and protections vary from state to state.” *Id.* at 22. Courts have taken judicial notice of the benefits of marriage and prepared lists of statutory benefits. *See* Goodridge, 798 N. E. 2d at 955-956.

98. In a single Western system, there can be several kinds of marriage differentiated by the formalities of solemnization, by the scope of spousal duties and rights, and by the nature of incidents and effects. *See generally* 6 HALSBURY’S LAWS OF INDIA 50.009-50.020 (Butterworths India, New Delhi, 1999). In India, family laws, including marriage and maintenance, are referred to as personal laws and are sourced in religious laws. *See id.* at 50.009. Is India in the West? Its methodology—how it knows and expresses the law—is manifestly Western.

99. The divergent relationship models present particular challenges for private international law. *See generally* SWISS INSTITUTE OF COMPARATIVE LAW, ASPECTS DE DROIT INTERNATIONAL PRIVÉ DES PARTENARIATS ENREGISTRÉS EN EUROPE—ACTES DE LA XVII<sup>E</sup> JOURNÉE DE DROIT INTERNATIONAL PRIVÉ DU 5 MARS 2004 À LAUSANNE (Schulthess, 2004) (discussing marriage, cohabitation, and partnerships for Germany, Great Britain, Netherlands, the Nordic countries, Spain, France, Belgium, and Switzerland).

100. The intimate relationships might be cumulative, e.g., a person might be statutorily recognized as a cohabitant, for Canadian federal purposes, and recognized as united (the civil union of Quebec) or partnered (the domestic partnership of Nova Scotia) for provincial rights and benefits. Co-extensively, a person might be both civilly united (in Quebec) and civilly registered (in the United Kingdom). Finally, a number of recognized relationships are co-equal, e.g., the institutions of civil union and marriage both in Quebec and in Vermont. Yet, this co-equality is not identical in Quebec and Vermont since the constitutional prerogatives of the province and of the state and their relations with their respective federal authorities are different.

101. Quebec allows civil union spouses to convert their civil union into marriage. However, Quebec can only provide for one-way travel. The province is arguably not constitutionally competent to provide for the conversion of marriage into a civil union. The conversion will not confer any additional rights in Quebec private law although it may be advantageous, in a limited number of cases, for federal entitlements. *See An Act to amend the Civil Code as regards*

Intimate associations can exist or co-exist at differing intensities of social and economic intimacy in a single jurisdiction. This graduated intimacy, that is to say intimacy measured by degrees of social and economic functionality, is troubling; yet, it is no more troubling than the distinct social and economic consequences of marriage that are now prevalent in the West, e.g. ownership and management of marital property.

Specific rights and duties attach to all of these relationships. Some were (and still are) initially available for either homosexuals *or* heterosexuals and some are now available for homosexuals *and* heterosexuals. Although legal recognition of heterosexual cohabitation started first and later embraced homosexual cohabitation, civil unions and domestic partnerships were conceived in the first instance for gay and lesbian couples. Sometimes, their conception has been an honest attempt to introduce a new edifice to house the rights and duties of intimates between themselves and in their relations with the sovereign.

However, in the United States, civil unions and domestic partnerships do not seem to have been conceived on the basis of their intrinsic merits nor imagined as refreshed secular institutions to complement (or replace) erstwhile civil marriage, now in a high state of desecularization and resacramentalization. Nor can it be said that they were conceived for economically symmetrical relationships, in contrast to the continued asymmetry of marriage.<sup>102</sup> Rather, these unions and partnerships were intended as legislative comforters for public anxiety, real or imagined, over gay marriage.

All these institutions compete for the attention of the lawmaker and vie with the paradigmatic institution of marriage. Yet, marriage is a confused paradigm. In most of the West, marriage has been defined as a *sui generis* secular contract, divorced from

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*marriage*, S.Q. c. 23 (2004) (Quebec). The Explanatory Notes state that this will allow couples “to continue their life together as a married couple” and that marriage dissolves the civil union but that the effects of the civil union continue into the marriage. Is this an upgrade (or a downgrade)? Opinions differ.

102. The life-profile theory of marriage suggests that long-term support promises protect specific investment by the economically vulnerable spouse. See generally ANTHONY W. DNES, THE LIFE-PROFILE THEORY OF MARRIAGE, COHABITATION, AND SAME-SEX MARRIAGE (MAY 2004) (American Law & Economics Association 14th Annual Meeting: Working Paper 65). “Marriage enables a man and woman to plan their lives and to avoid turning a sexual asymmetry into the basis for exploitation of the weaker party.” *Id.* at 10-11.

its former religious and sacramental past.<sup>103</sup> It is, therefore, a civil and purely temporal institution. In this regard, citizens are told that this is why civil marriage is called civil.<sup>104</sup> Despite all this clarity, its secular nature remains unfathomable to some religious bodies. Regardless of the secular rhetoric of the civil law, the institution of marriage has been unable to detach itself from its sacramental tattoo.

## VI. CONCLUSION

Where did we start? Where have we gone? What is law? What is intimacy? In the good law of today for the people of now, there is a place for intimacy. There is room for every person's socially-tempered autonomy in the choice of an intimate partner. The life of the citizen is a life of legal travel, with all of its "mishaps and disappointments" not a life of legal tourism "cushioned against misadventure."<sup>105</sup> Her implication in the law requires that she and her mate cooperate with the community in which they live and love, full of both *eros* and *agape*,<sup>106</sup> and in which they enjoy and

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103. Daniel Borrillo briefly addresses the institution of marriage in France, a country that prizes its secular tradition. *See generally*, Daniel Borrillo, *Le mariage homosexuel: hommage de l'hérésie à l'orthodoxie?*, in *LA SEXUALITE A-T-ELLE UN AVENIR?* 39-54 (Presses universitaires de France, 1999). Borrillo points out that the 1791 French constitution clearly states: "La loi ne considère le mariage que comme un contrat civil." *Id.* at 47. For the continued French interest in its secular tradition, *see generally* CONSEIL D'ETAT, *RAPPORT PUBLIC 2004: JURISPRUDENCE ET AVIS DE 2003. UN SIECLE DE LAÏCITE* (La Documentation française, Paris, 2004). For an official affirmation of secular marriage, *see id.* at 250, 354-356. In France, clerics are expressly prohibited under the *Code pénal* (Criminal Code) from conducting a religious marriage before a civil marriage has taken place. *Id.* at 354-355. Yet, notwithstanding its secular tradition, French courts considered the Roman Catholic moral position relating to homosexuality as a valid ground for the dismissal of an assistant sacristan. *See* D. 30 mars 1990 (Cour d'appel de Paris) at 596-597 (stating that the Roman Catholic Church has always strongly condemned homosexuality as being radically contrary to divine law as this law is embodied in human nature.).

104. The Canadian government took great pains to stress the civil nature of marriage in its legislation on the topic. *See* An Act respecting certain aspects of legal capacity for marriage for civil purposes (Civil Marriage Act) (Bill C-38), S.C. 2005, chapter 33. *See* section 2: "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others."

105. *See* Lawrence Durrell, *Reflections on Travel*, in *SPIRIT OF PLACE: LETTERS AND ESSAYS ON TRAVEL* 423, 426 (Alan G. Thomas, ed., Marlowe & Company, New York, 1969).

106. For a current statement (restatement?) of the Roman Catholic position on love (*eros*, *philia*, and *agape*) and its many meanings, *see* the Encyclical Letter of Benedict XVI *Deus Caritas Est* (2005) at para.2-8. The

exercise their rights as individuals and as intimates. They are right-owners and duty-owers. In recognition of their economic and social contributions, the community respectfully greets them. The community is mindful that each of them and all other citizens have juridical personality, not third-person personality but first-person self-aware personality. Simone Weil might say that their juridical personality is their *metaxu*, that is to say “those . . . blessings (home, country, traditions, culture, etc.) which warm and nourish the soul and without which, short of sainthood, a *human* life is not possible.”<sup>107</sup> These *metaxu*—these blessings—are steppingstones from the temporal to the spiritual and fullness of being.<sup>108</sup>

Juridical personality is a way of understanding the private law. In the civil law tradition, it is the starting-point for all law-talk. By logical necessity, all legal operations are predicated on knowledge of the nature and scope of the individual rights and duties at play. An examination of the content of these rights and duties is unavoidable when determining the effectiveness of any particular act or fact.

In the common law tradition, an understanding of juridical personality is also indispensable for correctly establishing the boundaries of the private law and for identifying the number and quality of civil rights. Civil rights are rights that, in and of themselves, justify private-law operations. They do not seek nor do they need the endorsement of the public law. They are inherent in the person and suffice for all juridical acts and facts. These rights and duties are not constant. Each legal operation individually and the aggregate of all operations add texture to the assembled attributes of personality.

In the West, and especially in the common-law West, the construct of juridical personality is vital for any intelligent discussion of rights and freedoms.<sup>109</sup> It contains the public law to

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Letter is available at: <http://www.vatican.va/holyfather/benedictxvi/encyclicals/documents/hfben-xvienc20051225deus-caritas-esten.html> (last visited Feb. 21, 2011). All kinds of love represent “a single reality, but with different dimensions; at different times, one or other dimension may emerge more clearly.” *Id.* at para. 8.

107. See Simone Weil, *Metaxu*, in THE SIMONE WEIL READER 363, 365 (George A. Panichas ed., Moyer Bell, 7th prtg. 1999).

108. See generally *id.* at 363-365.

109. Juridical personality has always been vital in the civil-law West. This is tellingly noted by the title of H. Patrick Glenn’s personal survey of the world’s legal traditions. See GLENN, *supra* note 23. Glenn entitles his chapter on the civil law: “A Civil Law Tradition: The Centrality of the Person.” *Id.* at 125-

its proper sphere of operation, and it provides a proper foundation for the exercise of rights other than a constitutional foundation. In the Anglo-American tradition, rights and freedoms are almost always examined in the context of public law norms formally and officially issued by the political State. They operate or fail to operate on grounds related to the interpretation of charters or bills of rights and other like documents. The merits and demerits of intimate associations and, in particular, same-sex marriage, have been debated on constitutional grounds in Canada and the United States. As a result, the public is cajoled to believe that any exposition of dignity, autonomy, diversity, intimacy, or privacy is a top-down development. In fact, rights and duties inevitably take form bottom-up, from the person to the sovereign. Indeed, they move from the non-law to the law, and from folkways, to morals (*mores*), to law.<sup>110</sup>

The absence of the conception of juridical personality in the common law tradition has encouraged an inappropriate expansion of the public law, fully to the detriment of the private law, and heightened the positivistic profile of the general law. It has increased the girth of legislation as lawmakers endeavor to frame all rights and duties as emanations of sovereign authority and as special concessions of the state. All of this flies in the face of the Universal Declaration of Human Rights.

In the public or private law realms of intimate associations, it seems likely that current ideological quarrels will bear as much

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169. He addresses the issue of centrality by referring, on the one hand, to the Enlightenment thinking with respect to property, with its focus on individual ownership, and with respect to contract, as the meeting of autonomous wills, and by referring, on the other hand, to the notions of subjective law and social equality. *Id.* at 140-143.

So all the great concepts of western civilization come together in a kind of package, and at the base is the centrality of the person, now a rather abstract concept even if seen originally as a divine representative of the Jewish and Christian God. And then, once the theoretical package is in place, you have to look around and see if it is being applied properly, or whether the tradition is neglecting someone or something.

*Id.* at 142-143.

110. On the topic of the relation between non-law (*non-droit*) and law (*law*), see generally JEAN CARBONNIER, FLEXIBLE DROIT: POUR UNE SOCIOLOGIE DU DROIT SANS RIGUEUR (7th ed., Librairie générale de droit et de jurisprudence, Paris, 1992) at 23-48. Carbonnier discusses their hierarchy and chronology. Does non-law precede law? Which of the two takes first place? *Id.* at 36-44. Carbonnier seems inclined to the view that non-law results when law withdraws and abandons its interest in certain human relations. *Id.* at 25, 37.

fruit as ecumenical dialogue, that is to say, none. If this is so, then more questions should be asked about the role of the law, about personality, and about a citizen's autonomy in her social, economic, and sexual interactions with and within the community. Here are some of these questions.

Does the private law need a new civil institution, one that is truly secular and one that does not interfere with sacramental conceptions of marriage? Such an institution would not be a civil union that is more or less co-equal with marriage, but an institution that would act as an umbrella for all intimate associations and that would function as the only vessel for the patrimonial relations of the couple. Why should all intimate relationships be configured on the marriage model of procreation, paternal authority, monogamy, indissolubility, and legitimate succession? Should the law not provide citizens with a new type of close relationship that recognizes the diversity of economic and sexual profiles?

There are many notions of marriage that make no reference to procreation. Marriage shares these notions with other intimate associations. There is friendship. There is the *amicitia* of intimates, and this *amicitia* "induces people to love one another greatly."<sup>111</sup> Thus, love and friendship, emotionality, living-together, stability, mutuality, continuity, reciprocal dependence, reliance, loyalty, and companionship—all the constituents of *fides*—are some of the denominators.

These common characteristics might constitute the skeleton of a secular *consortium*—a new institution for intimates and a new well for their juridical personality.

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111. See LAS SIETE PARTIDAS, PART. IV, TIT. XXVII (Samuel Parsons Scott trans., Robert I. Burns ed., University of Pennsylvania Press, 2001). This remarkable Title (Concerning the Mutual Obligation Existing Between Men, by Reason of Friendship) defines and describes *amicitia* (friendship) in feudal Spain. The nature of the male *amicitia* of this Title might well describe the relationship between Gilgamesh and Enkidu. See *supra* note †.