MY DEATH IS MY CONCERN:
AN ARGUMENT FOR EUTHANASIA

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To My Wife

Theresa E. Green

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ABSTRACT

My Death Is My Concern:
An Argument For Euthanasia

James Green

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This paper is an argument for euthanasia that is developed around the Sue Rodriguez case which was recently before the Supreme Court of Canada. In the first chapter, an analysis of both the majority and the dissenting opinions provides a insight into the current, official status of euthanasia in Canada. Justice McLachlin holds the belief that the interests of the individual are paramount, while Justice Sopinka, who writes for the majority of the court, places the interests of the state prior to those of the individual. Justice Sopinka's argument in support of his view is based on the principle of the sanctity of life, the doctrine of double effect, and the distinction between killing and letting die. The next chapter consists of an argument against these three points.

The argument that I present against the doctrine of double effect follows the line it does not serve any useful function in the context of medical ethics. Demonstrating the falseness of the doctrine of double effect leads to the defeat of the argument for the distinction between killing and letting die, and it follows from this, that no relevant moral distinction can be demonstrated between withdrawing and withholding

treatment and palliative care deaths on the one hand, and active euthanasia on the other. This chapter concludes with an argument that the sanctity of life principle, which I view as the appeal of last resort in the debate on euthanasia, is without foundation.

In the final chapter, a different approach to debates in medical ethics is proposed. It is a combination of value theory methodology, (primarily that of Paul W. Taylor) and the composite principles of autonomy, nonmaleficence and beneficence, developed by Beauchamp and Childress. The purpose of this proposal is provide a way out of the raditional pattern of point and counter-point that the debate has followed for so long without producing a conclusive resolution.

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MY DEATH IS MY CONCERN

> Man should seek the approbation of others in his life; his death concerns himself alone.
>
> - Seneca

INTRODUCTION

The title of this paper should not leave the reader in any doubt as to its purpose. It is not intended to be a balanced analysis of the subject of suicide. I do not set out to weigh the pros and the cons of suicide. I begin from the position of one who has already weighed the pros and cons and has come to the conclusion that indeed there are some lives that are worse than death. The arguments presented herein are from the perspective of one who presumes that there are circumstances in which it is appropriate for one to end one's life. I have used the word 'appropriate' rather than 'right' or 'correct' quite deliberately. I wish to avoid any notion that it is a question of whether it is right or wrong to take one's life. 'Appropriate' conveys a sense of having to make a judgement about the propriety of an action with regard to the circumstances. I do not view the question as one of whether it is right to end one's life but as a question of whether it is right that one be able to choose to do so - whether the decision is the individual's to make. I do not argue that there are circumstances in which it is right to take one's life. I argue that there are circumstances in which it is

right that one be free to choose to continue with one's life or to end it and that is wrong to deny this right and impose a "right" choice upon the individual under the authority of the state.

I do not deal with the problem of euthanasia or assisted suicide as a religious issue. Rather, I treat it as an ethical issue and conduct my discussion in ethical terms and in consideration of the ethical merit of a view, decision or action. I believe that this is an appropriate arena in which to discuss the subject because there are many people, including myself, who are concerned with the question but are not religious and are concerned with euthanasia as an ethical issue. In addition, the vehicle for my discussion is the Sue Rodriguez case which was recently before the Supreme Court, and the opinions given by the two justices which I examine are expressed in legal and ethical terms. One of the justices, Justice Sopinka makes the point that he regards the issue as one which is to be discussed in secular terms, when, early on in his statement, he brings to the reader's attention the fact that he is considering the principles in secular terms in the following remark:

> This argument focuses on the generally held and deeply-rooted belief in our society that human life is sacred or inviolable refers (which terms I use in the non-religious sense described by Dworkin).[1]

Furthermore, I regard this as a social issue. I see it as a conflict between those who seek a greater measure of autonomy and those who would retain the traditional order. While the issue in this case is over the amount of autonomous

control an individual may exercise over their life, I suggest that it is only part the increased demand for greater autonomy for the individual in many other aspects of life. Whether it is caused by a loss of the public confidence in the traditional leadership or the loss of confidence is a result of the trend towards greater autonomy in the western nations it is hard to say. However, Walter Lippmann speaks of the diminishment of respect and trust in the traditional authorities as far back as 1929, in his book *A Preface To Morals*,[2] long before there was any obvious movement towards greater individual autonomy.

I suggest that the defeat of the Charlottetown Accord in October 1992, is evidence of this loss of faith in the traditional institutions of government, business, and the news media, as reliable bases for public opinion in Canada today. Although, all of these institutions gave unqualified support to the Accord and conducted a huge, well-financed and well-orchestrated campaign against an unorganized opposition, they did not have sufficient influence upon the Canadian public opinion to defeat what was little more than a rag-tag, grass-roots movement. This indicates that the public are less reliant upon the nation's leadership for its decision-making in public matters and is taking a more autonomous role in the process.

The results of a Decima poll conducted in November, 1993 indicate that the degree of this decline of faith in the traditional leadership is significant.[3] I submit that this signals the beginning of a new direction in the relationship

between the individual and the state in which the individual expects to play a more independent role. Furthermore, the public acceptance of euthanasia is merely part of this trend towards greater individual autonomy[4] and the issue of euthanasia is one in which the individual's interests in autonomy are set in conflict with the state's interests in maintaining its traditional role.

The current public acceptance of suicide should also serve to demonstrate that the public does not perceive that suicide and murder are acts of the same kind. In the matter of suicide, the government is seen to be intervening in an area in which there is no justification for it to do so. On the other hand, the public aversion to murder is increasing. People, in general, are asking for more protection from murderers and more severe punishment for those who murder. The government is perceived as not intervening enough in the area of murder and it faces a continuing public support for the return of the death penalty. This would indicate that the public does not perceive suicide and murder as acts of a kind. If the public perceived them as acts of the same kind, then the aversion to suicide would increase as the aversion to murder increases, and this is simply not the case.

In the first chapter, I analyze the recent challenge in the Supreme Court to the law against assisted suicide by a woman who was suffering from ALS, Sue Rodriguez. I examine the written decisions of Justice McLachlin, who writes one of the dissenting opinions and Justice Sopinka, who writes the majority opinion. I restrict my examination to the statements

of these two justices in order to contain the scope of my investigation to the terms of section 7 of *The Charter Of Rights And Freedoms* which is concerned with the legal rights of life, liberty and security of person. The other sections of the *Charter* under which Ms. Rodriguez' petitions are concerned with her rights of equality as a physically impaired person. Dealing with s.7 alone allows my investigation to focus on the issue of assisted suicide in the context of the moral issue of the right to life.

The purpose of my analysis in this chapter is, first, to assess the validity of the logic of the legal arguments and, second, to identify the moral premises of the legal arguments in order to conduct an examination of the moral principles which underlie these premises. This analysis leads to the conclusions that Justice Sopinka's argument, which I characterize as the orthodox argument, is basically flawed. It is paternalistic in nature and is based on the principle of beneficence. His argument rests mainly on the traditional pillars of the doctrine of double effect and the principle of the sanctity of life, and the distinction between killing and letting die, which I refute in the following chapter.

In contrast, Justice McLachlin's argument, which I believe is a valid one, is grounded primarily in the principle of autonomy and disputes the logic of the traditional arguments.

In Chapter 2, I present my own arguments against the three main arguments of Justice Sopinka's. These arguments are so frequently found together that I view them as a plan of argument rather than three separate ones. The doctrine of

double effect, and the killing-letting die distinction, are used in the tactical manner of guard rocks in the game of curling. I see them used as a means of guarding against an attack on the sanctity of life principle which is the house stone. The sanctity of life principle is key to Sopinka's argument as it is the basis of the underlying premise that assisted suicide or voluntary euthanasia is wrong. Whenever the sanctity of life principle is challenged, invariably it is the slippery slope argument that is called upon in its defence, and I argue against the validity of this argument in the last part of the chapter.

By the end of Chapter 2, I have concluded my arguments against Justice Sopinka's points of argument. If my arguments have been successful, the reader will agree that the arguments of Justice Sopinka and the majority of the court are not valid. However, it cannot be assumed that their decision is wrong. They may be right for the wrong reasons. So in Chapter 3, I present my own argument in support of Sue Rodriguez' petition.

In order to break out of the almost mandatory pattern of point and counter-point that I have followed in arguing against Justice Sopinka, I take a different approach. I attempt to combine a theory of moral principles such as Beauchamp and Childress's composite theory and value theory such as that of Paul Taylor. I borrow from both only what is necessary. I wish to avoid having to present and defend what may be controversial theories. In addition, I do not wish to get caught up in replacing one dogmatic method, in this case

the dialectic method, with another.

In the first part of Chapter 3, I define the Rodriguez issue in terms of the principles involved. On the one hand, there is Rodriguez' appeal and McLachlin's support for her appeal under the principle of autonomy, and on the other, there is Sopinka's state paternalism under the principle of beneficence. To mediate between these two, I apply the principle of nomaleficence to the values that each side ascribes to life, in order to determine which would bear the greater harm from a decision in favour of the other party.

I believe that this different approach meets with some success. It has the advantage of casting the argument in terms of a concrete issue. The issue cannot be argued at the level of the principles involved; one must apply the principles to an issue and argue on the merits of the issue. If it is successful, it shifts the focus of the argument from the level of theoretical ethics into the level of applied ethics. While I make no claim that this attempt to take a different point of view represents a change of Kantian proportions, I do take Kant as the precedent for the idea that if the traditional methods do not appear to be working, try a different approach.

CHAPTER 1

THE LEGAL ARGUMENT

The Sue Rodriguez Story

Up to the time that she was diagnosed with amyotrophic lateral sclerosis (ALS) in late 1991 at the age of 41, Sue Rodriguez' life had been fairly typical of a modern North American woman. She was born in Winnipeg in 1950 and grew up and went to school in the average middle class surroundings of a Toronto suburb. Shortly after completing her education in early-childhood education, she married. Unfortunately, this did not work out well and by her mid-twenties she had divorced her first husband and moved to California. There she met and married her second husband and in 1984 Sue had her only child, a son. In 1990 she and her family moved to Victoria, B.C.

She had always been an animated and athletic person and continued to lead an active life. She had a full-time job, and she was active in a number of outdoor recreational activities, such as, running, cross-country skiing, climbing and hiking. However, the disease brought and end to the physical kind of life that she had known up to that time. Within a year she required home-help to manage the normal things such as bathing, dressing and preparing meals.

Ms. Rodriguez was aware of her prognosis. There is a standard prognosis for all who have the disease - ALS is fatal - she would be dead within a period of two to five years. If the disease were to run its normal course, she would

eventually succumb to a deterioration of her lungs that would result in her death by choking or suffocation. As the disease ran its course, she would become completely incapacitated. She would lose all control of her muscles becoming completely reliant on others for all of her life functions and she would be severely sedated to relieve the pain. And, throughout all of this, except for the effects of the drugs, her mind would be fully functional, she would be aware of all that was happening to her.

Ms. Rodriguez determined that her life would not end that way. However, she was not ready to end it at that particular point. Her life had not yet deteriorated to a state that was unacceptable to her. At the same time, she realized that by the time she was psychologically ready to end her life, she would be physically incapable of doing so. She would, by that time, have lost all control over her limbs. Certainly, hanging would be out of the question as would shooting herself. Moreover, as she would be unable to swallow properly, she could not take her own life by the obvious method of taking an overdose of pills. She would not be able to handle the pills herself nor, could she swallow them without assistance of some kind. However, assisting someone to commit suicide is contrary to the *Criminal Code*. Whoever helped her, even by passing her the pills and giving her water at her own request, would be committing a criminal act.

In September 1992, Ms. Rodriguez appealed to the Supreme Court of B.C. to have section 241(b) of the Criminal Code of Canada, which prohibits the giving of assistance to commit

suicide, declared invalid on the ground that it violated her rights given under sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms*. Her argument was that, because of her physical impairment, she required assistance to exercise the freedom to commit suicide which all physically non-impaired enjoyed. Therefore, s.241(b) of the *Criminal Code* violated her charter rights. Her petition was turned down by the B.C. Supreme Court and her appeal of this decision was rejected by the B.C Court of Appeal. In May 1993, the Supreme Court Of Canada heard Ms. Rodriguez' appeal and gave its decision in September of that same year. On 30 September 1993, the Supreme Court rejected her appeal with five judges assenting and four dissenting.

By that time, her condition was worsening rapidly. She was not able to move without assistance and her upper body had deteriorated to the point that she was no longer able to speak, swallow or even breathe properly. It was expected that, in short order, she would be bedridden, and lose the ability to speak. It would soon be necessary to maintain her respiration mechanically and she would require a gastrotomy in order to accept nourishment. If the disease were allowed to run its course, her lungs would lose their capacity to function even with assistance and Ms. Rodriguez would die from choking or suffocation within two to fourteen months.

Ms. Rodriguez died on 12 February 1994. Her death is alleged to be a case of assisted suicide, however, the investigation into her death has not resulted in any charges being laid. The Vancouver MP, Svend Robinson, who admits to

witnessing her death, refused to give police the name of the physician who, presumably, administered the lethal injection. Thus far, Mr. Robinson has not been charged with withholding evidence, or with counselling, aiding or abetting suicide.

The Legal Issues

The Sue Rodriguez story serves as an excellent case study for an examination of the ethical and legal aspects of legally assisted suicide in the Canadian setting. Although, Ms. Rodriguez was the subject of the petition, it is obvious that there was more at issue than her case alone. A number of interest groups were involved on both sides. The Right to Die Society of Canada was funding her legal battle and there were several other organizations of a death-with-dignity nature who were allowed as interveners in her petition. And on the other side, opposing her as interveners, were groups such as the Canadian Conference Of Catholic Bishops and the Evangelical Fellowship of Canada. So it is clear that in allowing these other parties to intervene, the court realized that the issue was the standing of assisted suicide in society as a whole, not just Ms. Rodriguez' case.

Ms. Rodriguez petitioned to have section 241(b) of the *Criminal Code of Canada*, which prohibits the giving of assistance to commit suicide, declared invalid on the ground that it violated her rights given under sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms*. Section 241 of the *Criminal Code* is set down as:

> 241. Everyone who
> a) counsels a person to commit suicide, or
> b) aids or abets a person to commit suicide,
> whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.[5]

Ms. Rodriguez' argument was that, because of her physical impairment, she required assistance to exercise the freedom to commit suicide which all physically non-impaired persons enjoyed. Sections 7 and 12 are given as legal rights in the *Charter*, while section 15 is given as an equality right. My analysis will be restricted to only those issues that address section 7. This is not because I believe that section 12[6] and section 15[7] are not important to the Rodriguez case. Rather, it is because they are concerned with the matter of her disability, whereas Section 7 is more to the issue of the ethical standing of assisted suicide. Moreover, while both of these sections are relevant to the Rodriguez case, I believe that both are dependant, to a large degree, upon the definition of the legal rights to which an individual is entitled under the law, and these are defined in section 7. It is these legal rights and their moral underpinnings that are the topics which will be of particular interest to me in this case study.

S.7 of the *Charter* is the section that deals with the basic rights of Canadians within Canadian society. S.7 of the *Charter* states that:

> Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[8]

This defines the legal position of the individual within the state. However, the legal position is presumed to rest upon ethical foundations, and to be justifiable in ethical terms. These ethical foundations to which the justices appealed as justification for their judgements will be examined in the next chapter. First, however, it is my intention to examine the logic of their legal reasoning with respect to the definition and interpretation of section 7.

The supreme court was split five to four against Ms. Rodriguez' appeal. The dissenting opinions of Justices McLachlin and L'hereaux Dube, given by Justice McLachlin, found that section 241(b) violated Ms. Rodriguez' rights under section 7 of the charter. Justice Cory, dissenting and writing his own opinion, also found that sec. 241(b) violated section 7 of the charter, but for reasons different from those of McLachlin and Dube. Chief Justice Lamer's dissenting opinion is based on the equality rights of Ms. Rodriguez under section 15 of the charter. On the other side, the majority opinion is given by Justice Sopinka, who writes for himself and the remaining justices, La Forest, Gonthier, Iacobucci and Major. Sopinka addresses the three relevant sections 7, 12 and 15, but, for the most part, his emphasis is on section 7.

In the remainder of this chapter, I wish to examine the statements of the judgements made by Justice Sopinka and Justice McLachlin in order to evaluate the merit of each and also to determine the ethical principles underlying their judgements. But first, there are a couple of points that need to be made clear concerning the nature of written legal

judgements and some of the terms of reference that are used.

The records of the judgement of McLachlin and Sopinka should be seen as justifications for the positions that they have declared not as the reasonings by which they came to these conclusions. Whereas in the course of their deliberations they very likely considered both the pros and cons of the issues before them, these documents do not constitute a record of their deliberations. In their statements we are given only those points that support their judgements or conclusions. So we need not be in any doubt as to the thrust of their statements or their relative positions on the subject. McLachlin supports assisted suicide and Sopinka opposes it and we may view their statements in this light.

One effect of their statements being something of the nature of an explanation of their conclusions rather than an account of the way that they reached their conclusion , is that they appear to acting as spokesmen for their particular side. We assume that they were acting in a mediate role in reaching their decisions. However, in his statement, Sopinka appears, at times to be speaking as if the court's interests and the state's interests are one and that the court is speaking on behalf of the state. Similarly, McLachlin can often be seen to be speaking as if hers and Rodriguez' interests are the same.

The second point concerns the term of reference. Throughout their analyses, the justices explain their decisions in terms of the concepts of interests and rights and the relations of

the concepts interests to rights, laws, and principles to each other. These concepts are inter-connected in what I perceive as a type of relational framework and it is around this framework that I structure my analysis of the statements of the two justices.

I will not attempt to justify or to refute their use of the terms, only to describe them. Moreover, as I have no particular disagreement with the way in which they are used in this context, I will use the terms in the following way in my analysis of their statements. An interest is presupposed by a right and the right, in turn, protects the interest from which it is derived or inferred. However, rights do not govern behaviour, rules or laws do. Therefore, where a legal right imposes an obligation or a duty on others, laws or rules may be made to protect or enable the right. For these laws to be moral they must be justifiable by appeal to ethical principles. For example, assume that one has an interest in owning property, and from this interest, a right to own property is derived. Laws or rules of a protective and, or enabling nature such as, laws against damage, trespass, theft, and so on, are then created to protect this right. These laws or rules of behaviour are entailed by, and are, in turn, justified by appeal to, an ethical principle of autonomy that includes the principle that one ought to be free to own property.

This last condition indicates that there is an additional relation between the interest and the moral principle. There is a presupposition of consistency for the sake of credibility

here in as much as one cannot credibly pursue an interest that is inconsistent with the relevant moral principle that one holds. To refer back to the example, one could not plausibly declare an interest in private property thereby making a claim to the right to own property in order to protect one's interest, and also hold to a moral principle that ownership of property ought to be communal. Nevertheless, we recognize that no principles are absolute and so we do accept apparent inconsistencies such as communists owning property and capitalists advocating such things as state owned utilities.

When we analyze the arguments of Sopinka and McLachlin in terms of this relational framework, we can see that the important issues in the Rodriguez case can be reduced to three. The first concerns the interests which are properly represented by the right to life. As the definition of the 'right to life' is largely a reflection of the interest that it is created to protect, the definition is dependent upon whether it is the state's or Rodriguez' interests that are perceived as being protected. The first issue then, is whose interests should be protected by the right to life, those of the state or the individual?

The second point pertains to the relation between the legal right and the law. The question is whether the prohibition on assisting with suicide contained in s.241 does, in fact, protect and, or enable the right as defined in the expression 'right to life.' It seems apparent that since there is an interest-dependent range of possible definitions for the right to life, it is unlikely that s.241(b) will prove to be

compatible with all of them.

The third issue is this. What ethical principle is being appealed to, in order to justify the law that is involved and is it consistent with the interest? Again it is a question of the compatibility of s.241(b), not with the right to life as in the second condition, but with a moral principle that is consistent with the interest involved. For instance, a prohibition on assisting with suicide may be justifiable by appeal to an ethical principle of life in which the inviolability of life predominates. However, if the autonomy or the quality of life of the individual is the predominant feature of the ethical principle, the prohibition cannot be perceived to be justified.

It is clear that the issue of interest is a principal element of the relationship just described, and this is certainly true of the two legal arguments that we are reviewing. Both Justice Sopinka and Justice McLachlin recognize that the basic problem is the conflict between the interests of the state and the interests of the individual, Rodriguez.

Obviously, if the interests that are expressed are disparate, the rights that are derived from these interests will be disparate. This will have an effect on the interpretation rendered of s.7, that is, each party will have a different interpretation of what is protected by s.7. And, since each interpretation will mandate that a procedure that meets the requirements dictated by a particular interpretation be followed, this, in turn, will affect the petition process.

And, as we examine the statements of and McLachlin, we can see that this is exactly the situation that occurs. The two justices each perceive that different and opposing interests are engaged, and from this, they define the rights given in s.7 differently. This results in differing interpretations of s.7, thence, to differing views of the review process to be followed.

McLachlin begins with the understanding that it is the individual's rights that are engaged when the case is one that is concerned with human rights. To her, the rights to life liberty and security of person are rights that are given by s.7 are those that are inferred from the interests of the individual appellant.

For McLachlin, this means that the problem is one of determining what rights accrue to Rodriguez under the terms of s.7. This involves giving definition to Rodriguez' rights to life, liberty and the security of person and determining whether the infringement upon these rights by s.241(b) is within the limits of the principles of fundamental justice.

Justice McLachlin believes that it is at this point, following the resolution of the individual's rights under s.7, that the balance between the interests of the individual and those of the state is properly struck when s.1 of the *Charter* is under consideration. It is at this time that it is determined whether limits that can be justified in a free and democratic society are warranted. Section 1. of the *Charter* states that:

> The *Canadian Charter of Rights and Freedoms*

> guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[9]

The important points in this process are that, first, the appellant need only prove that her rights at s.7 are infringed by s.241(b). And secondly, the onus is on the state to demonstrate that under s.1, the infringement is justified and serves the interests of the state. McLachlin concludes that under s.7, Rodriguez has the right to assisted suicide. And, furthermore, the state cannot demonstrably justify that an infringement of these rights is within limits that are reasonable in a free and democratic society.

On the other hand, Justice Sopinka perceives Rodriguez' appeal in the light of an entirely different interpretation of the *Charter*. Sopinka believes that the balance between the interests of the individual and the state is achieved among the elements of s.7 itself. The rights accruing to the individual are determined by considering the state's interests in the right to life and the individual's interests in liberty and security of person. Then, it must be determined that these balanced rights fall within the limits of fundamental justice. That is, when it happens that the rights claimed by the individual are infringed upon by the rights claimed by the state, the individual must demonstrate that the infringement is not within the conditions of fundamental justice.

This interpretation of s.7 results in a markedly different process from that envisioned by Justice McLachlin, who believed that s.7 was defined in terms of the individual's

interests. For Sopinka, while the interests of Rodriguez are considered under the rights to liberty and the security of person clauses of s.7. it is the state's interests that are reflected in the definition of the right to life clause. This means that the appellant must demonstrate that s.241(b) not only violates her rights under liberty and security of person, but also the state's rights under the right to life. If Rodriguez shows that her rights are violated, but cannot show that the state's rights are violated, then she must prove that her interests are prior to those of the state. For Sopinka, s.1 is not engaged in this case. The entire judgement is made in terms of s.7. He concludes that whereas Rodriguez does demonstrate that her rights to liberty and security of person are violated by s.241(b), she does not demonstrate that the right to life clause is. Therefore, as she does not succeed in demonstrating that her interests in s.7 are prior to the state's interests in s.7, Sopinka finds that the infringement represented by the retention of s.241(b) is within the bounds of the principles of fundamental justice.

The McLachlin process divides the burden of proof between the two parties. Rodriguez is required to prove that her rights are unjustly infringed upon while the state must prove that the infringement is justified in virtue of the state's interests. In contrast, the Sopinka process places the entire burden of proof upon Rodriguez.

The different perception that each of the justices has with regard to this case is, in all likelihood, a direct consequence of the theory of life to which each holds.

McLachlin subscribes to a theory of life in which one is free to make choices based upon one's own estimation of one's quality of life. This includes the freedom and the right to choose death with dignity by preempting the course of nature and being assisted with suicide. On the other hand, Sopinka holds to a sanctity of life theory which excludes the freedom to choose to die. Although, as we shall see later in this chapter, while not to be free to choose to die means that one is forbidden to choose suicide, one is not forbidden to choose to reject medical treatment, even though it may result in one's death.

In any event, these underlying presuppositions concerning the nature of life, influence the way in which s.7 is interpreted by McLachlin and Sopinka. This in turn, dictates the requirements that Rodriguez must meet to satisfy her appeal in the eyes of the court and the form of the appeal process itself.

Summarizing the right to life arguments of Justice McLachlin and Justice Sopinka in terms of the relational framework described earlier, Justice McLachlin perceives that the interests that ought to be presupposed by s.7 are those of Ms. Rodriguez. The meaning of 'life' in the right to life clause of s.7. is derived from the interests of Ms. Rodriguez. Rodriguez' rights as represented by s.7 are considered by McLachlin to be violated by s.241(b). Moreover, s.241(b) cannot be morally justified by the quality of life principle to which McLachlin and Rodriguez subscribe. For Justice Sopinka on the other hand, the interests of the state are

considered when defining the right to life. Thus, these rights are not violated by s.241(b), but are appropriately protected and enabled by s.241(b). In addition, the conditions of s.241 are morally justifiable by appeal to the sanctity of life principle to which Sopinka subscribes.

Justice McLachlin

As we have just seen, there is a marked contrast between the approaches taken by McLachlin and Sopinka both in the way in which they interpret the sections of the constitutional act and the way in which they view Ms. Rodriguez' petition. Sopinka understands Ms. Rodriguez' petition as a request to be allowed to choose death over life. On the other hand, McLachlin believes that Sopinka is wrong. Ms. Rodriguez is not choosing death; the choice has been made for Rodriguez by fate, or nature, or whatever. The choice of life or death is not one that it is given to Rodriguez to make. McLachlin believes that the purpose of Ms.Rodriguez petition is that she be allowed to determine the time and manner of her dying, not whether she will die. She recognizes that her death is inevitable and imminent and that the most she can do is to exercise some degree of control over the circumstances in which it takes place.

McLachlin accepts the inevitable nature of Ms. Rodriguez' death as a justification for her request. She argues that as persons who are not physically handicapped are free within the law to commit suicide, a law that prevents physically handicapped persons from doing so violates that person's

rights under s.7. Parliament has passed laws that have created the situation whereby the act of suicide is lawful while the action of assisting with suicide is criminal.[10] The effect of this is that persons such as Ms. Rodriguez are denied the choice of ending their lives as others who are not handicapped are able to do, because they do not have the physical capacity to do so. Thus, Rodriguez is deprived of the right to make decisions about her body which is given by the security of person clause of s.7.

For McLachlin, the purpose of s.7 is to protect the interests of the individual. The purpose of s.7 is to ensure "human dignity and individual control, so long as it harms no one else."[11] The *Charter* recognizes that each person has a right to make decisions concerning his or her own body and s.7 protects these rights in law. The autonomy of the individual is upheld by the security of person clause which protects the individual's interest in their dignity and privacy. Section 7 safeguards one's freedom to exercise control over one's body, and this control includes the right to make choices concerning one's death. The right to life clause of s.7 presupposes Rodriguez' interests with respect to life. It is Rodriguez' interest in her own life, just as it is Rodriguez' interest in her own liberty and security of person, that is protected by s.7. This is the purpose of s.7, for McLachlin, to protect the interests of the individual.

McLachlin contends that part of the control over one's own life given at s.7 is the right to determine the value of one's own life when making decisions concerning one's life.

> ... what value is there in life without the choice to do what one wants with one's life... . One's life includes one's death Different people hold different views on life and on what devalues it. For some, the choice to end one's life with dignity is infinitely preferable to the inevitable pain and diminishment of a long, slow decline. Section 7. protects that choice against arbitrary state action which would remove it.[12]

When claiming rights under s.7, it is the right of the individual to define the life that is protected by the right to life clause. As McLachlin contends, the lives of some individuals are so little valued by the individuals themselves, that they may choose, and have the right to choose, to die. No other party has the right to make the evaluation of one's life or one's choice of living or dying. The evaluation of an individual's life and the choice made on the basis of that evaluation are actions that are controlled by the individual.

McLachlin recognizes that the rights given under s.7 are not absolute. They may be denied in accordance with the principles of fundamental justice.[13] This requires a judgement by the court to determine whether Rodriguez' rights under s.7 are violated by s.241(b), or any infringement of Rodriguez' rights is justified.

In McLachlin's view, in cases in which s.7 is involved, it is necessary that when arriving at the principles of fundamental justice that apply to a particular case, the principles require that each person, as an individual, must be treated fairly by the law. This means that the law must be judged as it applies to the individual, Rodriguez, not as it

applies to a class or a category of persons. She draws a parallel between the Rodriguez case and that of Dr. Morgentaler in which it was accepted that a legislative scheme which arbitrarily infringes on the rights of an individual violates the right of the individual. A law is deemed arbitrary if it bears no relation to, or is inconsistent with, the objective for which the legislation is intended and McLachlin contends that in its application to Rodriguez, s.241(b) is arbitrary. She argues that the intended objective of s.241(b) is not to prevent suicide - suicide is not prohibited by the criminal code; consequently, the objective of the state cannot be to prevent suicide and it follows that the law is arbitrary. Ms. Rodriguez' requires assistance to commit suicide and is prevented from doing so because of s.241(b), a law that is not intended to prevent people such as her from committing suicide, but nevertheless, has that effect.

According to Sopinka, the state's interest in upholding s.241(b) is justified as it prevents the "vulnerable who might be induced in moments of weakness to commit suicide."[14] Sopinka expresses his concern for those whose condition leaves them open to the influence of others which would result in them choosing suicide when they would otherwise choose to continue living. He is concerned that unless the prohibition of assisted suicide is absolute, suicide be used as a cover for murder. The weak may be coerced, or pressured into opting for suicide by others for their own interests. However, McLachlin's point is that in protecting the weak and the

vulnerable it prevents others such as Sue Rodriguez, who are not vulnerable or acting in a moment of weakness, from doing what persons who are not handicapped are free to do. For this reason, McLachlin holds that s.241(b) is arbitrary and violates the rights to which Sue Rodriguez is entitled under s.7. Thus, Ms. Rodriguez, as an individual, is not seen to be treated fairly by the law as the principles of fundamental justice require, and s.241(b) constitutes a breach of these principles.

According to McLachlin, it is at this point, after it has been determined that the individual's interests have been set aside by the violation of his or her rights under s.7, that the state's interests are weighed against those of the individual under section 1 of the *Charter*. Her decision, that there was a breach of fundamental justice caused by a violation of rights provided under s.7, must now be considered in the terms s.1 of the *Charter* to determine if the conditions of reasonable limits apply. That is, the state must demonstrably justify that the limits imposed upon Ms. Rodriguez' rights, are limits acceptable in a free and democratic society. Moreover, by considering the state's interest under s.1 instead of s.7, the burden of proof is placed upon the state where it rightfully belongs. When the state's interests are considered under s.7 as Sopinka does, the responsibility falls upon the individual to demonstrate that his or her interests are arbitrarily violated by the state. This is a responsibility, McLachlin argues, it is inappropriate to place upon an individual when the *Charter* is

an issue.

In her argument against the justification of s. 241(b) in terms of s.1, McLachlin reiterates her point that the purpose of s.241(b) within the *Criminal Code* cannot be to prevent suicide, as suicide is not a crime. She also offers counter-arguments against the concerns expressed by Sopinka for the protection of the vulnerable which Sopinka believes serve to justify s.241(b). Sopinka declares his concern for those whose condition may make them a victim of unscrupulous persons. McLachlin responds that the use of coercion, force or duress to compel someone to commit suicide falls under s.241(a) which prohibits counselling to commit suicide and will remain in force even if s.241(b) is set aside. McLachlin further notes that in this view, s.241(b) is not intended to prohibit suicide, which is the stated purpose of the act, but murder. The crime of murder is properly addressed by laws that deal with murder, not suicide.

She makes the following comment:

> I entertain considerable doubt whether a law which infringes the principles of fundamental justice can be found to be reasonable and demonstrably justified on the sole ground that crimes other than those which it prohibits may become more frequent if it is not present.[15]

In other words, McLachlin cannot see that the violation of Ms. Rodriguez' rights by the conditions of s.241(b) can be justified on the ground that if the prohibition of assisting with the lawful act of suicide were to be struck down, there would be an increase in the number of murders taking place. For example, there is no doubt that the number of motor

vehicle accidents could be reduced if the consumption of alcohol were prohibited, but the prohibition of the consumption alcohol could not be justified on these grounds.

McLachlin states that the second reason that Sopinka offers as justification for upholding s.241(b) is that, in moments of depression, persons may be influenced or persuaded to suicide. McLachlin argues that it is the nature of suicide that it is an act that is carried out by people who are experiencing depression and, hence, vulnerable, and yet suicide is not regarded as criminal conduct. I do not take it that McLachlin means by this that we should offer assistance to commit suicide to all persons experiencing depression. But, there are cases, such as those of Sue Rodriguez and others who suffer from a terminal disease, where depression is appropriate and being depressed should not bar them from assistance. Certainly a depression brought on by three bad hair days in a row would be grounds for disqualification, But, at the same time, it would be somewhat ridiculous to set a requirement that all those who seek assistance to commit suicide must be cheerful. There is a sense that a rational decision cannot be made when one is in an emotional state. But we do not prohibit marriage to all those who are in an emotional state of love and must, therefore, be behaving irrationally. And we certainly do not forbid athletes from entering into long-term, multi-million dollar contracts because they are excited and obviously unable to think straight.

There needs to be a distinction made between the assessment made of emotions when they are appropriate to the

circumstances and when they are not. All depression cannot be considered as a sign of mental incompetence. I would suggest that the competence of someone who is aware that they have an incurable, fatal condition and is happy with their prospects is more to be questioned than someone who is depressed. Also, there are degrees of emotions within what we call depression that need to be considered. These run from moody, sad, despondent, and so on, to crushed and broken in spirit. When describing a person as depressed, the degree and the appropriateness of the depression should enter into any assessment about whether the person is in a condition of weakness and vulnerability. It is a mistake to characterize everyone who exhibits emotions of a depressed nature when faced with a certain death of a horrible nature as weak and vulnerable. Toward the end of her life I would describe Ms. Rodriguez as very depressed. However, I would suggest that it was an appropriate reaction to her circumstances and, furthermore, that she was strong and courageous to the end.

McLachlin also points out that s.241(a) prohibits counsel to commit suicide which protects those who are genuinely weak and vulnerable. Section 241(a) prohibits counselling to commit suicide of any kind, well-meaning or malicious, and this law will remain in force regardless of the disposition of s.241(b).

McLachlin concludes that Ms. Rodriguez' has been deprived of her right to assisted suicide and that there are no reasons for so depriving her that can be justified in a free and democratic society. There are sufficient measures existing in

law to prevent the crimes that some anticipate would be committed under cover of assisted suicide. To penalize Ms. Rodriguez by denying her the right to assisted suicide in order to preclude the chance of such crimes occurring, is arbitrary and constitutes a breach of fundamental justice.

Justice Sopinka

The difference between what Justice Sopinka and Justice McLachlin perceive as the correct procedure to follow when s.7 is involved centres around the issue of the state's interests. We have seen that McLachlin maintains that only the individual's interests are involved in s.7. If it is determined that the individual's rights under s.7 have been violated, the conflict, if any, between the interests of the individual and the state are resolved under s.1.

On the other hand, Sopinka understands that s.7 involves two stages of analysis. The first stage is concerned with "the values at stake with the individual." The second stage is concerned with the "possible limitation of those values" by the principles of fundamental justice which requires "a balancing of interests of the individual and the state."[16] If it were to be determined from this two stage analysis that under s.7 the interests of the individual prevail, the conflicting interests would then be examined in terms of the s.1. Here, the interests of both parties are again considered when a determination of whether the objective of the legislation is valid and the effects of the limitations are proportionate to the objective. For example, a total

prohibition of the use of alcohol to eliminate drunk driving would not be considered proportionate.

Sopinka's notion of what constitutes a breach of fundamental justice includes the state's interests as a condition. Whereas McLachlin is of the opinion that a limit is arbitrary if "it bears no relation to, or is inconsistent with, the objective that lies behind it," Sopinka believes that the relationship between the law and the state's interest must be considered. In this instance it must be determined:

> whether the blanket prohibition on assisted suicide is arbitrary or unfair in that it is unrelated to the state's interest in protecting the vulnerable, and that it lacks foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition. [17]

It is evident that in the procedure followed by Sopinka, the state's interests are considered at every step. In addition, the burden of proof placed upon the individual by the requirements of Sopinka's process are far greater than that required by McLachlin's.

I believe that it is reasonable to characterize the position taken by Justice Sopinka as orthodox. Throughout his statement he emphasizes the perspectives of tradition and the status quo and refers to conventional and historical authorities. In addition, his arguments are grounded in traditional ethical principles, such as, the sanctity of life and the doctrine of double effect.

He does not begin from a mid-way or neutral position and proceed to weigh the interests of Ms. Rodriguez against the interests of the state. He takes the current status of

assisted suicide in legal and medical practice as his point of departure. It is very obvious that it is his view that the appellant has the burden of demonstrating that there is reason to move from that point. The following passage reveals his attitude towards the issue and also that his judgement is influenced by what he describes as a "deeply rooted belief" that he believes is shared by most Canadians. When speaking of Rodriguez' appeal under the right to security of person component of s.7, he makes the following statement:

> I find more merit in the argument that security of person, by its nature, cannot encompass a right to take action that will end one's life as security of the person is intrinsically concerned with the well being of the living person. This argument focuses on the generally held and deeply rooted belief in our society that human life is sacred or inviolable (which I use in the non-religious sense ... to mean that human life is seen to have a deep intrinsic value of its own). As members of a society based upon respect for the intrinsic value of human life and on the inherent dignity of every human being, can we incorporate within the constitution which embodies our most fundamental values a right to terminate one's own life in any circumstances? This question in turn evokes other queries of fundamental importance such as the degree to which our conception of the sanctity of life includes notions of the quality of life as well.
>
> Sanctity of life ... has been understood historically as excluding freedom of choice in the self-infliction of death and certainly in the involvement of others in carrying out that choice. At the very least, no new consensus has emerged in society opposing the right of the state to regulate the involvement of others in exercising power over individuals ending their lives.[18]

The "generally held deeply-rooted belief that life is sacred or inviolable," which he clearly shares, can be perceived as underlying each step of Sopinka's reasoning. The belief that life is inviolable influences his view of the

following: the nature of the state's interest, the definition of the legal right to life, and the propriety of s.241(b). If McLachlin's thesis of the nature of life can be correctly characterized as one which is grounded in the moral principle of the autonomy of the individual, it is correct to characterize Sopinka's as one which is grounded in the moral principle of the sanctity of life.[19]

Sopinka makes the point that although Rodriguez' appeal is made in terms of the violation of her rights to liberty and security of person, these cannot be viewed apart from the third right, the right to life. He makes the statement

> The appellant seeks a remedy which would assure her some control over the time and manner of her death. While she supports her claim that her liberty and security of person interests are engaged a consideration of these interests cannot be divorced from the sanctity of life which is one of the three *Charter* values protected by s.7.[20]

I assume that he is using the expression 'the sanctity of life' within the previous quotation to mean life as a thing of sacred or inviolable value. If this is correct - and it is certainly not at odds with any other of Sopinka's statements - clearly Sopinka believes that the nature of the life referred to in 'the right to life' as given at s.7 is a life that is sacred or inviolable.

When he refers to the sanctity of life as a value protected by s.7, he appears to be saying that the sanctity of life is an interest, an interest that is protected by the legal right to life of s.7. This agrees with the relational framework

discussed earlier in which the relation between rights and interests is that rights protect interests. Also, Sopinka's claims that "human life is sacred or inviolable" and that it has a "deep intrinsic value of its own" is in keeping with this conclusion. So, while he treats the rights of liberty and security of person as those of the individual, he indicates that he believes that the interests that are involved in the right to life clause are not those of the individual. Instead, he seems to attribute them to "members of a society based upon respect for the intrinsic value of human life and on the inherent dignity of every human being [the sanctity of life]." At any rate, nowhere does Sopinka encourage the idea that the right to life reflects the interests of the particular individual, as do the other rights to liberty and security of person of s.7.

Sopinka's analysis of Rodriguez' rights under s.7 concentrates on the relation between the law and the moral principle - the moral justification of s.241(b) under the moral principle of the sanctity of life. He finishes the first stage of his analysis, which is concerned with the values at stake with the individual, by having somewhat vaguely defined Rodriguez' rights under s.7 as a right to security of person that "by its nature, cannot encompass a right to take action that will end one's life" and a right to life grounded in the "deeply rooted belief in our society that human life is sacred or inviolable." In the second stage, which is concerned with the possible limitation of those values by the principles of fundamental justice, he proceeds by, first, justifying the

principle of s.241(b) by an appeal to the moral principle of the sanctity of life. Secondly, he explains that the social practice of prohibiting assisting with suicide as a means to protect the vulnerable within society, is a practice which has a long standing in the history of western society, is a practice that is followed by nearly all western democracies at this time, and is supported by nearly all western legal and medical authorities. The exception among western nations is the Netherlands, where, according to unnamed critics, they are experiencing a rise in the number of nonvoluntary doctor assisted deaths. This is exactly what was feared such a practice would lead to and confirms the prudence of the others in not allowing assisted suicide. He acknowledges that, while there are specific cases such as that of Rodriguez which may appear to warrant a relaxation of the prohibition, it cannot be allowed in any circumstances. He makes the following statement when speaking of the practices current among western nations:

> It can be seen therefore, that while both the House of Lords and the Law Reform Commission of Canada have great sympathy for the plight of those who wish to end their lives so as to avoid significant suffering, neither has been prepared to recognize that the active assistance of a third party in carrying out this desire should be condoned, even for the terminally ill. The basis for this refusal is twofold it seems - first, the active participation by one individual in the death of another is morally and intrinsically wrong, and second, there is no certainty that abuses can be prevented by anything less than a complete prohibition. Creating an exception for the terminally ill might therefore frustrate the purpose of the legislation of protecting the vulnerable because adequate guidelines to control the abuse are difficult or impossible to develop.[21]

Both of these reasons for refusal can be seen to be connected to the principle of the sanctity of life. The first as being inferred from the principle and the second as a reason for upholding the principle. As I have said earlier, the principle underlies much of Sopinka's reasoning. Clearly, he leans heavily on it in order to justify his decision that the principles of fundamental justice override any rights that Rodriguez has with respect to assisted suicide. In fact, s.241(b) and the sanctity of life seem to be issues that are so closely associated to each other in Sopinka's account, that his analysis appears to be as much a justification of the principle of the sanctity of life as it does a justification of s.241(b).

In his concluding remarks of his analysis of the matter of s.7, he claims that:

> Canada and other Western countries recognize and apply the principle of the sanctity of life as a general principle which is subject to limited and narrow exceptions in which notions of personal autonomy and dignity must prevail.[22]

The narrow exceptions to which he refers are those that fall into the category of passive euthanasia, the withholding of, and the withdrawing of life-sustaining treatment, and deaths that occur in the course of palliative care. Previous courts have judged these actions to be lawful and among the rights of the individual under the *Charter*. However, Sopinka defends the distinction between the acts of passive euthanasia and active euthanasia as a sort of crossing of the Rubicon. In effect, if the distinction cannot be maintained, the principle

of the sanctity of life cannot be perceived as having any function in our society except in those crimes that we classify as homicides, an important, but, nonetheless fairly restricted category. He defends the differentiation made between withdrawing and withholding treatment, and more active measures by calling on the killing-letting die distinction, and he distinguishes between death during the course of palliative care and active euthanasia on the basis of the doctrine of double effect.

Conclusion

Both McLachlin and Sopinka agree that respect for life is one of the fundamental principles on which our society is grounded. However, McLachlin appears to believe that the principle of respect for life, on which the right to life in s.7 is grounded, includes both our right that our life be protected, and our right to exercise autonomous control over our lives. Moreover, this is in accord with the other rights given at s.7, the rights to liberty and the security of person which guarantee individual autonomy. In order to support his argument against the autonomy of the individual in the matter of his or her life, Sopinka takes the somewhat implausible step of setting the right to life in conflict with the autonomy given by the right to liberty and the right to security of person.

I believe that Justice McLachlin's method of handling of the issue is the more judicious of the two. Not simply because her conclusion agrees with the position I have already

declared for myself on the question of euthanasia, but her approach is more appropriate to the issue before the court than is Justice Sopinka's. The issue centres on the application of s.7, which is the section dealing with individual rights. This is a situation that seems to call for a focus upon the interests of the individual. Not that all others should be excluded, but when s.7 is invoked it seems appropriate that the interests of the individual must be clearly defined before they are balanced against competing interests. Justice McLachlin believes that the correct approach is to first consider Rodriguez' interests in terms of s.7. Then, to balance Rodriguez' interests against the interest of the state in terms of the rights accruing to the state under s.1. of the *Charter*.

Ms. Rodriguez must only demonstrate that her rights under s.7 are infringed by s.241(b) and that this infringement is not in accordance with the principles of fundamental justice. For McLachlin this requires that the individual demonstrate to the court that she is not being treated fairly by the law. It does not require that she demonstrate that the consequences to society of this decision are not contrary to the interests of society. The state must demonstrate under s.1 that the consequences of the decision taken under s.7 harm the state's interests in a manner that is disproportionate to the benefits to the interests of the individual.

This appears to be a reasonable approach to an issue of individual rights considered under the *Charter of Rights and Freedoms*. First, the individual must demonstrate that her

right claim is legitimate, then, if this is successful, the state must demonstrate that there are overriding reasons, based on the public interest, to reject the claim, or the state must allow it.

Justice Sopinka takes an entirely different approach. One that I contend is not appropriate to a case in which the issue involves individual rights under the *Charter*. Sopinka believes that the balance of the interests of Rodriguez and the state is struck at s.7 itself. Defining the individual rights in terms of the state's interest at this stage has the effect that the individual's interests protected by s.7 are watered down in the definition of rights. This can be seen in the very narrow definition that Sopinka gives to the rights to assisted suicide that Rodriguez can claim under s.7. The security of person clause is limited by the condition that security of person itself, by definition, excludes the right to suicide. Further, the security of person clause cannot be separated from the right to life clause which is defined in terms of the principle of the sanctity of life that also prohibits suicide. Then, this already tightly constrained definition is further conditioned by the need to balance these individual rights against society's interest in the principles of fundamental justice, which he perceives as the interest to protect the vulnerable from assisted suicide.

The task that Sopinka sets for Rodriguez is to demonstrate that her rights under s.7 are infringed upon by s.241(b) and that this infringement is not in accordance with the principles of fundamental justice. To do this she must

convince the court that her claim to assisted suicide is not beyond the definition of her rights as given by the state which, as we have seen, excludes suicide as legitimate right. If she were to somehow succeed at this then she must demonstrate that her right to assisted suicide overrides the interest that society has in protecting the weak and the vulnerable from suicide.

When we consider that Sopinka excludes the right to suicide from what Rodriguez may claim under the right to life clause of s.7, and, having done this, places the upon her the burden of demonstrating that s.241(b) which prohibits the right to assist with suicide violates this right, we can understand why Sopinka believes that it is not necessary to consider the state's interests under s.1. There appears to be nothing left of the state's interest to consider at s.1, that has not already been adequately covered in the consideration of s.7

I believe that Justice Sopinka has demonstrated that his method of considering the Rodriguez appeal was not appropriate to an appeal made under the *Charter of Rights*. In this case Sopinka places the entire burden of proof upon the individual while at the same time setting the interests of the state in conflict with the interests of the individual. I believe that his conduct of the trial shows that he has allowed his own deep rooted beliefs in the sanctity of life and the immorality of suicide to influence his interpretation of the law in such a manner as to prevent Ms.Rodriguez from receiving a fair trial

CHAPTER 2

THE MORAL ARGUMENT

The Moral Issues

McLachlin's and Sopinka's legal theories appear to be grounded in two opposing moral theories. McLachlin is obviously a deontologist. She believes that as an autonomous moral agent the individual must be free to make the moral decisions that concern his or her life, and this includes the decision of whether or not to die at a time of one's own choosing. Sopinka, on the other hand, is clearly a consequentialist. One has the impression that throughout his judgement he was not so much concerned with the question of Rodriguez' autonomy - which would be an appropriate concern in a case concerning the *Charter of Rights and Freedoms* - as he was with how to prevent these rights and freedoms from interfering with, what he believed to be, the state's interests in preserving the sanctity of life principle as the principle underlying the laws concerned with life in our society. He holds the opinion that the consequences of abandoning, or further compromising the sanctity of life principle will cause harm to society in general. Therefore, whatever harm will come to Ms. Rodriguez as a consequence of having her appeal denied is outweighed by the benefits to society of upholding the sanctity of life principle.

As we have seen, McLachlin does not concur with either

Sopinka's consequentialist moral theory or with his belief in the principle of the sanctity of life as an overriding moral principle. I am in full agreement with McLachlin on this last count at least. I made it clear in my introduction that I agree with assisted suicide in the context of voluntary active euthanasia. Throughout this chapter, I will argue against the principle of the sanctity of life and the two principles which are used to support it in the medical context, the doctrine of double effect, and the killing-letting die distinction.

I believe that to use the principle of the sanctity of life to deny the individual the right to choose the end that is acceptable to the individual, is not morally justifiable. The principle is invoked to deny to the individual the autonomy to control his or her own life on the grounds that there is a higher interest than that of the individual which must be served. Whether the alleged higher interest be God, as the religious claim, or some sort of societal conscience as those such as Sopinka claim, the result is the same. In either of its guises as a religious principle or a secular principle, it is used to deny the right to death to an individual seeking euthanasia, thereby condemning the individual to a type of death that is chosen for him or her by others on the grounds of their beliefs.

The sanctity of life principle has its roots in religious theology. However, in order for Sopinka to use it in an argument which involves constitutional law, there is a requirement to establish the principle of the sanctity of life as a secular moral principle, not a religious principle. This

would be necessary to avoid violating the freedom of religion rights of the *Charter* given in s.15.

Sopinka refers to three sources which present a secular version of the principle of the sanctity of life: Ronald Dworkin's *Life's Dominion*[23]; two Law Reform Commission papers, the Law Reform Commission Report Working Paper 28 *Euthanasia Aiding Suicide, And Cessation Of Treatment*[24]; and a research document prepared for the commission in preparation for the report by Edward Keyserlingk, *Sanctity Of Life Or Quality Of Life.*[25]

Sopinka's line of argument takes the following course: he invokes the doctrine of double effect to demonstrate that intention constitutes the criterion for distinguishing between actions that are morally justified and those that are not. He then presents the doctrine of double effect, along with an argument from cause, in support of the claim that there is a moral relevance in the distinction made between killing and letting die;[26] This, in turn, is used to support the principle of the sanctity of life,[27] which he justifies by the wedge or slippery slope argument.[28] I propose to follow this line of Sopinka's argument and examine these three moral concepts in turn beginning with the doctrine of double effect.

The Doctrine of Double Effect

In the context of social ethics, the doctrine of double effect provides a way out of the absolutism dictated by the sanctity of life which underlies the moral injunction "do no harm." If life is sacred, how does one morally justify killing

in war or self-defence, for example? The doctrine of double effect allows for the moral justification of an action in terms of the intended consequence under certain conditions. This provides a means of qualifying the sanctity of life principle so that it is possible to morally justify killing in war, or self-defence, and at the same time claim to adhere to the principle of the sanctity of life, that life is sacred.

In the context of medical ethics, the doctrine of double effect is used in an attempt to justify deaths that occur in the course of palliative care and to distinguish between the act of killing and letting die when death occurs from the withdrawal or the withholding of medical treatment. I contend that while the doctrine of double effect may serve its intended purpose of allowing us to distinguish between acts which are legally justified in the context of war and self-defence, it does not serve the same function in the context of biomedical ethics when doctor-initiated deaths, such as palliative-care deaths,[29] and the withholding and withdrawing of medical treatment are involved. I wish to emphasize that I do not claim that the doctrine of double effect is nonfunctional in all cases, only that it does not serve the function for which it is intended in those areas of biomedical ethics that I have mentioned.

The doctrine, or principle of double effect is often attributed to St Thomas Aquinas, who, if he is not the originator, is the one who gave it definition and a theological pedigree.[30] There are many versions of the doctrine, however, in the discussion of the doctrine of double

effect that follows, I shall be referring to the following definition presented by Beauchamp and Childress which has the advantage that it frames the definition in terms of biomedical ethics:

> There is a morally relevant difference between the intended effects of a person's action and the nonintended though foreseen effects of the action. An act of killing the innocent is wrong in itself, but it may nevertheless be permissible to allow the bad effect of a person's death to occur if this effect is a nonintended consequence of an action performed for the sake of a good (and overriding) effect. The good effect is seen as direct and intended; the harmful effect is seen as indirect, unintended, or merely foreseen.[31]

The authors also define four qualifying conditions:

> 1. The action itself (independent of its consequences) must not be intrinsically wrong (it must be morally good or at least morally neutral).
> 2. The agent must intend only the good effect and not the bad effect. The bad effect can be foreseen, tolerated and permitted but it must not be intended: it is allowed but not sought.
> 3. The bad effect must not be the means to the end of bringing about the good effect.
> 4. The good result must outweigh the evil permitted; there must be a proportionality or a favourable balance between the good and the bad effects of the action.[32]

While the doctrine seems to be an indispensable part of any argument about euthanasia or the sanctity of life, it is not accepted as a useful principle by everyone. Nagel criticizes arguments that rely on the doctrine because its use depends on the particular description of the act.[33] And, in their critique of the doctrine, Beauchamp and Childress criticize it for much the same reason:

> Adherents of double effect need an account of intentional actions and intended effects of action that allows them to be distinguished in just the

> right way from nonintentional actions and unintended effects.[34]

I believe that this is more than a problem with the doctrine. It means, as I have already said, that it serves no useful purpose in the field of medical ethics and this is the point that I intend to demonstrate in this section. If the doctrine of double effect itself is defeated, then there is no morally relevant distinction that can be made between killing in palliative care and killing in active euthanasia for moral or legal purposes. It follows from this, that the killing-letting die distinction must be seen to be a fiction.

There may be some question about the use of the word 'killing' in the expression 'killing in the name of palliative care'. However, according to *Webster's Encyclopedic Dictionary Of The English Language*, to kill is "1. v.t. to cause life to cease in". I believe that this avoids any confusion that is introduced by the use of euphemistic metaphors such as 'she passed away', 'she is gone', 'we lost her', and the equally euphemistic 'I let her die'. When someone is dead from being struck by lightning we say that she was killed by lightning. Similarly, when someone is dead from being injected with a lethal dose of medication of some kind, whoever administered the lethal dose killed her - in other words, is causally responsible for her death. Fault or blame for the killing, if any, are separate issues from killing and depend upon whether the killing is justified. Fault or blame are issues of moral and/or legal responsibility. This brings us back to the point that if the doctrine of double effect is to be of any value in

the biomedical context, it must provide us with a means of determining whether the killing is justified and I maintain that it does not.

From the definition given by Beauchamp and Childress, it is apparent that intention is the key element in applying the principle to a given situation. Let us first consider an actual example in the military context, the bombing of Dresden,[35] in which the doctrine appears[36] to function as it is intended. In the closing months of WWII, Air Marshall Harris, Commander of Allied Bomber Command in Europe, ordered an air strike on the German city of Dresden, a city of no strategic value. The planes were loaded with percussion and incendiary bombs which was not uncommon. However, in this particular raid the number of incendiary bombs was disproportionately large. Anyone who is familiar with this sort of thing is aware that incendiary bombs are used when the objective is to start fires and percussion bombs have the effect of destroying buildings and roads and disabling electrical and water service. In inhabited urban areas this has the effect of trapping people where they are. Emergency crews are prevented from reaching the damage sites to attend to casualties and fire vehicles cannot fight fires even if were able to reach the scene because the water mains are damaged. The raid resulted in the death of 140,000 mostly civilian inhabitants and the virtual destruction of the city.

In a case such as Dresden, the intention of the individual becomes manifest in behaviour that is observable, and a judgement may be made of his intentions from his actions. We

can conclude from the data of the planning and preparation that the bombing appears to be directed against a civilian population. In addition, there are the consequences of 140,000, mostly civilian inhabitants of a city of no strategic value being killed and the city itself destroyed that indicate that a crime has taken place, or at the very least that there is a possibility that a crime has taken place and an investigation is in order.

When there is tangible evidence as there is in this example, such that we can make a determination of the person's intentions based on his behaviour, the doctrine of double effect serves as a criterion of demarcation between actions that are morally justified and those that are not, based on a distinction between intended and unintended actions. The fact that, based on the tangible evidence, the intentions of the person who ordered the raid are being questioned almost forty years after the fact to determine whether the raid was morally justified attests to this. In this application, or ones similar, the doctrine can be seen to serve the function of distinguishing between an action that intends good but unavoidably causes harm and is morally justifiable and one that intends harm and is not morally justifiable, on the basis of the distinction between the intended consequence or effect and the nonintended effect.

Although it is generally accepted that the doctrine of double effect can perform the same function in the context of medical ethics that it does in military ethics, I submit that it does not. First, I suggest that justifications of

palliative-care killings that appear to depend on appeal to the doctrine of double effect for acceptability, are actually justified on the basis of other conditions. Second, the nature of doctor-initiated death itself precludes the use of the doctrine as a means of distinguishing between justifiable and unjustifiable killings.

In what appears to be a successful application of the doctrine of double effect in palliative care, a physician, Dr. Wanzer, speaking on behalf of a group of several fellow physicians invokes the doctrine of double effect in the following statement concerning the administering of pain killing medication:

> Narcotics or other pain medications should be given in whatever dose and by whatever route is necessary for relief. It is morally correct to increase the dose of narcotics to whatever dose is needed, even though the medication may contribute to the depression of respiration or blood pressure the dulling of consciousness, or even death, provided the primary goal of the physician is to relieve suffering.[37]

One of the conclusions that can be drawn from this statement is that in palliative care situations such as these, the care givers operate under the principle that relief from suffering is morally prior to causing death. Wanzer et. al. openly contend that, in palliative care, it is morally correct for a doctor to place the avoidance of suffering ahead of avoiding death. It would follow, I assume, that conversely, a doctor who allows suffering for the sake of maintaining life is morally incorrect. In other words, suffering is a greater harm than death. If Wanzer's is a correct representation of

the palliative care issue from the perspective of a practising physician, then it seems to point to the conclusion that the immediate relief of suffering brought about by active euthanasia is preferable to, and perhaps more moral than, the prolongation of suffering caused by extended palliative care. However, regardless of whether this last conclusion is accepted or not, according to Wanzer's priorities, both palliative killings and active euthanasia are the same kind of acts, that is, they are both justifiable choices of death over the alternative of suffering.

It may be argued that the doctor has not chosen death. He or she may want the patient to live longer but this is not possible. But, a person cannot be relieved of the responsibility for his or her actions because the end that was desired was not possible to attain, or because the end that was chosen was the end that was possible but not desired. This may serve as a justification for his or her choice, but it is not an argument that no choice was made or that he or she is not responsible for it.

Even if one does not concur with this description of the palliative care doctor as choosing death for his or her patient in the same way that a doctor who is performing euthanasia does, nevertheless, the practice advocated by Wanzer, which appears to be fairly common among palliative care-givers, demonstrates that it is perceived as a greater harm to allow a patient to suffer than it is to cause his or her death in an effort to relieve the suffering. (Incidentally, this is a practice that, although it is not law

in Canada, is supported by Justice Sopinka.[38])

The problem with the notion that in the context of palliative care, suffering is a greater evil than death and that killing in the course of relieving suffering is justifiable under the doctrine of double effect, is that it places the doctrine of double effect in the position of contradicting the principle of the sanctity of life which holds that the taking of human life is the greatest evil. However, the doctrine of double effect was developed for the purpose of supporting the principle of the sanctity of life in those contexts in which harm is unavoidable. The use of the doctrine of double effect in the context of palliative care implies two conclusions, either the doctrine of double effect does not support the principle of the sanctity of life, or the doctrine of double effect does not justify deaths that occur in the course of palliative care. The latter conclusion is the more obvious and also, as there are approximately eight centuries of philosophical accounts in which the doctrine of double effect can be found to be supporting the principle of the sanctity of life, the more probable. This rules out the possibility that palliative care killings are supported by the doctrine of double effect.

The second reason for my contention that palliative care killing are not justified by appeal to the doctrine of double effect concerns Wanzer's premise that it is the intended consequence or the "primary goal of the physician" that distinguishes between acts that are morally correct and acts that are morally incorrect. It is true that when a patient who

is in palliative care dies from a dose of medication given for the purpose of relieving pain, the doctor is not held to blame. However, it does not follow that because the patient's death is unintended by the doctor, that this is the reason that the doctor is not held to blame. I would argue that Wanzer's premise that it is false that the intention of the doctor (in his words, 'the primary goal') that is the determining factor of the moral correctness of the action.

Consider the same sort of situation where the patient is not under palliative care, for instance, a burn victim who is suffering horrible pain but does not meet the Wanzer criteria of "dying or hopelessly ill" because the pain is of a temporary nature. Even if the primary goal of the physician responsible for this patient's treatment was to relieve suffering, we would not feel that the physician was blameless if the patient were to die from an overdose of a pain-killing drug. This indicates that we do not determine blame on the intention of the doctor. We do not absolve the palliative care doctor on the basis of his intentions, but on the grounds that the condition of the patient that warrants him or her being a candidate for palliative care constitutes extenuating circumstances. This is not to say that the intention of the doc[illegible] is not in any way a factor. If the doctor had an ulterior purpose, we would not consider him or her morally blameless in any case. However, given that the doctor does not have an ulterior purpose it is because the palliative care patient is in a condition of being hopelessly ill and dying that we do not attach blame.

Thus far I have argued that, in practice, the doctrine of double effect is not the basis of the distinction that we now make between actions that are morally correct and incorrect in the context of palliative care. First, because in this application it contradicts the principle of the sanctity of life that it is supposed to support, and second, moral correctness is not determined by the intentions of the doctor but by other conditions. The next point that I wish to demonstrate is that the doctrine of double effect cannot be made to function to distinguish between morally correct and incorrect actions in this context.

Let us assume that a doctor of the same school of thought as Dr. Wanzer, Dr. Black is treating a patient, Ms. Jones. who meets the Wanzer criteria of dying, or hopelessly ill. Dr. Black feels morally justified in prescribing pain-killing medication for Ms. Jones in whatever amounts are necessary to control her pain, even to the point of death, as long as his intention is only to relieve her pain. Thus, Dr. Black's intention would be sufficient to justify his action under the conditions set by Wanzer. However, it seems obvious that in the course of such a treatment, Dr. Black must realize when he has crossed the threshold from a safe dose to a lethal dose. As the quantity he prescribes increases, he must come to the point where he believes that he is administering an amount of the drug that will, in all likelihood, kill the patient. It is one thing to claim that the death one has caused was a nonintended consequence of an action performed for the sake of a good (and overriding) effect. But this claim becomes

implausible when a nonintended consequence becomes a nonintended but probable consequence that one is aware of. If Dr. Black's claim that he intended the good effect, not the harmful effect, is to be allowed, should it not at least be necessary that he can reasonably expect that the good effect is more likely to occur than the foreseen but nonintended effect? It appears to me that in order to claim that one is acting to relieve pain, a necessary condition for such a claim is that one must believe that at the end of it, there will be someone who is alive to be the beneficiary of the relief from pain.

Furthermore, if one believes that a given action will have several consequences, can one claim that only one of these is the one that is intended? Consider the following example. Let us suppose that a Dr. White was treating a patient and he knew that his patient was allergic to a certain drug. Furthermore, he also knew that in at least 50 percent of the cases in which the individual was allergic to the drug, the reaction would be fatal if the drug were to be administered to the individual. However, let us imagine that a situation arose in which Dr. White decided it was necessary that he give the drug to his patient, and, unfortunately, the patient was among those for whom the drug was fatal and she died. Would we absolve Dr. White of blame if he were to claim that the fatal reaction was a foreseen but nonintended consequence, that he had intended to cure the patient? Not likely. We would probably decide that if Dr. White believed that both the cure of the disease and the death of the patient were probable consequences, then it

was an intentional act. We would probably conclude that if he believed that the results of his act would be the conjunction of A and B, then he cannot by some mental manoeuvre separate A and B and then claim that he only intended A, he must have intended both A and B. It may be that we would decide that there were reasons that would justify Dr. White's action. For example, if the drug was the only effective treatment for the disease and it was the only chance that the patient had to survive, we might conclude that the doctor was justified in accepting the risk. However, we would not justify Dr. White's action on the basis of his intention, but on the grounds of these other reasons that constitute extenuating circumstances.

Consider another example. Dr. Brown has a patient, Ms. Smith who has the same medical condition and is in the same state as Ms. Jones. At some point before her condition deteriorated when there was no doubt about her competency, she had asked Dr. Brown to do whatever was necessary to allow her a quick death when it reached this stage. In other words, patient Smith had asked Dr. Brown to perform active euthanasia on her and Dr. Brown, who believed that active euthanasia is morally justifiable, had agreed that he would do as she asked. Ms. Smith's condition has now deteriorated to the point at which Dr. Brown had agreed that he would act. In order to conceal his intention and to avoid legal punishment for an act that he believes to be morally correct, Dr. Brown prescribes increasing doses of a narcotic pain-killer for Ms. Smith until eventually the dosage is increased to the point that patient Smith dies.

Although, Dr. Black kills his patient in the course of palliative care treatment and Dr. Brown kills his patient as an act of active euthanasia, both doctors know that their action will kill their patient: the actions of each is the same, the administration of a lethal dose of drug; the consequences are the same, the patient is dead; and, I suggest that neither wants the death of his patient.

Whereas it seems clear that Dr. Black accepts, but does not want the death of his patient, it may not be so clear that, equally, Dr. Brown does not want the death of his patient. However, if it occurred that as a result of the injection given by Dr. Brown., Ms. Smith were not to die, but to recover from her illness, Dr. Brown. would not then administer more drugs until she were dead as would be the case if he wanted her dead. It is not his intention to harm his patient any more than it is Dr. Black's intention to harm his patient. We must assume that Dr. Brown perceives euthanasia as a suitable elective treatment for the condition of his patient just as Dr. Black considers palliative care an appropriate treatment.

Nevertheless, it is what is intended, not what is wanted, that is the distinguishing feature in the doctrine of double effect and while one intends to relieve pain and the other intends to kill, there is no difference between Dr. Black's action and Dr. Brown's by which an observer could distinguish between their intentions. This is a crucial point for the application of the doctrine of double effect as it is based on the intent of the one performing the action. But in the examples of doctors Black and Brown, the intention of neither

doctor can be ascertained by another party except by questioning the doctor concerned. Moreover, if the action were to be questioned, we would have to accept the testimony of the person whose actions were being examined which means that we must accept his description of the act. But, in fact, under the present regime, a doctor's actions are not questioned, because there is no way for another party to distinguish between an action intended to sedate and an action intended to kill that would call the action into question.

Under these circumstances, the doctrine of double effect may serve a purpose as a self-governing moral rule for the physician. That is, on the basis of a doctrine-based rule, "Do no intentional harm." Dr. Black may feel free to absolve himself from guilt based upon his own perception of his intention. However, in the examples above, while it may be of some use as a standard for one's conscience, the rule does not provide an external observer with the means of distinguishing between treatment that is intended to relieve pain and treatment that is intended to kill. Except for an admission of wrong-doing by the one performing the act, a second party cannot tell when the rule has been broken and this is a requirement of any rule that is intended to govern a social practice.

Paul Taylor speaks of Wittgenstein's four basic characteristics of rules defining a social practice. One of the characteristics is this:

> A practice-defining rule functions as a norm or criterion of conduct; it may be appealed to in judging whether something is done correctly or

incorrectly.[39]

In the context of an event such as the bombing of Dresden it is possible to appeal to a rule such as, "Do no intentional harm," to judge if an action is morally correct. The intentions become manifest in the actions or the means of attaining the consequences. In other words, a second party such as an historian, 'observing', that is, assessing the information about a long past event based, not upon the description, but the data. It is possible to make a determination as to the intention of the officer-in-command of the operation, as his intentions are made apparent by the evidence consisting of the means he employed, that is, the actions he ordered, and the results that he achieved. There is tangible evidence that may be used to confirm or deny his description of the event. It is possible to consider the evidence of the circumstances and the consequences in order to evaluate whether the action is in compliance with a rule or maxim such as, "Do no intentional harm." Under these conditions it is possible to appeal to the rule to determine whether the officer-in-command is in compliance with the rule. In the Dresden case, the evidence indicates that he appears to be not in compliance and, therefore, wrong.

If we compare this to the examples in the medical context, the difference is obvious. The actions of doctors Black and Brown are the same and the results of both doctors are the same. Both patients are dead and both were killed by an injection of a lethal drug. There is no data that might serve

as evidence of intention. Both doctors ordered or gave an injection of a pain-killing medication appropriate to the condition of the patient in an amount that was lethal, and each of their patients died as a result. An external observer cannot apply the rule, "Do no intentional harm," because we cannot determine their intentions from their actions, which is a requirement if we are to employ the rule. The context of the action does not permit objective third party determination to be made of intention, and because of this, these actions do not permit the use of the doctrine of double effect.

Therefore, in the context of palliative care, we cannot entail rules that serve any use as the basis for making a moral distinction between these types of killings by using the doctrine of double effect. Consequently, the doctrine of double effect cannot be used by the legal system to distinguish between palliative killings and euthanasia killings, that is, between actions that are lawful and actions that are unlawful.

In some contexts in social ethics, the doctrine performs the function of allowing us to determine from the evidence whether an action is morally correct. Based upon this distinction, a legal distinction is made between actions that are lawful or unlawful for the purposes of law enforcement. The doctrine does not serve the same function in medical ethics because we cannot determine from the evidence whether an action is morally correct or not; therefore, there is no basis upon which to make a distinction between lawful or unlawful acts.

Sopinka seems to have some idea of its weakness in the medical context, but for some reason clings to it anyhow:

> ... the distinction here is one based upon intention, in the case of palliative care the intention is to ease pain, which has the effect of hastening death, in the case of assisted suicide, the intention is to undeniably to cause death. ... a doctor should never refuse palliative care to a terminally ill person only because it may cause death. In my view distinctions based upon intent are important, and in fact form the basis of our criminal law. While factually the distinction may, at times be difficult to draw, legally it is clear. The fact that in some cases, the third party will, under the guise of palliative care, commit euthanasia or assist in suicide and go unsanctioned due to the difficulty of proof ... [40]

We must conclude that the doctrine of double effect cannot have any useful application in palliative treatment for two reasons. First, because of the private nature of the act there is no tangible evidence that can be used by another party to determine whether a rule or law made to regulate the act has been complied with or violated. Second, the doctrine has the inherent flaw of being dependent upon the description of the act, and because of the first reason, the description cannot be verified.

Perhaps these conclusions could be questioned by claiming that the palliative care situation is particularly problematic because the line between palliative-care killing and euthanasia killing is indistinct. However, the problem of description mentioned by Nagel and Beauchamp and Childress exists with respect to withholding treatment and withdrawing treatment. Depending upon the point of view of the one giving the description, an act of withdrawing life-support equipment

from a terminal patient may be described either as the act of ceasing to administer extraordinary treatment or as the deliberate act of the terminating the medical treatment that is necessary to sustain life. And, the intended consequence may be described as either allowing the patient's illness to run its natural course or as killing. Thus, a doctor who withdraws life-sustaining treatment from an elderly female patient may describe his action and his intention as "The cessation of treatment to allow the patient's illness to run its natural course." On the other hand, a son or a daughter of the elderly female patient who disagreed with the treatment of their parent might describe it as "Deliberately withdrawing the life-sustaining treatment necessary to sustain her life thereby killing my mother." If the doctrine of double effect is to be of any use in this situation, one must first resolve the problem of which description is the correct one. However, this seems to be begging the question. It appears to me that one must make a judgement of the underlying intent in order to determine which of these is the appropriate description.

The Killing-Letting Die Distinction

Biomedical ethics has its own unique set of problems. In the social context, for example, if one person kills another in self-defence and can establish that it was not her intention to kill the other person, that it was her intention to prevent injury or death to herself, and in the course of so doing the other person was killed, she is considered to be morally justified and to have acted lawfully. But, it should

be noted that it is not simply a matter of her claiming that it was self-defence. There is an investigation and there is a requirement that there be evidence to support the declared intention and the description of the act as one of self-defence. As I have argued above, this is an appropriate application of the doctrine of double effect. However, even if her claim is established, there is no question that she caused, that is, that she is causally responsible for the death of the other person. Nor, is there any requirement that it appear that she did not do so; it is acknowledged that she did indeed kill the other person. There is no attempt to have the killing appear to be something other than a killing, albeit a justified killing.

This is the difference between the use of the doctrine of double effect used in the social context and the way that it is used in the medical context in the area of withholding and withdrawing treatment from terminally ill patients. When used in these latter circumstances the doctrine of double effect is not used to justify a killing, but to deny that there was a killing. There is an attempt to apply the doctrine to create another category, the category of letting die.

The problem of euthanasia in medical ethics has been exacerbated by the recent advances in medical technology that have enabled doctors to intervene very effectively in the dying process. So effectively, in fact, that it is possible to maintain life indefinitely in persons who have only lower brain functions. Obviously, there are humanitarian as well as economic and practical reasons why, at some point, life-

maintaining treatment must be withdrawn from such persons. This raises two ethical and legal problems. The first is how to enable medical personnel to withdraw these life-maintaining treatments without making the person who gives the order for the withdrawal and the person who carries out the order morally or legally culpable. The second is how to accomplish the first and, at the same time, maintain the distinction between these and acts of active euthanasia for which the perpetrator is legally and, allegedly at any rate, morally culpable. In other words, the problem is to give definition to a distinction between the actions of causing death by withdrawing treatment and "letting die", and "killing" by active euthanasia. This is the distinction between active and passive euthanasia - the killing-letting die distinction.

The killing-letting die distinction is of great importance to many such as Justice Sopinka. It is the Rubicon which separates passive from active euthanasia. He contends that assisted suicide must remain a criminal act because he fears that making suicide legal would diminish respect for life within society. This would erode the standing of the principle of the sanctity of life thereby threatening the preservation of human life as a fundamental value of [illegible] society.[41]

This appears to be Sopinka's underlying concern throughout the Rodriguez case. He is not so much concerned that doctors may be allowed to assist with suicide, as he is concerned that if suicide is legalized in the medical context, it will be impossible to prohibit it in the non-medical context. He acknowledges that the blanket prohibition on assisted suicide

contained in s.241(b) may cause suffering to some (Rodriguez). However, in spite of its shortcomings in this regard, s.241(b) is preferable to a law that does not protect society's interest in preserving life and protecting the interest of the vulnerable.[42] Hence, it is necessary that a distinction be made between passive euthanasia as a moral and lawful action and active euthanasia as an immoral and criminal action. If passive euthanasia is not perceived and treated as a distinct category, physicians might be reluctant to put a patient on a life-support device out of concern that if the patient did not respond to the treatment, they would remain on support indefinitely. And, unless active euthanasia is recognized as a distinct category, there is a danger that assisted suicide in all contexts would be decriminalized.

The killing-letting die distinction rests on two points: the doctor does not intend to kill the patient; and he is not the cause of death, the patient dies a natural death.

The doctrine of double effect is used to support the claim that the doctor who withdraws life-sustaining treatment does not intend the patient's death while the cause and effect argument is used to demonstrate that the doctor is not the cause of death. In combination, they work to absolve the doctor of any responsibility for the death of the patient. While they do not complement each other, they do (if they are accepted) reinforce each other.

As I have argued in the previous section, the doctrine of double effect is ineffectual as a means to determine whether it is the intention of the doctor, who withholds or withdraws

treatment to kill the patient or let her die. Therefore, it must be possible to demonstrate that there is a distinction between killing and letting die by the argument from cause or the distinction itself is shown to be false.

The argument from cause attempts to prove that by withdrawing treatment, the doctor does not cause death, but allows a natural condition that was held in abeyance by the treatment to continue its natural course. The characterization of death as 'natural' is important to Justice Sopinka and others such as Keyserlingk and is a distinguishing feature between killing and letting die. Sopinka quotes Keyserlingk in the following passage:

> in the case of the withdrawal of treatment, the death is 'natural' - the artificial forces of medical technology which have kept the patient alive are removed and nature takes its course. In the case of assisted suicide or euthanasia, however, the course of nature is interrupted and death results directly from the human action taken.[43]

It is implicit in this statement that the cause-effect relationship is limited to the effect immediately following in the chain of events initiated by the causal event. I disagree. If we consider the conditions essential for fire. One must have at least: A, combustible material; B, oxygen; and, C, ignition (following initial ignition, the process itself maintains ignition). Together, they form a conjunction A&B&C = Fire. If, for any reason, one of the elements is removed, the fire goes out.[44] For example, if the oxygen, is removed, the result is A&~B&C = ~Fire. Whoever, or whatever, is the cause of the change to the condition is responsible for the

resulting state. That is, if the fire itself depletes the oxygen supply, the fire is said to have burned itself out. If a fireman is responsible for removing the oxygen, we say that the fireman put the fire out.

In the context of life, let us assume that the conditions essential for life are: D, blood circulation; E, respiration; F, nutrients; and, G, all other life-favouring body functions and conditions such as the digestive system, temperature, air pressure etc. Together they form a conjunction D&E&F&G = Life. As with the fire conjunction, the removal or negation of any one condition causes the condition not life or death. For example, if the nutrients are removed, the equation becomes D&E&~F&G = ~Life. Also, the person or thing that is the cause of the changed condition in the conjunction is perceived to have caused the resulting state of not life or death.

I do not agree with those who would argue that the doctor who is responsible for extending life in the first place may be entitled to cease extending it. A doctor who intervenes in the dying process does not thereby earn a proprietary or custodial right over the life that is extended, and there is certainly no legal basis for this argument. I would agree that the doctor who intervenes in the dying process creates a new situation in which he or she becomes part of the causal chain thereby putting himself or herself in the position of controlling the determinant condition for the life or death of the patient. However, the right to life and, consequently, the right to decide on withdrawing treatment, remains the patient's, or in the event that the patient is incompetent,

the proxy's. Neither morally, nor legally, is the patient's right to life ceded to the doctor.

In my following argument against withdrawing treatment I assume that the patients in both examples are terminally ill and life is being sustained by ordinary means which includes the provision of nutrition and respirators.[45] First, let us assume that Dr. Black injects his patient Ms. James, with a lethal drug that acts on the brain in such a manner that it halts circulation. We then we have the conjunction, ~D&E&F&G = ~Life. Dr. Black is the cause of the change of condition D to condition ~D and is perceived to be responsible for the change of Life to ~Life. Dr. Black is said to have killed Ms. James.

Next, assume that Dr. Brown has a patient, Ms. Smythe, whose life is being sustained by intravenal feeding. We have, $D\&E\&F_i\&G$ = Life (where F_i = intravenal nourishing). Now, suppose that Dr. Brown withdraws the drip from Ms. Smythe. Dr Brown is responsible for the changed condition $\sim F_i$. The new equation is $D\&E\&\sim F_i\&G$ = ~Life and Dr. Brown who is the agent responsible for the change of condition F to ~F may be said to have killed Ms. Smythe. I have used the word 'may' not 'is' because unlike the example of the fire or the example of Dr. Black who injected his patient with a lethal dose, there are many who would be of the opinion that Dr. Brown has not killed Ms. Smythe and, in fact, is not even causally responsible for her death.

Those who hold to this latter view infer the intermediary condition of starvation, that is, $D\&E\&\sim F_i\&G$ = Starvation. Dr.

A's actions are not perceived as causing death but only as creating a new condition and it is this condition that is the cause of death. They hold that under these circumstances Ms. Smythe dies of a natural cause. They argue that in the case of starvation the action of the doctor has the effect of starvation and this, in turn, is the cause of the effect of death. But, this is only to say that the action of withdrawal of treatment is not the proximate cause of the effect, that is, the one that is closest to the effect in time. It is certainly the precipitate cause, the causal action that sets in motion the events that result in the effect.

I believe that part of the reason that this argument seems plausible to some is because of the rather sloppy way we speak of death, the cause of death and, the manner of dying. We do not always distinguish among them. According to H.L.A. Hart:

> ...it is clear that in this causal sense not only human beings but also their actions or omissions, and things and conditions may be said to be responsible for outcomes.[46]

For example, if we say "X was killed by a firing squad", we are referring to the causal agent, the firing squad. It is implicitly understood that X was killed by the impact of the bullet(s), that is, by gunshot wounds. If we say that "X was killed by gunfire." we are referring to the manner of X's death, not the cause. However, it is implicitly understood that there is a causal agent who did the shooting. Similarly, when we speak of someone dying from a lethal injection or starvation, as we do in the examples above, we must to understand that there is a causal agent. Someone gave Ms.

James the lethal injection and killed her, and someone deprived Ms. Smythe of nourishment and killed her. However, in response to the question "How did so and so die.?" we would probably answer "By a firing squad."; "By lethal injection.", and; "From starvation." That is, sometimes we respond with the causal agent and sometimes with the manner of dying.

Admittedly, when death is due to starvation, we frequently attribute cause to a natural phenomenon, such as plagues of locusts or droughts, which cause famines. We tend to think of death by starvation as being natural, similar to death from TB or stroke. However, we do not consider that the millions who died from starvation in Nazi concentration camps died from natural causes. We attribute responsibility and blame to those who caused the conditions of starvation among the prisoners. Furthermore, we hold them to be as guilty of unjustified killings as those who shot or gassed their victims.

With this in mind, I would argue against those who would claim that Ms. Smythe dies of a natural cause. While death by starvation may be more prolonged than death by lethal injection, or hanging, or shooting, they are all a means by which a causal agent can kill, they are not the causal agent. When Dr. Black gives Ms. James a lethal injection thereby causing her circulatory system to fail, then, Dr. Black is the cause of Ms. James' death. In other words, Dr. Black killed Ms. James. Similarly, if Dr. Brown withdraws nourishment from Ms. Smythe, thereby starving Ms. Smythe, Dr. Brown is the cause her death. In other words, Dr. Brown killed Ms. Smythe. It should be noted that in both cases, we are attributing

cause, not blame.

Let us suppose that while a patient, Ms. Smithers, who suffered from ALS, was being maintained by a respirator, her lungs deteriorated to the state that they were unable to supply her body's needs and she died. Her death certificate would accurately record that she died of a natural cause, asphyxiation. If asked what she died of we would probably not respond that she died of asphyxiation, but ALS. However, let us suppose that while patient Smither's life was being maintained by a respirator, there was a power failure which caused the respirator to cease to function and she died. Her death certificate would accurately state that she died of a natural cause, asphyxiation. However, we would in this case not respond to a question of her death that she died of ALS, but that she died because of a power failure. If it came to a litigious action, the power company or the hospital or both would be the object of the litigation. Causal responsibility would be attached to the agent responsible for the loss of power and with it moral and legal responsibility.

Also, if someone (say a janitor cleaning the room) who did not know that the plug was the respirator power plug, pulled the power plug out of the receptacle, thereby stopping the respirator, that person would be held to be the causally responsible for the accidental death of Ms. Smithers, and perhaps held to be negligent. However, if we accept the killing-letting die distinction, we are accepting the claim that while causal responsibility may be attributed to a power failure, or a careless individual who did not realize that he

or she was stopping a piece of vital machinery, none may be attributed to a physician who deliberately switches off a piece of life-sustaining equipment in the full knowledge that his action will result in the death of the patient. This seems to be a somewhat contradictory proposition. Unless, of course, one subscribes to the notion, which I do not, that the doctor, having been responsible for sustaining the patient's life, is in a special position and is entitled to terminate it.

Nevertheless, I would add that I do not believe that I have demonstrated that the person who is responsible for turning the equipment off is guilty of any moral wrongdoing, only that he or she is causally responsible for the death of the patient. I do claim that, causally, no distinction can be made between the action of a person who withdraws life-sustaining treatment and one who administers a lethal injection. Moreover, assuming that the actions are carried out for humane reasons and at the request of, or with the consent of, the patient, I suggest that both actions are morally justifiable; in these circumstances, the person who "kills" the patient by lethal injection is as innocent of any moral wrongdoing as the person who withdraws treatment and "lets" the patient die.

I do not believe that any distinction can be drawn between withholding treatment and withdrawing treatment, with regard to causal responsibility. This may seem too strong a statement as one is an act of commission and the other an act of omission. I agree that this is a valid difference in some contexts, but not in the context of medical treatment. For example, I believe that there is general agreement that there

is no obligation on the part of a spectator at a house fire to go into the building in an attempt to rescue someone inside. However, it is generally held that a fireman who is on-duty at the fire scene has such an obligation. We feel that he has a prima facie duty to rescue the person inside even at a calculated risk to his or her own safety. It is in the nature of the situation and his profession. Similarly, at the scene of a crime we impose an obligation upon police officers to take appropriate action that we do not impose upon ordinary citizens.

In other words, the moral status of an omission of action is perceived differently depending on the circumstance and the perception we have of the professional responsibility owed by the person. All persons who become members of a profession put themselves under an obligation to conform to the constitutive rules of the profession. Speaking of this role-responsibility Hart makes the following statement:

> ... whenever a person occupies a distinctive place or office in a social organization to which duties are attached to provide for the welfare of others ... , he is properly said to be responsible for the performance of these duties, or for doing what is necessary to fulfil them. Such duties are a person's responsibilities.[47]

We do not accept the inaction on the part of one who has an obligation to take action appropriate to the profession as an act of omission. If there was a decision not to act, we perceive it as a negative act - the making of a decision of inaction when one had an obligation to act. This in itself does not necessarily make the individual blameworthy, but, if

the reasons for not acting do not justify the failure to act, then blame is appropriate.

Similarly, in the medical setting when a doctor who has a duty to provide life sustaining treatment, and it is possible to do so, does not do so, he has made a decision to withhold treatment. For example, if a patient in an emergency room were to suddenly show signs that he was asphyxiating and the only other person in the room was a young hospital clerk, we do not expect her to commence emergency treatment on the patient. If she went for help, we would consider her to have acted correctly and to have met her moral obligation. However, if the other person in the room were a doctor and she did not commence emergency treatment, we would consider her behaviour to be prima facie wrong. It may be that there are reasons present that would justify her actions. For instance, it may be that the patient had presented a living will that prohibited attempts to resuscitate him in just such circumstances.

Nevertheless, it remains that the doctor acted in such a way as to not treat the patient when there was a prima facie obligation to do so. The failure to act that must be justified. The point must be taken that when there is a duty to act and one does not, it is not perceived as the omission of an act unless it is an omission by ignorance or incompetence. Rather it is the commission of an act based on a decision not to act and the individual is causally responsible for the results of the act.

In terms of causal responsibility, the actions of

withholding treatment and withdrawing treatment are actions of the same kind. The doctor who withholds treatment does not remain outside of the causal chain. It is a matter of the role-responsibility that Hart spoke of. The captain of a ship at sea, in his role as captain, is responsible for the safety of his ship and all persons who are onboard. If the ship is in danger and the captain fails to take whatever action he can to attempt to save his ship, he is held responsible for the loss of his ship and any loss of life. By accepting the office of captain, he accepts the responsibilities associated with that office. Similarly, a doctor accepts the responsibilities that accompany his profession and his office. Whether the patient lives or dies depends upon the decision of the doctor in attendance. He cannot be perceived to be outside the causal chain because he decides to withhold life-saving treatment. If the patient dies from the lack of life-saving treatment, the doctor is causally responsible for the death of the patient.

The doctor who either withholds life-sustaining treatment or withdraws it is the agent causally responsible for letting the patient die, and that, I have argued, is the equivalent of killing the patient. And again, I suggest that, assuming that the action is carried out for humane reasons and at the request of, or with the consent of, the terminally-ill patient, the action is morally justifiable. Conversely, if a doctor withholds or withdraws life-sustaining treatment, or administers a lethal injection to a terminally-ill patient for reasons that are other than humane, and not at the request of, or without the consent of the patient, the actions are not

morally justified.

At the beginning of this discussion of the killing-letting I characterized the argument of the proponent's of the killing-letting die distinction as resting on two points. First, that the doctor's intention is not to kill the patient and that his or her actions are, therefore, morally justified. Second, that as the death is natural, the doctor is not causally responsible. In the previous section I demonstrated that intention cannot be used as the basis of determining moral justification in the context of medical ethics. And, if I have succeeded in my arguments in this section, I have will have demonstrated that the doctor who is responsible for withdrawing or withholding life-sustaining treatment from a patient is causally responsible for killing that patient if the patient dies. Therefore, it must be concluded that there is no distinction between killing or letting die.

The Principle Of The Sanctity Of Life

There can be no doubt that Justice Sopinka's legal opinions are rooted in his faith in the sanctity of life as a elemental principle of our society. He holds that society has a fundamental interest in the preservation of life and that the principle underlies laws that are created to safeguard this interest. However, at no point in his statement does he give an explanation of the principle, except perhaps when he speaks of "the generally held and deeply rooted belief in our society that human life is sacred or inviolable."[48] At different times he makes reference to Law Commission documents, including one

by Edward Keyserlingk. Therefore, I believe that it is reasonable to refer to the definition given by Keyserlingk in his study paper *Sanctity Of Life or Quality Of Life*, particularly as it seems to agree with the way in which Sopinka has used the expression. Keyserlingk suggests that giving precise definition to the principle is difficult and that it is a task that is generally avoided even by those who write about the principle. He points out that nowhere in Glanville William's well-known, *The Sanctity Of Life And The Criminal Law* does Williams indicate what he means by the expression. Keyserlingk himself stops short of defining it but does conclude that:

> Commentators tend to agree that the principle includes at least these three points:
>
> (i) Human life is precious, even mysterious, and is worthy of respect and protection. Human worth is not determined merely by subjective or utilitarian concerns.
>
> (ii) Human life may not be taken without adequate justification and human nature may not be radically changed.
>
> (iii) The sanctity of life principle (or an equivalent principle) is basic to our society and its rejection would endanger all human life. [49]

Sopinka uses all of these points in his statement, but it is the last one that appears to have the greatest bearing on his decision. It is this aspect of the principle that he believes is threatened by any further qualification of the principle that setting aside s.241(b) would represent. In addition to the traditional qualifiers of war and self-defence, there are the ones added in recent years. Suicide is

no longer subject to the post-mortem sanctions of the abuse of the corpse as was the case in some places in the last century. Since 1972, those who fail at suicide are no longer considered to have committed a criminal act. As I have already mentioned, the patients who refuse to commence life-sustaining treatment or demand to discontinue such treatment cannot be forced to receive it. This, in effect, is a repudiation of the sanctity of life principle as it authorizes the individual to override the sanctity of life principle on the individuals own terms. But, perhaps the greatest blow to the principle was the legalizing of abortion on demand. This had long been a territory staked out by the defenders of the sanctity of life as an area of special interest. As recently as several decades past, a great deal of philosophical effort was expended wrestling with the problem of whether it was correct to save the life of the fetus or the life of the mother if a situation arose in which it was possible to save only one. While abortion is still often a topic of passionate debate, even murder in the USA, the nature of much of the debate has changed. It is not concerned with the principle of abortion but with specifics such as whether it should be on demand for minors and whether it should be publicly funded, and so on.

It is interesting, that, recently anyhow, the law has usually come down on the side of individual autonomy over the sanctity of life in these matters. Nevertheless, it seems that none of these recent rejections of the sanctity of life as an overriding principle in our society, has sufficiently weakened it to the point that "would endanger all human life". Nor does

Sopinka claim that legalizing assisted suicide itself would by itself bring about such a state of affairs. He contends that "a relaxation of the absolute prohibition [of assisted suicide] takes us down the 'slippery slope.'" And he refers to statements made by critics of the Dutch experiment with voluntary active euthanasia who claim that it is being practised to an increasing degree.[50]

Sopinka's views are well supported by international parliamentarians, international jurists, many international medical associations and numerous philosophers, and Sopinka provides references to their material in his statement. However, they all appear to hold to one common reason for their belief in the sanctity of life - that is, those who claim to believe for non-religious reasons - the fear of the slippery slope.

There are three versions of the slippery slope or wedge argument that are the most frequently used. The first, by Glanville Williams is useful as it defines the argument in the most general terms:

> The wedge principle means that an act which, if raised to a general line of conduct would injure humanity, is wrong even in an individual case.[51]

The version which Beauchamp/Childress labels the logical-conceptual, is as follows:

> If we judge X to be right, and we can point to no morally relevant dissimilarities between X and Y, then we logically cannot judge Y to be wrong. ... support for one sort of action that seems acceptable logically implies support for another unacceptable action where it is not possible in principle to identify morally relevant differences.[52]

The third statement of the wedge is the psychological-sociological or the causal-empirical:

> This ... version focuses on what the wedge is driven into by examining the culture in order to determine the probable impact of making rules or changing rules in a more permissive direction. If certain constraints against killing are removed, a moral decline might result, because various psychological or social forces make it unlikely that people will draw distinctions that are, in principle, clear and defensible.[53]

When using the slippery slope argument, it is the common practice to provide an example that serves to establish an analogous relationship between some past experience and the present debate. In the literature on euthanasia, the analogy of choice appears to be the Nazi experience. This is an adroit choice for two reasons. It is rhetorically forceful. People tend to shy away from arguing against claims that include parallels made to practices carried out by the Nazis. For instance, a claim that "Euthanasia is evil because the Nazis practised it," places the one who would argue that euthanasia is not evil, at the disadvantage being seen to be either arguing that the practices of the Nazis were not necessarily all evil, when the common wisdom is that they could not be otherwise, or of siding with the Nazis, and perhaps both. The second reason that it is a good choice is due to the effect of reciprocity. The Nazi example is frequently used in the debate on euthanasia because it is well-known and needs little explanation in the debate, and reciprocally, the Nazi example needs little explanation in the debate on euthanasia because it is so frequently used. For example, Beauchamp and Childress

make the following statement:

> In debates about euthanasia, the Nazi holocaust continues to serve as a powerful vision of the bottom of the slippery slope for a society that adopts mercy killing ... .[54]

I suggest that the Nazi slippery slope argument does not demonstrate that there is good reason to prohibit euthanasia here in Canada because of the Nazi experience with euthanasia. The Nazi analogy fails because it is based upon three assumptions that are incorrect. First, it assumes that conditions in Canada today are similar to the conditions in Germany in the nineteen thirties. Second, it assumes that the euthanasia program in Nazi Germany and the program that euthanasia program that Canadians desire are similar. And third, it assumes that the euthanasia program in Nazi Germany was the beginning of the slide down the slippery slope to the holocaust.

There is no basis upon which it is possible to draw an analogy between Nazi Germany in the thirties and present-day Canada because of the vastly dissimilar characteristics of these two cultures. Canada has a relatively stable, well-established social structure. The Germany of the twenties and thirties was a country that was in ruins. The general social and economic situation was one of chaos. Most of the traditional institutions that define a particular culture, were destroyed either in the war or afterwards as part of the armistice agreement. The country had been forced to undertake the change from a constitutional monarchy in which the monarch had significant powers to a parliamentary democracy, the

government of which was still ineffectual when Hitler came on the scene. The military class, which prior to the war had wielded a powerful conservative influence over the country's affairs, had also been abolished. These were some of the conditions of cultural instability that Hitler took advantage of to take power and to establish his fascist government.

Organizations such as the Gestapo and the SS were created to enforce Hitler's will. When Hitler's euthanasia program was introduced on 1 September 1939,[55] it was introduced into a country that was in the iron grip of Hitler and Nazism. which history has shown to be one of the most repressive and brutal regimes ever. The regime of Nazi Germany should be viewed as unique. The nation of Nazi Germany, simply does not lend itself to analogy with any free and democratic nation. There are no points of resemblance between Nazi Germany and Canada that are relevant to a debate on euthanasia.

The second assumption that the slippery slope argument relies on is that the euthanasia programs are analogous. This is totally without ground. The Nazi euthanasia program - if the term 'euthanasia' can be said to be appropriate - was not a voluntary program from the outset. It was more like a cull of people who did not meet the standards set by the Nazis for normality. Alexander describes the process:

> All state institutions were required to report on patients who had been ill for five years or more and who were unable to work, by filling out questionnaires giving name, race, marital status, nationality, next of kin, whether regularly visited and by whom, who bore financial responsibility, and so forth. The decision regarding which patients should be killed was made entirely on the basis of this brief information by expert consultants, most

> of whom were professors of psychiatry in the key universities. These consultants never saw the patients themselves.[56]

I have no knowledge of any group that has an interest in the legalization of euthanasia that does not have as its primary condition that it must be voluntary. The definition of euthanasia that is accepted by Canadians, generally, is the same as that which the Dutch accept:

> The definition of euthanasia widely accepted in the Netherlands is: the active termination of a patient's life at his own request, by a physician.[57]

The Nazi program described above certainly does not fall within this definition. Therefore, it appears reasonable to conclude that the Nazi euthanasia program would not be analogous to any Canadian program that might come into being.

The third assumption is that the holocaust had its beginnings in the euthanasia program which was the first step on the slippery slope. Writers such as Beauchamp and Childress, Kamisar, Dyck and others who use the Nazi experience and the slippery slope in arguments against euthanasia, all refer to the Alexander article and, generally, quote the following passage to support their argument:

> Whatever proportions [the Nazi] crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings. The beginnings at first were merely a shift in the basic attitude of the physicians. It started with the acceptance of the attitude, basic in the euthanasia movement, that there is such a thing as a life not worthy to be lived. This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually the sphere of those to be included in this category was enlarged to include the socially unproductive, the ideologically unwanted, the racially unwanted and

> finally all non-Germans. But it is important to realize that the infinitely small wedged-in-lever from which this entire trend of mind received its impetus was the attitude toward the nonrehabilitable sick. [58]

All of these arguments are grounded in the one article by Alexander which has been used as a fundamental element of the arguments that have been used to morally justify denying a program of euthanasia to Canadians. Since over the last several decades, there are probably tens of thousands of Canadians who have died in a manner they would not have chosen if a euthanasia program were available in this country, it is obviously important that Alexander be correct. If Alexander is wrong, or his claims are not well supported, then the slippery slope example of the Nazi euthanasia program is not a legitimate basis of argument against euthanasia.

I believe that there are sufficient inconsistencies in Alexander's article to warrant that, at least, a study be made to determine whether Alexander's premise that the Nazi euthanasia program was, in fact, the slippery slope origin of the holocaust is sound.

In the quotation of Alexander above, there are elements of both the logical and the psychological definitions of the argument that are given by Beauchamp and Childress. We can see how it is possible to fit the events of the Nazi experience with euthanasia into the definition of the logical-conceptual and psychological-sociological forms of the slippery slope argument. The range of possible candidates can become enlarged to include other groups because once the logic is accepted

that the sick qualify as candidates for killing because they are not well, then, logically, all who are not well can become candidates for the Nazi killing program. And if involuntary euthanasia is psychologically accepted as an instrument of the state's health care program, it can desensitize the public to the use of killing as a general instrument of state policy in the administration of other public programs, for example, justice and immigration.

In terms of the logical-conceptual form of the slippery slope argument, the program is alleged to have begun with the non-rehabilitable sick and then by an extension of the logic that there were some other categories of persons who would benefit from death, it was expanded to take in those who were socially, ideologically, and racially unwell or non-rehabilitable.

However, if we consider a description that Alexander gives of the actual program that the Nazis put into place, there is no evidence of any appeal to logic. Alexander quotes a German appeal court judge who was criticizing the euthanasia program in December 1939, barely three months after the program was initiated:

> Every day from one to three buses with shades drawn pass through ... delivering inmates to the liquidation institution there. ... the arrivals are immediately stripped to the skin, dressed in paper shirts, and forthwith taken to the gas chamber where they are liquidated by hydrocyanic acid gas and an added anaesthetic. The bodies are reported to be moved to a combustion chamber by means of a conveyor belt, six bodies to a furnace.[59]

This is not a description of the start of a program that

began small and then proceeded down the slippery slope to the holocaust on the basis of an appeal to logic. There is no evidence of degeneration; the program began in the same heinous form in which it ended. This program appears to be have been used as a prototype for places like Auschwitz and Dachau. In other words, from the judge's description, they did not justify adding new groups to the list of those liable to destruction by appeal to some logical consistency. It is reasonable to conclude from the evidence, that the euthanasia program was merely the implementation phase of a program of extermination that was planned from the outset to become larger, phase by phase, by the planners. Moreover, the so-called euthanasia program consisting of busloads of people taken to a gas chamber to be gassed was an extermination program. It does not fall within the meaning of the expression 'euthanasia' and the entire process is properly perceived as an extermination program that began with a prototype model and expanded according to plan. I would suggest this cannot be seen as a euthanasia program that proceeded down the slippery slope to the holocaust because it never began as a legitimate euthanasia program.

The other version of the slippery slope is the psychological- sociological. In the Alexander quotation this is the attitude that there "is such a thing as a life not worthy to be lived". Once this attitude is taken, we become callous about death and dying, so that as the categories of lives that are not worthy to be lived is logically extended to include other kinds of lives, we are also psychologically

prepared to accept that they too should die.

Alexander speaks at length in his article about two German doctors, Dr. Rascher and Dr. Gebhardt, who were engaged in some of the infamous experiments that were conducted in the death camps. He discusses the reasons that these people became involved in such acts:

> The reasons are fairly simple and practical, no surprise to anyone familiar with the evidence of fear, hostility, suspicion, rivalry and intrigue, the fratricidal struggle euphemistically termed the "self-selection of leaders" that went on within the ranks of the ruling Nazi party and the SS. ...
> ...Dr Gebhardt performed these experiments to clear himself of the suspicion that he had been contributing to the death of SS General Reinhardt ("The Hangman") Heydrich. ...
> ... Dr. Sigmund Rascher did not become the notorious vivisectionist of Dachau concentration camp and the willing tool of Himmler's research interests until he was forbidden to use the facilities of the Pathological Institute of the University Of Munich because he was suspected of having communist sympathies.[60]

In other words, both of these particular people got involved in the SS research programs to save their lives. To be suspected of contributing to the death of Heydrich, who was Himmler's deputy, or to be suspected of being a communist in Nazi Germany was likely to be fatal. Both of them acted to prove themselves good Nazis and thereby remove the suspicion that they were under. Alexander makes the point that these people were motivated by fear to which they surrendered:

> ...fear and cowardice, especially fear of punishment and ostracization by the group, are often more important motives than simple ferocity or aggressiveness.[61]

Implicit in the Beauchamp and Childress definition of the

psychological form of the slippery slope, is an inference that there is a sort of gradual, seductive psychological process at work. A little first, then a bit more, and so on, down the slope. His account of the two doctors is hardly one of a seductive sort of slide. Certainly, to be in a condition of fearing for one's life is a psychological state, but it is at odds with the notion of seduction that is conveyed by the definition of the psychological form. In addition, if one begins at the emotion level of survival, which is considered the most powerful emotion, one cannot become any more psychologically involved. Moreover, if we consider that Dr Gebhardt became involved at the level of vivisection, it is not really possible to go down from there. In terms of the slippery slope metaphor, Gebhardt is getting on at the bottom.

There does not appear to be any support, in the examples presented in his own article, for Alexander's conclusion that the progression from the Nazi euthanasia program to the holocaust was a sort of slippery slope expansion. It appears to have expanded laterally.

Alexander also discusses the psychological effect upon the general public. He refers to propaganda programs "in which they attempted to gain supporters by means of indoctrination seduction and propaganda." It does not follow that because there was a propaganda campaign for euthanasia and later there was a euthanasia program that the one brought about the other. This leaves out the most important element in Nazi policy, Hitler. I believe that we can infer from Nazi history that there was a 'euthanasia program,' because Hitler wished it,

and the program was the way it was because Hitler wanted it that way. Any excesses that were reached were attributable to him and his circle of cohorts, not to a psychological state of the German people brought about by a program of propaganda and other forms of psychological conditioning. I suggest that any estimate of the power or the influence of public opinion in Nazi Germany must be kept in a sensible perspective and that we have to keep in mind the realities of the Nazi leadership and the power of the Gestapo and the SS. The Nazis relied on brute force and terror to gain the obedience of, not the consent of, the German public.

The Nazi analogy fails because it is based upon the three assumptions that I have attempted to demonstrate are incorrect. First, that conditions in Canada today are similar to the conditions in Germany in the nineteen thirties; second, that a Canadian euthanasia program would resemble the Nazi so-called euthanasia program; and third, that the growth of the so-called euthanasia program in Nazi Germany into the holocaust was due to a slippery-slope process. There are sufficient inconsistencies in Alexander's account of the Nazi euthanasia program to cast doubt upon its suitability as an authoritative reference for use in support of any demonstration of the dangers inherent in euthanasia programs.

The Sanctity of Life and the Vulnerable

Supporters of the principle of the sanctity of life who warn of the dangers of the slippery slope uniformly contend that it will lead to abuse. We are told that those who will be

abused are the weak and the vulnerable, and Sopinka appears to be particularly concerned with what he believes to be the possibility of abuse among the terminally ill, who he considers the most vulnerable. He makes the following remark when speaking of the right to life:

> ... seeking to control the manner and timing of one's death constitutes a conscious choice of death over life. It follows that life as a value [disvalue] is engaged even in the case of the terminally ill who seek to choose death over life. Indeed it has been abundantly pointed out that such persons are particularly vulnerable as to their life and will to live and great concern has been expressed as to their adequate protection, as will be further set forth.[62]

A statement from his concluding remarks on the disposition of s.7 demonstrates the importance that he attaches to the threat of abuse when he gives it as his reason for rejecting Ms. Rodriguez claim that her rights under s.7 are violated.

> Given the concerns about abuse that have been expressed and the great difficulty in creating appropriate safeguards to prevent these, it cannot be said that the blanket prohibition on assisted suicide is arbitrary or unfair. I am thus unable to find that any principle of fundamental justice is violated by s.241(b).[63]

Unfortunately Sopinka does not suggest who it is that he perceives as being the abuser of the system. To go back to a point that I made earlier, I do not believe that Sopinka's real concern is the merit of Rodriguez' claim to assisted suicide which is presented in the context of medical treatment. He says as much when he makes the following statement in his conclusion to his analysis of s.7:

> To permit a physician to lawfully participate in taking life would send a signal that there are

> circumstances in which the state approves of suicide. [64]

This appears to be the abuse with which Sopinka is concerned, the enlargement of the scope of assisted suicide from the medical area to the entire social area. He doubts that it is possible to restrict the legalizing of assisted suicide to the medical context. However, I would suggest that there are a number of precedents for distinguishing between actions that are acceptable in the context of medical treatment while they remain prohibited in the social context. As I have just argued, palliative care and withdrawal and withholding of medical treatment deaths are acts of killing that are considered to be justified in a medical context while they are not justified outside of that context. Moreover, anaesthetists routinely "kill" people and take control of their basic bodily functions of respiration and circulation, and doctors prescribe and administer drugs that would land them in jail outside of the medical context. And in addition, the law against assault with a deadly weapon did not have to be discarded to allow surgeons to use their instruments in the course of surgery.

None of these actions are sanctioned by law. As the Law Reform Commission of Canada remarks:

> Medical practice does not wait for the legislator. ... Doctors model their conduct on what they believe to be just and ethical under the circumstances, on the basis of their own expertise and the standards established by their codes of ethics. [65]

If we consider the list of potential abusers, there are

only three: the government, the doctors, and the patients. Let us suppose that a future Canadian government were to wish to enlarge the scope of euthanasia to include involuntary euthanasia as a way of economizing on scarce health care funds. Given our traditional social values, it is improbable that parliament would legislate standards for lives that are worth living and not worth living. It is even more improbable that it would pass into law that persons who did not meet government standards for lives worth living would be subject to government euthanizing. A Nazi-type killing program is alien to Canadian social values. A program of this sort would have to be forced upon the Canadian people as it was forced upon the German people. There is no indication that the government represents a potential abuser of the system for this or any other reason.

Nor, is there evidence to support a claim that the public would abuse the system. The Dutch experience with government-sanctioned euthanasia has not resulted in a mad rush of people demanding to be euthanized for some trivial reason. The Remmelink Committee commissioned by the Dutch government to report on medical decisions at the end of life, revealed that in 1990 there were 2300 cases of death by voluntary euthanasia, or 1.8 percent of the total number of deaths in 1990. There were an additional 400 cases of assisted suicide which represents 0.3 percent of the total for a combined figure of 2.1 percent or 2700 deaths out of a total of 129,000 deaths from all causes. And the figures for 1992 indicate that the incidence of euthanasia and assisted suicide were constant

over the period 1990 to 1992.[66] These are not alarming figures for a country in which voluntary euthanasia and assisted suicide have been officially condoned by a lack of legal prosecution for several years. This indicates that even when people believe that medically assisted death is available, they do not take advantage of it in a manner that could be considered abusive. There appears to be no justification for any fear that people are anxious to die and to allow euthanasia would open the floodgates to a frenzy of assisted self-destruction.

The third group of potential abusers of euthanasia is the health care givers. Sopinka mentions the critics of the Dutch system who point to evidence that involuntary euthanasia (this is not permitted by the Dutch guidelines) is being practised to an increasing degree. He gives no reference, but some support for his claim can be found in the Remmelink report - not for his claim that it is increasing, but that it is being practised. According to the report, 7.8 percent of the total, or 1000 deaths, were cases of physician-caused deaths which were not at the immediate request of the patient, although, in about 28 percent or 280 of these cases, there had been a request made at some time in the past. This leaves 72 percent or 720 people who were either non-voluntary or involuntary doctor-assisted killings.

I agree wholeheartedly with the conclusion of Welie and ten Have that the authorities be should be concerned with these 1,000 deaths, particularly the 720 deaths in which there is no record of the patient having ever requesting euthanasia. But,

I think that there is even more reason for them to be concerned with the 42,500 deaths made up of 20,000 deaths resulting from withholding or withdrawing treatment, and 22,500 deaths of patients in palliative care, that the statistics show, occurred over the same period.[67] The statistics indicate that out of a total of 129,000 annual deaths from all causes, 46,200 were doctor-initiated deaths, that is 42,500 from withdrawing and withholding treatment and palliative care, 2,700 from euthanasia, and 1,000 at the hands of the doctor without any immediate request. And of these 46,200 doctor-initiated deaths, only 2,980 were at the direct request, either immediate or past, of the patient. This means that there were 43,220 doctor-initiated deaths which the patient may not have requested or consented to.

Welie and ten Have determined that 6 percent or 1,350 of the 22,500 palliative care cases, the doctors stated that the administration of the lethal injection was for the sole purpose of hastening death. This is one-half of the number of euthanasia cases that occurred in the same period. Furthermore, hastening death was one of several other objectives in as many as 30 percent of the cases. This means that 8,100 or 36 percent of palliative care deaths are either non-voluntary or involuntary, and as I have argued there is no way to distinguish between this 36 percent and the other 64 percent, that is, to distinguish between the cases of passive and the active euthanasia. Nor, is there any way to determine which part of the 36 percent are non-voluntary and involuntary, and this is the distinction between euthanasia

and homicide as our law stands at present.

We know that the practice of palliative care killing and the withdrawing and withholding of life-sustaining treatment takes place here in Canada. If the numbers are proportionate to those of the Dutch, then a significant number of Canadians are killed each year by acts of involuntary euthanasia. This means that the actions of withholding and withdrawing treatment and lethal doses of medication given in the course of palliative care that Sopinka approves of,[68] may pose a far greater threat to human life, and the fundamental respect for life that Sopinka is attempting to protect, than do voluntary euthanasia or legally assisted suicide, which he believes must be prohibited. If the protection of the vulnerable is a primary concern of our justice system, the Dutch study indicates that the court's approval of these actions requires review. If the state is truly concerned with the protection of the weak and the vulnerable, then for the sake of consistency it should err on the side of safety and prohibit all doctor-initiated deaths, including palliative care ones, or at least order that a coroner's inquest be held in each case, to ensure that patients are not being victimized.

Nevertheless, none of this discussion has revealed the nature of the abuse to which the legalizing of voluntary euthanasia or assisted suicide will lead or who will be the abusers. The need for voter approval and the constitution seem to rule out the government. There is no suggestion that voluntary euthanasia or assisted suicide be made available to the public on demand. Like any other medical treatment, it

must be dispensed in a responsible manner. Surgery (exclusive of cosmetic surgery) is available to all who are suffering from a disorder for which surgery offers a remedy. That is, one must be suffering from a condition for which surgery is an appropriate action. One cannot walk in from the street and ask a surgeon to remove an arm and a leg because he or she wishes to qualify for a disability pension or because he or she is bored and wants a change. Likewise, euthanasia is only an appropriate treatment for one whose suffering is of a kind for which death is a reasonable resolution. There is no more reason to fear that the public will abuse the right to medically-assisted suicide than they do other serious medical treatments such as surgery, radioactive therapy and so on. And, since it would be a major medical treatment, it would be of an elective nature and the procedures of informed consent would apply. Consequently, the process will be open to control and review. In this respect, it is far less a danger to the public than are the actions of withholding and withdrawing treatment and palliative care, as they are presently practised, because there are no legal requirements or standards for the reviews that are conducted to determine that any guidelines are being followed or that any be adopted. Nor, is there a requirement that a review take place. At present withdrawing and withholding treatment and palliative care killings are actions that may be being exercised at the doctor's discretion.

Prior to the adoption of their present program, the Dutch recording process was much the same as ours is at present. The

doctor who administered the medication also signed the death certificate. Under the present Dutch reporting system, that doctor just reports the death; the death certificate is prepared and signed by the reviewing authority following the review process. The Remmelink Report does not indicate that the numbers of doctor-initiated deaths for other than voluntary active euthanasia have changed as a result of the voluntary euthanasia program. It indicates that the practice has been ongoing in Holland over an undetermined period of time. The report has simply served to quantify the practice. If the practice is to be controlled, and indeed it should be, then the acceptance of euthanasia has been instrumental in bringing controls about. The reporting procedure introduced with the euthanasia program has demonstrated that voluntary active euthanasia and assisted suicide are a very small proportion of the number of doctor-assisted deaths. The abuse that is feared by the introduction of voluntary active euthanasia may already be a fairly common practice amongst our health care givers. If the concern is that the medical care givers will be the ones who will be the abusers then the result of the Dutch program indicate that there is reason to be concerned over our present system.

Conclusion

I have attempted to demonstrate that the doctrine of double effect, and the killing-letting die distinction, do not buffer the sanctity of life principle from the effects of what has come to be accepted as normal medical practice. Advances in

medical science have provided doctors with the skills to prolong life for the terminally ill but not to halt the progression of the disease or the accompanying pain. The pain can be controlled by the administration of powerful analgesics, but, unfortunately, the patient develops a tolerance to the medication so that it is necessary to increase the dosage to a level which itself can cause death. If, at some point in the course of the treatment it were to happen that the patient died from an injection, unless some exception were made to our criminal law, the doctor must be charged with either assisting suicide or homicide. This is not an acceptable state of affairs and so an exception is allowed on the basis of the doctrine of double effect. I have argued that in this application, the doctrine of double effect is not functional. It is impossible to determine the intention of the doctor at the time of giving or ordering the medication.

Similarly, advances in medical science have made it possible to artificially maintain life at a vegetative level for decades, even when there is no hope that the patient will recover from the state. When the doctor places a patient on such systems, it is usually with the expectation that the patient will recover. When it becomes obvious that the patient will not, that the patient is being provided with useless therapy, the only way to end it is to remove the individual from the equipment. Again, unless an exception is made by our criminal justice system, the doctor doing so will have committed either a criminal act of assisting suicide or homicide. An exception to the criminal law is made by allowing

that the doctor did not kill the patient, but let him or her die. In the same way, a doctor who does not put a patient on life support equipment because the prognosis is that the patient will not recover, is perceived to be denying life treatment to a patient and the doctor must be protected in these cases. Once more, an exception is made under the killing-letting die distinction.

I have argued that this distinction is illusory, that there no such distinction is possible. It is based on the premises that the doctor does not intend the death of the patient and that the he or she is not causally responsible for the death. I believe, I have demonstrated that, in the context of medical ethics, intention cannot serve as the basis for moral justification, and that there is no way to remove causal responsibility from the doctor.

I maintain that palliative care deaths and deaths from withdrawing or the withholding of treatment are acts of assisting suicide or homicide depending on whether the act is at the request of or with the consent of the patient or not. Further, if it is in accordance with the wishes of the patient, it is an act of active euthanasia.

We can infer from the many references he makes to the principle of the sanctity of life and the number of authorities he calls upon to support his position, that Justice Sopinka believes that the principle of the sanctity of life plays a fundamental role in our society. He notes the similarity of the function of the prohibition of capital punishment and prohibition of assisting with suicide as

working to promote the role of the state as a role model in regards to respect for life, and he implies that our societal respect for life is grounded in the principle of the sanctity of life. If he is right, then it must be explained how it is that there did not appear to be any conflict between the sanctioning of capital punishment and the principle of the sanctity of life for the best part of two thousand years, or how it is that the it did not suffer when capital punishment was rejected. If, as it appears, the principle of the sanctity of life can exist in a society equally as well with or without capital punishment, then why can it not exist equally as well with or without assisted suicide?

Sopinka and others apparently hold the belief that the acceptance of assisted suicide constitutes a rejection of the sanctity of life principle, and all of the social principles derived from it. I believe that part of the explanation is that suicide is not perceived by society as just another illegal act of some kind, but that it may be held as a societal taboo. If one considers the major changes that have recently occurred in our laws concerned with life, such as, capital punishment, abortion, and attempted suicide, none has been opposed by Parliament or The Supreme Court on the grounds that it would affect our respect for the sanctity of life. Casting it in the light of a taboo may explain the response that any attempt to legalize voluntary active euthanasia seems to stir up. Regardless of whether one believes that doctors are morally and legally responsible for palliative care deaths and deaths involving withdrawing and withholding medical

treatment or not, it is a fact that no laws were rescinded or amended to enable these exceptions to criminal law. It was not deemed necessary to write into law that deaths of this nature, that occur in the context of medical treatment, are not normally to be investigated or prosecuted because the doctrine of double effect or the killing-letting die distinction is invoked. There is simply the same sort of covenant between the legal and medical systems that exists with regards to surgery and laws of assault. There is no apparent explanation for prohibiting assisted suicide as a special case that has the potential to put our society at risk.

Although, Sopinka and others state that the principle of the sanctity of life is fundamentally important to our society, there is no way of knowing what effect the principle has on our present society. That is, we cannot know how voiding the principle might affect our society in the future and we cannot really determine what effect the principle has had in shaping our present society. We do not know that our laws that prohibit harmful acts against life originate in the principle of the sanctity of life.

Consider what Sopinka is claiming. He claims that the principle of respect for life is at risk if the s.241(b) is overturned. There is an assumption here that there is at least a logical connection between the principle of respect for life and s.241(b), a law prohibiting assisting with suicide. If this assumption is true, it seems odd that there is no logical entailment of a law prohibiting attempting suicide from the same principle. The fact that there is no law against

attempting suicide gives the appearance, at least, that suicide a lawful act. And, one wonders what grounds there are for the claim that the principle of respect for life would be voided by setting aside s.241(b), when it was not voided when the law against attempted suicide was set aside in 1972.

Let us grant that because of the influence of the Christian church on our legal and on our social principles, through the years, many of our laws concerning the status of life in our society have been entailed by the principle of the sanctity of life. Further, that these laws have, in general been beneficial to all of us and are worth retaining. It does not follow that because they originated in the principle of the sanctity of life, if the principle is diminished or voided, that all that we have entailed by it and incorporated into our culture will diminish or disappear. Our public institutions such as parliament, the provincial assemblies, the courts, our common law system have all come to us from a monarchal system of government. However, not even the most zealous monarchist would argue that if the monarchy were to disappear, all of the institutions that have arrived because of the monarchy would be lost. Once a principle or an institution is accepted by a society and is integrated into, and becomes a coherent part of the social fabric, it acquires an existence of its own, it does not depend on its origin for its existence.

CHAPTER 4

A DIFFERENT APPROACH

Introduction

Earlier I described the respective positions taken by Sopinka and McLachlin as the consequentialist and the deontological. I would add that I believe that their almost total disagreement with each others' views is a reflection of the underlying conflict between these two ethical theories. The differences between these two schools of thought appear to be irreconcilable. It seems that a debate between the two sides, of any moral issue whatever, produces two conclusions which are polarized according to the theory of ethics held. In this case, for instance, the sides are split along the lines of the individual and the greatest number.

I suggest that there may be some advantage to adopting a different approach. It seems to me that if one attempts to apply two theories that are at an impasse at the theoretical level to a problem, all that is accomplished is that the impasse is transported from the theoretical level to the applied level. I propose an approach similar to that taken in science where problems that exist at the theoretical level do not affect the application of the science. For example, for many years, scientists did not know whether electricity flowed from the positive to the negative terminal (conventional flow) or from the negative to the positive (electron flow). This did

not impede engineers and technologists from building devices that used electricity. They applied principles in which the theoretical direction of current flow was not a factor.

I view the work done on biomedical ethical principles by Beauchamp and Childress as an analogous step. It is a step in the direction of being able to apply ethical theory to problems of a medical nature without becoming embroiled in the underlying theoretical arguments. However, as I believe Beauchamp and Childress unintentionally demonstrate, it is possible to apply their principles to problems and still continue on with the traditional arguments. It points to a requirement that the principles must be applied in a different framework if any advantage is to be gained.

I suggest that the principles be used in conjunction with value theory. I admit that this combination is, in part, prompted by a personal predilection for value theory. However, values are frequently an underlying issue in biomedical ethics. For instance, when an individual speaks of her quality of life she is referring to the value judgement she has made of her life. Furthermore, if we speak of the issues in terms of the value judgements of the parties concerned, the discussion is forced down from the level of the abstract to the level of the concrete. It is less likely that the discussion will be side-tracked by theoretical issues.

I do not suggest that the approach that I propose is the only way. There may be better sets of principles than those offered by Beauchamp and Childress or there may be a better framework in which to apply them than value theory, or both.

Nevertheless I do submit that a different approach is required and that this is one possible solution.

A System of Moral Principles

I have suggested that ethical arguments conducted in traditional terms are usually fruitless because arguing specific moral issues in terms of deontological and consequentialist theories frequently takes on the character of an ideological argument in which each side is primarily concerned with the ideology rather than the specific issue. In order to circumvent the problems presented by the differences between the traditional theories, Beauchamp and Childress have attempted, with some success, to develop a theory of principles. They describe their theory, which they call a composite theory,[69] as the result of a search for the common ground between rule utilitarianism and rule deontology. They believe that there are principles and rules that can be defended under either utilitarianism or deontology. Furthermore, in the event of a conflict between principles, it is possible that there would be common agreement between the two theories as to which is the prior principle when these principles were applied to a concrete issue. They acknowledge that some compromise is necessary:

> These two types of theory can be drawn closer still if utilitarians take a broad view of the values underlying the rules and include indirect as well as direct and remote as well as immediate consequences of classes of acts, and if deontologists agree that moral principles such as beneficence and nonmaleficence require us to maximize good and minimize evil outcomes and to trade off some values for the sake of other

values.[70]

If one considers that they are proposing their theory in the context of biomedical ethics, this compromise makes excellent sense. When speaking of human life it is inappropriate to determine the morality of an act upon the life of an individual only by a determination of whether the action itself is morally justifiable as in a deontological system, or only by a determination of whether the consequences are morally justifiable as in a utilitarian system. Neither one, by itself, is fitting. A human life should not be considered solely either as the means to an end, nor as an end in itself. An act upon a human life affects both the individual, whose life it is, and the society of which the individual is a member. These matters are best discussed in the framework of principles, particularly in terms of principles which are theory-neutral such as Beauchamp and Childress have proposed, if not achieved. I believe that their theory has merit and I propose to examine it in so far as it has application to the subject of euthanasia.

Their system of principles consists of the four principles of: autonomy, nonmaleficence, beneficence, and justice. These principles have two important features: there is no hierarchal ordering assigned to them, none is prior to the other; nor are they considered as absolute in any way, they are all prima facie binding.

Although there are four principles, Beauchamp and Childress consider justice in terms of the distribution of resources,

and, as this is not germane to the subject at hand, I will confine my discussion to the remaining three. I do not believe that omitting the principle of justice, as they have treated it, undercuts their theory in any way.

The definitions that they present do not contain any new concepts. Beauchamp and Childress define the principle of autonomy as, "One ought not to subject the autonomous actions of others to controlling restraints."[71] This involves acknowledging that the individual person is a self-directing agent who has the right to hold views, to make choices, and to take actions based on personal values and beliefs. There is a presumption that these rights are not held by an individual who is incompetent by virtue of incapacity, age, and so on. However, where these constraints do not apply, the autonomous agent is only liable to be restricted in the exercise of his or her rights by some competing moral principle which is given a prima facie priority.

Beauchamp and Childress acknowledge that in the minds of many, beneficence and nonmaleficence cannot be separated. Nevertheless, they believe that in the context of biomedical ethics there are many situations in which these two can be seen as two competing principles and so they do separate them. For example, surgery normally requires that the patient be harmed in order to treat a greater threat to his or her well-being. On the other hand, there may be a point in the course of a treatment, such as a final stage of cancer, when the benefit that surgery will provide does not warrant the harm that the surgery will cause.

The principle of nonmaleficence is defined as "the obligation not to inflict evil or harm."[72] The authors either believe 'evil' to be self-explanatory or not pertinent to the subject, but at any rate, do not mention it again. However, harm is very much a concern and they define it as "the thwarting, defeating, or setting back of the interests of one party by the invasive actions of another party."[73] 'Interests' are defined in general terms, such as, reputation, property, privacy or liberty, or in a more narrow sense as mental harms and physical harms, such as, pain, disability, and death.

The principle of nonmaleficence is prohibitive or negative in as much as it obliges us not to act in such a way as to inflict harm on anyone. On the other hand, the principle of beneficence is injunctive. The principle of beneficence obliges us to act to help others further their important and legitimate interests by promoting their welfare and preventing and removing harm in a way that achieves a balance between benefits and harms."[74] The principle of beneficence is defined by Beauchamp and Childress as follows:

> (1) One ought to prevent evil or harm,
> (2) One ought to remove evil or harm, and
> (3) One ought to do or promote good.12

Beauchamp and Childress associate the principle of beneficence with paternalism and in fact describe paternalism as a conflict between beneficence and autonomy.

In summary then, these three principles, expressed as obligations are:

1. Autonomy - an obligation not to subject the a tonomous

actions of others to controlling restraints.

2. Nonmaleficence - an obligation not to inflict evil or harm, or to thwart, defeat or set back the important and legitimate interests of another.

3. Beneficence - an obligation to prevent evil or harm, to remove evil or harm, and to do or promote good.

When we frame the Sue Rodriguez case in terms of this triad of non-hierarchical principles, I believe that it is obvious that Justice McLachlin and Ms. Rodriguez are appealing for her rights under the principle of autonomy. Their claim is that Ms. Rodriguez has an autonomous right to assisted suicide and the state has an obligation not to restrain Ms. Rodriguez from the performance of an autonomous act. And indeed, Justice Sopinka agrees that Ms. Rodriguez is acting under the principle of autonomy. He views the issue as one that is concerned with the balance that must be struck between the autonomy of Ms. Rodriguez and the protection of the weak and the vulnerable.

Justice Sopinka's claim that the state has an obligation to prevent harm to the weak and vulnerable, is quite clearly a claim under the principle of beneficence to prevent harm to others. He defends the claim by the state to have an obligation, under the principle of beneficence, to override Rodriguez' interests for the sake of the public interest. It may be argued that the state's position is not paternalistic in this instance, because the state claims to be concerned with third-party interests, not those of Rodriguez, and this falls outside of the usual definition of paternalism such as

the following given by Beauchamp and Childress, which requires that the paternalistic action be directed to the first party.

> "overriding a person's wishes or intentional actions in order to benefit *or* to avoid or prevent harm to that person,"[75]

However, Beauchamp and Childress also refer to the definition given in the Oxford English Dictionary which gives the meaning of paternalism as the:

> 'the principle and practice of paternal administration; government as by a father: the claim or attempt to supply the needs or to regulate the life of a nation or community in the same way a father does those of his children.'[76]

In addition, throughout their writing they refer to individuals or groups, such as patients, prisoners, persons, and so on, as the objects or victims of paternalism. And one last point, in their chapter, *The Principle Of Beneficence*, Beauchamp and Childress sub-title the section in which they discuss paternalism "Paternalism: conflicts between beneficence and autonomy."[77] In view of these points, and the general nature of Sopinka's, defence of the state's position, I believe that it is correct to characterize the his position as paternalistic and that Sopinka's defence of the state's position is a defence of paternalism that he attempts to justify by appeal to the principle of beneficence.

Although Sopinka stresses the harm to third parties, the weak and the vulnerable, in his justification, he appears to include Rodriguez among those he considers to be weak and vulnerable. He makes the following comment when addressing Rodriguez' statement that her choice is one of choosing of the

time and the manner of her death because her death is inevitable:

> ... it has been abundantly pointed out that such persons [the terminally ill] are particularly vulnerable as to their life and will to live and great concern has been expressed as to their adequate protection,[78]

I do not believe that there is any benefit to be gained from an examination of Rodriguez' claim in terms of the principle of beneficence or with Sopinka's claim with respect to the principle of autonomy as might be suggested by too literal an interpretation of Beauchamp and Childress's system of equal and competing principles. In any conflict between the individual and paternalism in which the principles of autonomy and beneficence are engaged, the individual inevitably claims that her right to act autonomously is also in accord with the principle of beneficence as it is for the purpose of preventing harm to herself. On the other hand, the paternalistic agency claims the corporate right to the same rights of autonomy that an individual enjoys. The principle of autonomy is the primary principle invoked by the individual and the principle of beneficence can be considered a secondary or subordinate principle. It need only be considered in so far as it is needed to determine that a benefit will accrue to the individual from the granting of his or her claim under the primary principle. The reverse is true for the paternalist party, the principle of autonomy need only be considered as it is necessary to verify the claim that the agency has the right to be a party to the conflict.

The third principle, the principle of nonmaleficence, must also be considered. Both parties claim that if their claims are denied, they will suffer harm. Again, I believe that this is following the pattern of any argument in which paternalism is involved. The one side claims a right under the principle of autonomy, the other side puts forth a counter-claim under the principle of beneficence. Both parties claim a right to have the other party's claim denied in order to avoid the infliction of harm. In the one instance, the alleged harm is to the individual making the claim, and in the other, it creates the potential for harm to others if the state's claim is not upheld.

The benefit of redefinition of the problem in terms of the principles may not be immediately obvious. However, what has been accomplished is that it has taken the problem out of the utilitarian versus deontologist arena. The argument is not now between two sides in which each side begins with the presupposition that by virtue of the ethical theory that the other side holds, the other side is wrong. Furthermore, the argument need no longer be conducted at the level of abstract principles. The argument is now framed in the context of the concrete issue of Ms. Rodriguez.

Values

In addition to defining the problem as a set of conflicting principles, I suggest that there is much to be gained by examining the problem in terms of the values involved on either side of the issue. Both Sopinka and McLachlin speak of

values throughout their statements, but neither has stated what they believe these values might be. I would like to define these values first, and then to analyze them within the perspective of the Beauchamp and Childress principles. However, before it is possible to proceed with an examination of these values, which I will do in the next section, several principles of value theory must be put forward. I say "several principles" advisedly as I wish to avoid getting sidetracked on an exposition or a defence of a particular value theory. In the main, I shall draw upon the account of value theory given by Paul W. Taylor in *Normative Discourse*, which he describes as "an attempt to use the informal logic approach in general theory of value."[79]

The first, and perhaps for some, insurmountable, problem of value theory is the ambiguous nature of the term 'value'. This ambiguity is manifest in the amount of literature on the nature of value. I mention several texts in the bibliography which provide extensive, and I might add, diverse accounts of the nature of value. The account that I have found the most useful and readable is one by Z. Najder in *Values and Valuations*. I prefer this over Taylor's because of its simplicity, but at the same time, it is compatible with Taylor's use of the expression. Najder does not so much define 'value' as he records the way in which we use the expression. He lists three common uses of 'value' which he describes as often overlapping and frequently confused.[80] The first is the quantitative sense, which is primarily used in an economic context, but has some limited use in ethics and aesthetics,

eg., This house is worth $ 100,000.00.

> (1) Value is what a thing is worth; sometimes translatable into or expressible by some units of measurement or comparison, frequently definable numerically.

The second is the attributive sense which has a wide range of application. It applies to: (a) individual objects or facts eg., works of art, and (b) certain properties of these eg., artistic originality.

> (2) Value is a valuable (a) thing or (b) property (quality); something to which valuableness is attributed or ascribed.

The third meaning, which is the axiological, is the sense given to value when we use it in connection with a certain idea, principle or criterion, eg., If we consider a work of art as valuable (as in (2a)), we must consider art as a value; if we consider that the value of a work of art consists in its property of originality (as in (2b)), we must consider the concept of originality as a value.

> (3) Value is an idea which makes us consider given objects, qualities or events as valuable.

Taylor uses the term in both the attributive and the axiological senses of (2) and (3). But, he is also concerned with quantifying the value. Not in the sense of (1) above, but by ranking it in relation to other things of the same class or grading it in relation to the ideal of that class as we shall see later.

Taylor speaks of evaluation both as a process and a product and distinguishes between them in this way:

> The process of evaluation consists in trying to determine the value of something. As a product or outcome of that process, an evaluation is a settled opinion that something has a certain value. ... I shall refer to this [appraisal, criticism] evaluation, the product of the process as a value judgement.[81]

The distinction that Taylor makes here between "evaluation" in the verbal mode of 'to evaluate' and value judgement in the nominal mode of 'evaluation' serves to clear up a great deal of ambiguity. This is a practice worth following: as is the use of another expression 'evaluatum(a)', or that which is evaluated.

Taylor analyzes the evaluation process to determine how we think when we are evaluating. Not the psychological process that we follow, but the logical method which a rational person might follow if he or she were trying to come to a careful reflective decision about the value of something or to justify a value judgement already made. He concludes that there are five elements or conditions that form the logical process. However, I suggest that there are only three that need concern us in this analysis.[82] The first is the element of the point of view, the second is the class of comparison, and the third is the norm or set of norms, that is, the criteria and standards of evaluation.

Value judgements are not of a binary nature; it is not just a matter of an object having the quality that we value or not having it. There is also the condition that, if the evaluatum has the quality that we value, it has it in some quantity. Whenever we evaluate something, we do so either to assign it

a grade or to rank it in comparison with other things like it. In either case, there is a point of view that is presupposed. Everyone who attributes a value to an evaluatum, does so from a point of view and refers to norms that are relevant to that point of view when evaluating.

Evaluations may be made from many points of view: the moral, the aesthetic, the religious, the intellectual, the political, the legal, the economic, the prudential, and so on. In order to evaluate something we must decide which point of view we wish to take. We must decide what it is that we are evaluating the evaluatum as. For instance, there are many ways that we can evaluate automobiles. We may wish to determine a car's value as a status symbol or as a taxi or as a cheap, reliable vehicle to be used for daily commuting.

Whatever point of view we take determines what other things are included in the class of comparison and the norms of evaluation that are relevant to the evaluatum. Let us assume that we are considering buying a car and we wish to evaluate a Honda Civic from the practical point of view of a car as inexpensive, reliable transportation and we want to rank it with other cars. The others would have to be cars of the same general type and so our class of comparison would be restricted to cars that also provide inexpensive, reliable transportation, for instance, the Toyota Tercel, the Dodge Shadow, and the Ford Tempo. The norms of evaluation that we would select would probably include criteria such as insurance rates, gas consumption, driver/passenger comfort, safety/maintenance reputation. We would also prioritize the

criteria and we would establish standards of excellent/good/bad for each of the criteria. Then, it would be a matter of examining each vehicle in terms of the norms to judge the degree to which the characteristics of the car fulfil the norms. We would then be in a position to rank the different vehicles in order to determine where our Honda Civic fit.

If we were to take a new point of view, we would have to establish different norms of evaluation. New criteria and standards must be adopted that are relevant to the new point of view. For example, after ranking our Honda Civic from the practical point of view may wish to evaluate it from an aesthetic point of view, perhaps rank it by appearance with the same group of cars. While we would not change the class of comparison, we would have to adopt new norms relevant to an aesthetic point of view.

However, sometimes changing our point of view requires a change in both the norms of evaluation and the class of comparison. For instance, assume that we decided that we were not concerned with the cost, that we wanted a luxury car that would make a statement about our social position - a status car. The class of comparison would have to be changed to take in Mercedes-Benz, BMW, Jaguar, and perhaps a Porche. The norms that we would adopt would probably still include driver/passenger comfort and safety/maintenance reputation, but we would drop criteria of a cost conscious nature, such as, insurance rates and gas consumption and we would add criteria such as the luxury of the fittings and intangibles

such as the amount of envy/admiration the car invokes in our acquaintances.

So far, we have considered the evaluation process as a ranking tool. However, it is not always the case that we wish to rank an evaluatum. We may only wish to grade it in order to determine whether it is good or bad. If this is the case, we must still take a point of view and establish the norms of evaluation; however, we take the ideal as the class of comparison. For example, if we wished to grade the Honda Civic, we would compare it to an imaginary car that ideally satisfied all of our norms of evaluation. This creates the possibility that we might rank the Honda Civic as the best of its class, and, at the same time, give it a grade of bad. A better example of this situation might be Canadian prime ministers.

It is obvious that any rational process of evaluation must begin with the definition of the point of view in order to establish relevant norms with which to evaluate the class of comparison. If we attempt to evaluate from several points of view at the same time, we become involved in conflicting norms and disparate classes of comparison. Inevitably this will result in an incoherent value judgement for which one cannot provide either a sensible explanation or a rational justification.

It is true that in practice our final value judgements are seldom taken from one point of view alone. They are a composite of several points of view. The value of a Rembrandt to its owner may not only be the aesthetic value of the piece,

but also its economic value, its historical value, and its value as a treasure of the art world. All of these comprise its value to the owner. However, it is to his or her advantage to be cognizant of each value separately. For example, the discovery of twenty hitherto unknown Rembrandts would likely have an impact upon the economic value of his painting. The owner is in a better position to make a new value judgement of the painting if he or she is aware that the painting's value as an investment may have been affected. From the point of view of the painting as an investment, the owner may wish to re-evaluate it in a class of comparison of all other possible million dollar investments using financial norms of the investment industry. It may well be that its aesthetic and historic values and its value as a cherished art object are more important to the owner than its investment value. However, knowing each value separately helps him or her to make an informed decision. This is the purpose of the Taylor process. It is to provide a logical method for a rational person to follow in order to come to a careful reflective decision about the value of something or to justify a value judgement already made.

It is evident that while norms must be relevant to the point of view and the evaluatum itself, they are dependent upon the evaluator to some degree. If we consider our initial list of norms for an inexpensive automobile, insurance rates, gas consumption, driver/passenger comfort, and safety/maintenance reputation, these criteria may be core or common to any list of criteria. However, the list may also

include criteria of a strictly personal nature. For example, someone who is six feet ten and weighs three hundred and fifty pounds would likely include a spacious driver's position as a criteria. On the other hand, someone four feet ten weighing ninety-five pounds would likely insist on a height adjustable seat. One person may be safety-conscious and insist on air bags, while another who suffers from hay-fever may include air conditioning. These underlying criteria would be included in the final value judgement regardless of the point of view from which the vehicles were being evaluated.

Because of the diversity of points of view and the margin that the evaluator has to establish the norms of evaluation, it is obvious that Taylor's elements or conditions are intended as a schemata for the evaluation process, not as the directions or rules of evaluating. This does not indicate that the process is one of a Protagorean "man is the measure of all things". Certainly, there are certain matters of taste in which the criteria of evaluation are of an individual nature. A's idea of a wine whose taste he values might clash with that of B who would argue that A's wine tastes like vinegar, while A argues back that B's wine tastes much too sweet. There is no resolution possible in areas such as this in which matters of taste are involved. Neither A's or B's criteria or use of the word 'good' can be said to be outside of the range of normal. For example, if 95 percent of the population agrees with B that A's wine does not taste good, it does not mean that when A exclaims, "This wine tastes good," he stands to be corrected. He cannot be told "No you are wrong; you must say

that it tastes bad." If A were to state that "This is a good wine." he may be corrected on appeal the consensus of the 95 percent, but I cannot see that he can be wrong about what it is that tastes good to him.

Few of our value judgements are of the nature of tastes. If one were to declare that, " Reich Chancellor Adolf Hitler was a good man," then immediately one's criteria of what constitutes a good man, or one's understanding of the meaning of the word good, would be called into question, because obviously one, or the other, or both, are not within the range of normal usage. So, just as the meaning of the word 'good' is governed by the semantic rules of language, in the same way, the criteria that are suitable for use when making a value judgement of a man's character are governed by rules of public acceptance. That is, the criteria used to determine that a person is a 'good man' must be publicly accepted. One cannot use the criterion that a person be kind to his dog to judge that person a 'good man' while some one else uses the criterion that a person drives an expensive car.

At the beginning of this section I spoke of the way that we use value in both an attributive and an axiological sense: For example, if we attribute value to a person because he is honourable, we must place a value on the concept of honour. Values, in both senses, are related to elements of the relational framework of interests and rights that we spoke of earlier and the framework should be expanded to include them. An axiological value fits into the relation framework as a precursor to an interest. Values, in their axiological sense,

are presupposed by interests. Whenever there is an interest taken, it follows that the interested party values the object of interest. If we have an interest in freedom, it is because we value freedom. Obviously, axiological values, like interests, are not universally held. One person who values religion may attribute value to an individual because of the religious devotion of the individual. Another person who does not value religion would deny an attribution of value in this case.

This new relational framework may become clearer if we consider it in an example. Let us assume that X values freedom of expression and declares an interest. X claims the legal right to freedom of expression to protect her interest. X's legal right is supported by the constitution and the laws that are in place to protect X's right and to enable her to practice freedom of expression. These laws are legally justified by X's constitutional right to autonomy of person and morally justified by appeal to the moral principle of autonomy. Furthermore, the principle of autonomy also justifies X's claim to the moral and legal right to evaluate her right to freedom of expression, so that violations of her right are in terms of her values not the values of others.

This last point is significant. X's right to freedom of expression is severely weakened if the right to evaluate is not included in her right to freedom of expression. It is frequently the case that a repressive regime which does not wish to appear repressive may be able to point to the individual's right to freedom of expression in their

constitution. However, at the same time, they can suppress the practice of freedom of expression, by retaining the right to make the value judgement of what constitutes a violation of freedom of expression of the individual and what constitutes a violation of freedom of expression by the individual. The right to make a value judgement of, that is, to attribute value to the evaluatum, is a necessary part of a right of, if the right is to be enabled and exercised.

Raz refers to an account of interests by a T.M. Scanlon, in which Scanlon distinguishes between three types of interests in connection with freedom of speech.[83] Scanlon defines first-party interests as speaker's interests, the interest of the right-holder to communicate with others. A second-party interest is the audience interest that a person has that others are free to communicate with him or her. The third is the public interest, the interest that we have to live in a society in which there is the freedom to communicate.

In terms of values, first and second-party interests are related to attributive values. A person can attribute a value to the right to express herself to another person and the right of that person to express himself to her. Third-party interests are the public interests which presuppose axiological values. For instance, the value we place on the concept of freedom of expression in our society is an axiological value which is presupposed by our third-party interest in freedom of expression.

Distinguishing between interests and values in terms of first, second and third parties, in this way, is a useful

analytical tool. For instance, it may appear inconsistent for a person to express both an interest in freedom of expression and the right to privacy. However, if we understand that he or she has a first-party interest in his or her right to privacy and a third-party interest in the public's right to freedom of expression, there is no appearance of inconsistency, only a legitimate conflict of interests. It also makes clearer the distinction that we make between property as a public or societal issue and our own private property. We have both a third and a first-party interest in property. This can be seen as a reflection of the way that we value the concept of property in an axiological sense and make value judgements of items of property in an attributive sense. Furthermore, it makes clear the distinction that McLachlin attempts to make between life as a public issue and life as a private issue. Each of us values life and we have a third-party interest in life, and, in addition, each of us makes a value judgement about our own life in which we have a first-party interest.

The Value Of Life

As I have written previously, I believe that the reference to value by both McLachlin and Sopinka throughout their analyses is significant. Mclachlin makes the statement:

> Certain of the interveners raise the concern that the striking down of s.241(b) might demean the value of life. But what value is there in a life without the choice to do what one wants with one's life, ...[84]

I believe that her expressions "value of life" and "value in

a life", and "one's life" are meaningful - perhaps more than she meant them to be - and that they provide the key to a better understanding of both sides of the problem. I would suggest that these are references to the two senses of values that we have discussed. The value referred to in "the value of life" and "the value in life" is the axiological value; it is a reference to the value of the concept of life and presupposes a third-party interest, that is, the interest we have in a society in which life is valued. When she speaks of the "[the value of] one's life" McLachlin is speaking of a first-party attribution of value to a specific life. She argued for Ms. Rodriguez' first-party interests and her right to determine her own fate. At the same time, she argued that the state's interests, which she acknowledged were legitimate, were well-protected in sections of the criminal code other than s.241(b). McLachlin obviously recognized and considered the two interests at issue, the first-party interest of the individual and the third-party interest of the state.

While McLachlin's view may appear to be an enlightened one, it is not one that is unusual in law. Consider the law's position on property in which the interests of all parties are recognized. Property is an important element in cultures that have a large middle class such as ours and most other western societies. Our property laws are extremely comprehensive, and can be seen to protect the members of society from being deprived of their property by other members of society, and, under most conditions, by the state itself. The law enforcement agencies have a duty to protect one's property

from theft and the legal system has a mandate to prosecute and to punish those who steal it. In addition, this protection of property extends to the safeguarding of all public and private property such as structures, parks, and so on. Underlying this shield of the protection of property that the state provides, is the principle of respect for property. As a major and defining element of our culture, property is given a position of respect, and respect for property is seen as a fundamental principle within our society.

Nevertheless, as important as the concept of property is to society and in spite of the emphasis that is given to the security of property in our laws, it does not preclude one's right to exercise one's autonomy over one's own property. We consider that this right is included in the fundamental principle of respect for property. In fact, one might argue that the laws that the state puts in place and the institutions created to enforce those laws have, as their purpose, the guaranteeing of one's right to the unhindered use of one's property by protecting our authority over our property from all forms of trespass by others. At the same time, the right to the use of one's property includes the right to dispose of it. One is free to exercise control over one's property constrained only by the condition, normal to a free and democratic society, that one must not cause harm to others by so doing. One cannot use one's property in such a way that the manner of use encroaches on the rights of others in the use of their property.

In the matter of property, then, the state perceives that

it has a mandate to protect all interests in much the same way it does freedom of expression. We have a first-party interest in owning our own property and a second-party interest that others own their property so that we may sell, buy, and exchange property between and among ourselves. In addition, we have a third-party interest, which is the public interest, in living in a society in which we are free to exercise the rights of ownership. This last interest requires that the government not only protects all owners of property from being deprived of his or her property, but, that it at the same time, protects the owner's autonomous control over his or her property. And, in contrast to the position taken with one's life, protecting these different levels of interests is not perceived as presenting conflicting objectives for the state.

It is evident that property can perceived from two different points of view and ascribed two different values. From the point of view of the state, property is evaluated as a concept and as such it has a single value.[85] That is, regardless of the nature of the object itself, as a piece of property it is valued the same as any other piece of property in that the laws governing the protection of property apply to it equally as to all other pieces of property. In principle, all objects are property and all property is perceived as equal under the laws of property. We could not function as a capitalist society if this principle of respect for property were not adopted. The right to own property must be guaranteed and protected if the members of a society are to accept the acquisition of property as a basic societal objective.

For the individual, property is evaluated from two points of view. The individual, at least those who agree in general with the capitalist nature of the society, share the state's point of view of the protection of property as a fundamental principle. That is, each individual shares in a third-party interest in property. Each property owner in society has an interest in the state taking the position it does with respect to property, as this affords the individual the protection and guarantees needed for him or her to enjoy the use of his or her own property. However, with respect to the ownership of property, the individual has a first-party right to evaluate his or her property based upon his or her point of view and upon the personal norms that he or she establishes. Under the autonomy implicit in the principle of respect for property, the individual is free to make value judgements of a sentimental, personal, economic, aesthetic nature, and so on, of property as specific pieces of property. In addition, based upon his or her value judgements, the individual has the right to dispose of his or her property in a manner that he or she deems fitting.

For McLachlin, the principles of respect for property and life have much in common. The principle of respect for life serves a twofold purpose as does the principle of respect for property and the division of purpose is along the same line. The laws governing property guarantee us protection from being unjustifiably deprived of our property and at the same time guarantee our autonomous control over our property. These are complementary laws in tne sense each loses its significance

without the other. Our laws concerning human life are also comprehensive, and serve to protect the members of society from being deprived of their life by other members of society and, under most conditions, by the state itself. The law enforcement agencies have a duty to protect life and the legal system has a mandate to prosecute and to punish those who take life without justification.

The contrast between the position taken by the state (as represented by the Sopinka decision) with respect to life, on the one hand, and the position taken on property, on the other, is obvious. When it is the principle of respect for property that is involved, there is a presupposition that this includes the right of the individual to exercise control over his or her property even to the point of destroying it, constrained only on the grounds of causing harm to others. An individual is only in violation of the principle of respect for property in so far as he or she steals the property of another, or in some other way, deprives another of the use of his or her property. If the same conditions were to be applied to the principle of respect for life, then one would be seen to be in violation of the principle only if one were to take the life of another or to somehow deprive another of the use of his or her life.

Sopinka seems to be unable to accept the premise of laws of a two-fold complementary nature as regulating life, because of his conviction that the principle of respect for life is derived from the principle of the sanctity of life. Autonomous individual control over one's own life is incompatible with

the belief that life is the province of a divine agent, albeit Sopinka refers to the version given by Keyserlingk that has been given a secular veneer. Therefore, Sopinka understands that the state's interest in protecting life includes not only protecting the life of the individual from others but from himself or herself. Sopinka does not appear to recognize a first or second-party interest in life. For Sopinka, there is only a third-party interest involved.

If we consider the value judgements that underlie the positions of the two justices, the contrast is obvious. McLachlin evaluates life from two different points of view: as "the value of life" from the point of view of the state and life as "one's life" from the point of view of the individual.

For Sopinka, who represents the state's interests, whereas the value of one's life is a matter of importance to the individual, the value of life is a fundamental defining principle of our society and is of greater importance. The state is not concerned with the attributive value of a life, that is, the value of any particular life. It is concerned with the axiological value of life. In the context of social principles, all lives are of equal value. This is the condition that is implicit in Sopinka's idea of the principle of the respect for life as a defining principle of our society. For example, we can assume that in Stalinist Russia, the value of the respect for life as a defining principle of Stalinist Russian society was ascribed a lesser value than we ascribe to the principle of respect for life in our free and democratic society. In our society, it is perhaps the ultimate

value, whereas in Stalinist Russia, we can suppose that the principle of respect for the state was the ultimate value.

Those individuals such as Ms. Rodriguez and McLachlin who reject the principle of the sanctity of life, understand the principle of the respect for life as both respect for life in general and as respect for one's own life. Every person who lives in our society shares the state's interest in protecting life. Everyone expects the state to provide laws concerned with the protection of life, such as, laws against murder, kidnap, assault, and so on, that protect each member of society from harm by others. This grants the individual the protection and the guarantees needed to live his or her own life in the manner of their choosing. However, the value of one's life, like the value of one's property, is also evaluated from a personal point of view. Just as one attributes a value to one's property that is different from that which anyone else would attribute to it, because of emotional factors, the value one attributes to one's own life is personal and, therefore, unique. McLachlin argues that since the law recognizes the unique nature of each life and allows each individual freedom of choice in the way he or she lives, it is contradictory to deny this uniqueness by refusing the individual the freedom of choice in the way he or she dies.

I daresay that everyone, without exception, expects to live in a free and autonomous manner under the protection provided by our laws. Some believe that this autonomy rightfully extends to the right to stop living when the value of their

own life, as evaluated by themselves, is not acceptable. Others believe that the constitutional right to autonomy does not, under any circumstance, include the right to choose when to die. This is the crux of the issue that divides McLachlin and Sopinka: Rodriguez and the state.

Principles and Values

Having, to me at any rate, made a good beginning at a different approach, Beauchamp and Childress then proceed to generally ignore their own principles in their discussions. For example, their extensive discussion of killing and letting die is conducted in terms of what have come to be the customary arguments - the Nazi analogy, for instance - not in terms of the principles that they have proposed. After presenting their principles, one assumes that they would have taken the opportunity to put them to use to cast the problem of euthanasia in a new light and reformulate the argument in new terms. Unfortunately, they did not.

They followed the dialectic method of point and counter-point that I followed in the previous chapter. I presented my counter-arguments to the traditional arguments of the doctrine of double effect, the killing-letting die distinction and the Nazi analogy. Anyone interested in disputing my position would be expected to counter my counter arguments. And, I suggest that by staying with this process, the debate over the legalization of euthanasia will go on until it is overtaken by events as happened with the abortion debate.[86] The legal debate over abortion in Canada became redundant, for all practical

purposes, when attempts to convict Dr. Morgentaler resulted in juries refusing to convict him in spite of the evidence and in spite of the law.

I have suggested that there is a need for a different approach. I propose that one follow a simple method when applying the principles of Beauchamp and Childress to cases in which there is an ethical conflict between the individual and a paternalist agent. (Any review of the literature on biomedical ethics will show that problems involving paternalism represent a significant portion of all of the problems in this area.) The method involves evaluating the claims of the parties in the conflict in terms of the three principles and the value judgements involved in the their arguments. I emphasize that the method that I am suggesting is an evaluative process. It is not a algorithmic process whereby one feeds in the data and the result comes out automatically. One must make rational evaluations and be prepared to provide rational justifications for one's evaluations throughout.

In the method that I am proposing, there are three steps and it is necessary that all three be taken to make a rational evaluation. It may seem apparent after analyzing the claim in terms of the principles of autonomy and beneficence that one party's claim is better justified than the other's. However, it may be the case that the examination of both sides in terms of the principle of nonmaleficence reveals that the claim determined to be the one most justified in terms of these two principles, also causes the most harm. Therefore, the evaluation requires that all of the principles be considered.

The first step is to evaluate the claims of both parties to verify that there is a valid claim under the principle that is invoked. I suggest that the best place to start is to examine the claim and supporting arguments of the paternalist side. This is generally the state or some agency of the state, in which I include professional agencies chartered under the state's laws. The reason I suggest that we start here is that we can evaluate the state's argument without verifying the Rodriguez claim whereas we cannot evaluate Rodriguez' claim without having verified the state's. In order to verify the claim of the individual, it must be demonstrated that the beneficent claim does not represent a prima facie cause to override the claim of autonomy.

If the state's claim made under the principle of beneficence is that the action that is being taken is necessary to prevent harm, it must be demonstrated that there is a harm and that it is severe enough that it justifies overriding the autonomy of the individual. The paternalist claim is invariably one of a general nature. That is, it is not concerned with a specific case, but with all cases of the same kind. For instance, in the present case, Justice Sopinka's reasons for his refusal are in no way dependent upon the specifics of Rodriguez' claim, they are applicable to all claims of this nature.

The second step is to verify the individual's claim and the justification given for it. It is not enough that the individual shows that she has been subjected to controlling restraints, she must also show that her claim reflects

legitimate and worthwhile interests and underlying values, and that the state's reasons for imposing the restraints do not represent a prima facie cause to override the autonomy of the individual.

Finally, regardless of the result of the evaluation at steps one and two, the harms to both parties must be considered before the evaluation is complete. The reasons for this step should be obvious. The benefits to be gained by either party to the dispute, by a decision in their favour as a result of considering their claims under the principles of autonomy and beneficence, may be outweighed by the harm that would be inflicted upon a party by a decision one way or the other.

First, let us outline the state's position in terms of the principle of beneficence, which is "an obligation to prevent evil or harm, to remove evil or harm, and to do or promote good." The state claims that if Ms. Rodriguez' petition is granted and s.241(b) is repealed, the state's interest in preserving the sanctity of life as a fundamental principle is harmed and society as a whole will suffer because of the loss of respect for life that this would bring about. The state claims the obligation to act to prevent harm to the weak and the vulnerable who would be endangered by a loss of respect for life. There are the two points here, first that the state has an obligation to intervene to prevent harm and second that there is a harm that must be prevented.

There is justification for the view that the state has an obligation to act in a beneficent manner. It is an expectation

that we have of our government. For instance, no one questions the state's right to act for the public welfare by intervening in the areas of public health measures to provide: safe food and medical drugs; labour safety laws to ensure safe labour practices; employment codes to prevent exploitation of workers; and by passing laws against the sale of addicting drugs, and so on. Actions such as these are beneficent in nature and the state is perceived as having a legitimate and well-established right to interfere in our lives in the name of beneficence. Much of the state's intervention in the lives of its citizens is not only welcomed by them, but is frequently at their request. Witness our environment protection laws which seem to be forthcoming from a reluctant government only by the insistence of the public.

Therefore, it is not simply a matter of the proponents of the principle of autonomy arguing that any intervention by the state in the lives of individuals is wrong. It seems that, in many situations, we readily accept the state's right to intervene in our lives. In fact, we do not normally quarrel with the right of the state to intrude in our lives. We accept its intrusion as part of the mandate that we give to our governments to provide peace, order and good government.

Turning to the matter of assessing the harm that the state claims that will be prevented by retaining s.214(b) we encounter some difficulty. Consider what the state is claiming. Sopinka claims that the principle of respect for life is at risk if the s.241(b) is overturned. There is an assumption here that there is at least a logical connection

between the principle of respect for life and s.241(b), a law prohibiting assisting with suicide. If this assumption is true, it seems odd that there is no logical entailment of a law prohibiting attempting suicide from the same principle. The fact that there is no law against attempting suicide gives the appearance, at least, that suicide is a lawful act. Furthermore, one wonders what grounds there are for the claim that the principle of respect for life would be voided by setting aside s.241(b), when it was not voided when the law against attempted suicide was set aside in 1972. For the sake of consistency, Sopinka is required to show that there is a relevant difference between these two such that one would damage our social fabric while the other did not.

There is another inconsistency in Sopinka's evaluation. He makes the following comment:

> To the extent that there is a consensus, it is that human life must be respected and we must be careful not to undermine the institutions that protect it.
>
> This consensus finds legal expression in our legal system which prohibits capital punishment. This prohibition is supported, in part, on the basis that allowing the state to kill will cheapen the value of human life and thus the state will serve in a sense as a role model for individuals in society. The prohibition against assisted suicide serves a similar purpose.[87]

He states that the prohibition of capital punishment and assisted suicide are both grounded in our respect for human life. He has also given the very long history of the prohibition of assisted suicide in western society as a justifying reason for the retention of the prohibition of assisted suicide. However, the use of capital punishment had

at least as long a history and was grounded in the same principles of respect for human life and the sanctity of life as is the prohibition of assisting suicide, and by the way, as was the prohibition of attempted suicide. In the 1960s the state's position on capital punishment was reversed with no damage to respect for life. In fact, Sopinka appears to be saying that it enhanced our respect for life. In the 1970s the state's position on attempted suicide was reversed - again without any apparent injury to our respect for life. However, he claims that if the state's position on assisted suicide were to be reversed our respect for human life would be injured to extent that it constitutes a harm to society. There is an obvious inconsistency in Sopinka's argument.

There is no way to determine the way in which our society is affected by the principle of respect for life, it seems to embrace both capital punishment and the prohibition of capital punishment, and attempted suicide and the prohibition of attempted suicide with equal facility. The principle is indeterminate as to which policy promotes it or which one damages it. So, even if we were to accept Sopinka's claim that the principle of respect for life would be damaged, there is no way to determine the effect that this would have, if any, on our society. Any determination of the injury caused to society by somehow injuring the principle is at best conjectural.

The state's claim, as presented by Sopinka, that the principle of respect for life has value as a principle that somehow controls the way that we treat the weak and the

vulnerable in our society, is not supported by his argument.

It is obvious that, in view of this conclusion, the state's claim that under the principle of beneficence they have the right to override Rodriguez' claim to the right to assisted suicide under the principle of autonomy is not justified. However, it does not follow that because the state's claim is not justified, Sue Rodriguez' claim should be granted. It is always possible that an evaluation of her claim will show that it too is not justified.

The petition of Sue Rodriguez to be given the freedom to control her body is made under appeal to the principle of autonomy. Throughout her campaign for the right to be assisted to commit suicide, Ms. Rodriguez emphasized the issue of autonomy. In a statement made before a parliamentary committee she expresses her belief in the autonomy of the individual:

> A law which states or implies that Canadians are not masters of their own fate but belong somehow to the State or some other hypothetical authority simply won't be tolerated much longer. ... I can only hope that somewhere in the system I will find a recognition for my rights as a person. ... I want to ask you, gentlemen, if I cannot give consent to my own death, then whose body is this? Who owns my life?[88]

Her argument is that the state's interest in protecting human life under the principle of beneficence does not include denying an individual the control over his or her body in the choice of suicide. There is prima facie support for her claim in the principle of autonomy which is "the right not to be subjected to controlling constraints by others."

Her claim is supported by McLachlin, who contends that the state's argument that allowing assisted suicide will threaten the social structure is mistaken. The state's interests are safeguarded by other legislation that is already in the *Criminal Code*. McLachlin does not argue against the state's contention that the principle of the respect for life is fundamental, rather that the allowing of assisted suicide does not threaten it. This is pretty much the conclusion that was reached in our evaluation of the state's claim.

Rodriguez claims the right to live a self-directed life in which the quality of her life is an important factor. She believes that among the rights she has as an autonomous agent is the right to make her own value judgement of her life, in order to determine its quality. Rodriguez claims that S.241(b) violates her right to assisted suicide and forces her to live a life on which she places no value. She has, or will in the near future, reach a point at which her death will have more value to her than her life. By denying her the right to act on the basis of her judgement of the value of her life, the state harms her by causing her emotional and physical suffering.

Sue Rodriguez is very much concerned with life itself - her life. And, the value judgement that she makes of her own life is that it is so lacking in any value that death is preferable. Because of the personal nature of the point of view and the definition of criteria involved in evaluation it is not possible for one person to make an evaluation on behalf of another. However, because we know the value judgement that

Ms. Rodriguez made, that is that her life was of no value to her, and something of her background, we can make an attempt to justify her value judgement. Is she one who is capable of making a valid value judgement that can be justified as the product of a rational process of evaluation? Or, does she fall into the state's category of one whose condition has rendered them vulnerable and, who, in a moment of weakness, has come to believe that her life is without value and, therefore, does not have a justified claim to the right to assisted suicide?

I suggest that a self-evaluation of one's life is, to an important degree, made in terms of past experience, present condition and expectations of the future. Accordingly, the norms of evaluation that anyone establishes includes norms concerned with one's past, present, and future and, among these, the future is the most important. In WWII, there was a phenomena known as "turning one's face to the wall" that was recorded among the allied prisoners of war. An individual who had given up hope just "turned his face to the wall" and died of apparently natural causes - a sort of a suicide by resignation. The interesting point is that it was not a phenomenon brought about by past conditions or even the conditions present at the time, although these were undoubtedly the basis upon which the individual based his expectations for the future: The apparent suicides took place when the individual gave up hope for the future.

Ms. Rodriguez was an active person and it is reasonable to assume that one important norm she would set would concern her capacity for activity. Under this norm she would probably

compare the level of capacity for activity that she had when she was healthy to her present level and also to her anticipated future level. And, she would also compare her anticipated future level to the future level she had anticipated for herself at a time when she was healthy. For example, consider a person who at age thirty is a competitor in marathons races and, quite reasonably, anticipates that when she is forty she will still be competing, however, by age thirty-five finds herself virtually immobilized by disease. To some degree, when evaluating her future, such a person considers these unrun marathons as part of the future that might have been, but which is now unrealizable. Similarly, these sorts of expectations comprise Ms. Rodriguez unrealizable future and this unrealizable future would figure largely as a standard of evaluation when making a value judgement of her life.

Sue Rodriguez knew what her future contained and it gave no cause for hope. Her interest, outside of her sports, was her nine year old son. However, her condition was reaching the stage that she could no longer enjoy a relationship with him. She was a person whose life was work, sports, physical activity, and her family. She was not a Stephen Hawking who is living a productive, fulfilling life while he suffers from the same disease as Ms. Rodriguez. Hawking has a vocation and while his disease has changed the way in which he does his work, nevertheless, he is able to continue to work. Hawking's life is an intellectual one; according to his own testimony, his physical impairment has not affected his capacity for an

intellectual life.[89] For Ms. Rodriguez, her disease meant that all of the physical activities that had been part of her former life were lost to her. Like many of us, a Rodriguez may admire or even envy a Hawking, but cannot emulate him. It may be that the court challenge that occupied her in the later stage of her life was as close as Sue Rodriguez came to having a cause or a vocation. It is ironic that she was fighting for the right to die.

There is, then, good reason to believe that Ms. Rodriguez' value judgement of her life as one that is not worth living is justified. If we consider her life from her point of view as one whose present life is almost completely dislocated from her past, whose present condition is dreadful, and whose future is predictably a slow and deplorable decline to a death, I believe that there is consensus in support of her value judgement, and that her value judgement is justified.

Because Ms. Rodriguez' value judgement that the quality of her life is such that it will soon reach the level that it is of no value to her is justifiable, and because the state can identify no claim that would override her prima facie right to be assisted to commit suicide, I believe that we must conclude that her claim is justified.

We must now evaluate the positions of both parties in terms of the principle of nonmaleficence, "the obligation not to inflict evil or harm, to thwart, defeat, or set back the important and legitimate interests of another." We wish to avoid justifying a claim that violates the principle of nonmaleficence. To do so, we must determine whether setting

back the state's interests by granting Ms. Rodriguez' appeal is a greater moral harm than the defeating of her interests by refusing her appeal. In other words, we must decide which side is harmed most having their interests overridden and having to accept the values of the other. This involves a fourfold decision. We need to consider the harm to Rodriguez if her appeal is denied or granted and the harm to others if her appeal is denied or granted.

To assess the harm that setting aside her petition would cause Rodriguez herself, we need only consider the nature of the life it will force her to continue on with to the end. From the already dreadful state of her current life, the quality of her existence would continue to decline. She would eventually asphyxiate because her lungs would no longer oxygenate her blood supply in spite of her being permanently on a respirator. By setting aside her petition she is being forced to continue right to a very bitter and unenviable end.

On the other hand, if Rodriguez' appeal were granted, the harm inflicted upon her by the current state policy would be relieved. She would not be forced to continue to live a life that, to her, was completely lacking of any quality that she valued. In the words of Seneca, she would find the refuge of death.[90]

There does not seem to be any way to assess the harm that would be caused to the state by granting Ms. Rodriguez' petition. All of the claims of harm made by the state are at best conjectural but more properly considered as speculative. It is impossible to determine what the effect of an action

will have on something if it is not known what it does. Whether the particular principle of respect for life that Sopinka refers to serves any purpose at all in our society appears to be a matter of faith, which may be a reflection of its origins.

While one cannot be certain of the harm, if any, to our social fabric by allowing assisted suicide, one can draw upon the analogy that we have already made between life and property. This is a particulary appropriate analogy; we often speak of our life and our body as if it were a property. Sue Rodriguez at various times asked "Whose body is it anyhow?" and "Who owns my life?". Judith Thomson in *The Realm Of Rights* speaks of assault as an "infringement of a property claim." She also refers to our bodies as our "First Property" and everything else we own as our "Second Property."[91]

The principles of respect for property and respect for life have similar roles in our society. And yet, the property principle is not seen to be at risk because individuals are allowed to exercise the same control over their property that is denied them over their lives because it would, supposedly, place the life principle at risk. The state appears to be able to embrace first, second and third-party interests when dealing with property, but only third-party interests when life is involved.

If a person wishes to dispose of a chair that she has, she may do so. In so doing, she does not diminish her respect for the rest of her property. Nor does it happen that others who observe her throwing her chair out feel that they must dispose

of their chairs old, or new, regardless of condition. Knowing that someone has disposed of a piece of property that is no longer of any value to them does not invoke in others some sudden loss of respect for property that causes them to place no value on their property. If a person were to dispose of all of her property, we might be inclined to question her judgement. However, if we believed that her reasons justified her actions we would not feel that we must stop her from doing what she considered appropriate.

While we cannot be certain of the harm done to society by granting Rodriguez petition, we can be sure of the harm done by denying it. Rodriguez, and thousands of others who have the misfortune to wind up in her position, are forced to suffer needlessly at the end of their lives and to die in a way that is contrary to their wishes and, often, those of the people close to them. The right to choose how to die is denied them. Instead of being allowed to choose a dignified death they are forced to die feeling helpless and humiliated, if they are sufficiently free of drugs and pain to feel anything at all. Sopinka speaks of the harm that <u>might</u> befall the weak and the vulnerable if the petition is granted while, at the same time, he ignores the harm that <u>is</u> caused by his decision.

This completes the analysis of Rodriguez' case in terms of principles and values. It seems clear that Ms. Rodriguez' claim has more merit than that of the state. The state's claim of acting to prevent a harm under the principle of beneficence cannot be justified whereas Rodriguez' claim that she is being denied the exercise of a right to which she is entitled can be

justified. The state's implicit claim that forcing her to live as long as possible is of greater benefit to the state than her being assisted to end it, was simply not demonstrated. Nor, was the state's claim under the principle of maleficence able to be justified. The grounds for the claim that allowing assisted suicide would damage the social fabric were conjectural. On the other hand, Sue Rodriguez' claim that she was harmed by being forced to continue living in a wretched state that would only end in an even more wretched death is hardly arguable. The state acknowledged the harm, but claimed that the harm to society would be greater. I can only repeat that this is purely conjectural and cannot be supported. Therefore, there is no adequate justification for the state to have denied Sue Rodriguez' right to assisted suicide that was hers under the principle of autonomy.

Conclusion

My objective in this chapter was to present a different approach to the way in which debates involving matters of biomedical ethics are conducted. Far too often in the literature dealing with such matters, one need only identify the ethical theory to which the writer subscribes to predict which position he or she will take on the subjects that are of concern in biomedical ethics, particularly euthanasia. Frequently, it is not the particulars of any given case that seem to be the issue of the debate so much as the principles and the theories from which the principles are entailed.

This approach means that the questions that Sue Rodriguez asks need never be given a direct answer. She asks "Whose body is this? Who owns my life?" Sopinka, in effect, replies "They are not yours." Since there are only two interests involved in Sopinka's discussion it appears to me that the only obvious alternative to them not being Rodriguez' body and Rodriguez' life are that they are the state's. Fifty or perhaps even thirty years ago, a judge in Sopinka's position could have replied, "They are God's" and there would have been no public outcry. However, I am sure that Sopinka would prefer not to have to reply, "Your life and your body are the state's." He escapes giving a direct answer by never allowing the concrete issue of Rodriguez' life to enter into his discussion. He kept his discussion at the level of the concept of assisted suicide, the principle of respect for life, and the principle of the sanctity of life. In short, he dealt only with axiological values and third-party interests.

This became obvious during the analysis covered in the last section. It was possible to verify, or at least attempt to verify the value judgement Sue Rodriguez made of her life. Her evaluation of her life could not be compared to the one that Justice Sopinka made of her life, because he did not evaluate her life as such. Nor was it possible to evaluate his judgement of the value of the principle of respect for life that he was protecting because there is no way to evaluate a concept or a principle such as this. What exactly does it mean? For instance, in the context of war it seems to embrace everything from absolute pacifism to total war.

The approach that I have suggested dictates a level of evaluation in which the specific case under examination cannot be excluded, and I believe that this is at least a step toward a method of application of biomedical ethics. I suggest that there is a need for the development of a methodology of applied ethics if philosophers are to take part in the development of the new ethic of medicine that seems to be occurring and that it is obvious that they need to be involved. There is a compelling need for philosophers to find a way to apply the knowledge that they have in order to play a greater role in emerging medical practices and technology. Just to take several examples, at present we have our laws on euthanasia being prepared by lawyers and our policies on reproductive technology and genetic engineering being decided by the doctors engaged in those fields. This is rather like letting politicians design their own pension plan.

ENDNOTES

1. Canada, Justice Sopinka, Rodriguez v. British Columbia (Attorney General, [1993] 3 S.C.R. 519, Supreme Court Of Canada, September 30, 1993, p.585.

2. Walter Lippmann, A Preface To Morals, (New York: Time Incorporated, 1964), particularly Chapter XII, Government In The Great Society, pp.243-246.

3. "Voices Of Canada," MacLean's, January 4, 1994, pp.42-45.
   1. The reasons for Canada's slow economic recovery:
      a). Economic and labour conditions ---- 33%
      b). The government ---- 63%.

   2. The way an MP should vote on major issues:
      a). MP's own conscience or party policy --- 28%
      b). Constituency view --- 71%.

   3. One of the polls indicates that among the professions of physician, scientist, professors, business executives, journalists, lawyers, and politicians, only 2% believed that politicians had the most honesty and integrity. In addition, the last four groups which are generally the most active in shaping public opinion received in total only 28% of the poll.

   4. The reason that politicians are so poorly regarded:
      a). They are incapable, out of touch with the people, are self-serving and abuse their position --- 89%
      b). People expect too much --- 9%.

4. Doug Fischer, "Most Canadians Support Right To MD-Aided Suicide" The Daily News, 2 March 1994, p.10.
   This Southam News article reports the results of an Angus Reid poll, conducted the previous week, which showed that seventy-four percent favoured the legalization of doctor-assisted suicide involving dying patients.
   See also:
   Chris Wood, "The Legacy Of Sue Rodriguez" Maclean's, February 28, 1994, pp.22-25.
   This article includes the results of a poll by Gallup Canada in which more than seventy-five percent agreed that "When a person has an incurable disease that causes great suffering, competent doctors should be allowed to end the patient's life through mercy killing."
   There is also the evidence of several recent events, such as, the votes held on the legalization of doctor assisted suicide held in the state of Washington in 1991 and in California in 1992. The initiatives were defeated in both cases, but the fact that there was enough support to warrant

the taking of a vote is significant. Here in Canada the pressure from the public has brought about senate hearings on the subject that will, if sufficient support is indicated by the hearings, result in a free vote in parliament. None of these events would have been considered possible twenty, perhaps, even ten years ago.

5. Canada, Justice McLachlin, Rodriguez v.British Columbia (Attorney General), [1993] 3 S.C.R. 519, Supreme Court Of Canada, September 30, 1993, p.616.

6. Canada, The Constitution Act, 1982, p.4.
Section 12 states that:
Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

7. Canada. Constitution, p.4.
Section 15 states that:
(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

8. Canada, Constitution, p.2.

9. Canada, Constitution, p.1.

10. To me, it is even more paradoxical that in the event that the suicide attempt fails, the would-be-suicide could be charged with conspiring to aid and abet with their own suicide.

11. McLachlin, [1993] 3 S.C.R. 519, p.618.

12. McLachlin, [1993] 3 S.C.R. 519, p.624.

13. McLachlin describes the principles of fundamental justice as "... the basic tenets of our legal system whose function is to ensure that state intrusions on life, liberty and security of the person are effected in a manner which comports with our historic, and evolving, notions of fairness and justice.": McLachlin, [1993] 3 S.C.R. 519, p.619.

14. Sopinka, [1993] 3 S.C.R. 519, p.595.

15. McLachlin, [1993] 3 S.C.R. 519, p.625.

16. Sopinka, [1993] 3 S.C.R. 519, p.584.

17. Sopinka, [1993] 3 S.C.R. 519, p.595.

18. Sopinka, [1993] 3 S.C.R. 519, pp.585.

19. Edward E. Keyserlingk, The Sanctity Of Life Or The Quality Of Life: In The Context Of Ethics, Medicine And Law, (Ottawa: Minister Of Supply And Services, 1979), p.18.
Although I deal with the principle of the sanctity of life in depth in the next chapter, I include the Keyserlingk definition here for information and convenience. Keyserlingk does not claim that his is an exhaustive definition but that any definition would include the following three points:

(1) Human life is precious, even mysterious, and is worthy of respect and protection. Human life is not determined merely by subjective or utilitarian concerns.

(2) Human life may not be taken without adequate justification, and human nature may not be radically changed.

(3) The sanctity of life principle (or an equivalent principle) is basic to our society and its rejection would endanger all human life.

20. Sopinka, [1993] 3 S.C.R. 519, p.584.

21. Sopinka, [1993] 3 S.C.R. 519, p.601.

22. Sopinka, [1993] 3 S.C.R. 519, p.605.

23. Ronald Dworkin, Life's Dominion: An Argument About Abortion, Euthanasia And Individual Freedom, (New York: Alfred A. Knopf, 1993)

24. Canada, Law Reform Commission Working Paper 28, Euthanasia, Aiding Suicide And Cessation Of Treatment, (Ottawa: Department Of Supply And Services Canada, 1982)

25. Edward W. Keyserlingk, Sanctity Of Life Or Quality Of Life In The Context Of Ethics Medicine And Law, (Ottawa: Minister Of Supply And Services Canada, 1979)

26. Sopinka, [1993] 3 S.C.R. 519, p.607.

27. Sopinka, [1993] 3 S.C.R. 519, p.608.

28. Sopinka, [1993] 3 S.C.R. 519, p.603.

29. I use the expressions 'palliative care deaths' or 'palliative care killings' in order to avoid the use of the longer, 'deaths/killings that occur in the course of palliative care treatment from physician administered, lethal doses of pain-killing medication given to relieve pain'. These are the killings which have the sanction of Justice Sopinka

that result from the "administration of drugs designed for pain control which the physician knows will hasten death ..." 1993, 3 S.C.R. 519, p.607.

30. Victor Grassian, Moral Reasoning: Ethical Theory And Some Contemporary Moral Problems, (Englewood Cliffs: Prentice-Hall, 1981), pp.415-417.

31. Tom L. Beauchamp and James F. Childress, Principles of Biomedical Ethics, (3rd ed; New York: Oxford University Press, 1989), pp.127-8.

32. Beauchamp and Childress, Biomedical Ethics, p.128.

33. Thomas Nagel, "War And Massacre" Consequentialism And Its Critics, ed. by Samuel Scheffler, (New York: Oxford University Press, 1988), pp.58-60,

34. Beauchamp and Childress, Biomedical Ethics, p.130.

35. On the 14 and 15 February 1945, Allied bombers bombed the German city of Dresden. Dresden was primarily a cultural and residential centre, "the Florence of Germany", which contained much of Germany's historical architecture. It was considered to be of no strategic or tactical importance and was, therefore, virtually undefended by the Germans. The bombs which were dropped contained a high proportion of incendiary bombs and Dresden was turned into an inferno. There were 140,000 German people, mostly civilians, killed in the raid. Not everyone on the Allied side agreed with the raid and it came under heavy criticism at the time. The "torching" of an entire city was considered unacceptable even by people hardened by years of war and anxious for it to end. At this point in time, the Allied victory was certain and the destruction of Dresden contributed little, if anything, to the defeat of the Germans. Although the raid was never officially condemned, the British commander, Air Marshall Harris, was never honoured by a viscountcy after the war, as were the other British military commanders. It is felt that the controversy over this raid was a factor in his being ignored and, in effect, reprimanded.

36. I say that it "appears" to function as it is intended because I believe that the doctrine of double effect suffers from the flaw of ambiguity. Because of this, contradictory conclusions can be arrived at when the combatants do not agree to the conditions. Take, for example, a situation where the first condition is under consideration and one side that believes that the use of chemical and biological weapons is intrinsically evil and the use of radioactive devices is acceptable and the other side believes the reverse. This permits contradictory evaluations to be made by each party when the doctrine of double effect is appealed to as a means of settling the justifiability of given military action.

Nevertheless, with this weakness in mind, it has a prima facie value as a criterion of demarcation in the context of war when all parties agree to the definition of the conditions as is the case when all combatants are signatories of the Geneva Convention. I believe that in its application to an example of the Dresden type, where all parties subscribe to the same war conventions, the doctrine of double effect does function as a criterion of demarcation.

37. Sidney H. Wanzer et al., "The Physician's Responsibility Toward Hopelessly Ill Patients," Euthanasia: The Moral Issues. ed. by Robert M. Baird and Stuart Rosenbaum (Buffalo: Prometheus Books, 1989), p.170.
This article appeared in the New England Journal Of Medicine 320, No.13 (March 30, 1989) The article is co-authored by Wanzler and nine other physicians.

38. Sopinka, [1993] 3 S.C.R. 519, p.607.

39. Paul W. Taylor, Normative Discourse (Englewood Cliffs: Prentice-Hall, Inc., 1961), p.267.

40. Sopinka, [1993] 3 S.C.R. 519, p.607.

41. Sopinka, [1993] 3 S.C.R. 519, p.608.

42. Sopinka, [1993] 3 S.C.R. 519, p.605.

43. Sopinka, [1993] 3 S.C.R. 519, p.606.

44. Helga Kuhse, The Sanctity-Of-Life Doctrine In Medicine (Oxford: Clarendon Press, 1987)
Note: Although I do not directly refer to the material of this excellent book, it has significantly influenced my opinions on this subject.

45. Law Reform Commission, Working Paper 28, p.35.

46. H.L.A. Hart, "Responsibility," Philosophy Of Law, 3rd ed., ed. by Joel Feinberg and Hyman Gross, (Belmont: Wadsworth Publishing Co., 1986), p.475.

47. Hart, "Responsibility," p.474.

48. Sopinka, Rodriguez, p.585.

49. Keyserlingk, Sanctity or Quality, p.4.

50. Sopinka, [1993] 3 S.C.R. 519, p.603.

51. Williams, Sanctity of Life, p.315.
Note. The author makes the point that this argument avoids any discussion of specific cases but frames all discussion in the context of general principles. " 'the general line of conduct'

involved in permitting a particular case of a suffering patient in a fatal illness is that all suffering patients in fatal illnesses may have voluntary euthanasia."

52. Beauchamp and Childress, Biomedical Ethics, p.139.

53. Beauchamp and Childress, Biomedical Ethics, p.141.

54. See: Beauchamp and Childress Biomedical Ethics, p.142.; Yale Kamisar, quoted in: Grassian, Moral Reasoning, p.279-80.; and, Arthur J. Dyck, "Alternative To The Ethic Of Euthanasia", Ethical Issues In Death And Dying. ed. by Robert F. Weir. (New York: Columbia University Press. 1977), p.292.

55. Leo Alexander, "Medical Science Under Dictatorship," The New England Journal Of Medicine, Vol.241, Num.2, July 14,1949, pp.39-47.

56. Alexander, Science Under Dictatorship, p.39.

57. Maurice A.M. de Wachter, "Futhanasia in the Netherlands," Hastings Center Report, (March-April, 1992), p.23.

58. Beauchamp and Childress, Biomedical Ethics, p.142.

59. Alexander, "Science Under Dictatorship," p.40.

60. Alexander, "Science Under Dictatorship," p.44.

61. Alexander, "Science Under Dictatorship," p.45.

62. Sopinka, [1993] 3 S.C.R. 519, p.586.

63. Sopinka, [1993] 3 S.C.R. 519, p.608.

64. Sopinka, [1993] 3 S.C.R. 519, p.608.

65. Law Reform Commission, Working Paper 28, p.29.

66.Johannes J.M. van Delden, Loes Pijnenborg, and Paul J. van der Maas, "The Remmelink Study: Two Years Later," Hastings Center Report, (November-December, 1993), pp.24-27.

67. Henk A.M.J. ten Have and Jos V.M. Welie, "Euthanasia: Normal Medical Practice?" Hastings Centre Report, (March-April, 1992), pp.34-38.

68. Sopinka, [1993] 3 S.C.R. 519, pp.599-600.

69. Beauchamp and Childress, Biomedical Ethics, p.51.

70. Beauchamp and Childress, Biomedical Ethics, p.44.

71. Beauchamp and Childress, Biomedical Ethics, p.72.

72. Beauchamp and Childress, Biomedical Ethics, p.122.

73. Beauchamp and Childress, Biomedical Ethics, p.124.

74. Beauchamp and Childress, Biomedical Ethics, p.195.

75. Beauchamp and Childress, Biomedical Ethics, p.214.

76. Beauchamp and Childress, Biomedical Ethics, p.212.

77. Beauchamp and Childress, Biomedical Ethics, p.209.

78. Sopinka, [1993] 3 S.C.R. 519, p.586.

79. Taylor, Normative Discourse, xi.

80. Z. Najder, Values & Valuations (Oxford: Clarendon Press, 1975), pp.42-49.
Note: The three definitions, or more correctly the three categories of observed usage, are a summary of the account given by Najder over the pages sec. 5 of Ch.II.

81. Taylor, Normative Discourse, p.3

82. The use of the other two, the pro-con attitude and the set of good-bad making characteristics, requires that we adopt Taylor's theory as well as his process. I leave them out of my discussion in order to avoid any argument that might arise about Taylor's particular subjectivist view of value theory.

83. Joseph Raz, The Morality Of Freedom, (Oxford: Clarendon Press, 1986), p.179.

84. McLachlin, [1993] 3 S.C.R.3 519, p.624.

85. It is acknowledged that the law distinguishes between theft of a dollar value of more than one thousand dollars, and theft of less than one thousand dollars, and treats them as crimes of a different magnitude. Nonetheless, both are considered to be criminal acts. There is no object so inexpensive that the owner can be deprived of it in law. Witness the shop lifting convictions for objects worth less than one or two dollars. Invariably, the judge or magistrate will refer to the principle of respect for property, not to the dollar value. Property has a value separate from its dollar value; it has value in law as a principle.

86. Susan M. Wolf, "Final Exit: The End Of Argument" Hastings Center Report, (January-February, 1992), pp.30-33.

87. Sopinka, [1993] 3 S.C.R. 519, p.608.

88. Svend Robinson, Statement By Svend Robinson, MP Concerning The Death Of Sue Rodriguez, House Of Commons, Feb 14, 1994.

89. "World in Brief," The Daily News, 3 August 1994, p.14. The following statement made by Hawkings on 2 August 1994 confirms that he has lost none of his intellectual ability:

> Stephen Hawking, ... told an audience at a Boston computer show yesterday that computer viruses should be considered a 'life form.
>
> 'I think it says something about human nature that the only form of life we have created so far is purely destructive. We've created life in our own image' he said.

90. Against all of the injuries of life, I have the refuge of death. - Seneca.

91.Judith Jarvis Thomson, The Realm Of Rights (Cambridge: Harvard University Press, 1990), Ch.8.

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