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# Death in Context

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## DEATH IN CONTEXT

ROGER B. DWORKIN†

"[I]n this world nothing is certain but death and taxes."\*

Benjamin Franklin

Taxes may remain inevitable,<sup>1</sup> but death no longer appears as certain as it did to Benjamin Franklin less than two hundred years ago. Heart-lung machines, respirators, organ transplants and chronic dialysis now prolong the life (in some sense of the term) of persons who not long ago would have died in short order. Developments in genetics may promise a future of spare parts banks to provide the goods to prolong life indefinitely. Less dramatic developments in nutrition, health care delivery etc. give all of us an increased life expectancy. Simultaneously, new knowledge about the brain has rendered conventional notions of death obsolete in the eyes of many, including leading scientists and physicians.<sup>2</sup> We no longer know when or what death is, but we do know that whatever it is, it occurs later in man's cycle than it used to and that it can be fought off for ever increasing lengths of time.

The new uncertainty of death has given rise to a spate of efforts to define or redefine it.<sup>3</sup> Numerous authors have explained that the old

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\* Letter to M. Leroy (1789).

1. The scientific developments which have sparked the death definition debate in which this article is an entry have also posed interesting taxation problems which probably even Franklin could not have anticipated. See, Note, *Tax Consequences of Transfers of Bodily Parts*, 73 COLUM. L. REV. 842 (1973).

2. See, e.g., Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, *A Definition of Irreversible Coma*, 205 J.A.M.A. 337 (1968) [hereinafter cited as Harvard Committee].

3. See, e.g., Berman, *The Legal Problems of Organ Transplantation*, 13 VILL. L. REV. 751 (1968) [hereinafter cited as Berman]; Biörck, *When Is Death?*, 1968 WIS. L. REV. 484 [hereinafter cited as Biörck]; Capron & Kass, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal*, 121 U. PA. L. REV. 87 (1972) [hereinafter cited as Capron & Kass]; Elkinton, *The Dying Patient, The Doctor, and the Law*, 13 VILL. L. REV. 740 (1968) [hereinafter cited as Elkinton]; Halley & Harvey, *On An Interdisciplinary Solution to the Legal-Medical Definitional Dilemma in Death*, 2 IND. LEGAL F. 219 (1969) [hereinafter cited as Halley & Harvey]; Potter, *The Paradoxical Preservation of a Principle*, 13 VILL. L. REV. 784 (1968) [hereinafter cited as Potter]; Wasmuth, *The Concept of Death*, 30 OHIO ST. L.J. 32 (1969) [hereinafter cited as Wasmuth]; Wassmer, *Between Life and Death: Ethical and Moral Issues Involved in Recent Medical Advances*, 13 VILL. L. REV. 759 (1968); Comment, *The Criteria for Determining Death in Vital Organ Transplants—A Medico-Legal Dilemma*, 38 MO. L. REV. 220 (1973) [hereinafter cited as Comment].

notion of death, the cessation of heartbeat and respiration, is no longer adequate because: (1) it does not accord with the best current medical knowledge; (2) it creates a dilemma for physicians whose patients will never regain consciousness, but whose heart and lungs continue to function (albeit with mechanical assistance); and (3) if cessation of heartbeat and respiration constitutes death and if a beating heart is necessary for transplantation, the transplantation of a heart will require removing it while it is beating, thereby causing the doctor to have "killed" his patient.

These authors share certain premises, some of which seem to me to be wrong, and none of which seems sufficiently clear to constitute a premise rather than a conclusion. They all begin with the notion that there are such things as life and death and that each is a unitary concept.<sup>4</sup> They all accept the need to define death and to reach agreement on its definition.<sup>5</sup> They accept as inevitable the central role of the physician in the determination of death and the need for the law to define death in a manner acceptable to physicians because: (1) the law should be as accurate as possible, and a law which does not follow the wisdom of experts is "a ass;"<sup>6</sup> (2) physicians will most often be the persons in a position to make decisions affecting death, and they cannot be controlled effectively by inexpert, far-removed courts applying notions with which they disagree;<sup>7</sup> and (3) physicians are exposed to the risk of civil or criminal penalties in the process of determining whether death occurred, and it is unfair to impose liability on terms they find unacceptable.<sup>8</sup> Paradoxically, the authors who seek to define death agree that death is not merely a medical question; consequently, they do not believe doctors should define death, but only that the definition must be acceptable to doctors and should accord with current medical thinking.<sup>9</sup>

The distinction between allowing doctors to define death and de-

4. See, e.g., Biörck, *supra* note 3, at 487; Capron & Kass, *supra* note 3, at 106, 111, 115; Halley & Harvey, *supra* note 3, at 237; Wasmuth, *supra* note 3, at 49, 55.

5. See, e.g., Berman, *supra* note 3, at 751; Capron & Kass, *supra* note 3, at 95-97, 99; Halley & Harvey, *supra* note 3, at 221. Wasmuth, *supra* note 3, at 33 n.4; Comment, *supra* note 3, at 234. The Secretary of Health, Education and Welfare's Commission on Medical Malpractice believes that the question of the legal definition of death is so important that the definition should be enacted into law only by the United States Congress. HEW, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 31 n. 10 (1973).

6. See, e.g., Berman, *supra* note 3, at 753-59; Halley & Harvey, *supra* note 3, at 229, 236; Comment, *supra* note 3, at 230-31, 234; cf. Elkinton, *supra* note 3, at 745.

7. See Capron & Kass, *supra* note 3, at 96; cf. Elkinton, *supra* note 3, at 746-47.

8. Berman, *supra* note 3, at 753; cf. Biörck, *supra* note 3, at 494-95.

9. Capron & Kass, *supra* note 3, at 93-94; Halley & Harvey, *supra* note 3, at 224; Potter, *supra* note 3, at 791. But see Berman, *supra* note 3, at 753.

fining it in a way doctors find acceptable is an example of another shared premise of the new definers of death. They all accept the utility of fine analytical distinctions and insist, for example, on the importance of differentiating between the questions of when a person is dead and when (if ever) he should be allowed to die.<sup>10</sup> Likewise, they would distinguish the question of the definition of death from the actual determination of whether death has occurred.<sup>11</sup> Finally, they all agree that organ transplantation ought to be facilitated,<sup>12</sup> although they concede the need to protect potential organ donors from overly eager transplant surgeons.<sup>13</sup>

Unsurprisingly, these premises lead the writers who share them to similar conclusions. They all propose a unitary definition of death which recognizes that a person with irreversible loss of brain function is dead. This definition is to be enacted into law by legislatures and applied by courts, but among its principal virtues is its acceptability to physicians. Physicians are to develop and apply the criteria for recognizing that death has occurred, and they are to be left free to use the conventional signs (cessation of heartbeat and respiration) when circumstances suggest this as the most practical basis for action. This approach maximizes the doctor's ability for flexible response, and permits vital organ transplantation without fear of liability.<sup>14</sup>

The best of the recent attempts to grapple with the problem of the definition of death is the work of Professor Alexander Morgan Capron and Dr. Leon R. Kass,<sup>15</sup> who acknowledge that the need of transplant surgeons to obtain organs in good condition has stimulated work in this area.<sup>16</sup> Professor Capron and Dr. Kass ask whether the public should

10. The clearest statement of the importance of the distinction is found in Capron & Kass, *supra* note 3, at 105-06.

11. See *id.* at 93; Elkinton, *supra* note 3, at 745; Halley & Harvey, *supra* note 3, at 224.

12. See, e.g., Berman, *supra* note 3, at 751; Elkinton, *supra* note 3, at 746-47.

13. See, e.g., Elkinton, *supra* note 3, at 746-47.

14. See generally authorities cited note 3 *supra* at pages indicated in notes 4-13 *supra*. The difficulty of distinguishing premises from conclusions is suggestive of the reason for what appears to me to be the unsatisfactory nature of the death definition literature. Writings about death have more of the characteristics of pronouncements than argumentation. Professor Capron and Dr. Kass are the most successful at avoiding this conclusory approach. For that among other reasons I have dealt at some length with their views. Text accompanying notes 15-36 *infra*.

15. Capron & Kass, *supra* note 3. My reference to the Capron & Kass article as "[t]he best of the recent attempts" is by no means meant to be faint praise or condescension. Although I disagree with their premises and hence their conclusions, I think their work is very good. I trust that no disrespect will be thought to inhere in disagreeing with an earlier work of a fellow participant in this Symposium and that all will understand that I mean merely to accept Professor Capron and Dr. Kass's invitation to join "what we hope will be a robust and well-informed public debate. . . ." *Id.* at 118.

16. *Id.* at 89. Perhaps this motivation explains the disquiet which Professor Capron and Dr. Kass note, *id.* at 91, in the responses of both the lay community and

be involved in defining death, and conclude that public participation is necessary because many aspects of an acceptable definition of death are outside medical competence.<sup>17</sup> They observe that formulation of the concept of death is at least partly a philosophical question which requires more than technical expertise for its resolution.<sup>18</sup> Noting that the question of when death occurs is now shrouded in confusion,<sup>19</sup> Professor Capron and Dr. Kass call for "a clear and acceptable standard."<sup>20</sup>

They believe the public should be involved in formulating this standard, and that it should be formulated by legislatures:

Reliance on judge-made law would . . . neither actively involve the public in the decisionmaking process nor lead to a prompt, clear, and general "definition." . . . A need to rely on the courts reflects an uncertainty in the law which is unfortunate in an area where private decisionmakers (physicians) must act quickly and irrevocably. An ambiguous legal standard endangers the rights—and in some cases the lives—of the participants. In such circumstances, a person's choice of one course over another may depend more on his willingness to test his views in court than on the relative merits of the courses of action . . . .

Uncertainties in the law are, to be sure, inevitable at times and are often tolerated if they do not involve matters of general applicability or great moment. Yet the question of whether and when a person is dead plainly seems the sort of issue that cannot escape the need for legal clarity on these grounds.<sup>21</sup>

Professor Capron and Dr. Kass bolster their plea for a legislative solution by making the standard arguments in favor of legislative approaches,<sup>22</sup> and adding that those who want physicians to control the definition of death are content to leave the matter to the courts because they believe the courts will adopt the consensus view of the medical profession.<sup>23</sup>

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parts of the medical profession to the so-called Harvard Committee's now famous adoption of the concept of irreversible coma (brain death) as defining the end of life. See Harvard Committee, *supra* note 2.

17. Capron & Kass, *supra* note 3, at 93.

18. *Id.* at 94.

19. *Id.*

20. *Id.* at 95.

21. *Id.* at 96-97.

22. As compared to legislatures, courts operate in narrow confines and lack the staff, expertise and authority to obtain enough information to act wisely. *Id.*

23. *Id.* at 97.

They also reject the desirability of employing different definitions of death in transplant cases and in other cases because employing different standards "would create chaos,"<sup>24</sup> and they state that

certainly it cannot be successfully argued that there should be one concept of death which applies to one type of litigation while an entirely different standard applies in other areas.<sup>25</sup>

Later they observe:

By indicating that the various standards for measuring death relate to a single phenomenon legislation can serve to reduce a primary source of public uneasiness on this subject. Once it has been established that certain consequences—for example, burial, autopsy, transfer of property to the heirs, and so forth—follow from a determination of death, definite problems would arise if there were a number of "definitions" according to which some people could be said to be "more dead" than others. . . .

One wonders . . . whether it does not appear somewhat foolish for the law to offer a number of arbitrary definitions of a natural phenomenon such as death. Nevertheless, legislators might seek to identify a series of points during the process of dying, each of which might be labelled "death" for certain purposes. Yet so far as we know, no arguments have been presented for special purpose standards except in the area of organ transplantation.<sup>26</sup>

Rejecting the notion of special purpose statutes<sup>27</sup> and stressing the importance of keeping separate the questions of whether someone is dead and whether he should be allowed to die,<sup>28</sup> Professor Capron and Dr. Kass propose a statute defining death.<sup>29</sup> Their statute, which permits the use of cessation of spontaneous brain function as a criterion for deter-

24. *Id.* at 99 n.46.

25. *Id.*

26. *Id.* at 106.

27. *Id.* at 106-08.

28. *Id.* at 105-06.

29. A person will be considered dead if in the announced opinion of a physician, based on ordinary standards of medical practice, he has experienced an irreversible cessation of spontaneous respiratory and circulatory functions. In the event that artificial means of support preclude a determination that these functions have ceased, a person will be considered dead if in the announced opinion of a physician, based on ordinary standards of medical practice, he has experienced an irreversible cessation of spontaneous brain functions. Death will have occurred at the time when the relevant functions ceased.

*Id.* at 111.

mining the occurrence of death,<sup>30</sup> leaves open the possibility of relying on traditional criteria where appropriate.<sup>31</sup> It is flexible so that the standards to be applied can respond to changes in medical technology.<sup>32</sup> And unlike the best known death definition statute,<sup>33</sup> the Capron-Kass proposal does not speak of being "medically and legally dead thus avoiding . . . the mistaken implication that the 'medical' and 'legal' definitions could differ."<sup>34</sup> The proposed statute is "predicated upon the single phenomenon of death," and applies uniformly to everyone.<sup>35</sup> Finally, while Professor Capron and Dr. Kass seem less concerned about facilitating organ transplants than some writers, adoption of their proposal would have that result.<sup>36</sup>

The Capron-Kass proposal is intelligently conceived and developed, and given its premises it may well be as good a solution to the death definition problem as we are likely to find. Regrettably, however, I believe its premises are wrong and that the entire spate of death definition literature, of which the work of Professor Capron and Dr. Kass is the best, misses the boat entirely.

The effort devoted to defining death is wasted at best, counter-productive at worst. The modern writers on death have failed to ask the

30. *Id.*

31. *Id.*

32. *Id.* at 108, 113.

33. A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice, there is the absence of spontaneous respiratory and cardiac function and, because of the disease or condition which caused, directly or indirectly, these functions to cease, or because of the passage of time since these functions ceased, attempts at resuscitation are considered hopeless; and, in this event, death will have occurred at the time these functions ceased;

or

A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice, there is the absence of spontaneous brain function; and if based on ordinary standards of medical practice, during reasonable attempts to either maintain or restore spontaneous circulatory or respiratory function in the absence of aforesaid brain function, it appears that further attempts at resuscitation or supportive maintenance will not succeed, death will have occurred at the time when these conditions first coincide. Death is to be pronounced before artificial means of supporting respiratory and circulatory function are terminated and before any vital organ is removed for purposes of transplantation.

These alternative definitions of death are to be utilized for all purposes in this state, including the trials of civil and criminal cases, any laws to the contrary notwithstanding.

KAN. STAT. ANN. § 77-202 (Supp. 1972).

34. Capron & Kass, *supra* note 3, at 115.

35. *Id.* at 111.

36. Any time cessation of spontaneous brain function is used as the indicator of death, transplantation of organs like the heart is facilitated by allowing the heart to be removed while mechanical devices are keeping it healthy and beating.

most basic question about the death definition problem: What difference does it make whether somebody is dead? That question places the issue of death into the only posture in which it can be of relevance to the law—the posture of context or consequences. Whatever may be the needs of the philosopher or the ethicist, the lawyer needs only to know what consequences follow upon a given determination. Only if we are persuaded that one definition of death will *always* lead to the correct resolution of legal problems do we need to search for such a definition.

Why might a lawyer want to know whether somebody was dead? As noted previously, most current discussion focuses on the problems of organ transplantation and “pulling the plug” on dying (or dead?) patients.<sup>37</sup> In fact, these dramatic situations are among the least significant reasons for wanting to know whether someone is dead.

As a practical matter the questions of whether and when death has occurred control many legal problems. Obviously, all wrongful death actions, whether or not they involve special situations such as transplantation or cessation of extraordinary care can be brought only after death. Similarly, death is a prerequisite to a successful prosecution for homicide;<sup>38</sup> in many states the time of death is critically important because a murder conviction can only be obtained if death occurs within a year and a day of the fatal blow.<sup>39</sup> Medical advances may affect the results of cases under the year and a day rule, but they did not create the need to determine the time of death.

Numerous property and wealth transmission issues raise death questions: When may an estate be probated?<sup>40</sup> When may property of a testate or intestate decedent be distributed?<sup>41</sup> When does a life estate end?<sup>42</sup> When does property pass to a surviving joint tenant?<sup>43</sup> When do life insurance benefits become payable<sup>44</sup> and health insurance benefits cease to accrue?<sup>45</sup> When may property escheat?<sup>46</sup> When do agents,<sup>47</sup>

37. See text accompanying notes 3 & 16 *supra*.

38. See, e.g., WASH. REV. CODE ANN. § 9.48.020 (1961).

39. W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 35, at 266-67, § 67, at 534 (1972) [hereinafter cited as LAFAYE & SCOTT].

40. See, e.g., IND. ANN. STAT. § 29-2-6-1 (Code ed. 1972).

41. See, e.g., N.H. REV. STAT. ANN. § 553:18 (1955).

42. See, e.g., OKLA. STAT. ANN. tit. 58, § 911 (1965); S.D. COMPILED LAWS ANN. § 21-44-15 (1967); WYO. STAT. ANN. § 34-97 (Cum. Supp. 1971).

43. See, e.g., COLO. REV. STAT. ANN. §§ 118-2-2 to -3 (1963); GA. CODE ANN. § 113-2904 (Supp. 1972); KAN. STAT. ANN. § 58-501 (1964); N.Y. REAL PROP. ACTIONS § 1211 (McKinney 1963); OKLA. STAT. ANN. tit. 58, § 911 (1965); WYO. STAT. ANN. § 34-97 (Cum. Supp. 1971).

44. See, e.g., COLO. REV. STAT. ANN. § 153-20-9 (1963).

45. See Halley & Harvey, *supra* note 3, at 223-24 & n.7.

46. See MICH. COMP. LAWS ANN. § 567.47 (1967).

47. See, e.g., CAL. CIV. CODE § 2356 (West 1954), as amended, (West Supp.



conservators,<sup>48</sup> attorneys<sup>49</sup> and trustees<sup>50</sup> lose their authority to act, and when do banks become liable for admitting persons to safe deposit boxes<sup>51</sup> and paying money out of accounts?<sup>52</sup> When is an estate tax due?<sup>53</sup> When is a gift within three years of death so that it may be said to be in contemplation of death?<sup>54</sup> And perhaps most importantly, who died first in the event that persons with interests in one another's estates perished in a common disaster?<sup>55</sup>

Status relationships often turn on whether someone is dead. For example, whether a person who remarries is a bigamist<sup>56</sup> and whether the remarriage is valid<sup>57</sup> may both turn on whether the prior spouse is or is deemed to be alive or dead. Whether one may be a voter<sup>58</sup> or elected to an office<sup>59</sup> may depend on whether and when he died. In addition crimes besides homicide and bigamy may depend on someone's being dead or alive.<sup>60</sup> Coroners' obligations<sup>61</sup> and the mandatory contents of death certificates<sup>62</sup> require determinations of the time of death. And occasional unusual statutes<sup>63</sup> make other matters turn on whether and when someone died, and even in one situation,<sup>64</sup> on whether a physician thinks his patient is "at the point of death."

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1973); FLA. STAT. ANN. § 709.01 (1969); MONT. REV. CODES ANN. § 2-305(2) (1968); N.D. CENT. CODE § 3-01-11 (1959).

48. See, e.g., ARIZ. REV. STAT. ANN. § 14-873(B) (1956); HAWAII REV. STAT. § 551-48 (1968); IND. ANN. STAT. § 29-2-8-3 (Code ed. 1972); KY. REV. STAT. § 384.070 (1971).

49. See, e.g., ALA. CODE tit. 37A, § 46 (1958); OKLA. STAT. ANN. tit. 58, § 1056(a) (2) (Supp. 1972).

50. See, e.g., ILL. ANN. STAT. ch. 3, § 523 (Smith-Hurd 1961).

51. See MINN. STAT. ANN. § 55.10 (1970).

52. See UNIFORM COMMERCIAL CODE § 4-405.

53. See 26 U.S.C. § 2001 (1970).

54. See *id.* § 2035.

55. See UNIFORM SIMULTANEOUS DEATH ACT.

56. See, e.g., CAL. PENAL CODE § 282 (West 1970); COLO. REV. STAT. ANN. § 153-20-4 (1963); IND. ANN. STAT. § 34-3-4-1 (Code ed. 1973). See also note 76 *infra* & text accompanying.

57. See, e.g., MINN. STAT. § 518.01 (1969); MONT. REV. CODES ANN. § 48-111 (1961).

58. See, e.g., ARIZ. REV. STAT. ANN. § 16-150 (Supp. 1972), *amending* (1956); FLA. STAT. ANN. § 98.301 (1960); IND. ANN. STAT. § 3-1-22-14 (Code ed. 1972).

59. See, e.g., NEV. REV. STAT. § 293.368 (1971).

60. E.g., CONN. GEN. STAT. ANN. § 53a-92(a)(3) (1958) (kidnapping in the first degree); N.Y. PENAL LAW § 135.25 (McKinney 1967) (kidnapping in the first degree); N.D. CENT. CODE § 23-02-33 (1970) (failure to fill out a death certificate).

61. See, e.g., CAL. HEALTH & SAFETY CODE § 10252 (West 1964).

62. See, e.g., *id.* § 10225; WIS. STAT. ANN. § 69.38 (1965).

63. See, e.g., COLO. REV. STAT. ANN. §§ 153-20-9, -10 (1963) (determines when statute of limitations begins to run); TENN. CODE ANN. § 30-1803 (1955) (same); N.D. CENT. CODE § 34-03-03 (1972) (termination of employment by death of employer); *id.* § 47-16-18 (1960) (termination of lease).

64. DEL. CODE ANN. tit. 13, § 120 (Cum. Supp. 1970) (permitting physician to appear and apply for marriage license for patient "at the point of death" and other-

It would be odd indeed if all these different situations were susceptible to resolution by one definition of death. They involve different consequences and resolutions of different policy questions. In all of them death is not important in its own right but is merely a shorthand description of when certain events are to occur. When everyone agreed on what death meant, the shorthand might have been convenient, although even then different meanings attached to the notion of death in different contexts.<sup>65</sup> Now that agreement no longer exists and that an awakened sense of medical progress may suggest continuing evolution in our understanding of death, any potential convenience has been lost. A few examples should suffice.

I think most people would agree that a person who purposely shoots a gun at another person in an effort to kill him ought to be punished very severely because he "deserves" severe punishment; such punishment is necessary to discourage him or others from repeating such acts; or his conduct manifests a degree of dangerousness that requires long-term removal from society in order to incapacitate or rehabilitate him.<sup>66</sup> None of the reasons for imposing severe punishment is affected by whether the victim dies. Therefore, his fortuitous survival ought in no way affect the degree of punishment inflicted on his attacker. Whether the attacker caused his victim's death is thus theoretically irrelevant to the questions of whether and (more realistically) how severely he ought to be punished. Surely the timing of the victim's death is absolutely irrelevant.

Nonetheless, the law of homicide does require a showing that the defendant caused his victim's death,<sup>67</sup> and the time of death may affect whether the killing was murder or manslaughter.<sup>68</sup> While recognizing the lack of a sound theoretical base for such requirements, the drafters of the *Model Penal Code* suggest that the causation requirement reflects common reactions and that juries would nullify an attempt to convict of the most serious crime persons who try but fail to kill their victims.<sup>69</sup> Conceding the correctness of the *Model Penal Code's* view of reality, it suggests at most a practical reason for requiring a result in homicide statutes. Given the lack of theoretical base for such a causation requirement, the sole policy supporting it is a desire to avoid jury nullification. Thus, for homicide cases the law need only adopt a view of death suf-

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wise entitled to marry).

65. See notes 75-101 *infra* & text accompanying.

66. For the best short discussion of the reasons or justifications for punishment see H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 35-61 (1968) [hereinafter cited as PACKER].

67. LAFAYE & SCOTT, *supra* note 39, § 67, at 534.

68. See *id.* § 35, at 266-67.

69. See MODEL PENAL CODE § 2.03, Comment (Tent. Draft No. 4, 1955).

ficient to serve that policy. I should think, then, that for homicide that approach which made convictions easiest to obtain ought be adopted. This would probably involve selecting the broadest definition of death, or if we must retain the year and a day rule, the one which permits a finding that death occurred at the earliest time. Alternatively, it might require adoption of the most commonsense view of death (cessation of heartbeat and respiration) since juries are the decisionmakers thought to be relevant.

None of these considerations, however, has any bearing on organ transplantation policy. If we believe that encouraging organ transplants is important, we should adopt the broad and early view of when a person is dead. If, on the other hand, our primary concern is for the protection of the dreadfully ill or injured who have healthy hearts rather than those who are dreadfully ill because they need a healthy heart, then the definition which is most restrictive and delays the determination of death until as late as possible ought to be adopted. If some middle ground between the extremes is sought, a full consideration of all factors at stake might be pursued without ever asking the question which stops, rather than aids, analysis: Is the potential donor dead? In no event are the policies relevant to purposely shooting healthy people involved in deciding when to transplant organs. If the answers to the questions of when may we imprison an attacker for life and when may a doctor transplant a heart are the same, it is a mere coincidence; and if the same law of homicide that governs the attacker threatens the doctor, then the fault lies with the law of homicide and our criminal law's refusal to consider motive,<sup>70</sup> and not with our definition of death.

Similarly, property transmission involves considerations wholly different from those involved in organ transplantation and the law of homicide. A state might well recognize in any particular case that the chance of a return to health, productivity or even consciousness would be so slight as not to justify depriving a surviving spouse and children of the material goods in a "sick?" "dead?" "dying?" person's estate without deciding to extinguish that small chance by allowing the person's heart to be removed.

The *Uniform Simultaneous Death Act*<sup>71</sup> determines, as far as the law is concerned, when persons who perish simultaneously have died. The purpose of this act is to prevent disputes that would otherwise arise between claimants to estates.<sup>72</sup> Society suffers no harm from concluding for some purposes that A predeceased B and for others that B predeceased

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70. See generally LAFAYE & SCOTT, *supra* note 39, § 29, at 204-07.

71. UNIFORM SIMULTANEOUS DEATH ACT.

72. *Id.*, Commissioner's Prefatory Note.

A, when, in fact, no one knows whether A or B "really" died first. Furthermore, the considerations which lead to these determinations obviously have no relevance to the law of homicide or organ transplantation.

Additional examples could be given, but little is served by beating a horse who either lacks heartbeat and respiration or who registers a flat EEG. Amazingly, the current definers of death not only overlook the obvious point that death only matters in terms of its consequences, but also ignore the fact that the law has long recognized that death occurs at different times for different purposes.<sup>73</sup> The suggestion that no one can successfully argue for different concepts of death for different purposes and that no arguments have been made for special purpose standards except in transplant cases<sup>74</sup> ignores the fact that different concepts of death do exist for different purposes. Even without the blessing of the commentators, the successful operation of the law may be thought a fairly persuasive argument in itself.

A presumption of death is a legal determination that death has occurred. Common contexts in which presumptive death problems arise involve property distribution and bigamy. For property distribution purposes most states presume the death of a person who has been absent from home without tidings for a period of time, usually seven years.<sup>75</sup> Yet twenty-one of those states provide a shorter presumptive death period, usually five years, when the issue in dispute is whether the spouse of the absent person committed bigamy by remarrying.<sup>76</sup> Such a distinction is

73. See, e.g., text accompanying notes 75-76 *infra*.

74. Capron & Kass, *supra* note 3, at 99, 106.

75. E.g., ARIZ. REV. STAT. ANN. § 12-509 (1956); CAL. EVID. CODE § 667 (West 1966); DEL. CODE ANN. tit. 12, §§ 1105, 1701-12 (1953); D.C. CODE ENCYCL. ANN. §§ 14-701 to 02 (1966); FLA. STAT. ANN. § 734-32 (1964); GA. CODE ANN. § 113-2601 (1959); KAN. STAT. ANN. § 59-2704 (1964); KY. REV. STAT. ANN. § 422.130 (1972); ME. REV. STAT. ANN. tit. 18, § 2701 (1964); MICH. COMP. LAWS ANN. §§ 705.1-2 (1968); MISS. CODE ANN. § 13-1-23 (1972); MO. ANN. STAT. § 490.620 (1952); MONT. REV. CODES ANN. § 93-1301-7(26) (1964); NEB. REV. STAT. § 30-1902 (1964) (but see *id.* § 30-2012); NEV. REV. STAT. § 47.250(14) (1967); N.J. STAT. ANN. § 3A:40-1 (Supp. 1972); N.M. STAT. ANN. § 31-14-1 (1953); N.D. CENT. CODE §§ 31-11-03(26), -04 (1960); OHIO REV. CODE ANN. § 2121.01 (Page 1968); OKLA. STAT. ANN. tit. 58, §§ 941, 946 (1965); ORE. REV. STAT. § 41.360(26) (1971); PA. STAT. ANN. tit. 20, § 5701(b) (Spec. Pamphlet 1972); *id.* tit. 48, § 1-8(b) (1965); S.D. COMPILED LAWS ANN. §§ 21-44-17, 30-5-5 (1967); TENN. CODE ANN. § 30-1802(2) (1955); TEX. REV. CIV. STAT. ANN. art. 5541 (1958); VA. CODE ANN. § 64.1-105 (1973); W. VA. CODE ANN. § 44-9-1 (1966); WYO. STAT. ANN. § 1-190 (1957). Other states presume death from a five year absence with various other requirements. See, e.g., IND. ANN. STAT. § 29-2-5-1 (Code ed. 1972); IOWA CODE ANN. § 633.510 (1964).

76. Compare ARIZ. REV. STAT. ANN. § 13-271 (1956); CAL. PENAL CODE § 282 (West 1970); DEL. CODE ANN. tit. 11, § 384 (1953); D.C. CODE ENCYCL. ANN. § 22-601 (1967); FLA. STAT. ANN. § 799.02 (1965); KY. REV. STAT. ANN. § 436.080 (1973); MASS. ANN. LAWS ch. 272, § 15 (1968); MICH. COMP. LAWS ANN. § 750.439 (1968); MONT. REV. CODES ANN. § 94-702 (1969); NEB. REV. STAT. § 28-903 (1964); NEV. REV. STAT. § 201.160 (1971); N.H. REV. STAT. ANN. § 579:6 (1955);

quite sensible. A person ought not lightly be deprived of his property, and the policies of certainty involved in real property law counsel extreme caution before distributing the property of a person who may return to assert a claim to it. On the other hand, the marital rights of an absentee of five years are difficult to worry about; a preference for marriage rather than nonmarital relationships is widespread; and the law of bigamy is exceedingly difficult to justify at all.<sup>77</sup> Therefore, the twenty-one states have acted very intelligently in finding that death occurred earlier for bigamy purposes than for purposes of wealth distribution.

A number of states explicitly provide for finding that death occurred at different times for different purposes. In one short subsection of the "Definitions" section of the Pennsylvania inheritance tax laws, for example, "Date of death" is defined as meaning: (1) the date of "actual" death; except in cases of persons presumed dead, when it means (2) the date found by decree to be the date of presumed death; provided that for purposes of determining interest and discount, it means (3) the date on which the court enters the decree.<sup>78</sup>

The New York provisions are more complicated. The basic statute presumes death upon five years' absence without tidings,<sup>79</sup> but permits a finding that death occurred earlier if the person was "exposed to a specific peril,"<sup>80</sup> and provides for the use of different statutory periods where prescribed.<sup>81</sup> Seven years' absence is prescribed as the period necessary for termination of a joint tenancy, tenancy in common or tenancy by the entirety,<sup>82</sup> except that in such cases a one-year absence will suffice

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N.J. STAT. ANN. § 2A:92-1 (1969); N.C. GEN. STAT. § 14-183 (1969); N.D. CENT. CODE § 12-22-03 (1960); OHIO REV. CODE ANN. § 2905.43 (Page 1954); OKLA. STAT. ANN. tit. 21, § 882 (1958); PA. STAT. ANN. tit. 18, § 4503 (1963); S.D. COMPILED LAWS ANN. § 22-22-15 (1967); TENN. CODE ANN. § 39-702 (1955); and TEX. PENAL CODE ANN. art. 491 (1952) with ARIZ. REV. STAT. ANN. § 12-509 (1956); CAL. EVID. CODE § 667 (West 1966), CAL. PROB. CODE § 280 (West 1956); DEL. CODE ANN. tit. 12, §§ 1105, 1701-12 (1953); D.C. CODE ENCYCL. ANN. §§ 14-701 to 02 (1966); FLA. STAT. ANN. § 734.32 (1964); KY. REV. STAT. ANN. § 422.130 (1972); MASS. ANN. LAWS ch. 200A, § 2 (1969); *id.* ch. 203, § 32; MICH. COMP. LAWS ANN. §§ 705.1-2 (1968); MONT. REV. CODES ANN. § 93-1301-7(26) (1964); NEB. REV. STAT. § 30-1902 (1964); NEV. REV. STAT. § 47.250 (1971); N.H. REV. STAT. ANN. § 553:18 (1955); N.J. STAT. ANN. § 3A:40-1 (1953); N.C. GEN. STAT. §§ 28A-1, -13 (1966); N.D. CENT. CODE §§ 31-11-03 to -04 (1960); OHIO REV. CODE ANN. § 2121.01 (Page 1968); OKLA. STAT. ANN. tit. 58, §§ 941, 946 (1965) (and see *id.* tit. 84, § 271 (1970)); PA. STAT. ANN. tit. 20, § 5701(b) (1972); *id.* tit. 48 §§ 1-8(b) (1965); S.D. COMPILED LAWS ANN. §§ 30-5-5, 21-44-17 (1967); TENN. CODE ANN. §§ 30-1801, 36-404 (1955); and TEX. REV. CIV. STAT. ANN. art. 5541 (1958). See also MD. ANN. CODE art. 27, § 18 (1971) (bigamy provision); *id.* art. 16, §§ 200-212 (1973) (presumption provisions).

77. See generally PACKER, *supra* note 66, at 312-14.

78. PA. STAT. ANN. tit. 72, § 2485-102(6) (1964).

79. N.Y. EST., POWERS & TRUSTS LAW § 2-1.7(a) (McKinney 1967).

80. *Id.* § 2-1.7(a)(1).

81. *Id.* § 2-1.7(a)(2).

82. N.Y. REAL PROP. ACTIONS LAW § 1211(3)(a) (McKinney 1963).

“upon proof of other circumstances from which the probability that the missing co-tenant is dead may reasonably be inferred.”<sup>83</sup> Relief which extinguishes the estate of a missing person shall not be granted if the court finds as a fact that the missing person is dead.<sup>84</sup> However, such a finding of death is not to be considered an adjudication of death or be controlling in any other proceeding in which the missing person’s death is in issue.<sup>85</sup> Seven years’ absence is also required to presume death in a proceeding concerning New York personal property or administration of the estate of a person with personal property in New York “or upon whose life an estate in real property depends.”<sup>86</sup> In addition New York specifically provides a five-year period for dissolution of marriage,<sup>87</sup> but waits twenty-five years to determine the death of unknown heirs who fail to appear to claim their share of the proceeds of a sale.<sup>88</sup> Upon the determination of their death, however, they are presumed to have been dead at the time of the sale.<sup>89</sup> The property of an absentee may be distributed as if he died ten years after the date he was last seen or heard from.<sup>90</sup>

Several states demonstrate a belief that there may be a difference between “real” and “legal” death, but they nonetheless proceed according to legal standards. Thus, property is distributed and actions taken as if a person were “really dead”<sup>91</sup> or “in fact dead”<sup>92</sup> or had suffered “actual death.”<sup>93</sup> Moreover, states differ on whether the effects of legal death are irreversible. New York even has different rules for different proceedings. A New York absentee may not recover his property after a decree of distribution issues,<sup>94</sup> but an “alleged decedent” who returns may recover some of his property.<sup>95</sup> Several other states permit persons presumed dead to recover some or all of their property,<sup>96</sup> and in some circumstances Tennessee even permits an absentee who returns to find his

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83. *Id.* § 1211(3) (b).

84. *Id.* § 1211(4).

85. *Id.*

86. N.Y. DECEDENT EST. LAW § 80-a (McKinney Supp. 1966).

87. N.Y. DOM. REL. LAW § 221 (McKinney Supp. 1972).

88. N.Y. REAL PROP. ACTIONS LAW § 991(1) (McKinney 1963).

89. *Id.*

90. N.Y. Surr. Ct. Pro. Law § 911(3) (McKinney Supp. 1972), *amending* (McKinney 1967).

91. OHIO REV. CODE ANN. § 2121.05 (Page 1968); VA. CODE ANN. § 64.1-111 (1973).

92. W. VA. CODE ANN. § 44-9-6 (1966).

93. OHIO REV. CODE ANN. § 2121.06 (Page 1968).

94. N.Y. Surr. Ct. Pro. Law § 911(3) (McKinney Supp. 1972), *amending* (McKinney 1967).

95. *Id.* § 2225 (McKinney 1967).

96. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-509 (1956); ARK. STAT. ANN. § 62-2122 (1971); MINN. STAT. ANN. § 576.15 (1947).

spouse remarried to "insist upon restoration of conjugal rights. . . ."<sup>97</sup> In Colorado, on the other hand, the validity of a finding of death is not affected by a later determination that the absentee is alive or was alive when he was determined to be dead.<sup>98</sup>

Virginia takes perhaps the most flexible view of what it means to be dead. In addition to presuming death upon a seven-year absence,<sup>99</sup> Virginia provides a special presumption of death after a six-months absence for persons in buildings damaged or destroyed by floods resulting from Hurricane Camille or at sites in the path of such floods.<sup>100</sup> Moreover, Virginia permits estates and funds to be distributed as if a person whose interest depends on his being alive at a particular time were dead at that time, even though it is not known or cannot be shown whether the person was alive or dead and the legal presumption of death does not apply.<sup>101</sup>

Thus, the law treats people as dead when that seems the best thing to do. Only by suggesting that there is a difference between being dead and being treated as if one were dead can anyone argue that the law contains a single concept of death. However, since doing things to people or their property is the only way the law can demonstrate what it believes their status to be, such a suggestion would be fanciful.

Why, then, if death is meaningful for the law only in context, and if the lawmakers already recognize that, would anyone wish to legislate an all-purpose definition of death?<sup>102</sup> One might seek such a definition to avoid confusion. As yet, though, no showing of the confusion of the present law has been made, and one might well wonder what confusion would result from defining death. A definition that abolished statutory provisions about death would, at the least, upset countless estate plans and open many marriages and property titles to question. A definition which let such provisions stand would be meaningless because presuming death is merely another way of defining death. Therefore, the definition and presumption standing together would destroy the uniformity the definition sought to achieve and leave the definition useful only in the contexts where it was the best approach to death. In other words, the all-purpose definition would become a special definition.

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97. TENN. CODE ANN. § 36-833 (1955).

98. COLO. REV. STAT. ANN. § 153-20-2(3) (1963).

99. VA. CODE ANN. § 64.1-105 (1973).

100. *Id.* § 64.1-105.1.

101. *Id.* § 64.1-106.

102. Some of the arguments mentioned and (hopefully) refuted here were offered by participants at an off-the-record Workshop on Medical Ethics I attended in July, 1973. The rather strict ground rules regarding nonattribution adopted by my fellow conferees and me precludes giving further description or credit. I am grateful to have had the benefit of participating in this lively exchange of views.

One might argue that people generally believe death is a unitary concept and that the law should reflect the common understanding. Granting the assumption that such a common understanding exists, it is a slender reed on which to build an approach that deviates widely from present practice and from the normal way the law deals with problems, and that has no other demonstrable benefits. Moreover, it ignores the law's role as teacher of the public as well as reflector of present views. Why should the law take a less sensible position that reflects assumptions, rather than a more sensible view that may change erroneous assumptions? Indeed, if the law were only to reflect and never teach, I suppose we would be stuck for some time with cessation of heartbeat and respiration as the definition of death.

Seeing the law as a teacher, one might argue that not having a single definition of death teaches a dangerous lesson: It cheapens life by suggesting that there is a question about what life is and by opening the door to practices many people believe are bad—such as euthanasia, the killing of the old and helpless and using one person for the benefit of another. This argument is largely beside the point and prevents rather than promotes analysis. There *is* a question about what life is, and playing ostrich will not make the question go away. Recognizing it in no sense leads to any conclusion about practices that rightly make people uneasy. Recognition merely opens the door to analysis. All can agree that killing is bad without agreeing what killing means or even believing that killing can never be justified. Surely, no one would seriously contend that the law teaches a bad moral lesson by recognizing self-defense as a defense to a prosecution for homicide. Here again, the law looks to context to determine what legal response is most appropriate.

If one wishes to determine what the law should do about euthanasia, he can approach the question in either of two ways: by definition or by analysis. He can define those people who are to be transferred to a status of indisputable death as dead already, thereby paying lip service to the sanctity of life while leaving open the question of which people are to fall into the already dead category. Conversely, he can define them as alive, thereby either ending discussion since it would be intolerable to kill a living person or taking the position that killing the living is sometimes acceptable. Alternatively, the problem could be examined in its entirety. Analysis does not ignore ethics, but considers it along with economics, sociology, psychology, judicial administration and all other factors which bear on a problem. The lack of a definition of death does not lead to a decision for euthanasia; it leads to an opportunity to consider the question freed of automatic answers. Rather than teach that human life is cheap, recognition that it cannot be defined may increase reverence for life by



making clear how totally beyond our ken the concept is. Certainly the lack of definition protects the life of people with transplantable hearts far better than a brain death definition.

Finally, however, proponents of a single definition of death might point out that at least in cases not involving a presumption of death arguing for no definition is silly. A person cannot live without a heart. Therefore, if brain death gives rise to the consequence of permitting the "dead" person's heart to be transplanted, brain death has, for all practical purposes, become the definition of death. Upon transplantation of the heart, death by cessation of heartbeat and respiration and all the consequences that ever flow from death will inevitably occur without delay. Such an argument begs the question, though, by assuming that brain death should permit transplantation, thus reflecting the favorable view of transplantation common to the death definers. If we approach the question of vital organ transplantation with an open mind, we may well decide to discourage, but not prohibit the practice and to protect patients by adopting a cessation of heartbeat and respiration standard for when vital organs may be removed. That approach would still leave us free to distribute an estate, prosecute for homicide or permit a spouse to remarry upon brain death if we chose to do so.

Thus, the case in favor of defining death comes down to a feeling that the lack of definition offends a sense of neatness in allowing the law to use a term whose meaning no one knows. I agree that it is confusing and aesthetically displeasing to define "death" as meaning different things in different contexts. However, in view of the manifold advantages of avoiding definition, a different route to aesthetic satisfaction should be pursued. The simplest solution lies in recognizing that as there is no need to define death, so too there is no need for the law to use the term at all. Professor Capron and Dr. Kass speak of certain consequences following from a determination of death.<sup>103</sup> What is important, though, are the consequences, not the conclusory determination. The law must be able to determine when each consequence is to occur. Confusion only arises if the word "death" is used to set the time and if it has several meanings. No confusion relevant to this discussion inheres in legal rules such as: "No person's heart may be removed from his body until it has stopped beating (with or without mechanical assistance);" or "Any person who, for the purpose of depriving another of his ability to function as an integrated conscious being, causes another person to lose that ability (or to lose the functional ability of his brain) shall be punished (by the most severe sanction available in this jurisdiction)." The confusion lies in the

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103. Capron & Kass, *supra* note 3, at 106.

use of the concept of death. If the law stops using the concept and seeks only to describe the circumstances under which given consequences are to flow, we shall be able to avoid confusion, face problems head-on with the hope of resolving them correctly and, of course, obviate the need for the tidiness of a definition. Such an approach would also relieve us of the need to distinguish the question of whether a person is dead from the question whether to allow him to die. Neither question has meaning for the law, which only needs to know whether a defendant may be convicted of the most serious crime, a doctor may remove a heart or an estate may be probated etc. The concept of death may remain useful for philosophy, religion and literature, but for the law placing death in context should prove the mortality of death.