

2001

Playing God: Mary Must Die So Jodie May Live Longer

Charles I. Lugosi, *Lincoln Memorial University - Duncan School of Law*



SELECTEDWORKS™

Available at: http://works.bepress.com/charles_lugosi/1/

Playing God: Mary Must Die So Jodie May Live Longer

Charles I. Lugosi, LL.B., LL.M.*

ABSTRACT: In 2000, conjoined twins were born in England. What made this case unique was the fact that if the twins remained unseparated, medical opinion held they would die; if they were separated one twin would live, and one twin would die; the parents refused to consent to separation; and the hospital charged with their care brought the matter to court. The trial court and court of appeal approved of the surgery, which was promptly performed, resulting in the immediate death of the weaker twin. The author argues that there is no justification in law or morality for the courts' decisions, and that, in fact, the courts' decisions overrule prior precedent and effectively divorced law from morality.

This is the writing that was inscribed: MENE, TEKEL, and PERES. These words mean: MENE God has numbered your kingdom and put an end to it; TEKEL, you have been weighed on the scales and found wanting; PERES, your kingdom has been divided and given to the Medes and Persians.

Daniel 5:5, 25-28 [Written by a detached human hand on the pallace wall in Babylon the night the Chaldeans were overrun by the Medes and Persians and King Belshazzar assassinated.]

This is the Judgment of the Court: Mary, your days are numbered and your life will be terminated; on balance, your life is not worth preserving since you are severely disabled and not viable; the doctors will separate your body from your sister's body and you will be sacrificed in order to perserve her life.

*Visiting Professor, Yale Law School; Visiting Professor of Law, Jan. 2002, University of Western Ontario, Canada; Barrister and Solicitor; Ontario and British Columbia Bars, Canada; LL.B., University of Western Ontario, 1979; LL.M., University of Pennsylvania, 2001; M. Bioethics candidate, University of Pennsylvania, 2002. The author acknowledges the valued encouragement and guidance of Professor Anita Allen-Castellitto of the University of Pennsylvania Law School.

[This is a paraphrase of the judgment of the English Court of Appeal in the case of Mary and Jodie.]

In the late summer of 2000, a news story from England about conjoined "siamese" twins gripped the attention of millions of people around the world. While the birth of conjoined twins was an extreme rarity in itself, what made this case so unique were the moral, ethical, religious and legal dilemmas facing the parents, the doctors, the hospital and the courts. It all boiled down to this: if the twins were to be separated, it would be at the cost of killing the one who was weaker. Without the operation, prospects were bleak and both twins would most likely die in early childhood. With the operation, the one who was stronger had a better chance to live longer. In the end, the English Court of Appeal overruled the refusal of the parents to give consent for the operation and gave the proxy consent the hospital sought, clearing the way for the surgery.¹ It was a highly controversial result, the Court seeing itself "on the sharpest horns of a dilemma," having to choose between "the lesser of two evils."²

I will argue that it was wrong to violate the bodily integrity and sanctity of life of the weaker twin. Moreover, the interests of medical science, represented by the doctors and the petition by the hospital seeking court approval for substituted consent, may never replace the absolutely essential voluntary informed consent that was never obtained from the infant girl who was sacrificed. While the parents refused consent, protecting their daughter's absolute inviolate sanctity of life, it would have also been wrong for them to consent to the murder of their child. The Court could have ruled that no one, not even the parents, had the right to consent to the operation that would deliberately take the life of this infant. Judicial proxy consent on behalf of a human being incapable of giving informed consent to "treatment" which results in involuntary human sacrifice violates the fundamental principles of individual autonomy and the Nuremberg Code.³ The voluntary assumption of risk in surgery for possible gain is one thing; it is quite another to be forced to undergo surgery and be murdered in the process. In this case, no attempt was

¹See *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All E.R. 961 (C.A. Civ.) (U.K.).

²*Id.* at 1004, 1006. See generally Sally Sheldon & Stephen Wilkinson, *Conjoined Twins: The Legality and Ethics of Sacrifice*, 2 MED. L. REP. 149 (1997).

³THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION 2 (George J. Annas & Michael A. Grodin eds., 1992). The Nuremberg Code is a collection of ethical laws pertaining to the conduct of physicians engaged in human experimentation. It was formulated by American Judges in the case of *United States v. Karl Brandt et al.*, Oct. 1946-Apr. 1949, as a direct response to reported German atrocities against involuntary subjects during World War Two. *The Doctors's Trial*, as the case was called, is reported in 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW 10 (1950). In *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), the Nuremberg Code was not pleaded and played no role in the outcome of the case.

made to utilize the doctrine of substituted judgment,⁴ which may have led to a different outcome.

For the Court to sanction the murder of an infant with full legal personhood is a jurisprudential watershed. By weighing in the balance who is worthy of life and who is marked for an accelerated death, the Court demonstrated that equality is an abstract hypothetical ideal that may be disregarded in the difficult case. It should signal an alarm that no human life is safe from involuntary sacrifice for the practical purposes of others who may be stronger and more powerful. This development is another step down the "slippery slope" devaluing the sanctity of human life. It is the inevitable result of the same kind of utilitarian philosophy and legal reasoning that justifies killing unborn babies by abortion.

In this case, the Court revealed it was willing to play God and make life and death decisions, but on an unfair scale of values prejudiced against those persons who are vulnerable, helpless, weak, and disabled, and who cannot speak for themselves. It will be argued that it is morally unacceptable for a court to permit the taking of someone's life by overruling a valid parental decision generally accepted in society, when the court's decision might be wrong. All doubt should be resolved in favor of preserving life, because once an innocent life is taken, it can never be restored.

I will further argue the Court exceeded its jurisdiction by giving an advisory opinion on criminal liability for murder in advance of a proposed homicide. The Court did not need to protect the doctors by in effect granting them immunity from criminal liability. If the Court found it impossible to accede to the hospital's request for proxy consent without giving its opinion on the question of criminal liability, then no consent in the civil case ought to have been given at all. Only an English jury, after the fact, has the jurisdiction to render a verdict, whether or not the crime of murder was committed. By issuing an opinion on criminal liability in a civil case, the Court created a chilling effect on the police and the office of the coroner, who in the ordinary course, would have of their own volition investigated this case and in all likelihood, have instituted criminal proceedings resulting in a charge of murder. The Court put itself into a hopeless conflict, by being a party to an agreement to cause the death of an innocent infant girl, and has circumvented the normal course of criminal procedure. In doing so, the Court has lost not only its impartiality, but also its credibility.

It is beyond the scope of this article to discuss how in the span of one hundred years the English Court has reversed itself, by now permitting the defense of necessity in circumstances where the murder of one human being is justified to save the life of another human being. No longer is drawing lots (which assumes the inherent equality of each human being) used to decide who must be tossed "overboard"

⁴See *In Re Boyd*, 403 A.2d 744 (D.C. 1979); *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969).

to save the rest in the “overloaded leaky lifeboat.” It is now legal to make value judgments among members of the fully human class on who is more deserving of living, and who is weaker and destined to die. The moral authority of the Court is now seriously undermined by the absolute divorce of law from morality.

This article puts the Court of Appeal on trial. First, it examines the facts of the case, and the individual reasons of the judges. Second, it identifies the underlying ethical philosophy driving the Court’s decision and those that were either ignored and rejected. The doctrine of informed consent is examined, as the shield against utilitarian evil. The divorce of law from morality is exemplified by contrasting judicial decisions one hundred years apart on the issue of the murder of innocent human life to save the life of others. The Nuremberg Code and the doctrine of substituted judgment are discussed and applied to the facts of this case. Third, the article focuses on the criminal law and questions the applicability of the defense of necessity and the wisdom of providing an advisory opinion prior to a murder being committed. And fourth, it concludes that the Court erred in its decision, that the parents were right in refusing to give consent, and that no consent to murder can ever be given on behalf of another human being.

Analysis of the Facts and Rationale of the Judges

The Facts

On August 8, 2000 two little girls were born at forty-two weeks following conception.⁵ Their combined weight was 6 kg.⁶ One was called “Mary” and the other “Jodie.”⁷ They were twins. They were also conjoined, meaning attached to one another. They were fused together at the pelvis. The lower ends of their spines were fused and the spinal cords joined. They shared a single torso forty centimeters long. Each infant had her own brain, heart, lungs, liver and kidneys. They shared a common bladder. Each had a pair of legs. Technically, to the doctors, they were known as ischiopagus tetrapus conjoined twins.⁸

Mary’s brain was severely abnormal and she was likely to have learning difficulties and suffer epileptic seizures.⁹ Although she was responsive to stimulation, it was uncertain whether Mary could feel pain or pleasure, from the facial expressions she was able to make.¹⁰

Jodie’s heart and blood vessels were connected to Mary in such a way that Jodie’s heart bore the function of supporting her sister’s circulation.¹¹ Jodie’s heart

⁵See *Re A (Children) (Conjoined Twins: Surgical Separation)*, *supra* note 1, at 971.

⁶See *id.*

⁷Not their real names. See *id.* at 970.

⁸See *id.*

⁹See *id.* at 975.

¹⁰See *id.* at 983-84.

¹¹See *id.* at 972, 973, 977.

at three weeks was stable and coping well with supporting herself and her sister.¹² As of September 13, 2000 Jodie's heart remained steady and there was no sign of failure.¹³ The doctors believed that eventually the strain of supporting her sister would be too much for Jodie and lead to heart failure.¹⁴ Assuming this was true, absence of medical intervention meant that both little girls might die as soon as six months or live together for several years, but not likely for the long term.¹⁵ It was impossible to accurately estimate an upper limit to life expectancy.¹⁶ The longer Jodie's heart worked normally, the higher was the life expectancy.¹⁷

Mary's heart and lungs were in poor condition. There was no blood flow into her heart.¹⁸ She had virtually no functioning lung tissue.¹⁹ Had she been born as a singleton, she would have died.²⁰ Alone, she was not viable.²¹ With Jodie's heart pumping blood into Mary, she was alive.²² Without the "life support" provided to her by Jodie, Mary would die.²³

Jodie had a normal brain, heart, lungs, bowel and liver.²⁴ She had two kidneys and a full spinal cord.²⁵ She appeared alert, responsive and was of normal intelligence.²⁶

Together the twins appeared contented.²⁷ There was nothing to suggest they were in an obvious pain or distress.²⁸

The doctors urged surgical intervention to separate the twins.²⁹ Mary would immediately die, but Jodie had a chance to live longer than she probably would being joined to her sister.³⁰ The surgical plan required the clamping of the blood supply from Jodie to Mary, and then severing the artery that pumped blood to Mary.³¹ This act would kill Mary.³² Jodie could be left with serious disabilities.³³

¹²See *id.* at 974.

¹³See *id.*

¹⁴See *id.* at 976.

¹⁵See *id.*

¹⁶See *id.* at 976-77.

¹⁷See *id.* at 977.

¹⁸See *id.* at 975.

¹⁹See *id.*

²⁰See *id.* at 969.

²¹See *id.*

²²See *id.* at 974-75.

²³See *id.* at 976.

²⁴See *id.* at 973.

²⁵See *id.*

²⁶See *id.*

²⁷See *id.* at 974.

²⁸See *id.*

²⁹See *id.* at 977.

³⁰See *id.*

³¹See *id.* at 969, 1003.

³²See *id.* at 969, 978, 1012.

³³See *id.* at 980.

Jodie would need further operations to gain normal function of her bowels and reproductive organs.³⁴ She could develop severe scoliosis.³⁵ In the worst case scenario, she would need a wheelchair to get around.³⁶ The Court did not overtly concern itself with whether psychologically Jodie would mourn the loss of her twin and perhaps feel guilt when she understood her birth history and subsequent surgery.

Michaelangelo and Rina Attard, of Gozo, near Malta, the parents of "Mary" and "Jodie" refused to give consent for surgery to separate their children.³⁷ The Attards had left their country and went to England to seek medical care they could not get at home.³⁸ As Roman Catholics, they put their faith in God and while they wanted the best possible care for their children.³⁹ They were not willing that Mary would be sacrificed for Jodie:

We cannot begin to accept or contemplate that one of our children should die to enable the other one to survive. That is not God's will. Everyone has the right to life so why should we kill one of our daughters to enable the other one to survive? That is not what we want and that is what we have told the doctors.⁴⁰

They also worried Jodie's outlook was bleak, even if she survived the operation.⁴¹ In making their decision, they took into account the best interests of their only children.⁴² They could not understand why they were not permitted by the law of England to decide on the future care of their own children.⁴³

The Trial

Court proceedings were begun by St. Mary's Hospital on August 18, 2000 to seek judicial consent for the proposed surgery in place of the parent's refusal and the children's inability to give consent.⁴⁴

On August 25, 2000 Justice Johnson approved the proposed operation to separate the twins, under the authority of the *Children Act 1989* and the inherent jurisdiction of the High Court.⁴⁵

He held the parents' rights were subordinate to the welfare of the children.⁴⁶ He engaged in an examination of the quality of life for each infant. He concluded

³⁴See *id.* at 981.

³⁵See *id.*

³⁶See *id.* at 980.

³⁷See *id.* at 969, 985-86.

³⁸See *id.* at 986.

³⁹See *id.* at 969, 971, 986.

⁴⁰See *id.* at 985.

⁴¹See *id.* at 1009.

⁴²See *id.* at 986.

⁴³See *id.* at 986-87.

⁴⁴See *id.* at 987.

⁴⁵See *id.* at 969, 987.

⁴⁶See *id.* at 988-89.

Mary's physical bond to Jodie would result in her being dragged around by Jodie, and give Mary pain and discomfort.⁴⁷ Mary's life would be "worth nothing to her" and would be hurtful to her.⁴⁸ In comparison, Jodie had a chance at a "relatively normal" life, if she were to be separated from Mary.⁴⁹

If the operation was regarded as a positive act, it was not lawful and could not be made lawful.⁵⁰ His solution was to characterize the proposed operation as a form of lawful euthanasia. If the doctors placed a clamp within Jodie's body to block the blood circulation to Mary, she would die, but not from any invasion of her body.⁵¹ The withdrawal of Mary's blood supply would bring fatal consequences to Mary, but that was not the primary goal of the operation.⁵² Using the analogy of withdrawing food and water (which was not a positive act and therefore lawful), the trial judge reasoned it would be lawful to simply discontinue the life support given to Mary from the body of Jodie.⁵³ Since in England it is legal to withhold food and water from a disabled person with the intent that the person would die,⁵⁴ he ruled in favor of the hospital.

The Court of Appeal unanimously dismissed the appeal by the parents on September 22, 2000.⁵⁵ For ease of reference, the gist of each of the three judgments is summarized below.

Lord Justice Ward

Every person's body is inviolate.⁵⁶ The performance of a medical operation without consent is the crime of trespass and the tort of trespass and is thus unlawful.⁵⁷ The principle of self-determination means every adult patient can choose what, if any, medical treatment is to be done to that person's body, even if it is against the doctor's advice.⁵⁸ In English law, the principle of the sanctity of human life must yield to the principle of self-determination. The adult patient has a right to refuse treatment on the basis of autonomy, even if that decision means his or her own death.⁵⁹ This case is different because it involves proxy consent on behalf of a child.⁶⁰

⁴⁷See *id.* at 988.

⁴⁸See *id.*

⁴⁹See *id.*

⁵⁰See *id.* at 989.

⁵¹See *id.* Judge Johnson did not define what was exclusively Mary's body, Jodie's body, or any body held in common.

⁵²See *id.* at 989.

⁵³See *id.*

⁵⁴See generally, *Airedale N.H.S. Trust v. Bland* [1993] A.C. 789 (H.L.) (U.K.).

⁵⁵*Re A (Children) (Conjoined Twins: Surgical Separation)*, *supra* note 1.

⁵⁶See *id.* at 989. See also *In Re F (Mental Patient: Sterilization)* [1990] 2 A.C. 1 (H.L.) (U.K.).

⁵⁷*Re A (Children) (Conjoined Twins: Surgical Separation)*, *supra* note 1, at 990.

⁵⁸*Id.* See also *Airedale N.H.S. Trust v. Bland*, *supra* note 54, at 864, 891.

⁵⁹*Id.* at 991.

⁶⁰*Id.* at 991-992.

Parents may have a duty to give consent to medical treatment on behalf of their children.⁶¹ Parents are authorized by law to give consent to medical treatment.⁶² Parents must act in the best interests of their children.⁶³ Parental refusal of consent may be overridden by the court by the sovereign's power to protect infants.⁶⁴ Parental rights are qualified and are not absolute.⁶⁵

The court's first and paramount concern is the welfare of the child.⁶⁶ The definition of "welfare" is open-ended. The best interest of a child is not limited by medical concerns, but include emotional and other issues too.⁶⁷

The court may not make an order that violates the criminal law.⁶⁸ It makes no difference whether the killing is by act or omission, as that is a distinction without a difference.⁶⁹ Would the killing of Mary by severing the common aorta she shared with Jodie constitute murder?

Mary and Jodie were born alive.⁷⁰ Although their bodies were fused, they were separate persons, each having a life in being.⁷¹ Biological dependence or interdependence did not disturb the legal conclusion that Jodie and Mary were separate legal persons for the purposes of both civil and criminal law.⁷²

The trial judge's approach was flawed.⁷³ He was wrong to find Mary's life was worth nothing to her.⁷⁴ It was impossible to classify the operative procedure as an act of omission rather than a positive act.⁷⁵ It was not a simple matter to discover which part of the shared body was Mary and which part was Jodie.⁷⁶

It was in Jodie's best interests to proceed with the surgery,⁷⁷ but it was not in Mary's, for she would certainly die.⁷⁸ The surgery would deny her inherent right to life and cut short her natural life.⁷⁹ It was contrary to her best interests and offered her no advantage at all.⁸⁰ Faced with this conflict between the best interests of the

⁶¹*Id.* at 991.

⁶²*Id.*

⁶³*Id.* at 992.

⁶⁴*Id.* at 992, 1006-08.

⁶⁵*Id.* at 992-3, 1006-08.

⁶⁶*Id.* at 993.

⁶⁷*Id.* at 994.

⁶⁸*Id.*

⁶⁹*Id.* at 1003, 1015.

⁷⁰*Id.* at 995-96.

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.* at 997, 1004.

⁷⁴*Id.* at 1002.

⁷⁵*Id.* at 1003.

⁷⁶*Id.*

⁷⁷*Id.* at 996-97.

⁷⁸*Id.* at 1004.

⁷⁹*See id.*

⁸⁰*See id.*

children, the Court must choose the lesser of two evils.⁸¹ If the parents are unable to make this choice, the Court will make it for them.⁸²

A balancing test is used to determine the lesser of the two evils.⁸³ Jodie and Mary had an equal right to life, and a right to be treated equally.⁸⁴ The proposed operation was worthwhile for Jodie, but not for Mary.⁸⁵ The actual quality of life, enjoyed by each infant, now and may be enjoyed in the future, is relevant in the balancing evaluation.⁸⁶ The operation would accelerate the termination of Mary's death, but she was "designated for death," because her capacity to live her life was fatally compromised.⁸⁷ The chance for Jodie to have a normal life far outweighs Mary's "parasitic living" as "she sucks the lifeblood out of Jodie."⁸⁸ Without Jodie, Mary is not a viable child. Mary is to be sacrificed, for her life is outweighed by Jodie's chance at a longer life and the possibility of her having a normal quality of life. Parents in such a position must choose the lesser of their inevitable loss, and if they do not, the Court will choose for them. Failure to kill Mary may mean a decision in favor of killing Jodie.⁸⁹ The scales come down heavily in Jodie's favor.⁹⁰ If the parents abdicate their duty to Jodie, they might be killing Jodie.⁹¹ This might be a culpable omission amounting to manslaughter.⁹²

The killing of Mary would not be murder, even though the operation would be a positive act resulting in her inevitable death. The sanctity of life argument is rejected, since equal protection affords no benefit to Jodie and the scales come out equal. Mary may have a right to life, but "she has little right to be alive."⁹³ She has already been living on "borrowed time."⁹⁴ Mary is "beyond help."⁹⁵

The doctrine of double effect has no applicability to the facts of this case.⁹⁶ The side effect to the good effect on Jodie is the death of Mary, and the operation was not intended to have any benefit for Mary.⁹⁷

⁸¹See *id.* at 1006, 1016.

⁸²See *id.* at 1010.

⁸³See *id.* at 1010-11.

⁸⁴See *id.* at 1010.

⁸⁵See *id.*

⁸⁶See *id.*

⁸⁷See *id.*

⁸⁸See *id.*

⁸⁹See *id.* at 1016-17.

⁹⁰See *id.* at 1011.

⁹¹See *id.* at 1013.

⁹²See *id.*

⁹³See *id.* at 1010.

⁹⁴See *id.* at 976.

⁹⁵See *id.* at 1010.

⁹⁶See *id.* at 1012.

⁹⁷See *id.*

Here the doctors have a conflict of duty toward two patients. They are under a duty to operate on Jodie, but not on Mary. They are under a duty to choose.⁹⁸ The sanctity of life principle alone cannot be the deciding factor, because equal protection preserves the status quo.⁹⁹ The impasse can be broken by giving freedom of choice to the doctors to weigh factors other than the sanctity of life.¹⁰⁰ Since over time, Jodie's heart will be eventually fatally weakened by supporting Mary, she might not be morally innocent.¹⁰¹ Medical intervention to save Jodie from Mary is quasi self-defense to rescue Jodie from Mary's threat to her health.¹⁰² The law must allow an escape through the choosing of the lesser of two evils. The operation is lawful.

Lord Justice Brooke

Could one twin be sacrificed so that the other may have a chance to live? Will the operation to separate the twins result in murder?

The sanctity of life is the value protected by the common law crime of murder.¹⁰³ Once a child is born alive, it is entitled to the protection of the law, and is accorded the benefit of the principle of the universality of rights.¹⁰⁴ In general, Jodie and Mary are considered equal in legal standing before the Court.¹⁰⁵ The general rule is that quality of life considerations are of no relevance.¹⁰⁶ The proposed operation would be a positive act and directly cause the death of Mary.¹⁰⁷ The English law would find the surgeons intended to kill Mary, however little they desired that outcome, since they knew her death would be the inevitable result of their acts in clamping and severing the common aorta.¹⁰⁸

The doctrine of double effect has no application in this case because an operation designed to benefit Jodie and kill Mary could never be in Mary's best interests.¹⁰⁹ The proposed operation would involve the murder of Mary.¹¹⁰

⁹⁸See *id.* at 1015.

⁹⁹See *id.* at 1016.

¹⁰⁰See *id.*

¹⁰¹See *id.* at 1017.

¹⁰²See *id.*

¹⁰³See *id.* at 1024.

¹⁰⁴See *id.* at 1026.

¹⁰⁵See *id.*

¹⁰⁶See *id.*

¹⁰⁷See *id.* at 1027.

¹⁰⁸See *id.* at 1029.

¹⁰⁹See *id.* at 1030. In coming to this conclusion, Brooke L.J. considered and rejected at page 1031 the doctrine of double effect discussed in two American articles: George J. Annas, *Siamese Twins: Killing One to Save the Other*, HASTINGS CENTER REP., Apr. 1987, at 27; David C. Thomasma et al., *The Ethics of Caring for Conjoined Twins*, HASTINGS CENTER REP., July-Aug. 1996, at 4.

¹¹⁰Re A (Children) (Conjoined Twins: Surgical Separation), *supra* note 1, at 1031.

The general rule is that necessity is not a defense to a charge of murder.¹¹¹ This is a non-utilitarian doctrine.¹¹² This rule is not absolute.¹¹³ The right to life is “almost” a supreme value.¹¹⁴ But utilitarian reasons may justify the deliberate killing of an innocent person who is destined to die, especially where there is no question from all the circumstances who should be chosen to die.¹¹⁵ The autonomy of everyone simply cannot always be protected.¹¹⁶ For example, a doctor may have to choose between the life of a mother and her unborn baby.¹¹⁷ The doctrine of necessity is an expression of the philosophy of utilitarianism.¹¹⁸

This case is one of those cases of necessity that the English law recognizes. The defense may be relied upon even if no emergency existed and the harm sought to be avoided is not “unjust aggression.”¹¹⁹ The proposed operation satisfies three criteria needed to establish the defense of necessity: the act is needed to avoid inevitable and irreparable evil; no more should be done than is reasonably necessary for the purpose to be achieved; and, the evil inflicted must not be disproportionate to the evil avoided.¹²⁰ This is because Jodie’s interests outweigh those of

¹¹¹See *id.* at 1038. See *R. v. Dudley and Stephens* [1884] 14 Q.B.D. 273, 285-86 (U.K.); *R. v. Howe* [1987] 1 A.C. 417 (H.L.) (U.K.); *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa.1842).

¹¹²See *id.* at 1039. See GLANVILLE WILLIAMS, *TEXTBOOK OF THE CRIMINAL LAW* 604 (2d ed. 1983):

The usual view is that necessity is no defense to a charge of murder. This, if accepted, is a non-utilitarian doctrine; but in the case of a serious emergency is it wholly acceptable? . . . The question is whether you could deliberately kill someone for calculating reasons. We do regard the right to life as almost a supreme value, and it is very unlikely that anyone would be held to be justified in killing for any purpose except the saving of other life, or perhaps the saving of great pain or distress. Our revulsion against a deliberate killing is so strong that we are loath to consider utilitarian reasons for it.

¹¹³See *Re A (Children) (Conjoined Twins: Surgical Separation)*, *supra* note 1, at 1038.

¹¹⁴See *id.* at 1039.

¹¹⁵See *id.* at 1043. See John Smith, “Justification and Excuse on the Criminal Law,” and “Necessity and Duress,” the Hamlyn Lectures (1989). On the moral problem of choosing one’s victim, see Andrew Ashworth, *Justifications, Necessity, and the Choice of Evils*, in *PRINCIPLES OF CRIMINAL LAW* 153-54 (3d ed. 1999):

Yet it is surely necessary to make some sacrifice, since the autonomy of everyone simply cannot be protected. A dire choice has to be made, and it must be made on a principle of welfare or community that requires the minimization of overall harm. A fair procedure for resolving the problem—perhaps the drawing of lots—must be found . . . one should not obscure the clearer cases where there is no need to choose a victim: in the case of the young man on the rope-ladder, blocking the escape of several others, there was no doubt about the person who must be subjected to force, probably with fatal consequences.

¹¹⁶See *id.*

¹¹⁷See *id.* at 1043-44. See *R. v. Bourne* [1939] 1 K.B. 687 (U.K.).

¹¹⁸See *Re A (Children) (Conjoined Twins: Surgical Separation)*, *supra* note 1, at 1050.

¹¹⁹See *id.* at 1051.

¹²⁰See *id.* at 1052. Left unsaid was whether objective or subjective criteria were met in this case. A problem not dealt with was the role of the jury in considering the defense of necessity. See *R. v. Martin* [1989] 1 All E.R. 652 (C.A.) (U.K.).

Mary.¹²¹ The proposed operation would give each of these children the bodily integrity that nature has denied them.¹²² The operation is lawful.

Lord Justice Walker

This is a rare case.¹²³ There is no precedent to guide the court.¹²⁴ The law regards Mary and Jody as separate persons.¹²⁵ While Mary was born alive, without Jody she is not viable as a biologically independent human being.¹²⁶ The court is bound by the best interests of the infants.¹²⁷ Here the court assumes there is a conflict in the interests of the children in this decision of life or death. The sanctity of human life is embedded in our law and moral philosophy. For this reason, murder is reviled as a grave and heinous crime. In this case, to prolong Mary's life for a few months would be of no advantage. If she had been born separate from Jodie and put on artificial life-support, it would have been permissible to withdraw that support and allow Mary to die.¹²⁸

The proposed operation to separate the twins would be a deliberate positive act, invasive of Mary's body, and cause her death.¹²⁹ Here the good purpose (the operation to separate) cannot be achieved without the bad consequence (taking Mary's life). The doctrine of double effect is not relevant, unless the division of Mary's body from Jodie is seen as a good end in itself, even if Mary dies in the process.¹³⁰

The common law recognizes the defenses of necessity, self-defense, and duress of circumstances. The special features of this case are that the doctors have duties to both Mary and Jodie.¹³¹ It is impossible to perform any relevant surgery on one without affecting the other.¹³² Inaction will probably result in the death of the twins within a matter of months.¹³³ It is permissible to break the law in circum-

¹²¹See *Re A (Children) (Conjoined Twins: Surgical Separation)*, supra note 1, at 1052.

¹²²See *id.*

¹²³See *id.* Identical twins occur in about one out of 250 live births. Very rarely, perhaps in one out of 100,000 births, do identical twins developed from a single fertilized egg fail to separate completely. Only about two percent of those have four legs and are joined at the pelvic area. About 75% die at birth or within 24 hours of birth. For Mary and Jodie to have been survivors for so long was a miracle in itself.

¹²⁴In 1977 conjoined twins Amy and Angela Lakeberg were separated at Children's Hospital in Philadelphia. A court permitted the surgery to proceed, knowing that Amy would immediately die. No written reasons were released. Angela died 10 months later. See George J. Annas, *Siamese Twins: Killing One to Save the Other*, *HASTINGS CENTER REP.*, Apr. 1987, at 27.

¹²⁵See *Re A (Children) (Conjoined Twins: Surgical Separation)*, supra note 1 at 1052.

¹²⁶See *id.* at 1053.

¹²⁷See *id.* at 1054.

¹²⁸See *id.* at 1057.

¹²⁹See *id.* at 1061-62.

¹³⁰See *id.* at 1063.

¹³¹See *id.* at 1065.

¹³²See *id.*

¹³³See *id.*

stances where it is necessary to rescue someone to whom is owed a positive duty of rescue.¹³⁴

Each twin has a right to life and the right to physical integrity.¹³⁵ While necessity is no justification for the taking of innocent human life, it will be allowed and extended in this case of conjoined twins, which represents a unique problem.¹³⁶ This case should not be regarded as a further step down the slippery slope.¹³⁷

The submissions based on the teachings of the Roman Catholic faith were rejected. This case was to be decided by legal principle, and not by reference to religious teaching or individual conscience.¹³⁸

The *bona fide* intention of the doctors to separate the twins removes any guilty mind that constitutes the crime of murder.¹³⁹ A well-intentioned purpose, to save the life of Jodie, absolves the doctors of the crime of murder.¹⁴⁰ It would only be unlawful to kill Mary if the operation's main purpose was to kill her.¹⁴¹ Mary's death would be the inevitable consequence of the operation, but not its purpose.¹⁴² Mary's death would occur simply because her own body was incapable of sustaining her life.¹⁴³ Mary must not be regarded as an "unjust aggressor."¹⁴⁴

Not only would the surgery be in the best interests of Jody, it would also be in the best interests of Mary too.¹⁴⁵ To remain conjoined would deprive Mary of bodily integrity and human dignity which is her natural right.¹⁴⁶ The right to life carries the implied right to a whole and intact body, and the eventual right to make decisions about one's own body.¹⁴⁷ Continued life for Mary would hold nothing for Mary at all, except for possible pain and discomfort.¹⁴⁸

The operation is therefore lawful.

¹³⁴See *id.* at 1066 (quoting Wilson J. in *R. v. Perka* [1984] 2 S.C.R. 232 (S.C.C.) (Can.)). See *R. v. Walker* [1979] 48 C.C.C. 2d 126 (Ont. Co. Ct.) (Can.); *R. v. Instan* [1893] 1 Q.B. 450 (Can.).

¹³⁵See *id.* at 1066. In this context, physical integrity means the right to a whole body over which to exercise autonomy and self-determination.

¹³⁶See *id.* at 1067.

¹³⁷See *id.*

¹³⁸See *id.* at 1069.

¹³⁹See *id.*

¹⁴⁰See *id.*

¹⁴¹See *id.* at 1070.

¹⁴²See *id.*

¹⁴³See *id.*

¹⁴⁴See *id.* at 1067.

¹⁴⁵See *id.* at 1069.

¹⁴⁶See *id.*

¹⁴⁷See *id.* at 1070.

¹⁴⁸See *id.*

The Death of Mary

There was no further appeal.¹⁴⁹ The operation to separate Mary and Jodie took place at Saint Mary's Hospital in Manchester England on Monday, November 6, 2000.¹⁵⁰ It lasted twenty hours and involved a team of twenty-two people.¹⁵¹ The final separation of the twins took place in silence.¹⁵² Pediatric surgeons Dr. Alan Dickson, a Catholic, and Dr. Adrian Bianchi, an evangelical Christian, made the final cut together as they felt it was inappropriate for one person to assume the entire responsibility as the cause of Mary's death.¹⁵³ As expected, Mary died.¹⁵⁴

In an interview on "Tonight With Trevor McDonald" on ITV, aired December 7, 2000 on Granada television, Michaelangelo and Rina Attard spoke of the loss of Mary.¹⁵⁵ Michaelangelo, her father, described holding Mary after her death, "It was good to hold her because it was the first time we could cuddle her because she was always joined. Although she was dead, she was free at the time."¹⁵⁶ Rina, Mary's mother said, "I went to see her right away. I lifted and cuddled her. She was dead but I was happy I was holding her."¹⁵⁷

¹⁴⁹The Court of Appeal had granted permission to appeal to the House of Lords on September 22, 2000. By September 27, the Official Solicitor had been advised by the parents they did not wish to appeal. On October 30, a summons was issued by the Pro-Life Alliance seeking to appoint Bruno Quintavalle as guardian ad litem for Mary and to remove the Official Solicitor, Laurence Oates from acting for failure to launch an appeal to save Mary's life. The originating application before the President of the Family Court, Justice Dame Elizabeth Butler-Sloss was dismissed on November 3. A panel of the Court of Appeal, Justices Ward and Walker, heard an application for permission to appeal within three hours the same day, and denied permission to appeal. The operation was proceeding even as the reasons were being read out in the Court of Appeal on November 6, 2000. See *Re A (Children) (Conjoined Twins) (No.2)* [2001] 1 F.C.R. 313 (C.A. Civ.) (U.K.). The Official Solicitor didn't see a need to appeal, not viewing the case as a precedent. See BBC News Online, *Solicitor's 'Agony' over Twins Decision* (Sept. 29, 2000) at <http://news.bbc.co.uk/low/english/health/newsid_945000/945677.stm>.

¹⁵⁰See BBC News Online, *Marathon Op to Separate Twins* (Nov. 7, 2000) at <http://news.bbc.co.uk/low/english/health/newsid_1009000/1009117.stm>; BBC News Online, *Siamese Twin Dies After Separation* (Nov. 7, 2000) <http://bbc.co.uk/low/english/health/newsid_1010000/1010994.stm>.

¹⁵¹See BBC News Online, *Siamese Twin Op Details Revealed* (Dec. 7, 2000) at <http://news.bbc.co.uk/low/health/newsid_1059000/1059963.stm>.

¹⁵²See *id.*

¹⁵³See *id.*

¹⁵⁴See *id.*

¹⁵⁵See BBC News Online, *Jodie's Parents Tell of Grief* (Dec. 7, 2000) at <http://news.bbc.co.uk/low/english/health/newsid_1058000/105873.stm>. Mr. and Mrs. Attard were paid £150,000 for the interview. The money was expected to be used for Jodie's future care. The publicity ban pertaining to identity was lifted the day before the interview for the parents to be named in the interview with Martin Bashir, and in a documentary filmed by the television company Granada. See BBC News Online, *Siamese Twin Parents Named* (Dec. 6, 2000) <http://news.bbc.uk/low/english/newsid_1058000/1058223.stm>.

¹⁵⁶See *id.*

¹⁵⁷See *id.*

The coroner, Leonard Gorodkin decided on December 15, 2000 not to hold an inquest into Mary's death, but simply recorded the following narrative verdict: "Mary died following surgery separating her from her conjoined twin, which surgery was permitted by an order of the High Court, confirmed by the Court of Appeal."¹⁵⁸

Noting the Court of Appeal had ruled it was in the best interests of both little girls for the operation to occur, even though Mary would die, the coroner concluded:

In view of their findings, I don't have to consider the questions of lawfulness nor the question of moral, ethical, and religious beliefs. I am sure there are many with such beliefs who objected to the separation of the twins. That debate on the decision will continue I am sure.¹⁵⁹

Earlier, the coroner had pondered the exceptional nature of the case, "Although I have dealt with many, many deaths that have followed surgery, that surgery wasn't carried out with the knowledge the person was going to die."¹⁶⁰

To date, no criminal charges have been laid against the doctors.

Morals and Ethics

Should the Court Be Playing God?

More questions than answers have arisen since the Court's decision. Is death inherently evil? Are we not all destined to die? Is it not more important how we live than how long we live? Is interdependence a good thing, even to the point of ensuring a conjoined twin's survival? Isn't choosing the lesser of two evils still choosing evil? If sanctity of life is the ultimate value, can murder now be excused if done to save the life of another? Can law be utterly divorced from morality? Did the Court exceed its jurisdiction by "playing God?"

In the famous case of *R. v. Dudley and Stephens*,¹⁶¹ Captain Tom Dudley and navigator Edwin Stephens were tried and convicted of the murder of ordinary seaman, seventeen-year-old Richard Parker. Along with able seaman Ned Brooks, they had been sailing the yacht *Mignonette* from England to Sidney Australia for its new owner, lawyer John Henry Want. On July 5, 1884, the unseaworthy yacht foundered in heavy seas off the coast of Africa and had to be abandoned in minutes. All four survivors managed to scramble into a thirteen-foot open dinghy that served as

¹⁵⁸"Siamese Twin Inquest Verdict," BBC News Online (Dec. 15, 2000) at <http://news.bbc.co.uk/low/english/health/newsid_1072000/1072031.stm>.

¹⁵⁹See *id.*

¹⁶⁰See BBC News Online, *Siamese Twin Verdict 'Will Be Difficult'* (Dec. 15, 2000) at <http://news.bbc.co.uk/low/english/health/newsid_1070000/1070220.stm>.

¹⁶¹*R. v. Dudley and Stephens*, *supra* note 111, at 285-86. The details of the narrative which follows have been gleaned from the fascinating account of the story of the voyage and trial in A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW* 45-72, 195-255 (1984).

their lifeboat for the next nineteen days. Without a supply of fresh water, and sustained by ten pieces of turnips contained in two tins salvaged from the sinking vessel, the only other food consumed was the flesh of a small turtle that was caught by the shipwrecked sailors on July 9. By July 13, they were drinking their urine, as not enough rainwater could be collected to slack their insatiable thirst. On July 20, out of desperation and ignoring advice, Richard Parker drank a considerable quantity of seawater and became violently ill. By now the question of sacrifice and cannibalism had been openly discussed among the sailors. Richard Parker was destined for death. He was the weakest, and killing him would only accelerate his inevitable death. His sacrifice was necessary to enable the others to live longer so they would have a chance to be rescued. Both Dudley and Stephens were married with children to support. It was agreed between them that their lives were worth more in the balance. Brooks was the healthiest, so there was no thought of him being sacrificed. On July 24, Dudley approached Parker and said, "Dick, your time has come." Parker replied with his last words, "What, me Sir?" Without his consent, and without the fair drawing of lots, Parker was selected to die. Dudley then killed Parker with a penknife, stabbing him in the neck. The survivors first drank Parker's blood, and then ate his heart and liver. Until they were rescued by a passing German ship, the *Moctezuma*, on July 29, the survivors were nourished by Parker's body. Upon their return to England, the survivors were openly candid about their adventure and were shocked to find themselves under arrest for murder. Brooks was not prosecuted and ended up testifying for the Crown. The jury delivered a special verdict on the facts without a finding of guilt or innocence. A special five member panel of judges was assembled to decide whether the defense of necessity excused the act of murder. The defense of necessity was rejected by the court, even though all the men would have perished without murdering Parker and consuming his body. In finding the defendants guilty of murder, the court reasoned it was never lawful to kill an innocent human being so that another human being could live longer. Even though this was a rare case where necessity was claimed, the court refused to sanction the sacrifice of the weak to benefit the strong. The sentence of death was commuted by the exercise of the royal prerogative of mercy to six months imprisonment, without hard labor.

Chief Justice Lord Coleridge, who delivered the judgment in *Dudley and Stephens*, declared necessity could never justify killing an innocent human being. To permit such a defense would mark an absolute divorce of law from morality. Self-preservation was not the ultimate goal at any cost. It would be unworkable to be the judge in this kind of scenario. There was no satisfactory standard that would tip the scales of justice in measuring the comparative worth of human beings. The court refused to play God. In finding Dudley and Stephens guilty of murder, the Chief Justice said:

Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognized

excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called 'necessity.' But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet *the absolute divorce of law from morality would be of fatal consequence and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it.* It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the Birkenhead these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink, as indeed, they have not shrunk *It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what?* It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. *In this case the weakest, the youngest, the most unresisting, was chosen.* Was it more necessary to kill him than one of the grown men? The answer must be 'No'¹⁶²

One hundred years later, the laws of England appear to have changed. Lord Justice Brooke, who was the leader of the Court in respect of the criminal law, decided the cases of *R. v. Dudley and Stephens* and *R. v. Howe* were not conclusive as to whether the defense of necessity prohibited the murder of an innocent.¹⁶³ In excusing the operation as "lawful," the Court of Appeal had now in effect adopted the defense's position in *Dudley and Stephens*. Why? The simplest explanation is the Court is now willing to play the role of God, when once it wasn't.

What was the reasoning that formed the basis of the Court of Appeal's ruling in the case of Mary and Jodie? In contrast to Lord Coleridge, who refused to divorce law from morality, Lord Justice Ward, had no such reluctance, and stated at the outset of his ruling, "This court is a court of law, not of morals, and our task has been to find, and our duty is then to apply the relevant principles of law to the situation before us—a situation which is quite unique."¹⁶⁴

The Court viewed the murder of an innocent child (Mary) to be lawfully excused in order to save the life of another innocent child (Jodie). It was better that one child should live, than both should die. The end justified the means. This was a utilitarian approach. There was an evil in performing a medical procedure that

¹⁶²*R. v. Dudley and Stephens*, *supra* note 111, at 286-88 (emphasis added).

¹⁶³*Re A (Children) (Conjoined Twins: Surgical Separation)*, *supra* note 1, at 1038 (citing *R. v. Dudley and Stephens* *supra*, note 111 and *R. v. Howe* *supra*, note 111).

¹⁶⁴*See id.* at 969.

was going to kill Mary, but the Court assumed a greater evil by permitting nature to take its course where the death of both Mary and Jodie was inevitable. Since Mary was the weaker, the more dependent, the one least likely to enjoy a meaningful quality of life, she was destined for death. Freeing Jodie of Mary's body would give personal autonomy to Jodie and eventually control over her body. She would be delivered from the burden of supporting her "parasitic" sister and gain her independence. The death of Mary was unfortunate, but a necessary step along the way to self-fulfillment and self-preservation. Jodie, released from Mary, would then have a better chance to survive, achieve full autonomy to be independent, acquire bodily integrity, and be in sole control of her body.

The Court departed from precedent and forcibly imposed its own philosophy upon the parents of Mary and Jodie, and the baby girls themselves. However noble it may have been objectively viewed for Mary to sacrifice her life for Jodie, in reality, Mary was never given a choice. The Court presumed it was in Mary's best interests to die—despite her tiny body's struggle for daily existence. Like Richard Parker, she was the weak one destined to die. The Court presumed Jodie would get over a lifetime of guilt and remorse knowing that her sister had been killed so she could live longer. The Court has now entered into the realm of playing God. After all, stated Lord Ward, "Deciding disputed matters of life and death is surely and pre-eminently a matter for a court of law to judge."¹⁶⁵

Is this too much power for a judge to have? Was deciding Mary's fate morally acceptable? After all, judges have in the past and do in the present pronounce sentences of death and have ordered executions, even of those later proven to be innocent.¹⁶⁶ Judges may not have the wisdom of a King Solomon, but who else in society has the job of making the tough decisions?

Unfortunately, judges are mere mortals and are prone to errors. Miscarriages of justice can and do occur. God is presumed as a matter of faith and doctrine to be perfect. Human judges are not. In matters not involving life and death, mistakes can be corrected. In matters of life and death, once an innocent person has died, nothing can be done by an atoning judge to bring that victim of injustice back to life.

Lord Justice Ward, admitted a judge might be wrong, in approving the following as a correct statement of the law:

But the role of the court is to exercise an independent and objective judgment. If that judgment is in accord with that of the devoted and responsible parent, well and good. If it is not, then it is the duty of the court, after giving due weight to the view of the devoted and responsible parent, to give effect to its own judgment. That is what it is there for. *Its judgment may of course be wrong.* So may that of the

¹⁶⁵See *id.* at 987.

¹⁶⁶See generally MICHAEL RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992); BARRY SCHECK ET AL., ACTUAL INNOCENCE (2001).

parent. But once the jurisdiction of the court is invoked its clear duty is to reach and give the best judgment that it can.¹⁶⁷

Assuming the role of playing God and making a life and death decision is a judicial power, it still must be done with humility and great caution. At a minimum, it is disturbing to hear a judge say, with an implied measure of arrogance, "there is only one right answer and the court has given it."¹⁶⁸ What if morality were absent from the judge's reasoning in deciding matters of life and death? Will justice be achieved? In this case, Roman Catholic morality had one answer, and the law another. There was a complete divorce of law from morality.

The Court did not heed the wisdom of Lord Hailsham of St. Marylebone who warned in *Howe* that any attempt to completely divorce law from morality was doomed:

I begin by affirming that, while there can never be a direct correspondence between law and morality, *an attempt to divide the two entirely is and has always proved to be, doomed to failure*, and, in the present case, the overriding objects of the criminal law must be to protect innocent lives and to set a standard of conduct which ordinary men and women are expected to observe if they are to avoid criminal responsibility.¹⁶⁹

Whose Philosophy?

Utilitarianism. Utilitarianism is an English philosophy attributed in its modern form to Jeremy Bentham and John Stuart Mills.¹⁷⁰ The greatest happiness principle is the root of this school of thought.¹⁷¹ Actions are assumed to be right when they produce happiness; actions are wrong when they tend to produce misery.¹⁷² The utility of an action is measured by its likelihood to produce joy; the right action is the choice that would bring about the greatest amount of happiness. The ultimate value is happiness, closely accompanied by the avoidance of pain and the enjoyment of life.¹⁷³ Mills claimed the golden rule of Jesus embodied the complete spirit of the ethics of utility: "To do as you would be done by, and to love your neighbor as yourself, constitute the ideal perfection of utilitarian morality."¹⁷⁴ But utilitarianism does not morally bind an individual to do good to others.¹⁷⁵ For

¹⁶⁷*Re A (Children) (Conjoined Twins: Surgical Separation)*, *supra* note 1, at 1007-08 (emphasis added) (citing Bingham M.R. in *Re Z (a minor)* (freedom of publication) [1995] 4 All E.R. 961, 986 (U.K.)).

¹⁶⁸*Id.* at 968.

¹⁶⁹*R. v. Howe*, *supra* note 111, at 430 (emphasis added).

¹⁷⁰John Arras & Robert Hunt, *Ethical Theory in the Medical Context*, in *BIOETHICS: HEALTH CARE LAW AND ETHICS* 5-26 (Furrow et al., eds., 3rd ed. 1997 & Supp. 1999).

¹⁷¹*See id.* at 7.

¹⁷²JOHN STUART MILL, *Utilitarianism*, in *THE UTILITIANS* 407 (1961).

¹⁷³*See id.* at 412.

¹⁷⁴*See id.* at 418.

¹⁷⁵*See id.* at 455.

example, to save a life, expediency is permitted. It is not only allowable, but indeed may be the duty in these circumstances to steal or to take by force whatever is necessary to attain this desired objective.¹⁷⁶ Mills himself stops short of naming murder as an approved means to save a life, although his philosophy by logical extension would appear to approve this moral transgression.

To apply utilitarian principles, one must first decide which individual or classes of individuals have an interest in obtaining happiness, which sometimes must come at another person's or class of persons' expense. Act-utilitarianism represents the application of the doctrine on an individual case basis; Rule-utilitarianism represents the application of the theory to classes in society on a rule-making basis.¹⁷⁷

The ethical outlook of utilitarianism is teleological, or end-based.¹⁷⁸ What is important are the consequences, not the means by which the goal of happiness is reached. The end justifies the means. In assessing the moral quality of a choice, the appropriate question is: What will be the result? The answer to this question often requires both a short term and long term analysis.¹⁷⁹

In this case, the Court assumed the greatest happiness would be that one live child was better than two dead ones. The Court looked to the short term consequences of the potential benefits to Jodie and to her parents. Whatever spiritual consequences would flow from the taking of Mary's life was not relevant to the decision. Would saving Jodie in this manner really make her happy? Would she wish she would have died with her sister, considering the special intimacy twins share, the numerous operations ahead, and the possibility of severe disability?

Survivors of conjoined twin operations, where one twin was sacrificed so the other may live longer, may endure needless suffering from invasive medical procedures, and no benefit in either longevity or quality of life.¹⁸⁰ Who benefits, then, the medical practitioner who achieves superstar status as a pioneer in medicine?¹⁸¹

The medical evidence before the Court suggested Mary and Jodie could live several years without life-threatening medical complications. In an interview reported by ABC news on September 13, 2000 Professor Glen McGee of the Center for Bioethics from the University of Pennsylvania stated: "There is something beautiful about conjoined twins. Throughout history, conjoined twins have shown that it's possible to live a good life while completely connected to another person. That's

¹⁷⁶See *id.* at 465.

¹⁷⁷John Arras & Robert Hunt, *Ethical Theory in the Medical Context*, in *BIOETHICS: HEALTH CARE LAW AND ETHICS*, *supra* note 170, at 8.

¹⁷⁸See *id.*

¹⁷⁹See *id.* at 8-9.

¹⁸⁰Alice Domurat Dreger, *The Limits of Individuality: Ritual and Sacrifice in the Lives and Medical Treatment of Conjoined Twins*, 29 *STUD. HIST. PHIL. BIOL. & BIOMED. SCI.* 1 (1998).

¹⁸¹Dr. C. Everett Koop, who eventually became Surgeon General of the United States, achieved fame in the 1970's in his unsuccessful attempt to save the Philadelphia Lakeberg conjoined twins.

a profound lesson that should not be lost or thrown away by the act of separating these children.”¹⁸²

Utilitarian theory is also suspect in this case, because the assumed happiness of Jodie is incommensurable with the death of Mary. Under no utilitarian analysis can it be concluded that Mary’s death will bring her happiness in this world.

In this case the utilitarian philosophy of the Court collided with the parents’ fundamental moral beliefs of Roman Catholicism. It was immoral for them to consent to the death of Mary, even if there was a benefit to Jodie. They loved their children equally, and one’s life was no more valuable than that of the other. It was unjust to sacrifice Mary as a sacrificial lamb. The parents stood in a special moral relationship to each of their children. As parents, they had responsibility for the lives of both of their children. They were in a position of trust—a fiduciary relationship. “You shall not kill,”¹⁸³ was a clear and unambiguous command that the parents were bound in good conscience to obey. Other relevant Biblical passages shed light on this moral injunction: savings one’s own life is self-destructive;¹⁸⁴ physical disability is preferable to eternal damnation;¹⁸⁵ God desires mercy, not sacrifice of the innocent;¹⁸⁶ treat others the way you would have them treat you;¹⁸⁷ don’t worry how long you’re going to live—God loves you so have faith and don’t worry;¹⁸⁸ it is good to preserve life—it is evil to destroy life;¹⁸⁹ Jesus blessed the little children;¹⁹⁰ the least one among you is the greatest;¹⁹¹ and, let no man separate what God has joined together as one flesh.¹⁹²

Nowhere in the Bible is there any scripture where God approves the taking of innocent human life as a means to save oneself. The opposite is true, is that love means we are called to voluntarily lay down our lives for others.¹⁹³ The person whose first priority is to save his own life, ends up destroying himself in the process.¹⁹⁴ Eternal life is lost by murdering an innocent person.¹⁹⁵ There is no scrip-

¹⁸²ABC News.com Online Chat, *The Choice of Life* (Sept. 13, 2000) at <http://abcnews.go.com/onair/WorldNewsTonight/chat_000912_twins.html>.

¹⁸³NEW AMERICAN BIBLE (Roman Catholic St. Joseph Ed.1993) *Exodus* 20:13; *Deuteronomy* 5:17.

¹⁸⁴*See id.* at *Matthew* 16:25.

¹⁸⁵*See id.* at *Matthew* 18:8-9.

¹⁸⁶*See id.* at *Matthew* 12:7.

¹⁸⁷*See id.* at *Matthew* 7:12.

¹⁸⁸*See id.* at *Matthew* 6:26-34.

¹⁸⁹*See id.* at *Mark* 3:4.

¹⁹⁰*See id.* at *Mark* 10:14-16. This scripture follows Jesus’ statements on marriage, divorce and entrance into the Kingdom.

¹⁹¹*See id.* at *Luke* 9:48.

¹⁹²*See id.* at *Matthew* 19:6.

¹⁹³*See id.* at *1 John* 3:16 ; *John* 15:13.

¹⁹⁴*See id.* at *Matthew* 16:25-26.

¹⁹⁵*See id.* at *Matthew* 19:16-18.

ture in the Holy Bible that permits the choice of murder to resolve an ethical dilemma such as the lesser of two evils.¹⁹⁶ A child that is born disabled is not the consequence of sin: the purpose of such a child is “to let God’s works show forth in him.”¹⁹⁷ Scripture tells us God hates hands that shed innocent blood¹⁹⁸ and the condemnation of the innocent.¹⁹⁹ Only God Himself, in the person of the Son of Man voluntarily gave his life as an innocent sacrifice for the salvation of souls.²⁰⁰

In stark contrast to the philosophy of utilitarianism, Pope John Paul II in *Envangelium Vitae*,²⁰¹ confirmed, by virtue of the authority vested in him, that “the direct and voluntary killing of an innocent human being is always gravely immoral.”²⁰² He added:

The deliberate decision to deprive an innocent human being of his life is always morally evil and can never be licit either as an end in itself or as a means to a good end. It is in fact a grave act of disobedience to the moral law, and indeed to God himself, the author and grantor of that law; it contradicts the fundamental virtues of justice and charity. . . . Furthermore, no one is permitted to ask for this act of killing, either for himself or herself or for another person entrusted to his or her care, nor can she or he consent to it, either explicitly or implicitly. Nor can any authority legitimately recommend or permit such an action. As far as the right to life is concerned, every human being is absolutely equal to all others.²⁰³

Only God has the power over life and death.²⁰⁴ From every person in regard to his neighbor and himself, God will demand an accounting for human life.²⁰⁵

¹⁹⁶The high Priest Caiaphas demanded the killing of Jesus, since it was better for one man to die than to have the Jewish nation destroyed. This was a utilitarian theory based on the Argument of Numbers: *John* 11:49-50. In a tempest, after lots were cast, Jonah was singled out as the probable cause of the impending shipwreck. Jonah offered to be tossed into the sea, for he had disobeyed God and placed his ship and its crew in mortal danger. After a delay, and trying but failing to reach land, the sailors cried out to God as they threw Jonah into the raging sea: “We beseech you O Lord, let us not perish for taking this man’s life: do not charge us with shedding innocent blood, for you, Lord, have done as you saw fit.” The seas abated, and Jonah was swallowed into the belly of a large fish where he remained for three days and three nights until he was spewed upon the shore. *Id.* at *Jonah* 1:1-16 ; 2:1-11.

¹⁹⁷*See id.* at *John* 9:1-3.

¹⁹⁸*See id.* at *Proverbs* 6:17.

¹⁹⁹*See id.* at *Proverbs* 17:15. “The innocent and the just you shall not put to death.” Exodus 23:7.

²⁰⁰*See id.* at Mark 10:45; *John* 10:11, 17-18.

²⁰¹*See* Pope John Paul II, *The Gospel of Life: On the Value and Inviolability of Human Life* (Mar. 25, 1995) at <<http://www.priestsforlife.org/magisterium/EVText.htm>>.

²⁰²*Id.* at Chap. III, § 57, p.36.

²⁰³*Id.* (emphasis added).

²⁰⁴*See* NEW AMERICAN BIBLE, *supra* note 183, at *Job* 12:10 ; 1 *Samuel* 2:6 ; *Deuteronomy* 32:39.

²⁰⁵*See* NEW AMERICAN BIBLE, *supra* note 183, at *Genesis* 9:5.

These were the core beliefs of the Attards' Catholic faith and why their souls were in mortal danger if they consented to the operation. Conflict with the Court's utilitarian philosophy was thus inevitable, absolute, and irreconcilable.

Yet the parents, who were not British, did not flee with Mary and Jodie from England to Italy where sanctuary was offered on August 27, 2000 by Cardinal Ersilio Tonini.²⁰⁶ The Diocese of Ravenna and the hospital, Opera Santa Teresa, offered indefinite and completely free medical services and hospitality to Mary and Jodie and their parents.²⁰⁷ No surgery would be performed, respecting the moral integrity of the parents' religious beliefs. This offer was presumably refused. Why? Was it because the parents in their hearts could not bear to lose both children and wanted someone else to make a decision to take Mary's life, a decision that they themselves could never make?

One problem with utilitarianism is that it may lead to decisions that conflict with the basic concepts of justice and fairness. When presented with a choice between justice and utility, the inclination of a utilitarian judge is to favor utility. The end result in this case was Mary was a little lamb sacrificed to serve her sister's perceived need for autonomy.

Without the means to defend herself, Mary was a victim of a Court that favored efficiency over life. By her mere existence, Mary was perceived as an enemy to be eliminated, since she compromised the potential well-being of her stronger sibling. Rather than viewing Mary with acceptance, love and care, the Court viewed her life as useless, an intolerable burden, and was disposable as a means to an end. Mary's life was not a "good"; it was an "evil."

The Court perceived happiness as coexistent with physical separation, autonomy, and self-determination. Mary, whose body was alive and in a state of being, was not viewed with a level of dignity that manifested her intrinsic value. Instead, she was coldly and clinically evaluated as a dehumanized "parasite" on the scales of justice and found wanting. Tipping the balance against Mary was the Judges' desire to save Jodie, whose attributes promised an independent existence, and thus made her worth saving on a cost/benefit basis. In the end, utility triumphed over justice.

Mary's autonomy was violated by the surgeon's knife. She suffered harm. The operation was of no benefit to her. She lost the only thing that she had—her life.

Jodie gained autonomy. She no longer had to be her sister's keeper. The operation probably did her psychological harm, by missing her sister now and when older, guilt over Mary's death. Physically, it will not be known for a while if the operation did more harm than good. She might have to endure the pain and suffer-

²⁰⁶See Press Release, Pro-Life Alliance, *Italian Cardinal Offers Immediate Safe Haven To Manchester Siamese Twins And Their Family* (Aug. 27, 2000) at <[wysiwyg://zoffsitebottom.92/http://www...nce.org.uk/PressReleases/pr270800b.html](http://www.nce.org.uk/PressReleases/pr270800b.html)>.

²⁰⁷See BBC News Online, *Italian 'Safe Haven' for Siamese Twins* (Aug. 28, 2000) at <http://news.bbc.co.uk/low/english/health/newsid_899000/899080.stm>.

ing of lifelong operations, treatments, and disability. She might die sooner than she would have, being conjoined to Mary. It was a gamble that promised high rewards of a relatively normal life. Risks aside, the operation was of benefit to Jodie.

Remarkably, the Court denied it was deciding this case on any basis other than discernable legal principles,²⁰⁸ when it relied exclusively upon the philosophy of utilitarianism. Who was the Court trying to fool? Was this simply legal fiction? Why did the Court deny reality?

The Court offered no reason why its philosophy was any better than any other competing philosophy it could have adopted, including that of the parents. The Court cannot hide behind thinly disguised "legal principles" and pretend it was not guided by the personal values of the individual judges.

The issue always was, whose values would win. In power and authority, the Court was stronger than the parents. Hence the Court's view prevailed.

Kantian Ethics. Immanuel Kant believed utilitarianism was deeply flawed and argued that consequences do not make an action ethically right or wrong.²⁰⁹ An act was moral only if it originates from a will ruled by a rational moral principle.²¹⁰ This is a deontological ethical theory, where the morally decisive factor is the principle upon which a decision is made.²¹¹ What matters is the "good will"—the pure moral principle upon which an individual performs his or her duty.²¹² Kantian ethics demands that others are treated as moral equals who deserve the same treatment we ourselves would want.²¹³

An individual's duty is either perfect or imperfect.²¹⁴ A perfect duty is a moral obligation that may never be broken.²¹⁵ For example, we have a moral obligation to do no harm to others.²¹⁶ This may be called the duty of non-maleficence.²¹⁷ In this sense, we are under a perfect duty to respect the liberty and bodily integrity of others.²¹⁸ We have a matching right to this duty.²¹⁹ We have a perfect right to be secure in our liberty and bodily integrity, free from the violation by others.²²⁰ This understanding of perfect duty and the corresponding perfect right is expressed in the doctrine of the sanctity of life. Utilitarian exploitation of others, such as mur-

²⁰⁸See *Re A (Children) (Conjoined Twins: Surgical Separation)*, *supra* note 1, at 1069.

²⁰⁹See Arras & Hunt, *supra* note 170, at 12-20.

²¹⁰*Id.* at 12.

²¹¹*Id.*

²¹²*Id.*

²¹³*Id.* at 13.

²¹⁴*Id.* at 14.

²¹⁵*Id.*

²¹⁶*Id.*

²¹⁷*Id.*

²¹⁸*Id.*

²¹⁹*Id.*

²²⁰*Id.*

dering an innocent person as a means to an end, has no place in Kantian ethics and can never override a perfect duty.²²¹

Kant's practical imperative requires an individual to "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."²²² The fundamental goal of utilitarianism, one's own happiness, was rejected by Kant as incompatible with morality:

But the principle of one's own happiness is the most objectionable of all. This is not merely because it is false and because experience contradicts the supposition that well-being is always proportional to good conduct, nor yet because this principle contributes nothing to the establishment of morality, inasmuch as it is a very different thing to making a man happy from making him good, and to make him prudent and farsighted for his own advantage is far from making him virtuous. Rather, it is because this principle supports morality with incentives which undermine it and destroy all its sublimity, for it puts the motives to virtue and those to vice in the same class, teaching us only to make a better calculation while obliterating the specific difference between them.²²³

Thus, human beings are not things that may be disposed of to be used as a means to an end.

An imperfect duty is a voluntary moral obligation assumed to contribute to the well-being of others.²²⁴ A duty to help others by doing what is best for them is called the principle of beneficence.²²⁵ For example, a physician may choose to accept or decline a patient for surgery. Once having accepted the patient, in this case Mary, the doctor is under an ethical duty to do what is best for her. If the doctor refuses to treat Mary, that choice is respected. That is because there is no matching right to an imperfect duty.²²⁶ For example, a patient cannot insist that he or she has a right to an operation by a doctor of his or her choice.

The Kantian philosophy provides an alternative to the utilitarian view that sanctioned the sacrifice of Mary for Jodie. Jodie's assumed interest in saving herself stops at the point when it begins to violate her sister's right to be let alone. Any proposed operation involving Jodie must also be good for Mary. It would be unjust for an innocent person to die so another could live longer without the burden of interdependence. Mary had a perfect right to life and bodily integrity. Since the operation would violate these moral values, it would never have been allowed to proceed, if the Court had taken a Kantian view.

²²¹*Id.*

²²²IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 47 (1981).

²²³*See id.* at 61.

²²⁴Arras & Hunt, *supra* note 170 at 14.

²²⁵*See id.*

²²⁶*See id.*

Natural Law

In general, natural law is about doing good and rejecting evil.²²⁷ It is foundational to Roman Catholic ethics.²²⁸ In its simplest terms, the direct killing of an innocent person is always wrong, even if it is the only means to save another's life.²²⁹ To directly take the life of Mary, an innocent human person, violates the principles of non-maleficence (do no harm) and justice.²³⁰ To kill one innocent person to save the life of another is always, without exception, morally wrong.²³¹ This is because every living human being is equal to every other human being in respect of the right to life. No human being may be discriminated against, or compared to another, to assess which individual is more deserving of a longer life.

Human life is of absolute and infinite value. It is irrelevant whether that human life lasts for a moment, or for a hundred years. It matters not whether that human life is a Rhodes Scholar or a conjoined twin. It makes no difference whether that human life is the Lord Chief Justice or in the form of Mary Attard.²³²

Professor of Talmudic Law, Rabbi Moshe Tendler teaches:

[H]uman life is of infinite value. This in turn means that a piece of infinity is also infinite and a person who has but a few moments to live is no less of value than a person who has 60 years to live . . . a handicapped individual is a perfect specimen when viewed in an ethical context. The value is an absolute value. It is not relevant to life expectancy, to state of health, or to usefulness to society.²³³

The principle of double effect is used to analyze the morality of actions that involve more than one effect.²³⁴ It is used as a tool in natural law to justify an action that will have a bad effect.²³⁵ Three conditions must be met: (1) "The evil must not be the means of producing the good effect"; (2) "The evil may not be 'directly' intended"; and (3) "There must be a proportionate reason for performing the action, in spite of its evil consequences."²³⁶ As noted earlier, the Court unanimously rejected the doctrine of double effect in its decision.

²²⁷See *id.* at 21. See generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

²²⁸See *id.* at 20.

²²⁹See John Finnis, *Abortion and Health Care Ethics*, in *BIOETHICS: AN ANTHOLOGY* 15-17 (Helga Kuhse & Peter Singer eds., 2000).

²³⁰See *id.*

²³¹See *id.* Some Catholic theologians would make an exception for an abortion to save the life of an expectant mother, such as where there is an ectopic pregnancy, where the embryo cannot be successfully transplanted from the tube to the uterus.

²³²Mary was of absolutely no utility to society, except as a measure of the moral character of society, which had a choice to lovingly accept or clinically reject that hopeless and helpless human life.

²³³Helge Kuhse, *A Modern Myth: That Letting Die is Not the Intentional Causation of Death*, in *BIOETHICS: AN ANTHOLOGY* 257 (Helga Kuhse & Peter Singer eds., 2000).

²³⁴Arras & Hunt, *supra* note 170, at 21-22.

²³⁵See *id.*

²³⁶See *id.*

The proposed operation, to satisfy the requirements of natural law, could only be ethically acceptable if the operation would contribute to increased chances of survival for both children. The surgery would have to be designed for the benefit of both patients, and be inherently suited to preserve both lives to the extent possible.

The Court, by approving in advance the operation that would kill the innocent Mary, was in effect sanctioning an immoral act contrary to natural law.²³⁷ The Court thus became a participant in the process that resulted in the killing of an innocent human being.²³⁸ According to natural law, the Court is now just as morally culpable as the doctors, nurses, and others who participated in separating the twins.²³⁹ The members of the Court had a choice based on a basic human duty and a corresponding right not to participate in a moral evil.²⁴⁰ Philosopher and Professor of Law John Finnis explains:

Anyone who commands, directs, advises, encourages, prescribes, approves, or actively defends doing something immoral is a cooperator in it if it is done and, even if it is not in the event done, has willed it to be done and thus already participates in its immorality.²⁴¹

Other Philosophies

This brief review of utilitarian, Kantian, and natural law theories should not be seen as limiting the spectrum of ethical theories that might apply to the case of Mary and Jodie. Some alternative theories defy neat categories, and offer new perspectives in resolving bioethical dilemmas.²⁴²

The personal story of the parents who struggled to make the best decision for both their children is an example of the *narrative approach*. *Virtue bioethics* asks what would a truly good saintly virtuous person do in the unique circumstances of this case. To truly meet the needs of Mary, the *ethics of caring* would override the plan for the “final solution” represented by the operation, and like the Italian offer, give loving care. An *economics* approach would consider the enormous care costs of raising a disabled Jodie, who over her lifetime will require many operations needed as a direct result of being separated from Mary. The *cultural* shock of returning to their Catholic nation of Malta with their surviving child might cause an ongoing controversy and possible social stigma for the Attard family to endure. Cultural *feminists* may feel violated by the male judges preoccupation with cold-hearted automatism and abstract objectives, to the exclusion of the humane values of motherly responsibility, relationship and essential connectedness.

²³⁷See John Finnis, *supra* note 229, at 18.

²³⁸See *id.*

²³⁹See *id.*

²⁴⁰See *id.*

²⁴¹See *id.*

²⁴²See Arras & Hunt, *supra* note 170, at 23-6.

Using analogies in judicial reasoning may lead to ethically unsound moral judgments. For example, the trial judge applied in this case the euthanasia model of withdrawing food and water. The Court of Appeal, by writing about Mary “sucking the lifeblood” from Jodie, created the image of an evil vampire. Such reasoning obscures the fundamental point that the life of an innocent human being is about to be destroyed through no fault of her own. The *casuistry* of the common law case method approach is fraught with this kind of faulty reasoning.

In this context, one wonders why only the theory of utilitarianism dominated the Court’s reasoning. Perhaps it was because the Court already decided what the result should be, and then applied the philosophy that fit that goal. Did the Court have adequate time to reflect?²⁴³ Or was the Court so entrenched in its views, it could not begin to appreciate the values inherent in the other approaches? Or was the Court’s exclusive preoccupation with utilitarianism a product of a lack of education in philosophy and in particular the discipline of bioethics? Lord Justice Brooke observed, “The court is not equipped to choose between these competing philosophies.”²⁴⁴ Yet it chose utilitarianism.

The Nuremberg Code and the Question of Consent

Was the killing of Mary a crime against humanity? Would Mary have been killed by the doctors if the question of Mary’s lack of consent had been given its due consideration?

The Nuremberg Code was drafted by American judges who decided the “Doctors’ Trial” in 1947.²⁴⁵ On trial for war crimes and crimes against humanity were medical doctors from Germany who had used human beings without their consent for medical experiments to benefit the German war effort.²⁴⁶

The human experimentation was not confined to military needs. Dr. Joseph Mengele unsuccessfully attempted to create conjoined twins, whom he surgically joined back to back.²⁴⁷ Their blood vessels and organs were joined together too. Gangrene set in. After three days and nights of screaming in agony, the twins died.²⁴⁸

The suffering, murder and sacrifice of these human beings were justified by utilitarian philosophy.²⁴⁹ The doctors defended themselves by relying on an argument of numbers: ultimately lives of German soldiers, sailors, and airmen would

²⁴³See *Re A (Children) (Conjoined Twins: Surgical Separation)*, *supra*, note 1 at 969. Lord Justice Ward complained there was not enough time “to read, to reflect, to decide, and then to write.” *Id.*

²⁴⁴See *id.* at 1051.

²⁴⁵See *THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION* (George J. Annas & Michael A. Grodin eds., 1992) (hereinafter the book will be cited as “THE NAZI DOCTORS”).

²⁴⁶See *id.* at 94-104, 120.

²⁴⁷Eva Mozes-Kor, *The Mengele Twins and Human Experimentation*, in *THE NAZI DOCTORS*, *supra* note 245, at 57.

²⁴⁸See *id.*

²⁴⁹Arthur Caplan, *The Doctors’ Trial and Analogies to the Holocaust in Contemporary Bioethical Debates*, in *THE NAZI DOCTORS*, *supra* note 245, at 266-68.

be saved by knowledge acquired from experiments such as drinking seawater, freezing to death while submerged in ice-cold water, and high-altitude experiments in pressure chambers simulating conditions of falling without oxygen or a parachute. Those who were selected for these experiments were considered by the Nazis as subhuman, enemies of the state, and inferior to the lives of members of the superior German race.²⁵⁰

The doctors claimed immunity from prosecution, relying upon the doctrine of following orders and German law.²⁵¹ They argued war was a national emergency and it was necessary to engage in these experiments for the greater good of the war effort. It was necessary to tolerate a lesser evil, the murder of a few, to achieve a greater good, the saving of many lives. Science and medicine would be advanced by the knowledge gained from these experiments. The prisoners utilized for these experiments were already condemned to death. Implied consent should be assumed since these prisoners would have grasped at any chance to live longer, and in any event there was no record of a refusal of consent.²⁵²

The judges at Nuremberg rejected these arguments in finding most of the defendants guilty. Seven doctors were hanged.²⁵³ In its final judgment, the Nuremberg Court announced ten principles of moral, ethical and legal concepts to define the boundaries of medical ethics.²⁵⁴ These principles are today known as the Nuremberg Code. It was presumably intended to serve as an ethical guide to prevent the murder of innocent human beings in future medical experiments. It was a defense of the sanctity of life from utilitarianism.

In affirming the value of personal autonomy as the shield against tyranny, the Nuremberg Court declared the absolute essential need to obtain free and voluntary consent from the intended subject of the experiment.²⁵⁵ In evaluating the legality of this consent, the Nuremberg Code requires that consent be made without duress. It must also be informed, having regard to the full disclosure of risks, the nature of the medical procedure, and an appreciation of the consequences of participation. *No experiment was possible if death or disabling injury would result.*²⁵⁶ The experiment on the human subject must be humanitarian, with the ultimate goal to benefit the patient, to cure, treat or prevent illness.

²⁵⁰Telford Taylor, *Opening Statement of the Prosecution December 9, 1946*, in THE NAZI DOCTORS, *supra* note 245, at 67-93.

²⁵¹Michael A. Grodin, *Historical Origins of the Nuremberg Code*, in THE NAZI DOCTORS, *supra* note 245, at 132-33.

²⁵²*See id.*

²⁵³Alexander Mitscherlich & Fred Mielke, *Epilogue: Seven Were Hanged*, in THE NAZI DOCTORS, *supra* note 245, at 105-07.

²⁵⁴Extract from *Judgment of the Military Tribunal in the Doctors' Trial*, in THE NAZI DOCTORS, *supra* note 245, at 102-03.

²⁵⁵*See id.* at § 1.

²⁵⁶*See id.* at § 5, 7, 10.

Arthur Caplan, Director of the University of Pennsylvania's Center for Bioethics states, "The Nuremberg Code explicitly rejects the moral argument that the creation of benefits for many justifies the sacrifice of the few."²⁵⁷ What the Nuremberg Code provides is a defense to "crass" utilitarianism by its unconditional emphasis on voluntary informed consent that is not negotiable.²⁵⁸ Autonomy trumps utilitarianism.²⁵⁹

In this case, the surgery to separate conjoined twins may be compared to the human medical experiments performed by the German doctors. Mary was described by the Court as "a parasite," and thus implied to be of subhuman quality. Ethical guidelines designed for "experiments" would also meet any ethical requirements for "routine" procedures. It is immaterial whether the operation to separate Mary from Jodie was viewed as experimental, routine, or somewhere in between. The end result was all the same. Mary would be intentionally killed by the doctors, for she was designated for death. There was no operative benefit for Mary. Her death was planned in advance. Severing her aorta was part of the plan to divide her from Jodie.

No consent was given by Mary or Jodie, nor was consent possible. The Nuremberg Code does not permit the delegation of informed consent. The operation in this case violated the Nuremberg Code. Authority to give proxy consent for the murder of Mary could not be delegated to anyone—not to her parents, not to her doctors, not to the hospital and not to the judges of the courts of England.

The Court reversed the parents' refusal to give consent for the operation. The go ahead decision to operate probably made the hospital's doctors feel secure. It led them to believe they were absolved by the Court of any legal liability for causing the death of Mary. After all, they were just following the lawful order of the Court.

There is no such immunity. In *Howe*, Lord Hailsham of St. Marylebone stated the defense of following superior orders will not absolve one of criminal responsibility for murder, but will be taken into account in mitigation of sentence:

I would only add that art 8 of the Nuremberg statute (Charter of the International Military Tribunal (1945) (annex to TS 27 (1946) Cmd 6903)) which was, at the time, universally accepted, save for its reference to mitigation, as *an accurate statement of the common law* both in England and the United States of America, states that — 'The fact that the Defendant acted pursuant to order of his Government or of a superior *shall not free him from responsibility*, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.' 'Superior orders' is not identical with 'duress,' but, in the circumstances of the Nazi regime, the difference must often have been negligible. I should point out that, under art 6, the expression '*war crimes*' expressly included *that of murder*, which, of course, does not include the killing of combatants engaged in combat.²⁶⁰

²⁵⁷Arthur Caplan, *supra* note 249, at 269.

²⁵⁸*See id.*

²⁵⁹*See id.*

²⁶⁰*R. v. Howe*, *supra* note 111, at 427-28 (emphasis added).

This defense of following orders will have no more validity than that given to the defendants at the Nuremberg Doctors' Trial, should the British doctors and nurses responsible for the death of Mary be tried for the crime of murder under English criminal law or as an International Crime Against Humanity.

Human Rights Act of 1998

As of October 2, 2000 the *Human Rights Act 1998* came into force in England.²⁶¹ This legislation brought England into conformity with Article 2 of the *European Convention on Human Rights*. It was binding on the medical team at the time of the operation to divide Jodie from Mary. Article 2 states:

1. Everyone's right to life shall be protected by law. *No one shall be deprived of life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
2. Deprivation of life shall not be regarded as inflicted in contravention of this article where it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.²⁶²

Nowhere in this law is the defense of necessity. The sanctity of life is paramount. Mary was innocent and did not commit any act of unlawful violence. If Mary was intentionally killed, that act would be unlawful. Yet the Court nullified the force of this law, either by claiming it only confirmed English law,²⁶³ or that it was subject to an undefined "implied limitation."²⁶⁴

Involuntary Human Sacrifice

The Court could have been spared a lot of trouble if the parents had decided to abort the twins. Killing the twins prior to their birth was lawful in England.²⁶⁵ No question of murder would then have arisen. However, abortion was never an option for the parents.²⁶⁶

Lord Justice Ward mused about the irony that it would have been lawful to kill Mary as an unborn baby, or if she had been in a coma with irreversible brain

²⁶¹See *Re A (Children) (Conjoined Twins: Surgical Separation)*, *supra* note 1, at 1067.

²⁶²See *id.* (emphasis added).

²⁶³This was the view of Lord Justices Brooke and Walker. See *id.* at 1050, 1068.

²⁶⁴This was the view of Lord Ward. See *id.* at 1017.

²⁶⁵Section 1(1)(d) Abortion Act 1967 (U.K.).

²⁶⁶*Re A (Children) (Conjoined Twins: Surgical Separation)*, *supra* note 1, at 970-71.

damage at the other end of life.²⁶⁷ The law was not so well developed about killing a three-month-old infant with physical and mental disabilities in stable condition. The Court was at least consistent in sanctioning the killing of Mary.

There is now in jurisprudence two classes of human life forms, one ("fully human beings," herein the "master class"), endowed at birth with legal protection, and the other ("subhuman beings" herein the "slave class") without legal protection, whose legal personhood is denied by judicial definition.²⁶⁸ Members of the slave class have no right to life, and their existence is subject to the will of the individual member (usually the mother) of the superior master class who holds fully endowed legal rights and power and unfettered power and dominion over the unborn child. Unwanted human life in any form prior to birth falls into the slave class. The destruction of unwanted fetuses and abandoned embryos is increasingly common to serve the general societal interests of the master class to further advance the goals of medical science, or the individual goal of the mother to be free from the responsibility of carrying her child to term. The usual way a member of the slave class gains admittance to the master class is to be a wanted child and be allowed to exist until born alive.²⁶⁹ Until birth, there is an "open season" on the taking of the lives of any member of the slave class.

In this case, the Court removed the boundaries between the master and slave classes, so that the infant Mary, who was a member of the master class, was nevertheless found to have inferior legal status. She was relegated to the slave class, and ended up being killed. Other junior weaker disabled members of the master class like Mary, who have a legal right to life, may one day be in jeopardy of their very lives. The future fate of the members of the slave class, who have no legal right to life, is grim. Courts will be inclined by precedent to continue this jurisprudence into the foreseeable future, unless stopped by legislation. Absent intervention, individual members of the slave class are destined to serve the will of the master class.

²⁶⁷See *id.* at 985.

²⁶⁸Canadian jurisprudence is a good example of going down the slippery slope and creating a slave class of human life forms: *R. v. Morgentaler* (No. 2) [1988] 1 S.C.R. 30 (Can.) (federal abortion legislation ruled unconstitutional); *Tremblay v. Daigle* [1989] 2 S.C.R. 530 (Can.) (father has no legal right to stop mother from aborting his unborn child; a fetus is not a human being and has no legal rights); *R. v. Sullivan* [1991] 1 S.C.R. 489 (Can.) (an unborn child, even partially emerged at the time of birth, is not a human being, and may be killed without incurring criminal liability); *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)* [1997] 3 S.C.R. 925 (Can.) (wanted unborn baby has no legal rights to be free from child abuse and may be lawfully subject to biological and chemical effects of mother's illegal or legal drug abuse, even if it results in injury or death to the fetus); *Dobson (Litigation Guardian of) v. Dobson* [1999] 2 S.C.R. 753 (Can.) (pregnant mother enjoys civil law immunity for negligent torts committed against her wanted fetus; a born alive fetus has no cause of action against mother for torts committed prior to birth). The thread of consistency linking these cases is the Canadian Supreme Court's desire to protect the lawfulness of abortion.

²⁶⁹For a discussion on the born alive rule, and an argument for its abolition in this new technological age, see generally Clarke Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563 (1987).

Their ultimate fate is involuntary human sacrifice, whether it is on the altar of abortion, the harvesting of live fetal tissue for transplantation, or the production and/or destruction of embryos and zygotes for human experimentation in stem cell research, cloning or organ harvesting.²⁷⁰

If the Court were to have recognized Mary's right to life and refused to order the operation, its reasoning would have undercut the philosophical foundations of the utilitarian theory that supports abortion, human embryo freezing, stem cell research and cloning. This the Court was plainly unwilling to do.

Mary's case before the courts was doomed from the very beginning as long as English law permits the involuntary sacrifice of innocent human life for utilitarian goals, whether that life is in the form of an embryo, fetus, or newly-born baby.

Doctrine of Substituted Judgment

In the United States, courts do not compel involuntary violation of bodily integrity by surgical intrusion for the benefit of saving another's life. In *McFall v. Shimp*,²⁷¹ the court refused to substitute its consent for the refusal of Shimp to undergo a medical procedure to donate his bone marrow to his cousin, without which his cousin would die:

The common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save another human being or to rescue For our law to compel defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn.²⁷²

In the case of *In Re A.C.*,²⁷³ the District of Columbia Court of Appeals ruled *en banc* that under the common law and the Constitution, every person, whether competent or not, possessed the right of bodily integrity, irrespective of the patient's quality of life or life expectancy.²⁷⁴ In the A.C. case, two lives were at stake: a pregnant mother dying of cancer and her twenty-six-week old viable unborn baby. Without a competent refusal from the mother to consent to an emergency cesarean operation, and without a finding through substituted judgment that the mother would not have consented to the surgery, the court held it was an error in law to

²⁷⁰See generally Clarke D. Forsythe, *Legal Perspectives on Cloning: Human Cloning and the Constitution*, 32 VAL. U. L. REV. 805 (1998); Stephen C. Hicks, *The Right to Life in Law: The Embryo and Fetus, the Body and Soul, the Family and Society*, 19 FL. ST. U. L. REV. 805 (1992); Kayhan Parsi, *Metaphorical Imagination: The Moral and Legal Status of Fetuses and Embryos*, 2 DE PAUL J. HEALTH CARE L. 703 (1999).

²⁷¹See *McFall v. Shimp*, 10 Pa. D. & C. 3d 90 (Allegheny County Ct. 1978).

²⁷²See *id.* at 91.

²⁷³See *In Re A.C.*, 573 A.2d 1235 (D.C. 1990).

²⁷⁴See *id.* at 1247.

proceed to a balancing test, and to weigh the rights of the mother against her baby's right to life.²⁷⁵

The doctrine of substituted judgment is invoked when an incompetent patient is unable to give informed consent to a medical procedure. In such an event, the court acts as a surrogate on behalf of the patient, substituting its judgment on behalf of the patient, having regard to all the evidence.²⁷⁶ This procedure originated from English law,²⁷⁷ and has been used in cases involving organ donations,²⁷⁸ in "right to die" cases²⁷⁹ and cases of religious-based conscientious objection to medical treatment.²⁸⁰

It is a subjective process, where a court may look to any history of express wishes of the patient, the value system of the patient and the patient's family, and as a last resort, what most persons would do in similar circumstances.²⁸¹ Where the patient is pregnant, she may look beyond her own welfare, and consider with her prognosis, that of her baby and the impact the proposed medical intervention would have on lives, individually and collectively.²⁸²

In our case of the conjoined twins Mary and Jodie, the strongest evidence available to the Court was the strong religious belief of the Attard family. It may be that the greatest love of all is to lay down one's life for another. But to murder is plainly against the Ten Commandments, and no compromise would be morally permissible for a devout Roman Catholic. On a substituted judgment analysis, the Court would have had to refuse consent for the operation. It compounded its error in proceeding to a balancing test, in which there were a winner and a loser. Lord Justice Ward was aware of this doctrine, but expressed doubt on whether the substituted judgment approach was still good law in the aftermath of *Bland*,²⁸³ and so gave it no further consideration.²⁸⁴

Medical Science at the Frontier

Neither Mary nor Jodie was responsible for the predicament into which they were trapped. Neither one asked to be separated. Mary didn't volunteer to die, nor did Jodie want Mary to die. Their parents were opposed to the operation. So whose interests were really being served?

²⁷⁵See *id.*

²⁷⁶See *id.* at 1249.

²⁷⁷See *Ex parte Whitebread* [1816] 2 Mer. 99 (U.K.); *Strunk v. Strunk*, *supra*, note 4, at 147.

²⁷⁸See *Strunk v. Strunk*, *supra* note 4.

²⁷⁹See *In re Spring*, 405 N.E.2d 115 (Mass. 1980).

²⁸⁰See *In re Boyd*, *supra* note 4.

²⁸¹See *In Re A.C.*, *supra* note 273, at 1249-51.

²⁸²See *id.* at 1251.

²⁸³See *Airedale N.H.S. Trust v. Bland*, *supra* note 54, at 871-72.

²⁸⁴See *Re A (Children) (Conjoined Twins: Surgical Separation)*, *supra* note 1, at 999.

Did technology and medical science thus create the “emergency” on the question of the proposed operation?²⁸⁵ Conjoined twins have survived into adulthood, and led fruitful lives.²⁸⁶ The advance of modern medicine has proven it was possible to separate conjoined twins, albeit with risks and costs.²⁸⁷ But medicine has its limits, when the cost of separating conjoined twins means the certain death of one. Even the frontiers of medicine must have boundaries when science and technology are reduced to the taking of innocent human life.

Entry into the 21st Century is no guarantee that we are now living in a more humane and loving world. Even though biotechnology is at the frontier in mapping the human genome, separating conjoined twins, and embarking upon the cloning of human beings, society is struggling with the ethics of the annual aborting of millions of unborn babies, genocide in Europe and Africa, human slavery in the Sudan and the pain of the Holocaust. The erosion of the sanctity of life, not just in England, but throughout the world, is accelerated by utilitarian actions. Modern medicine and science are capable of being used for evil just as well as used for good. This is why old law like *Dudley and Stephens* is still good law, to stop the murder of the weak, the disabled and those who cannot speak for themselves.

In English contemporary society, secular humanism dominates judicial reasoning, whereas historically Christian morality infused legal principles. Medical science and biotechnology are now seen as solutions to resisting the inevitability of death, especially for those who have no faith in spiritual life after death. The Court viewed death as an evil to be avoided at all costs, and assumed Jodie would consent to anything to extend her life span, including the killing of her sister. The Court ought to have considered that death is not to be feared, but is a part of the natural order of life. The parents were secure in their faith and trusted God. They were willing to obey God and follow His commands, even if it meant the early deaths of both Mary and Jodie.

Philosopher John Hardwig writes:

We fear death too much. Our fear of death has led to a massive assault on it. We still crave after virtually any life prolonging technology that we might conceivably be able to produce. We still too often feel morally impelled to prolong life—

²⁸⁵LEO KATZ, BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW 61 (1987).

²⁸⁶The story of the “Siamese” twins, Chang and Eng Bunker, who lived joined to the chest for 63 years, were married to sisters, and fathered 21 children, is told by Page Chichester, “A Hyphenated Life” in *Blueridge Country Online*, at <<http://www.blueridgecountry.com/twins/twins.html>>. See also *A Social History of Conjoined Twins*, at <<http://zygotte.swarthmore.edu/cleave4b.html>>. In an interview with the radio service of the BBC, 40 year-old conjoined twin, Lori Schappell, describes in fascinating detail the productive life she has had with her sister, and took the side of the parents of Mary and Jodie. *BBC Interview with Lori Schappell* (Sept. 5, 2000) at <http://news.bbc.co.uk/olmedia/910000/audio/_910773_Schappell0700_5sep.ram>.

²⁸⁷See *Re A (Children) (Conjoined Twins: Surgical Separation)*, *supra* note 1, at 1021-23. As of September 22, 2000 there were 210 reports of surgical separations of conjoined twins in world medical literature. Before 1955, surgical separation was rarely attempted.

virtually any form of life—as long as possible. As if the best death is the one that can be put off longest. We do not even ask about meaning in death, so busy are we with trying to postpone it. But we will not conquer death by one day developing a technology so magnificent that no one will have to die. Nor can we conquer death by postponing it ever longer. We can conquer death only by finding meaning in it.²⁸⁸

The Attards, who found meaning in life and death, knew what was best for their family. Lord Justice Ward admitted, “[T]he parents’ views were not obviously contrary to any view generally accepted in our society.”²⁸⁹ The Court should have honored their refusal to consent to the operation.

Criminal Law

Defense of Necessity

The driving force behind the Court’s reasoning was that it could not bear the thought of two lives lost when one not worth living could be sacrificed. Therefore, Mary could be murdered to save Jodie. Is this the essence of the defense of necessity?

The necessity defense is a utilitarian doctrine that is offered as a concession to the frailty of the human condition in exigent circumstances. It has been historically rejected as a defense to the crime of murder because it withdraws the cloak of the law’s protection from the weak, vulnerable and innocent and instead provides a mantle of protection around the criminal acts of the strong and the immoral who see nothing inherently evil in killing the innocent for their own survival or that of another.²⁹⁰ It is not an act of heroism to kill the innocent, but an act of cowardice.²⁹¹ Lord Justice Marylebone of Hailsham offered this observation in *Howe*:

[T]he ‘concession to human frailty’ is no more than to say that in such circumstances a reasonable man of average courage is entitled to embrace as a matter of choice the alternative which a reasonable man could regard as the lesser of two evils. Other considerations necessarily arise where the choice is between the threat of death or a fortiori of serious injury and deliberately taking an innocent life. In such a case a reasonable man might reflect that one innocent human life is at least as valuable as his own or that of his loved one. In such a case a man cannot claim that he is choosing the lesser of two evils. Instead, he is embracing the cognate but morally disreputable principle that the end justifies the means.²⁹²

In England, the defense of necessity was generally thought not available for the crime of homicide. The authorities of *R. v. Dudley and Stephens* and *R. v. Howe*

²⁸⁸John Hardwig, *Is there a Duty to Die?* in *BIOETHICS: AN ANTHOLOGY* 346 (Helga Kuhse & Peter Singer eds., 2000).

²⁸⁹*Re A (Children) (Conjoined Twins: Surgical Separation)*, *supra* note 1, at 1056.

²⁹⁰*See R. v. Howe*, *supra* note 111, at 432.

²⁹¹*See id.*

²⁹²*See id.* at 433.

were believed conclusive on this point. William Blackstone, in 1765, affirmed the common law's revulsion of the murder of the innocent to save one's own skin: "And therefore though a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person; this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent."²⁹³

In the United States, the leading case on this issue, *U.S. v. Holmes*,²⁹⁴ came to the conclusion that the defense of necessity did not excuse homicide on the high seas, in deciding the fate of seaman Holmes who chucked surviving passengers to their deaths into the frigid Atlantic ocean from a leaky overloaded lifeboat in imminent danger of sinking. Holmes was tried and convicted in Philadelphia of the manslaughter of only one of the victims, Frank Askins, for which he was sentenced to three years hard labor and a twenty dollar fine.²⁹⁵ But there are some authorities in England and the United States suggesting there are conflicting opinions whether murder may be justified by the defense of necessity.²⁹⁶

More recently, the Supreme Court of Canada in *R. v. Latimer*²⁹⁷ approved the removal of the defense of necessity from the jury in the murder trial of farmer Robert Latimer who chose to gas his daughter Tracy, without her consent, with carbon monoxide, rather than to see her endure a lifetime of suffering as a quadriplegic, and to remove his burden of caring for her. The Supreme Court identified the rationale for the necessity defense as a recognition that in situations of extreme emergency, human weakness, propelled by instincts, and motivated by self-preservation or altruism, leads to deliberate wrongful acts, in violation of the criminal law.²⁹⁸ For the defense to have merit, the actions of the offender must be viewed objectively, for a purely subjective test would make every person a law unto themselves, and lead to being "a mask for anarchy."²⁹⁹ The defense may only be asserted by an individual in that rare case where involuntariness is present.³⁰⁰ Before a jury is entitled to consider the defense of necessity, the trial judge must be satisfied there

²⁹³WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAW OF ENGLAND, Chap. 2, VI 2 (1765).

²⁹⁴*United States v. Holmes*, *supra* note 111.

²⁹⁵*See id.* at 369. See the detailed narrative of the shipwreck of the *William Brown* in A.W. BRIAN SIMPSON, CANNIBALISM AND THE COMMON LAW 45-72, 161-176 (1984).

²⁹⁶These authorities reject the defense of necessity in murder cases: SMITH AND HOBAN, CRIMINAL LAW 249-251 (9th ed. 1999)(U.K.); Law Reform Commission of Canada, REPORT ON CODIFYING CRIMINAL LAW 36 (1987); P.H. ROBINSON, 2 CRIMINAL LAW DEFENSES 63-65 (1984). These authorities take an opposite view: CARD CROSS AND JONES, CRIMINAL LAW 352 (12th ed. 1992) (U.K.); AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES 3.02 14-15 (1985); *See also* W.R. LAFAVE & A.W. SCOTT, 1 SUBSTANTIVE CRIMINAL LAW 634.38 (1986).

²⁹⁷*See R. v. Latimer*, No. 26980 Can. Sup. Ct. LEXIS 1 (Sup. Ct. Can. 2001)(Can.).

²⁹⁸*See id.* at § 26.

²⁹⁹*Southwark London Borough Council v. Williams* [1971] Ch. 734, 746 (C.A.) (U.K.).

³⁰⁰*See R. v. Perka*, *supra* note 134, at 250.

is an air of reality to this defense.³⁰¹ A three-part test derived from the leading case of *R. v. Perka*,³⁰² was applied and expanded upon in *Latimer*:

1. *Imminent Peril or Danger*: There must be an urgent situation of clear and imminent danger. The harm must be unavoidable and near. It is not enough that the peril is foreseeable or likely. It must be on the verge of transpiring and virtually certain to occur. The emergency must be so pressing normal human instincts cry out for immediate action. This is an objective evaluation, modified by the situation and characteristics of the defendant.

2. *There Must Be No Reasonable Legal Alternative to the Course of Action Undertaken*: Was there a legal way out? If so, there is no necessity. If a realistic appreciation of the open choices discloses a reasonable legal alternative, this branch of the test is failed. This is an objective evaluation, modified by the situation and characteristics of the defendant.

3. *Proportionality Between the Harm Inflicted and the Harm Avoided*: The requirement is *not* one where the harm avoided clearly outweighs the harm inflicted. The two harms must be of comparable gravity. The harm avoided must be either comparable to or clearly greater than the harm inflicted. The harm inflicted must not be out of proportion to the peril to be avoided. This is a purely objective test, reflecting society's moral values. In evaluating whether or not the act inflicted merits legal protection, the court must take into consideration community standards and constitutional law. An example would be the equality rights of the disabled.³⁰³

In applying these guidelines to the facts of this case, the defense of necessity does not arise.

The team of medical professionals themselves did not face any imminent peril. Jodie's health was foreseen to be in future danger, but at the time the operation was performed, there was no immediate pressing danger or imminent peril. Jodie's heart was strong. She and Mary appeared contented. One medical report suggested there was the possibility they could have lived together for several years.³⁰⁴ There was no indication of acute suffering by either infant. Rather it was the proposed surgery to divide the twins that posed imminent danger to the life of Mary. The first branch of the test is not met.

There were reasonable legal and ethical alternatives to going ahead with the surgery. It was inconceivable that criminal charges would be brought against the parents for refusing to consent to the surgery. The hospital could have accepted the parent's wishes and not forced the issue by taking the question of consent to the

³⁰¹See *R. v. Latimer*, *supra* note 297, at § 36.

³⁰²See *R. v. Perka*, *supra* note 134, at 250.

³⁰³See *R. v. Latimer*, *supra* note 297, at § 28-34.

³⁰⁴This was the opinion of the pediatrician from the Great Ormond Street Hospital in London. See *Re A (Children) (Conjoined Twins: Surgical Separation)*, *supra* note 1, at 976.

courts. The medical team could have continued to care for Mary and Jodie, helping them to live in as much comfort as possible. The offer of care from Italy was a reasonable legal and ethical alternative. The second branch of the test is also not met.

The harm inflicted was the deliberate killing of Mary. That harm was vastly out of proportion to letting her live in her severely disabled condition. Her conjoined status with Jodie was medically manageable. The major concern was that the life expectancy of Mary and Jodie as conjoined twins was short. Killing Mary was not a proportionate response to the issue of giving Jodie the possibility of a longer life alone, with permanent disabilities. Jodie is still recovering from the operation, and it is premature to know whether her life expectancy has changed. Community standards have not yet reached a consensus on whether murder of the weaker is legally excusable in order to allow the stronger to survive longer. Constitutional values in this case include the sanctity of human life and the equal worth of all human beings, irrespective of disabilities. On this branch of the test too, the test is not satisfied.

This analysis suggests the defense of necessity has no application to the facts of this case, and should not have been relied upon by the Court to characterize as lawful what ought to have been viewed as the planned and deliberate murder of Mary. Even if charges are now laid against those responsible for the death of Mary, the defense of necessity ought not to be left to the jury.

What then is the precedent left by the Court in this case? It is this: The wilful premeditated killing of an innocent human being is justified by the defense of necessity where the victim is a conjoined twin and the death of one twin might benefit the life of the other. This result is unprecedented and is not firmly grounded in law or morality.

The necessity defense in criminal law can have no application in circumstances where a person disobeys a law believed to be inapplicable to the circumstances. How are the courts to decide what is a situation of true necessity, from one that isn't? Can a positive law, like the one against murder, cease to apply in circumstances where the law of the survival of the fittest takes over? The rule of law must never give way in extreme situations to the tyranny of the ultimate survivor. Mercy, if justified, can always be achieved in the sentencing of the convicted or by executive clemency.

The Argument of Numbers

The Court was obsessed with the idea that it was better for one infant to die than that both perish together in the near future. This employs the utilitarian logic of the argument of numbers.³⁰⁵

³⁰⁵I am indebted to the brilliant ideas of Leo Katz, who inspired my philosophical hypotheticals. See LEO KATZ, *supra* note 285, at 32-38.

Assume Mary and Jodie are in a lifeboat with room only for one. As long as the selection is done fairly, one could be jettisoned and dies an accelerated death so the other could live longer in the hope of being rescued. Assuming both lives were of equal value, drawing lots would be the fairest way to choose who would live and who would die. But what if one life, Jodie's, was assessed to be worth more than Mary's? Jodie has better health. She has more potential for a higher quality of life, and she would be less of a burden to her family and society. Isn't this also fair? In the real world, all lives are not equal and the hypocrisy of equality is exposed in this exercise. The survival of the fittest means that Jodie triumphs over her weaker sister, whose life is expendable. The operation was in one sense liberation for Jodie; it was also the "mercy" killing of Mary.

Assume further that Mary and Jodie were not going to be operated on after all. Their lives might then be over in as little as six months. Suppose there was a terrible accident involving infants at a nursery. St. Mary's hospital has now suddenly developed an urgent need for infant organs needed for immediate transplant operations that could save up to nine infant lives who would otherwise die within days. The conjoined twins would be perfect donors, so long as the operation took place now, before their bodies deteriorated. Wouldn't the argument of numbers permit the hospital to kill Jodie and Mary to save nine children who would otherwise die since there would be a net saving of nine lives? The defense of necessity would justify what would otherwise be the murder of Mary and Jodie. In choosing between the lesser of two evils, the Court would justify the deaths of Mary and Jodie, who after all, were destined to die.

The value of a law is not tested in the easy case: its integrity is measured in the furnace of affliction. It is in the hard case that it is discovered whether a law is worth the paper it is written on. The rule of law demands no less.

Given the choice between two evils, there is always the option to choose neither.³⁰⁶ The argument of numbers is incompatible with the nobility of the human spirit. To save oneself by murdering an innocent human being may extend temporarily one's physical life, but brings certain death to morality, justice and truth. To live in such a state is not worth the price of survival.

Justice Cardozo had this to say about forced sacrifice: "Where two or more are caught up in a common disaster, there is no right on the part of one to save the lives of some by the killing of another. There is no rule of human jettison."³⁰⁷

Jurist Edmund Cahn observed: "if none sacrifice themselves of free will to spare the others—they must all wait and die together . . . no one can save himself by killing another. . . . Whoever saves one, saves the whole human race; whoever kills one, kills mankind."³⁰⁸

³⁰⁶See *id.* at 52-58.

³⁰⁷BENJAMIN CARDOZO, *LAW AND LITERATURE* 113 (1931).

³⁰⁸EDMUND CAHN, *THE MORAL DECISION: RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW* 71 (1955).

Murder

Without the blessing of the Court, the killing of Mary was murder: “the proposed operation would involve the murder of Mary unless some way can be found that what is being proposed would not be unlawful.”³⁰⁹ By becoming part of the process that authorized the operation to proceed, the Court became an actor in the events. The role of the Court traditionally has been to refrain from hypothetical pronouncements. On this occasion, the Court issued a ruling as it was compelled to do under the authority of a statute.

Assuming the Court was wrong in its decision on the criminal law, can a charge of murder now be laid? Would the Court be immune from a prosecution for conspiracy to murder? Aren’t murder prosecutions brought after the fact as a matter of course? Wouldn’t the parents, have standing to lay an information to begin criminal proceedings? Isn’t it one thing to grant civil authorization for the operation to proceed, but another to grant immunity from criminal prosecution for murder and conspiracy to murder in advance of the “crime” being committed? Is the Court above the law if it were merely engaged in doing its duty?

Judges as Jurors

Whether Mary was murdered is a question of fact for an English jury. Only an English jury may decide whether the criteria for the defense of necessity have been met.³¹⁰ Whether the defense of necessity should be left to the jury is another matter. If English law permits the murder of an innocent human being to save the life of another, only then should this defense be left to the jury, provided there is an air of reality to the defense.

Charges of murder should be laid, a trial held, and a verdict rendered. It is not the province of the Court of Appeal to pre-empt the course of English justice. Its opinion as to whether the murder of Mary was lawfully criminally excused exceeded its jurisdiction. The question of criminal liability for murder and the question of guilt or innocence is within the exclusive jurisdiction of a jury, which has heard the evidence, and was properly instructed in the law. The verdict of the jury is what counts. Justice for Mary demands nothing less.

Lord Brooke was aware of this, for in his judgment he reviewed the case of *R. v. Stratton* and cited Lord Mansfield, who had this to say on the topic of resolving in advance moral dilemmas of the law and the conduct of those who claimed necessity to save themselves from criminal liability:

[B]ut these cases cannot be defined beforehand, *and must be adjudicated upon by a jury afterwards*, the jury not being under the pressure of the motives which influenced the alleged offenders. I see no good in trying to make the law more definite

³⁰⁹Per Lord Justice Brooke: *Re A (Children) (Conjoined Twins: Surgical Separation)*, *supra* note 1, at 1031.

³¹⁰*R. v. Martin*, *supra* note 120, at 653-54.

than this, and there would I think be danger in attempting to do so. There is no fear that people will be too ready to obey the ordinary law. There is great fear that they would be too ready to avail themselves of exceptions which they might suppose to apply to their circumstances.³¹¹

In this case, however, the Court became part of the chain of events and felt pressured to come to a decision within a compressed period of time. In these circumstances, it was impossible for the Court to be emotionally detached and to refrain from imposing their own values and choices upon the Attard family. Hence, it was not obvious to Lord Justice Brooke that this was the sort of case predicted by Lord Coleridge that would mark an absolute divorce from law and morality.³¹²

It is not too late to bring criminal charges against the participants in the events that led up to the actual killing of the infant known as Mary. An English jury is the conscience of the community. Were the judges out of touch with the core values of the ordinary members of English society? The jury would in effect judge not only the case, but the Court of Appeal itself. Perhaps the Court's decision will be "upheld" or "overturned" by the jury. Until there is a trial, and a true verdict delivered by a jury, there will be no justice for Mary.

Conclusion

In this case Mary was the sacrificial lamb. She was not a threat or an aggressor in any sense that would justify self-defense. No attempt was made by the Court to engage in a substituted judgment analysis. Mary was instead placed on a set of scales and found wanting. She was found inferior to Jodie. She was exposed as a liability by a Court that was supposed to embody the highest virtues of British justice. She was, in effect, sentenced to death. Equality was thrown out in favor of utility. Mary was a victim of discrimination and moral relativism by a Court that seized the opportunity to play God.

The Court never paused to consider whether it may have been Jodie's fate to die at an early age so she and Mary could have lived in harmony. The bonding of twins and ties of love and affection within a family cannot be evaluated by a utilitarian theory. What gives meaning to our lives as humans are our loved ones who define and sustain us. The parents of Mary and Jodie intuitively knew this when they refused consent for the operation.

This case, cannot be confined to its facts, as the reasoning of the Court demonstrates the depths to which the Court has sunk, by divorcing law from morality, and the Court's willingness to play the role of God in matters of life and death. The Court's decision to sanction the killing of an innocent human being was wrong and outside of its jurisdiction.

³¹¹R. v. Stratton [1779] 1 Doug K.B. 239, 99 ER 156 (U.K.) (emphasis added).

³¹²"All that a court can say is that it is not obvious that this is the sort of clear-cut case, marking an absolute divorce of law and morality, which was of such concern to Lord Coleridge and his fellow judges." *Re A (Children)(Conjoined Twins: Surgical Separation)*, *supra* note 1, at 1051.

Science and technology have advanced so rapidly, they have snapped the tether that held them to their ethical moorings. The temptation of achieving spectacular medical accomplishments that were only dreamed of a generation ago, are now within reach. The separation of conjoined twins is just one example of how the pioneers of medicine have the capacity to do good things for people. When the ambition of medical practitioners results in harm to the patient, by the deliberate taking of that patient's life, murder is murder and cannot be disguised by rationalizing that the now dead patient at least has the comfort of bodily independence that she should have had at birth.

In this case, nature should have been allowed to take its course, for better or for worse. It was uncertain what the future would bring, with or without the medical intervention. Accordingly, the most decent thing to do would have been to accept the interdependent condition of the twins, and to care for them as equally valued human beings. If the medical profession cannot set its own boundaries, the criminal law and the courts must.

The "best interests of the child" test in family law could never have been intended to confer upon a judge the authority to consent to the murder of an innocent infant. Being separate as nature "intended" is no benefit at all when all life has extinguished by the surgeon's knife. To assume such a "benefit" on behalf of Mary adds insult to injury.

For a believer of Christian doctrine, death is not the ultimate evil. It is the evil of sin that destroys the soul and robs the believer of eternal life. In this case, the Court concluded the evil of murder was justified because it cheated death its impending claim on Jodie. At what price? The cost is the loss of the absolute sanctity of human life. In the very end, there may have been another cost: the very soul of the Court.

