

Justice, Rhetoric and Law: Reflections on *Latimer v. The Queen*

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My subject is a recent decision by the Supreme Court of Canada, in January 2001, to uphold the conviction and sentence imposed upon Robert Latimer, a Saskatchewan farmer, who had killed his twelve-year old disabled daughter, Tracy, in the fall of 1993. Latimer killed Tracy, who suffered from cerebral palsy and was quadriplegic, while the rest of his family attended church on a Sunday morning in October 1993. He carried her from her bed, placed her in the cab of his pick-up truck, and directed the truck's exhaust through a tube into the cab. When she was dead, he returned her to her bed and left her there for his wife to find when she went to bring Tracy her lunch. When the police, summoned to the farm, informed Latimer that there would have to be an autopsy, he told them that Tracy was to be cremated. Although Mrs. Latimer seemed at first surprised by this statement, she agreed with her husband after the two had an opportunity to consult. Following the medical examiners' discovery that Tracy's death had resulted from carbon monoxide poisoning, police returned to the Latimer farm to question and arrest Latimer, who now confessed and showed the police how he had killed his daughter. Latimer was charged with first-degree murder and a year later convicted of second-degree murder. Under the mandatory sentencing provisions of Canada's criminal code, he was sentenced to life imprisonment, or up to twenty-five years of imprisonment with no possibility of parole for ten years. In the years that preceded the Supreme Court's 2001 decision, Latimer's conviction and sentence were appealed to and upheld by the high court of Saskatchewan, and appealed to the Supreme Court, who ordered a new trial when it was told that the prosecutor had improperly questioned jurors before his first trial. Latimer was convicted again in his second trial in November of 1997, but the trial judge granted a constitutional exemption from the mandatory sentencing of the Criminal Code and imposed a sentence of less than two years, with one of those years to be spent in community service. Again Latimer's

defense appealed his conviction to Saskatchewan's Court of Appeals, and this time the crown appealed his reduced sentence. In November 1998, the Appeals court upheld the conviction and restored the sentence mandated by the law. Latimer's lawyers commenced the appeal against his conviction and sentence to the Supreme Court of Canada. The Court's rejection of this appeal is the subject of my essay.

Although the Court that decided *Latimer v. The Queen* operated within a peculiarly Canadian legal context—interpreting the Charter of Rights that has been part of Canada's constitutional since 1982 and a provision of Canada's criminal code requiring a “life sentence” for a conviction of second-degree murder and looking primarily for precedents in the decisions of other Canadian courts—its decision deserves the attention of all those concerned to see the lives and rights of the disabled protected.ⁱ The decision deserves our attention because the issues it poses are universal in scope and because the legal proceedings which the Canadian court affirmed and completed—the prosecution and conviction and sentencing for murder of a parent accused of killing his own disabled child—are almost unique.ⁱⁱ

My comments on the *Latimer* case are not those of a lawyer or professor of law. And so it is that I must confess that my initial reaction to the Court's decision was not one of unqualified enthusiasm. A friend who is a lawyer, who had represented one of the interveners in the case, has told me how pleased he was by the fact that this and other recent decisions of the Supreme Court of Canada have been “law-based.” I understood what my friend meant by his remark, and I shared his approval for those decisions. Still, I wondered whether the only alternative to what he called “law-based decisions” was judges acting upon their own policy preferences or perceptions of public opinion. And I was left a little uncertain about the adequacy of law, or decisions made in the course of interpreting and applying law, as a basis for moral or just decision making in the area here under study. I had no doubt that the right decisions were for the most part being made in the case of Mr. Latimer, but I wondered whether law courts could long uphold and defend justice on the narrow grounds on which that defence was being

made. Often what seemed to be going on in the various courtrooms that dealt with the Latimer case was a contest between two teams of lawyers conducted before another set of lawyers in the role of umpires. The one set of lawyers representing the defendant was trying, it seemed, to find a means whereby members of the jury could feel justified in acting on their emotions: sympathy for the accused, either as the father of a disabled child or as a man who might have to be separated from his family by imprisonment, and perhaps even a lack of sympathy for the severely handicapped victim of the accused. And on the other side were the lawyers for the Crown and, fortunately, most of the lawyers on the bench who were trying to prevent this from happening, trying to stop the jury from doing what it may very well have wanted to do. For a democrat it is discomfoting to see lawyers pushing jurors around—probably that discomfort has something to do with the popularity of lawyer jokes. As I wrestled with this difficulty, two quite different statements by two very great American statesmen came to mind. The first was Madison’s remark in the *Federalist Papers* that it is not the passions but the reason of the people that ought to rule in a democracy.ⁱⁱⁱ The second was something Lincoln said when he explained why the abolition of slavery could not mean immediate and complete social equality for those who had been slaves: “My own feelings will not admit of this; and if mine would, we well know that those of the great mass of the white people will not. Whether this feeling accords with justice and sound judgment is not the sole question, if indeed it is any part of it. A universal feeling, whether well or ill-founded, cannot be safely disregarded.”^{iv} Now, we know that Lincoln did *not* mean by this that what he called a universal feeling, or powerful element of public opinion, could never be wrong or unjust. And we know that he thought an unjust public feeling could be changed through public discussion partly by appealing to that popular sense of justice that is also universal. From the time of the repeal of the Missouri compromise until 1860 Lincoln spoke of almost nothing but the political evil and injustice of slavery, and neither he nor we can doubt that his speaking had momentous consequences. And yet we are still left with his reminder of the unescapable importance of public opinion in a democracy and may therefore wonder justice whether will finally prevail when the

case for it is entirely “law-based.”

On January 18, 2001, the Supreme Court of Canada announced its decision in the case of *Latimer v. the Queen*.^v In a unanimous decision, whose authorship was not attributed to any particular member of the Court, the Court upheld the second-degree murder conviction of Latimer for the 1993 slaying of his daughter Tracy, who suffered from “severe cerebral palsy.”^{vi} The Court also approved the application of the mandatory minimum punishment prescribed for second-degree murder by Canada’s Criminal Code. According to this provision of the Criminal Code, anyone convicted of second degree murder is to be imprisoned for life and shall be ineligible for parole for at least ten years, or at most twenty-five years.^{vii} The Court thus ended a process in law that began in early November of 1993 when Latimer was arrested and charged (initially) with first degree murder in the death of his daughter. In the course of those seven years Latimer was tried and convicted twice by juries in Saskatchewan—Latimer’s second trial was ordered by the Supreme Court of Canada when it was alleged that the prosecutor in his first trial had improperly questioned some potential members of the jury about their views on abortion, euthanasia, and religion prior to the trial.^{viii} And in the case of each of Latimer’s trials, appeals followed to the Saskatchewan Court of Appeals and to the Supreme Court of Canada.

What has been the public response to the Latimer decision? Has the Court brought the public discourse sparked by this case to an end? The Court itself acknowledged that it could not do this. And indeed, the Court also observed—more than once in its decision—that the sentence imposed upon Latimer could be reduced by an exercise of executive clemency, and so the Court fueled, if it did not ignite, efforts to mobilize public opinion to persuade the federal cabinet to do just this: to exercise the royal prerogative to pardon Latimer, or at least reduce his sentence. If the Court has not ended public discussion about Latimer’s sentence or the larger issue of “mercy killing,” have the Court’s decision and its arguments affected that discussion? The short answer seems to be: not much. The Court’s decision was welcomed by some and denounced by many. Public opinion following the Court’s decision looks much as it did before. Nor did those who approved or disapproved of the decision waste

much effort in looking at the Court's arguments. The *Toronto Star* called the Court's decision an "unforgiving judgment" and urged a lesser penalty for what it called mercy-killing; the *Star* claimed to speak for "three out of every four" Canadians who thought Latimer's punishment too harsh.^{ix} On the other hand, two of Canada's leading national newspapers approved the Court's decision. The *Globe and Mail* noted that Tracy Latimer had not consented to her own death and editorialized that "to excuse or diminish Mr. Latimer's offence ... would send a signal to other care givers for severely disabled children or adults that, if they took upon themselves the role of executioner, society would see their murders as somehow worthier and more understandable than most killings. It would send a signal to people with disabilities that whether they lived or died depended on the threshold of pain or tolerance of those caring for them."^x Similarly, the *National Post* congratulated the Court for recognizing that it is "not hard cases, but Parliament that makes the law" and for sending the message that "mercy-killing is [still] a species of murder."^{xi}

As for public opinion, it seems to be, as we have said, relatively unchanged. But what exactly is that public opinion? Those who approve the decision to uphold Latimer's conviction and sentence *and* those who want to pardon him or reduce his sentence are *agreed* that public opinion wants his sentence reduced and feels that he ought not to have been convicted of murder. One representative of the disabled, whose advocates have fought long and nobly and effectively to uphold a decision which would protect the rights and lives of the disabled, Orville Endicott, has written despairingly that polls show "that more than two out of three Canadians reject the Supreme Court's determination that the life of a person with serious disabilities deserves the protection of the full force of the law."^{xii} On Endicott's reading, the Court flew in the face of public opinion in making its decision and its remark about the possibility of executive clemency may have been an effort to accommodate itself to that opinion. Those wanting Latimer freed have also appealed to public opinion and supposed it to be as just described. Thus *Post* columnist Donna Laframboise, for example, who appealed to Shakespeare for the proposition that justice should be tempered or equated with mercy and

outlined at length the very poor quality of life Tracy Latimer had suffered and described how Latimer put Tracy ‘to sleep for one last time’ has concluded that the federal government must bow to the public opinion that favours a reduced sentence since “justice is not only to be done, but to be seen to be done...”^{xiii} Justice will be seen to be done, Laframboise thinks, only when it reflects the public opinion that is unhappy with Latimer’s sentence. But is it certain that public opinion is as Endicott and Laframboise assume? What I want to suggest is that if public opinion is hostile to the decision reached by the Supreme Court of Canada, it is also deeply confused, and that those consulting it have done their best not to remove but to deepen and exploit that confusion.

In the months since the Court announced its decision one major Canadian pollster, Ipsos-Reid, commissioned by the *Globe and Mail* and one of our television networks has claimed to find wide public opposition to the Court’s decision.^{xiv} The author of the *Globe*’s story on the poll reports—as if it were something shown by the poll—that “many people consider Mr. Latimer to be an anguished, loving father whose only goal was to end his daughter’s suffering [and] see his sentence as deeply unfair [whereas] a minority deems him a murderous thug who should be locked up for many years because he treated his own flesh and blood no better than a farm animal.” In fact, none of the language contained in the reporter’s summary—nor anything like it—seems to have been part of the question put to those who were surveyed. Perhaps the pollster himself can offer a more reliable interpretation of his poll. Alas, what we find is one more effort to give a particular spin to the poll. An executive of the polling firm has advised the federal cabinet that the poll shows that people want “a compassionate reduction in his sentence” and that the government need fear no “backlash” if it does reduce Latimer’s sentence. The same executive has not offered his professional opinion as to whether the cabinet would suffer politically if it does not reduce Latimer’s sentence. What does the Ipsos-Reid poll actually show? The pollster has found that only 26% of Canadians agree with the statement that “Latimer’s sentence [was] warranted because he committed murder,” whereas 71% think “it should be reduced because *it* was an act of mercy (my emphasis)” What is not clear is what the “it” was that 71% were

willing to call an act of mercy, or whether the pollster's ambiguity here was a matter of deliberate design or a grammatical failing. We are left to suppose that some at least of the 71% may have thought of the "it" as murder but nevertheless justified. On the other hand, we might also suppose that some of those respondents might have given a different response if the question asked had been unambiguous: Do you think Latimer's sentence should be reduced because his motive for murdering his daughter was mercy? Nor is this the only evidence of confusion in this poll as reported. We are also told that not 71% but 59% of Canadians surveyed do not think that the Supreme Court of Canada should have upheld Latimer's conviction (41% strongly), whereas 37% support the decision (18% strongly). Neither the pollster nor the reporter tell us how to reconcile this finding with the other one to which they pay much greater attention.

One commentator on the Court's decision, Andrew Coyne writing in the *National Post*, has argued—powerfully, I think—that the Supreme Court's decision is justified precisely by the deep moral confusion present in public opinion on the questions that are posed by this case.^{xv} What Coyne argues is that we see this confusion and the special difficulty the law and our Court confront in this case in the fact that many—perhaps most—of those who want leniency for Latimer say that he is a good man who did the wrong thing, while others—including Latimer—insist that the thing he did was not wrong. And it is precisely where there is confusion as to the gravity of an offence—even as to whether what Latimer did is an offence at all—that the law must “become something of a teacher,” according to Coyne. It must perform that same task it has always had to perform, but with special clarity and firmness: “to express society's abhorrence of the crime.” The law through the Court must appeal to and, by doing so, reaffirm the shaky consensus on which our society is based. What is that consensus? Coyne says it consists in the following “crucial” moral truths: “that no one may presume to decide for another whether his life is worth living; that the life of a disabled person is not to be valued less than that of any other; that the taking of life, even for ostensibly benign motives, is still the taking of life.” The question to which his argument leads us is whether what Coyne calls the “moral confusion” in

our society is just a euphemistic mask for the collapse of the very consensus Coyne is talking about? Coyne offers at least one strong argument for his more hopeful reading; he asks whether those who think Latimer should be excused for what he has done would have agreed in advance of his act to permit him to kill his handicapped daughter. This is the right way to state the question, Coyne argues, because it is only when we do state it this way that we overcome our natural tendency to notice what is sympathetic about a father sentenced to prison while forgetting the worth of the life already destroyed by his deed.

Have the Supreme Court of Canada and the lower courts performed the role of moral teacher which Coyne attributes to them? To answer that question with any precision we must observe in the first place that if the Supreme Court, or any other court, is to act as a moral teacher it must do so while performing another and more immediate task. It must decide the questions in law that have been posed in the prior adjudication of the case before it. Tracy Latimer was protected like anyone else under the jurisdiction of the criminal laws of Canada in the sense that anyone who undertook to take her life, as her father did, was subject to prosecution and, if convicted, to punishment for murder under the law. The moral truths we have mentioned—that no one may rightly decide that the life of another is not worth living, that the life of a disabled person is worthy of the same protection as is anyone else's, that the taking of life is not justified by the claim of having acted for a benign motive—arise indirectly in cases like this one as truths that must be denied explicitly or, more often, implicitly in order to find a way in law to avoid the conviction and punishment that would otherwise follow from the acknowledged act of the accused killer. In the course of the Latimer case, the ways in law proposed to avoid conviction or prevent the imposition of the penalty called for by the law were three. Latimer might be acquitted or his conviction quashed, if his killing of his daughter could be excused as an act of what the law calls necessity. Or his conviction might have been set aside if it could be successfully argued that Latimer had the right to have the jury nullify the application of the law despite his action if the jury did not approve the law it was asked to apply or the penalty that would follow from conviction and that right was denied him by the conduct of

his trial. Or the penalty imposed as set down in the law for one convicted of second-degree murder might have been altered on the grounds that the mandatory punishment in this case was “cruel and unusual” and so entitled him to what the courts call a “constitutional exemption.” As we shall see, the Supreme Court followed the Court of Appeals of Saskatchewan in rejecting each of these three arguments. But, if we are to assess the Court in performing the role of a moral teacher we must ask whether and how it affirmed or evaded the moral truths we have identified in the course of denying these arguments.

Before taking up that question, however, we need to review a little more of the judicial history of the case from the October Sunday when Robert Latimer killed his daughter by piping carbon monoxide into the truck where he had placed her. What needs mention, first, is the Saskatchewan Court of Appeal’s response to Latimer’s appeal of his conviction and sentence in his first trial. After Latimer’s first conviction, his attorneys had appealed against his conviction that it had been based on an improperly obtained confession and that the trial judge had improperly ruled the defence of necessity inapplicable in his case. His lawyers also argued against his mandatory sentence that it was “cruel and unusual.” They argued that he ought to have been granted a constitutional exemption from the mandatory sentence prescribed by the Criminal Code. The Saskatchewan Court of Appeals upheld Latimer’s conviction with two of its three members rejecting the argument for a constitutional exemption from the mandatory sentence prescribed. The third member of the Court, the Chief Justice of Saskatchewan, Edward Bayda argued that it was important to infer and insist that Tracy’s father had not killed her because of her disability but to end her pain and that with this in mind it was right to conclude that Latimer should be constitutionally exempted from the mandatory punishment as “cruel and unusual.” The sentence that had been imposed upon Latimer, so the Chief Justice of Saskatchewan claimed, had provoked a public outrage that the court should not ignore. He claimed that the sentence was inconsistent with penalties that had been imposed upon others who had taken the lives of the terminally ill and that it was grossly disproportionate to the only proper aims of punishment: to deter or rehabilitate. The prescribed

penalty was, he said, “revenge carried to the extreme.”^{xvi}

The Saskatchewan Court’s decision was of course appealed to the Supreme Court of Canada but the Supreme Court had to deal not only, or primarily, with objections to the Saskatchewan decision but also with the revelation that the prosecutor in the first trial had questioned some of the jurors about their opinions on euthanasia and other matters in advance of the trial. So the Court ordered a new trial and dismissed objections to the admissibility of Latimer’s confession. It did not at this time address any of the other issues it would later confront, or declare itself on the issues that had divided the members of the Saskatchewan Court of Appeal.

The conduct of Latimer’s second trial has been a matter of much discussion both by members of the press who observed the trial and by members of the courts who subsequently had to review that conduct.^{xvii} What became elements in the defence’s subsequent appeal to the Court of Appeals and the Supreme Court of Canada were the decision of the trial judge, Mr. Justice Noble, to await the closing summary of Latimer’s defence before telling the jury whether they could consider the “defence of necessity” in weighing their verdict, and his reply to a query from the jury that they should ignore the question of punishment in reaching a verdict as something that might be discussed later by the judge and jury if Latimer were convicted. Latimer’s counsel claimed that he was unfairly handicapped by the judge’s refusal to rule in advance of his own concluding remarks to the jury whether he would tell the jury that it should or should not consider the defence of necessity. The Appeals Court and Supreme Court of Canada seem to have reasonably suspected that the effect of the judge’s conduct and the reserve with which he ruled against the “necessity defence”—as if his ruling that they ought not to consider this as a possible defence was something he was compelled to make “as a matter of law” no matter how arbitrary—was more likely to have advantaged the defendant by allowing the jury to hear the defence in the first place.^{xviii} As for the judge’s lack of clarity about the mandatory sentence and his ambiguity about the jury’s possible role in determining Latimer’s punishment if convicted, Latimer’s counsel claimed that the prospect of the jury “nullifying” the law by acquitting Latimer despite the evidence against him was unfairly reduced by the fact that the jury did

not know, or were not sure, that his conviction would result in the mandatory sentence. In this case too, what created the basis for the defence's subsequent appeal were actions by the trial judge that were likely intended not to disadvantage Latimer but to prepare the way for the judge's own intention to allow the jury to make a sentencing recommendation and to grant a constitutional exemption against the mandatory sentence. And, finally, the trial judge also prepared for the successful appeal against his "constitutional exemption" to the Court of Appeals and the Supreme Court of Canada when he dismissed the previous ruling of the Saskatchewan high court against the argument for a "constitutional exemption" from the penalty as "cruel and unusual."^{xix}

In assessing the Supreme Court's decision as it responds to the legal challenges before it and discharges its role as moral teacher, we mean to look closely at what the Court says in the course of upholding the Appeals Court's decisions that the jury was rightly told not to consider the defence of necessity and that the mandatory punishment prescribed by the Criminal Code ought to be restored in place of the lesser penalty Latimer's trial judge had substituted for it as a constitutional exemption. It is in the Supreme Court's reasoning in these two instances, I think, that we encounter the greatest evidence of the Court's own reluctance to be the moral teacher we have described. The third possible line of defence, that Latimer's trial judge had deprived Latimer of the right to have his jury nullify the law by refusing to convict him of a crime that did not seem to them deserving of the punishment prescribed for it under the law when he proceeded as if that sentence might be modified, did not impress the Court much. Does an accused person have the right to the possibility of what is called jury nullification, and was this right abridged through the conduct of his trial? To this question the Court's answer is that "the accused is not entitled to a trial that increases the possibility of jury nullification. If the trial of the accused has not been unfair and if no miscarriage of justice has occurred, the accused cannot succeed on an argument that due to some departure from the norm by the trial judge, his chances of jury nullification are lessened." Though jury nullification may sometimes occur, it can never be the task of the law to encourage or even sanction that possibility [68]. It is rather the duty of a trial judge to

prevent jury nullification so far as he can.

Although the Supreme Court is equally firm in rejecting the defence of necessity and gives a thorough explanation of why the trial judge had no choice but to rule that defence unavailable to the jury, the court's reasoning is not quite so satisfactory to one looking for an unambiguous affirmation of the moral truths on which Latimer's conviction rested. A successful use of the defence of necessity, the Court argues, must show that some unlawful action of the accused was justified, despite the law that forbids it, by the presence of some imminent danger; that there was no lawful alternative to the action taken; and that the harm done in acting so was less than, or at least proportional to, the harm that was averted. Appealing to the general principle that a defence should not be presented to a jury unless a jury properly instructed in the meaning and limits of that defence, as developed in previous cases in Canada and elsewhere, could acquit the accused on the basis of the evidence presented, the Court insists that the issue posed for the judge in any trial is whether the three requirements that must be satisfied to justify an unlawful act as necessary have at least some air of reality. Here, in the Supreme Court's view, the trial judge rightly ruled the defence unavailable because neither Latimer nor his daughter were in any imminent danger. Though the accused claimed to see imminent peril in the further surgery that her doctors proposed, his belief was unreasonable "particularly when better pain management was available." Nor was the accused without any reasonable legal alternative to killing his daughter; he could have struggled on, perhaps helping his daughter to manage her pain better, or he could have placed her in an available group home. Nor is it clear, the Court says, whether the proportionality of harm done to harm avoided can ever be satisfied in a case of murder; in this case, at any rate it is not: "killing a person— in order to relieve the suffering produced by a medically manageable physical or mental condition—is not a proportionate response to the harm represented by the non-life-threatening suffering resulting from that condition." Since all three of its requirements must be satisfied for the defence of necessity to apply, the defence should not be put to a jury if even one of the three elements has "no air of reality." Since here

none have that reality, the trial judge rightly ruled that the jury should not consider the defence. So far as the “defence of necessity” is one possible line of defence for the killing of the severely disabled, we might conclude that the Court’s answer to this question serves to safeguard the crucial moral principles that prevent anyone deciding that the life of another who is severely handicapped is not worth living. On the other hand, we cannot but wonder why the Court included the prospect of better pain management in order to show that the accused’s claim that his daughter was faced with an imminent peril was unreasonable. Without the prospect of better pain-management would his claim have been justified?^{xx} And why does the Court acknowledge its own uncertainty as to whether the proportionality requirement could be met for a homicide? Nor is it easy to be sure whom the Court means to reassure when it adds that in “considering the defence of necessity, we must remain aware of the need to respect the life, dignity and equality of *all* the individuals affected by the act in question.” [41 emphasis added]

The final question addressed by the Court was whether the punishment of Latimer as mandated by the Criminal Code ought to have been altered by a “constitutional exemption” as “cruel and unusual.” What was challenged by Latimer’s attorneys was not the constitutionality of the mandatory punishment attached by the Criminal Code to a second-degree murder conviction in general but whether the application of that required punishment to Latimer in this case violated his right under the *Canadian Charter of Rights and Freedoms* “not to be subjected to any cruel and unusual treatment or punishment.” What is at issue is what the courts call a “constitutional exemption” and the Court does not deny the possibility of such an exemption. Although it insists that the Courts must “consider and defer to the valid legislative objectives underlying the criminal law responsibilities of Parliament.... ‘the final judgement as to whether a punishment exceeds constitutional limits set by the Charter is properly a judicial function...’” [76-77]. Proper deference to Parliament’s objectives means that the Court should only strike down a punishment that is so excessive as to outrage standards of decency or is “grossly disproportionate.” But to determine whether a punishment is grossly disproportionate the court will properly examine a wide range of issues:

including, but not restricted to, the gravity of the offence, the characteristics of the offender, and the circumstances of the case. As it happens, according to the Court, an inquiry into these factors does not in this case call for a constitutional exemption. The “gravest possible consequences”—the death of his daughter—“resulted from an act of the most serious and morally blameworthy intentionality” on the part of her father. Turning to the characteristics of the offender and the circumstances of the case, the Court finds, and remarks that it is not surprised to find, extenuating and aggravating circumstances that cancel each other out. Mitigating considerations are Latimer’s good character and his long efforts as a caring parent; aggravating factors are the premeditated character of his act, his initial effort to hide what he had done, his lack of remorse and the great vulnerability of his victim. Because these factors cancel each other out, the inquiry into them does not “displace the serious gravity of this offence” [85]. What the Court might have said had Latimer expressed remorse or not denied what he had done is a matter for speculation, but that speculation is almost invited by the Court’s reasoning. Further, although the Court recognizes the important role of punishment in denouncing murder it also says that it “agrees”—with Latimer’s counsel, we can only suppose—that punishment is not required in this case for rehabilitation or specific deterrence. The Court does not explain why it knows that rehabilitation and specific deterrence are irrelevant here. If rehabilitation means affecting a change in the one rehabilitated so that he would not do again what he is being punished for doing, Latimer’s persistent lack of remorse would make rehabilitation a desirable if unlikely purpose of punishment. And if Latimer continues to think that what he did to his daughter was “right,” why should the Court suppose he would act any differently if placed in the same or very similar circumstances? All that makes specific deterrence unnecessary, we are forced to conclude, is the improbability of Latimer being in the same circumstances again. At this point we begin to fear that the Court itself is not after all so very far from those who regret its decision because they think that Latimer is a good man who has been so overwhelmed by the difficulties of his situation as to have done a wrong thing.

Perhaps our analysis has placed too much weight on what may be loosely chosen words. Perhaps the qualifications the Court has included in its reasoning are even justified in the Court's view in order to secure the widest possible agreement to the decisions it has reached as matters of law. Yet we may ask whether what is justified as legal rhetoric does not undermine the moral claims that finally support the conviction of Tracy's killer as an act of justice for his victim. In any case, one cannot help observing that the present discussion is followed almost immediately by the unexplained remark that the present appeal "raises a number of issues that are worthy of emphasis" including the wisdom of minimum sentences. And the discussion concludes with the reminder that executive clemency may be granted and what looks like an effort to encourage such an act by the executive when the Court remarks that "Mr. Latimer has undergone two trials and two appeals to the Court of Appeal for Saskatchewan and this Court, with attendant publicity and consequential agony for him and his family [90]." Is all that saves the Court from the moral confusion we spoke of earlier its reluctance to reverse Parliament in the matter of mandatory and minimum sentences?

APPENDIX: RELEVANT LAWS AND CHARTER PROVISIONS AS CITED IN
LATIMER V. THE QUEEN.

Criminal Code, R.S.C. 1985, c. C-46

235. (1) Every one who commits first degree murder or second degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.

(2) For the purposes of Part XXIII, the sentence of imprisonment for life prescribed by this section is a minimum punishment.

745. Subject to section 745.1, the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be...(c) in respect of a person who has been convicted of second degree murder, that

the person be sentenced to imprisonment for life without eligibility for parole until the person has served at least ten years of the sentence or such greater number of years, not being more than twenty-five years, as has been substituted therefor pursuant to section 745.4...

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

NOTES

i. Relevant provisions of the *Canadian Charter of Rights and Freedoms* and the *Criminal Code* are included in an appendix to this essay.

ii. Amy E. Hasbrouck, "Children Parents and the State," Winter, 1996-97.

iii. *Federalist Papers* No. 50.

iv. "Speech at Peoria, Illinois, October 16, 1854," in Roy Basler, ed., *Collected Works*, v.II (New Brunswick: Rutgers Univ. Press, 1953), p. 256.

v. *R. v. Latimer*, 2001 SCC 1.

vi. Decisions for which no specific member of the Court is identified as author are unusual on the part of the Supreme Court of Canada. A colleague who is a close observer and student of the Court says unsigned decisions may reflect the Court's view that the case is especially controversial in public opinion, or the fact that authorship has been shared by various members of the Court, or both.

vii. *Criminal Code*, R.S.C 1985, c. C-46, §235. (1), (2); § 745. (See appendix.)

viii. The prosecutor was subsequently acquitted of criminal charges arising out of his actions.

ix. *Toronto Star*, January 19, 2001.

x. *Globe and Mail*, January 19, 2001.

xi. *National Post*, January 19, 2001.

xii. Orville Endicott, "Analysis of the Supreme Court of Canada's Decision in the Latimer Murder Case," On line statement prepared for the Ontario Association for Community Living.

xiii. "Have mercy on Robert Latimer," *National Post*, April 26, 2001. In fact, it is Shakespeare's Portia she quotes and Laframboise does not consider how Portia's words are to be understood in relation to the "mercy" subsequently shown in seizing Shylock's goods and forcing him to give up his religion.

xiv. Jill Mahoney, "Most back cut in Latimer's sentence," *Globe and Mail*, April 18, 2001.

xv. Andrew Coyne, "The law stands for Tracy," *National Post*, Friday, January 19, 2001. Coyne's brief column (less than 900 words) shows that tight reasoning, moral gravity, and rhetorical effectiveness need not be opposed to one another.

xvi. *R.v. Latimer* (1995), 99 C.C.C (3d), 481.

xvii. See Joe Woodard, Report on Latimer trial in *Western Report*, December 8 & 15, 1997.

xviii. The Saskatchewan appeal court notes that the trial judge's "treatment of the matter lent an air of legitimacy" to counsel's appeal to necessity. The Supreme Court added that Justice Noble had not given a full account of the requirements of the defence—he had ignored the requirement that the harm done be less than or proportional to the harm averted by the unlawful act.

xix. Noble's claim that the punishment after Latimer's initial conviction had been upheld by the Appeals Court on the understanding that Latimer had killed Tracy "not because she was in pain but because she was disabled" while the

evidence in the second trial had established more than the first trial that Latimer had killed Tracy to end her pain was dismissed as based on an “untenable” reading of the Court’s decision, and wrong so far as it claimed that there was any significant difference in the evidence provided by the two trials.

xx. Since the presentation of this paper, Latimer has personally appealed to the Court to reconsider its decision arguing that the Court’s claim that better pain management was possible had no basis in fact. Though newspaper accounts say that the Court has treated his correspondence as “an appeal” it has refused it without argument. See “Supreme Court refuses to hear Latimer case again,” *The Ottawa Citizen*, May 15, 2002 and Rick Mofina, “Supreme Court says no to Latimer,” *Regina Leader Post*, May 15, 2002.