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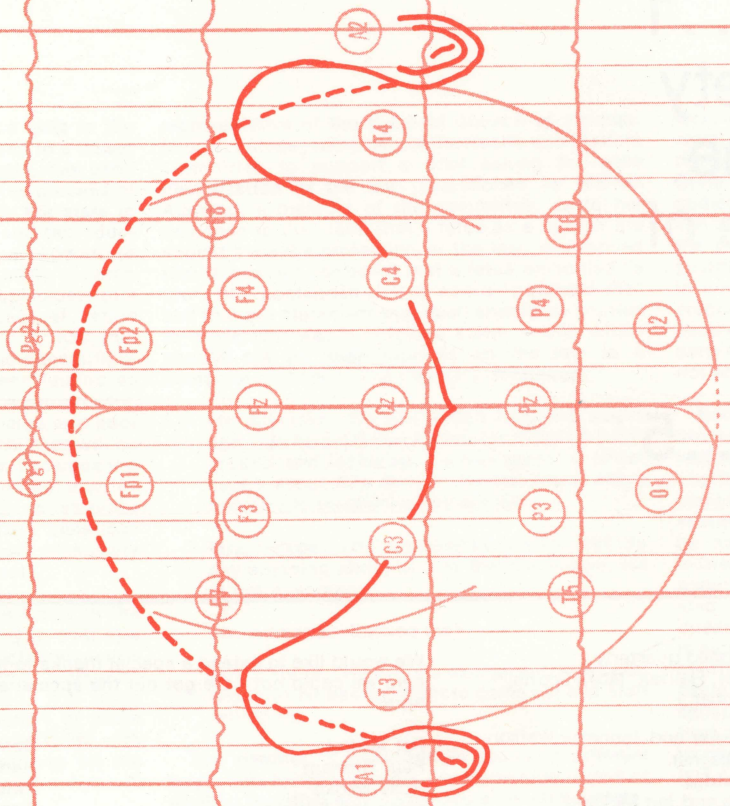

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abortion

by Donald MacDonald

INTRODUCTION

The recent liberalization of abortion laws in the United Kingdom, the United States, and to a lesser extent (at least theoretically) in Canada, has been regarded by many as a major step in the process of freeing women from unfair control by the state in the intensely private matters of sex and reproduction. Now that it is possible for a woman to determine when, by whom, and how many children she will have, women are just that much closer to a state of equality with men, free of state interference with their bodies. Not only has this changed wrought effect on the immediate configuation of the family -- it has also been lauded as having beneficial effects socially and economically. Pressure will be relieved on already large and poor families; the "tragedy" of unwanted children will be alleviated. On a larger scale, abortion becomes the ultimate contraceptive safeguard, the final step in a system of redundancy designed to stabilize population -- with again an immediate beneficial effect on the individual family as part of society and, indeed, a global beneficent effect.

In the United States, the Supreme Court in the landmark case of *Roe* v. *Wade* (410 U.S. 113) saw itself as participating in a type of social revolution while indicating a constitutional right of women to privacy on the matter of abortion. Yet even supporters of the continued relaxation of state interest in abortion were not entirely satisfied with the result in *Wade*. One, in commenting on the decision wrote:

> Abortion is too much like infanticide on the one hand, and too much like contraception on the other, to leave one comfortable with any answer; and the moral issue it poses is as fiendish as any philosopher's hypothetical.

This comment emphasizes the reason why abortion became and is such a volatile issue. Viewed as a variant of contraception, the compelling interests of women in security of the person and freedom of choice dictate a decision to free it as much as possible from state interference. Viewed as akin to infanticide, abortion clearly becomes a matter of state interest. Not only are these views mutually exclusive, but those who favour the "contraceptive" view of abortion do not readily concede that which the other camp insists -- that it really involves a clash of rights. More often it has been perceived as a clash of sexes, or one of religious dogma and secularism. And it is of no small significance that the state is still mostly run by males. The conflict on the matter of abortion has been largely polarized into male / catholic and female / secular camps. Those who would regulate abortion have been deemed at best paternalistic and at worst repressive. A vignette illustrative of this intense conflict can be found in the minutes of the Parliamentary hearings on the proposed amendment to the Criminal Code in 1967. A representative of the National Council of Women, Mrs. N. Lefcoe, came before the Health and Welfare Committee to support a brief asking for wide liberalization of the law. Questioned by Warren Allmand, a member of the committee, as to her response to the claim that a fetus as a human life should have the protection of the law, she replied that it was not her belief that a fetus embodied "a life". She contended that it was a "potential life" and that the statement that such should be entitled to protection was a religious claim -- one which should not be superimposed on the law in a democratic society. The dialogue continued:

> Mr. Allmand: We had a man here two weeks ago....[who said] that he had no religious background, and yet he has his own personal philosophy about this matter; he felt there was a human life there from the earliest.
>
> Mrs. Lefcoe: I do not think he has any right to say anything about this to the committee. He is not a woman.
>
> Mr. Allmand: Excuse me?
>
> Mrs. Lefcoe: He is not a woman and I really do not think he has any right to come out and start telling me . . .

The conflict is perceived in radically different ways. The colloquy shows what one side thinks of as vital, the other side dispenses with immediately - the right of the unborn to life.

The legal status of the non-adult and / or non-male has become a matter of great interest of late, especially that of children. A recent report on Family and Children's law has examined that status. It found that the "rights" which children presently enjoy are derived from "negative statements" of law. That is to say that the right of a child to enjoy, for example, adequate housing, is ensured by imposing the standards necessary on the conduct of the parent. Thus, the child does not enjoy a right, but benefits from the prescribed conduct of the parent. The report recommends that children be given rights in the form of affirmative standards, and that they be entitled to fulfillment of such.

I think it does no violence to this concept to analogize that situation to the legal position of the unborn child. For the "right to life" insofar as it has existed in any legal system, has also been derived from a "negative statement" -- a criminal sanction directed against abortion. From this perspective, the conflict over abortion comes down to a dispute between those who seek to give the unborn an affirmative right and those who would remove the sanction completely and thus the negative statement of right. The rights (if any) of a party most intimately associated with an abortion -- the child, have not received extensive attention. And the question is not one solely of academic interest. Quite often, in an abortion situation there are more bodies and issues involved than only the woman and her conceptus. One writer, for example, raises the problem of those who are involved as legal guardians of young women who become pregnant. In a decision as to whether to terminate such a pregnancy the issue of the right of the fetus to live becomes important. It is necessary for this third party to find out just how far his decision will or will not affect another right.

Recently, in both Canada and the United States events have conspired to produce the first genuine judicial statements on the nature and validity of abortion laws since their inception almost two centuries ago. And these statements have had something to say about the right of the fetus not to be aborted, directly in the United States and indirectly in Canada. The greatest change came about in the United States, but *Roe* v *Wade* (*supra*) also had an effect on Canada. It was argued directly before the Supreme Court of Canada in support of a contention that the Canadian law on abortion was invalid. *Wade* challenged the very basic assumptions underlying all such laws because of its radical view of the common law. And from the perspective of fetal rights, it is instructive to compare how both legal systems dealt with this issue.

The Common Law

Because of the use to which history has been put in the abortion debate, an interest in it in regard to fetal rights is not merely idle. It can be said, I think without exaggeration, that an exercise in legal historical revisionism has had one of the most profound effects on the modern law on that issue. Professor Cyril Means of the New York University Law School was appointed legal historian to the New York state Governor's Commission on Abortion in 1967. His findings were first submitted as part of that body's report and were later published in two lengthy articles. These articles acquired the distinction of becoming the very basis of the decision of the United States Court in *Roe* v *Wade* (*supra*). As such they were also influential in the challenge to the validity of Canada's abortion law.

Prior to that decision it was generally accepted that, although the common law had never spoken conclusively on the subject of abortion (and what it did say was not entirely intelligible), it viewed it as a serious crime - something less than homicide but conduct deserving criminal sanction nonetheless. The law accepted a quasi -- religious standard in setting the time of "quickening" - the subjective moment when the mother first felt the movement of

her child in the womb -- as the time from which the law would take cognizance of the offence. The whole matter was confused by the fact that it was also an ecclesiastical offence. Before the recent concern with abortion very little work had been done on its historical background. The three following comments, spanning thirty years, sum up the attitude towards the common law and its relevance to the law today. In 1939 a British report on abortion summed up the common law thus:

> The great authorities on the history of English Criminal law are remarkably silent upon the matter . . . From Bracton, who wrote in the early part of the thirteenth century. . .down to the "institutes" of Coke some 350 years later, the specific references to abortion are few in number. The reason for this comparative silence seems to be that the offence of procuring abortion was regarded as an offence to be dealt with by the ecclesiatical courts, and the writers on criminal law were only concerned to deal with it as it affected (the secular) criminal law, as in the case of homicide.

The 1955 edition of Martin's Criminal Code, in an historical note on the section dealing with abortion comments tersely:

> It is not clear that abortion was a crime at common law . . . although it appears to have been an offence against ecclesiatical law.

And in 1966 a noted British authority on the law in this area wrote:

> The attitude of the law towards the fetus reflects the general moral concensus in the community which while it stops short of equating the fetus with a human person agrees that as a living organism, a potential life, the fetus has rights which should be respected.

Means found otherwise, and radically so. In a thesis which struck at the constitutionality (in American terms) of abortion laws, he stated flatly that at common law a woman had the complete right to terminate pregnancy: ". . .an expectant mother and her abortionist (had) a common law liberty of abortion at every stage of gestation."

The very basis of Means revision consists of two fourteenth century cases comprising a few lines each in old year-books. He dubs them the "Twinslayer's Case" and the "Abortionist's Case". The first case concerned a man who had beaten a woman in an advanced state of pregnancy with twins. One twin died directly. The other was born, baptized, and died two days later. As he read the case, Means felt that the accused was discharged completely. The case reads that for the reason " "that the judges were unwilling to adjudge this thing a felony, the accused was released to mainpernors, and the argument was adjourned *sine dire.*". In the second case, even more sparsely reported, an indictment against a man for killing a child in the womb is dismissed because "no baptismal name was in the indictment, and also because it is difficult to know whether he killed the child or not..."

Means contends that these two cases represent the true position at common law -- that the two men were not convicted simply because what they had done was not a crime. The authorities which in later years attributed a criminal status to abortion did so for political and / or religious motives, and could do so due to the very nature of the act. It was a species of religious offence and thus not encouraged. But it was also a freedom. Bracton introduced the idea that abortion after quickening was a crime because he wished to import the religious idea of animation into the law. Coke, who classified abortion a "great misprision", and antenatal death from injury suffered in the womb as murder, had, according to Means, a political motive. He deeply disapproved of abortion, and also wished to forestall the encroachment of ecclesiastical courts on the courts of the Common law. Since abortions were performed, morally, in a limbo of sorts, these commentators could continue to fabricate as offence. But Means contends that they did not represent the law correctly and that the utter void of reported prosecutions is evidence that abortion was practiced unhindered. There were prosecutions for abortion but all involved either death or injury to the woman involved. This was the reason for the involvement of the common law with abortion. The freedom of abortion was complicated by the fact that, as a major operation, it was quite dangerous to the woman. But the law allowed it out of "respect for the great values of liberty and life." The law allowed the woman the liberty of running the risk of death on the operating table at a time when this risk was real and substantial, if she chose to rid herself of an unwanted pregnancy. "Yet so fond was it of life that, if she did not survive the operation or its aftermath he who had it performed was hanged." The common law valued personal liberty so much that though it was dangerous to life it allowed women to risk it . . . "without paternalistic interference from the state. They were liberals when liberalism cost something."

The immediate relevance of this interpretation becomes clear when he proceeds to deal with the statutory modifications to the law which began in the nineteeth century. The intention of these statutes, he submits, was not the protection of unborn life, but the protection of the health and safety of the mother from the extremely hazardous surgical techniques of the day. This was the innovation of the nineteenth century -- to remove from the woman the liberty to take the risk of injury. Women were deprived of their common law liberty in the name of health -- and the deprivation was justifiable in the circumstances. But the radical alteration and improvement in surgical technique and safety has since obviated any basis for the state police power in this area. Statistics are produced to show that at an undetermined year sometime between 1867 and 1950 the danger of death from abortion became equal to the danger involved in carrying to term, and that today, it is actually "safer" to abort than to give birth. The reason for the law having ceased to exist, it is no longer supportable. In the American context, such a law is unconstitutional and the common law freedom should be restored.

Means' thesis was attractive in that it avoided many of the problems which ordinarily studies of the common law of abortion brought up. It was apt for the time and the problem. And most importantly, it explained the strange silence of pre-statutory law, in a plausible manner. It has been very influential. It was challenged by Robert Byrn, who was a colleague of Professor Means on the New York Abortion Commission. Illustrative of the nature of the evidence and the conclusions drawn therefrom is one esoteric point which Byrn raises in objection. In his second article, Means relegates to a footnote and dismisses as a "tangential mystery" the part of the *Twinslayer's Case* dealing with the presence of a judge of another court. Byrn shows that the presence of Herle, C.J. of the Common Beach could mean, that the report is one which was before the King's Council, a special body for the trial of difficult cases. As such, Byrn states that the case stands for no more than that the judges were puzzled over how to deal with the accused and that "their dilemma was rooted in problems of proof". The lack of recorded prosecution is the result of the difficulty courts faced with accomodating the substantive crime with practical requirements of proof that the woman had been pregnant, the child alive, and that the abortionist had done the act:

> Faced with these seeming insuperable difficulties of proof the law accepted the quickening distinction as a flexible standard of proof, not a substantive judgment on the value of an unborn life.

And when the details of human conception and gestation became conclusively known in the nineteenth century, statutory restriction of abortion was imposed to protect unborn life, and, *in addition,* to protect women from hazardous operations.

Both theories are plausible. If nothing else, they show that at common law, our forebears were as perplexed with the issue as we are today. In regard to fetal life, however, this old law is important, for it has influenced courts dealing with that issue today, especially in the United States.

Canada

The American legal system has, rightly or wrongly, come to a direct decision on the right to live of the unborn. Although not free from ambiguity, that decision has been explicit. Canadian law has remained silent on the direct question. Any right not to be aborted must still be inferred from the criminal sanction which has prevailed since the nineteenth century. Thus the "right to life" exists (if at all) by legislative sufference. In the recent Criminal Code amendments, a compromise of sorts was achieved. Normatively, at least, the decision is not solely that of the woman -- yet a decision can be made in which the interests of "life or health" of the mother can override any right of life of the fetus. Of course all this is predicated on the inference of a right from criminal sanction. In the aftermath of *Wade* and its revision of the common law, the validity of this legislative purpose has been challenged in Canada. From this process the implied right to life has become, if not clearly delineated, at least somewhat more explicit.

Canadian law on abortion had its origin in Lord Ellenborough's Act of 1803. The final consolidation of that Act in the Offences Against the Person Act of 1861 was inherited by Canada at Confederation, which law has remained essentially unchanged in the *Criminal Code* (1892) until 1968:

> Every woman, being with child, who, with intent to procure her own miscarriage shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with like intent, and whatsoever, with intent to procure the miscarriage of any woman, whether she be or not with child, shall unlawfully administer (an abortifactent) or shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life.

This provision had two implications for the fetal right to life. First, reference is made to the "unlawful" procurement of abortion. This left doubt as to whether there existed circumstances under which abortion might be legal. Secondly, the reference of the existence of the offence solely on intent (where the woman was not actually pregnant) would buttress the contention that the real aim of the provision was to protect the woman. But the first *Criminal Code* of 1892 also contained a provision dealing with the killing of an unborn child:

> Everyone is guilty of an indictable offence and liable to imprisonment for life who causes the

> death of any child which has not become a human being, in such a manner that he would have been guilty of murder if such child had been born.
>
> No one is guilty of any offence who, by means which he in good faith considers necessary for the preservation of the life of the mother of the child, causes the death of any such child before or during birth.

For some reason, this section came to be construed as applying solely to infanticide at or immediately after birth, and no as a justification for therapeutic abortion based on necessity. For this reason, when in the 1955 revision of the Code the word "unlawfully" was removed from the substantive abortion provision, some felt that any justification for abortion was also removed, even that upheld in the English case of *R.* v. *Bourne,* (1938) 3 ALL E.R. 615. Perhaps the revisors felt, that on a literal reading of s. 271 (then s. 209) which permitted only one exception, the life of the mother, the word "unlawfully" was superfluous. It never became clear whether such was the case or whether it was the result of faulty draughtsmanship, for the abortion provisions were very rarely tried. As one commentator wrote in 1969: "There are hardly any reported cases under s. 237 of the *Criminal Code,* which defines criminal abortion. None of these few cases discuss *R.* v. *Bourne.*" On a purely theoretical level, the strongest inference for a fetal right to life could be drawn from s. 209 (1955 *Criminal Code*). The removal of "unlawfully" from the main provision obviated any possible justification of abortion on social, economic or personal grounds. Of course all this is idle inference, in fact inference upon inference made even more tentative by the fact that virtually no prosecution was ever carried out under these sections.

Of course in the real world abortions were being performed without legal justification at an increasing rate. During the 1960's the same pressures which worked on the American law were being exerted on ours. In 1967, the United Kingdom passed the *Abortion Act* which greatly broadened the grounds for abortion. Included was the risk of "injury to the physical or mental health of the pregnant woman or any existing children of her family", and "substantial risk that the child . . . would suffer such physical or mental abnormalities as to be seriously handicapped." In the same year three bills were introduced into the House of Commons recommending either great amendment or removal of the *Code* provisions on abortion. Commencing on October 3, 1967 and lasting six months, the standing committee on Health and Welfare held hearings by means of which the government intended to hear out public views on the proposed amendments. One would presume that these hearings would have produced some information dealing with the "right to life". Unfortunately, due to the very nature of the hearings and questions the committee set for itself, the issue was never fully aired. The Committee was chiefly concerned with the social issues surrounding abortion, the traffic in illegal abortion, health problems involved, and the problem of unwanted children. Grace MacInnis, sponsor of one of the bills, made clear that this issue was not really one involving "rights":

> (the) choice is not between having abortion in Canada and not having abortion in Canada. The choice is between having a large and increasing number of illegal abortions . . .and having abortions made within limited grounds and seeing that they are performed under conditions of proper medical competence and sanitation.

The issue of fetal rights drifts in and out of the long hearings without any detailed analysis. They were doggedly but unsophisticatedly stressed by committee members and witnesses opposed to any change in the law. Debate proceeded no further on the point that mutually exclusive declarations by both sides. A representative from the Canadian Medical Association declared that since a fetus was only a "potential human being", its rights were overriden by the living actual human being. A representative of the Catholic Physician's Guild assented otherwise; that there was no identifiable time during embryonic and fetal development when the organism makes a definite change such that it becomes human, whereas it was previously not. Therefore, "we must allow them all the rights which are granted to other humans".

One witness' testimony dealt with an area that went to the heart of the matter. Dr. Henry Morgentaler, speaking on behalf of an organization known as the Humanist Fellowship, proposed tht that there be no restriction on abortion up to the sixth month viability. Originally he stated that the viability criterion was valid for the reason that . . "at three months the diameter of the forming embryo is only about nine centimeters so obviously it is not yet a baby." Yet under further questioning he admitted that earlier survival was possible:" . . medicine is making so much progress that it is theoretically possible that such a contingency migh might arise. It is not here yet." This was the same issue which the United States Supreme Court became involved with and left open -- how viability was to define human beingness. When the Canadian Parliament amended the Code it made no reference to viability and so avoided (in a different way) the same issue which the American Court decided not to decide -- in Blackman, J's words "the difficult question of when life begins". In a particularly abrasive meeting of the committee, the Catholic Hospital Association insisted that before dealing with abortion as a social issue in administrative fashion, this basic question must be answered. They recommended that a Royal Commission be appointed for this reason -- at which suggestion committee members bristled. Throughout the hearings the members had complained of the paucity of reliable statistical information and conclusive medical testimony. Perhaps the criticism was more valid than the committee believed.

In its final report to the House, the following appeared: "Your committee feels that the subject matter of abortion should remain with the committee for further study". In December 1967, the government had introduced the omnibus *Criminal Code* amendment bill - Bill C 195. Contained in it was an amendment to the abortion section, authorizing abortion if a doctors' committee

> has by certificate in writing stated that in its opinion the continuation of the pregnancy would or would be likely to endanger her life or health.

The final report of the committee urged that the amendment read "will endanger the life or seriously and directly impair the health of the mother", but the original form of the amendment was retained by the legislature and became section 251 (4) of the *Code.* By rejecting the changes, the legislature widened the grounds for abortion, although leaving them theoretically narrower than those in America and England. Thus, the inference of right was still present, although narrowed to submit to interests of the mother's life or health.

Quite aside from the administrative difficulties involved in the new section 251, involving inequality inherent on the uneven distribution of therapeutic abortion committees throughout the country, the new law was unsatisfactory to those who favoured the primacy of the woman's right of privacy in the abortion decision. The *Wade* decision and the background on the old law which motivated it sparked new interest in the repeal of Canada's law. An Ottawa lawyer, Pamela C. Picker, proposed that there were good grounds on which the legislature could be found invalid. First, she accepted the historical basis of the law enunciated in *Wade.* The only rationale available from the substantive test for criminality stated by Rand, J. in *Reference Re Validity of s. 5 (a) of the Diary Industry Act* (1949), SCR 1, was "health" - that is to say the health of the mother. This, although once valid in the nineteenth century was no longer so. Since the basis for attaching criminal sanction was gone, so should the crime; it should be modified to match the remaining public interest. She dismisses the contention that the sanction could be supported as furthering a public interest on "morality" by holding that there could only be a limited interest in potential life:

> Quite interestingly, though unfortunately, the fact that s. 251 . . . still exists, combined with the fact that the protection of the mother's health is no longer an overriding public interest, leads one to conclude that the reason for s. 251 must be the protection of fetal life.

This argument as to constitutionality, so similar to that put forward in *Wade,* was aired in *R.V. Morgentaler* (No. 1) by the Quebec court of Queen's Bench. The issue was raised in the motion to quash the indictment of the doctor for performing an illegal abortion. The historical argument used in *Wade,* and its application to Canadian law were submitted as rendering s. 251 *ultra vires* the federal government. Since there was no proper rationale under s. 91 (27) of the B.N.A. Act, the law was an unjustified interference with the doctor-patient relationship which came within provincial matters in s. 92 (13). As to the evidence of the original purpose of abortion statutes, Hugessen, J. comments at page 426-7:

> ...although beyond the restricted scope of judicial notice I have accepted as proven for the purpose of this argument the various assertions of fact to which reference is hereinafter made.

But what followed was not what the American courts derived from the evidence. The judge points out the great difference between the constitutional systems of the two countries and that he cannot readily accept the *cessant-ratione legis* argument. To the "novel and challenging" argument that the only public evil sought to be remedied was the danger to female health he assigns two flaws. First, it "assumes a constancy of legislative intention", something contrary to human experience. Old laws "like old buildings and old clothes" are often turned to uses other than their original ones. He cites the change in the nature of the preliminary inquiry as an example, from "inquisatorial origins" to a protective weapon for the accused. Second, it assumes a logical consistency in that at one time the law appeared to place no great value on unborn life does not

> at the same time or subsequently, in another context see the protection of such life as being a legitimate matter for public concern and legislative intervention. Anyone who has eyes to see and ears to hear knows that, today at any rate, one of the principal concerns voiced by proponents of anti-abortion legislation is the protection of the life of the unborn child

As long as the legislative view was *bona fide,* it was not for a judge to disagree with it, or agree with it. Thus, in a few short paragraphs a judge of the Quebec Queen's Bench made one of the first judicial statements on the validity of Canada's abortion law. The case was to go to the Supreme Court, where these views would be upheld.

At first glance the Supreme Court treatment of the case would seem to have little to say about the legal rights of the unborn. As Dickson, J. asserted in beginning his judgment:

> [The Court] has not been called upon to decide, or even to enter the loud and continuous public debate on abortion which has been going on in this country. . .

But if, as Ms. Picker laments and *Morgentaler (No. 1)* affirms, the reason for the criminal sanction is a legislative intention to protect prenatal life, then the matters dealth with in the Supreme Court -- that is the defences available to a change under s. 251 -- are of importance in delimiting the bounds of this intention and the correlative right. Those two defences were necessity and section 45 of the *Code* (protection from criminal responsibility for surgical operations). The first, even if accepted in an abortion case is no threat to the inferred right in s. 251. That section saves from illegality certain abortions which fulfill the criteria for becoming justified. Necessity as a defence justifies in very exceptional circumstances a violation of the law. A judicial decision as to the effect of necessity in relation to section 251 would not involve a derogation from the circumstances set out there but a duplication of the same arising from urgent necessity and therefore dispensing with the procedural safeguards. In *Morgentaler* this urgent necessity was found to be lacking.

More challenging to the right, however, was s. 45. For, if accepted, the independent judgment of the performer of the abortion as a surgical operation that ". . .it is reasonable to perform the operation having regard to the state of health of the person at the time the operation is performed and to all the circumstances of the case", could be superimposed on the exceptions set out on s. 251. This would have two effects. First, it would make the fetal right to life -- now delineated by the hospital committee's estimation of danger to "life or health" of the mother, subject also to the independent judgment of a performer of the operation, thus eliminating the effect of the section. Second, it would reduce abortion to the status of an ordinary surgical operation. The majority of the elaborate provisions of s. 251 would be meaningless if ignored by virtue of the defence:

> If the argument is valid an abortion performed by surgical means could have the protection of s. 45 but not one performed by other means... We should pay Parliament the respect of not assuming readily that it has enacted legislative absurdities. The better opinion many view is that s. 251 contains a comprehensive code on the subject of abortions, unitary and complete within itself, which the general language of s. 45 does not touch.

Therefore, since the only defences to abortion are in the section itself, or duplicated by necessity, *Morgentaler* v *The Queen* stands in one respect as an affirmation of the qualified right to life to be found in s. 251.

Although Laskin, C.J.C., dissented on the issue of the defences, he spoke for the court in responding to two other issues. First, the constitutionality of the law was challenged on the same grounds as in *Morgentaler (No. 1)*. To this he replied:

> What is patent on the face of the prohibitory portion of s. 251 is that Parliament has in its judgment declared that interference...with the ordinary course of conception is socially undesirable conduct subject to punishment. That was a judgment open to Parliament in the exercise of its plenary criminal law power and the fact that there may be safer ways of terminating a pregnancy in that any woman or women claim a personal privilege to that end, becomes immaterial.

The Chief Justice also deals with a "catalogue of submissions" that s. 251 is invalid under the Canadian *Bill of Rights*; seven in all. Three of these, if accepted, would have had some effect on the fetal right by asserting a primacy for several rights of the mother. It was submitted that the law was violative of the rights of privacy in that it prohibited an individual's own decision as conclusive in the first trimester; that the law infringed the right of security of the person and by subjecting the woman to the "vague and subjective" opinion of a committee did so without due process; and finally that it imposed cruel and unusual punishment in not allowing a woman to terminate her pregnancy under safe conditions when she felt it was necessary to do so. This last one was rejected immediately as an attempt to make s. 2 of the Bill of Rights into a proscription against making conduct criminal. Although the Bill was not to be concerned solely with procedural safeguards, he could see no warrant to second guess the legislature, and as had the United States Supreme Court, "divide the normal gestation period, into zones of interest, one or more to be protected against state interference and others not". The right to security of the person could be regulated by Parliament, if such was in its interest. And its interest was to prevent interference with the ordinary course of conception. Thus, the Supreme Court decided that women have no overriding right to terminate pregnancy at any stage.

Only in the isolated and much publicized *Morgentaler* litigation has some judicial statement been elicited on fetal rights. But it was not direct, unlike the American courts which have made direct statements on the issue. But, in 1972, there was one unheralded decision which did approach the issue directly, unfortunately ending in irresolution. On January 27, 1972, Mr. Justice Lieff of the Ontario Supreme Court made permanent an injunction sought by a husband to restrain his wife from having an abortion. The 37 year old wife was 16 weeks pregnant. After receiving contradictory medical judgments on the risk to her health and the risk of an abnormal child from her own and her husband's doctor, she went before a therapeutic abortion committee and received authorization. The husband obtained an injunction restraining the defendants "from taking the life of the infant plaintiff" [the unborn child] either by preforming or undergoing an abortion. . .and from commiting a trespass to the person plaintiff by assault or battery or otherwise". The reasons given were that an extremely serious matter of a scientific nature had been invoked and that the matter was urgent. An editorial in the *Globe* decried the decision as one "which must be appealed", and said that the case "as it stands bristles with so many considerations that the Justice Department should have no hesitation in referring it to the Supreme Court of Canada". The reference to "infant plaintiff" made it clear that the judge was not only questioning the committee's decision, but was ruling that the mother's health must take second place to the claims of the husband or the infant plaintiff. D. Dehler, in light of the decision, hoped to have himself declared, as Robert Byrn had in the United States, guardian of all unborn in the province and take similar action to prevent all abortions without his consent. But within a week the whole affair had dissipated. The husband and wife came to a private agreement and the injunction was suspended when the women agreed to continue with the pregnancy. With the negative decision in the *Byrn* case, Dehler must have dropped his plans, for nothing ever became of them. Thus, the questions raised by the case were never conclusively answered. Still, there are those who think a case can be made against the abortion laws on behalf of the unborn by the use of tht universal solution, the *Bill of Rights*. Their success is not anticipated.

There may be, theoretically, more of a right to life in Canadian law than in American. But it can be said that, practically, the same solution exists in both countries. In a survey of abortion committees, it was found that of sixteen doctors surveyed, all but one would perform an abortion for rape or incest. All but two stated they took into account the social and economic state of the woman. All took into account extreme youth. "Danger to health" was defined as "inability to lead as productive a life". Nowhere in s. 251 is the health of the fetus mentioned, but all would allow abortions if it were likely that the fetus would be affected by the mother's condition. The decisions were rationalized as psychiatric indications. In view of these facts, what substantive difference does a legal right make?

The whole area is in a state of flux. The American cases averted to the effect the advance in medical technology would have on abortion. Fetal experimentation, which some hold to violate fetus' rights, may produce a type of inculator which can drastically lower the date of viability. It has been proposed that the unborn have negative rights not to be born unwanted or defective. And those who would remove restrictions from abortion before viability have found a strange ally in Dr. Robert Driman, a Jesuit priest and Dean of Boston College Law School. Morally opposed to abortion he has contended that the law should remain silent on the subject rather than involve itself in the invidious task of specifying instances in which life may be terminated. If, he says, law teaches as well as regulates conduct, the potential impact of a law which

> exalts the superiority of the mother's health over her child's right to be born and of a legal system which specifically permits the annihilation of predictably deformed or retarded children can hardly be exaggerated. Such a system creates a new and revolutionary hierarchy or rights in which . . . the happiness of the living transcends the rights of the unborn to existence. A law which is silent about the abortion of non-viable fetuses says no to such things.

It has even been argued that restrictive abortion laws, instead of fulfilling their ostensible aim of preserving life by prohibiting all but certain abortions, accomplish the reverse by forcing women to obtain illegal abortions, thereby not giving them the chance of obtaining counsel and medical advice which may ofter induce them to reconsider.

One face on which hampers any analysis of the effect of abortion law is the lack of accurate statistical data and interpretive tools to deal with such. For example, it has been found that in countries which liberalize their law, the number of illegal abortions at first drops slightly and then rises to exceed those done before the change. Pro-abortionists explain this as a result of the troublesome procedures which often accompany a changed law. Anti-abortionists read it as a result of the moral restraint being removed, even one which was violated widely and regularly. Neither interpretaion is proved or likely to be provable. But if the object of law on abortion is to stop the number of illegal abortions from rising, perhaps the latter interpretation can stand as a partial justification for the existence of a widely violated law.

Editor's Note:
The legal and moral dilemma of determining whether and when a human life should be sustained by mechanical means has surfaced as a pressing issue in North American society. The tremendous advances in human technology now enable the medical profession to place patients on machines which will prolong their lives indefinately. The question which must then come before the medical and legal professions is when should a dying human being be declared dead and by whom should the determination be made. The following is the problem posed before the Nova Scotia Medical Legal Society Medical Moot Court in February of 1976. The case was argued before His Lordship Mr. Justice O'Hearn by Jeffrey Thom and Alison Manzer for the Plaintiff and Arthur MacDonald and Peter Ross for the Defendant. The facts, the issues and the argments have been presented here - the decision is up to you.

Should Society Authorize the Maintenance of Life by Artificial Means?

Statement of Agreed Facts

Ms. Drake, a 29 year old mother of 3 children, suffered from a kidney ailment from childhood. In recent years, due in part to the extensive media coverage of artificial life sustaining devices, Ms. Drake gave considered thought to her own medical ailment and her response to such life sustaining devices. In early 1975, Ms. Drake, after extended discussions with and the approval of official representatives of her religious order, decided that in the event of her lapsing into a hopeless condition, she should be allowed to die "with grace and dignity".

In order to officially document her wishes, Ms. Drake visited her lawyer in Halifax, Nova Scotia, and instructed him to draft her will. The will was drafted in accordance with her instructions and included *inter alia,* the following clause:

> "... In the event of my illness taking a turn for the worse, and my condition deteriorating into a medically hopeless condition, it is my desire that I be allowed to die with grace and dignity. To implement my wishes, I now stipulate that my life should not be sustained by extraordinary means ..."

The above mentioned will was duly attested to by the requisite number of witnesses, and in the opinion of expert legal counsel, the document conforms with all the requirements of the *Wills Act* of Nova Scotia, R.S.N.S. 1967, c. 340.

In January 1976, Ms. Drake was referred to Dr. Realist. He confirmed a diagnosis of renal failure and he suspected that this was chronic in nature and explained to Ms. Drake that she was likely to require artificial kidney treatment and that the ultimate outlook would be that she would require a kidney transplant. He explained to her that he was most anxious that she be admitted to hospital for treatment as he was concerned about the size of her heart and the irregular beat which suggested to him that the high blood pressure and fluid retention was putting her at immediate risk.

She agreed to treatment but expressed her fear that she might be made a permanent cripple if anything should happen to her while in hospital. She then went on to express to the physician in the presence of her husband and of the doctor's secretary that if, under any circumstances, her heart stopped she did not want to be resuscitated. She stated that she had trained as a nurse, and although she had not practised for some years she knew the potential complications of resuscitation and did not relish the thought that she might end up a vegetable. She produced her will, signed and witnessed.

Dr. Realist reassured Ms. Drake that nothing like this was likely to happen, that with appropriate treatment she would soon improve and that with maintenance dialysis she would live a reasonable life until a suitable kidney became available.

Ms. Drake was admitted to hospital two days later and arrangements were made for her to have an arterio-venous shunt created in order for her to be able to go on the artificial kidney. She signed a standard consent form to the particular operation, but deleted permission for any additional procedures, necessary or otherwise. During the induction of anesthesia the patient had a cardiac arrest. Dr. Realist was in attendance and he immediately began attempts at resuscitation. Unfortunately the patient did not respond immediately and it was approximately four minutes before the heart re-started. As a consequence, the patient sustained severe brain damage.

The patient was seen by a neurologist about 6 hours after the episode of cardiac arrest. At this time, she was normothermic. No spontaneous movements were noted nor was there any spontaneous respiration. She was being maintained on a mechanical respirator. The tendon reflexes in the arms and legs could be elicited but they were extremely hypoactive. The plantar responses were normal. On pain stimulation there was a slight movement of the lower extremities but no facial grimacing or vocalization were noted. The corneal reflexes were absent, and there was no pharyngeal reflex. On testing the oculocephalic reflexes, there was a very slight deviation of the eyes to the opposite side when the head was moved to one side, however the calorie test was negative. No tonic neck reflexes could be obtained and there was no evidence of either decerebrate or decorticate activity. Just prior to the examination, blood gas determinations were done and found to be within the normal range. An EEG was done 30 minutes later. The record was contaminated by a great deal of artefact due to electrical interference in the Intensive Care Unit and due to movement of personnel around the patient. Muscle artefact was noted in several pages of the EEG recording. No alpha activity could be seen throughout the record which appeared to be isoelectric for the most part. However there were a few random slow wave discharges over the anterior head regions which were synchronous on the two sides. There were no sharp wave forms or spike discharges, and there was no evidence of a focal cerebral lesion. The presence of muscle artifacts precluded recognition of electrocerebral silence. No spontaneous eye movements were noted during the reporting which was carried out for approximately 15 minutes.

The patient was seen 18 hours later. Some withdrawal to pain stimulation was still evident in the lower extremities but there was no response to the oculo-cephalic test. The patient remained normothermic and the blood pressure was being sustained by vasopressor agents. An EEG at this time showed no evidence of muscle artefact. The tracing was extremely low in amplitude with no alpha activity, no spike or sharp wave discharges and no evidence of a lateralized lesion. Some slow wave random activity was noted over the anterior hemisphere and an EKG artefact was noted. The electroencephalographer silence in the EEG.

Points In Issue

1. Whether the patient is presently legally dead and therefore may be removed from the artificial life support systems.

2. Whether a patient submitting to treatment can refuse treatment designed for life maintenance.

3. Whether the patient refused to consent to the current medical treatment.

4. Whether the patient may be removed from artificial life support systems even if still living is she is found to have refused such treatment.

5. Whether the court is the proper forum to decide the preceding points.

First Argument

The plaintiff submits that there are no established criteria for determination of the point of death and that therefore the criteria to be used to determine if Ms. Drake is dead should be those proposed in the Canadian Medical Association Statement on death given in November 1968, also 1974 standards attached as Exhibit B. The use of this test would replace the now outdated and unrealistic test given in *Black's Law Dictionary,* Revised, 4th Edition where the definition of death is:

> "The cessation of life; the ceasing to exist, defined by physicians as a total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc."

That test is unrealistic in light of the recent medical developments in the field of respiration and cardiac maintenance which have given rise to circumstances where the physician can maintain some of the body organs functioning indefinitely inspite the irreversible cessation of brain function. The statement of the Canadian Medical Association, which was an adoption of the statement of the World Medical Association issued in Sydney, Australia in August, 1968, is affirming evidence of the medical profession's rejection of the older cardiac-respiration standard for death.

The medical profession then recommends the use of a definition of death utilizing cerebral function made in recognition of the concept that death must be determined by the fate of the individual and not by the state of preservation of individual cells. The focus for the recommended definition is the point of irreversibility, as was published in the Canadian Medical Association Statement on Death, *Canadian Medical Association Journal*, December 28, 1968, vol. 99, p. 1266:

> "the point of death of the different cells and organs is not so important as the certainty that the process has become irreversible by whatever techniques of resuscitation that may be employed."

The point to be established as the point of death under that suggested definition is the point of irreversible cessation of brain function. It is submitted that this is the correct definition and focus to be used in point of death questions.

The question remains as to the criteria to be used to establish the point at which brain function has irreversibly ceases. The Canadian Medical Association statement gives a number of "suggested aids" for determining this point. The plaintiff submits that these aids should be adopted to be used as a guide in determining the point of irreversible brain death but that such criteria are to be considered as aids only, with death to be finally determined by a preponderance of medical evidence. This submission means that the aids are not to be taken as absolute, with the presence of a contraindication on any one being determinative. The correctness of this submission is supported by the Canadian Medical Association statement where it is said that "no single technological criterion is entirely satisfactory. It is necessary then to make a cumulative determination of the patient's state in order to determine if a point of irreversibility has been reached. The preponderance of medical facts points to an irreversible cerebral damage and therefore amounts to death under the proposed standards. This is to be accomplished by first using expert witnesses to establish that the critical part of the Canadian Medical Association Statement on Death constitutes the general definition of death, using irreversibility of cerebral damage, and that the suggested aids are merely a

First Argument

It is respectfully submitted that the patient is alive by current legal and medical standards. There appear to be no statutes nor decided cases in Canada giving a legal definition of death. Therefore the case would appear to be one of original jurisdiction for this court.

> *Black's Law Dictionary*, 4th ed. defines death as: "The cessation of life; the ceasing to exist; defined by physicians as a total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc."

This definition has been accepted by several courts in the United States. The California Court of Appeal agreed with it in *In Re Estate of Schmidt* (1968), 67 Cal. Reptr. 847 at p. 854. The Supreme Court of Arkansas in *Smith* v *Smith*, (1958), 317 S.W. 2d 275 quotes Black's definition at page 279 and adds:

> "Admittedly this condition did not exist, and as to matter of fact, it would be too much of a strain on credulity for us to believe any evidence to the effect that Mrs. Smith was dead, scientifically or otherwise, unless the conditions set out in the definition existed".

In *Thomas* v *Anderson*, (1950), 215 P. 2d 478 the California District Court of Appeal accepted Black's definition at pages 481-2 then stated

> "...death occurs precisely when life ceases and does not occur until the heart stops beating and respiration ends."

The Court of Civil Appeals of Texas used a different criteria in *Douglas* v *Southwestern Life Insurance Co.*, (1964), 374 S.W. 2d 788 where at page 793 it holds:

> "Death is not an ambiguous term, and there is no room for construction ....Death has been defined as the termination of life; and as a state or condition of being dead."

If the Court chooses to accept these judicial definitions of death, the defendant will prove through expert testimony at trial that the patient does not meet these definitions in her present condition.

The medical profession, in keeping with improved medical technology, has adopted different standards from those of the courts. Brain death as defined in the *Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death* appears to be the most widely accepted current standard (see Exhibit A). It requires: 1. Unreceptivity and unresponsitivity. 2. No movements or breathing. 3. No reflexes. 4. Electro-cerebral silence; and 5. A repeat of testing 24 hours later with the same results.

If these conditions are met, the patient is considered medically dead. The Canadian Medical Association adopted these standards in its "*Statement on Death*" (see Exhibit B).

If the court decides to accept the current medical criteria for death, the defendant will prove through expert testimony at trial that the patient does not presently meet this definition either.

In summary, the defendant will prove that the patient is presently legally and medically alive.

basic guide to be followed. Expert witnesses will then testify to show that, factually, Ms. Drake is dead within the general definition using the general guides proposed.

Once it has been established that Ms. Drake has reached the point of irreversible cerebral damage then the plaintiff submits that *prima facie* she must then be removed from the state of mechanical and electrical existence into which she has been placed.

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Second Argument

In the alternative, if the patient is held to be legally alive, it is submitted that Ms. Drake, before submitting to medical treatment, can refuse to consent to treatment designed for artificial life maintenance. Such refusal by a patient cannot be argued to be legally barred, since even if it is contended that refusal of treatment resulting in death constitutes suicide, the provisions prohibiting suicide have been removed from the *Criminal Code.*

Therefore, the issue involved here constitutes a conflict between the patient's right of bodily self-determination and the defendant physician's commitment to preserve life in *any* event, as based on his Hippocratic Oath and beliefs in the sanctity of human life. It is clear in Canada that a person can submit to treatment and refuse specified medical procedures where that refusal does not result in death (*Mulloy* v. *Hop Sang* (1935) 1 W.W.R. 714, (Alta. S.C.)). However, there are no cases directly on point in Canada involving a refusal of treatment prohibiting life sustaining apparatus. It is submitted that there is no difference in principle between the ordinary case of refusal of consent, and refusal of consent resulting in the patient's death. In neither case does the physician have any grounds to interfere with the individual's right to determine what is to be done with his own body. Therefore it is submitted that Ms. Drake should be able to refuse to consent to the use of the respirator, and that such refusal amounts to a right of the patient to be allowed a "death with dignity".

In the United States, there are precedents indicating that a clear statement of intention to refuse life-sustaining medical treatment is valid and enforcable, in the absence of a compelling state interest or incompetence of the patient to consent. A hospital or a doctor cannot interfere with that decision.

In *Erickson* v. *Dilgard*, 252 N.Y.S. 2d 705 (Sup. Ct. 1962) the court refused to order a blood transfusion refused by the patient, without which there was little hope of the patient's recovery. The decision was based on the proposition, enunciated by the Court at p. 706, that:

> "It is the individual who is the subject of a medical decision who has the final say ... this must necessarily be so in a system of government which gives the greatest possible protection to the individual in the furtherance of his own desires."

This reasoning was followed in *In Re Yetter,* 62 Pa. D & C 2d 619 (C.P., Northampton County Court, 1973) where the court, relying on the individual's right to privacy, *inter alia*, refused to order lifesaving surgery for a patient in the face of her competent decision to refuse to consent to it.

This right of bodily self-determination has also been upheld in two recent Wisconisn decisions: *Guardianship of Gertrude Raasch,* County Ct. for

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Second Argument

It is respectfully submitted that the patient, having consented to medical treatment, cannot qualify her consent by refusing emergency life saving treatment found necessary in the course of the original treatment. To allow such qualifications would put the doctor in a legally untenable predicament should the emergency arise and the patient is unable to re-affirm her refusal. The doctor may be open to a malpractice or even criminal action if he fails to prevent the patient's death if she could have been saved. If she is kept alive, however, the doctor may be liable for battery. Even if the patient does re-affirm her refusal, the doctor cannot know if she is legally competent to make such a decision at that time.

A doctor also must face a moral dilemna in such a situation as his profession is dedicated to the preservation of life. This is shown in the World Medical Association's International Code of Ethics where it states: "A doctor must always bear in mind the importance of preserving human life from the time of conception until death." It later goes on to say: "A doctor must give necessary treatment in an emergency unless he is assured that it can and will be given by another."

The U.S. District Court for Connecticut recognized the problem in *U.S.* v *George,* (1965), 239 F. Supp. 752 at p. 754 where, when deciding that a Jehovah's Witness must take a blood transfusion it stated:

> "In the present case the patient voluntarily submitted himself to and insisted upon medical care. Simultaneously, he sought to dictate a course of treatment amounting to medical malpractice. To require these doctors to ignore the mandates of their own conscience, even in name of free religious exercise, cannot be justified under these circumstances. The patient may knowingly decline treatment, but he may not demand mistreatment."

It is conceded that normally a patient must give an informed consent to medical treatment if they are competent to do so. In cases where an emergency arises, however, and the patient is no longer capable of expressing her will, the doctor and the courts must always decide on the side of life. In *Marshall* v *Curry*, (1933) 3 D.L.R. 260, the Nova Scotia Supreme Court said at p. 275:

> "I think it is better, instead of resorting to a fiction to put consent altogether out of the case, where a great emergency which could not be anticipated arises, and to rule that it is the surgeon's duty to act in order to save the life or preserve the health of the patient...It is, I think, more in conformity with the facts and with reason to put a surgeon's justification in such cases on the higher ground of duty...."

There is also a compelling state interest present in this case. The patient is young and has three infant children. The family is the basic social

Milwaukee County, Probate Division, No. 455-996, and *Guardianship of Delores Phelps*, No. 459-207.

In the case at bar, it is admitted that a will has no binding legal effect until the death of the testatrix. However, the "living will" constitutes a clear statement of intention by Ms. Drake to refuse the treatment of the use of life sustaining apparatus, reinforced by her restatement of that intention to Dr. Realist before the operation. It is submitted that this was a well-reasoned, *competent* decision and should be recognized as being a decision enforcable by this Court, regardless of the defendant's decision or beliefs.

This recognition that an individual has a "right to die" will be shown by expert testimony to have been recognized virtually universally among writers on the subject. Some writers have also advocated euthanasia legislation, such as that proposed in the House of Lords in England in 1969 (Downing, A.B., *Euthanasia and the Right to Die*, p. 201). Also, Pope Pius XII pronounced, in 1957, "that Christian ethics do not require the administration of extraordinary treatment to patients where life is ebbing hopelessly" (Stephen and Billings, *The Law and Death - An Overview*, Journal of Contemporary Law, p. 224 at p. 228).

It is also submitted that there is no controlling state interest prohibiting Ms. Drake from having a legally enforcable right to refuse the treatment in question. The State no longer has an inherent interest to preserve a person's life, in light of the fact that a person can legally take his own life by suicide. The fact that there are three children of Ms. Drake who will be left without a mother is likewise not a compelling state interest. As a consequence of the serious and extensive brain damage of Ms. Drake, her children will never receive the benefits of a mother's care. As a result, this negates any interest that would compel the state to preserve her "life" in the face of her clear decision.

Therefore, it is submitted that any medical principles and objections of Dr. Realist which resulted in his treating Ms. Drake must be overcome by the clearly and competently made decision of Ms. Drake. She should be held to have a legally enforcable right to refuse the artificial life maintenance system. It is submitted that the Court should follow the policy laid down in the case of *Union Pacific Railway* v. *Botsford*, 141 U.S. 250 (1891) at p. 251:

> "No right is ... more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law."

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Third Argument

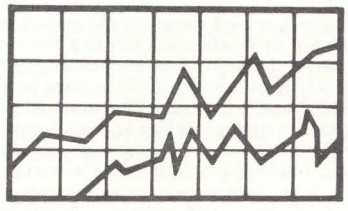
It is submitted that the patient in the case at bar in fact refused to consent to the current medical treatment. The consent form (Exhibit C) authorized the operation, but permission was deleted by Ms. Drake for any additional procedures, necessary or otherwise. The effect of the consent form is merely to protect the hospital from civil liability, and its lack of specific reference to the prohibited procedures must be evaluated in light of the patient's intention in signing the form. It is this intention that is of decisive importance in evaluating her refusal to consent.

In the case at bar, it is submitted that neither resuscitation nor use of the respirator were procedures authorized by Ms. Drake. Her intention to refuse consent for both procedures is clear from the facts of the case. She made a "living will", indicating her wishes not to be artificially maintained. Two days before the operation she informed Dr. Realist formally of her wishes and showed the will to him. Therefore when she signed the consent form in

structure in our society and the mother is a vital element in that unit. Whenever there is a possibility of maintaining the family unit, it is in the interests of the state that it be maintained so that the children may know the benefits of a complete family. Therefore, any prior refusal to life sustaining treatment should be considered void as against the greater interest of the community at large.

The strongest human instinct is that of survival. When a decision to die is taken prior to the immediate possibilty of death, it is more than likely the person will change their mind as they stare into the face of death. If the court sanctions their prior decision, however, and the person is thereafter unable to indicate a change of mind, the court may be decreeing the death of a person who wishes to live. If a person decided to commit suicide by taking an overdose of pills, could a court then prohibit a rescuer from saving that life when the person is unconscious on the grounds that she had expressed her intention to die?

It is respectfully submitted that in the interests of the physician, the state, the family, and particularly the patient, the court cannot give effect to any prior refusal to life sustaining measures in this case.



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Third Argument

It is respectfully submitted that the patient has not expressly refused her consent to the current medical treatment. The "living will" drafted by the patient is of no value other than as an indication of intention. The words used in that document do not cover the present situation. "In the event of my illness taking a turn for the worse" refers to her illness at that time, renal failure. It will be proven at trial, through expert testimony, that currently her condition in this respect is stable. It will also be shown that her present condition cannot be considered "medically hopeless" as required by the "will".

The patient is a trained nurse and therefore must be taken to have known at the time of the making of the document that the type of treatment she is presently being given is no longer considered "extraordinary" by the medical profession. Therefore the treatment does not fall within the conditions outlined in the "living will" and the document is of no value in

the hospital after her conversation with the doctor and deleted provision for all other procedures, this action must be taken to refer to those procedures about which she had told the doctor. She must not have thought it necessary to specifically name the procedures deleted as her instructions to Dr. Realist had been explicit.

This clear statement of refusal also precludes any argument based on "implied consent" in the emergency situation.

Therefore, it is submitted that Ms. Drake's altering of the consent form and previous specific reference to the prohibited procedures in fact admits of no other interpretation than that she validly refused to consent to the procedures involving artificial life maintenance.

Fourth Argument

It is submitted that Ms. Drake may be removed from the artificial life support system once it is found she has refused such treatment, since there are no legal bars at such removal.

Ms. Drake's refusal to consent should not have been wrongfully frustrated by the defendant, and Dr. Realist should have implemented her expressed wishes of her right to bodily self-determination by not treating her after the cardiac arrest. However, it is submitted that since such wrongful actions were taken by Dr. Realist, Ms. Drake's intention of not being sustained on the respirator must now be given effect as against the defendant's interests in maintaining her unless there is a legal bar to such a decision by this Court.

It is submitted that there would be no criminal responsibility involved, for any person, in removing the respirator and allowing Ms. Drake to die, and therefore there is nothing illegal to prohibit the declaration sought.

It is submitted that the removal of the life sustaining apparatus would not "cause" death as the term is used in s.205 of the *Criminal Code*, R.S.C. 1970, C-34, and would not amount to homicide. It is urged that the definition of "cause" not be given a restricted, narrowly legalistic meaning, but be construed in light of the purposes and values protected by the criminal law. The remedy sought here cannot be considered a cause in any real sense since the real cause of her death would be the irreversible brain damage that is being held at bay by the use of the respirator. Removal of this treatment would be in no sense a legal, operative cause of her death. The Court should look to the real sense and meaning to be given to the words in the statute ("to substance and not to form") and hold that removal of a respirator is not a cause in the situation at bar. This is especially applicable when no previous decisions as to the applicability of criminal responsibility to this situation have been made in a Canadian jurisdiction. The situation involved here can be analogized to the medical practice involved in heart transplant surgery, where the donor's heart is kept beating by a respirator until the respirator is removed to enable the transplantation of the heart. In none of these cases has a doctor been held liable under the criminal law for taking the donor off the respirator.

In the alternative, even if the removal of the respirator is held as "causing" death and constituting homicide within the meaning of s.205 of the *Criminal* deciding the issue before the court.

The statement by the patient when in the doctor's office was a refusal only in relation to resusciation if her heart stopped. It did not deal with the situation of life maintenance after cardiac resuscitation except to say she did not "relish" the idea of living in a vegetative state. This can hardly be considered an express refusal to the treatment.

Unless there is an express refusal to a life saving treatment, the courts will imply consent on the part of the patient or possibly hold the operating surgeon to be the representative of the patient to give consent. These two concepts were illustrated in *Mohr* v *Williams* (1905), 95 Minn. 261 and *Bennan* v *Parsonnet* (1912), 83 N.J. Law 20.

It is respectfully submitted that, as there was no express refusal of the present treatment and that treatment is essential to maintain the patient's life, the court should imply consent on the part of the patient.

Fourth Argument

It is respectfully submitted that the court lacks the authority to authorize the patient's removal from the life support systems as this would constitute murder under the Criminal Code, R.S.C. 1970, c.C-34, s.212. The defence will prove at trial that the removal of the patient from these systems will result in her death either immediately or in the near future. To remove her, therefore, would amount to culpable homicide as defined in the Criminal Code, s. 205 :

> 205. (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.
> (4) Culpable homicide is murder or manslaughter or infanticide.
> (5) A person commits culpable homicide when he causes the death of a human being
> (a) by means of an unlawful act;

It would be no defence to this charge to argue that removing the life support systems is not an act but rather an omission to provide treatment, as section 207 of the Code states:

> 207. Where a person, by an act or omission, does anything that results in the death of a human being, he causes the death of that human being notwithstanding that death from that cause might have been prevented by resorting to proper means.

Therefore, whether removal is an act or omission, it would still be the cause of death as that death would not otherwise have occurred.

Neither would it be a defence to say that the death would have resulted in any case if these life support measures had not been taken. Section 209 of the Code says:

> 209. Where a person causes bodily injury to a human being that results in death, he causes the death of that human being notwithstanding that the effect of the bodily injury is only to accelerate his death from a disease or disorder arising from some other cause.

The fact that the patient might refuse her present treatment if she could express herself is irrelevant. It would take an act on the part of someone else to remove the support systems which would make them criminally

Code, it is submitted that it is not *culpable* homicide under that section since it is not an "unlawful *act*" (s.205(5)(a) and therefore constitutes homicide that is not an offence under s.205(3).

The removal should be held to be an *omission*, rather than an act, and therefore not culpable homicide under the *Code*. This classification of such removal as an omission and analogous to the right to refuse treatment has been advocated by some authors in the fields of ethics and law, as will be shown by expert testimony. This submission is also supported by the apparent total absence of criminal prosecutions in this area.

The fact that removal takes physical movement should *not* be controlling, since some *prima facie* omissions have been construed to be acts. An example of this is that a person certainly "acts" when he refuses to apply the brakes of his speeding car to avoid hitting a pedestrian. The test proposed for distinguishing between "acts" and "omissions" in this area of removal of life maintenance systems is put forward by G.P. Fletcher (*Prolonging Life: Some Legal Considerations*) at p. 77:

> "whether on all the facts the activity can be regarded as one that causes harm, or one merely that permits harm to occur."

Therefore, to "cause" would involve an act, while to "permit" would be an omission. This distinction finds support in the normal use of language in which a respirator is spoken of as "prolonging life" and keeping death from happening. Therefore turning the respirator off would "permit" death to occur and would therefore be an omission.

It is submitted that policy reasons also dictate the conclusion of regarding the removal of the respirator as an omission, rather than an act. If held to be an act, putting a patient on a respirator by a physician would require impossible medical foresight of the patient's future condition, since respirators could not be turned off in *any* circumstances without criminal liability. In the case at bar, there is an additional basis for this argument in that this strictly literal interpretation of "act" would make the wrongful use of the respirator, in contravention of Ms. Drake's express refusal, impossible to rectify.

Therefore, it is submitted that no basis of possible criminal responsibility exists to bar a declaration by the Court that the patient be entitled to be taken off the life sustaining apparatus.

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Fifth Argument

It is submitted by the plaintiff that the Court is the proper forum to decide the issues involved in the case at bar, since the dispute is a justicible issue. It is necessary for the court to intervene for the reasons stated by Burger, J. (as he then was) in his dissent in *Application of President & Directors of* responsible for her death. Section 14 of the Code states:

> 14. No person is entitled to consent to have death inflicted upon him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted upon the person by whom consent is given.

Therefore, any person removing the patient from the life support systems would be causing her death as defined in sections 207 and 209 of the Code and would be guilty of culpable homicide as defined by s. 205 (5) (a). The type of culpable homicide would be murder as defined by s. 212 i.e.

> 212. Culpable homicide is murder
> (a) where the person who causes the death of a human being
> (i) means to cause his death, or
> (ii) means to cause him bodily harm that he knows is likely to cause his death and is reckless whether death ensues or not;

These provisions of the Criminal Code reflect the fundamental principles of our society. The right to life is the most basic of these principles for, if an individual is deprived of this right all others are meaningless. This attitude is further reflected in the Canadian Bill of Rights, R.S.C. 1970, App. III, s. 1 (a) which reads:

> I. It is hereby recognized and declared that in Canada there have existed, and shall continue to exist.....the following human rights and fundamental freedoms namely,
> (a) the right of the individual to life....and the right not to be deprived thereof except by due process of law.

For a court to deprive an individual of her life without legislative sanction would be a violation of the basic morals of the country and would indicate a cheapening of the value of human life. The New Jersey Superior Court echoed these ideas in the case of *In Re Quinlan* (1975), 44 2.W. 2215 where it noted:

> "....the court's power over persons suffering under disability is to protect their best interests. The authorization sought here would permit the daughter to die. This is not protection, it is not something in her best interest, in a temporal sense, and it is in a temporal sense that the court must operate whether it believes in life after death or not. The single most important temporal quality the daughter has is life and this court will not authorize that life to be taken from her."

In that case, as here, the patient was comatose and being maintained by artificial life support systems.

It is respectfully submitted that, as removal of this patient from the life support systems would be a violation of the Criminal Code and the contemporary morals or the nation; the court lacks the authority, either statutory or ethical, to grant the declaration sought.

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Fifth Argument

It is respectfully submitted that the decision as to whether a patient is alive or dead is solely that of the physician and should not be decided by teh courts. In the case of *In Re Quinlan* (supra) the court agreed, stating at p. 2216:

Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), where he agrees at p.1015 with the majority as to the necessity of reviewing "a legally protected right which is invaded ... by an opposing party."

Here Dr. Realist's commitment to the Hippocratic Oath and to preserving life was limited by Ms. Drake's refusal to consent to his procedures. The limits of the Doctor-patient relationship were controlled by the "living will" and statement of intention, and therefore there was a "legally protected right" invaded by Dr. Realist when he stepped beyond the circumscribed limits of Ms. Drake's consent. This fact distinguishes the case at bar from *In Re Quinlan*, N.J. Superior Court, November 10, 1975, where the intention of Karen Quinlan, the patient, not to be treated on a respirator was not capable of evidential determination. In that case, there was not a legally protected right of the patient's right of bodily self-determination for the Court to review.

The justiciability of cases involving Doctor-patient conflicts was reviewed by the majority in *Application of President & Directors of Georgetown College, Inc., supra,* and the Court there held at p. 1004:

> "Were a patient in a hospital, unable to leave, to protest its planned treatment, for the most fundamental reasons, it could hardly be questioned that the judiciary would have jurisdiction to rule upon the issue of the patient's, and the hospital's, rights and duties. In this area, failure of the courts to declare the law would not place the responsibility for decision in the executive or legislative branches of government. Judicial abdication would create a legal vacuum to be filled only by the notions, and remedies, of the private parties themselves. And if the courts are to act in this area, damage suits *post facto* are a poor substitute for *timely declaratory or injunctive relief.*" (emphasis mine)

The Court has traditionally been the upholder of individual rights and individual freedom. If the Court does not act to enforce Ms. Drake's wishes in the case at bar, which have been wrongfully contravened by the defendant, there will be no recourse to "timely declaratory relief" or any other relief by Ms. Drake in light of Dr. Realist's refusal to remove her from the life maintenance apparatus.

> "The nature, extent and duration of care by societal standards is the responsibility of a physician. The morality and conscience of our society places this responsibility in the hands of the physician. What justification is there to remove it from the control of the medical profession and place it in the hands of the courts?"

The concept of physical death changes with each advancement of medical technology. A person may have no heartbeat or respiration during an operation and yet still be vitally alive as these functions have been taken over by a heart lung machine. If the courts adopt a specific legal definition of death it will stunt the growth of the common law by restricting it to current technology. Only if the definition is sufficiently broad to indicate that the current medical standard is also the legal standard can this be prevented. Even *Black's* definition shows this where it refers to death "defined by physicians as". It is respectfully submitted that each case be decided as it arises and the definition of death be left to the medical profession.

Once it has been decided that the patient is alive, however, the courts must protect that life. It has been shown in the fourth argument that the right to life is basic. If a competent adult facing immediate death refuses medical treatment, the wish should be respected if there is no compelling state interest. Where a person is no longer competent, however, the court must exercise its *parens patrie* jurisdiction in favour of the person's life.

If the decision is left to the legal guardian there will always arise the possibility of interests other than the patient's influencing a life or death decision. A physician considering using the patient as a transplant donor may have the same conflict. Therefore it is the responsibility of the court to protect the patient's interest.

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