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Law in Search of a Principle

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LAW IN SEARCH OF A PRINCIPLE

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In a liberal democracy, the law derives its force from acceptance by the people. Its acceptance depends to no small extent on the way in which it is applied by the courts and tribunals charged with its enforcement. If the law, in its day to day application, corresponds with and buttresses the values of society, the law finds ready acceptance. If the law is at odds with the values of society, the law falls into disrepute and loses the force it needs to ensure conformity with its precepts. Law and the values of society live in a symbiotic relationship. Law by itself is a friable mortar with which to bind a society together; law needs the cement of common values to give it strength. Conversely, the values of a society that are not reinforced at strategic points by law are powerless to protect society from the unscrupulous.

The development of law calls for a consensus by the informed community as to the values to which the law should give effect. If old laws are to be repealed, there should be a consensus that the old values are no longer accepted. If new laws are to be created, there should be a consensus upon the values to which the law is to give effect. I have stated that law itself can be a powerful influence on the values which a society adopts and can sometimes be in advance of the values which it helps to form and which then underpin it. But in general the law lags a little, changing when a change in value demands. The law does not change because of some ephemeral shift of political or social opinion: Values have a more fundamental and enduring significance than opinions of that kind. Thus law operates as a force for conserving society, following its basic trends without forcing changes.

The values of society find their expression in legal principles manifested in particular rules of law. Legal principle provides the *raison d'etre* of legal rules; it guides the interpretation of statutes which express the law. It is the growth point of rules devised by judges in deciding concrete cases. Principle has a unifying function, providing the law with its internal consistency and dictating consistency in the decision of particular cases. If consistency is lacking, the law will not command acceptance by society. Principle is the life-blood of the law; without it, law becomes a mere charter of power. A principle must at once reflect a consensus value and be capable of articula-

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tion as a normative proposition from which it is possible to reason logically and analogically.

These truisms have an especial relevance to laws which govern or are proposed to govern medical research and practice affecting the beginning and the end of human life. A need for new laws or for the refinement of old laws has arisen because modern technology has developed procedures—embryo experimentation and the mechanical maintenance of life, to take two familiar examples—which demand from the community an answer to the question: How does the law value human life? Unless an answer to that question can be given with the support of a tolerable social consensus, the law will be problematic. But there is no consensus among the informed community about the value to be accorded by the law to human life. Yet the law, which is pressed into service to solve concrete cases, needs a unifying principle, and a unifying principle needs a supporting consensus as to the value to which effect is to be given. Absent such a consensus, any legal regime, whether created by legislative enactments, judicial declarations or academic treatises, will lack the cogency to command general obedience.

The legal problem is that, if it is impossible to state a basic principle which informs the law affecting the beginning and the end of human life, we have no starting point from which to reason to a legal solution of particular problems. Lord Browne-Wilkinson expressed his concern in the difficult case of Anthony Bland:

> Where a case raises wholly new moral and social issues, in my judgment it is not for the judges to seek to develop new, all embracing, principles of law in a way which reflects the individual judges' moral stance when society as a whole is substantially divided on the relevant moral issues. Moreover, it is not legitimate for a judge[,] in reaching a view as to what is for the benefit of the one individual whose life is in issue[,] to take into account the wider practical issues as to allocation of limited financial resources or the impact on third parties of altering the time at which death occurs. . . . If Parliament fails to act, then judge-made law will of necessity through a gradual and uncertain process provide a legal answer to each new question as it arises. But in my judgment that is not the best way to proceed.[1]

Among the values which have gained some acceptance by a proportion of those who have an interest in these problems, we can identify three which lead to widely differing principles. In endeavouring to state them, there is a risk of oversimplification and misplaced emphasis. Accepting that risk, it seems that the first value can be stated as follows: All human life is of equal

1. Airedal N.H.S. Trust v. Bland, 2 W.L.R. 316, 382 (1993).

value and its integrity is not to be subordinated to the interests of society or of another life without consent freely given. This view owes much to the natural law and to the Judeo-Christian tradition. A second body of informed opinion espouses another value, namely, that the value of human life is variable and its integrity can be subordinated to the interests of society or of another human life without consent when the benefit of society or to the other life exceeds the benefit of respecting the integrity of the human life in question. This view owes much to the doctrines of utilitarianism and legal positivism.[2] The third value to be mentioned is that the value of human life is variable and its integrity can be subordinated to other interests, including the interests of other forms of life, without consent, when the benefit to those other interests exceeds question. This view depends upon the notion that the universe contains many forms of life which are of graduated importance and that the importance of each life is not to be gauged merely by reference to the species to which the life belongs.[3]

The first view focuses its attention on human life as a subject intrinsically worthy of legal protection; I shall call it the "human life" value. The second view focuses attention on the quality of human life; I shall call it the "quality of life" value. The third view focuses attention on the comparative value of the life of all living beings. The third view is very much a minority view at the moment. Partly for that reason, but chiefly because the legal problems raised by the third view are similar in nature—though much more extensive than—the problems raised by the second view, I shall refer only to the first two views and the implications that they hold for laws that are founded on principles supported by those views.

There are, of course, some situations of bioethical interest where the human life and quality of life values lead to a common solution. Experimentation on normal people is one such area. In the aftermath of the Nazi experiments, the Nuremberg Code laid down a set of ethical rules about human experimentation.[4] It was expanded by the Declaration of Helsinki, adopted by the Eighteenth World Medical Assembly in 1964, and revised by the Twentieth World Medical Assembly in Tokyo in 1975.[5] These codes accepted that, while research is essential to the relief of suffering, the per-

2. *See, e.g.*, Baroness Mary Warnock, *Mortality and the Law: Some Problems*, 18 CAMBRIAN L. REV. 14 (1987). This was the third Lord Morris of Borth-y-Gest Memorial Lecture.

3. This view denies any special importance to human life as such. It is a particular but extreme example of the more widely-held view which gives respect to all forms of life. The more widely-held view has great implications, of course, for animal experimentation and the morality of animal killing.

4. Nuremberg Code, Aug. 19, 1974, arts. 5-6, *reprinted in* DICTIONARY OF MEDICAL ETHICS 130-32 (A.S. Duncan et al., eds., New Rev. Ed. 1981).

5. DECLARATION OF HELSINKI: RECOMMENDATIONS GUIDING MEDICAL DOCTORS IN

sonal integrity of the individual subject could not be subordinated to the benefits of research. Thus the Declaration stated: "Concern for the interests of the subject must always prevail over the interest of science and society .... The right of the research subject to safeguard his or her integrity must always be respected."[6] The Australian National Health and Medical Research Council issued a Statement on Human Experimentation in 1982, to the same effect: "In the conduct of research, the investigator must at all times respect the personality, rights, wishes, beliefs, consent and freedom of the individual subject."[7] So jealous was the Council of the integrity of the subject that, in the case of nontherapeutic research on children, it stated that: "The risk to the child should be so minimal as to be little more than the risks run in everyday life."[8] The primacy of personal integrity over the acquisition of knowledge by human experimentation has been generally acknowledged. The two views are in harmony on this point because the quality of life view sees the life of a normal person more worthy of protection that other interests.

In embryo experimentation, on the other hand, a substantial body of informed opinion would accord primacy to the interests of society at large, or of other individuals over the integrity of the embryo. The difference in approach is lucidly explained by Baroness Dame Mary Warnock, who chaired the 1984 British Commission on Human Fertilization and Embryology.[9] Seeing "the crucial question" to be the equality of the value of human life,[10] she stated the alternative view as thus:

> Those who propose that the human embryo should be given limited but not total protection under the law (limited, that is, in that the early embryo may be used but only for certain purposes, and only up to a fixed number of days, before it is destroyed), presuppose that, though the embryo is undoubtedly human and alive, it represents a *kind* of human life which is not so worthy of protection as other kinds, (for example, the lives of children, adults or foetuses.) Those who oppose any research whatever do so on the ground that *all* human life is equally valuable, equally worthy of the full protection of the law.[11]

BIOMEDICAL RESEARCH INVOLVING HUMAN SUBJECTS, 1964, rev. 1975, *reprinted in* DICTIONARY OF MEDICAL ETHICS at 132-35 (A.S. Duncan et al., eds., New Rev. Ed., 1981).

6. *Id.* at 134, art. 1, paras. 5-6.

7. Australian National Health & Medical Research Council, *Statement on Human Experimentation*, MED. J. AUSTL. (1982).

8. *Id.* at 8, n.2, para. (5)(ii).

9. *See* Warnock, *supra* note 2, at 14-24.

10. *Id.* at 23.

11. *Id.* at 22. For a discussion of the human life value in experimentation, see Rev. Graham Hardy, *Shall We Be as Gods?: A Theological Assessment of Experimentation with Life*, 17

As the human life and quality of life values lead to differing results in the area of embryo experimentation, a choice must be made between them in order to frame a law. If the human life value prevails, the law would prohibit acts done to prejudice the integrity of an embryo. If the quality of life value prevails, the law might prohibit acts done to prejudice the life of an embryo after a fixed number of days from fertilization, or it might leave each case to be determined according to its unique circumstances.

Birth is a clear and objective criterion which might be used to discriminate between laws protecting human life and laws which permit interference with or termination of human life. The common law of murder and manslaughter protected only persons born alive. Statutory law was enacted to protect the fetus. Should post-natal protection be based on the human life value and pre-natal protection be based on the quality of life value? The division is not so simple. Some principle must be found to determine whether protection should be afforded to defective neonates, especially anencephalic neonates, by the laws of murder and manslaughter. Those are the chief laws which protect post-natal life. An aspect of the problem of defective neonates, namely, the availability of organs for donation, was addressed by the Australian Law Reform Commission, under the chairmanship of Justice Michael Kirby, early in its corporate existence.[12]

The problem of organ and tissue transplants was stimulated, of course, by the development of new transplant technology. Transplant teams were seeking suitable well-perfused organs from donors and the need was being met in part by organs removed from the bodies of donors who, having been traumatically and fatally injured, were placed on life support machines. The patient awaiting a transplant organ, that patient's relatives and the transplant team all had an interest in acquiring the desired organ from the donor in optimal condition. The donor was in a position of comparative weakness and, unless her or his life was to be terminated or put at risk of premature termination by removal of the wanted organ, it was necessary to prohibit ante-mortem removal. The prohibition was seen to be not only in the donor's interest but in the interests of the donor's relatives and the donor's medical and nursing staff. The view was taken, in the case of live donors, "that persons lacking legal capacity for reasons other than minority whether adult or not, should under no circumstances be subjected to tissue removal. It should not be lawful to take tissue from the mentally incompetent."[13] The Commission's recommendations accorded with the view taken about human

AUSTL. J. FORENSIC SCI., 119 (1985), and Rev. Francis Harman, *A Christian Philosophy on Experimenting with Life*, 17 AUSTL. J. FORENSIC SCI., 131 (1985).

12. Human Tissue Transplant, Law Reform Commission Report No. 7, (1977).

13. *Id.* at 51, para. 113.

experimentation in the Nuremberg Code and the Helsinki Declaration. The recommendations declined to subordinate the interests of a living though mortally injured donor to the interests of the transplant recipient. The consideration that the recipient had the prospect of a better quality of life if he received the donation of an organ or tissue than the donor would have held if he were to retain it did not prevail over the integrity of the life of the potential donor. The law was framed on the simple principle that both lives were of equal and unique value and one was not to be subordinated to the interests of the other. The recommendations accorded primacy to the value of human life. Once a potential donor dies, of course, there is no human life at risk, and so the cadaver was regarded as a source from which organs or tissues might be taken for transplanting into another, subject to certain conditions.

That conclusion then focused attention on the definition of death. Death was defined as occurring when a person suffers irreversible cessation of all function of the brain, even though breathing and circulation are artificially maintained. Pursuant to that definition, a general regime of control over cadaver donation of organs and tissue was prescribed. A less stringent definition would accord primacy to a different view. It has been suggested that "cerebral death" may be regarded as tantamount to brain death.[14] But that definition has not been an accepted criterion for permitting the removal of organs and tissue when some function of the brain stem and cerebellum is retained. By shifting the criterion for removal of organs and tissue to cerebral death, living anencephalic infants would be an available source of supply for suitable organs for pediatric recipients. Dr. McCullagh notes an abrupt increase in renal and cardiac transplantation from anencephalic donors[15] and recites a letter to the editor of the *New England Journal of Medicine* in 1987:

> As with many other very important principles, the total brain death definition may have to be modified for a special "borderline" situation. . . . It may be that a majority of the community would give a higher priority to the life of persons needing transplants than to symbolic commitments that do not directly protect other persons. As far as the total brain death definition and anencephalic infants are concerned, we think that one can treasure the principle and at the same time argue for a morally acceptable exception. In

14. Peter McCullagh, *Experimental and Clinical Transplantation: Implications for Regulation of Medicine*, *in* TRENDS IN BIOMEDICAL REGULATION 128, 132 (Hiram Caton ed., 1990) (citing Julius Korein, *The Problem of Brain Death Development and History*, 315 ANNALS N.Y. ACAD. SCI. 19 (1978)).

15. McCullagh, *supra* note 14, at 135.

> view of the severe shortage of organs for transplantation, kidneys from anencephalic donors can give recipients who otherwise might die a chance to live full lives, and help the parents of such infants feel that some good has come of a shocking and tragic experience.[16]

Anencephalic infants, says Dr. McCullagh, "are incapable of cognition but are likely to be sentient and to exhibit responses that can be mediated by brain stem activity."[17] The anencephalic infant may be borne alive and thus within the prima facie protection of the laws protecting post-natal life, although total brain death may follow rapidly. To remove the organs or tissue of such an infant before total brain death would be to subordinate the life of the donor to the interests of the recipient. It follows that, if anencephalic infants were to be a "morally acceptable exception" standing outside the laws which protect post-natal life, those lives would require a comparison to be made between the quality of life of the donor and the quality of life of the recipient. So the problems occurring in ante-natal situations. The differences trouble us in defining the laws affecting every stage of human existence. Nor are the problems confined to cases where trauma or physical abnormality affect the quality of a life. Perhaps the most acute areas of controversy at present relate to the laws relating to abortion and active euthanasia, actions which may terminate a normal life at its beginning or at its end.

Professor Singer of the Monash Centre for Bioethics, in an article entitled *Sanctity of Life or Quality of Life?*, has noted that "[t]he first major blow to the sanctity of life view was the spreading acceptance of abortion throughout the Western world."[18] When an abortion is contemplated, the possibilities confronting the fetus are stark: The life it has—whatever be its quality— or death; from the viewpoint of the mother, father or family, a choice might be made between the life of the fetus and the quality of the other lives involved. Leaving aside those instances, now mercifully rare, where a choice must be made between the life of the mother and the life of the fetus,[19] a law which permits abortion calls for a comparison of the value of the life of the fetus with the value of the life of the mother, father or others whose interests may be affected by allowing the fetal life to continue. If the value of the fetal life is held to be less than the value of the quality of the lives of those whose interests may be affected, the fetal life may be terminated. In this area, those

16. W. Holzgreve & F. K. Beller, *Letter to the Editor*, 317 NEW ENGL. J. MED. 961 (1987).

17. McCullagh, *supra* note 14, at 135.

18. Peter Singer, *Sanctity of Life or Quality of Life?*, 72 PEDIATRICS 128 (1983).

19. The loss or taking of one life to preserve another raises a distinct area of moral decision-making, embracing capital punishment, pacificism and self-defense, as well as therapeutic abortion.

who would give the law's protection to fetal life—of whatever quality—over the quality of the other lives involved espouse the same view as those who would reject embryo experimentation, namely that all human life is equally valuable. Those who would make the alternative choice must give primacy to the quality of the more mature human life or lives over the fetal life.

The difference between the human life value and the quality of life value, which lies at the heart of the controversy about abortion, has not always been clearly perceived. In *The King v. Bourne*,[20] which, though only a ruling by a single judge during a criminal trial, has had a significant influence on the statement of abortion law in Australia,[21] Mr. Justice MacNaghten arguably transformed a statutory value of life test into a quality of life test. His Lordship gave the jury a direction which extended the phrase "for the purpose of preserving the life of the mother" to cover the termination of a pregnancy which would probably "make the woman a physical or mental wreck."[22] Once the quality of the mother's life, including her psychological state, became a criterion justifying the termination of a pregnancy, the legal protection of the fetus under the statute was diminished. In practice, and in some jurisdictions, in law the quality of life value has prevailed.

By contrast, the human life value appears to remain in the ascendancy in its influence on the law governing the termination of life, as the case of Anthony Bland shows. Anthony has been in a persistent vegetative state for three years after being crushed at the Hillsborough Football ground in 1989. The courts of England declared that his artificial feeding through a nasogastric tube, together with other medical treatment which had helped sustain his life, could be lawfully discontinued though the known and intended result would be his death by lack of nutrition if not by some supervening infection.[23] Some of the judgments expressly rejected the proposition that the decision to leave Anthony to die could be justified on the ground that Anthony, having no cerebral function, had such a diminished quality of life that it was not worth preserving.[24] Their Lordships' decision turned on the scope of the duty to provide medical treatment for Anthony. The existence of a duty was essential if there were to be a sheeting home of responsibility for the death which was intended to follow the cessation of nutrition. To determine the scope of the duty to provide treatment for an unconscious patient, their Lordships' held it was necessary to ascertain his "best inter-

20. The King v. Bourne, 1 K.B. 687 (1939).

21. *See, e.g.*, Reg. v. Davidson, V.R. 667 (1969). *Cf.* Reg. v. Ross, Q. St. R. 48 (1955).

22. *Bourne*, 1 K.B. at 694.

23. Airedale N.H.S. v. Bland, 2 W.L.R. 316 (1993).

24. *Bland*, 2 W.L.R. at 334 (Sir Thomas Bingham M.R.); *id.* at 395 (Lord Mustill); *cf. id.* at 354-355 (L.J. Hoffmann), *id.* at 387 (Lord Browne Wilkinson).

ests." Unless it were in Anthony's best interests to be provided with medical treatment, there was no duty to provide it. Absent a duty of that kind, there could be no liability, criminal or civil, for a failure to perform it. Their Lordships held that there was no duty to provide medical treatment. In reaching this conclusion, two steps were necessary: First, that feeding through the nasogastric tube was medical treatment and, second that artificial feeding was not in his best interests. Accordingly, it was held that there was no duty to leave the nasogastric tube in place and to continue to feed Anthony through it.

In deciding that artificial feeding was not in Anthony's best interests, their Lordships made an evaluation of the quality of his life. But this evaluation was not made for the purposes of a possible subordination of Anthony's life to the quality of the life of his family, friends, or carers, nor for the purpose of considering whether the National Health Service should bear the financial burden of his care. The evaluation was made in order to determine whether Anthony would derive some benefit from continuation of the treatment he had been receiving.

Lord Keitch of Kinkel said that, although in some cases it is possible to compare the effect of giving or withholding medical treatment on the quality of a patient's life,

> [i]n the case of a permanently insensate being, who if continuing to live would never experience the slightest actual discomfort, it is difficult, if not impossible, to make any relevant comparison between continued existence and the absence of it. It is, however, perhaps permissible to say that to an individual with no cognitive capacity whatever, and no prospect of ever recovering any such capacity in this world, it must be a matter of complete indifference whether he lives or dies.[25]

Lord Goff of Chieveley, in reference to cases where "treatment is of no benefit to [the living patient] because he is totally unconscious and there is no prospect of any improvement in his condition,"[26] said that "there is in reality no weighing operation to be performed. Here the condition of the patient, who is totally unconscious and in whose condition there is no prospect of any improvement, is such that life-prolonging treatment is properly regarded as being, in medical terms, useless."[27]Lord Browne-Wilkinson said "[w]hether he lives or dies he will feel no pain or distress. All the purely physical considerations indicate that it is pointless to continue life sup-

25. *Id.* at 361.
26. *Id.* at 371.
27. *Id.* at 372.

port."[28] Lord Mustill refused to accept any argument that it was in the best interests of Anthony that his life should be brought to an end.[29] An argument in those terms would "serve to legitimate a termination by much more direct means."[30] But his Lordship was prepared to accept the argument that "his best interests in being kept alive have also disappeared"[31] and that the duty to provide medical treatment disappeared accordingly.

It was one thing to hold that, if treatment was of no benefit to Anthony, there was no duty to provide it. It would have been an entirely different thing to hold that Anthony's life was of so minimal a quality that it was no longer within the protection of the law. The principle to be derived from the *Bland* case is that human life of whatever quality is protected by the law and is not subordinated to the interests of other lives or of society, but the duty to sustain human life depends on whether the treatment available to sustain it is beneficial to the life in question.

Their Lordships were careful to point out that their decision in Anthony's case was not necessarily a guide to the decision that should be made in other cases. Clearly enough, while artificial feeding of Anthony through a naso-gastric tube was, in the circumstances of his overall condition and management, held not to be beneficial treatment to him, artificial feeding might well be held to be beneficial for a patient in slightly different circumstances—for example, a partially anencephalic infant. The facts in *Bland* were extremely difficult to evaluate. Such facts are notoriously difficult to evaluate, and the evaluation of facts may be influenced by the standards of contemporary medical treatment. This evaluation has attracted and will attract some criticism. But the law, searching for a general principle, cannot determine the facts to which it is to apply: The law's concern is to identify an applicable principle supported by a community consensus.

All of this serves to emphasize the difficulty of the problems that new medical technology raises for determination. The importance of being able to identify principles which might inform a legal regime to govern the beginning and the end of life is manifest. It is unsatisfactory to adopt one principle to apply to some forms of human life and another to apply to other forms of human life. The division of the continuum of human life into segments to be governed by different regimes denies the possibility of consistency in the way in which the law regards human life. But if a legal regime is to be based on one value or another, it is desirable to recognize the problems to which each of the possible regimes may give rise.

28. *Id.* at 386.
29. *Id.* at 397-98.
30. *Id.* at 398.
31. *Id.*

If a legal regime is based on the human life value, laws can be framed so that their operation depends to a large extent on objective criteria: Is the patient dead? Will the treatment or the procedure preserve or prejudice the maintenance of life? Is a treatment or procedure beneficial to the patient having regard to the patient's condition and standards of contemporary medical practice? Is the purpose of treatment to relieve suffering or to cause death? These are questions of fact. In answering some of these questions, medical opinion will be decisive. In answering others, regard must be had to the patient's wishes and the position and wishes of family and carers. A regime based on the human life value seeks to protect any human life whatever its quality against any act that might be done to destroy it, and imposes a duty to provide reasonable care and treatment where that care and treatment are for the benefit of the life in question. A criticism made of this approach is that it appears not to provide for the relief of suffering that may be prolonged by maintaining life. The criticism is unwarranted so far as it related to palliative care. The general duty is to provide care and treatment for the benefit of the patient and, unless the patient consciously and lucidly refuses to accept it, that care and treatment included palliative care designed to alleviate suffering. It may be administered for that purposes though it may incidentally hasten death. The criticism, if criticism it be, that the human life value does not permit the deliberate hastening of death in order to prevent further suffering is valid. A legal regime based on the human life value alleviates suffering, but not by causing the death of the sufferer.

A regime which gives effect to the quality of life value is much more difficult to construct. It requires some definition of what constitutes quality of life and some calculus for comparing the quality of life of A with the quality of life of B or, when the termination of a human life is in question, how the quality of that life can be compared with its death. The problem in making comparisons between the quality of human lives was highlighted by Dame Mary Warnock when she sought to apply utilitarian principles to solve the problem of embryo experimentation. The attempt failed:

> since the balance of benefit over harm is intended by utilitarianism to apply only to human persons. The question about which there is no agreement in this case is precisely whether or not to count early human embryos among that class, whether *their* benefits and harms should or need not enter into the felicific calculus.[32]

Moreover, in the balancing of benefit and harm, there is no clear understanding of what is to count as harm: "There is no doubt that the infertile, and children who might be born with fatal or damaging inherited diseases

32. Warnock, *supra* note 2, at 19.

and many others will ultimately benefit from the research; the *embryos themselves* will not. How are we to weigh up the benefits and harms?"[33] And if suffering may be relieved by terminating the life of the sufferer in some circumstances, how is a decision to be made between the life in question and death? That is a decision which is incapable of control by legal means. As Lord Justice Griffiths has pointed out: "The court . . . has to compare the state of the plaintiff with non-existence, of which the court can know nothing; this I regard as an impossible task."[34]

If it is impossible legally to evaluate either the comparative quality of human lives at least when one of them is an ante-natal life or to compare a human life of whatever quality with death, can a law be construed which prescribes legal criteria governing the choice for or against the human life in question? The choice would have to be made according to the discretion of the person in whom the power to choose is vested. In whom should such a power be vested? The pregnant mother in the case of the fetus, the parents in the case of the embryo or the defective neonate, and the parents, children or next-of-kin in the case of the incurably or terminally ill are the logical candidates in whom the power to choose might be vested. Yet each of them has an interest which may be in conflict with the interest of the life in question. Usually a power to affect the interests of one party is not vested in a party whose interests are in conflict. Nor would it be characteristic of a legal regime to vest a discretionary power in a party who has an interest in the manner of its exercise.

An objection often times advances against a regime of laws based on the quality of life value is that is places the law on a slippery slope, there being no objective criterion which serves to protect a life in jeopardy. If quality of life is to be judged by reference simply to intellectual capacity, human life is not intrinsically worthy of any protection. Professor Singer makes this point:

> If we compare a severely defective human infant with a nonhuman animal, a dog or a pig, for example, we will often find the nonhuman to have superior capacities, both actual and potential, for rationality, self-consciousness, communication, and anything else that can plausibly be considered morally significant. Only the fact that the defective infant is a member of the species *Homo sapiens* leads it to be treated differently from the dog or pig. Species membership alone, however, is not morally relevant.

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33. *Id.* at 22.

34. McKay v. Essex Area Health Auth., 1 Q.B. 1166, 1192-93 (1982). *See also* Udale v. Bloomsbury Health Auth., 1 W.L.R. 1098, 1108-09 (1983); *Bland*, 2 W.L.R. at 398 (Lord Mustill).

> . . .
> If we can put aside the obsolete and erroneous notion of the sanctity of all human life, we may start to look at human life as it really is: at the quality of life that each human being has or can achieve. Then it will be possible to approach these difficult questions of life and death with the ethical sensitivity that each case demands.[35]

As far as one can see, it is unlikely that the divergent views held by members of the informed community are likely to coalesce. It may be that, despite the absence of a unifying principle, regimes based on differing values will govern the several stages of human life and the several conditions in which human beings exist. The regimes may be based not on a general consensus of values but on a majority view about the value which is to prevail in respect of this stage of life or that, this condition or that.

In that event, lawyers must concentrate on the text and scope of the particular rules. Legal analysis and criticism will be impeded by the absence of an informing principle. Although much ink may be split in discussing the problems and apparent inconsistencies in court decisions or in theories advanced by learned commentators, the discussions themselves will be flawed by the absence of a principled intellectual foundation. Unless the competent constitutional authorities settle the rules to be followed, the courts will perforce be engaged in making new laws to fill the legal vacuums created by technological advances. Controversy will be unavoidable.

Yet scholarship and discussion have never had a more important role to play. As the genius of the human mind encompasses more of the majestic mysteries of life and examines its origins and the manner of its existence more deeply, the societies in which men and women strive to live in harmony will need laws reasonable to the new learning and attuned to the intuitive aspirations of the human spirit which lie beyond the ken of science. In the devising of these laws, scholarship and compassion, insight and humility of mind will be in rare demand.

35. Singer, *supra* note 18, at 129.