

DEFINING DEATH: LAW, LANGUAGE, AND SYSTEMS

by

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I dedicate this to my mother.

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Abstract

The definition of death is often referred to as a fiction since brain death was conceived in the mid twentieth century. These observations are generally paired with concern that the fiction depresses the quality of a patient's consent to post-*mortem* tissue donation. However, such accounts are theoretically bereft. The author argues that a systems-theoretic account can better explain how fiction contributes to donative practices. He understands fiction as a legal speech act that misrepresents the intentions behind its expressed message. The misrepresentation may induce social behaviour (e.g., consent) consistent with its unstated intentions. In the context of death, these intentions emerge from a system of biopolitics disproportionately concerned with preserving the life of the populace. Determining death early on the continuum of dying may avail more viable tissue and free therapeutic resources to those in need. The operation of fiction will be explored and critiqued from within this socio-legal frame.

List of Abbreviations Used

ATP	Adenosine triphosphate
DCD	Donation after circulatory death (criteria)
DDR	Dead donor rule
DND	Donation after neurological death (criteria)
DNR	Do not resuscitate
POI	Pre-transplantation optimising interventions

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Chapter 1: Introduction

The twentieth century has shown that the definition of death is responsive to political and technological change.¹ Death was classically defined as the irreversible loss of the signs of life, recognised as the heartbeat and capacity to breathe.² Death quickly followed profound injury or illness in the absence of effective medical treatment, allowing the criteria for death to be applied reliably and with certainty.³ As the twentieth century unfurled technology radicalised medical care, so that a body could be sustained beyond boundaries of life and death previously held as natural and inevitable.⁴ The fatal consequences of disease and injury could be fettered as life-preserving interventions supported vital signs in the wake of a body's incapacitation.⁵ For example, circulatory and respiratory activity, necessary for cellular and tissue function, may be lost to disease or injury.⁶ The Iron Lung,

¹ See Linda Emanuel, "What is wrong with 'dead'?" In C. Machado, ed, *Brain death. Proceedings of the Second International Conference on Brain Death, Havana, Cuba, February 27-March 1, 1996* (Amsterdam: Elsevier, 1996) [Emanuel (1996)]; Amir Halevy & Baruch Brody, "Brain death: Reconciling definitions, criteria, and tests" (1993) 119:6 *Annals Internal Med* 519 [Halevy & Brody (1993)]; Michael Nair-Collins, "Brain Death, Paternalism, and the Language of 'Death'" (2013) 23:1 *Kennedy Institute Ethics J* 53 [Nair-Collins (2013)]; D. Alan Shewmon & Elizabeth S. Shewmon, "The Semiotics of Death and Its Medical Implications" in Calixto Machado & D. Alan Shewmon, eds, *Advances in Experimental Medicine and Biology* (Havana, Cuba: International Symposium on Coma and Death, 2004) [Shewmon & Shewmon (2004)]; Robert D. Truog, "Is it time to abandon brain death?" (1997) 27:1 *The Hastings Center Report* 29 [Truog (1997)]; Robert M. Veatch, *Death, dying, and the biological revolution* (New Haven, CT: Yale University Press, 1976) [Veatch (1976)]; Robert M. Veatch, "The Death of Whole-Brain Death: The Plague of Disaggregators, Somaticists, and Mentalists" (2005) *J Med & Phil* 353 [Veatch (2005)].

² See *Black's Law Dictionary*, 9th ed, *sub verbo* "death"; Nair-Collins (2013), *ibid*; Shewmon & Shewmon (2004), *ibid*; Veatch (1976), *ibid*; Veatch (2005), *ibid*.

³ See Nair-Collins (2013), *ibid*; Shewmon & Shewmon (2004), *ibid*; Veatch (1976), *ibid*; Veatch (2005), *ibid*.

⁴ *Ibid*.

⁵ *Ibid*.

⁶ *Ibid*.

a set of mechanical pumps fitted to the body that artificially induces breathing, and its progeny could sustain these activities when their organs failed them.⁷ A patient no longer needed to self-administer food to obtain nutrients or hydration.⁸ The function of the heart or lungs could be actuated by machine.⁹ Not surprisingly these technologies tore medical care at the end of life asunder and reshaped therapy to achieve outcomes previously unimagined outside science fiction.¹⁰ Dying could now entail experiences that were not possible before: a prolonged, uncertain, and at times messy continuum of dying.¹¹

As medical care changed the conditions of dying, the classical signs of death no longer seemed adequate, challenging the definition of death.¹² Patients with profound neurological injury increasingly occupied hospital beds with vital signs prolonged by mechanical aid.¹³ There appeared to be no remedy for their neurological injuries, permanently excepting patients from an ordinarily meaningful life, and yet they did not satisfy the classical signs of death.¹⁴ In addition, these patients were financially costly to support, families were emotionally afflicted by the uncertainty, and it seemed their bodies

⁷ *Ibid*; Also see Philip A. Drinker & Charles F. McKhann III, “The Iron Lung: First Practical Means of Respiratory Support” (1986) 255:11 JAMA 1476. Drinker and McKhann offer a brief history of the iron lung and other respiratory aids. In addition to facilitating the effective care of polio, a debilitating condition characterised by paralysis of respiratory muscles, the iron lung provided aid to those with neurological injury who could not sustain their own respiratory function.

⁸ See Nair-Collins (2013), *ibid*; Shewmon & Shewmon (2004), *ibid*; Veatch (1976), *ibid*; Veatch (2005), *ibid*.

⁹ *Ibid*.

¹⁰ *Ibid*.

¹¹ See Shewmon & Shewmon (2004), *ibid*.

¹² *Ibid*; Also see Nair-Collins (2013), *supra* note 1; Veatch (1976), *supra* note 1; Veatch (2005), *supra* note 1.

¹³ *Ibid*.

¹⁴ *Ibid*.

could be indefinitely sustained.¹⁵ This caused the medical profession to question whether these comatose patients were alive or not, starting with doctors in the 1950s probing the brain's neurological activity.¹⁶

Parallel to these changes was the emerging science of transplant medicine. Transplant medicine entailed the extraction of tissue from an organism and its placement either at a new location on the same organism (known as autotransplantation), or in a different organism entirely (known as allotransplantation if within the same species, or xenotransplantation if between species).¹⁷ By the mid-twentieth century it was possible to transplant vital tissue, such as a heart, from one human to another.¹⁸ Tissue transplants served a therapeutic purpose for the recipient by replacing diseased or atrophied tissue.¹⁹ In the case of heart failure or the failure of another vital organ, the receiving patient's death could be avoided by replacing dysfunctional tissue with viable tissue.²⁰ Very quickly this emerging medical procedure provoked questions of law, including the definition of death.²¹ Most critically, there was concern the donating patient could be killed in the process of

¹⁵ *Ibid.*

¹⁶ See Veatch (2005), *ibid.*; Also see Calixto Machado, Julius Korein, Yazmina Ferrer, Liana Portela, Maria de la C García, & José M. Manero, "The concept of brain death did not evolve to benefit organ transplants" (2007) 33:4 J Med Ethics 197 [Machado et al. (2007)]; P. Mollaret & M. Goulon, "Le coma dépassé mémoire préliminaire" (1959) 101 Rev Neurol 3 [Mollaret & Goulon].

¹⁷ See Robert P. Baker & Victoria Hargreaves, "Organ donation and transplantation: A brief history of technological and ethical developments" in Wayne Shelton & John Balint, eds, *The Ethics of Organ Transplantation* (Oxford, UK: Elsevier Science Ltd., 2001) [Baker & Hargreaves].

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ See Veatch (1976), *supra* note 1; Veatch (2005), *supra* note 1.

procuring tissue necessary for their life.²² Such concern was especially manifest with patients suffering profound and irreversible comas, because transplant physicians increasingly saw them as attractive candidates for tissue donation.²³

Vital tissue donation had been dependent on the occasion of death for its short duration up to that point, motivated by concern that a transplant prior to death would cause harm to the donating patient and violate the sanctity of life.²⁴ This jurido-ethical imperative, known as the *dead donor rule* (DDR), was enforced through existing penal sanctions, such as murder and manslaughter.²⁵ However, as physicians turned to comatose patients as

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ DDR is embraced by the medical community conducting organ and tissue transplants, and is reflected in provincial legislation governing the same. See Jocelyn Downie, Matthew Kutcher, Chantelle Rajotte, & Allison Shea, “Eligibility for organ donation: a medico-legal perspective on defining and determining death” (2009) 56 Can J Anaesth 851 [Downie et al. (2009)]; Also see e.g., *Human Tissue and Organ Donation Act*, RSA 2006, c H-14.5, ss. 4 & 6 (Alberta) [Alberta Act]; *Human Tissue Gift Act*, RSBC 1996, c 211, ss. 4 & 7 (British Columbia) [B.C. Act]; *The Human Tissue Gift Act*, CCSM 1987, c. H180, ss. 2 & 8 (Manitoba) [Manitoba’s *Human Tissue Gift Act*]; *Human Tissue Gift Act*, RSNB 2004, c H-12.5, ss. 4 & 7 (New Brunswick) [New Brunswick Act]; *An Act Respecting Human Tissue and the Disposition of Human Bodies*, SNL 1990, c H-15, ss. 6 & 9 (Newfoundland & Labrador) [Newfoundland and Labrador Act]; *Human Tissue Donation Act*, SNWT 2014, c30, s. 4 (Northwest Territories) [Northwest Territories Act]; *Human Tissue Gift Act*, RS, c 215 s. 5 (Nova Scotia) [Nova Scotia Act]; *Consolidation of Human Tissue Act*, RSNWT 1988, cH-6, s. 1 (Nunavut) [Nunavut Act]; *Trillium Gift of Life Network Act*, RSO 1990, c H20, ss. 4 & 7 (Ontario) [Ontario Act]; *Human Tissue Donation Act*, RSPEI 1992, c H-12.1, ss. 1 & 3 (Prince Edward Island) [P.E.I. Act]; *Act to facilitate organ and tissue donation*, RSQ 2010, c 38, s. 2.0.10(1) (Québec) [Quebec Act]; *The Human Tissue Gift Act*, RSS 1978, c H-15, ss. 5 & 8 (Saskatchewan) [Saskatchewan Act]; *Human Tissue Gift Act*, RSY 2002, c117, s. 4 (Yukon) [Yukon Act]; Also see generally Franklin G. Miller & Robert D. Truog, *Death, Dying, and Organ Transplantation: Reconstructing medical ethics at the end of life* (Oxford, UK: Oxford University Press) [Miller & Truog (2012)]; Seema K. Shah & Franklin G. Miller, “Can We Handle the Truth? Legal Fictions in the Determination of Death” (2010) Am J L & Med 540 [Shah & Miller (2010)]; Robert D. Truog, “Defining Death: Getting it wrong for all the right reasons” (2015) 93 Tex L Rev 1885 [Truog (2015)]; Robert D. Truog & Franklin G. Miller, “Changing the Conversation About Brain Death” (2014) 14:8 Am J Bioethics 9 [Truog & Miller (2014)]; Robert M. Veatch, “Killing by Organ Procurement: Brain-based death and legal fictions” (2015) J Med & Phil 289 [Veatch (2015)].

donative candidates, the law was initially uncertain of how to respond. In 1968, the Harvard Ad Hoc Committee on the Definition of Death offered neurological criteria, or a brain definition, as a replacement of the classical definition of death.²⁶ According to this definition, a patient could be determined dead once certain neurological pathways thought fundamental to life ceased.²⁷ This could be tested directly by the absence of neurological activity, or indirectly by classical signs of life. The brain definition caught on readily throughout Anglo-American jurisdictions, preserving the practice of tissue donation reliant on DDR.²⁸ Its consequence is clearly demonstrated today: most vital tissue is procured from patients who have died according to neurological criteria (i.e., Donation of Neurological Death, or DND).²⁹ Only a small, although increasing, number of cases involve the procurement of tissue from patients who have died by circulatory and respiratory criteria (i.e., Donation After Circulatory Death, or DCD).³⁰ The brain definition also resolved issues of pecuniary and emotional costs associated with comatose patients.³¹

²⁶ The Ad Hoc Committee of Harvard Medical School to Examine the Definition of Brain Death, “A Definition of Irreversible Coma” (1968) 205:6 JAMA 337 [Ad Hoc Committee].

²⁷ *Ibid*; Also see Miller & Truog (2012), *supra* note 25; Shah & Miller (2010), *ibid*; Seema K. Shah, Robert D. Truog, & Franklin G. Miller, “Death and Legal Fictions” (2011) 37:12 J L Med & Ethics 722 [Shah et al., (2011)]; Jacquelyn Shaw, “Of Mitochondria and Men: Why Brain Death is not the Death of the ‘Organism as a Whole’” (2014) 7:2 McGill J L & Health 235 [Shaw (2014)]; Truog (1997), *supra* note 1; Truog (2015), *supra* note 25; Truog & Miller (2014), *supra* note 25.

²⁸ See Shah & Miller (2010), *ibid*; Shah et al. (2011), *ibid*; Shaw (2014), *ibid*; Truog (1997), *ibid*; Truog (2015), *ibid*; Truog & Miller (2014), *ibid*.

²⁹ See Shah & Miller (2010), *ibid*; Shah et al. (2011), *ibid*; Truog (1997), *ibid*; Truog (2015), *ibid*; Truog & Miller (2014), *ibid*. Also see e.g., Canada, Parliamentary Information and Research Service, “Organ Donation and Transplantation in Canada”, by Sonya Norris, Legal and Social Affairs, Publication No 2011-113-E (Ottawa, CA: Library of Parliament, 2011).

³⁰ *Ibid*.

³¹ See Shah & Miller, *ibid*; Shah et al. (2011), *ibid*.

Taken together these parallel developments in end of life care and transplant medicine have shown that the definition of death may alter to meet technological and political demands.³² This causal effect of politics and technology has led to quarrels about the resulting definition and challenge to the language that describes death.³³ For some, the definition of death is a fiction in that the legal language is inaccurate or insufficient.³⁴ It was argued that the emergence of medical transplants led to the deliberate selection of a definition of death serviceable to the availability of organs.³⁵ Further, some contend that

³² Also see Qing Yang & Geoffrey Miller, “East-west differences in perception of brain death: Review of history, current understandings, and directions for future research” (2015) 12 *Bioethical Inquiry* 211 [Yang & Miller]. Yang and Miller inquire into cultural differences underlying perceptions of brain death. Eastern countries, like China, are reluctant to recognise brain death in their legislation. Yang and Miller suggest cultural differences are underpinned by preferred philosophical positions adopted by west and east decision makers. Yang and Miller offer an interesting contrast to the specific historical conditions explored in Anglo-American jurisdictions, while offering an examination of extra-legal factors in the determination of death.

³³ See Winston Chiong, “Brain Death Without Definitions” (2005) *Hastings Center Report* 20 [Chiong]; Nair-Collins (2013), *supra* note 1; Shewmon & Shewmon (2004), *supra* note 1. Chiong, Nair-Collins, and Shewmon & Shewmon address the issue of language in the most direct manner. Also see Emanuel (1996), *supra* note 1; Halevy & Brody (1993), *supra* note 1; Shah & Miller (2010), *ibid*; Shah et al. (2011), *ibid*; Jacquelyn Shaw, *Dead wrong: an analysis of the legal defensibility of brain death in Canadian healthcare* (LLM Thesis, Dalhousie University Faculty of Law, 2010) [unpublished] [Shaw (2010)]; Shaw (2014), *ibid*; Truog (1997), *ibid*; Truog (2015), *ibid*; Truog & Miller (2014), *ibid*; Veatch (1976), *supra* note 1; Veatch (2005), *supra* note 1; Veatch (2015), *supra* note 25. Contra James L. Bernat, “How much of the brain must die on brain death?” (1992) 3:1 *J Clinical Ethics* 21 [Bernat (1992)]; James L. Bernat, “A Defense of the Whole-Brain Concept of Death” (1998) 28:2 *The Hastings Center Report* 14 [Bernat (1998)]; James L. Bernat, Charles M. Culver, & Bernard Gert, “On the Definition and Criterion of Death” (1981) 94:3 *Annals Internal Med* 389 [Bernat et al. (1981)]; George Khushf, “A Matter of Respect: A Defense of the Dead Donor Rule and of a “Whole-Brain” Criterion for Determination of Death (2010) 35:3 *J Med Phil* 330 [Khushf].

³⁴ See Shah & Miller, *ibid*; Shah et al. (2011), *ibid*; Shaw (2014), *ibid*; D. Alan Shewmon, “Brainstem death, ‘brain death’, and death: A critical evaluation of the purported equivalence” (1998) 14:2 *Issues in L & Med* 125 [Shewmon (1998)]; D. Alan Shewmon “The brain and somatic integration: Insights into the standard biological rationale for equating ‘brain death’ with death” (2001) 26 *J Med Phil* 457 [Shewmon (2001)]; Shewmon & Shewmon (2004), *ibid*; Truog (2015), *ibid*; Truog & Miller (2014), *ibid*; Contra Chiong, *ibid*; Nair-Collins (2013), *ibid*; Veatch (2005), *ibid*; Veatch (2015), *ibid*.

³⁵ See R. Alta Charo, “Dusk, Dawn, and Defining Death: Legal Classifications and Biological Categories” in Sturt J. Yougner, Robert M. Arnold & Renie Schapiro, eds, *The Definition of Death: Contemporary Controversies* (Baltimore, MD: John Hopkins University Press, 1999)

the definition may vitiate consent to donate vital tissue, because patients' understanding of death is discordant with the law's understanding.³⁶ The latter two points have not been fully explored before, in part because of a dearth of academic interest. Of the scholarship that does consider the effect of a legal fiction, it relies on fairly antiquated, and conceptually inadequate, understandings of fiction.³⁷ Principally these scholars have relied on Lon Fuller and Hans Vaihinger to substantiate their description of legal fiction and concern for consent.³⁸

[Alta Charo]; Shah & Miller, *ibid*; Shah et al. (2011), *ibid*; Tina L. M. Stevens, "Redefining Death in America, 1968" (1995) 11:3 *Caduceus* 207 [Stevens]; Truog (2015), *ibid*; Truog & Miller (2014), *ibid*; Veatch (1976), *supra* note 1; Veatch (2005), *ibid*. Also see T. Forcht Dagi & Rebecca Kaufman, "Clarifying the discussion on brain death" (2001) 26:5 *J Med & Phil* 503 [Dagi & Kaufman]; Nair-Collins (2013), *supra* note 1; Nair-Collins does not call the definition of death a fiction; however, he does consider the definitional language deficient and exploited to suppress deliberative conversations about post-mortem organ and tissue donation in a way that is paternalistic. The paternalism that Nair-Collins describes is specific to increasing a supply of tissue for therapeutic purposes. Similarly, Dagi and Kaufman assert that debate about the determination of death is not a matter of who is dead, but rather is a matter of whom ought to be deemed dead. In this way, criteria of death are socially determined by the benefits a certain definition will afford the community. Like Yang and Miller, do not make use of the concept of legal fiction, but do indicate that the point of interest for scholarship on the determination of death is an epistemological, metaphysical, and normative issue that is not confined by biological concepts of *senescence*, or cellular death. Contra Gary Belkin, "Brain Death and the Historical Understanding of Bioethics" (2003) 58:3 *J History Med & Allied Sciences* 325 [Belkin]. Belkin disagrees with the critique that the definition was chosen on the basis of expanding tissue donation. Instead, he looks to the work of the Ad Hoc Committee's authors and an emerging bioethics to discern a fundamental interest in the neurology of consciousness. Not only is Belkin's historical analysis inadequate in that it disregards explicit comments in the Ad Hoc Committee's report that focus on ethical quandaries of tissue donation, but it also fails to identify how the logic underlying transplant medicine and a logic underlying a *neurology of consciousness* may share a historical origin. Given this aporia, Belkin's analysis can only serve as a foil to fuller interrogations.

³⁶ See Nair-Collins (2013), *ibid*; Shah & Miller (2010), *ibid*; Shah et al. (2011), *ibid*; Truog (2015), *ibid*; Truog & Miller (2014), *ibid*.

³⁷ See e.g., Shah & Miller (2010), *ibid*; Shah et al. (2011), *ibid*; Also see Veatch (2015), *supra* note 25.

³⁸ *Ibid*; Also see generally Lon Fuller, *Legal Fictions* (Stanford, CA: Stanford University Press, 1967) [Fuller (1967)]; Hans Vaihinger, *The philosophy of 'as if': A system of the theoretical, practical and religious fictions of mankind* (London, UK: Routledge & Kegan Paul Ltd., 1965) [Vaihinger].

By relying on Fuller and Vaihinger, their accounts do little by way of analysing the political and social bases underpinning the use of a legal fiction, or the specific interests that are advanced by fictions in the context of death.³⁹ Instead, the fictions are described limitedly in functionalist terms and their use is either accepted or rejected, depending on other normative commitments scholars might have.⁴⁰ Consequently, most theoretical and ethical work is done independent of studying how fictions arise and their operation in determining death, which potentially limits the value of such work. It is this lacuna that the following thesis should fill. The thesis will take seriously the social and political bases constituting legal fictions, in order to appreciate the relationship of legal fictions to the determination of death. I believe the legal fiction can only be understood by relating to the political conditions underlying its emergence. Specifically, I relate the language of fiction to a *biopolitical strategy* of governance seeking to preserve life. The thesis will also take seriously how legal understandings of death are communicated to, and interpreted by, patients and physicians. I argue that the fiction must be understood semiotically as a mode

³⁹ See Miller & Truog (2012), *supra* note 25; Shah & Miller (2010), *supra* note 25; Shah et al. (2011), *supra* note 27. Contra Karen Petroski, “Legal fictions and the limits of legal language” (2013) 9:4 Int J L in Context 485 [Petroski]. Petroski counters a trend in post-Fuller accounts of legal fictions which prioritise classification over an exploration of its linguistic elements. For Petroski, Fuller went beyond mere classification on the basis of a false proposition made knowingly or with utility. In Fuller’s second and third essays on legal fictions he considers it a linguistic phenomenon that is used to “manage social relations and interactions” (p. 490). Petroski advocates for a fuller analysis of fiction as a linguistic phenomenon through discourse analysis. This would extend from Fuller’s linguistic inclinations as a legal realist, and complete an understanding of how a fiction functions in discourse. As Petroski stated: “[while] both Vahinger and Fuller considered legal and scientific discourse as distinct non-overlapping systems of communications [...] they did not directly consider what might happen when members of these different communities try to communicate with members of others, or to make use of the products of other communities’ efforts.” (p. 494).

⁴⁰ See Petroski, *ibid*; See e.g., Miller & Truog (2012), *supra* note 25; Nair-Collins (2013), *supra* note 1; Shah & Miller (2010), *supra* note 25.; Shah et al. (2011), *supra* note 27.; Truog (1997), *supra* note 1.; Truog (2015), *supra* note 25.; Truog & Miller (2014), *supra* note 25.

of communication, whose content is misrepresented to achieve outcomes consistent with its latent motivations.⁴¹ A semiotic understanding will enable me to explore and critique how this information influences consent to tissue donation practices. Both tasks will be achieved through a socio-legal theory and method that examines the genesis and effect of fiction as a function of language. Put in other words, I will present a linguistic account of law that studies how fiction communicates legal information to others. I believe such a theory is systems theory, in the spirit of Jürgen Habermas, Günther Teubner, and Hanneke van Schooten, radicalised through the lens of Michel Foucault, Roberto Mangabeira Unger, and Robert Cover.⁴²

⁴¹ I will apply semiotics to a Fuller-Vaihinger account of legal fiction, expanding on its linguistic potential through a systems theory that understands law as an expression of communication. In doing so, I reject a functionalist interpretation of Fuller and Vaihinger, and try to analyse the emergence and operation of fiction as a consequence of language. I also share Jeremy Bentham's critique of fiction as pathological to the extent it entrenches political power over others by establishing an imagined necessity to the structure of legal institutions. See Jeremy Bentham, *Theory of Fictions* (London, UK: Paul, Trench, & Trubner, 1932) [Bentham]; Also see Michael Quinn, "Fuller on legal fictions: A Benthamic perspective" (2013) 94 *Int J L in Context* 466 [Quinn]. Also see generally Bernard S. Jackson, *Fact and Narrative Coherence* (Merseyside, UK: Deborah Charles Publications, 1988) [Jackson (1988)]; Bernard S. Jackson, "On Scholarly Developments in Legal Semiotics" (1990) 3:3 *Ratio Juris* 415 [Jackson (1990)]; Bernard S. Jackson, *Making Sense in Law: Linguistic, Psychological, and Semiotic Perspectives* (Liverpool, UK: Deborah Charles Publications, 1995) [Jackson (1995)]; Hanneke van Schooten, *Semiotics and legislation: Jurisprudential, institutional and sociological perspectives* (Liverpool, UK: Deobrah Charles Publications, 1999) [Van Schooten (1999)]; Hanneke van Schooten, *Jurisprudence and Communication* (Liverpool, UK: Deobrah Charles Publications, 2012) [Van Schooten (2012)]; Hanneke van Schooten, "Towards a New Analytical Framework for Legal Communication" (2014) 27:3 *Int J Semiot L* 425 [Van Schooten (2014)]; Anne Wagner, "Mapping Legal Semiotics" (2010) 23 *Int J Semiot L* 77 [Wagner].

⁴² See e.g., Robert Cover, "Violence and the Word" (1986) 95:8 *Yale L J* 1601 [Cover (1986)]; Michel Foucault, *The Archaeology of Knowledge* (New York, NY: Pantheon Books, 1972) [Foucault (1972)]; Michel Foucault, *Discipline and Punish* (Visalia, CA: Vintage Press, 1995) [Foucault (1995)]; Michel Foucault, "Truth and Juridical Forms" in James D. Faubion, ed, *Power: Essential Works of Foucault 1954-1984* (New York, NY: The Free Press, 2000), 1-89 [Foucault (2000a)]; Jürgen Habermas, *The theory of communicative action: Reason and the rationalization of society* (Boston, MA: Beacon Press, 1984) [Habermas (1984)]; Jürgen Habermas, *The theory of communicative action: Lifeworld and system- a critique of functionalist reason* (Boston, MA: Beacon Press, 1985) [Habermas (1985)]; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1998)

Methodology

In Chapter 2, I will describe the methodology underlying my analysis of legal fictions. Because I position my approach within a socio-legal theory and method – i.e., understanding and critiquing law as a social phenomenon – it is crucial for me to reflect on the methodology I deploy.⁴³ This reflection is crucial because I must be able to justify the standards of my critique in a manner that is internally consistent with my understanding that law is social in nature.⁴⁴ To put it in other words, I must explain how my standards are justifiable if both ideas of truth (what I use to critique) and law (what I am critiquing) are, as social phenomena, contingent.⁴⁵ If I cannot substantiate the standards of critique in this way, I have not raised a defensible account of law or society and my project is theoretically flawed.⁴⁶

[Habermas (1998)]; Van Schooten (1999), *ibid*; Van Schooten (2012), *ibid*; Van Schooten (2014), *ibid*; Günther Teubner, “Autopoeisis in Law and Society” (1984) 18:2 L & Soc R 291 [Teubner (1984)]; Günther Teubner, “The Two Faces of Janus: Rethinking Legal Pluralism” (1992) 13 Cardozo L R 1443 [Teubner (1992)]; Günther Teubner, *Law as an Autopoietic System* (London, UK: Blackwells, 1993) [Teubner (1993)]; Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (London, UK: Verso Press, 2015) [Unger (2015)].

⁴³ See generally Australia, Dennis Pearce, Enid Campbell, & Don Harding (‘Pearce Committee’), *Australian Law Schools: A discipline Assessment for the Commonwealth Tertiary Education Commission* (Canberra: Australian Government Publishing Service, 1987) [Pearce Committee report]; Canada, Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and the Humanities Research Council of Canada* (Ottawa: Information Division of the Social Sciences and Humanities Research Council of Canada, 1983) [Law and Learning report]; Also see general comments on theory and its application to methods in Richard F. Devlin, “The *Charter* and Anglophone Legal Theory” (1997) 4:1 Rev Constitutional Studies 19 [Devlin (1997)]; Terry Eagleton, *The Significance of Theory* (London, UK: Wiley-Blackwell, 1991) [Eagleton (1991)].

⁴⁴ See generally Allan C. Hutchinson, *Critical Legal Studies* (Totowa, NJ: Rowman & Littlefield Publishers Inc., 1989) [Hutchinson]; Law and Learning report, *ibid*; Pearce Committee report, *ibid*. Also see for comments generally about importance of methodology to critical social theory, Axel Honneth, *The Critique of Power: Reflective Stages in a Critical Social Theory* (Cambridge, MA: MIT Press, 1991) [Honneth (1991a)].

⁴⁵ See Honneth (1991a), *ibid*; Hutchinson, *ibid*.

⁴⁶ *Ibid*.

Past social theorists have responded variably to this tension between understanding and critique of social phenomena.⁴⁷ This variance is attributable to differences in researchers' ethical, ontological, and epistemological assumptions.⁴⁸ By ethical, I mean a researcher's normative evaluations of rightness, acceptability, or morality that affect the direction of their theoretical project. For example, a researcher may hold a normative belief that equality between people is good and aspire to see positions of difference erased.⁴⁹ By ontological, I mean assumptions about what is the essence of truth, a person, or any other aspect of reality and how it frames their understanding of larger phenomena. For example, a researcher may assume a person is the product of phenomena larger than oneself, and that their essence is constructed from interactions with their physical and social environments.⁵⁰

⁴⁷ *Ibid*; Also see Reza Banakar & Max Travers, "Critical Approaches" in Reza Banakar & Max Travers, eds, *Law and Social Theory* (Portland, OR: Hart Publishing, 2013), 91-94 [Banakar & Travers]; Duncan Kennedy, *A critique of adjudication* (Cambridge, MA: Harvard University Press, 1997) [Kennedy (1997)]. Also see specific applications to the study of law in Robert Fine, "Marxism and the Social Theory of Law" in Reza Banakar & Max Travers, eds, *Law and Social Theory* (Portland, OR: Hart Publishing, 2013), 95-109; Duncan Kennedy, "The Structure of Blackstone's Commentaries" in Alan C. Hutchinson, ed, *Critical Legal Studies* (Totowa, NJ: Rowman & Littlefield Publishers Inc., 1986) [Kennedy (1986a)]; Duncan Kennedy, "Form and Substance in Private Law Adjudication" in Allan C. Hutchinson, ed, *Critical Legal Studies* (Totowa, NJ: Rowman & Littlefield Publishers Inc., 1986) [Kennedy (1986b)]; Catharine MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence" in Allan C. Hutchinson, ed, *Critical Legal Studies* (Totowa, NJ: Rowman & Littlefield Publishers Inc., 1986) [MacKinnon].

⁴⁸ See Banakar & Travers, *ibid*; Honneth (1991a); Hutchinson, *ibid*; Kennedy (1997), *ibid*.

⁴⁹ See e.g., Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age" (1995) 212 *New Left R* 68 [Fraser (1995)]; Nancy Fraser, "Reframing Justice in a Globalising World" (2005) 36 *New Left R I* [Fraser (2005)]; Habermas (1984), *supra* note 42; Habermas (1985), *supra* note 42; Habermas (1998), *supra* note 42.

⁵⁰ See e.g., Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38 *Hastings L J* 805 [Bourdieu (1987)]; Pierre Bourdieu, *Language and Symbolic Power* (Cambridge, MA: Harvard University Press, 1991) [Bourdieu (1991)]; Pierre Bourdieu & Loïc Wacquant, *An Invitation to Reflexive Sociology* (Chicago, IL: University of Chicago Press, 1992) [Bourdieu & Wacquant]; Maurice Merleau-Ponty, *Structure of Behaviour* (Toronto, CA: S.J. Reginald Saunders and Company, 1963) [Merleau-Ponty (1963)]; Maurice Merleau-Ponty, *The Visible and the Invisible* (Evanston, IL: Northwestern University Press, 1968) [Merleau-Ponty (1968)]; Maurice Merleau-Ponty, *Phenomenology of Perception* (New York, NY: Routledge

This specific assumption affects a researcher's understanding of human behaviour and cognition, and their relation to society. Lastly, by epistemological, I mean assumptions about the nature of knowledge and how one comes to understand objects in the world. For example, a researcher may start from the position that all knowledge is the product of people using language to reflect experiences to one another, and that knowledge is inescapably affected by the cultures that animate their language and thoughts. The dependence of knowledge on social life thereby produces difference in truth claims across cultural boundaries.⁵¹ Each set of theoretical assumptions interrelates shaping the substantive theories that are developed atop their foundation.

In order to respond to the tension between understanding and critique, I must set out the methodological assumptions that undergird my project. I do this by considering the methodological differences of Michel Foucault and Jürgen Habermas, and exploring how their differences may be reconciled.⁵² More specifically, this requires me to defend a basis

Classics, 2002) [Merleau-Ponty (2002)]. Also see Rosalyn Diprose & Jack Reynolds, eds, *Merleau-Ponty: Key Concepts* (Stocksfield, UK: Acumen Publishing Ltd., 2008) [Diprose & Reynolds].

⁵¹ See e.g., Walter Benjamin, "The Task of the Translator" in Marcus Bullock & Michael W. Jennings, eds, (Cambridge, MA: Harvard University Press, 2002), 253-263 [Benjamin (2002)]; Robert Cover, "Nomos and Narrative" (1983) 97 Harvard L R 4 [Cover (1983)]; Hans-Georg Gadamer, *Truth and Method* (London, UK: Bloomsbury Publishing, 2004) [Gadamer (2004)]; Habermas (1984), *supra* note 42; Habermas (1985), *supra* note 42; Pierre Legrand, "The Impossibility of Legal Transplants" (1997) 4 Maastricht J Eur & Comp L 111 [Legrand]; Ludwig Wittgenstein, *Culture and Value* (Oxford: Oxford University Press, 1980) [Wittgenstein (1980)]; Ludwig Wittgenstein, *Philosophical Investigations* (Hoboken, NJ: Wiley-Blackwell Press, 2009) [Wittgenstein (2009)].

⁵² See Daniel W. Conway, "Pas de deux: Habermas and Foucault in Genealogical Communication" in Samantha Ashenden & David Owen, eds, *Foucault contra Habermas: Recasting the Dialogue between Genealogy and Critical Theory* (London, UK: Sage Publications, 1999), 21-44 [Conway]; Honneth (1991a), *supra* note 44; Axel Honneth, "Foucault's Theory of Society: A Systems-Theoretic Dissolution of the *Dialectic of Enlightenment*" in Michael Kelly, ed, *Critique and Power: Recasting the Foucault/Habermas Debate* (Cambridge, MA: MIT Press, 1991), 157-184 [Honneth (1991b)]; Michael Kelly, "Foucault, Habermas, and the Self-Referentiality of Critique" in Michael Kelly, ed, *Critique and Power: Recasting the*

of knowledge and its relation to social behaviour. Establishing this relation should show how meaning arises from people in communication with one another, and that meaning is consequently affected by the culture of participants in communication.⁵³ This includes an exploration of semiotics, specifically how language functions as a signal for behaviour.⁵⁴ This sets up an account of law as a social phenomenon, to be explored and applied substantively in my final chapter. Exploring Foucault's and Habermas' methodological differences will also require me to reconcile the tension between the basis of knowledge and its relation to critique. I must show how critique can be substantiated despite taking knowledge as socially contingent. Such an exploration demands that I wrestle with accusations of relativism; to resolve how a critical theory can both describe law as a social phenomenon and evaluate it without collapsing on itself.⁵⁵ By navigating the debate between Habermas and Foucault, I will propose a way by which this tension can be resolved to service a critical legal method.

Foucault/Habermas Debate (Cambridge, MA: MIT Press, 1991), 365-400 [Kelly (1991)]; David Owen, "Orientation and Enlightenment: An Essay on Critique and Genealogy" in Samantha Ashenden & David Owen, eds, *Foucault contra Habermas: Recasting the Dialogue between Genealogy and Critical Theory* (London, UK: Sage Publications, 1999), 60-89 [Owen]; Jonathan Simon, "Between Power and Knowledge: Habermas, Foucault, and the Future of Legal Studies" (1994) 28 L & Soc Rev 947 [Simon].

⁵³ See Foucault (2000a), *supra* note 42; Michel Foucault, "Truth and Power" in James D. Faubion, ed, *Power: Essential Works of Foucault 1954-1984* (New York, NY: The Free Press, 2000), 111-133 [Foucault (2000b)]; Habermas (1984), *supra* note 42; Habermas (1985), *supra* note 42.

⁵⁴ *Ibid*; Also see Cover (1983), *supra* note 51; Cover (1986), *supra* note 42; Van Schooten (2012), *supra* note 41; Van Schooten (2014), *supra* note 41.

⁵⁵ See e.g., Peter Condliffe, "Law, language and culture: Hermeneutic preliminaries" (1992) 8 Queensland U Tech L J 105 [Condliffe]; Stanley Fish, "Working on the Chain Gang: Interpretation in Law and Literature" (1982) 60 Texas L Rev 551 [Fish]; Carel Smith, "The Vicissitudes of the Hermeneutic Paradigm in the Study of Law: Tradition, Forms of Life and Metaphor" (2011) 4:1 Erasmus L Rev 21 [Smith (2011)]; Peter Winch, *The Idea of a Social Science and its Relation to Philosophy* (London, UK: Routledge Press, 1990) [Winch].

Ultimately, by favouring Foucault's methodologies, I am able to reconstruct Habermas' systems theory and apply it to law in a manner that approximates the institutional semiotics of Roberto Unger and Hanneke van Schooten.⁵⁶ Such an approach takes law as a social phenomenon, tasked with communicating meaning that is ideally taken up by citizens and regulates social life.⁵⁷ It also recognises that communication is often violent, and that regulatory functions of law involve the forcible alienation of cultures that do not coincide with the narrative animating law.⁵⁸ It also tries to understand how this narrative penetrates other strata of society, or systems, and is understood from within those systems.⁵⁹ Such an approach will enable me to study how meaning is communicated by a legal fiction, how it is taken up by medical discourse, and may affect a patient's consent to organ and tissue donation.

Death and Nomos

In Chapter 3, I describe how death is defined by law and what is communicated to physicians, patients, and other legal actors in defining death in such a way. This first requires me to set out the legal criteria, which are not uniformly provided in Canadian law, but are sometimes defined in provincial and territorial legislation governing post-mortem donation of human tissue. I focus on the legal definitions of Manitoba and Nova Scotia, as

⁵⁶ See Unger (2015), *supra* note 42; Van Schooten (2012), *supra* note 42; Van Schooten (2014), *supra* note 42.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*; Also see Walter Benjamin, "Critique of Violence" in Peter Demetz, ed, *Reflections* (New York, NY: Schocken Books, 1986), 277-300 [Benjamin (1986)]; Cover (1986), *supra* note 42.

⁵⁹ See Cover (1983), *supra* note 51; Cover (1986), *ibid.*; Unger (2015), *ibid.*; Van Schooten (2012), *ibid.*; Van Schooten (2014); Also see Teubner (1984), *supra* note 42; Teubner (1992), *supra* note 42; Teubner (1993), *supra* note 42.

their legislation defines death without deference to medical expertise.⁶⁰ Such criteria will be described and compared to post-*mortem* tissue practices authorised by Manitoba's and Nova Scotia's legislation.⁶¹ These may include:

1. DCD and DND – each authorised upon the legal fact of death as defined by the irreversible cessation of the properties of life; and
2. Pre-transplantation optimising interventions (POI), which are those interventions performed on a patient prior to the legal fact of death to improve chances of successful transplantation.⁶²

Following the institutional semiotics of Unger and van Schooten, the second task of this chapter will be to demonstrate what is communicated *to* physicians, patients, and other legal actors by the prevailing legal definition of death. This is the *nomos* of the law – if I may borrow a term of art from Robert Cover – which conveys meaning that is understood by and shapes the behaviour of those receptive to law's symbolic content.⁶³ A study of *nomos* will first require me to problematise the supposed naturalness of the definition, and the concepts ordinarily relied on by jurists to understand the use of DCD, DND, and POI by medical communities. I will review prior challenges to the legal definition by reflecting on somatic or embodied accounts of death that draw attention to the difference between

⁶⁰ See Manitoba's *Human Tissue Gift Act*, *supra* note 25, at s. 8; *The Vital Statistics Act*, CCSM, c. V60, s.2 (Manitoba) [*Vital Statistics Act*]; *Human Organ and Tissue Donation Act*, SNS 2010, c 36, s. 1 (Nova Scotia) [Bill 121].

⁶¹ See Bill 121, *ibid*, at s. 11; Manitoba's *Human Tissue Gift Act*, *ibid*, s. 2.

⁶² See Bill 121, ss. 10 & 11; Manitoba's *Human Tissue Gift Act*, s. 8. Also see generally Miller & Truog (2012), *supra* note 25.

⁶³ See Cover (1983), *supra* note 51.

law and biological processes of death.⁶⁴ These accounts generally conclude that the legal criteria of death are fictions devised for purposes serviceable to organ and tissue donation.⁶⁵ While the critical ethos of these accounts is celebrated, I will ultimately reject them for falling victim to the same conceptual pitfalls they critique.

In its place, I will argue that death is a social phenomenon affected by the language used to relate to factual experiences at the end of life. Bundled in the language around death are ideas of a human's relation to their body, the relation of a body to the State, and what it means to cease being a (live) human.⁶⁶ Due to changing political, social, and technological conditions that challenge these ideas, experiences of death are undergoing tumult and the language around death has not always caught up.⁶⁷ As will be explained, a legal fiction of death may have arisen from the absence of the symbolic specificity necessary to accurately relate all experiences at the end of life. To put this in other words, the signal transduction – the process of relaying and understanding the content of a legal communication between an author and their audience – is imprecise cuing interpretations that do not reflect what is taking place factually.⁶⁸ The absence of specificity in the signal has caused an absence of specificity in the signal's transduction, which may serve an *exaptive* role in promoting therapeutic interests related to organ and tissue donation.⁶⁹ By

⁶⁴ See e.g., Miller & Truog (2012), *supra* note 25; Also see Shah & Miller (2010), *supra* note 25; Shah et al., (2011), *supra* note 27; Shaw (2014), *supra* note 27; Truog & Miller (2014), *supra* note 25; Truog (2015), *supra* note 25.

⁶⁵ *Ibid.*

⁶⁶ See Veatch (2015), *supra* note 25.

⁶⁷ See e.g., Shewmon & Shewmon (2004), *supra* note 1.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

exaptive, I borrow an evolutionary term from Richard Lewontin and Steven Jay Gould, in which a particular structure comes to be functionally advantageous despite not having been its original (evolutionary) purpose.⁷⁰ It is exaptively advantageous in that patients may consent to organ and tissue donation under a misunderstanding of what death means, to the detriment of patients' interests in their personal sovereignty.

The definition of death is also a fiction in the sense that it misrepresents the motivations for selecting that definition. DCD, DND, and POI rely on a *nomos* principally informed by interests serviceable to organ and tissue donation, which does not fully coincide with how medical or lay communities may come to understand death. By concealing the interests advanced by the legal definition, which may be problematic for some patients intending to donate, the legal fiction may promote incidence of consent to organ and tissue donation.⁷¹ This will be demonstrated with reference to the documentary evidence, including law and bioethics commission reports, to show motivations and interests sought by legislative actors. I characterise these motivations and interests as biopolitical in nature, a style of governance that takes the preservation of life and health at the level of the population as its principal object.⁷² More specifically, I suggest the fiction's

⁷⁰ See e.g., from biology Stephen Jay Gould & Richard C. Lewontin, "The Spandrels of San Marco and the Panglossian Paradigm: A Critique of the Adaptationist Programme" (1979) 1161:204 *Proceedings Royal Soc Biol Sci* 581 [Gould & Lewontin (1979)]; Stephen Jay Gould & Elisabeth S. Vrba, "Exaptation – A Missing Term in the Science of Form" (1982) 8:1 *Paleobiology* 4 [Gould & Vrba (1982)].

⁷¹ See Nair-Collins (2013), *supra* note 1.

⁷² See Roberto Esposito, *Bios: Biopolitics and Philosophy* (Minneapolis, MN: University of Minnesota Press, 2008) [Esposito (2008)]; Roberto Esposito, *Immunitas: The Protection and Negation of Life* (Cambridge, UK: Polity, 2015) [Esposito (2015)]; Michel Foucault, *The Birth of Biopolitics* (New York, NY: Picador, 2008) [Foucault (2008)]; Also see generally Thomas Lemke, *Biopolitics: An Advanced Introduction* (New York, NY: New York University Press, 2011) [Lemke].

emergence as a consequence of language, and its operation as a function of language, form part of a biopolitical strategy to manipulate the category of death to promote life.⁷³ By determining the boundary of life and death at an early point along the continuum of dying, I suggest the biopolitic is able to avail society with more organs and tissue for transplant. I will also suggest it minimises the financial and personal costs of sustaining bodies that may no longer benefit from therapeutic aid. How exactly the legal fiction affects a patient communicatively will be expanded in the final chapter, in the context of systems theory.

Deliberative Physician-Patient Relationships

In Chapter 4, I describe law that gives shape to the therapeutic relationship between physicians and patients. Therapeutic relationships occur at the interstice between medical and lay communities, both of which are self-regulating cultural systems that govern human behaviour according to their own rules and customs.⁷⁴ Whereas in the past medical communities have enjoyed positions of unfettered advantage, enabling physicians to make therapeutic decisions without the direction of their patients, law has restructured the therapeutic relationship into an interstitial system – interstitial in the sense it is between medical and lay communities – which governs behaviour between physicians and patients according to rules and customs of deliberative communication.⁷⁵

⁷³ See Esposito (2008), *ibid*; Esposito (2015), *ibid*.

⁷⁴ See generally Van Schooten (2012), *supra* note 41; Van Schooten (2014), *supra* note 41.

⁷⁵ In this sense, I am trying to extract procedural norms of deliberative communication proposed by Habermas (1984), *supra* note 42, and (1985), *supra* note 42, from legal values in the context of the therapeutic relationship. This should follow from my discussion of methodology in Chapter 2, and should be consistent with observations made by Conway, *supra* note 52.

Just like there was a *nomos* to the legal definition of death, there is a *nomos* to the law that structures the therapeutic relationship. To demonstrate the *nomos*, I describe strategies used by physicians and patients in the context of the therapeutic relationship. These include the patient's interests in their personal sovereignty and the physician's professional duties to preserve health. Following lessons derived from my methodology, these interests are ordinarily in opposition to one another, but may be brought together productively through legal frameworks. With reference to case law, such as *Marshall v Curry*, [1933] 3 DLR 260 (NSSC) [*Marshall*] and *Allan v New Mount Sinai Hospital*, [1980] OJ No 3095 (ONCJ) [*Allan*], I explain how the courts rely on both contractual and fiduciary approaches to the strategy of consent in the law of battery to bring together opposing power interests.⁷⁶ These legal frameworks enable the court to structure our social relations in a manner that preserves the social good of medicine, while promoting a community's ideals of personal sovereignty. Collectively, these strategies inform a deliberative relationship between physician and patient, which fosters participatory, egalitarian communication.⁷⁷ This reflects a community's effort to curtail physicians' dominating tendencies – while making productive use of their expertise and skill for the delivery of important social services – by promoting conditions for meritorious decision-making.

In the common law the therapeutic relationship described in the context of the tort of battery only applies to *inter vivos* tissue donation and POI.⁷⁸ Furthermore, provincial

⁷⁶ *Allan v New Mount Sinai Hospital*, [1980] OJ No 3095 (ONCJ) [*Allan*]; *Marshall v Curry*, [1933] 3 DLR 260 (NSSC) [*Marshall*].

⁷⁷ See generally Habermas (1998), *supra* note 42.

⁷⁸ See *AB and Others v Leeds Teaching Hospital NHS Trust and Another*, [2004] EWHC 644 (QB) [*Leeds Teaching Hospital*]. *Leeds Teaching Hospital* relates to the duty of care owed in the

and territorial legislation governing *inter vivos* and *post-mortem* donation use different language that impose lesser obligations on consent in *post-mortem* contexts.⁷⁹ Unmistakably, the current state of law only avails donating patients with the contractual and fiduciary protections discussed above when alive at the time of donation. However, there appears to be some degree of overlap in strategic protections regardless of whether the donor is dead or alive. These similarities and the personal and cultural significance of having tissue treated in a manner consistent with a deceased's directions lead me to accept that the same, or at least a similar, *nomos* could exist in the *post-mortem* context. Assuming this to be the case, I explore the implications of a legal fiction of death on a patient's ability to participate in deliberative communication over DCD, DND, or POI. This serves as the standard of critique discussed in Chapter 2 and will enable me to examine and critique how the fiction may affect a patient communicatively in the final chapter.

Warring Systems and Fatal Fictions

In the final chapter, I describe how legal, medical, and lay communities interact in the context of *post-mortem* tissue donation. I describe how a legal definition of death communicates with medical and lay people, how its *nomos* is understood by them, and how it informs behaviour from within their respective communities.⁸⁰ It is an analysis of how information is transduced – the process of relaying and understanding a message – from

context of negligence. Patients who have died are no longer owed a duty of care, because the therapeutic relationship ended. However, note that the court did find that in the circumstances of a child patient, a duty of care may still be owed to the parents who survive their death. In this case, as part of that continuing duty of care, informed consent needed to come from those parents with respect to the disposition of the dead patients' bodies.

⁷⁹ See e.g., Manitoba's *Human Tissue Gift Act*, *supra* note 25; Bill 121, *supra* note 60.

⁸⁰ See generally Van Schooten (2012), *supra* note 41; Van Schooten (2014), *supra* note 41.

one system (a legal system) to another, and how and whether its content penetrates that other system.⁸¹ This requires me to describe a systems theory of law that can account for communication between legal, medical, and lay communities. This generates a review of systems theories consistent with my methodology set out in Chapter 2, and leads me to reconstruct a semiotic understanding of fictions through its theoretical lens.

I argue there exist legal, medical, and law communities (or systems) with their own cultural information. This cultural information is important to their self-propagation. Through a systems theory I demonstrate:

1. That the *nomos* animating a legal fiction of death penetrates both medical and lay communities. Its penetration is imperfect, in the sense described in Chapter 3. The English language lacks sufficient specificity about end-of-life processes to distinguish meaningfully between all factual experiences that emerge.⁸² The absence of specificity causes difference in interpretation.
2. Differences in culture may also affect the transmission of *nomos* from a legal to a non-legal system.⁸³ A legal fiction may be useful to transferring information between systems, by using language intelligible to the receiving system.
3. A legal fiction may also be relied on to come to common understanding. This common understanding does not depend on communication in a deliberative form, as described in Chapter 4, but instead depends on a simplified message ostensibly

⁸¹ *Ibid*; Also see Teubner (1984), *supra* note 42; Teubner (1992), *supra* note 42; Teubner (1993), *supra* note 42.

⁸² See Shewmon & Shewmon (2004), *supra* note 1.

⁸³ See Van Schooten (2012), *supra* note 42; Van Schooten (2014), *supra* note 42.

understood on all sides as a short hand.⁸⁴ In this sense, the fiction displaces deliberative communication about the factual experiences under which post-*mortem* practices will be carried out under at the end of life. The fiction becomes a *media* that supplants deliberative communication.⁸⁵ Where understanding is not actually shared the fiction can deceive the patient.⁸⁶

4. The legal fiction preserves difference in interpretation between social systems, so that a lay definition of death is left undisturbed, whilst advancing an unstated, and consequently unexamined, biopolitical object. As will be explained with reference to Roberto Esposito and Niklas Luhmann, the maintenance of distinct social systems advances a more general biopolitical strategy of preserving social order.⁸⁷ Without distinct social systems in place, the communal direction of biopolitical strategies (e.g., to promote the health of the population through the promotion of tissue donation) may be thwarted by the competing goals of individual actors.⁸⁸

⁸⁴ See Fuller (1967), *supra* note 38.

⁸⁵ See Habermas (1984), *supra* note 42; Habermas (1985), *supra* note 42.

⁸⁶ See Fuller (1967), *supra* note 38. If understanding is fully shared, a legal concept or definition is no longer fictive in the sense it misrepresents information. However, according to Fuller, it may still be fictive in the sense that it serves as a short-hand for conceptual reasoning. I largely disregard this second definition of fiction for the purpose of my thesis, not because I disagree with its formulation, but because it is not particularly helpful to understanding how a fiction of death affects consent to post-*mortem* tissue and organ donation. I will return to the second definition of fiction only briefly in this final chapter to the extent that it relates to the success of Bill 121, *supra* note 60.

⁸⁷ Esposito (2008), *supra* note 72; Esposito (2015), *supra* note 72; Niklas Luhmann, “The Autopoiesis of Social Systems” in *Essays on Self-Reference* (New York: New York University Press, 1990) [Luhmann (1990)]; Niklas Luhmann, *Social Systems* (Stanford, CA: Stanford University Press, 1995) [Luhmann (1995)]; Also see Michael King, “The Radical Sociology of Niklas Luhmann” in Reza Banakar & Max Travers, eds, *Law and Social Theory* (Portland, OR: Hat Publishing Ltd., 2013), at 59 – 74 [King (2013)].

⁸⁸ See Esposito (2015), *ibid.*

In these related yet distinct ways, the fiction advances a concealed *nomos* by exploiting deficiencies in language and functional advantages of fictional device.

The combined effect of the fiction, on the conduct of physicians and patients, thwarts a patient's ability to communicate deliberatively in a therapeutic relationship. I reach this conclusion having accepted that a therapeutic relationship may be understood as an interstitial system structured by law according to deliberative rules and customs. It thwarts deliberative communication by misrepresenting the factual experiences of death to patients and physicians.⁸⁹ Patients may then consent or fail to consent to DND, DCD, or POI because not all information relevant to post-*mortem* donation practices is made available to them.⁹⁰ Furthermore, physicians may apply tests of death without fully appreciating what is meant by them and act under similar misapprehensions of what a legal definition of death signifies.⁹¹

Nova Scotia's *Human Organ and Tissue Donation Act*, SNS 2010, c 36 [Bill 121] may present an exception to this analysis.⁹² If proclaimed, Bill 121 would impose duties on physicians and organ registry officials to provide accurate information about the procedures used in DND, DCD, or POI prior to gaining the patient's consent.⁹³ This includes information about processes followed to determine death, including its

⁸⁹ See Nair-Collins (2013), *supra* note 1; Also see Miller & Truog (2012), *supra* note 25; Shah & Miller (2010), *supra* note 25; Shah et al., (2011), *supra* note 27; Shaw (2014), *supra* note 27; Truog & Miller (2014), *supra* note 25; Truog (2015), *supra* note 25.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² See Bill 121, *supra* note 60.

⁹³ *Ibid* at s. 13.

definition.⁹⁴ These obligations are imperfect as long as our language lags behind the shifting conditions of end-of-life care; however, they do attempt to prevent aberrations from an ideal consistent with deliberative communication described in Chapter 4.⁹⁵ Bill 121 will be explored through systems theory to show how law may restructure the physician-donor relationship to dull the sword of *nomos* and pierce the armour of power, potentially serving as a model for other jurisdictions across Canada.

My systems-theoretic analysis is not carried out with the object of eliminating a legal definition of death, including brain death, or the DDR.⁹⁶ I am also not rejecting the biopolitical strategy of promoting organ and tissue donation.⁹⁷ Instead, I hope this account can reconstruct the relation between a legal definition of death and post-*mortem* donation practices, and challenge the use of legal fiction specifically. It is possible that DND, DCD, and POI may be carried out if a patient is given sufficient information to make informed decisions about their body. Where full understanding is promoted, the legal definition may no longer operate as a fiction, in the sense it no longer misrepresents the motivations underlying the definition.⁹⁸ Decisions about bodies at the end of life may then be entered

⁹⁴ *Ibid* at s. 13.

⁹⁵ See Shewmon & Shewmon (2004), *supra* note 1.

⁹⁶ See e.g., Mike Collins, “Reevaluating the Dead Donor Rule” (2010) 35:2 J Med Phil 154; Miller & Truog (2012), *supra* note 25; Lauren J. Riley, “A Call to Reject the Neurological Standard in the Determination of Death and Abandon the Dead Donor Rule” 87 Notre Dame L Rev 1749; Robert Truog, “The price of our illusions and myths about the dead donor rule” (2016) 42 J Med Ethics 318; Robert D. Truog, Franklin G. Miller, & Scott D. Halpern, “The Dead-Donor Rule and the Future of Organ Donation” (2013) 369:14 New Eng J Med 1287; Also see Veatch (2015), *supra* note 25.

⁹⁷ See Veatch (2015), *ibid*. Veatch does not advocate for the rejection of tissue and organ donation, but his response to Miller & Truog (2012), *ibid*, acknowledges that an alternate position on legal fiction and its relation to the DDR would be to reject tissue and organ donation altogether given the supposed impossibility or controversy with defining death.

⁹⁸ See Fuller (1967), *supra* note 38.

into with more complete understanding of the circumstances under which death is determined, or how organs and tissue are procured.⁹⁹ A systems theory is one way of understanding how legal fictions may delimit a patient's ability to make considered decisions about their bodies. A systems theory that understands the act of defining death implicates the interaction of law, language, and social systems may thereby improve the quality of future theoretical and ethical discourse as it relates to consent around organ and tissue donation. It may also contribute, even if only incrementally, to a theoretical understanding serviceable to the consideration of other issues germane to death and tissue donation.

⁹⁹ This may be important to patients to the extent that decisions at the end of life, such as how one wishes to die or have their body treated following death, matter emotionally, morally, and culturally. See generally Cecile Fabre, *Whose Body is it Anyway? Justice and the Integrity of the Person* (Oxford, UK: Oxford University Press, 2006) [Fabre]; Jesse Wall & John Lidwell-Durnin, "Control, Over My Dead Body: Why Consent is Significant (and Why Property is Suspicious)" (2012) 12 Otago L Rev 757 [Wall & Lidwell-Durnin]; T.M. Wilkinson, *Ethics and the Acquisition of Organs* (Oxford, UK: Oxford University Press, 2011) [Wilkinson].

Chapter 2: Methodology

Before I analyse the basis of and effect of legal fictions, I need to resolve the issue of methodology. Methodologies are: (1) the methods used to analyse a subject; and (2) the theoretical presuppositions those methods rely on.¹⁰⁰ It is crucial that I discuss methodologies, as the methodology is what installs a defensible perspective by which I can understand and critique the culture, institutions, and participants that comprise society.¹⁰¹ Critique absent a developed methodology is often fatal to the integrity of the theoretical project.¹⁰² Otherwise comments derived from theoretical work risk contradiction and vagueness.¹⁰³ Given this, theorists who self-identify as, or whose projects may be aggregated into, the school of critical theory take seriously the methodology animating critique.¹⁰⁴ Since I place my theoretical project within the demesne of critical theory, I also take seriously the methodologies I rely upon.

Critical theory attempts to take the culture, institutions, and practices of society and challenge their conceptual and ideological bases.¹⁰⁵ To begin, critical theory understands each component of society as the product of human activity.¹⁰⁶ As humans interact with each other, their ideas become alienated from themselves and are concretised in the

¹⁰⁰ See generally Pearce Committee report, *supra* note 43; Law and Learning report, *supra* note 43; Devlin (1997), *supra* note 43; Eagleton (1991), *supra* note 43.

¹⁰¹ See Honneth (1991a), *supra* note 44; Hutchinson, *supra* note 44.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*; Also see Unger (2015), *supra* note 42.

¹⁰⁵ *Ibid.*; Also see Banakar & Travers, *supra* note 47; Kennedy (1997), *supra* note 47.

¹⁰⁶ *Ibid.*

economic, institutional, or cultural structures that guide future social action.¹⁰⁷ This human activity is also partially determined by the economic, institutional, and cultural structures that pre-exist a given society.¹⁰⁸ In this way, social action is understood as the constituent blocks from which political and cultural systems are created, and cyclically informed by these very same systems.¹⁰⁹ Critical theory also understands these economic, institutional, and cultural structures as favouring empowered groups who have the economic, political, or cultural advantage to structure society to their betterment.¹¹⁰ Society is thereby assembled from and constrained by the ideology of empowered groups often to the exclusion of others.¹¹¹ Critical theory takes the issue of power as its principal object, challenging how the advantage of some is reflected in the structures of law, religion, media, medicine, and other social systems.¹¹²

Critical theorists carefully choose their methodologies to elicit the power structures that inform society.¹¹³ Theorists may then challenge those structures as impinging on some standard of human life.¹¹⁴ This requires the critical theorist to select a methodology that reveals the determinative structures to social life, and to come to a standard by which to

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*; Also see e.g., Kennedy (1986a), *supra* note 47; Kennedy (1986b), *supra* note 47; MacKinnon, *supra* note 47.

¹¹¹ See Banakar & Travers, *ibid.*; Honneth (1991a), *ibid.*; Hutchinson, *ibid.*; Kennedy (1997), *ibid.*; Unger (2015), *ibid.*

¹¹² *Ibid.*

¹¹³ See Honneth (1991a), *ibid.*; Hutchinson, *ibid.*; Unger (2015), *ibid.*

¹¹⁴ *Ibid.*

critique those structures.¹¹⁵ Methodologies inevitably differ according to the theoretical presuppositions and subject of critique, but critical theory exhibits consistent themes that I share. Those themes include: (1) the application of reason to reach standards for critique; (2) understanding of culture, institutions, and practices as the alienated expression of humans in communication; and (3) that society is structured by systems or apparatuses of power.¹¹⁶

To bring out these themes for the benefit of my analysis, I present an account of the oft-contrasted critical theories of Habermas and Foucault.¹¹⁷ Despite their frequent contrast, Habermas and Foucault share a commitment to the critique of systems or apparatuses of power.¹¹⁸ Their methodologies also overlap considerably, taking communicative acts as the principal object of analysis and relating them to broader social systems.¹¹⁹ Communicative acts are the utterances, gestures, and other acts that convey meaning from a person to another (or others) in communication.¹²⁰ Their differences lie in how they derive the standards of critique, and how these are variably applied to challenge the influence of power on social structures.¹²¹ This includes different approaches to the nature and use of reason, and the nature of communication.

¹¹⁵ See generally Honneth (1991a), *ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ See e.g., Conway, *supra* note 52; Honneth (1991a), *ibid.*; Honneth (1991b), *supra* note 52; Kelly (1991), *supra* note 52; Owen, *supra* note 52; Simon, *supra* note 52.

¹¹⁸ *Ibid.*

¹¹⁹ See Conway, *ibid.*; Kelly (1991), *ibid.*; Owen, *ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

I believe a reconstruction of their theories may overcome the oft-noted differences and make constructive use of their discursive critical theories.¹²² This is the task I take on here. Reconstructing the themes of critical theory through Habermas and Foucault will enable me to present a critical legal method, specifically a systems-theoretic analysis. Such a critical legal method will resemble the institutional and semiotic theories of law of Unger and van Schooten. Each coalesce on the idea that law is like any other communicative act, conveying meaning that is understood by and informs the behaviour of others.¹²³ By relating these semiotic understandings of law to the critical systems theories of Habermas and Foucault, I can capably study the steering nature of legal fictions. I can then launch my substantive analysis in the chapters that follow.

The Speech Act and Language

Habermas starts his critical theory, the theory of communicative action, with the speech act.¹²⁴ The speech act was first explored by Lüdwig Wittgenstein who thought language always expressed meaning with consequences on behaviour.¹²⁵ The speech act is comprised of: (1) a message conveyed by an author; (2) the meaning that is interpreted by another; and (3) the reaction of that other to the message as it was understood.¹²⁶ The success of the speech act – in the sense that its intended effect on behaviour actually

¹²² *Ibid*; Also see Simon, *supra* note 52.

¹²³ See Unger (2015), *supra* note 42; Van Schooten (2012), *supra* note 42; Van Schooten (2014), *supra* note 42.

¹²⁴ See Habermas (1984), *supra* note 42; Habermas (1985), *supra* note 42.

¹²⁵ See Smith (2011), *supra* note 55; Also see Wittgenstein (1980), *supra* note 51; Wittgenstein (2009), *supra* note 51.

¹²⁶ *Ibid*.

materialised – depends on mutual understanding between the author and interpreter.¹²⁷ Mutual understanding is possible because every speech act is made from a network of possible utterances, available to the author and interpreter by a shared culture.¹²⁸ Taken together, this network of possible utterances form a linguistic institution.¹²⁹ That linguistic institution provides meaning to a speech act in the form of grammatical rules, including the relevant syntax, morphology, and semantics of language.¹³⁰ It also informs the author or interpreter of the customs or contexts by which meaning can be further differentiated.¹³¹ Speech acts that did not coincide with the linguistic institution are devoid of meaning, failing to express an intelligible message to others.¹³² The stability or consistency of the institution guarantees a community can regularly predict the meaning of an author's speech act, according to the author's successful conformation to the grammar, customs, or context expected of them.¹³³

¹²⁷ *Ibid.*; Also see Habermas (1984), *supra* note 42; Habermas (1985), *supra* note 42.

¹²⁸ See Smith (2011), *ibid.*; Wittgenstein (2009), *ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.* Wittgenstein believed the grammar and customs of a linguistic institution did not express an essential quality or character of language. Instead, grammar and customs were the result of the cultural practices of a given community. Since culture was the consequence of ephemeral social conditions, the grammar and customs of a linguistic institution were also socially contingent. The contingent nature of language did not deny it was resistant to change. Language relied on a vast network of possible utterances to spell out its grammar and customs, which provided the stability or consistency necessary to predict the intended meaning of speech acts. This might give language the appearance of having a natural or ossified character; but, its mere resistance to change did not betray its cultural origins. In this sense, Wittgenstein proposed linguistic institutions were capable of change and continuously experienced the antagonism of change from aberrant, heterodox, or otherwise dissenting practices.

The advantage to studying the speech act lies in its constructivist nature.¹³⁴ By constructivist, I mean the study is attentive to how social actors rely on communication to create a society in their image.¹³⁵ For example, Peter Winch's anthropology of ethical beliefs made abundant use of the speech act.¹³⁶ For Winch, a society's worldview is interrelated with their linguistic institution, in the sense language mediates their relation to the world.¹³⁷ Understanding is not possible without the aid of language, especially with more complex cognitive concepts like morality.¹³⁸ Through language, an author can affirm or disaffirm personal experience of the world by communicating their experience to another person.¹³⁹ As the speaker communicates their experience, they rely on a network of utterances their given community's linguistic institutions provide them.¹⁴⁰ Accordingly, speakers make sense of their personal experience through communication, mediated by cultural knowledge established previously in linguistic institutions.¹⁴¹

Habermas similarly sees the speech act as constitutive of society, although he expands on its role.¹⁴² First, Habermas believes social actors unify their perception by sharing their private, personal experiences with others, who may jointly do the same in

¹³⁴ See Smith (2011), *ibid*.

¹³⁵ *Ibid*.

¹³⁶ See Habermas (1984), *supra* note 42; Winch, *supra* note 55.

¹³⁷ *Ibid*.

¹³⁸ *Ibid*.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid*.

¹⁴² See Habermas (1984), *ibid*; Habermas (1985), *supra* note 42; Also see Mathieu Deflem, "The Legal Theory of Jürgen Habermas: Between the Philosophy and the Sociology of Law" in Reza Banakar & Max Travers, eds, *Law and Social Theory* (Portland, OR: Hart Publishing Ltd., 2013), 75 – 90 [Deflem (2013)].

communication.¹⁴³ The exchange of personal experience allows people in communication to achieve mutual understanding about conditions of a physical and social world.¹⁴⁴ Speech acts thereby have a descriptive role in communication.¹⁴⁵ Having a shared understanding of the world allows those same social actors to coordinate social activity.¹⁴⁶ Speech acts create stable institutions of social behaviour by communicating prescriptions for how others should act to achieve certain goals.¹⁴⁷ Language also enables the development of meaningful social identities necessary for successful participation within a community.¹⁴⁸ As an individual obtains and internalises a community's cultural repertoire – including the grammars, contexts, and customs necessary to relate intelligibly to the relevant institutions of social life – their speech acts become meaningful to others.¹⁴⁹ This is a process of socialisation mediated through communication. Each function (i.e., mutual understanding, social integration, and socialisation) was taken to be constitutive of society.¹⁵⁰

Habermas also proposes that speech acts vary according to style or theme of communication.¹⁵¹ All speech acts are expressed in an argumentative form, in which the author asserts a message in communication and that message is criticisable.¹⁵² The message itself, and the critique by others, should all be supported by reasons. Each thematic problem

¹⁴³ See Habermas (1984), *ibid*; Habermas (1985), *ibid*.

¹⁴⁴ *Ibid*.

¹⁴⁵ *Ibid*.

¹⁴⁶ *Ibid*.

¹⁴⁷ See Habermas (1985), *ibid*.

¹⁴⁸ *Ibid*.

¹⁴⁹ *Ibid*.

¹⁵⁰ *Ibid*.

¹⁵¹ See Habermas (1984), *supra* note 42.

¹⁵² *Ibid*.

raised, of which there may be many within a single speech act, can be resolved rationally according to what approximates a yes-no binary.¹⁵³ For example, if an author expresses their personal experience of a state of affairs – e.g., the apple is blue for me – others can agree with that observation – e.g., yes, the apple is blue for me, too – or deny its factual content. Shared meaning is established with descriptive statements in this way. But some utterances express a theme that does not correspond to the true-false binary used with descriptive statements.¹⁵⁴ These speech acts are evaluated according to different binaries relevant to the specific themes used in communication.¹⁵⁵ There are at least four themes of communication, including descriptive, normative, expressive, and instrumental themes.¹⁵⁶ Statements that use a descriptive theme, exemplified above, relate to a community's factual understanding of the social or physical world.¹⁵⁷ These are expressed by raising propositions about a state of affairs and criticised according to a truth-false binary.¹⁵⁸ Statements may also correspond to a normative theme, which are related to establishing the norms or values.¹⁵⁹ These rely upon a binary organised around what one ought or ought not do, such as in the production of morals or customs.¹⁶⁰ Relatedly, normative statements may operate within a binary related to establishing preferable values or standards of judgement, such as what is good, or what is appropriate, or some other standard related to

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

appraising some quality of a thing.¹⁶¹ For example, an author may say that eating the apple was acceptable, conveying ideas about the moral quality of the act. Others may respond to the normative content of the message and either accept or reject its purported goodness. Others may also propose an alternate set of values by which to judge the consumption of an apple.

There is also an expressive theme, oriented to establishing the authenticity of expression.¹⁶² In this sense, an author's speech act may be evaluated according to the honesty by which it was expressed, or some other measure of authenticity defined by the community.¹⁶³ For example, the author may state that based on information available to them the apple was blue. Such a speech act is communicating a descriptive statement, but others may choose to evaluate its authenticity rather than its factual content. They may respond that the author was lying when they stated the apple is blue and reject the speech act on that basis; or, they may affirm that the author genuinely believed the apple was blue. Finally, there are speech acts communicating an instrumental theme, designed to coordinate the activities of many social actors to achieve commonly held goals.¹⁶⁴ Instrumental statements, and the conduct they refer to, can be criticised according to a binary of efficiency-inefficiency in terms of their success at coordinating behaviour and achieving the goals set upon.¹⁶⁵ For example, an author may state that an apple is sliced

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.* The efficiency of the statement and the conduct informed by the speech act can be treated as the same, in the sense that their efficiency may be evaluated together because they are indistinguishable. However, there are circumstances, especially in more complex chains of speech acts, where the efficiency of the statement may appear to be discordant with the efficiency of the

most effectively with a spoon. Others may disagree with the statement, responding that it would be more efficient for the apple to be sliced with a knife. Alternatively, the other may agree with the author and join in the endeavour.

Habermas suggests these speech acts take place within the social system of a *lifeworld*.¹⁶⁶ The lifeworld substantiates social life by providing speech acts with the cultural repertoire necessary for social actors to relate to one another and communicate meaning intelligibly.¹⁶⁷ The cultural repertoire is composed of understandings established in prior arguments, whose resolution had achieved consensus among a community and were no longer treated as problematic statements.¹⁶⁸ The descriptive, evaluative, expressive, and instrumental themes of communication relied upon these unproblematic, settled meanings as the background of *their* expressed meaning.¹⁶⁹ This requires social actors to be socialised within that network of unproblematic beliefs, as described above as the internalisation of a community's grammars, contexts, and customs.¹⁷⁰ In turn, the social actors internalise and rely on the lifeworld to form their speech acts. The function of the speech acts thereby reproduce the lifeworld's content sustaining its existence.¹⁷¹

conduct that it informs. Where it appears the statement and conduct differ in efficiency, it is likely the statement and conduct have been inappropriately linked. Put in other words, it is possible there exist a larger chain of speech acts that need to be identified. Breaking complex social action into smaller speech acts should allow for the efficiency of the statement and conduct to align.

¹⁶⁶ Habermas (1984), *ibid*; Habermas (1985), *supra* note 42.

¹⁶⁷ *Ibid*.

¹⁶⁸ *Ibid*.

¹⁶⁹ *Ibid*.

¹⁷⁰ *Ibid*.

¹⁷¹ *Ibid*. By establishing shared understanding, creating institutions that normalise behavioural expectations, and socialising members of a linguistic community through speech acts.

Colonising Systems and Communicative Reason

Deviations from the argumentative form of speech acts could have consequences on the achievement of mutual understanding, social integration, and socialisation.¹⁷² Such deviations are emblematic of colonising social systems, which favour the instrumental goals of specific groups.¹⁷³ Habermas identified these effects in the advent of economic systems reliant on capital, and the distension of bureaucratic governance.¹⁷⁴ Both possess their own cultural *modus operandi* critical to their self-propagation.¹⁷⁵ Habermas described their effect as a *colonisation* of the lifeworld, in the sense these colonising social systems supplant the lifeworld's connection to speech acts.¹⁷⁶ Instead of servicing mutual understanding, communication is circumscribed and redirected to the exclusive service of instrumental goals specific to these systems.¹⁷⁷ For example, speech acts may also be replaced by other media that steer social action to the achievement of goals endemic to capitalism (e.g., money, or capital), or to the maintenance of bureaucratic administration (e.g., technocratic decision-making of experts).¹⁷⁸ To the extent that the lifeworld wilts and communication services only these select power interests, these colonising systems often produce unjustifiable political, social, and economic inequalities in society.¹⁷⁹ Habermas argued these inequalities were unjustifiable in the sense colonising systems were not

¹⁷² See Habermas (1985), *ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

substantiated by persons enjoying reciprocal relations to one another, or equal standing to assert and react to arguments raised between them.¹⁸⁰ Instead, these colonising systems favour the social practices of the few who enjoy positions of advantage over others, and seek ends that guarantee this inequality.¹⁸¹

To make sense of this colonising effect, Habermas assumes that equality is endemic to the rational structure of argumentative speech acts.¹⁸² He also assumes it is endemic to the lifeworld itself, as it is the alienated expression of these speech acts.¹⁸³ Equality is endemic in the sense that an author must adopt a performative attitude in which the other is taken to possess equal standing to them, and *vice versa*.¹⁸⁴ The rationality of argument is defaced if the social actors do not treat each other as equals, as that assumes the standard by which to resolve argument is no longer the provision of reasons alone.¹⁸⁵ This relates to the second aspect of equality underlying argumentative speech acts. The performative attitude is made possible because successful communication only requires social actors have access to the cultural repertoire necessary to raise or react to intelligible utterances.¹⁸⁶ No other qualities of the social actors should relate to the intelligibility or rationality of their utterances.¹⁸⁷ By contrast, colonising systems shirk the argumentative form, typified

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² See Habermas (1984), *supra* note 42; Also see Deflem (2013), *supra* note 142; Habermas (1998), *supra* note 42.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

by the absence and active suppression of deliberation.¹⁸⁸ Communication is no longer animated by the merits of reasons, but affirm specific interests of the colonising system.¹⁸⁹ This ineluctably leads to unequal outcomes in communication.¹⁹⁰ Equality is then what distinguishes argumentative speech acts and the lifeworld from the effect of colonising systems on communication.¹⁹¹

Habermas believes law, or other social rule systems, can reflect the alienated expression of the performative attitude necessary for rational argument; a conscious attempt of a given community to secure and maintain equal positions between social actors.¹⁹² For example, the rights, freedoms, or protections afforded by law may organise communities in such a manner that guarantees or ensures equal opportunity to share in the social practices constitutive of a lifeworld.¹⁹³ These may include:

- (1) Direct protections of one's social activity in the freedoms of religion, expression or speech, and political association.¹⁹⁴

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² See Deflem (2013), *supra* note 142; Habermas (1998), *supra* note 42; Contra Habermas (1984), *ibid*; Habermas (1985), *ibid*; Also see Hugh Baxter, "System and Lifeworld in Habermas's Theory of Law" (2002) 23 *Cardozo L R* 473 [Baxter]; James Bohman, "Complexity, Pluralism, and the Constitutional State: On Habermas's Faktizität und Geltung" (1994) 27 *L & Soc R* 897 [Bohman]; Habermas was committed earlier in his career to the idea that law was a colonising system itself, because it served as a form of media that eliminated the need for communication. Habermas eventually turned away from this categorisation of law and embraced its potential to buttress communication, or protect communication from colonising systems. Law could exhibit this character because that is how society used it – as an alienated expression of their social form. That, of course, did not deny the possibility that law would reflect other social forms and be pernicious or pathologising in character.

¹⁹³ See Baxter, *ibid*; Bohman, *ibid*; Deflem (2013), *ibid*; Habermas (1998), *ibid*.

¹⁹⁴ *Ibid.*

- (2) Rights to access political institutions, such as rights to representation or vote, may help guarantee equal participation in political organs.¹⁹⁵
- (3) Rights to participate in public society despite colour, creed, race, ethnicity, religious beliefs, political affiliation, genetic make-up, gender identity, sexual orientation, or disability.¹⁹⁶
- (4) Rights to liberty, which enable individuals to make autonomous decisions fundamental to their life, liberty, or security of their person. These rights are fundamental in the sense they undergird the formation of identity and the expression of discourse.¹⁹⁷

Consequently, Habermasian critical legal studies, or critical theory generally, examines the potential of society's institutions to establish and maintain the conditions necessary for democratic discourse, including the success of their resistance to the pathologising influence of colonising systems.¹⁹⁸

Power and Language

Foucault departs from Habermas' use of communicative reason. According to him, rationality cannot establish a democratic ideal by which systems-theoretic analysis can critique systems, because speech acts do not represent an equalising expression of social

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid*; Important to note that this language is specific to a Canadian context in light of the *The Constitution Act, 1982 (Canadian Charter of Rights and Freedoms)*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

¹⁹⁸ See Deflem (2013), *ibid.*

activity.¹⁹⁹ Put differently, communication is not centred on the achievement of shared understanding by equal participants.²⁰⁰ Social actors regularly spar to control or dominate others in their social practices, vying to attain and stabilise positions of advantage in a given environment.²⁰¹ The knowledge or truth-claims constructed from this political struggle cannot substantiate a universal ideal by which critique can be securely made.²⁰² Instead, knowledge serves to distend the organs of power and bring an end to practices that do not conform.²⁰³

Foucault reaches this appraisal by assuming a natural state of conflict in human sociality.²⁰⁴ As organisms, humans' fundamental animus is effected by their origins as individuals.²⁰⁵ Their egos or social identities may be constituted in relation to others, but their individual success or survival is dependent on autonomous acts carried out against an environment often opposed to or in competition with their interests.²⁰⁶ Foucault starts from a position similar to Thomas Hobbes, who assumes autonomy compounds with scarcity to drive enduring conflict between humans.²⁰⁷ Their survival was guaranteed by acquiring resources, the scarcity of which required an unequal division between those with power

¹⁹⁹ See Conway, *supra* note 52; Kelly (1994), *supra* note 52; Owen, *supra* note 52; Simon, *supra* note 52.

²⁰⁰ *Ibid*; Also see Foucault (2000a), *supra* note 42; Foucault (2000b), *supra* note 53.

²⁰¹ See Foucault (2000a), *ibid*; Foucault (2000b), *ibid*.

²⁰² *Ibid*.

²⁰³ *Ibid*.

²⁰⁴ See Foucault (2000a), *ibid*; Also see Mitchell Dean & Kaspar Villadsen, *State Phobia and Civil Society: The Political Legacy of Michel Foucault* (Palo Alto, CA: Stanford University Press, 2016) [Dean & Villadsen].

²⁰⁵ See Foucault (2000a), *ibid*; Dean & Villadsen, *ibid*.

²⁰⁶ *Ibid*.

²⁰⁷ See Dean & Villadsen, *ibid*.

and the disaffected, with the latter obtaining a disproportionately meagre sum.²⁰⁸ Disaffection, and the fear of succumbing to it, beget aggression between and within social groups over control of these precious resources, which Hobbes thinks reflects instinctual proclivities for war and conflict.²⁰⁹ This necessitated the creation of the state whose intervention could redefine human sociality and stabilise society.²¹⁰

Nietzsche similarly thinks social practices arise from instincts inspired by violence.²¹¹ Human instincts are not predicated on cultivating the seed of knowledge through pursuit of an object's essence, as is often assumed in Western philosophic traditions.²¹² Rather, the instinct is to the drive to laugh, lament, and detest. It is to:

[Keep] the object at a distance, differentiating oneself from it or marking one's separation from it, protecting oneself from it through laughter, devalorising it through complaint, removing it and possibly destroying it through hatred.²¹³

These are the mechanisms undergirding social practices, understood as the struggle between persons in contest for survival.²¹⁴ By consequence, knowledge itself is the invention of these social practices.²¹⁵ Knowledge does not reflect a natural essence belonging to objects in the world.²¹⁶ It is derived from organisms in conflict, at the junction

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ See Foucault (2000a), *supra* note 42; Also see Friedrich Nietzsche, *On the Genealogy of Morality* (Cambridge, UK: Cambridge University Press, 2008).

²¹² Such as the hermeneutics of Gadamer, speech act theory of Wittgenstein, and theory of communicative action of Habermas.

²¹³ Foucault (2000a), *ibid* at 11.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

of the instincts animating their vituperative games.²¹⁷ For Nietzsche, knowledge is “a spark between two swords”, which reflects neither the essence of the swords nor the soldiers who brandished them.²¹⁸ Instead, knowledge is constructed from their interstice.²¹⁹

In doing so, Foucault explains, Nietzsche rejects Baruch de Spinoza, who asserts that knowing requires one to abandon the passions of our instincts.²²⁰ Spinoza thinks abandoning human instincts will enable people to acquire knowledge free of their distortion, holding to the idea knowledge reflects an essence extracted from the world by rational, dispassionate study.²²¹ Nietzsche inverses the relation between knowledge and the instincts, by acknowledging the impossibility of getting behind human instincts to know an object dispassionately.²²² Every experience of knowing is filtered through them.²²³ Foucault follows Nietzsche by similarly asserting knowledge is the consequence of political struggle; reciprocally informing the organisation and motivation, but not representing the chief aim, of social action.²²⁴

With Foucault’s reliance on Hobbes and Nietzsche, and in his contrast to Habermas, it is not surprising that Foucault gave speech acts a very different function in society. According to Axel Honneth, Foucault believes social practices consist of:

²¹⁷ *Ibid.*

²¹⁸ *Ibid* at 11.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ *Ibid.*

Systems of social knowledge that owe their genesis to the strategic requirements of an established order of power even as they may in turn effectively act upon a given order of thought.²²⁵

Accordingly, social practices reflect strategic action informed by a system of meaning engendered and stabilised by domination over another.²²⁶ Speech acts are not first motivated by a desire to obtain common understanding on the basis of reciprocal relations between participants.²²⁷ Rather, social actors *assert* a given understanding through speech acts, and when met with competing systems of meaning, confront them with force.²²⁸ Communication is a medium by which institutional and cognitive strategies are expressed and inflicted onto others, battling for the successful propagation of their substantiating systems and their position as its arbiters.²²⁹ Victorious participants, who possess stronger or more effective strategies of effecting control over others, assume positions of social advantage.²³⁰ From this position of advantage, social integration may be achieved by expelling competing discourses and absorbing participants within their preferred system.²³¹ However, the advantage enjoyed by a given linguistic system and its capacity to integrate a community are precariously determined by the strength of the strategies used to secure them; strategies of social actors who suffer constant opposition.²³²

²²⁵ See Honneth (1991a), *supra* note 44, at 152-153.

²²⁶ See Foucault (2000a), *supra* note 42; Foucault (2000b), *supra* note 53.

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *Ibid.*; Also see Honneth (1991a), *supra* note 44.

²³⁰ See Foucault (2000a), *ibid.*; Foucault (2000b), *ibid.*

²³¹ *Ibid.*; Also see Honneth (1991a), *supra* note 44; Honneth (1991b), *supra* note 52.

²³² *Ibid.*; Also see Simon, *supra* note 52. It is important to recall, as Simon does, that Foucault saw power as not essentially negative. As alluded to above, discursive practices effected positive functions in that their struggle against others enabled certain expressions of life, which reflected

Critical to Foucault is that the object of power, as these practices express, is not exclusively exercised by the state.²³³ Every expression of social action is essentially a struggle against, or an effort to distance oneself from others, no matter the position of advantage enjoyed by the social actor (or lack thereof).²³⁴ There is a *diversity of power relations* inclusive of all in society, effected against others within and between social groups.²³⁵ This is not to deny the state often holds greater means to substantiate the integration of a given society. It is a recognition that the diversity of power relations "... [seem] to start out from a multiplicity of competing subjects rather than from one subject holding power".²³⁶ The network of power relations permeates the entire body of society, originating from the social practices of actors at society's outermost ends and is gradually taken up by the state where those strategies exemplify success.²³⁷ In this way, Foucault insists the state cannot form the centre of inquiry.²³⁸ Instead, critical theory, especially one expressed through a systems-theoretic analysis, must view social practices as strategies

the prevailing discourses that organised and gave meaning to their social action. The "repressive hypothesis", as exhibited by Habermas' idea of colonising systems, blinds us to the positive role of power and its foundational role to all discourse, not just pathologised discourse.

²³³ See Dean & Villadsen, *supra* note 204; Foucault (2000a), *ibid*; Foucault (2000b), *ibid*; Honneth (1991a), *ibid*; Conway, *supra* note 52; Kelly (1994), *supra* note 52; Simon, *supra* note 52.

²³⁴ See Dean & Villadsen, *ibid*; Foucault (2000a), *ibid*; Foucault (2000b), *ibid*.

²³⁵ See Foucault (2000a), *ibid*.

²³⁶ See Honneth (1991a), *supra* note 44 at 154.

²³⁷ See Foucault (2000a), *ibid*; Foucault (2000b), *supra* note 53; Honneth (1991a), *ibid*; Honneth (1991b), *supra* note 52.

²³⁸ See Foucault (2000a), *ibid*; Honneth (1991a), *ibid*; Honneth (1991b), *ibid*; Also see Conway, *supra* note 52; Dean & Villadsen, *supra* note 204; Kelly (1994), *supra* note 52.

used in the political struggle of every person, and connect the formation of the systems undergirding society to the function of these enduring struggles.²³⁹

Archaeology, Genealogy, and Agonic Reason

According to Honneth, Foucault believes speech acts were best understood through:

A [systems]-theoretic analysis [that] investigates the external (i.e., functional or causal) relations between the empirical constituents of a social system, between knowledge formations and power relations. [...] [Through a systems-theoretic analysis] [t]he order of knowledge is transformed into an order of social power. With the introduction of a monistic conception of power, Foucault not only leaves the methodological framework of semiological structuralism definitely behind; he also gives his theory in general a new object domain. In the place of culturally determining forms of knowledge, whose history during the period of European modernity should be investigated, *institutional and cognitive strategies of social integration now emerge, whose stabilising effect for the societies of modern Europe are to be analysed. The theory of knowledge becomes the theory of power.*²⁴⁰ [My emphasis]

A systems theory thereby attempts to analyse the triadic relationship between society, knowledge, and power.²⁴¹ It understands that knowledge is the consequence of power relations.²⁴² Speech acts make use of this knowledge to animate the descriptive and prescriptive functions of language.²⁴³ Speech acts then structure society in a manner that reflects the power relations undergirding them, by asserting a given understanding through institutions and other social strategies.²⁴⁴

²³⁹ See Foucault (2000a), *ibid*; Honneth (1991a), *ibid*; Honneth (1991b), *ibid*.

²⁴⁰ Honneth (1991a), *ibid* at 152-153.

²⁴¹ See Foucault (2000b), *supra* note 53.

²⁴² *Ibid*.

²⁴³ *Ibid*.

²⁴⁴ *Ibid*.

Foucault thinks such an analysis is best achieved through an archaeological method, which takes specific social practices and studies their development from and in reaction to earlier strategies in a society.²⁴⁵ In effect, social practices are put in a historical context by examining their functional relation to the participants' expressions of power, recognising the plurality of conditions that inform a specific practice at a specific time.²⁴⁶ Social practices are not the expression of an ideal type, in the sense its expression is rarely determined by or a reaction to a single, encompassing condition; but rather, because of their centrifugal origins, speech acts are informed by a multiplicity of strategies to localised problems, each embedded in a plurality of conditions.²⁴⁷ Accordingly, the archaeological method must closely study how a panoply of localised social practices relate together and inform the production of a social system.²⁴⁸

The archaeological method does not attempt to place these specific practices within a grand narrative of history befitting some evolutionary or transcendental idea of social development.²⁴⁹ It treats social practices as fragmentary in history and tries to understand *how* those practices are carried out in a given period, accessing the plurality of conditions

²⁴⁵ See Conway, *supra* note 52; Honneth (1991a), *supra* note 44; Owen, *supra* note 52; Also see Foucault (1972), *supra* note 42.

²⁴⁶ See Michel Foucault, "Questions of Method" in James D. Faubion, ed, *Power: Essential Works of Foucault 1954-1984* (New York, NY: The Free Press, 2000), 223-238 [Foucault (2000c)]; Michel Foucault, "The Political Technology of Individuals" in James D. Faubion, ed, *Power: Essential Works of Foucault 1954-1984* (New York, NY: The Free Press, 2000), 403-418 [Foucault (2000d)]. In Foucault (2000d), he states at 416: [P]olitical rationality is linked with other forms of rationality. Its development in large part is dependent upon economic, social, cultural, and technical processes. It is always embodied in institutions and strategies and has its own specificity."

²⁴⁷ See Conway, *supra* note 52; Foucault (2000c), *ibid*; Foucault (2000d), *ibid*; Honneth (1991a), *supra* note 44; Kelly (1994), *supra* note 52; Owen, *supra* note 52.

²⁴⁸ *Ibid*.

²⁴⁹ See Conway, *ibid*; Foucault (2000a), *supra* note 42; Foucault (2000c), *ibid*; Foucault (2000d), *ibid*; Kelly (1994), *ibid*; Owen, *ibid*.

that inform their functions.²⁵⁰ Archaeology is the rejection of constants or progression in history and an embrace of event:

rediscovering the connections, encounters, supports, blockages, plays of forces, strategies, and so on, that at a given moment establish what subsequently counts as being self-evident, universal, and necessary [in social knowledge].²⁵¹

From such a position, the systems of cultural knowledge that give speech acts meaning can be properly interrogated. For Foucault this means:

[t]he target of analysis wasn't "institutions," "theories," or "ideology" but *practices* – with the aim of grasping the conditions that make these acceptable at a given moment; the hypothesis being that these types of practice are not just governed by institutions, prescribed by ideologies, guided by pragmatic circumstances – whatever role these elements may actually play – but, up to a point, possess their own specific regularities, logic, strategy, self-evidence, and "reason". It is a question of analysing a "regime of practices" [...] to analyse programs of conduct that have both prescriptive effects regarding what is to be done (effects of "jurisdiction") and codifying effects regarding what is to be known (effects of "veridiction"). [...] It's a matter of shaking [the] false self-evidence [of a given practice], of demonstrating its precariousness, of making visible not its arbitrariness but its complex interconnection with a multiplicity of historical processes[.]²⁵²

Accordingly, the archaeological method seeks to uncover the immediate conditions that gave rise to speech acts.²⁵³ Those conditions cannot be accessed from institutions, theories, or ideology alone.²⁵⁴ Speech acts are fragmentary, assembled from an aggregate of strategies reacting to historical conditions.²⁵⁵ Exclusive attention to the structure of institutions, theories, or ideology will only reveal part of the narrative expressed by a

²⁵⁰ *Ibid.*

²⁵¹ Foucault (2000c), *ibid* at 226-227.

²⁵² *Ibid* at 225.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

speech act.²⁵⁶ Whatever a speech act conveys needs to be parsed in relation to the multiplicity of strategies, or regime of practices, used to effect power interests.²⁵⁷ This multiplicity of strategies, understood in its historical context, can reveal the descriptive (veridiction) and prescriptive (jurisdiction) functions of language.²⁵⁸

This does not deny continuation in history.²⁵⁹ The conditions that determine a specific practice at a given time may be similarly expressed in other periods, or interconnect with conditions of a prior or later sociality.²⁶⁰ But it denies that this continuation can be related to some necessary progression through history or rationality toward some terminus in an ideal society or truth.²⁶¹ Unlike Habermas, who takes the integrating function of argument as constitutive of society, linking it up to some developmental history of communicative reason, and an indication toward an ideal expression, Foucault denies the possibility of the transcendental in his archaeology.²⁶² Instead of necessity being extracted from contingencies, as Habermas does by obtaining the procedural norms of communicative reason through history of modern societies, archaeology inverts this relation so that what ostensibly appears to the researcher as necessary is determined by and can be broken down into contingencies.²⁶³

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*; Also see Conway, *supra* note 52; Foucault (2000a), *supra* note 42; Foucault (2000b), *supra* note 53; Foucault (2000d), *supra* note 248; Kelly (1994), *supra* note 52; Owen, *supra* note 52.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² See Conway, *ibid.*; Honneth (1991a), *supra* note 44; Kelly (1994), *ibid.*; Owen, *ibid.*

²⁶³ See Owen, *ibid.*

While Foucault's theory of power appears, at first glance, to give an overarching rationality to social action, he intends for the analysis of power to merely identify the many forms that social action can take.²⁶⁴ A theory of power, which understands society as the product of a struggle between power interests, does not propose a rational form to social action.²⁶⁵ Power has no prescribed content for Foucault.²⁶⁶ Instead, power factors in every encounter, strategy, reaction to, or effort to distance oneself from the opposing forces of others.²⁶⁷ This can take indeterminate forms.²⁶⁸ The only possible universal Foucault can be accused of assuming is the distancing drive of social practices, which conduces both positive and negative effects in social action.²⁶⁹ But communication does not prescribe an ideal society, as in Habermas' communicative reason, as it fails to prescribe necessary functions to social practices. It is an admission of contingency.

This relates to Foucault's concerted use of genealogy alongside archaeology to ground the critical ethos of his systems-theoretic analysis. Whereas his methods can be characterised as archaeological:

[i]n the sense that it will not seek to identify the universal structures of all knowledge or all possible moral action, but will seek to treat the instances of discourse that articulate what we think, say, and so as so many historical events [...]²⁷⁰

the critique the methods substantiate is genealogical:

²⁶⁴ See Conway, *supra* note 52.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*; Foucault (2000a), *supra* note 42;

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ See Foucault (2000a), *ibid.*

²⁷⁰ Michel Foucault, "What is enlightenment?" in P. Rabinow, ed, *The Foucault Reader* (Harmondsworth: Penguin Press, 1984), at 46 [Foucault (1984)].

[...] in the sense that it will not deduce from the form of what we are what it is impossible for us to do and to know; but it will separate out from the contingent that has made us what we are, the possibility of no longer being, doing, or thinking what we are, do or think.²⁷¹

In effect, genealogy is an ethic that embraces the contingency unearthed by archaeology.²⁷² It entails the agonic use of reason to access alternate possibilities of social expression or, put differently, entails problematising what is accepted as necessary in a given discourse and opening ourselves up to the possibility of different horizons.²⁷³ Once the conditions of social practices are problematised, an individual can reflect on the productive and marginalising consequences of a given speech act and choose to reaffirm its prescriptive and codifying content, or subvert it.²⁷⁴ Subversion entails adopting an alternate set of strategies that may produce a different vision of human sociality.²⁷⁵ There is a triadic relationship between *power* and *knowledge* as discussed above, and *ethics*, in the sense of how individuals as subjects act on ourselves.²⁷⁶ Social practices and their related discourses, or systems of meaning, may be altered by an individual's self-conscious behaviour.²⁷⁷ This cannot eliminate the possibility of power, or the formation of discourses, but it may work against tendencies to prescribe or codify certain expressions of social life.²⁷⁸ Correspondingly, the self-conscious agent may find advantage in the institutional

²⁷¹ *Ibid* at 46.

²⁷² See Conway, *supra* note 52; Also see Kelly (1994), *supra* note 52.

²⁷³ *Ibid.*

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

or cognitive strategies of a particular discourse, and deliberately readopt some or all of them.²⁷⁹

Genealogy is thus performance of a reflective attitude that animates possibility for change and, accordingly, critique of the culture, institutions, and practices that comprise society.²⁸⁰ This is made clear by David Owen, who takes together Foucault's archaeology and genealogy to represent:

[a] conceptual apparatus [that shows] how we come to experience a form (or aspect of a form) of subjectivity as necessary by tracing its historical emergence and development and, in doing so, to show the respects in which it is 'singular, contingent and the product of arbitrary constraints. [...] [G]enealogy exemplifies the conception of enlightenment as critical ethos – precisely because genealogy is nothing other than the performance of an agonistic engagement with a given limit or form of subjectivity which is experienced as problematic. It is in this respect that Foucault describes genealogy as 'work carried out by ourselves on ourselves as free beings'; to which one can add that this work is also carried out for ourselves as free beings. [...] Genealogy is a practice of freedom, an ethical labour of the self on itself, directed to enhancing our capacity to engage in practices of freedom – or, to put it negatively, directed to allowing us 'to play these games of power with as little domination as possible'.²⁸¹

In this way, the archaeology and genealogy allow an individual to reflect on the historical processes that have given shape to their understanding. The individual assumes a critical ethic that orients them to the fact their social practices have emerged from historical contingencies.

It is important for me to note that Foucault appears to adopt a relativist position.²⁸²

Foucault accepts a plurality of possible grammars, customs, or contexts by which human

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ Owen, *supra* note 52 at 33 & 36.

²⁸² *Ibid.*

sociality may be structured and expressed. Given this plurality, critique can only extend from individuals' reflections on the conditions of their experience.²⁸³ It cannot meaningfully extend to the experiences of others, in the sense that – to paraphrase Wittgenstein – critique says more about one's own culture than it does another.²⁸⁴ But in spite of Foucault's effort to distance himself from transcendental ideals and his embrace of a Wittgensteinian plurality to speech acts, Foucault affirms the rationality of critique in the sense of its function in guiding social action.²⁸⁵ As Daniel Conway reminds us, Foucault's use of archaeology and genealogy to substantiate critique is not a refusal of reason.²⁸⁶ The ethic of genealogy, as described above, is the use of practical reason to reflect on conditions and direct the course of social action. It is agonistic and oriented to the study of events, in contrast to positive and universal applications of reason, but Foucault does not embrace the irrational.²⁸⁷ This allows Foucault to retain and animate a critical ethos in his anthropology of social systems, in spite of his relativist tendency.²⁸⁸ Consequently, genealogy may allow a reflective population to be aware of the contingency that underlies the prescriptive and codifying functions of a society's institutions, cultures, and strategies. It also may allow them to then purposefully abandon, adopt, and re-imagine the boundaries of social life.

²⁸³ See Conway, *supra* note 52; Owen, *ibid.*

²⁸⁴ See Smith (2011), *supra* note 55.

²⁸⁵ See Conway, *supra* note 52.

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

Foucault *contra* Habermas

Both Habermas and Foucault attend to the systems that animate discursive practices.²⁸⁹ Both are interested in how systems of meaning codify and prescribe certain expressions of human sociality.²⁹⁰ Put differently, both are interested in how there are a plurality of discourse types – with their own governing grammars, contexts, and customs – that systemically animate social life by integrating and stabilising a community.²⁹¹ These systems render social practices intelligible, in the sense of coordinating the strategies by which a populace organises and understands themselves.²⁹² In turn, these systems are reproduced by and stabilised through those same strategies, which work to reproduce their substantiating discourse types while excluding competitors.²⁹³ Where this entails a modern state, this may include the use of law to mandate, empower, and organise preferred discursive strategies.²⁹⁴

Habermas and Foucault differ in how they substantiate their critiques. As shown above, Habermas relies upon a positive and transcendental understanding of reason, as expressed through universal standards of rational discourse, which allow him to compare discourses to an ideal form.²⁹⁵ This ideal form is communicative reason, a democratic expression of argument in which propositions are expressed and explained, and either

²⁸⁹ See Honneth (1991a), *supra* note 44; Honneth (1991b), *supra* note 52.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*; Also see Conway, *supra* note 52; Habermas (1984), *supra* note 42; Kelly (1994), *supra* note 52; Owen, *supra* note 52.

rationally accepted or denied by others.²⁹⁶ Social actors communicate with each other as equal discursive participants, in the sense that their arguments are adjudicated on their merits and not on conditions irrelevant to the content and function of the speech act.²⁹⁷ This requires equal, mutually reciprocating participants in discourse, and universal assent to establish the binding content of the speech act.²⁹⁸ By contrast, Foucault sees all social practices as oppositional. Speech acts are expressed strategically with the intent of securing and stabilising a preferred understanding, distancing oneself from competing understandings.²⁹⁹ These struggles manifest diversely, depending upon a given set of interests that produce the social activity³⁰⁰. Speech acts obtain their prescriptive effects from the constructive capacities of these struggles, acting on the contingencies of the world to create meaning.³⁰¹ Foucauldian critique makes use of rationality to interrogate the contingencies undergirding sociality and reconsider untapped constructive capacities of language.³⁰² In this sense, Foucault *contra* Habermas does not use a communicative ideal,

²⁹⁶ See Conway, *ibid*; Habermas (1984), *supra* note 42; Kelly (1994), *ibid*.

²⁹⁷ *Ibid*.

²⁹⁸ *Ibid*.

²⁹⁹ See Conway, *ibid*; Foucault (2000a), *supra* note 42; Foucault (2000c), *supra* note 246; Michel Foucault, "Critical Theory/ Intellectual Theory" in Michael Kelly, ed, *Critique and Power: Recasting the Foucault/Habermas Debate* (Cambridge, MA: MIT Press, 1991), 109-138 [Foucault (2000e)]; Kelly (1994), *ibid*; Owen, *supra* note 52; Contra Jürgen Habermas, "Some Questions Concerning the Theory of Power: Foucault Again" in Michael Kelly, ed, *Critique and Power: Recasting the Foucault/Habermas Debate* (Cambridge, MA: MIT Press, 1991), 79-108 [Habermas (1991a)]; Jürgen Habermas, "Taking Aim at the Heart of the Present: On Foucault's Lecture on Kant's 'What is Enlightenment'" in Michael Kelly, ed, *Critique and Power: Recasting the Foucault/Habermas Debate* (Cambridge, MA: MIT Press, 1991), 149-156 [Habermas (1991b)].

³⁰⁰ See Conway, *ibid*; Foucault (2000a), *ibid*; Owen, *ibid*.

³⁰¹ See Owen, *ibid*.

³⁰² *Ibid*.

or any transcendental ideal, to guide critique in a consistent direction, seemingly leaving critique to indeterminate ends.³⁰³

For Habermas, the absence of a communicative ideal in genealogy incapacitated Foucault's anthropology in the sense its critical programme could not intelligibly distinguish between genuine alternatives:

But if [genealogy] is just a matter of mobilising counterpower, of strategic battles and wily confrontations, why should we muster any resistance at all against this all-pervasive power circulating in the bloodstream of the body of modern society, instead of just adapting ourselves to it?³⁰⁴

Put differently, Habermas thinks the treatment of all social practices as a reflection of an ubiquitous expression of power rendered any critical project torpid.³⁰⁵ Not only would critique have no standard by which to distinguish between preferable expressions of social life over those not preferred, it also lacks any basis to motivate resistance against a scorned system of sociality.³⁰⁶ Power and counterpower appear the same, in the sense that there is no hierarchical difference between motivation to resist or adapt to power.³⁰⁷ If all discourse is power without intelligible difference between kinds, then Foucault is committed to a relativist position in which no expression of power is better than the other.³⁰⁸ Relativism is untenable for Habermas.

³⁰³ See Conway, *supra* note 52; Honneth (1991a), *supra* note 44; Owen, *ibid.*

³⁰⁴ Jürgen Habermas, *The Philosophical Discourse of Modernity* (Lawrence, MA: MIT Press, 1990), at 283-284.

³⁰⁵ See Conway, *supra* note 52; Also see Habermas (1991a), *supra* note 299.

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

However, Conway asserts Habermas is mistaken. Foucault does not embrace a totalising theory of power, as Habermas attributes to him.³⁰⁹ Rather, while all social practices are affected by relations of power between individuals, Foucault acknowledges the capacity for freedom in opposition to domination.³¹⁰ For Foucault, domination entails the restriction of one's capacity for freedom. Freedom is expressed by a rational agent by adapting their strategies of power to resist those strategies determined by an other's will to dominate.³¹¹ As Conway puts it:

Foucault embraces the *tertium quid* that is constituted by the convergence of resistance and adaptation. Although power relations contour all forms of human interaction, not all power relations need be conducive to domination. Or, as Foucault puts it, 'relations of power are not something bad in themselves, from which one must free one's self'. The options that Habermas offers – resist or adapt – are thus misleadingly presented in the frame of an exclusive disjunction. *All* strategies of resistance presuppose some measure of accommodation to prevailing regimes of power. To put Foucault's point somewhat rhetorically: resistance always already comprises a measure of adaptation, and vice versa. [...] [Consequently] genealogy informs practical reasoning, which in turn enables strategic political resistance. Thus emerges the distinctly political dimension of Foucauldian genealogy: to expose the movement of power within structures of domination is to render this consolidation less effective and less dangerous. Power relations can neither be eradicated nor suspended, but their escalation into structures of domination can often be neutralised within local regimes.³¹²

Therefore, genealogy could allow a reflective individual to reconsider their tendency to dominate others in light of the historical processes that suffuse their social practices.³¹³ The reflective individual can then choose to act differently.³¹⁴ This may cause the

³⁰⁹ See Conway, *ibid.*

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² *Ibid* at 71.

³¹³ *Ibid.*

³¹⁴ *Ibid.*

dismantlement of structures that dominate others.³¹⁵ It is also possible that others, in the face of having their freedom restricted, may deploy a set of strategies to neutralise structures of domination.³¹⁶ Resistance also benefits from the genealogical ethic, in that it reveals how strategies of resistance may overcome the danger of domination.³¹⁷

For Foucault, critique remains contingent in the absence of a transcendental ideal, in the sense it is constructed by an individual responding directly to a dominating social practice.³¹⁸ However, this does not incapacitate critique.³¹⁹ Foucauldian standards of critique merely constrain the kinds of claims critique can make; notably, they suppress the tendency to construct metanarratives asserting universals or constants in history.³²⁰ However, Foucault shares Habermasian commitments to practical reason, in the sense of a rational agent's freedom to deliberate over reasons to adapt or resist another's social practices.³²¹ Collaborative – though not necessarily equalising, nor universally assenting – deliberation of many can thereby coordinate strategies to collectively resist dominating others.³²² This deliberative function to reason means Foucault's genealogy *can* share a similar output to Habermas' communicative reason as Conway put it:

Indeed, in response to the threat of domination, we can easily imagine Foucauldian guerrillas assembling for strategy sessions that might closely approximate the ideal, mutually reciprocal communication situation described by Habermas himself.³²³

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ *Ibid.*

³²² *Ibid.*

³²³ *Ibid* at 72

But this ideal is established by adapting strategies of power to oppose certain forms of discourse they think undesirable.³²⁴ It is established contingently, through an archaeological and genealogical examination of the conditions of social life at a given period in history.³²⁵ In this sense, the ideal situation of mutually reciprocal communication needs to be repeatedly re-established and potentially adjusted to accommodate new power relations opposing them.³²⁶ Further, these adjustments repeatedly call on the collaborative deliberation of many in order to coordinate and stabilise their preferred strategies against intrusions on their ideals.³²⁷ Their oft opposing interests would render this collaboration tenuous.³²⁸ Finally, following Foucault's anthropology, I must remember that all social practices, even those informed by a genealogical ethics, are affected by power relations.³²⁹ The conditions of social action are ineluctably embedded in discursive strategies against others, even as I reflect on the contingencies of social life.³³⁰ Therefore, the installation of a democratic ideal, if it takes place at all, will always be impure or an insecure approximation.³³¹

It is on the basis of genealogy that Habermas' theory of law, and the communicative ideal that undergirds it, can potentially be reconstituted. This depends on the conditions that animate discursive strategies in a given period. Without genealogy, a Habermasian

³²⁴ *Ibid.*

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ *Ibid.*

³²⁸ *Ibid.*

³²⁹ *Ibid.*

³³⁰ *Ibid.*

³³¹ *Ibid.*

understanding of law as the alienated expression of communicative reason cannot confidently critique deviations from that ideal without bald assertions reliant on transcendentalism. As I turn to discussions of medical law and consent in Chapter 4, I will demonstrate the value of reconstituting Habermas' theory through genealogy in understanding the effect of legal fictions.

A Critical Legal Method

As this relates to the study and use of law, Foucault's systems theory bears remarkable resemblance to Unger's institutional critical legal theory. Unger is also interested in the social phenomenon of law, including its role in creating ideals and rule forms.³³² Put in other words, Unger is interested in law as a system that gives meaning to the social action of participating actors.³³³ Without commenting on Unger's broader social theory, his critical legal theory studies the professed ideals, interests, or norms of a legal discourse by examining the historical conditions that give rise to it.³³⁴ This includes examining a plurality of legal strategies that may constitute a legal discourse.³³⁵ These strategies are often in opposition to one another as instruments of actors in political struggle.³³⁶ These actors struggle against each other, like those theorised by Nietzsche or Foucault, exploiting their relations of power and affirm the dominance of their preferred

³³² See Unger (2015), *supra* note 42.

³³³ *Ibid.*

³³⁴ *Ibid.*

³³⁵ *Ibid.*

³³⁶ *Ibid.*

system of meaning.³³⁷ As these strategies are implemented to meet conditions of political need, they are taken up by and aggregated in a legal discourse.³³⁸

The similarities to Foucault continue in the contingent and diverse forms of social life. Legal strategies originate from or are otherwise the result of social action occurring within the capillaries of society.³³⁹ As non-state actors agitate against each other and the state, their strategies may be taken up by the state apparatus to stabilise resistance and integrate society.³⁴⁰ Contradiction emerges from the centrifugal origins of legal strategies, as they are contingently taken up by a legal discourse to respond to the capricious conditions of political struggle.³⁴¹ To this extent, the system informing social action may not express a pure discourse in the sense of servicing a perfectly harmonious set of ideals.³⁴² Some strategies may actually work to others' detriment by providing exceptions to or otherwise overriding previously established strategies.³⁴³ This is further complicated as previously established strategies are coopted for purposes inconsistent with or at least different from their original use. The repurposing of legal strategies depends on who assumes control of the legal and political apparatuses and the historical conditions they are embedded in.³⁴⁴

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

Relatedly, Unger does not try to impose a unifying narrative to understand legal phenomena.³⁴⁵ Unger focuses his analysis on the multiplicity of law by taking its cultural content as the expression of these numerous and unrelated strategies.³⁴⁶ There is no unifying constant in history, nor some transcendental ideal by which law can be critiqued against. Legal discourse is merely the aggregate of strategies carried out by a plurality of actors in the context of a specific sociocultural space.³⁴⁷ The best way to analyse legal discourse then is to make use of an archaeological method, similar to that of Foucault's, sensitive to the conditions of a historical event. In this sense, Unger proposes that a critical legal theorist should identify the ideals, interests, or norms immanent to legal strategies used by a community, and reflect on the historical conditions that led to their aggregation in a given legal discourse.³⁴⁸

This immanent analysis is also genealogical, as Unger sees it as exposing the contingencies of social life.³⁴⁹ Social life, including legal discourse, is the outcome of localised strategies to historical conditions.³⁵⁰ It is an alienated expression of human sociality, constructed through the discursive practices of the people who constitute a community, giving it an indeterminate character.³⁵¹ Accordingly, as a human construct, there is no necessary form to legal discourse.³⁵² The immanent analysis of the critical legal

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid.*

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.*

³⁵² *Ibid.*

theorist may then enable them to identify the strategies that undergird legal discourse and reflect purposefully on how these or different strategies may be deployed to achieve the desired ends of a given community.³⁵³ Put in Ungerian terminology, the legal theorist identifies the *false necessities* of legal discourse and tries to *reimagine* how its *contingencies* may be reconfigured.³⁵⁴

Foucault's systems theory also resembles the semiotic theory of law advanced by van Schooten.³⁵⁵ Van Schooten understands law as speech acts that generate effects in society.³⁵⁶ Whether the law is represented in text or is communicated by some other medium, it conveys an institutional fact that informs the social practices of a given community.³⁵⁷ The institutional fact is characterised as rule-defined, which asserts a set of expectations for social behaviour.³⁵⁸ However, the institutional fact is not solely defined by the rules it expresses.³⁵⁹ The institutional fact is also dependent on conventions of understanding internalised in a society's culture and social institutions.³⁶⁰ The message conveyed by an institutional fact, or *nomos*, relies on the totality of this cultural background to obtain meaning.³⁶¹

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ See Van Schooten (2012), *supra* note 41; Van Schooten (2014), *supra* note 41.

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*; Also see Cover (1983), *supra* note 51; Cover (1986), *supra* note 42; Teubner (1984), *supra* note 42; Teubner (1992), *supra* note 42; Teubner (1993), *supra* note 42.

³⁶¹ *Ibid.*

Cover notes the *nomos* may have destructive consequences in stabilising a preferred worldview.³⁶² As each law recalls conventions of understanding that render its message intelligible, the law also determines what normative values fall outside its institutions.³⁶³ What falls outside law's internalised conventions becomes illegal.³⁶⁴ These are ordinarily the worldviews of fringe elements and undesirables, whose culture and social institutions do not contribute to and contrast with those animating law.³⁶⁵ The law may then attempt to control, rehabilitate, or extinguish those illegal conventions with the application of force.³⁶⁶

As Cover put it:

Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.³⁶⁷

Accordingly, every act of law extirpates a competing discourse. Where it constructs social life, it also destroys.

To access the *nomos* of law, a semiotic legal method requires van Schooten to determine how communities understand laws. This requires van Schooten to identify the conventions of understanding specific to a community, with reference to their cultural and

³⁶² See Cover (1986), *ibid.*

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid* at 1601.

social institutions.³⁶⁸ She describes the method as analysing law at three levels of the community – the cultural, causal, and psychological:

Applied to legal language, we noted that the rule expresses imaginary terminology that needs to be thought of as real. The visualisation of the image projected by the rule can be analysed by distinguishing three levels regarding the linguistic and visual aspects of the legal system: the cultural level, the causal level, and the psychological level. The three levels are interrelated. The cultural and causal levels in particular intensify each other, resulting in the existence of particular groups, dominated by internal distinctions and codes, generating the meaning for the image, distinct from other groups. Thus, the construction of an internal image of the legal rule is in its meaning-making and meaning-using connected to groups and cultures. Shared meanings and shared concepts depend upon shared modes of discourse for negotiating differences in meaning and interpretation. Meaning is a culturally mediated phenomenon that depends on prior existence of a shared symbol system. Groups demarcated by profession, religion, gender, etc., have their own inner codes, distinctions, and meanings which can only be acquired by participation in that particular group. Semiotic groups differ from each other, since they create their own internal frameworks [...]³⁶⁹

Put in other words, van Schooten begins by exploring the customs, contexts, and grammars applied by specific communities.³⁷⁰ This is facilitated by reference to the psychological dispositions or cognitive capacities of their members, which may reflect historical conditions specific to them.³⁷¹ This services an understanding of the consequence of the *nomos* on social life.³⁷² Similarly, Foucault's theory of power is dually structured requiring an analysis of resistance in relation to the structures or apparatuses that effect power. Meaning cannot be understood without reference to the broader networks of power that animate it.

³⁶⁸ See Van Schooten (2012), *supra* note 41; Van Schooten (2014), *supra* note 41; Also see Jackson (1988), *supra* note 41; Jackson (1990), *supra* note 41; Jackson (1995), *supra* note 41.

³⁶⁹ Van Schooten (2012), *ibid* at 49.

³⁷⁰ See Van Schooten (2012), *ibid*; Van Schooten (2014), *supra* note 41.

³⁷¹ *Ibid*.

³⁷² *Ibid*.

Conclusion

In sum, a critical legal method can be genealogical in its methodological assumptions and archaeological in its methods. It can also be semiotic in understanding the importance of language and communication to the production of legal norms. Such a critical legal method thereby gains the benefits heretofore discussed in the context of Foucault's anthropology of power, including its genealogical methodology and archaeological methods. It also gains from the semiotic tradition Foucault expanded and radicalised. As I keep these methodological orientations in mind and relate them to a critical legal method, I will be better able to analyse the effect of systems and speech acts in law.

Chapter 3: Death and *Nomos*

A definition of death describes more than a human's biological state. It also conveys ideas about what is constituent of *human* life.³⁷³ Bundled in the language around death are ideas of a human's relation to their body, the relation of a body to others, and what it means to cease being a live human.³⁷⁴ Together, these relations may be understood as social in nature, in that they take place in and structure social life, and are not wholly determined by biology.³⁷⁵ Accordingly, ideas conveyed by a definition of death may affect how a person treats a life that has ended or is about to end – an influence that cannot be explained by biology alone.³⁷⁶ A *legal* definition of death can similarly convey ideas about the essence of human life, in the sense it also relies on language to define and communicate a concept, including the relation of a body to a human, to others, and to the State.³⁷⁷ To the extent its definition is taken up by others, a legal definition informs behaviour toward a life that has ended or is about to end.

³⁷³ See Shewmon & Shewmon (2004), *supra* note 1; Veatch (1976), *supra* note 1; Veatch (2005), *supra* note 1.

³⁷⁴ *Ibid*; It can also convey ideas about what it means to be a person, as per Veatch (1976; 2005), in the sense of having a social identity distinctly recognised by others as possessing cultural or legal rights and entitlements. This can overlap with, but is not coterminous, with ideas germane to the life of a human as the species *Homo sapiens*. Put in other words, the loss of personhood can, depending on one's ontological and normative commitments, occur at time separate from the loss of human life. For my purposes, I am interested in the social construction of human life and not personhood as I believe the prevailing legal definition – whole brain death – does not embrace an assessment of personhood. This is not to deny the existence of a long history of debate about the suitability of higher brain death. Rather, I feel this debate is not immediately helpful in my analysis of the legal fiction.

³⁷⁵ *Ibid*; Also see Chiong (2005), *supra* note 33.

³⁷⁶ *Ibid*.

³⁷⁷ See generally Van Schooten (2012), *ibid*; Van Schooten (2014), *supra* note 41; Unger (2015), *supra* note 42.

Understanding how a legal definition conveys ideas is helpful in understanding its effect on post-*mortem* tissue donation. For that reason, the ideas conveyed by a legal definition of death will be propounded and examined. I argue that a legal definition has a unique social effect on post-*mortem* tissue donation. This unique effect arises from the use of legal fiction – often understood as a conceptual device that asserts a legal fact of death that does not reflect biological processes of death.³⁷⁸ In place of reflecting biological processes of death, the legal fiction asserts a reality about death that is serviceable to promoting post-*mortem* organ and tissue donation.³⁷⁹ How the fiction emerges and how its ideas are serviceable to post-*mortem* organ and tissue donation will be explored as both a consequence and operation of language.³⁸⁰

As will be shown, the legal fiction of death is strategically important to a biopolitical style of governance.³⁸¹ I follow Roberto Esposito and Michel Foucault in understanding biopolitics as the exercise of political power over biological life.³⁸² Such power is exercised in a manner that advances the health of a population, including protection against disease and death.³⁸³ I will posit that the legal fiction of death originates as a strategy of biopolitics, which attempts to preserve the health of the population by promoting the incidence of tissue donation. It may achieve this through language that

³⁷⁸ See prior treatments of legal fiction in discussing death with Miller & Truog (2012), *supra* note 25; Also see Shah & Miller (2010), *supra* note 25; Shah et al., (2011), *supra* note 27; Shaw (2014), *supra* note 27; Truog & Miller (2014), *supra* note 25; Truog (2015), *supra* note 25.

³⁷⁹ *Ibid*; Also see Alta Charo, *supra* note 35; Nair-Collins (2013), *supra* note 1.

³⁸⁰ See generally Petroski, *supra* note 39.

³⁸¹ See Esposito (2008), *supra* note 72; Esposito (2015), *supra* note 72; Foucault (2008), *supra* note 72; Also see generally Lemke, *supra* note 72.

³⁸² Esposito (2008), *ibid*; Esposito (2015), *ibid*; Foucault (2008), *ibid*.

³⁸³ *Ibid*.

defines death at a moment when biological matter will be viable for transplant, but is no longer of use to the host patient. It may also accomplish this by focussing therapeutic services on those who are judged to be in actual need. I can then examine the potential effect of this fiction in subsequent chapters.

Legal Definition of Death

Death is not uniformly defined in Canadian law.³⁸⁴ No federal legislation defines death. Provincial and territorial legislation either leave definition up to accepted medical practice (Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Ontario, Quebec, Saskatchewan, and the Yukon), provide no definition of death at all (Nunavut, Quebec), or where legislation does provide a definition the criteria appear to differ with each jurisdiction (Manitoba, New Brunswick, the Northwest Territories, and Prince Edward Island).³⁸⁵

³⁸⁴ By contrast, death is clearly defined in American law. See *Black's Law Dictionary*, 9th ed, *sub verbo* "death" & "brain death". The Black's Law Dictionary defines death as "the ending of life; the cessation of all vital functions and signs". This includes *brain death* defined as: "The bodily condition of showing no response to external stimuli, no spontaneous movements, no breathing, no reflexes, and a flat reading (usu. for a full day) on a machine that measures the brain's electrical activity." A legal definition of brain death arose from American case law dealing with the legality of heart transplants. See e.g., *Tucker v Lower*, No. 2831 (Richmond, Va, L & Eq Ct, May 23, 1972), *People v Flores*, No. 20190 (Sonoma Co Mun Ct Dec 19, 1973), rev'd No. N746-C (Sonoma Co Super Ct July 23, 1974); *People v Lyons*, 15 Crim L Rep 2240 (Alameda Co Super Ct, May 21, 1974). It is also defined in the American *Uniform Determination of Death Act*, which is adopted by most states. The act defines death by both neurological and circulatory criteria, although both are understood to reflect the same legal definition of death as the irreversible cessation of all vital functions and signs.

³⁸⁵ Manitoba defines death in *Vital Statistics Act*, *supra* note 60, s. 2 as "[taking] place at the time at which irreversible cessation of all [a] person's brain function occurs". New Brunswick's Act, *supra* note 25, s. 7 refers to both neurological and "other" criteria, implying death could be determined by circulatory criteria provided it was determined accepted medical practice. Prince Edward Island Act, *supra* note 25, ss. 1 & 11 defines death as brain death and then refers to circulatory criteria as being an acceptable proxy for determining death. Northwest Territories defines death in the Northwest Territories Act, *supra* note 25, ss. 1 & 14 as "includ[ing]" brain death, which would imply that circulatory criteria would be permissible if used in accordance with

Of those jurisdictions that define death, the legal language appears to differ. For example, Prince Edward Island's *Human Tissue Donation Act*, RSPEI 1992, c. H-12.1 defines death as brain death and then refers to circulatory criteria as being an acceptable proxy for determining death.³⁸⁶ While the PEI legislation specifies that legal death is brain death for the purpose of organ and tissue donation, it does not explain what brain death is, leaving it up to accepted medical practice to define.³⁸⁷ Northwest Territories similarly defines death in the *Human Tissue Donation Act*, SNWT 2014, c. 30 as *including* brain death, which would imply that neurological criteria are not the only standard.³⁸⁸ It also leaves death open to be determined by other criteria if used in accordance with accepted medical practice.³⁸⁹ Similarly, New Brunswick's *Human Tissue Gift Act*, SNB 2004, c. H-12.5 refers to both neurological and "other" criteria.³⁹⁰ Neither the Northwest Territories or New Brunswick legislation explain what brain death is, leaving it to be determined by prevailing medical practice.³⁹¹

Manitoba's *Human Tissue Gift Act*, CCSM c. H180 [*Human Tissue Gift Act*] is the only proclaimed legislation that offers a substantial definition of brain death, in the sense

accepted medical practice. Eight jurisdictions (Alberta Act, *supra* note 25, at s. 6, British Columbia Act, *supra* note 25, s. 7, Newfoundland and Labrador Act, *supra* note 25, at s. 9, Nova Scotia Act, *supra* note 25, s. 8; Ontario Act, *supra* note 25, s. 7, Saskatchewan Act, *supra* note 25, s. 8, and the Yukon Act, *supra* note 25, s. 7) define death in legislation governing post-mortem tissue donation according to "accepted medical practice". Neither the Quebec Act, *supra* note 25, or the Nunavut Act, *supra* note 25, define death. Note, that the Nunavut Act is retained from the Northwest Territories.

³⁸⁶ P.E.I. Act, *ibid* at ss. 1 & 11.

³⁸⁷ *Ibid* at s. 1.

³⁸⁸ Northwest Territories Act, *supra* note 25, ss. 1 & 14.

³⁸⁹ *Ibid* at s. 14.

³⁹⁰ New Brunswick, *supra* note 25, s. 7.

³⁹¹ *Ibid* at s. 7; Northwest Territories Act, *supra* note 25, s. 1.

it indicates what is meant by brain death. The *Human Tissue Gift Act* states that post-mortem tissue donation may only take place after brain death “within the meaning of *The Vital Statistics Act*, with circulation still intact”.³⁹² Manitoba’s *The Vital Statistics Act*, CCSM, c. V60 [*Vital Statistics Act*] defines death as, “[taking] place at the time at which irreversible cessation of all [a] person’s brain function occurs”.³⁹³ Accordingly, Manitoba provides in its legislation a legal definition of death that reflects whole brain death, or total brain failure.³⁹⁴ Whole brain death will be explained in greater detail shortly.

Nova Scotia has also passed, although it has not proclaimed, Bill 121, which defines death as “the irreversible cessation of functioning of the organism as a whole as determined by the irreversible loss of the brain’s ability to control and coordinate all the organism’s critical functions.”³⁹⁵ Critical functions are defined in the same section as “respiration and circulation, endocrine and homeostatic regulation and consciousness”.³⁹⁶ If proclaimed, this would be the most comprehensive definition provided by a Canadian jurisdiction. It is similar to the Manitoban definition, in that it also determines death at the moment of total brain failure.

I will be addressing those jurisdictions that provide a legal definition of death in their provincial legislation, including Manitoba’s *Human Tissue Gift Act* and *Vital*

³⁹² Manitoba’s *Human Tissue Gift Act*, *supra* note 25, s. 8.

³⁹³ *Vital Statistics Act*, *supra* note 60, s. 2.

³⁹⁴ See generally US, The President’s Council on Bioethics, *Controversies in the determination of death* (Washington, DC: A White Paper of the President’s Council on Bioethics, 2008) [President’s Council (2008)]; Shah et al., (2011), *supra* note 27; Also see Nereo Zamperetti & Rinaldo Bellomo, “Total brain failure: A new contribution by the President’s Council on Bioethics to the definition of death according to the neurological standard” (2009) 35:7 *Intensive Care Med* 1305.

³⁹⁵ Bill 121, *supra* note 60, s. 2.

³⁹⁶ *Ibid* at s. 2.

Statistics Act, and Nova Scotia's unproclaimed Bill 121.³⁹⁷ The Manitoban and Nova Scotian legislative schemes offer the best material by which to examine how a legal fiction uniquely contributes to consent in the context of organ and tissue donation. Jurisdictions that do not define death or defer to medical professionals for a definition do not rely principally on legal device, specifically fiction, to determine death. Accordingly, the latter jurisdictions are distinct and require separate treatment that I cannot adequately achieve in this thesis.

I will now explain the criteria of death required by Manitoba's and Nova Scotia's legal definition, the irreversible cessation of all vital functions and signs of life represented by total brain function, and their relation to organ and tissue donation. Physiologically, this is understood as the cessation of all neurological activity.³⁹⁸ It can also be determined by cessation of the circulatory and respiratory systems upon which the brain relies.³⁹⁹ Both offer different paths by which tissue may be extracted, including DND and DCD.⁴⁰⁰

Death and Tissue Donation

Circulatory criteria require a body to irreversibly lose capacity for circulatory and respiratory function before death can be determined by a physician.⁴⁰¹ Circulatory and

³⁹⁷ Bill 121, *supra* note 60; Manitoba's *Human Tissue Gift Act*, *supra* note 25; *Vital Statistics Act*, *supra* note 60.

³⁹⁸ See Bill 121, *supra* note 60, s. 2; *Vital Statistics Act*, *supra* note 60, s. 2; Also see Miller & Truog (2012), *supra* note 25; Shah & Miller (2010), *supra* note 25; Shah et al., (2011), *supra* note 27; Shaw (2014), *supra* note 27; Truog (2015), *supra* note 25; Truog & Miller (2014), *supra* note 25.

³⁹⁹ *Ibid.*

⁴⁰⁰ See generally Miller & Truog (2012), *ibid.*

⁴⁰¹ See generally Miller & Truog (2012), *ibid.*; Shah & Miller (2010), *ibid.*; Shah et al., (2011), *ibid.*; Shaw (2014), *ibid.*

respiratory function are considered fundamental to providing cells and tissue with the material constituent to the biological processes necessary for life.⁴⁰² These include a tissue's immune response, cell repair and growth, the production of cellular energy, and stabilising the temperature and acidity of cellular environments.⁴⁰³ If either circulatory or respiratory function cease those processes undergirding life also come to an end, and a state often recognised as death ensues.⁴⁰⁴ Since neurological activity depends so greatly on oxygen and other material availed by circulatory and respiratory systems, the brain cannot survive independent of their function.⁴⁰⁵ In this sense, circulatory criteria may signify the imminent – if not actual – cessation of all neurological activity.⁴⁰⁶ Put in other words, brain death follows the loss of circulatory and respiratory function.

Whole brain criteria require a physician to observe the irreversible loss of neurological activity within the whole brain, including the brain stem.⁴⁰⁷ This is also known

⁴⁰² *Ibid*; Circulatory function includes the movement of blood throughout an organ system comprised of the heart and vessels. Respiratory function involves the body's intake of oxygen and expiration of carbon dioxide as mediated by the act of breathing. Both circulatory and respiratory function coincide, in the sense that as oxygen is taken up by the lungs it enters and perfuses the blood. Oxygenated blood returns to a chamber of the heart that then pumps it through arterial vessels away from the heart and toward tissue. As blood reaches tissue radial from the heart, oxygen and other transported material is deposited with cells and larger aggregates of tissue. Oxygen and the transported material is then used by cells and tissue in the production of biological processes necessary for life. Such processes include a tissue's immune response, cell repair and growth, production of cellular energy, and stabilising the temperature and acidity of cellular environments. Deoxygenated blood is returned to the heart through veins, re-oxygenated and wastes expelled at the pulmonary loop of the lung, and circulatory and respiratory function renew. Circulatory criteria of death entail the cessation of these fundamental biological processes.

⁴⁰³ *Ibid*.

⁴⁰⁴ *Ibid*.

⁴⁰⁵ *Ibid*.

⁴⁰⁶ *Ibid*.

⁴⁰⁷ *Ibid*; Contra Royal Colleges and their Faculties, "Diagnosis of brain death: Statement issued by the honorary secretary of the Conference of Medical Royal Colleges and their Faculties in the United Kingdom on 11 October 1976" (1976) 2 *British Med J* 1187. The requirement of whole brain death may appear to differ from criteria of other jurisdictions. For example, the United

as total brain failure, as the criteria reflect the total collapse or failure of the biological functions necessary for human life.⁴⁰⁸ Whole brain death is understood as corresponding with:

1. The loss of consciousness;
2. The loss of motor, perceptual, or cognitive response to external stimulation, with exception of spinal reflexes; and
3. The loss of neural pathways involved in coordinating or regulating physiological functions that underlie biological systems fundamental to human life, including circulatory and respiratory systems.⁴⁰⁹

Kingdom look exclusively to the loss of activity in the brain stem. It is understood that the brain stem is important to coordinating and regulating important neural pathways, such as circulatory and respiratory systems, and facilitating communication between different regions of the brain and spinal cord. See e.g., Gregory J. Basura, Seth D. Kohler, & Susan E Shore, “Multi-sensory integration in brainstem and auditory cortex” (2012) 1485 *Brain Research* 95; A. Jean, “Brain stem control of swallowing: Neuronal network and cellular mechanisms” (2001) 82:2 *Physiology Rev* 929; S.L. Lightman, K. Todd, & B.J. Everitt, “Ascending noradrenergic projections from the brainstem: Evidence for a major role in the regulation of blood pressure and vasopressin secretion” (1984) 55 *Experimental Brain Research* 145; Dipankar Nandi, Tipu Z. Aziz, Xuguang Liu, & John F. Stein, “Brainstem motor loops in the control of movement” (2002) 17 *Movement Disorder* 22; Josef Parvizi & Antonio Damasio, “Consciousness and the brainstem” (2001) 79:1 *Cognition* 135; Gary J. Schwartz, “Integrative capacity of the caudal brainstem in the control of food intake” (2006) 361:1471 *Philosophical Transactions of The Royal Society* 1275; R. Alberto Travagli, Gerlinda E. Hermann, Kirsteen N. Browning, & Richard C. Rogers, “Brainstem circuits regulating gastric function” (2006) 68 *Annual Rev Physiology* 279. While circulatory and respiratory systems are semi-autonomous it is uncommon for their operation to continue following the loss of the brain stem independent of medical intervention. It is also presumed that the loss of activity in the brain stem corresponds with incapacity for consciousness. The presumption may well be unfounded in light of recent demonstrations of sustained neurological activity in cortical and neuroendocrine regions of the brain; although, it is important to note that neurological activity does not equate with consciousness. However, it is not possible to confirm or reject the presumption in prevailing experimental conditions. See generally President’s Council (2008), *supra* note 394.

⁴⁰⁸ See President’s Council (2008), *ibid*.

⁴⁰⁹ *Ibid*; Also see e.g., Canadian Council for Donation and Transplantation, *Severe Brain Injury to Neurological Determination of Death: A Canadian Forum* (Vancouver, BC: The Canadian Council for Donation and Transplantation, 2003); Sam D. Shemie, Christopher Doig, Bernard Dickens, Paul Byrne, Brian Wheelock, Graeme Rocker, Andrew Baker, T. Peter Seland, Cameron Guest, Dan Cass, Rosella Jefferson, Kimberly Young, & Jeanne Teitelbaum, “Severe brain injury

In this sense, the brain is observed as a vital organ to human life.⁴¹⁰ Its physiological footprint is vast, coordinating and regulating numerous biological processes throughout the body.⁴¹¹ These processes maintain the structural and functional integrity of the human body, ensuring that biological systems operate in concert with each other to service human development and survival.⁴¹² It is also responsible for the cognitions that are believed by some to create conscious experience, a neurological substrate that mediates human interaction with an external environment.⁴¹³ With the irreversible loss of these capacities the human life is considered extinguished.⁴¹⁴

to neurological determination of death: Canadian forum recommendations” (2006) 174:6 CMA J S1 [Shemie et al., (2006)].

⁴¹⁰ See Miller & Truog (2012), *supra* note 25; President’s Council (2008), *ibid*; Shah & Miller (2010), *supra* note 25; Shah et al., (2011), *supra* note 27; Shaw (2014), *supra* note 27; Truog (2015), *supra* note 25; Truog & Miller (2014), *supra* note 25.

⁴¹¹ *Ibid*.

⁴¹² *Ibid*.

⁴¹³ Such a position asserts there is a neurological correlate to consciousness that is effected by some cognitions. The source of consciousness and its relation to the human body is a subject of great and enduring debate. See generally Francis Crick & Christof Koch, “A framework for consciousness” (2003) 6:2 Nature Neuroscience 119; B.I.B. Lindahl, “Consciousness and Biological Evolution” (1997) 187 J Theor Biol 613; William James, “Are we automata?” (1879) 4 Mind 1; William James, “Does ‘consciousness’ exist?” (1904) 1 J Phil Psych Sci Meth 477; Also see Peter Århem & Hans Liljenström, “On the Coevolution of Cognition and Consciousness” (1997) 187 J Theor Biol 601 [Århem & Liljenström]. Århem & Liljenström discuss the co-evolution of cognition and consciousness, connecting their respective development in tandem with increased complexity of the central nervous system. Conscious cognition, distinguished from unconscious cognition, allows for greater adaptability and survival. Unconscious cognition and conscious cognition may both mediate an organism’s interaction with an external environment, existing in parallel. In this sense, cognition is not coterminous with consciousness. As part of their account, consciousness is not solely possessed by the species *homo sapiens*. It can exist in other species as well, including mammals and birds. Such a perspective is consistent with the idea that consciousness and cognition interrelate and act on each other.

⁴¹⁴ See Miller & Truog (2012), *supra* note 25; Shah & Miller (2010), *supra* note 25; Shah et al., (2011), *supra* note 27; Shaw (2014), *supra* note 27; Truog (2015), *supra* note 25; Truog & Miller (2014), *supra* note 25; At minimum, the physician must identify an etiology that could cause brain death; observe deep unresponsive coma with bilateral absence of motor responses, excluding spinal reflexes; observe no brain stem reflexes as defined by absent gag and cough

These are the same capacities that the circulatory criteria of death are believed to reflect.⁴¹⁵ While circulatory and neurological criteria offer two physiological pathways a physician can follow to determine death, the conceptual definition of death that is affirmed by meeting such criteria is shared.⁴¹⁶ That definition can be put more descriptively as: the loss of those integrative biological processes that underlie the emergent properties society recognises as signs of life.⁴¹⁷ Accordingly, the brain and circulatory criteria are the physiological correlates to a broader conceptual definition of what death is thought to be comprised of.⁴¹⁸ While that definition, and the corresponding criteria, have been the subject of academic debate between ethicists and jurists in recent decades, both comprise a legal standard in Manitoba's *Vital Statistics Act* and Nova Scotia's Bill 121.⁴¹⁹

The definition of death is important to post-mortem tissue donation. As stated before, DDR prohibits the extraction of vital tissue from a donor until the fact of death is determined.⁴²⁰ Bill 121 would allow for organ and tissue donation once death is determined according to:

reflexes and the bilateral absence of corneal responses, pupillary responses to light with pupils at mid-size or greater, and vestibulo-ocular responses; observe no respiration through an apnea test; and identify no confounding factors that may cause a patient to appear brain dead. If these clinical tests can be shown, then whole brain death is identified.

⁴¹⁵ See President's Council (2008), *supra* note 394; Also see Law Reform Commission of Canada, *Criteria for the Determination of Death* (Ottawa, ON: Law Reform Commission of Canada, 1981) [Canada Law Reform Commission]; Law Reform Commission of Manitoba, *Report on a Statutory Definition of Death* (Winnipeg, MB: Law Reform Commission of Manitoba, 1974) [Manitoba Law Reform Commission].

⁴¹⁶ See Truog (2015), *supra* note 25.

⁴¹⁷ See Miller & Truog (2012), *supra* note 25; President's Council (2008), *supra* note 394; Shah & Miller (2010), *supra* note 25; Shah et al., (2011), *supra* note 27; Truog (2015), *ibid*; Truog & Miller (2014), *supra* note 25.

⁴¹⁸ *Ibid*.

⁴¹⁹ See Bill 121, *supra* note 60, s. 2; *Vital Statistics Act*, *supra* note 60, s. 2.

⁴²⁰ See Downie et al., (2009), *supra* note 25.

1. Neurological criteria – known as donation after neurological death or DND; or
2. Circulatory criteria, if the patient has profound neurological injury or disease that renders them without consciousness and limited neural activity but does not satisfy neurological criteria of death – known as donation after circulatory death or DCD.⁴²¹

Manitoba only allows organ and tissue donation after neurological criteria are satisfied.⁴²² DND has been regularly practiced since tissue transplants became possible in the mid-twentieth century.⁴²³ Comparatively, DCD is a recent procedure.⁴²⁴ DCD is ordinarily carried out in situations where a physician has issued a *do-not-resuscitate* (DNR) order.⁴²⁵ The DNR order may be made in response to a patient's advanced directive or from a substitute decision-maker's request that a physician not attempt to revive them.⁴²⁶ Through a DNR, circulatory criteria can be controlled to the benefit of organ donation.⁴²⁷ DCD emerged as a practicable alternative to DND due to the advent of *pre-transplantation optimising interventions* or POI.⁴²⁸

⁴²¹ Bill 121, *supra* note 60, ss. 2 & 11; Also see generally Miller & Truog (2012), *supra* note 25; President's Council (2008), *supra* note 394; Shah & Miller (2010), *supra* note 25; Shah et al., (2011), *supra* note 27; Truog (2015), *supra* note 25; Truog & Miller (2014), *supra* note 25.

⁴²² See Manitoba's *Human Tissue Gift Act*, *supra* note 25, s. 8.

⁴²³ See Miller & Truog (2012), *supra* note 25; President's Council (2008), *supra* note 394; Shah & Miller (2010), *supra* note 25; Shah et al., (2011), *supra* note 27; Truog (2015), *supra* note 25; Truog & Miller (2014), *supra* note 25.

⁴²⁴ *Ibid.*

⁴²⁵ See Miller & Truog (2012), *ibid.*

⁴²⁶ *Ibid.*

⁴²⁷ *Ibid.*

⁴²⁸ *Ibid.*

In the past, tissue from those who died according to circulatory criteria was rarely viable; however, POI enabled physicians to preserve tissue viability until it was necessary to procure the tissue for donation.⁴²⁹ With POI, physicians may wait for asystole, the absence of cardiac contraction, after withdrawing or withholding life-sustaining treatment ideally in accordance with a DNR.⁴³⁰ The practice varies, but physicians generally wait between 3 – 12 minutes after diastole (relaxation of the heart) to determine whether asystole has taken place.⁴³¹ If the heart does not spontaneously enter systole within that period, physicians insert a shunt that severs the brain from the circulatory and respiratory systems, replace the patient's blood with artificial fluid, and induce systole.⁴³² The artificial fluid perfuses the body sustaining the circulatory system.⁴³³ By consequence, the ordinary functions of organs and other human tissue are preserved for an extended period.⁴³⁴ Without POI most instances of DCD would not be possible, and DND also benefits from having POI.⁴³⁵ POI is only addressed in Nova Scotia's Bill 121; however, it is generally occurring.⁴³⁶

⁴²⁹ See Miller & Truog (2012), *ibid*; Shah & Miller (2010), *supra* note 25; Shah et al. (2011), *supra* note 27; Truog (2015), *supra* note 25; Truog & Miller (2014), *supra* note 25; Veatch (2005), *supra* note 1; Veatch (2015), *supra* note 25; Also see generally Baker & Hargreaves, *supra* note 17.

⁴³⁰ See Miller & Truog (2012), *ibid*.

⁴³¹ *Ibid*.

⁴³² *Ibid*.

⁴³³ *Ibid*.

⁴³⁴ *Ibid*.

⁴³⁵ See Jocelyn Downie, Chantelle Rajotte, & Alison Shea "Pre-mortem transplantation optimising interventions: The legal status of consent" (2008) 55:7 Can J Anesth 458.

⁴³⁶ *Ibid*; Also see Sam D. Shemie, Heather Ross, Joe Pagliarello, Andrew J. Baker, Paul D. Greig, Tracy Brand, Sandra Cockfield, Shaf Keshavjee, Peter Nickerson, Vivek Rao, Cameron Guest, Kimberly Young, & Christopher Doig, "Organ donor management in Canada: Recommendations

Legal Fiction

Despite the legal standards established in Manitoba's and Nova Scotia's legislation, the definition applied in their respective laws does not reflect all accounts of death.⁴³⁷ A group of ethicists and jurists have critiqued the standard as treating death as a fact to be determined upon a certain event.⁴³⁸ Physiological criteria provide a checklist that confirms a category change from a living person to a dead entity.⁴³⁹ The category change is sudden, taking place immediately on a determination of circulatory or neurological criteria; but, this binary distinction between life and death runs afoul with accounts that focus on the systems that make up the human body to explain death.⁴⁴⁰ For these accounts, death is a process that spans a longer period than the legal definition would imply.⁴⁴¹ That process of senescence, or cellular ageing, begins at inception and proceeds along human development until the systems of the human body can no longer sustain the vitality of its cells.⁴⁴²

Franklin Miller and Robert Truog, for example, argue that death as biological process culminates in intercellular collapse, in which cells, tissues, organs, and the

of the forum on Medical Management to Optimize Donor Organ Potential" (2006) 176:6 CMA J s13; Miller & Truog (2012), *supra* note 25.

⁴³⁷ See Chiong (2005), *supra* note 33; Miller & Truog (2012), *ibid*; Nair-Collins (2013), *supra* note 1; Shah & Miller (2010), *supra* note 25; Shah et al. (2011), *supra* note 27; Shaw (2010), *supra* note 33; Shaw (2014), *supra* note 25; Truog (2015), *supra* note 25; Truog & Miller (2014), *supra* note 25; Veatch (2005), *supra* note 1; Veatch (2015), *supra* note 25; Contra Bernat (1992), *supra* note 33; Bernat (1998), *supra* note 33; Bernat et al. (1981), *supra* note 33; Khushf, *supra* note 33.

⁴³⁸ See Chiong (2005), *ibid*; Miller & Truog (2012), *ibid*; Nair-Collins (2013), *ibid*; Shah & Miller (2010), *ibid*; Shah et al. (2011), *ibid*; Shaw (2010), *ibid*; Shaw (2014), *ibid*; Truog (2015), *ibid*; Truog & Miller (2014), *ibid*; Veatch (2005), *ibid*; Veatch (2015), *ibid*.

⁴³⁹ *Ibid*.

⁴⁴⁰ *Ibid*.

⁴⁴¹ *Ibid*.

⁴⁴² *Ibid*.

organism collectively fail to maintain the integrated functioning of the body.⁴⁴³ This process is known as homeostasis – the process of stabilising environments internal to an organism in the face of external disturbance.⁴⁴⁴ A stabilised internal environment allows for appetitive molecular behaviours that are collectively responsible for the emergent properties of a living organism.⁴⁴⁵ These include an organism’s responsiveness to external environments generally and, in the case of the human species, underpin the genesis of complex cognition and behaviour.⁴⁴⁶

Homeostasis is characterised by a complex set of processes at the level of the cell, tissue, organ, and organism in response to external conditions.⁴⁴⁷ Each response stabilises the internal environment relative to the external environment to ensure the molecular machinations of life may take place optimally.⁴⁴⁸ However, its intercommunicative bulwark is not impenetrable.⁴⁴⁹ Disease represents the sustained assault of homeostasis, bringing disorder to the organism’s internal environment by impairing its regulatory processes.⁴⁵⁰ Similarly, ageing is the gradual enervation of the body’s capacity to stabilise its internal environment.⁴⁵¹ Eventually, whether the assailant is ageing alone or enjoined

⁴⁴³ See Miller & Truog (2012), *ibid.*

⁴⁴⁴ *Ibid.*; Truog & Miller (2014), *supra* note 25; Shewmon (1998), *supra* note 34; Shewmon (2001), *supra* note 34; Also see generally Walter B. Cannon, *The Wisdom of the Body* (New York: W. W. Norton & Company, 1932); William R. Clark, *A means to an end: The biological basis of aging and death* (New York: Oxford University Press, 2002) [Clark].

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Ibid.*

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*

⁴⁵¹ *Ibid.*

by disease, the body is unable to withstand their destabilising forces.⁴⁵² Without a stabilised internal environment, the organism begins to mirror conditions external to it and is no longer capable of the emergent properties of life.⁴⁵³ By consequence, biological death results as the internal environment irreversibly fuses with the external environment.⁴⁵⁴

Jacquelyn Shaw goes further by crowning mitochondria as the determinative property of life and, consequently, death.⁴⁵⁵ Mitochondria are organelles found in cells responsible for a suite of activities vital to an organism's wellbeing.⁴⁵⁶ Notable activities include cellular respiration and cell death.⁴⁵⁷ Cellular respiration is the production of energy that fuels molecular processes that underlie the emergent properties of life, including homeostasis.⁴⁵⁸ Through a series of pathways, mitochondria pump charged particles across its outer membrane.⁴⁵⁹ As the particles cross the outer membrane, a reaction takes place, and energy is captured in molecules called adenosine triphosphate (ATP).⁴⁶⁰ Without mitochondria storing energy in ATP, most cellular activity would arrest bringing an end to cells', tissues', organs', and the entire organism's ability to engage in appetitive

⁴⁵² *Ibid.*

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*

⁴⁵⁵ Shaw (2014), *supra* note 25.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ *Ibid.*; also see generally Clark, *supra* note 444; Nick Lane, *Power, sex, suicide: Mitochondria and the meaning of life* (New York: Oxford University Press, 2005); Erwin Schrödinger, *What is life? And other scientific essays* (Garden City, NY: Doubleday & Company, 1956); Douglas C. Wallace, "A mitochondrial paradigm of metabolic and degenerative diseases, aging, and cancer: A dawn for revolutionary medicine" (2005) 39 *Annual Rev Genetics* 359.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.*

molecular behaviours.⁴⁶¹ This includes homeostasis, whose intercommunicative and regulatory functions are costly and, as discussed above, fundamental to stabilising an organism's internal environment relative to its external environment.⁴⁶² This also includes cell growth, repair, and reproduction, which counteracts the disintegrating force of entropy; whole-body movement necessary for many adaptive, higher-order behaviours; and neural activity.⁴⁶³

Mitochondria are also involved in cell death or apoptosis.⁴⁶⁴ Apoptosis is both internally and externally mediated.⁴⁶⁵ External apoptosis involves a specific molecule, known as a necrotic factor, attaching to receptors on the cell's external membrane.⁴⁶⁶ The necrotic factor initiates a series of molecular reactions that ultimately result in the cell's destruction.⁴⁶⁷ In some cases, the molecular pathway uses mitochondria.⁴⁶⁸ Internal or mitochondria-determined apoptosis occurs as a result of changes in the cell's internal environment by a manifold of cellular stresses.⁴⁶⁹ Mitochondria respond by undergoing structural changes that release signals into the cell's internal environment.⁴⁷⁰ These signals

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid.*

⁴⁶³ *Ibid.*

⁴⁶⁴ *Ibid.*; Also see David R. McIlwain, Thorsten Berger, & Tak W. Mak "Caspase Functions in Cell Death and Disease" (2013) Cold Spring Harbor Perspectives in Biology, online: <<http://cshperspectives.cshlp.org/content/5/4/a008656.full.pdf>>; Stephen W. G. Tait & Douglas R. Green, "Mitochondrial Regulation of Cell Death" (2013) Cold Spring Harbor Perspectives in Biology, online: <<http://cshperspectives.cshlp.org/content/5/9/a008706.full.pdf>>.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*

⁴⁷⁰ *Ibid.*

deactivate agents responsible for suppressing self-degradative behaviour and, consequently, assist in the cell's death.⁴⁷¹

Given the importance of mitochondria to these and other physiological functions, Shaw argued mitochondrial activity was determinative of life and death.⁴⁷² It would not be possible to imagine the integrative functions of cells, tissues, organs, and the organism as a whole – those functions underlying the emergent properties of life – without mitochondria.⁴⁷³ This bears resemblances to the argument of Miller and Truog, in that it locates the definitional properties of life in the operations of the body. These operations exist prior to or independent of circulatory and neurological systems.⁴⁷⁴ In this sense, these processes are not reliant upon the brain or circulatory system for their propagation.⁴⁷⁵

These somatic or embodied accounts of death find resonance with empirical studies. For example, Alan Shewmon recounts cases in which homeostasis and other cellular processes were present in patients, despite being functionally decapitated.⁴⁷⁶ Furthermore, while the heart's circulatory functions (i.e., oxygenation and exchange of materials) are important to homeostasis and other cellular processes, its functions can be and are regularly supplanted by alternate, artificial means.⁴⁷⁷ These support the arguments that neurological criteria, and to some extent circulatory criteria, do not equate with the

⁴⁷¹ *Ibid.*

⁴⁷² Shaw (2014), *ibid.*

⁴⁷³ *Ibid.*

⁴⁷⁴ See Miller & Truog (2012), *supra* note 25; Shaw, *ibid.*; Shewmon (1998), *supra* note 34; Shewmon (2001), *supra* note 34.

⁴⁷⁵ *Ibid.*

⁴⁷⁶ See e.g., Shewmon (1998), *ibid.*

⁴⁷⁷ See Miller & Truog (2012), *ibid.*

biological process of death.⁴⁷⁸ Instead, the legal definition of death appears to rely on criteria that disregard the factual reality of dying.

Miller and Truog suggest neurological and circulatory criteria were selected as criteria for post-*mortem* organ and tissue donation on the basis of social or policy positions.⁴⁷⁹ This appears to be borne out in the major committee reports issued on the definition. Miller, Truog, and Shah show that a minority of the President's Council on Bioethics acknowledge the epistemic discrepancy between biological, and neurological and circulatory death, and agree that the definition of neurological death was a response to social issues.⁴⁸⁰ Similarly, the Harvard Ad Hoc Committee responded explicitly to the interpretive needs of a community that could not fathom organ donation without a nexus to death.⁴⁸¹

Accordingly, Miller, Truog, and Shah have called the criteria legal fictions.⁴⁸² As legal fictions, there exists a discrepancy between the biological process of death and its legal analogue; i.e., a person may be treated as dead in a legal sense despite being biologically alive in some other sense.⁴⁸³ Instead of reflecting the biological reality of

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Ibid*; Shah & Miller (2010), *supra* note 25; Shah et al. (2011), *supra* note 27; Truog (1997), *supra* note 1; Truog (2015), *supra* note 25; Truog & Miller (2014), *supra* note 25.

⁴⁸⁰ *Ibid*; Also see e.g., President's Council (2008), *supra* note 394.

⁴⁸¹ See Miller & Truog (2012), *ibid*; Shah & Miller (2010), *ibid*; Shah et al. (2011), *ibid*; Truog (2007), *ibid*; Truog (2015), *ibid*; Truog & Miller (2014), *ibid*; Also see e.g., Ad Hoc Committee, *supra* note 26.

⁴⁸² See Miller & Truog (2012), *ibid*; Shah & Miller (2010), *ibid*; Shah et al. (2011), *ibid*; Truog (1997), *ibid*; Truog (2015), *ibid*; Truog & Miller (2014), *ibid*; Also see Alta Charo, *supra* note 35; Chiong (2005), *supra* note 33; Nair-Collins (2013), *supra* note 1; Veatch (2005), *supra* note 1; Veatch (2015), *supra* note 25.

⁴⁸³ See Miller & Truog (2012), *ibid*; Shah & Miller (2010), *ibid*; Shah et al. (2011), *ibid*; Truog (2015), *ibid*; Truog & Miller (2014), *ibid*.

death, the criteria are legal constructs, or devices, wielded to reach desired ends in the social programmes related to death.⁴⁸⁴ Miller, Truog, and Shah have categorised legal fictions in death according to the function they serve; i.e., the anticipatory fiction of circulatory criteria, by drawing a line within the process of dying in anticipation of death, or the category fiction of neurological criteria, because it treats a biologically viable patient as dead.⁴⁸⁵

Nomos and Fiction

The somatic critique recounted above addresses fiction as the mere consequence of factual inaccuracy.⁴⁸⁶ This is consistent with Fuller and Vaihinger, who defined legal fictions as false propositions of fact used to obtain certain legal outcomes.⁴⁸⁷ Fuller and Vaihinger separately argued that fictions operate by constructing reality in a way that may deviate significantly from what may truly exist.⁴⁸⁸ This constructed reality serves as a shorthand that compresses complex processes into simple concepts.⁴⁸⁹ By dispensing with detail, necessarily complicated processes may be addressed by legal discourse with ease, obtaining certainty and consistency where it may not otherwise be found.⁴⁹⁰ Fictions may also be used to extend law's application to new contexts, create entities that are not

⁴⁸⁴ *Ibid.*

⁴⁸⁵ *Ibid.*

⁴⁸⁶ *Ibid.*

⁴⁸⁷ See Fuller (1967), *supra* note 38; Vaihinger, *supra* note 38.

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *Ibid.*

otherwise reflected in the world, circumscribe categories with clear legal characteristics or outcomes, or otherwise guide legal decision-making uniformly.⁴⁹¹

Accordingly, a fiction of death simplifies through inaccuracy.⁴⁹² It treats a (potentially, biologically) viable body as dead under uniform, identifiable conditions – e.g., circulatory and neurological criteria.⁴⁹³ The fictive criteria dispense with the uncertainty entailed by the biological process of death, circumscribing precise legal characteristics that denote a legal fact of death.⁴⁹⁴ The criteria have also adapted the legal concept of death to novel circumstances arising from medical advancements.⁴⁹⁵ By consequence, Miller, Truog, and Shah conclude the fiction serves as a tool used to accomplish certain goals, which include the motivation to preserve and promote the practice of post-*mortem* organ and tissue donation.⁴⁹⁶

However, describing fiction merely as the consequence of factual inaccuracy ignores how law is used to construct patterns of social life.⁴⁹⁷ Laws, even those considered fictions, express ideas.⁴⁹⁸ These ideas are communicated to and received by others.⁴⁹⁹ To the extent the ideas are understood and are considered meaningful, law then informs and

⁴⁹¹ *Ibid.*

⁴⁹² See Miller & Truog (2012), *supra* note 25; Shah & Miller (2010), *supra* note 25.; Shah et al. (2011), *supra* note 27.; Truog (2015), *supra* note 25.; Truog & Miller (2014), *supra* note 25.

⁴⁹³ *Ibid.*

⁴⁹⁴ *Ibid.*

⁴⁹⁵ *Ibid.*

⁴⁹⁶ *Ibid.*

⁴⁹⁷ See generally Petroski, *supra* note 39.

⁴⁹⁸ See generally Van Schooten (2012), *ibid*; Van Schooten (2014), *supra* note 41; Unger (2015), *supra* note 42.

⁴⁹⁹ *Ibid.*

patterns behaviour, structuring social life.⁵⁰⁰ A fiction may similarly convey ideas capable of patterning social life; but one way of distinguishing fiction from non-fictional law is the nature of how those ideas are conveyed and understood.⁵⁰¹

A law or a set of laws can become fictive where:

1. its ideas are expressed (**expressed meaning**) by an author for unstated motivations or, where motivations are stated, for motivations that differ from those that are provided (**underlying motivations**);
2. the **expressed meaning** is intended to be understood in a manner that brings about an outcome consistent with the **underlying motivations**, without exposing those motivations;
3. its expressed ideas, but not its underlying motivations, are understood by the interpreter and pattern behaviour (**understood meaning**); and

⁵⁰⁰ *Ibid*; Also see Cover (1983), *supra* note 51; Cover (1986), *supra* note 42. In asserting a vision of social life, law necessarily dispossesses competing visions of society, bringing about their atrophy. Typically, as Cover described, law's capacity to do this is often buttressed by the threat of force. Apparatuses of the State loom over law's subjects as an omnipresent threat, a fearsome sovereign surveying its jurisdiction for defiant acts it can classify and punish as illegal or criminal. As law's narrative becomes integrated with the interpreter's understanding – an understanding that is informed by normative values shared with others in a given community, known as *nomos* – the State can rely less on force to structure social life; although, the threat never fully dissipates. On the other hand, legal fictions may not depend on the threat of force to the same degree. Fictions may undermine competing visions of social life by quietly appealing to understanding informed by the interpreter's *nomos*. As it is taken up concealed narrative is consistent with the unstated motivations underlying the creation of law, inducing an outcome that seems almost normal or expected. This will be explored in greater detail in the context of systems theory in Chapter 5.

⁵⁰¹ See Fuller (1967), *supra* note 38. Although, my semiotic reconstruction of fiction is consistent with Petroski, *supra* note 39. Fuller was sensitive to the relationship of a legal fiction to cultural society; however, this is largely forgotten in applications of the concept to the definition of death.

4. the difference in **understood meaning** and **underlying motivations** is the result of a misrepresentation.⁵⁰²

The easiest fiction to identify is a law that deliberately misrepresents the purpose behind its expressed meaning.⁵⁰³ Put in other words, unstated motivation directs the author to express a set of ideas with the intention of bringing about an outcome consistent with that motivation. It intends to deceive an interpreter through subterfuge, like the Trojan horse in myth.⁵⁰⁴ In that myth, the Greeks constructed a wooden structure that conveyed the likeness of a horse.⁵⁰⁵ The city of Troy believed they were victorious against a Greek

⁵⁰² To understand the *nomos* of a legal fiction it is important to examine how its message is understood by the subjects who interpret its meaning. While the intended meaning and motivations need to be considered to identify the presence of a fiction, the *nomos* conveyed by the fiction cannot be understood from the author's motivations alone. The *nomos* structures social life to the extent it is taken up and understood by an interpreter.

⁵⁰³ See Fuller (1967), *supra* note 38. Note that Fuller suggested the use of fiction must intend to be known to its audience, making a distinction between lies and fictions. False propositions are *mere lies*, and not legal fictions, when used with the intention to deceive; although, he is satisfied that a legal fiction may have the unintended consequence of deceit. The use of legal fiction may also coincide with a broader program intended to deceive, as long as the fiction's use is not intended to create belief in the veracity of the fiction's construction. But, where a fiction is associated with programmes of deceit, its association may warrant critique of its quality as a legal device. He does not explain why this is a meaningful distinction, but by taking together his essays on legal fictions with his later writing on natural law, it is possible this was caused by an implicit belief that mere false statements violate a necessary condition or norm of law, i.e., transparency, thus invalidating its status as a legitimate legal device. As I do not believe that there are any necessary, normative conditions in defining law, as Fuller's natural law would suggest, I do not find this distinction meaningful. See e.g., Lon Fuller, "Positivism and Fidelity to Law – A reply to Professor Hart" (1958) 71:4 Harvard L R 630; Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1969); Also see generally Kristen Rundle, *Forms liberate: Reclaiming the jurisprudence of Lon L. Fuller* (Portland, OR: Hart Publishing, 2012).

⁵⁰⁴ See generally Thomas G. Chondros, Kypros Milidonis, Stefanos Paipetis, & Cesare Rossi, "The Trojan Horse reconstruction" (2015) 90 Mechanism & Machine Theo 261 [Chondros]; Also see e.g., of its use as a metaphor in biology Guillaume Collet, Catherine Grillon, Mahdi Nadim, & Claudine Kieda, "Trojan horse at cellular level for tumor gene therapies" (2013) 525:2 Gene 208.

⁵⁰⁵ See Chondros, *ibid.*

siege, and opened their gates to retrieve the supposed horse as a trophy of war.⁵⁰⁶ Unbeknownst to the Trojans, the Greeks had combative motivations and hid a small force of soldiers inside the structure.⁵⁰⁷ Once safely inside, the soldiers climbed out of the structure and felled the city of Troy.⁵⁰⁸ In the sense of a legal fiction, the horse conveyed a set of ideas that structured the social behaviour of Trojans. It informed their behaviour in that it brought about an outcome consistent with the Greeks' motivations, but not reflective of what was expressly communicated.

Alternatively, the author may not recognise the unstated motivations, unknowingly producing a Trojan horse that induces misunderstanding. In this alternate construction, the Greeks and Trojans are not actively at war. The Greeks construct a wooden structure at the direction of Poseidon. The structure also bears the likeness of a horse. Again, but this time at Poseidon's direction, the Greeks present it as a gift to the city of Troy. But Poseidon's counsel was not benevolent – his instructions to the Greeks were subterfuge as he hid a small force of mercenaries inside. The Trojans open their gates and accept the supposed horse, but once inside the mercenaries escape from its underbelly and fell the city of Troy. The Greeks, unaware of the consequence of their action, later come to discover and benefit from the collapse of Troy, innocently claiming the city as their own. In the sense of a legal fiction, the misrepresentation is unintentional on the part of the authors themselves, and instead arises from the unstated motivations of an external influence to the author.⁵⁰⁹ In

⁵⁰⁶ *Ibid.*

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Ibid.*

⁵⁰⁹ See Fuller (1967), *supra* note 38. Fuller may have classified this as a mistake and not as a fiction; however, the temptation to classify an unintentional fictive representation as a mistake would eliminate the conceptual potential of legal fictions. There are many circumstances in which the motivations are not deliberately sought, but implicitly carried out by the habits or customs

either case, the fictive properties are identifiable by those who interrogate the underlying motivations and identify the misunderstanding caused.

A legal example is found in Jeremy Bentham, who described how the rule of law was conveyed in 19th century England.⁵¹⁰ Law and its surrounding institutions conveyed a narrative that imparted ideas about the status of juristic activity.⁵¹¹ That narrative suggested the common law was unchanging and that judges merely distilled and applied law through the exercise of judicious reasoning.⁵¹² The narrative subtracted the judge from having any creative role in the application of law.⁵¹³ In this way, the nature of law was represented to the public in a manner that insulated judicial opinion from challenge, except by fellow jurists conversant in legal logic.⁵¹⁴ Bentham critiqued law and its institutions as a fiction, identifying that the common law was actually a body of customary rules vulnerable to the ephemeral interests of judges.⁵¹⁵ As mere custom, the common law could not be inherently right as its narrative claimed.⁵¹⁶ Law was capable of aberration that could be repudiated and reformed, preferably by codifying desired and useful laws in statutes.⁵¹⁷ However, for

sedimented in the cultural institutions of a society. To the extent these cultural institutions impart values, and to the extent these values are taken up by the social actors, there are patent motivations even if those motivations are not consciously brandished by the immediately acting social actors. This is what the metaphor of Poseidon is intended to capture. To merely classify this as a mistake or error, would ignore the possibility that concepts may be unintentionally deceiving.

⁵¹⁰ See Bentham, *supra* note 41; Also see Quinn, *supra* note 41.

⁵¹¹ *Ibid.*

⁵¹² *Ibid.*

⁵¹³ *Ibid.*

⁵¹⁴ *Ibid.*

⁵¹⁵ *Ibid.* It lacked what he thought were essential criteria of law: clarity, determinacy, authority, and content.

⁵¹⁶ *Ibid.*

⁵¹⁷ *Ibid.*

as long as the narrative captured the minds of the public it would suppress any will to reform.⁵¹⁸ The legal system would thus be preserved.⁵¹⁹

A legal fiction of death similarly conveys a narrative that structures social life. That narrative is expressed, like most law, through language.⁵²⁰ Both the patient and physician then assimilate the narrative into their understanding, against a background of cultural and normative values.⁵²¹ The fiction informs, in the broadest sense of the word, behaviour and attitudes adopted at the end of life, which cannot be accounted for by a definition of fiction availed by Fuller and Vaihinger. Seeing fiction as merely the subtraction of information, deliberately done to accomplish instrumental goals, cannot offer a meaningful account for its productive effect on behaviour.⁵²² By understanding a legal fiction of death as an operation of language, I am in a better position to understand how these fictive criteria are produced, what they represent to those who will interpret them, and their potential effects on social life. This is a semiotic analysis of legal fiction.

A semiotic analysis also resists the conceptual trappings of the somatic critique. The somatic critique reaffirms the conceptual definition of death, while it disputes the legal criteria that determine death.⁵²³ It understands death as a biological process and legal criteria that do not reflect its processable nature are accordingly fictive.⁵²⁴ I concede and will explain how circulatory and neurological criteria are fictive; but defining a fiction by

⁵¹⁸ *Ibid.*

⁵¹⁹ *Ibid.*

⁵²⁰ See Shewmon & Shewmon (2004), *supra* note 1.

⁵²¹ See generally Van Schooten (2012), *ibid*; Van Schooten (2014), *supra* note 41.

⁵²² See Petroski, *supra* note 39.

⁵²³ See Shewmon & Shewmon (2004), *supra* note 1; Also see Veatch (2005), *supra* note 1.

⁵²⁴ See generally Miller & Truog (2012), *supra* note 25.

its degree of comportment to a biological account of death disregards how people come to understand death. As Veatch, Shewmon and Shewmon, Nair-Collins, and Chiong all assert, people define death according to normative values, cultural understanding, and experience.⁵²⁵ Legal criteria may result from the confluence of these values, understandings, or experiences held as important to that society.⁵²⁶ The events that criteria are characterised as reflecting are thereby meaningful in a social sense.⁵²⁷ These events take place along a continuum of a biological process of death, but there are stages of biological decline that correspond with the loss of functions that are meaningful to a society's understanding.⁵²⁸ A somatic critique loses sight of this sociality by insisting on biological abstraction.⁵²⁹ This is an error the semiotic analysis can deftly avoid.⁵³⁰

Fiction of Death

The somatic critique was useful in illustrating that the legal definition of death and its corresponding criteria may not accurately describe all realities of dying.⁵³¹ The somaticists were also correct in describing it as a fiction, especially one that services the

⁵²⁵ Alta Charo, *supra* note 35; Chiong (2005), *supra* note 33; Nair-Collins (2013), *supra* note 1; Shewmon & Shewmon (2004), *supra* note 1; Veatch (1976), *supra* note 1; Veatch (2005), *supra* note 1; Veatch (2015), *supra* note 25.

⁵²⁶ *Ibid.*

⁵²⁷ *Ibid.*

⁵²⁸ See Shewmon & Shewmon (2004), *ibid.*

⁵²⁹ *Ibid.*

⁵³⁰ *Ibid.*

⁵³¹ See e.g., Miller & Truog (2012), *supra* note 25; Shah & Miller (2010), *supra* note 25.; Shah et al. (2011), *supra* note 27; Shaw (2014), *supra* note 27; Shewmon (1998), *supra* note 34; Shewmon (2001), *supra* note 34; Truog (2015), *supra* note 25.; Truog & Miller (2014), *supra* note 25.

practice of organ and tissue donation.⁵³² However, as stated above, the somaticists principally characterised fiction as the absence of information. This disregards the role of law in structuring social life.⁵³³ The legal definition of death is indeed a fiction, but it is not a fiction because it is informationally deficient. It is a fiction because of the deceit involved in communicating to legal subjects – the misrepresentations used to induce them to act in particular ways.⁵³⁴

The legal fiction conveys ideas about a human's relation to their body, to others, and when those relations cease.⁵³⁵ Like any law, those ideas form part of a narrative that gives structure to and animates social life.⁵³⁶ What is fictive to this definition is that the authors' motivations are not known by the legal subjects, yet the definition was chosen on the basis of those motivations.⁵³⁷ Accordingly, when these subjects interpret what death is they are unaware of these motivations and may be induced to act contrary to how they would act if properly acquainted with the definition's basis. Law and bioethics commission reports show that the motivations and interests sought by legislative authors, or at least those directing legislative actors, are to promote the health of the population.⁵³⁸ As will be

⁵³² See e.g., Miller & Truog (2012), *ibid*; Shah & Miller (2010), *ibid*; Shah et al. (2011), *ibid*; Truog (2015), *ibid*; Truog & Miller (2014), *ibid*.

⁵³³ See Petroski, *supra* note 39; Also see generally Van Schooten (2012), *ibid*; Van Schooten (2014), *supra* note 41.

⁵³⁴ See Fuller (1967), *supra* note 38; Also see Nair-Collins (2013), *supra* note 1.

⁵³⁵ See generally Veatch (2015), *supra* note 25.

⁵³⁶ See Van Schooten (2012), *ibid*; Van Schooten (2014), *supra* note 41.

⁵³⁷ See Fuller (1967), *supra* note 38.

⁵³⁸ See Ad Hoc Committee, *supra* note 26; Canada Law Reform Commission, *supra* note 415; Manitoba Law Reform Commission, *supra* note 415; President's Council (2008), *supra* note 394.

explained later, these motivations and interests are informed by a system of biopolitics, or a biopolity.

Before I turn to the motivations underlying the legal fiction of death, and how these may affect the understanding of others, I wish to demonstrate that the legal fiction arose as a consequence of language. The legal fiction arose in part because the English language is insufficient at communicating about circumstances surrounding death.⁵³⁹ Understanding how the fiction is a consequence of language will better enable my analysis of how it is also an operation of language. Then I will describe those motivations in full.

i. Consequence of Language

The English language, especially the word *death*, lacks the specificity needed to communicate about the end of life.⁵⁴⁰ Whereas death was a comparatively simple concept to apply in the past, medical interventions have radically altered the experience of dying.⁵⁴¹

For example:

1. death is now determined by both circulatory **and** neurological criteria;
2. patients may undergo neurological decline or suffer profound neurological injury, causing them to appear dead;
3. circulatory or respiratory arrest may be reversed with medical intervention;

⁵³⁹ See Shewmon & Shewmon (2004), *supra* note 1.

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Ibid.*

4. patients who are supposedly dead are able to donate *viable* hearts and other vital tissue for transplant into other bodies, because biological processes may be sustained artificially; and
5. relatedly, there are physical processes that operate independently of the heart or brain fundamental to the viability of human tissue.⁵⁴²

These and other concepts may be expressed by or relate to the use of the word *death*.⁵⁴³ Accordingly, Shewmon and Shewmon suggest that *death* is no longer tasked with communicating just one experience; instead, it can express a plurality of experiences.⁵⁴⁴ Put in other words, there may be one biological state of death; but, the experiences of dying have changed significantly as technological capacities have altered the therapeutic capacities at the end of life.⁵⁴⁵ Without deliberation, *death* is descriptively overburdened, expressing a panoply of meaning that could potentiate multiple interpretations.⁵⁴⁶

Shewmon and Shewmon insist this lag in language is understandable given medicine's short history with end-of-life care.⁵⁴⁷ Cultures that frequently and enduringly interact with a specific property generally have numerous terms available in their language to describe the property accurately.⁵⁴⁸ For example, Inuit peoples may have fifty-two words

⁵⁴² *Ibid.*

⁵⁴³ *Ibid.* These are not experiences of *death* as a biological state, *per se*. There remains only one biological state of *death* notwithstanding changes in medical capacities. However, the enumerated examples may reflect different experiences of *dying* that were not generally possible to experience prior to medical advances.

⁵⁴⁴ *Ibid.*

⁵⁴⁵ *Ibid.*

⁵⁴⁶ *Ibid.*

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Ibid.*

in the Inuktitut language that describe or otherwise refer to some property of snow.⁵⁴⁹ These words draw detailed and subtle distinctions between types of snow that allows the Inuktitut language to communicate with clarity.⁵⁵⁰ Anthropologists attribute such an abundant cache of words to the Inuit peoples' cultural experiences and needs in the Arctic, which is intricately bound to activities involving snow.⁵⁵¹ By analogy, Shewmon and Shewmon believe the English language will eventually offer more than one word to describe the end of life, reflecting a medical culture's sustained involvement in the experiences of dying persons.⁵⁵²

In the meantime, the absence of specificity prevents a legal definition from accurately portraying experiences at the end of life.⁵⁵³ The law stipulates that death is measured by the irreversible loss of neurological or circulatory activity, without further explanation as to what that entails. As legal authors have not publicly declared their motivations for coming to the legal definition, a physician and patient may misinterpret what the definition conveys, coming to understanding based on other presuppositions they may hold. To put it in semiotic terms, the signal transduction is imprecise cuing an interpretation of death that may not identify all relevant details.⁵⁵⁴ It may then cause behaviour that would otherwise not be entered into if the message was properly

⁵⁴⁹ *Ibid*; Also see John L. Steckley, *White Lies About the Inuit* (Toronto, ON: University of Toronto Press, 2007).

⁵⁵⁰ *Ibid*.

⁵⁵¹ *Ibid*.

⁵⁵² Shewmon & Shewmon (2004), *ibid*.

⁵⁵³ *Ibid*.

⁵⁵⁴ See Van Schooten (2012), *supra* note 41; Van Schooten (2014), *supra* note 41.

understood.⁵⁵⁵ Accordingly, the physician or patient may come to believe the definition encapsulates all that death could possibly entail, without realising it may not entirely coincide with such an interpretation. The misinterpretation may induce behaviour, such as post-*mortem* organ and tissue donation, from a physician and patient under a mistaken understanding of what is meant by the definition in the context. Put in other words, post-*mortem* donation may take place under conditions that would not otherwise be acceptable to the patient.

In some circumstances a difference in interpretation may just represent an error, or a difference in understanding attributable to culture that did not originate for the purpose of the fiction. In these circumstances the absence of specificity may allow for, or at least ease, the use of a legal fiction. As stated above, a legal fiction can entail a misrepresentation that informs the behaviour of an interpreter.⁵⁵⁶ The absence of specificity *exaptively* benefits the misrepresentation, in that the absence of specificity originally arose for reasons unrelated to the fiction but were nonetheless instrumentally useful.⁵⁵⁷ For example, in my representation of the Trojan myth, the Trojans, for whatever reason myth provides, could not detect the difference between the wooden structure and a real horse. There was an absence of specificity in this sense. The Greeks exploited this to exact the outcome they were motivated to achieve – e.g., the fall of Troy – which went unstated by the Greeks who appeared to have surrendered.

⁵⁵⁵ *Ibid.*

⁵⁵⁶ See Fuller (1967), *supra* note 38.

⁵⁵⁷ See Gould & Lewontin (1979), *supra* note 70; Gould & Vrba (1982), *supra* note 70.

Just like the Trojan horse, the absence of specificity in the language around death can be exploited in a predictable manner to induce a desired action. It may attenuate the capacity of legal subjects to detect false signals, allowing authors to conceal their motivations to steer behaviour.⁵⁵⁸ A legal subject less discerning of the signals they rely on may interpret and respond to the word *death* and authorise certain post-*mortem* behaviour without full appreciation of what is taking place.⁵⁵⁹ By contrast, steering effects of a fictive definition would diminish if the language around death were more complex, or if deliberation about death was made more available.⁵⁶⁰ If the Trojans were able to detect the horse's ligneous composition, the Greeks would suffer greater impediments to exacting their subterfuge.

Accordingly, post-*mortem* behaviour (e.g., DND, DCD, or POI) may be authorised by a patient without full knowledge of the conditions entailed by being post-*mortem*. This effect will be examined in greater detail in a later chapter, once I expand on the models of communication between law and other social systems. For the time being, it is sufficient to know that a fiction of death may proceed from a culture that provides little linguistic material to understand dying.⁵⁶¹ The English language only provides coarse signals that, due to imprecision, are likely to be taken up by an interpreting subject in a manner consistent with their cultural experience.⁵⁶² Since little conversation is had about death, lay understandings of death may generally reflect experiences of death prior to the

⁵⁵⁸ See Nair-Collins (2013), *supra* note 1.

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*

⁵⁶¹ See Shewmon & Shewmon (2004), *supra* note 1.

⁵⁶² *Ibid.*; Also see Nair-Collins (2013), *supra* note 1; Van Schooten (2012), *supra* note 41; Van Schooten (2014), *supra* note 41.

technological shift society is presently undergoing.⁵⁶³ Fictions use this coarse signal to misrepresent a message to a legal subject, while exploiting its interpretive noise to conceal the motivations for defining death as they have. What those motivations are will now be addressed.

ii. Operation of Language

Prior accounts have said the legal fiction of death emerged to meet challenges caused by post-*mortem* organ and tissue donation.⁵⁶⁴ Miller, Truog, and Shah have argued that neurological criteria preserved post-*mortem* organ and tissue donation despite the capacity to sustain circulatory and respiratory systems in the absence of an operating brain.⁵⁶⁵ Without neurological criteria, these patients would not satisfy a circulatory definition of death causing significant ethical qualms related to DDR.⁵⁶⁶ Relatedly, they attribute the emergence of DCD, and the POI used to maximise the success of transplants gained by circulatory criteria, to a fiction principally interested in increasing the availability and viability of donated organs.⁵⁶⁷ These evaluations are shared by Nair-Collins and Chiong, who similarly believe neurological and circulatory criteria emerge from interests in promoting organ and tissue donation.⁵⁶⁸ Assuming more linguistic descriptions of

⁵⁶³ See Nair-Collins (2013), *ibid*; Shewmon & Shewmon (2004), *ibid*.

⁵⁶⁴ e.g., Miller & Truog (2012), *supra* note 25; Shah & Miller (2010), *supra* note 25.; Shah et al. (2011), *supra* note 27; Shaw (2014), *supra* note 27; Shewmon (1998), *supra* note 34; Shewmon (2001), *supra* note 34; Truog (2015), *supra* note 25.; Truog & Miller (2014), *supra* note 25; Also see Veatch (2005), *supra* note 1; Veatch (2015), *supra* note 25.

⁵⁶⁵ Miller & Truog (2012), *ibid*; Shah & Miller (2010), *ibid*; Shah et al. (2011), *ibid*; Truog (2015), *ibid*.; Truog & Miller (2014), *ibid*.

⁵⁶⁶ *Ibid*.

⁵⁶⁷ *Ibid*.

⁵⁶⁸ Chiong (2005), *supra* note 33; Nair-Collins (2013), *supra* note 1.

fictions, Nair-Collins and Chiong see the fiction as a means to suppress challenge to the ethics surrounding DND, DCD, and more liberal applications of POI.⁵⁶⁹ The fiction is used in the place of deliberation over the conditions of dying and under which donation will take place, because opportunities to reflect on those conditions may allow for objections to post-*mortem* donation from patients or a wider public.⁵⁷⁰

I agree with these accounts functionally, in the sense that a legal fiction is used to establish conditions that promote organ and tissue donation. As I will show shortly, reports from the Canadian Law Reform Commission, Manitoba Law Reform Commission, the Harvard Ad Hoc Committee, and President's Council each demonstrate neurological criteria were helpful in preserving the ethical practice of post-*mortem* tissue donation.⁵⁷¹ The President's Council also shows that circulatory criteria in DCD are applied in a manner that promotes the availability of viable tissue, especially when applied in combination with POI.⁵⁷² In this sense, neurological and circulatory criteria service objectives related to transplant medicine. However, tissue donation is not the sole motivation; instead, it forms part of set of related motivations that promote the health of the population generally. Each set of legal authors demonstrate a *nomos* that privileges the object of preserving health by defining the boundaries of life and death. That *nomos* takes futurity as its *grundnorm* and gives shape to the determination of death – specifically futurity informs it in a manner that advances a biopolitical strategy of preserving health.

⁵⁶⁹ *Ibid.*

⁵⁷⁰ *Ibid.*

⁵⁷¹ Ad Hoc Committee, *supra* note 26; Canada Law Reform Commission, *supra* note 415; Manitoba Law Reform Commission, *supra* note 415; President's Council (2008), *supra* note 394.

⁵⁷² President's Council (2008), *ibid.*

Futility is defined as something “incapable of producing any result; ineffective; useless; not successful”.⁵⁷³ In this sense, I believe that what I identify is a judgement of what is no longer effective, successful, or useful in preserving human life. However, as Sarah Winch and Ian Kerridge describe, futility is conceptually fraught in bioethical discourse.⁵⁷⁴ Most critically, Eleanor Milligan identifies futility as a culturally informed concept.⁵⁷⁵ The cultural content of futility is largely determined by the values, medical knowledge, and biological data possessed by the physician who make use of the concept.⁵⁷⁶ To the extent that a determination of futility is considered binding on others, it may thereby buttress the physician’s exercise of power over medical decision-making by granting it ethical clout.⁵⁷⁷ Futility is thereby a socially contingent value vulnerable to physicians’ abuse of power.

To countervail against the power of physicians, Milligan proposes that patients should have greater involvement in the moral deliberation of medical decision-making, allowing for their subjective experience to be inserted into evaluations of futility.⁵⁷⁸ Alternatively, Grant Gillett proposes that futility may be salvaged by fleshing out what he takes to be its constituent parts: (1) physiological futility, a judgement corresponding to a

⁵⁷³ See *Dictionary.com Unabridged*, *sub verbo* “futile”.

⁵⁷⁴ Sarah Winch & Ian Kerridge, “No Chance, No Value, or No Way: Reassessing the Futility in Health Care and Bioethics” (2011) 8:2 *J Bioethical Inquiry* 121 [Winch & Kerridge]; Also see Allan S. Brett & Robert D. Truog, “Beyond Futility to an Ethic of Care” (1995) 99 *Am J Med* 443 [Brett & Truog (1995)]; Robert D. Truog Allan S. Brett, & Joel Frader, “The Problem with Futility” (1992) 326:23 *New Eng J Med* 1560 [Truog et al., (1992)].

⁵⁷⁵ *Ibid*; Also see Eleanor Milligan, “Same Coin-Different Sides? Futility and Patient Refusal of Treatment” (2011) 8:2 *J Bioethical Inquiry* 141 [Milligan].

⁵⁷⁶ *Ibid*.

⁵⁷⁷ *Ibid*.

⁵⁷⁸ *Ibid*.

prevailing biological understanding of what has utility; (2) substantial benefit, considering the perspective of the patient as to what is contextually helpful; and (3) an assessment of risk for outcomes that are unacceptably bad to the patient and physician.⁵⁷⁹ The latter categories, substantial benefit and assessment of risk, are oriented toward guarding the patient against the possibility of a physician's abuse.⁵⁸⁰ For some, such as Kenneth Mitchell, Ian Kerridge, and Terence Lovat, futility should be open to public values to reach some socio-political consensus where patients cannot be involved in decision-making.⁵⁸¹

I find that in the context of determining death, legal authors are largely inserting values of physiological futility into the language around death. Since patients are dead or imminently dead when the process of determining death is undertaken, it is not possible for the patient to be involved in evaluations of futility, as Milligan, Kerridge, and others would recommend. For that reason, I can largely elude those aspects of futility that invite the greatest rebukes and focus principally on observations relating to physiological futility. That, of course, is not to deny that biological judgements may be value laden. In fact, as I will later explain, I believe judgements of futility, at least to the extent they are used to define death, relate to a cultural system of biopolitics.

⁵⁷⁹ Grant Gillett, "Minimally Conscious States, Deep Brain Stimulation, and What is Worse than Futility" (2011) 8:2 J Bioethical Inquiry 145 [Gillett (2011)].

⁵⁸⁰ *Ibid*; Also see Stephen Honeybul, Grant R. Gillett, & Kwok Ho, "Futility in Neurosurgery: A Patient-Centered Approach" (2013) 73:6 Neurosurgery 917 [Honeybul et al., (2013)].

⁵⁸¹ See Kenneth R. Mitchell, Ian H. Kerridge, & Terence J. Lovat, "Medical futility, treatment withdrawal and the persistent vegetative state" (1993) 19:2 J Med Ethics 71 [Mitchell et al., (1993)].

Take the Harvard Ad Hoc Committee as an example. The Harvard Ad Hoc Committee was responsible for creating an ethical standard or definition of death based on neurological criteria.⁵⁸² It stated such a definition was needed because:

- (1) Improvements in resuscitative and supportive measures have led to increased efforts to save those who are desperately injured. Sometimes these efforts have only partial success so that the result is an individual whose heart continues to beat but whose brain is irreversibly damaged. The burden is great on patients who suffer permanent loss of intellect on their families, on the hospitals, and on those in need of hospital beds already occupied by these comatose patients.
- (2) Obsolete criteria for the definition of death can lead to controversy in obtaining organs for transplantation.⁵⁸³

The Committee was convinced the neurological criteria presented the best resolution to both the economic and ethical quandaries raised.⁵⁸⁴ It stated that:

An organ, brain or other, that no longer functions and has no possibility of functioning again is for all practical purposes dead. Our first problem is to determine the characteristics of a permanently nonfunctioning brain.⁵⁸⁵

Neurological criteria reflected the absence of receptivity to an external environment, measured by the absence of consciousness and absence of an innate drive to survive.⁵⁸⁶

More specifically, it entailed the loss of a brain's capacity to govern circulatory and respiratory function, consciousness, movement, and reflexes.⁵⁸⁷ Provided the loss of these

⁵⁸² See Miller & Truog (2012), *supra* note 25; Shah & Miller (2010), *supra* note 25.; Shah et al. (2011), *supra* note 27; Truog (2015), *supra* note 25. Note that Machado et al. (2007), *supra* note 16, show neurological criteria of death were developed prior to transplant medicine and the Ad Hoc Committee, *supra* note 26. This was achieved alongside the development of EEG, applied to patients with profound neurological injury; however, an ethical standard for brain death was not selected until the Ad Hoc Committee. Also see e.g., Mollaret & Goulon, *supra* note 16.

⁵⁸³ Ad Hoc Committee, *ibid* at 337.

⁵⁸⁴ *Ibid* at 337.

⁵⁸⁵ *Ibid* at 337.

⁵⁸⁶ *Ibid* at 337-338.

⁵⁸⁷ *Ibid* at 337-338.

functions could not be explained by any temporary condition, it could be safely determined that the individual patient was no longer alive.⁵⁸⁸ The Committee added:

From ancient times down to the recent past it was clear that, when the respiration and heart stopped, the brain would die in a few minutes; so the obvious criterion of no heart beat as synonymous with dead was sufficiently accurate. In those times the heart was considered to be the central organ of the body; it is not surprising that its failure marked the onset of death. This is no longer valid when modern resuscitative and supportive measures are used. These improved activities can now restore 'life' as judged by the ancient standards of persistent respiration and continuing heart beat. This can be the case even when there is not the remotest possibility of an individual recovering consciousness following massive brain damage. In other situations 'life' can be maintained only by means of artificial respiration and electrical stimulation of the heart beat, or in temporarily by-passing the heart, or, in conjunction with these things, reducing with cold the body's oxygen requirement.⁵⁸⁹

It appears that, in selecting brain death the Committee is making a judgement of futility. The irreversible loss of brain function showed the individual was no longer capable of life, in the sense of having the receptivity, responsiveness, and other cognitive capacities necessary to qualify as a living human. While life could be preserved by a physician through all reasonable and available means, extraordinary measures should stop once it was apparent those capacities for life could not be restored.⁵⁹⁰ Neurological criteria best reflected this demarcation of what was futile, in that the condition reflected a point at which biological life could not be resuscitated. Brain death would then indicate an acceptable time to procure viable organs and tissue for transplant, and avoid the economic and psychological burden of continual care. In this sense, what appears to be judged as futile is

⁵⁸⁸ *Ibid* at 338.

⁵⁸⁹ *Ibid* at 441.

⁵⁹⁰ *Ibid* at 441.

not the *person* dying, but rather the effort to preserve the *human* life.⁵⁹¹ The judgement is informed by the remoteness of therapeutic success – in terms of reversing a fatal condition – based on an understanding of the relationship of the body to human life.

Promotion of tissue donation and evaluations of futility are also discussed in a report from the President's Council. First, the Council acknowledges that a patient whose circulatory and respiratory function is maintained by artificial means, and whose death is determined according to neurological criteria, is often the best candidate for tissue donation.⁵⁹² Life-sustaining treatment preserves the viability of the tissue, despite total brain failure, maintaining the quality of the tissue procured for transplant.⁵⁹³ If tissue donation takes place in other contexts, tissue must endure a period in which it is deprived of blood and oxygen.⁵⁹⁴ This period of deprivation, known as warm ischemia, can cause damage to the tissue to be donated impinging its success in a future transplant.⁵⁹⁵ The Council acknowledges that this fact was not disregarded by prior authors of the legal definition.⁵⁹⁶ The Council concludes that death was defined accordingly in part because of the clarity and improvements it would provide tissue donation; although, a minority felt the neurological standard was largely driven by the desire to procure more organs.⁵⁹⁷ Other

⁵⁹¹ Although, it is possible that ideas about personhood and human life may interact, it does not appear from the report, Ad Hoc Committee, *ibid*, that the Ad Hoc Committee was concerned with the subject of personhood.

⁵⁹² See President's Council (2008), *supra* note 394, at 8.

⁵⁹³ *Ibid* at 8-9.

⁵⁹⁴ *Ibid* at 8-9.

⁵⁹⁵ *Ibid* at 8-9.

⁵⁹⁶ *Ibid* at 8-10

⁵⁹⁷ *Ibid* at 9. A report released by the Task Force on Death and Dying of the Institute of Society, Ethics and Life Sciences appraised the neurological standard shortly after the Ad Hoc Committee, *supra* note 26, published their recommendations. The Task Force confirmed neurological criteria

factors included economic burdens on hospitals, psychological and social effects on family or healthcare providers, and the socially-determined ideas of what constituted human life.⁵⁹⁸

Second, like the Ad Hoc Committee, the Council proposes a legal definition of death that may also be governed by evaluations of futility.⁵⁹⁹ The definition, in the sense of the irreversible loss of those vital functions underlying the organism as a whole, refers to a person's capacity to *commerce* with their environment. Commerce involves:

- (1) Openness to the world, that is, receptivity to stimuli and signals from the surrounding environment.
- (2) The ability to act upon the world to obtain selectively what it needs.
- (3) The basic felt need that drives the organism to act as it must, to obtain what it needs and what its openness reveals to be available.⁶⁰⁰

This involves consciousness, capacities to instrumentally interact with an external environment independently or with the assistance of another, breathe, eat, and other appetitive behaviours that sustain their survival.⁶⁰¹ When a patient is no longer able to commerce spontaneously with an external environment by consequence of total brain failure, the signs of life are considered gone, an evaluation that leads to a determination of death.⁶⁰² This appears to mirror a judgement of futility to the extent that the irreversible loss of these capacities cannot be corrected by medical treatment:

did factor into the increased availability of tissue for donation, but that it was not the sole objective. The Council appears to adopt this position with exception of some of the authors.

⁵⁹⁸ *Ibid* at 5-9.

⁵⁹⁹ *Ibid* at 91.

⁶⁰⁰ *Ibid* at 61.

⁶⁰¹ *Ibid* at 61-65

⁶⁰² *Ibid* at 61-65.

If there are no signs of consciousness and if spontaneous breathing is absent and if the best clinical judgment is that these neurophysiological facts cannot be reversed, [this position] would lead us to conclude that a once-living patient has now died.⁶⁰³

For the Council this was motivated by:

Strong moral convictions about what is at stake in the debate: The bodies of deceased patients should not be ventilated and maintained as if they were still living human beings. The respect owed to the newly dead demands that such interventions be withdrawn. Their families should be spared unnecessary anguish over purported ‘options’ for treatment.⁶⁰⁴

Its reliance on futility is not as explicit as an alternate position offered by the President’s Council. For them, futility of medical treatment is one of the principal criteria by which a determination of death should occur. The Council stated:

[A]nother view of the neurological standard was also voiced within the Council. According to this view, there can be no certainty about the vital status of patients with total brain failure; hence, the only prudent and defensible conclusion is that such patients are severely injured – but not yet dead – human beings. Therefore, only the traditional signs – irreversible cessation of heart and lung function – should be used to declare a patient dead. Also, according to this view, medical interventions for patients with total brain failure should be withdrawn only after they have been judged to be futile, in the sense of medically ineffective and non-beneficial to the patient and disproportionately burdensome. Such a judgment must be made on ethical grounds that consider the whole situation of the particular patient and not merely the biological facts of the patient’s condition. Once such a judgment has been made, interventions can be and should be withdrawn so that the natural course of the patient’s injury can reach its inevitable terminus.⁶⁰⁵

Turning to Canadian applications, the Canadian Law Reform Commission also invokes futility as a *grundnorm* in the determination of death. In proposing a federal legislative definition, the Commission stated legislation would needed to provide clarity, be applied equally in all circumstances where the determination of death was at issue, and

⁶⁰³ *Ibid* at 64.

⁶⁰⁴ *Ibid* at 58.

⁶⁰⁵ *Ibid* at 91.

reflect standards and criteria generally accepted by the Canadian public.⁶⁰⁶ The latter would require a legislative definition to accord with the popular concept that “death is the death of an individual person, not of an organ or cells.”⁶⁰⁷ Lastly, it stated the criteria should not be determined only or mainly in relation to the practice of tissue donation, although this did not exclude the possibility of it being a factor.⁶⁰⁸ For the Commission, death equated with the “total disappearance of all brain functions [as] equivalent to the death of the person”.⁶⁰⁹

The Commission was deliberate in determining death according to the irreversible loss of brain *functions* and not *activities*.⁶¹⁰ According to the Commission, it was not possible to monitor and relate neural activity to the physiological or cognitive processes underlying consciousness with any degree of accuracy.⁶¹¹ Neural activity could not meaningfully indicate the possibility of the patient recovering consciousness.⁶¹² To use *activities* as the principal object of assessment would frustrate the clarity sought by the definition.⁶¹³ The absence of clarity could prevent a physician from making an effective

⁶⁰⁶ Canada Law Reform Commission, *supra* note 415, at 3, 10-11. The definition proposed, which is consistent with the definitions practiced in Canada today, requires: (1) A person is dead when an irreversible cessation of all that person’s brain functions has occurred; (2) the cessation of brain functions can be determined by the prolonged absence of spontaneous cardiac and respiratory functions; and (3) when the determination of the absence of cardiac and respiratory functions is made impossible by the use of artificial means of support, the cessation of the brain functions may be determined by any means recognised by the ordinary standards of current medical practice.

⁶⁰⁷ *Ibid* at 12.

⁶⁰⁸ *Ibid* at 12.

⁶⁰⁹ *Ibid* at 10.

⁶¹⁰ *Ibid* at 16.

⁶¹¹ *Ibid* at 17.

⁶¹² *Ibid* at 17.

⁶¹³ *Ibid* at 17.

determination by undermining their confidence or ability.⁶¹⁴ *Functions* were a clearer concept that were observable and open to circumscription begetting the determination process.⁶¹⁵ As the the Commission stated:

[The Commission] did not wish to prevent diagnosis of death, only because there could still exist some of these measurable ‘activities’ that are not symptoms of real ‘function’. [...] The presence of residual electrical activities in the brain stem would not prevent a person from being declared dead if these activities bear no relation to brain functions.⁶¹⁶

Death thereby occurs once brain functions are irreversibly lost, including consciousness, and the circulatory and respiratory functions necessary for sustaining brain function have also ceased irreversibly.

The Commission was also satisfied that the loss of brain function corresponded with the loss of what was commonly recognised as the constituent properties of life.⁶¹⁷ Although the term is not used, the Commission is mindful of a person’s capacity to commerce with an external environment.⁶¹⁸ The irreversible loss of brain functions represents the loss of that capacity, corresponding with what the medical profession and the public come to understand as indicative of death.⁶¹⁹

Combined these factors demonstrate the Commission’s effort to avoid frustrating the diagnostic efforts of the physician once it is apparent the body can no longer participate in life.⁶²⁰ Once the body can no longer spontaneously support itself, or artificial

⁶¹⁴ *Ibid* at 17.

⁶¹⁵ *Ibid* at 17.

⁶¹⁶ *Ibid* at 17.

⁶¹⁷ *Ibid* at 19-20.

⁶¹⁸ *Ibid* at 19-20.

⁶¹⁹ *Ibid* at 19-20.

⁶²⁰ *Ibid* at 20.

interventions cannot maintain a person's capacity to commerce with an external world, a determination of death will follow.⁶²¹ This reflects an evaluation of futility, a determination of when it is no longer considered effective to attempt to preserve the life of the patient. It underlies all the Commission's decisions about the suitability of neurological and circulatory criteria as a measure of legal death.

The Manitoba Law Reform Commission is more explicit in its reference to futility as the value advanced by legal definition of death. The Commission stated:

The need for a definition [includes] [a]voidance of the undue prolongation of engagement of hospital personnel and equipment in the maintenance of heartbeat respiration after death has occurred.⁶²²

Later in their report the Commission states the pressure to "keep functioning whatever of the patient's systems and organs" is no more laudable than actively depriving life.⁶²³ While cases of profoundly comatose patients recovering years later fortify a physician's caution in diagnosing death:

Patients in a state of brain death produce much mental trauma to their families, cost enormous sums of care, occupy beds and equipment which could be used for other living patients, and make excessive physical and and psychological demands on all medical staff.⁶²⁴

The Commission was also satisfied that futility, expressed in a legal definition of death, would balance physicians' opposing interests in preserving life of patients affected by injury or disease, and in procuring viable tissue for transplant.⁶²⁵ The Commission did not

⁶²¹ *Ibid* at 20.

⁶²² Manitoba Law Reform Commission, *supra* note 415, at 11.

⁶²³ *Ibid* at 15.

⁶²⁴ *Ibid* at 16.

⁶²⁵ *Ibid* at 15-16.

accept that organ and tissue transplants could legitimate the early deprivation of life.⁶²⁶ That would require change to the legal concept of homicide.⁶²⁷ Accordingly, a legal definition had to protect a patient's life from deprivation by the actions of another.⁶²⁸ However, a legal definition could simultaneously benefit tissue donation.⁶²⁹ Since medical interventions had a protractive effect on the "continuum of dying", a legal definition would establish clarity as to when organs or tissue could be procured for transplant purposes.⁶³⁰ If appropriately timed, it would guarantee that human organs and tissue was viable for transplant, which would benefit the life preserving efforts sought by transplant medicine.⁶³¹ Meanwhile, it would authorise physicians to act to preserve the life of patients whose conditions had not yet rendered their life futile.⁶³²

Each set of authors also refers to the irreversible loss of spontaneous circulatory and respiratory function as an approximation of total brain failure.⁶³³ Given the brain's dependence on a ready supply of oxygen, circulatory and respiratory function it strongly indicates the presence of brain function.⁶³⁴ In this sense, circulatory and respiratory function provide alternate criteria by which the futility of a life can be evaluated; but, circulatory criteria in the context of DCD also demonstrate how that evaluation of futility

⁶²⁶ *Ibid* at 15-16.

⁶²⁷ *Ibid* at 14.

⁶²⁸ *Ibid* at 13-15.

⁶²⁹ *Ibid* at 13-15.

⁶³⁰ *Ibid* at 13-15.

⁶³¹ *Ibid* at 13-15.

⁶³² *Ibid* at 15-16.

⁶³³ See Ad Hoc Committee, *supra* note 26; Canada Law Reform Commission, *supra* note 415; Manitoba Law Reform Commission, *supra* note 415; President's Council (2008), *supra* note 394.

⁶³⁴ *Ibid*.

can be used to promote tissue donation.⁶³⁵ The President's Council, referred to above, acknowledge that the requirement of irreversibility under a legal definition of death may not actually be irreversible in the ordinary sense.⁶³⁶ Put differently, the circulatory criteria have been flexibly applied in DCD to legitimate post-mortem donation.⁶³⁷ As stated above, DCD depend on the irreversible loss of circulatory and respiratory function; however, the success of a heart transplant, for example, depends on the reversibility of its circulatory function.⁶³⁸ Accordingly, the success of the transplant procedure depends on the capacity of the tissue to function.⁶³⁹

This is circumvented by requiring tissue to be incapable of spontaneous function, in the sense that the tissue no longer has the natural capacity to carry out its biological functions without external assistance.⁶⁴⁰ This is ordinarily tested by withholding life-sustaining treatment and confirming the absence of spontaneous circulatory recovery once a specified period of time has passed without a heartbeat.⁶⁴¹ DCD is thereby compatible with the legal definition of death if its requirement of irreversibility is qualified in this manner.⁶⁴² However, some physicians begin POI after waiting for less time than is recommended by accepted medical practice.⁶⁴³ It is thought that beginning POI early

⁶³⁵ See President's Council (2008), *ibid*.

⁶³⁶ *Ibid* at 21.

⁶³⁷ *Ibid* at 83-87.

⁶³⁸ *Ibid* at 83-87.

⁶³⁹ *Ibid* at 83-87.

⁶⁴⁰ *Ibid* at 21.

⁶⁴¹ *Ibid* at 83-87.

⁶⁴² *Ibid* at 87.

⁶⁴³ *Ibid* at 85-86; Miller & Truog (2012), *supra* note 25; Shah & Miller (2010), *supra* note 25; Shah et al. (2011), *supra* note 27. POI also form part of the context surrounding the use of a legal fiction of death. Legislation is silent on the acceptability of POI in all but Nova Scotia, allowing such

promotes the viability of organs, by intervening before the body is deprived of oxygen for too long.⁶⁴⁴ Physicians put organs at risk of harm by delaying, which may frustrate the success of transplant procedures that follow.⁶⁴⁵ Accordingly, the flexible application of circulatory criteria is able to promote organ and tissue donation.⁶⁴⁶

iii. Biopolitics and Language

Together these documents show that the legal fiction of death expresses a narrative of futility that informs physicians and others to abandon efforts to preserve the life of the patient.⁶⁴⁷ Futility is understood in these documents as the absence of reversibility, or the inevitable loss of human life. This appears to include a patient's capacity to commerce with an external environment, including their consciousness, circulatory, respiratory, and endocrine systems.⁶⁴⁸ Death results when external supports cannot reverse total brain failure, which extinguishes one's capacity to commerce with the world; or, in the context of DCD, when it is assumed no spontaneous recovery will be achieved.⁶⁴⁹ However, what is left unstated by the fiction, and yet revealed by study of the authors' motivations, is that futility is not only a *grundnorm* to be taken up by the social life of legal subjects. Futility also services the object of promoting tissue donation and the conservation of resources for

procedures to take place in an unfettered manner. These procedures, as stated above, are used in the context of DCD or DND as a means of promoting the sustained viability of the tissue.

⁶⁴⁴ *Ibid.*

⁶⁴⁵ *Ibid.*

⁶⁴⁶ *Ibid.*

⁶⁴⁷ See Winch & Kerridge, *supra* note. 574.

⁶⁴⁸ See Ad Hoc Committee, *supra* note 26; Canada Law Reform Commission, *supra* note 415; Manitoba Law Reform Commission, *supra* note 415; President's Council (2008), *supra* note 394.

⁶⁴⁹ *Ibid.*

other medical programmes. Both reflect a *nomos* of biopolitics, or biopolitical discourse, which is a style of governance that strives for the preservation of life, and avoidance of death, at the level of the population.⁶⁵⁰

Foucault traced the emergence of a biopolitical discourse to a historically-determined tendency in modern society to subject human capacities to scientific methods.⁶⁵¹ Scientific methods allowed for the quantification of human capacities, promoting their comparison and regulation.⁶⁵² These capacities then became subject to the construction of norms based on statistical observation.⁶⁵³ Disease and illness, in this way, became objectified indices by which the health of the patient could be judged, and treatment could be justified to correct for deviations from these norms of health.⁶⁵⁴ Its application has historically harmed those dispossessed in society by legitimating State action that caused their discipline or, at its extreme, eradication.⁶⁵⁵ For example, Foucault looked to the development of the modern clinic and psychiatric asylum as the historical conditions that elevated a physician's power to discipline bodies.⁶⁵⁶ Those classified as deviants and feeble-minded by medical knowledge were brought into the modern clinic in which their bodies became subject to discipline and control.⁶⁵⁷ The clinic was a physical space designed to amplify biopower over patients whose behaviours endangered society's

⁶⁵⁰ See Esposito (2008), *supra* note 72; Esposito (2015), *supra* note 72; Foucault (2008), *supra* note 72; Also see generally Lemke, *supra* note 72.

⁶⁵¹ Foucault (2008), *ibid.*

⁶⁵² *Ibid.*

⁶⁵³ *Ibid.*

⁶⁵⁴ *Ibid.*

⁶⁵⁵ *Ibid.*

⁶⁵⁶ *Ibid.*; Also see Lemke, *supra* note 72.

⁶⁵⁷ *Ibid.*

norms by expulsing patients from public life, and confining them to an environment amenable to medical methods.⁶⁵⁸ Relatedly, Foucault and Esposito stated that racial hygienic programmes and genocide inflicted by the Nazi Socialist Party reflected the social action of biopolitics.⁶⁵⁹ The extermination camps stripped Jewish, Romani, disabled, homosexual, and others of their political existence in the politico-legal community.⁶⁶⁰ In doing so, the Nazi Socialist Party separated the biological lives of these peoples from their legal status.⁶⁶¹ At its extreme, biopolitics justified the outright extermination for the regime, and evidenced the sovereign's object in controlling life and death, or health and sickness.⁶⁶² Biopolitics could thereby reflect a politics of death, or thanatopolitics, in its effort to preserve life.⁶⁶³

The tension between thanatopolitics and life is put by Esposito who suggested biopolitics is principally premised on the paradigm of immunisation.⁶⁶⁴ The paradigm of immunisation is defined by political and technological acts that contribute to the health of the population by warding off ailment or injury.⁶⁶⁵ Thomas Lemke summarises:

[Esposito] shows, via a reconstruction of political theory since Thomas Hobbes, that the modern concepts of security, property, and freedom can be understood only within a logic of immunity. Characteristic of this logic is an inner connection between life and politics, in which immunity protects and promotes life while also limiting life's expansive and productive power. Central to political action and thinking is the safeguarding and preservation of life. This goal ultimately leads to (self-)destructive results. In other words, to the extent that the logic of immunity secures and preserves

⁶⁵⁸ *Ibid.*

⁶⁵⁹ Esposito (2008), *supra* note 72; Foucault (2008), *ibid*; Also see Lemke, *ibid.*

⁶⁶⁰ *Ibid.*

⁶⁶¹ See Lemke, *ibid.*

⁶⁶² *Ibid.*

⁶⁶³ *Ibid.*

⁶⁶⁴ Esposito (2008), *supra* note 72; Esposito (2015), *supra* note 72.

⁶⁶⁵ Esposito (2015), *ibid.*

life, it also negates the singularity of life processes and reduces them to a biological existence. This “immunity logic” leads from the maintenance of life to a negative form of protecting it and finally to the negation of life.⁶⁶⁶

Racial hygienic programmes and genocide effected by the Nazi Socialist Party thereby represent an extreme of the immunity logic, by which the infliction of death potentiates the advancement of life.⁶⁶⁷ As Esposito put it:

The disease against which the Nazis fight to the death is none other than death itself. What they want to kill in the Jew and in all human types like them isn't life, but the presence in life of death: **a life that is already dead because it is marked hereditarily by an original and irremediable deformation**; the contagion of the German people by a part of life inhabited and oppressed by death [...] In this case, death became both the object and the instrument of the cure, the sickness and its remedy.⁶⁶⁸ [my emphasis]

I will not comment on the wider application of biopolitics to social theory generally; but, the tension between death and life that underlies biopolitical discourse appears to animate the legal fiction of death. It does so by informing a concept of futility, which is used to control the boundaries of life and death. Futility accomplishes this gatekeeping role as an expression of biopower, in the sense it jointly indicates the degree of deviation from a healthy body, and the statistical probability of successful intervention. It determines death by observing an irremediable deviation in the health of the body at an early, recognisable event along a continuum of dying. At this point, the patient only exhibits bare life, in the sense of residual biological capacities. Their political existence, defined by commercial capacities, is altogether extinguished. Viable organs are thereby availed for donation. Medical resources are redirected to those who may advantage from care. It is in this manner

⁶⁶⁶ Lemke, *supra* note 72, at 89-90.

⁶⁶⁷ Esposito (2008), *supra* note 72.

⁶⁶⁸ *Ibid* at 137-138.

the State is fashioned with the material necessary to counter morbidity caused by disease and infection among the population. In effect, the fiction takes a life to give life to others; or, to mangle a Foucauldian phrase, it exerts power to make life by letting others die.⁶⁶⁹

Conclusion

I raise this reconstruction of the fiction to illustrate that the motivations underlying law's expression are not clearly made to the public. The legal fiction exerts an idea of what death is comprised by without full explanation. This could impinge a patient's proper consent to procedures entailed by post-*mortem* tissue donation, including DND, DCD, and POI. If these motivations were known to the public, a patient would be in a better position to deliberate over the ethical components of end-of-life decisions, including their personal directives pertaining to tissue donation. However, before the effect of legal fictions can be accounted for, I must turn to the conditions of physician-patient relationship and a systems theory of law. While understanding the semiotic conditions of a legal fiction will contribute to the analysis of its effect, it alone cannot fully reconstruct the impediment it serves.

⁶⁶⁹ In stating this, I am not rejecting the biological or cultural basis for determining death by neurological or circulatory criteria. There is sound reason biologically and culturally to do this.

Chapter 4: Deliberative Physician-Patient Relationships

Medical law consists of discursive strategies that collectively approximate the deliberative discourse envisioned by Habermas. Individually, the strategies comprising medical law are often in opposition to one another, with each strategy attempting to secure the power interests of a particular class of people. Cumulatively, the strategies point to a community's preferred ideal of egalitarian, participatory communication between a patient and physician. This will be shown with the law of battery, which is constituted by opposing strategies of consent and a physician's duties to preserve life.⁶⁷⁰ These strategies are installed in legal discourse by inserting and balancing them within conceptual frameworks – essentially broader legal strategies – that alter or constrain the strategies in order to unite them and structure our social relations in a preferred way. In this case, the strategies of medical law contribute to the production of a deliberative ideal.

The tort of battery is only applicable to those who are alive.⁶⁷¹ The common law has not treated dead individuals as having legal personalities whose autonomy and bodily integrity can be interfered with.⁶⁷² The common law also considers the physician-patient

⁶⁷⁰ As will be argued, the duty to preserve life is the principal object of medical practice, although it may not be the only object a physician seeks. This of course disregards, for the purpose of this analysis, the potential that a physician may exhibit cultural, racial, or gendered ideologies quite apart from therapy in the course of medical treatment. The insertion of these ideologies into a physician's assessment of best interests may justify actions seemingly apart from therapy itself. While others and I have argued that cultural, racial, or gendered ideologies may be linked up to medical care through a lens of biopolitics, such discussions are not immediately useful for this subject.

⁶⁷¹ See *Leeds Teaching Hospital*, *supra* note 78. As stated before, *Leeds Teaching Hospital* relates to the duty of care owed in the context of negligence. Patients who have died are no longer owed a duty of care, because the therapeutic relationship ended. However, note that the court did find that in the circumstances of a child patient, a duty of care may still be owed to the parents who survive their death. In this case, as part of that continuing duty of care, informed consent needed to come from those parents with respect to the disposition of the dead patients' bodies.

⁶⁷² *Ibid.*

relationship extinguished on the death of the patient, cancelling legal duties ordinarily owed to a patient who is receiving care.⁶⁷³ Accordingly, a discussion of deliberative communication may seem odd in the context of post-*mortem* tissue donation, because tissue is procured after the legal fact of death has been determined.⁶⁷⁴ It is perhaps even more odd since Canadian legislation governing human organ and tissue donation has historically demanded less for consent in post-*mortem* contexts compared to *inter vivos* donation.⁶⁷⁵ Despite this, I believe the strategies comprised by the law of battery can be helpful in understanding and critiquing the effect of legal fictions. While the deliberative narrative may be applicable only to *inter vivos* donation in the current state of law, I will try to indicate why it should apply to post-*mortem* donation given some overlap in the strategies used, and the significance of end-of-life decisions.

To adequately demonstrate how these diverse strategies come together to approximate the deliberative ideal of Habermas' communicative reason, it is useful to apply the critical legal method I set out in Chapter 2. As noted before, these methods are sensitive to the panoply of strategies that arise in medical discourse, including those unintended and contradictory.⁶⁷⁶ Such methods will be applied to judicial decisions that

⁶⁷³ Exceptions apply to confidential information. A patient's death does not extinguish a surviving physician's duty to confidentiality to the patient. That duty is owed to the patient's estate. See e.g., *Petrowski v Petrowski Estate*, 2005 ABQB 909. Provincial privacy statutes have also made it clear that a patient's medical information does not extinguish on a patient's death. Disclosure of that information would correspondingly violate a patient's privacy rights despite their death. See e.g., *Vuong v Toronto East General & Orthopaedic Hospital*, 2010 ONSC 6827; Also see *Personal Health Information Protection*, 2004, SO 2004, c 3, Sched. A, (Ontario), ss. 9(1) & 38(4).

⁶⁷⁴ See Bill 121, *supra* note 60; Manitoba's *Human Tissue Gift Act*, *supra* note 25.

⁶⁷⁵ *Ibid.*

⁶⁷⁶ Although, not necessary to discuss in too great of detail, some of these strategies do not originate from conditions of medical practice. Their origins are in other legal discourses, borrowed and redeployed to give shape to a therapeutic relationship consistent with ideals important to that

constitute the juridico-ethical culture of our common law traditions, parsing the strategies that comprise the tort of battery.⁶⁷⁷ Such an analysis should show how these oft opposing strategies collectively form a deliberative ideal to the therapeutic relationship, thus servicing our subsequent analysis of the effect of legal fiction.

The Therapeutic Contract

In *Marshall*, the Supreme Court of Nova Scotia stated that a physician who failed to obtain consent from a patient committed harm against them – specifically, a tort of battery.⁶⁷⁸ The tort of battery is the direct interference with a person through the application of force.⁶⁷⁹ The trespass must interfere with a person’s control over their self, which may

constitutive community. Sometimes these alien origins produce contradictions, antinomies, or faults that upend or otherwise affect the value of the particular strategy, in the sense their historically informed functions or logics are retained despite their new use in medical discourse. These retained functions or *spandrels*, in the sense of evolutionary theorists Gould & Lewontin, *supra* note 70, are a by-product of the historical conditions that produced the strategies originally, revisited in their contemporary use, potentially affecting how the social actor comes to view or behave in a particular legal situation. Spandrels are not initially selected for any endemic advantage, in the sense their functions did not principally inspire their use in medical contexts, but rather result collaterally from their entwinement with the structures or logics of the legal strategies borrowed from and deployed. However, spandrels may contribute *exaptively* to their new medical contexts, conferring unanticipated functions to medical discourse. For example, in the common law, informed consent retains the logics of proximity, relationality, and foreseeability found in the tort of negligence, affecting the scope and nature of duties owed in a patient-physician relationship. These logics were not the principal motivators for their selection, but accompanied the particular strategies deployed to countervail the power interests opposed, i.e., physicians unilaterally deciding the fates of patients’ bodies. Specifically, the logics of proximity, relationality, and foreseeability delimit the class of people duties are owed to, giving shape to the legal relationships between the patient and physician. Spandrels can thus contribute productively to the installation of legal ideals, parallel to the strategies intentionally used.

⁶⁷⁷ These comments are constrained to strategies used in the juridico-ethical culture of our common law traditions, and should not be carelessly extended to other legal systems.

⁶⁷⁸ *Marshall*, *supra* note 76.

⁶⁷⁹ See *Non-Marine Underwriters, Lloyd’s London v Scalera*, 2000 SCC 24 [*Non-Marine Underwriters*]; Also see *Scott v Shephard* (1772), 96 ER 525 (Eng KB) [*Scott*]; *Leame v Bray* (1803), 102 ER 724 (Eng KB) [*Leame*].

include their body.⁶⁸⁰ In this case, a patient went to his physician for treatment of a hernia, the partial exit of tissue from a cavity in the body in which it ordinarily resides.⁶⁸¹ The patient was anaesthetised and during the course of surgery, the physician determined that removal of the patient's testicle was necessary to the treatment. The testicle was removed. When the effects of anaesthesia subsided, the patient came to discover he was less something potentially important to him. Disappointed with this outcome, the patient brought an action against the physician in the province's superior court.

The patient claimed consent was a necessary part of the therapeutic relationship between physician and patient, and that consent was not given to the exact procedures taken to remedy his hernia.⁶⁸² This either amounted to negligence in the physician's performance, by failing to properly diagnose the condition complained of and to inform the patient of the true nature of the procedure; or it was an assault committed on the patient without his consent.⁶⁸³ The physician claimed removal of the testicle was necessary to the successful treatment of the patient's condition, and that, if consent was required by the court, it was implied by the patient's submission to the physician's therapeutic skill.⁶⁸⁴ Alternatively, it

⁶⁸⁰ See *Non-Marine Underwriters, ibid*; While not important to my discussion here, for the sake of completeness I should acknowledge that the law of battery does not require the tortfeasor cause harm, nor does it require direct physical contact. As stated by the Supreme Court of Canada in *Non-Marine Underwriters* at para. 16, direct interference of a person may be vis-à-vis an object rode by or held by the victim of the tortfeasor such as a horse, a car, or gun; Also see e.g., *Cole v Turner* (1704), 90 ER 958 (Eng KB); *Dodwell v Burford* (1669), 86 ER 703 (Eng KB); *Green v Goddard* (1704), 2 Salk 641 (Eng KB); *Kennedy v Hanes*, [1940] 3 DLR 499 (ONCA); *Sirois v Gustafson*, 2002 SKQB 452.

⁶⁸¹ See *Marshall*, *supra* note 76.

⁶⁸² *Ibid* at 1 & 2.

⁶⁸³ *Ibid* at 1 & 2.

⁶⁸⁴ *Ibid* at 1 & 2; The physician also claimed the patient unreasonably delayed in making the action and was consequently barred by a statute of limitations. The argument is not relevant for our purposes and will not be surveyed here, but the court did not find the action barred.

was claimed that a physician acts as the patient's representative in exceptional cases while a patient is under anaesthesia and incapable of giving consent on their own.⁶⁸⁵ If the alternate argument was accepted by the court, the physician claimed he duly executed his role as the patient's representative in deeming consent to the medically-necessary procedure.⁶⁸⁶ These opposing claims may be characterised as strategies deployed to effect outcomes consistent with the power interests of the patient or the physician.

i. Strategies of Consent

The patient is interested in outcomes that are consistent with his autonomy, the freedom to make choices that accord with his will, and the protection and maintenance of the integrity of his body for that purpose.⁶⁸⁷ In a sense, the patient's power is entailed by his resistance to unwanted interference by the physician. Consent is a strategy by which the patient effects his resistance by identifying conditions of acceptable trespass and, correspondingly, circumscribing what acts are prohibited. The court explains that this resistance is a matter of personal sovereignty or the freedom of the patient to govern his own affairs, comprising his interests in autonomy, liberty, and bodily integrity.⁶⁸⁸ Put in other words, a free person must not be fettered in their ability to govern themselves, especially with respect to decisions affecting their body. The strategy is demonstrated by

⁶⁸⁵ *Ibid* at 6.

⁶⁸⁶ *Ibid*.

⁶⁸⁷ *Ibid* at 4.

⁶⁸⁸ *Ibid* at 4 & 5.

the claim consent is a mandatory feature of a therapeutic relationship, and that in the absence of consent the removal of his testicle amounted to interference with his body.⁶⁸⁹

To support this connection between consent and sovereignty, the Nova Scotia Supreme Court refers to reasons provided in *Mohr v Williams* (1905), 95 Minn 261 (MN) [*Mohr*], in which a patient's left ear was operated on without her consent while she was anaesthetised.⁶⁹⁰ In that case, the patient believed it was her right ear that would be operated on, but in the course of operation the physician determined the left ear was in worse condition. She subsequently brought a claim against the physician, like the patient in *Marshall* did. Deciding in favour of the patient, the Minnesota court stated:

It was said in the case of *Pratt v Davis*, 37 Chicago Leg. News 213...: ‘**under a free government, at least, the free citizen’s first and greatest right, which underlies all others – the right to the inviolability of his person; in other words the right to himself – is the subject of universal acquiescence, and this right necessarily forbids a physician, or surgeon, however skilled or eminent, who has been asked to examine, diagnose, advise and prescribe (which are at least necessary first steps in treatment and care), to violate, without permission, the bodily integrity of his patient by a major or capital operation, placing him under an anaesthetic for that purpose, and operation upon him without consent of knowledge.**’ [my emphasis]⁶⁹¹

In this sense, the court affirmed the importance of consent to personal sovereignty, and the significance of that interest to a particular form of society.⁶⁹² The Nova Scotia Supreme Court agreed with *Mohr*, stating “[a] person's body must be held inviolate and immune from invasion by the surgeon's knife, if an operation is not consented to.”⁶⁹³

⁶⁸⁹ *Ibid* at 1 & 2.

⁶⁹⁰ *Ibid* at 5; Also see *Mohr v Williams* (1905), 95 Minn 261 (MN) [*Mohr*].

⁶⁹¹ *Mohr*, *ibid* at 268.

⁶⁹² *Ibid* at 268.

⁶⁹³ *Marshall*, *supra* note 76, at 8.

This is consistent with the traditional use of the law of battery as action against trespasses to the person.⁶⁹⁴ For an action to succeed, the victim must show direct interference with their person.⁶⁹⁵ This may result from: (1) direct force (e.g., a tortfeasor applies unwanted force to the victim, such as being struck in the face by a pellet gun in *Cook v Lewis*, [1951] SCR 830 (SCC) [*Cook*]); (2) indirect force (e.g., the tortfeasor applies unwanted force to an accessory of the victim, such as a horse the victim is riding in *Dodwell v Burford* (1669), 86 ER 703 (Eng KB), or by touching an object held by the victim, such as in *Green v Goddard* (1704), 2 Salk 641 (Eng KB)); or (3) from apprehension of force (e.g., the victim had reason to believe the tortfeasor would interfere by unwanted force, such as pointing a gun at a victim in *Kennedy v Hanes*, [1940] 3 DLR 499 (ONCA)).⁶⁹⁶ Once the victim has demonstrated the tortfeasor caused a harm one of these ways, the burden shifts to the tortfeasor to prove exception to the wrong committed, such as the victim's consent, or some other defence.⁶⁹⁷ In Canada, the victim does not need to prove intention or incompetence, although the tortfeasor may except the wrong committed by showing his actions were neither intended nor the result of negligence.⁶⁹⁸ Taken together, this is considered the traditional rule or approach to the law of battery.⁶⁹⁹ While jurisprudence in the United States and United Kingdom has deviated, it remains the

⁶⁹⁴ See *Cook v Lewis*, [1951] SCR 830 (SCC) [*Cook*]; *Non-Marine Underwriters*, *supra* note 691, *Leame*, *supra* note 462; *P.P. v D.D.*, 2016 ONSC 258; *Scott*, *supra* note 462; Also see Ruth Sullivan, "Trespass to the Person in Canada: A defence of the Traditional Approach" (1987), 19 *Ottawa L Rev* 533 [Sullivan].

⁶⁹⁵ *Non-Marine Underwriters*, *ibid.*

⁶⁹⁶ See Sullivan, *supra* note 694.

⁶⁹⁷ *Non-Marine Underwriters*, *supra* note 679.

⁶⁹⁸ *Ibid.*; Also see *Cook*, *supra* note 694.

⁶⁹⁹ *Non-Marine Underwriters*, *ibid.*

preferred approach of the Supreme Court of Canada in understanding the elements of battery, as shown in *Cook and Non-Marine Underwriters, Lloyd's London v Scalera*, 2000 SCC 24 [*Non-Marine Underwriters*].⁷⁰⁰

By requiring proof of interference rather than fault, the traditional approach takes promotion of a victim's personal sovereignty as the law's principal object.⁷⁰¹ Conceptually, it requires the victim's right to personal sovereignty "[to be] determined prior to and independently of the [tortfeasor's] freedom to act." This is effected by requiring only the interference to be proven, defined exclusively in relation to the scope and nature of the victim's personal sovereignty.⁷⁰² The tortfeasor's intentions or "the moral character or utility of his actions" are thereby immaterial to describing the harm caused.⁷⁰³ This does not ignore the matter of fault, understood in the sense of having contributed to the wrong aggrieved; a person will not be held as a tortfeasor without having caused the wrong committed.⁷⁰⁴ However, fault is imputed from proof of interference, with the imputation rebuttable by the tortfeasor with those defences availed by law.⁷⁰⁵ The importance of fault to liability is consequently preserved without constricting the scope and nature of the victim's personal sovereignty, fully correcting for the violation caused. The traditional approach also imposes a comparatively less arduous burden on the victim to prove

⁷⁰⁰ *Ibid*; Also see *Cook*, *supra* note 694; See generally Sullivan, *supra* note 694; contra *Brown v Kendall* (1850), 6 Cush 292 (MA); *Fowler v Lanning*, [1959] 1 QB 426 (Eng QB); *Letang v Cooper*, [1965] 1 QB 232 (Eng CA).

⁷⁰¹ See Sullivan, *ibid*.

⁷⁰² *Ibid*.

⁷⁰³ *Ibid* at 546.

⁷⁰⁴ *Ibid*.

⁷⁰⁵ *Ibid*.

interference alone rather than attempt to prove fault in tandem.⁷⁰⁶ This installs a strategic advantage for the victim within the law.⁷⁰⁷

The strategic and conceptual importance of personal sovereignty to the traditional approach is apparent when contrasted with jurisprudence that takes fault as its principal object. This has been the preferred approach in the United States and, lately, the United Kingdom, rejecting the traditional approach described above.⁷⁰⁸ The Supreme Court of Canada described this tendency in *Non-Marine Underwriters*:

Some critics have suggested that this rule should be altered. They suggest that tort must always be fault-based. This means the plaintiff must prove fault as part of her case, by showing either: (1) that the defendant intended to harm; (2) that the defendant failed to take reasonable care or was ‘negligent’; or (3) that the tort is one of strict liability, i.e., legally presumed fault. On a practical level, some, like F.L. Sharp, argue that the traditional approach confers an unfair advantage on the plaintiff by easing her burden of proof: “Negligent Trespass in Canada: A persistent Source of Embarrassment” (1978), 1 *Advocates’ Q* 311, at pp. 312-14 and 326. It is suggested that the law has moved in this direction in England: see *Fowler v Lanning*, [1959] 1 QB 426 (Eng QB) approved in obiter in *Letang v Cooper* (1964), [1965] 1 QB 232 (Eng CA). In the spirit of these comments, my colleague Iacobucci J proposes to alter the traditional rule, at least for sexual battery, to require the plaintiff to prove fault, i.e., That the defendant either knew or ought to have known that she was not consenting.⁷⁰⁹

But the court was unwilling to adopt the fault-based approach, as it contradicted the primary purpose of the law of battery:

I do not agree with these criticisms of the traditional rule. In my view the law of battery is based on protecting individuals’ right to personal autonomy. To base the law of battery purely on the principle of fault is to subordinate the plaintiff’s right to protection from invasions of her physical integrity to the defendant’s freedom to act [...]. Although I do not necessarily accept all of Sullivan’s contentions, I agree with her characterisation [...] of trespass to the person as a ‘violation of the plaintiff’s right to exclusive control of his person’. This right is not absolute, because a

⁷⁰⁶ *Ibid.*

⁷⁰⁷ *Ibid.*

⁷⁰⁸ *Ibid.*

⁷⁰⁹ *Non-Marine Underwriters*, *supra* note 679, at para. 9.

defendant who violates this right can nevertheless exonerate himself by proving a lack of intention or negligence [...] Although liability in battery is based not on the defendant's fault, but on the violation of the plaintiff's right, the traditional approach will not impose liability without fault because the violation of another person's right can be considered a form of fault. Basing the law of battery on protecting the plaintiff's physical autonomy helps explain why the plaintiff in an action for battery need prove only a direct interference, at which point the onus shifts to the person who is alleged to have violated the right to justify the intrusion, excuse it or raise some other defence.⁷¹⁰

Or, to put it in the words of jurist Ruth Sullivan, the fault-based approach does not assume:

the infliction of injury on another is [...] intrinsically wrongful. The character of the transaction between the parties, whether it is wrongful or not, depends on judicial assessment of the [tortfeasor's] conduct rather than the effect of that conduct on the plaintiff.⁷¹¹

While this difference of burden between the traditional and fault-based approaches may not ordinarily cause noticeable difference in the outcomes of cases, it does represent a difference in value embedded in law.⁷¹² The fault-based approach would define the wrong committed in relation to the tortfeasor's intentions or the utility of their actions, not the personal sovereignty of the victim.⁷¹³ Furthermore, the traditional approach, as acknowledged before, confers some strategic advantage to the victim proportional to the importance of their personal sovereignty. A fault-based approach would redistribute advantage held by the victim, imposing a greater onus to prove not only that the tortfeasor caused the harm complained of but also intended the act and acted competently.⁷¹⁴ Accordingly, the Supreme Court of Canada believed the traditional approach needed to be

⁷¹⁰ *Ibid* at para. 10.

⁷¹¹ Sullivan, *supra* note 694.

⁷¹² *Ibid.*

⁷¹³ *Ibid.*

⁷¹⁴ *Ibid.*

retained to ensure the law of battery aligned with its principal object of correcting harms to a victim's personal sovereignty.⁷¹⁵

The traditional approach was also adopted in *Marshall*.⁷¹⁶ Consequently, the patient's claim that consent was required in a therapeutic relationship can be understood as a strategy to promote his personal sovereignty. Consent would allow the patient to govern, in accordance with and from the exercise of his autonomy, what trespasses may be justifiably committed against his person. This understanding is reflected in the Nova Scotia Supreme Court's traditional approach to the law of battery, and in their reference to the Minnesota court's comments in *Mohr*.

ii. Strategies of Treatment

By contrast, the physician was interested in outcomes that guaranteed the health of the patient, including the successful treatment of the condition complained of and diminishment of further complications related to injury or disease. Exemplifying the physician's outlook, the Nova Scotia Supreme Court stated:

In the operation the [physician] found the muscles very much weaker than he had anticipated. In opening the inguinal canal the testicle appeared and was found grossly diseased; it was enlarged, nodular and softened. In order to cure the hernia it was necessary in the [physician's] opinion to obliterate the canal completely so as not to leave any space. **The defendant deemed it necessary to remove the testicle in order to cure the hernia, and also because it would be a menace to the health and life of the [patient] to leave it.** That, he says, was his best judgment in the circumstances. After the operation the [physician] cut the testicle in two and found multiple abscesses in it. The [physician] gave, as his opinion that if the testicle had not been removed, it might have become gangrenous, and the

⁷¹⁵ See *Non-Marine Underwriters*, *supra* note 679.

⁷¹⁶ *Marshall*, *supra* note 76, at 3.

pus might be absorbed into the circulation, and a condition of blood-poisoning have set up. [my emphasis]⁷¹⁷

Furthermore, the court characterised this interest as “philanthropic” or “humanitarian”:

On these findings it becomes necessary to consider the questions of law which arise with respect to the rights and liabilities of the patient and surgeon and on what principle the action of the defendant must be justified. **It seems to me that that justification must be found** either in assent implied by the circumstances which arose or in **some other principle – broader than and outside any consent – founded on philanthropic or humanitarian considerations.** [my emphasis]⁷¹⁸

The physician’s interest in preserving health is consistent with the medical profession’s motivating duties. For many in medical practice, Tom Beauchamp’s and James Childress’ four principles of medical ethics are authoritative, including autonomy, non-maleficence, beneficence, and justice.⁷¹⁹ Of those principles relevant here: (1) beneficence imposes a duty on a physician to act to the erasure of harm, disease, or injury, and to be good by assisting a patient with their health and wellbeing; meanwhile (2) non-maleficence imposes a duty on a physician to refrain from inflicting unnecessary pain,

⁷¹⁷ *Ibid* at 1.

⁷¹⁸ *Ibid* at 3.

⁷¹⁹ See Tom L. Beauchamp & James F. Childress, *Principles of Biomedical Ethics*, 7th ed (Oxford: Oxford University Press, 2013) [Beauchamp & Childress]; Also see Johnna Fisher, *Biomedical ethics: A Canadian Focus* (Oxford, UK: Oxford University Press, 2009) [Fisher]; Contra Jonathan Beever & Nicole Morar, “The Porosity of Autonomy: Social and Biological Constitution of the Patient in Biomedicine” (2016) 16:2 *Am J Bioethics* 34; Jocelyn Downie & Susan Sherwin, “A Feminist Exploration of Issues Around Assisted Death” (1996) 15 *St. Louis U Pub L Rev* 303; Jennifer L. Llewellyn & Jocelyn Downie, *Being relational: Reflections on relational theory and health law* (Vancouver, BC: UBC Press, 2011); Susan Sherwin, “Foundations, Frameworks, Lenses: The Role of Theories in Bioethics” (1999) 13:3 *Bioethics* 198; Susan Sherwin, “A Relational Approach to Autonomy in Health Care” in E. Boetzkes & W. Waluchow, eds, *Readings in Health Care Ethics* (Peterborough, ON: Broadview Press, 2000), at 69-87; Susan Sherwin, “Whither Bioethics? How Feminism Can Help Reorient Bioethics” (2008) 1:1 *Int J Fem Approaches Bioethics* 7.

suffering, or harm.⁷²⁰ Both are articulated in the professional codes of physicians.⁷²¹ Many medical students and physicians recite the Hippocratic Oath, widely believed to have been written between the 5th and 3rd century before the common era, which affirms ideals consistent with beneficence and non-maleficence.⁷²² Similarly, the *Code of Hammurabi*, a Babylonian legal code occasionally referred to by physicians and ethicists with historical pride, prohibited a surgeon from causing harm to those they provided care for.⁷²³ These commitments to beneficence and non-maleficence are often treated by physicians as their principal motivation, whose professions were established to achieve the promotion of health and wellbeing and the elimination of disease and illness in society.⁷²⁴

Foucault has also studied the genesis of clinical medicine and its power interests. While less celebratory of the power strategies deployed by physicians to preserve life and promote health, especially in contexts pertaining to psychiatry and hospitals, he traces the origin of clinical medicine to a historically-determined tendency to subject human capacities to scientific methods.⁷²⁵ By scientific method, Foucault is chiefly concerned with

⁷²⁰ *Ibid.*

⁷²¹ See e.g., Royal College of Physicians and Surgeons of Canada, *CanMEDS Role: Professional*, online: <<http://www.royalcollege.ca/rcsite/canmeds/framework/canmeds-role-professional-e>>; Also see S.R. Cruess, S. Johnston, & R.L. Cruess, “Profession: A working Definition for Medical Educators” (2004) 16:1 *Teach Learn Med* 74; S.R. Cruess & R.L. Cruess, “Professionalism and medicine’s social contract with society” (2004) 6:4 *Virtual Mentor*.

⁷²² See Lisa R. Hasday, “The Hippocratic Oath as Literary Text: A Dialogue Between Law and Medicine” (2013) 2:2 *Yale J Health Policy, L, & Ethics* 4.

⁷²³ See Darren P. Mareiniss & David Casarett, “Principles of Bioethics” in Declan Walsh, ed, *Palliative Medicine* (Philadelphia, PA: Saunders Elsevier, 2009).

⁷²⁴ Fisher, *supra* note 719.

⁷²⁵ See Michel Foucault, *The Birth of the Clinic* (New York: Pantheon, 1973) [Foucault (1973)]; Michel Foucault, “The Birth of Social Medicine” in James D. Faubion, ed, *Power* (New York: The New Press, 2000) [Foucault (2000g)]; Foucault (2008), *supra* note 72; Also see Lemke, *supra* note 72.

the quantification of human capacities, separating patients' bodies from their social elements by rendering them calculable according to standards of performance.⁷²⁶ Disease and illness, in this way, become objectified indices by which the health of the patient is judged against, and the basis by which treatment is justified to correct deviations from these professionally held, numerically calculable norms.⁷²⁷ Bodies consequently become subjected to power interests of those who govern and provide these therapeutic services.⁷²⁸ While the physicians' power, as a participant in biopolitics, may be channeled productively to the betterment of individual and collective health, it has historically contributed to the dispossession of particular categories of people in society.⁷²⁹

In this sense, we may understand the physician's claims in *Marshall* as strategies of treatment. The physician attempts to effect these strategies in accordance with their professional responsibilities, owed to a community by virtue of their unique social positions. These strategies include objectifying the body by applying scientifically-induced norms of standard health. Deviations from these norms are identified by the physician through measurement and observation, enabling them to make judgments about the patient's health and devise plans for treatment where those deviations fall too far outside an acceptable range. The physician in *Marshall* relied on such a standard to determine the

⁷²⁶ *Ibid.*

⁷²⁷ *Ibid.*

⁷²⁸ *Ibid.*

⁷²⁹ See Foucault (2008), *ibid*; Lemke, *ibid*; Also see Joshua Shaw, "De-Recognition of Disability: Canadian *Parens Patriae* Jurisdiction and Sterilization" (2015) 36 Windsor Rev Legal & Soc Issues 147 [Shaw (2015)].

patient's testicle was diseased and posed an immediate risk to the patient, justifying his interference with the patient's body.⁷³⁰

iii. Strategies of Equipoise

Having characterised the opposing interests, the Nova Scotia Supreme Court sought a conceptual framework in which their corresponding strategies could be brought together. First, the court considered a framework informed by contractual principles, because they were consistent with the import of personal sovereignty to the strategy of consent.⁷³¹ Every free person is presumed to be capable of entering a contract, with terms negotiated and entered into as participants of equal bargaining power.⁷³² A physician and patient both possessed the power as sovereign individuals to enter contracts with one another about the therapeutic services a physician would provide.⁷³³ Accordingly, the physician's conduct would be constrained by mutual agreement between the physician and patient, represented by a contract of services, which the patient had power to authorise by virtue of their power as a free citizen:

1 Kinkead Torts, s. 375, states the general rule on this subject as follows: 'The patient must be the final arbiter as to whether he shall take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognises as a legal one. Consent, therefore, of an individual must be either expressly or impliedly given before a surgeon may have the right to operate'. **There is a logic in the principle thus stated, for, in all other trades, professions, or occupations, contracts are entered into by the mutual agreement of the interested parties, and are required to be performed in accordance with their letter spirit.** No reason occurs to us why the same rule should apply between physician and patient. **If the physician advises his patient**

⁷³⁰ *Marshall*, *supra* note 76.

⁷³¹ See *Marshall*, *ibid* at 5.

⁷³² *Ibid* at 5.

⁷³³ *Ibid* at 5.

to submit to a particular operation, and the patient weighs the dangers and risks incident to its performance, and finally consents, he thereby, in effect enters into a contract authorising his physician to operate to the extent of the consent given, but no further.⁷³⁴

This differed from other approaches available to the Nova Scotia Supreme Court. In *Mohr*, the inviolability of the person demanded a patient's participation in the therapeutic process in order to enter into a contract of services.⁷³⁵ In contrast to the American jurisprudence cited, an ostensibly lower standard than consent was preferred by an influential legal text, the Halsbury's Laws of England. At the time it stated:

When during an operation a practitioner forms an opinion that is necessary, in order to save the patient's life, to remove some organ or limb, and accordingly removes the organ or limb ... **the practitioner cannot be charged with negligence for having taken that step, unless there is evidence that expressed instructions were given by the patient that no organ nor limb should be so removed**, and that the operation was performed negligently, and it is in the jury to consider whether such instructions were communicated or not. [my emphasis]⁷³⁶

According to this text, there was no requirement of consent, in the sense of a patient directing a physician to do a specific act on their body. It required something less than consent in that it merely required the absence of objection or some other direction, endowing the physician with an otherwise unfettered degree of freedom to do what they opined to be necessary.⁷³⁷ Put differently, provided a patient had not previously objected

⁷³⁴ *Mohr*, *supra* note 690, at 268-9; Also see *Marshall*, *ibid* at 5.

⁷³⁵ *Mohr*, *ibid*.

⁷³⁶ 20 Hals, at 332-3, as cited in *Marshall*, *supra* note 76, at 4 [Halsbury's].

⁷³⁷ See e.g., *Leeds Teaching Hospital*, *supra* note 78, at para. 127. The difference between non-objection and positive consent was discussed by the English High Court of Justice. In *AB*, the High Court of Justice presided over a dispute between the surviving kin of many child patients whose tissue were removed from their bodies during post-mortem examinations. Tissue was disposed of or otherwise retained without consent of the patients' parents. The 1961 *Human Tissue Act* (UK) empowered physicians to retrieve tissue if surviving kin did not object to its use. It only required the physician make reasonably inquiries to determine whether any legally relevant person objected. It was apparent a framework built around non-objection was vulnerable to abuse. Accordingly, the court inserted a requirement of positive consent for post-mortem

to the circumstances that arise while under anaesthesia, a physician was permitted to perform any procedure they deemed necessary to save the patient's life.⁷³⁸ Such an approach was relatively passive compared to those strategies entailed by the contractual framework conceived in *Mohr*.

According to the Nova Scotia Supreme Court, the jurist who wrote this entry to the Halsbury's Laws of England ostensibly relied on the case of *Beatty v Cullingworth* (1886), which was unreported except for mention at the 1909 Medico-Legal Society.⁷³⁹ In *Beatty*, the ovaries of a female patient were removed when the treating physician found them to be diseased.⁷⁴⁰ Prior to the operation, the patient had said neither ovaries were to be removed as she was to be married, but the physician had supposedly replied that he would do what he could, and "[would] not remove anything [he] could help."⁷⁴¹ The physician claimed that the patient heard and understood the remark, thus vitiating any prior objection to be construed from her request.⁷⁴² The Court of Queen's Bench accepted the physician's position and dismissed the patient's claim that the physician performed negligently.⁷⁴³ Notably, Justice Hawkins of the Queen's Bench Division observed to the jury:

If a medical man, with a desire to do his best for the patient, undertakes an operation, **I should think it is a humane thing for him to do everything in his power to remove the mischief, provided he has no definite instructions not to operate.** There was no question as to the propriety of the operation, and the

examination through the law of negligence. A requirement of positive consent could countervail the potential abuse of physicians' power.

⁷³⁸ Halsbury's, *supra* note 736.

⁷³⁹ *Marshall*, *supra* note 76, at 4.

⁷⁴⁰ *Beatty v Cullingworth* (1886), as cited in *Marshall*, *ibid*, at 4.

⁷⁴¹ *Ibid* at 4.

⁷⁴² *Ibid* at 4.

⁷⁴³ *Ibid*.

defendant always told the plaintiff she must give him a free hand. If you think tacit consent was given you must find for the defendant. [my emphasis]⁷⁴⁴

The Queen's Bench Division's reasons were upheld by the Court of Appeal, and the House of Lords declined to revisit the issue.⁷⁴⁵

However, the Nova Scotia Supreme Court distinguished *Beatty* on the basis that it appeared consent was taken to be implied vitiating the prior objection, which the court was of the opinion could not possibly be taken to be true in the matter of *Marshall*.⁷⁴⁶ But the court's distinction seemed to go further than failing to find consent was implied. The court did not apply the non-objection framework included in the Halsbury's or *Beatty*, and instead continued to discuss the strategy of consent as forming part of a contract, as discussed in the American jurisprudence.⁷⁴⁷ In doing so, the court favoured an interpretation of the jurisprudence that characterised the patient's claim as imposing positive obligation on the physician to discuss with the patient and come to mutual agreement about permissible procedures.⁷⁴⁸ This best accorded with the personal sovereignty of the individual patient, as required by a democratic society founded on ideals of liberty.⁷⁴⁹

However, the Nova Scotia Supreme Court was not satisfied that all therapeutic relationships could be resolved through strategies of consent and, correspondingly, a

⁷⁴⁴ See Alfred Swaine Taylor, *Taylor's Medical Jurisprudence* as cited in *Marshall*, *ibid* at 4.

⁷⁴⁵ *Ibid* at 4.

⁷⁴⁶ *Ibid* at 4.

⁷⁴⁷ *Ibid* at 5 & 8.

⁷⁴⁸ *Ibid* at 5 & 8.

⁷⁴⁹ *Ibid* at 5 & 8.

contractual framework.⁷⁵⁰ Sometimes patients were unconscious at the time communication was needed most.⁷⁵¹ Accordingly, the physician's duties to treat or protect life were unopposed. The Illinois court acknowledged this in *Pratt v Davis* (1906), 224 Ill 300 (IL) [*Pratt*] when it stated:

Where the patient desires or consents that an operation be performed and unexpected conditions develop or are discovered in the course of the operation, it is the duty of the surgeon, in dealing with these conditions, to act on his own discretion, making the highest use of his skill and ability to meet the exigencies which confront him, and in the nature of things he must frequently do this without consultation or conference with any one, except, perhaps, other members of his profession who are assisting him. **Emergencies arise, and when a surgeon is called it is sometimes found that some action must be taken immediately for the preservation of the life or health of the patient, where it is impracticable to obtain the consent of the ailing or injured one or anyone authorised to speak for him.** In such event the surgeon may lawfully, and it is his duty to, **perform such operation as good surgery demands, without such consent.** [my emphasis]⁷⁵²

It was similarly identified in *Mohr*:

Seasonable latitude must, however, be allowed [to] the physician in a particular case; **and we would not lay down any rule which would unreasonably interfere with the exercise of his discretion, or prevent him from taking such measures as his judgment dictated for the welfare of the patient in a case of emergency.** If a person should be injured to the extent of rendering him unconscious, and his injuries were of such a nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied. And again, if, in the [course] of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient, **he would though no press consent was obtained or given, be justified in extending the operation to remove and overcome them.** [my emphasis]⁷⁵³

⁷⁵⁰ *Ibid* at 8 & 9.

⁷⁵¹ *Ibid* at 8 & 9.

⁷⁵² *Pratt v Davis* (1906), 224 Ill 300 (IL), at 309-310 [*Pratt*].

⁷⁵³ *Mohr*, *supra* note 690, at 269.

However, the New Jersey court had a different approach in *Bennan v Parsonnet* (1912), 83 NJ Law 20 (NJ) [*Bennan*]. In this case, the court held that the physician was the representative of the patient during anaesthesia.⁷⁵⁴ A patient requested treatment for a rupture in his left groin.⁷⁵⁵ When the patient was anaesthetised, the surgeon decided the right groin was in worse condition and would cause death if not treated.⁷⁵⁶ Accordingly, the surgeon dedicated surgical time to the more serious rupture, and offered to the patient when he recovered to do the left groin at a later time.⁷⁵⁷ The patient refused and brought a suit for performing surgery on the right groin without his consent.⁷⁵⁸ While the New Jersey court doubted the value of the contractual model applied in *Mohr*, proposing the reality of surgery meant patients were often dispossessed of the wherewithal to direct the course of therapy, it assumed consent was still a factor.⁷⁵⁹ But this consent would come from the physician, who was taken to be a custodian of the patient's wishes:

Without stopping to point out the fallaciousness of the premise that a surgical operation can be contracted for or performed according to plans and specifications, it is enough to say that the entire foundation of the supposed analogy is swept away by the surgical employment of anaesthesia which renders the patient unable to consent the very time that the rule of the common law required that his consent be obtained. ... to meet this fundamental change in the condition of the patient is imperative that the law shall in his interest raise up some one to act for him – in a word, to represent him in those matters affecting his welfare concerning which he cannot act for himself because of a condition that has become an essential part of the operation. ...

The conclusion therefore to which we are led is that **when a person has selected a surgeon to operate upon him and has appointed no other person to represent**

⁷⁵⁴ *Bennan v Parsonnet* (1912), 83 NJ Law 20 (NJ) [*Bennan*].

⁷⁵⁵ *Ibid.*

⁷⁵⁶ *Ibid.*

⁷⁵⁷ *Ibid.*

⁷⁵⁸ *Ibid.*

⁷⁵⁹ *Ibid.*

him during the period of unconsciousness that constitutes a part of such operation, **the law will by implication constitute such surgeon the representative *pro hoc vice* of his patient and will**, within the scope to which such implication applies, cast upon him the responsibility of so acting in the interest of his patient that the latter shall receive the full benefit of that professional judgment and skill, to which he is legally entitled. [my emphasis]⁷⁶⁰

The Nova Scotia Supreme Court rejected the court's reasons in *Bennan*.⁷⁶¹ The court suggested it was an unnecessary legal fiction that did not adequately represent the interests sought by patients and physicians in these pressing circumstances, and an intellectual diversion that undermined the value of consent by which therapeutic relationships are ordinarily governed.⁷⁶² Instead, the court preferred to put consent out of mind in such exceptional circumstances.⁷⁶³ Where an emergent or unanticipated condition was discovered and the patient was incapable of providing consent to life-sustaining treatment, the court would characterise such action as motivated out of and excepted by the physician's duty to protect life:

I am unable to see the force of the opinion, that in cases of emergency, where the patient agrees to a particular operation, and in the prosecution of the operation, a condition is found calling in the patient's interest for a different operation, the patient is said to have made the surgeon his representative to give consent. There is unreality about that view. The idea of appointing such a representation, the necessity for it, the existence of a condition calling for a different operation, are entirely absent from the minds of both patient and surgeon. The will of the patient is not exercised on the point. There is, in reality, so such appointment. **I think it is better, instead of resorting to a fiction, to put consent altogether out of the case, where a great emergency which could not be anticipated arises, and to rule that tis is the surgeon's duty to act in order to save the life or preserve the health of the patient;** and that in the honest execution of that duty he should not be exposed to legal liability. It is, I think, more in conformity with the facts and with reason, to put a surgeon's justification in such cases on the higher ground of duty, as was done in

⁷⁶⁰ *Ibid* at 23-26.

⁷⁶¹ *Marshall*, *supra* note 76, at 9.

⁷⁶² *Ibid* at 9.

⁷⁶³ *Ibid* at 9.

the Quebec cases [of *Parnell v Springle* (1899), 5 Rev de Jur 74 (QC) and *Caron v Gagnon* (1930), 68 Que SC 155 (QC)]. [my emphasis]⁷⁶⁴

Consequently, it appeared to the Nova Scotia Supreme Court that treatment could be conducted without consent if a situation arose in which: (1) an emergent or unanticipated condition was discovered; (2) the condition was so serious it caused immediate endangerment to the life and health of the patient; and (3) there was no reasonable opportunity to obtain consent without causing irreparable harm.⁷⁶⁵

Applying this framework to the facts of *Marshall*, the court held that the physician did not commit a tort of battery against the patient.⁷⁶⁶ This finding was supported by the observation that the patient's condition was of a serious character that would reasonably demand immediate treatment to prevent irreparable harm or death.⁷⁶⁷ Put in other words, it would not have been reasonable for the treating physician to revive the patient and clarify his consent prior to removing the testicle.⁷⁶⁸ As the physician could not delay treatment to obtain consent without risking serious harm or death, the court held that the physician did not commit a tortious harm.⁷⁶⁹

Accordingly, *Marshall* stands for the common law rule that consent from the patient, or their proper representative, is ordinarily required to except the physician's interference

⁷⁶⁴ *Ibid* at 8-9.

⁷⁶⁵ *Ibid* at 9. Such a ruling was supported by numerous cases, such as: *Rolater v Strain*, (1913) 39 Okla 572 (OK) [*Rolater*]; *Rishworth v Moss*, (1913) 159 SWR 122 (TX) [*Rishworth*]; *Schloendorff v New York Hospital* (1914), 211 NYR 125 (NY) [*Schloendorff*]; *Parnell v Springle* (1899), 5 Rev de Jur 74 (QCSC) [*Parnell*]; *Caron v Gagnon* (1930), 68 Que SC 155 (QCSC) [*Caron*]

⁷⁶⁶ *Marshall*, *supra* note 76, at 9.

⁷⁶⁷ *Ibid* at 9.

⁷⁶⁸ *Ibid* at 9.

⁷⁶⁹ *Ibid* at 9.

with the human body from a finding of tortious harm. This is best understood through a contractual framework, according to *Marshall*, as it demands the participation of the patient in the therapeutic process. This best balances the competing interests of the patient and the physician. Only with the exception provided by a patient's consent, unless it falls into some other category discussed above, can the physician's duty to treat and protect life be acted upon.

Deliberative Communication

From the foregoing discussion, I begin to see the confluence of strategies in the context of the tort of battery. These include the confrontation of personal sovereignty, and the consequences of its demesne over matters personal to bodily integrity, and the opposing strategy of the physician's duty to protect life, repair injury, and eradicate disease. While each strategy strives to achieve ends consistent with its motivating interests, the court has responded by taking up those strategies into the language of law and balancing them in such a manner that accords with their preferred ideals. In *Marshall*, and the early American jurisprudence, the courts preferred to balance these strategies through a contractual framework.⁷⁷⁰ Through principles of contract, a capable and cognisant patient could meet with the mind of the physician and come to a mutual agreement about the course of treatment.⁷⁷¹ As argued previously, this appeared to differ from the English jurisprudence

⁷⁷⁰*Ibid* at 5, 8-10.

⁷⁷¹ *Ibid* at 5, 8-10.

of the time, which did not require consent in any positive sense, and only required there to be no therapeutic act contrary to a patient's objections.⁷⁷²

These strategies were similarly balanced in the case of *Allan*. In this case, a patient requested anaesthesia be administered in her right arm and not her left arm.⁷⁷³ Nonetheless, the physician administered anaesthesia to her left arm.⁷⁷⁴ The patient subsequently suffered a severe reaction to the anaesthetic and brought a suit for battery and negligence.⁷⁷⁵ The Ontario High Court of Justice found the physician carried out the anaesthesia procedure competently, but with respect to the tort of battery held that the physician went beyond what was consented to.⁷⁷⁶

With respect to that consent, it was clear it must be more than a patient's non-objection, mandating a positive act on the part of the patient communicated either orally or through gesture.⁷⁷⁷ Where that consent is not provided, a physician's interference with the body of a patient will amount to a tortious harm:

The administration of an anaesthetic is a surgical operation. To do so would constitute a battery, **unless the anaesthetist is able to establish that his patient has consented to it.** It is not up to the patient to prove that he refused; **it is up to the doctor to demonstrate that a consent was given.** An actual, subjective consent, however, is not always necessary if the doctor reasonably believes that the patient has consented. Thus, if a patient holds up an arm for a vaccination, and the doctor does one, **reasonably believing that the patient is consenting to it,** the patient cannot complain afterwards that there was no consent. **Silence by a patient, however, is not necessarily a consent.** Whether a doctor can reasonably infer that a consent was given by a patient, or whether he cannot infer such consent, and must

⁷⁷² *Ibid* at 4.

⁷⁷³ *Allan*, *supra* note 76, at paras. 2-5.

⁷⁷⁴ *Ibid* at paras. 2-5.

⁷⁷⁵ *Ibid* at paras. 2-5.

⁷⁷⁶ *Ibid* at paras. 23-26, & 36.

⁷⁷⁷ *Ibid* at paras. 27-29.

respect the wishes of the patient, as foolish as they may be, always depends on the circumstances. [my emphasis]⁷⁷⁸

The patient had provided explicit consent to the right arm and objected to use of the left arm prior to the procedure; but, the physician claimed the patient implicitly consented after her verbal expression by offering her left arm to the physician.⁷⁷⁹ The physician argued that if she was not consenting, she would have recoiled or otherwise not offered her left arm when prompted.⁷⁸⁰ The court held it was not reasonable for the physician to infer a positive act of consent from the patient's conduct, given explicit direction from the patient was given just prior to commencement of the procedure.⁷⁸¹ Accordingly, the therapeutic act on her left arm was an unwelcome interference with the patient's body, violating her bodily integrity.⁷⁸²

It is apparent from *Allan* that the strategy of consent was not merely about affirming a patient's control over their body.⁷⁸³ The High Court of Justice also intended to "foster meaningful communication between a physician and patient and to encourage a more participatory and egalitarian physician and patient relationship".⁷⁸⁴ *Marshall* demonstrated, in its reliance on *Mohr*, that mutual agreement would form the principal method by which the court could balance opposing strategies of sovereignty and treatment.⁷⁸⁵ *Allan* further

⁷⁷⁸ *Ibid* at para. 28.

⁷⁷⁹ *Ibid* at para. 30.

⁷⁸⁰ *Ibid* at para. 30-34.

⁷⁸¹ *Ibid* at para. 30-34.

⁷⁸² *Ibid* at para. 37.

⁷⁸³ *Ibid* at paras. 28 & 34.

⁷⁸⁴ See John Irvine, Philip Osborne, and Mary Shariff, *Canadian Medical Law* (Toronto, ON: Carswell, 2014) [Irvine, Osborne, & Shariff], at 22; Also see *Allan*, *ibid*, at paras. 28 & 34.

⁷⁸⁵ *Marshall*, *supra* note 76, at 5.

asserts this contractual relationship entails deliberative communication.⁷⁸⁶ This includes a physician engaging and challenging a patient whose direction they believe to be flawed, trying to convince them through argument.⁷⁸⁷ Deliberative communication would enable a patient to competently and meaningfully direct the course of treatment.⁷⁸⁸

From the perspective of the Ontario High Court of Justice, the requirement of positive consent established conditions for deliberation between the physician and patient, in that it demanded a physician entreat a patient for their directions.⁷⁸⁹ Without requiring consent, such as the more passive approach of non-objection considered in *Marshall*, there would be no motivation for a physician and patient to come to any mutual agreement:

While our Courts rightly resist advising the medical profession about how to conduct their practice, our law is clear that the consent of a patient must be obtained before any surgical procedure can be conducted. Without a consent, either written or oral, no surgery may be performed. This is not a mere formality; **it is an important individual right to have control over one's own body, even where medical treatment is involved.** It is the patient, not the doctor, who decides whether surgery will be performed, where it will be done, when it will be done and by whom it will be done. [The physician], when told by [the patient] not to use her left arm, had an obligation to comply with her wishes. **If he thought it inadvisable, it was his duty to discuss the matter with her and try to convince her to change her mind. The expert evidence of [another physician] was to the effect that this would be the usual thing to do. [The physician] was not entitled to say that he knew what he was doing, and proceed to inject the needle into [the patient's] left arm contrary to her express wishes.** [my emphasis]⁷⁹⁰

This would appear to support the contractual framework used in *Marshall* as a strategy to balance physicians' and patients' competing interests.

⁷⁸⁶ *Allan*, *supra* note 76, at paras 28 & 34.

⁷⁸⁷ *Ibid* at para. 34.

⁷⁸⁸ *Ibid* at para. 34.

⁷⁸⁹ *Ibid* at para. 34.

⁷⁹⁰ *Ibid* at para. 34.

Nature of Deliberative Communication

The deliberative approach indicated by *Marshall* and affirmed in *Allan* appears to balance the power interests in such a way that guarantees patients' personal sovereignty. The physicians' interests in preserving health are minimally excepted; only permissible by law where a patient and physician come to a common understanding of the treatment to be undertaken. However, what exactly this deliberative approach demands are not fully found in *Allan*. We are left with an understanding that a patient should direct the course of convalescence and be informed of the circumstances by which treatment will be endeavoured, but little more. To further illustrate what deliberative communication looks like in the context of a therapeutic relationship, we must dig deeper into the strategies used in the jurisprudence.

i. Power to Consent

The extent to which deliberative principles undergird the contract between physician and patient can be illuminated by referring to cases involving mature minors. Specifically, the character of these deliberative strategies may be revealed by examining the court's reasons for allowing patients of such an age to make decisions about their health free of interference. As a child acquires a certain measure of ability over their biological and social development, certain conditions are met that endow the child with the legal capacity to exploit the strategy of consent enjoyed by the adult patients described above. Cases involving mature minors indicate what capacities are required, including those the court treats as important to deliberation over the significance of medical decisions.

For example, in *Gilleck v West Norfolk and Wisbech Area Health Authority*, [1986] 1 AC 112 (UK) [*Gilleck*], the House of Lords held that a mature minor may possess the competence required to make medical decisions without interference from their parents.⁷⁹¹ In this case, a child of 16 years sought an abortion, which an abiding physician provided.⁷⁹² The parents' subsequently discovered and disagreed with the treatment and brought a suit against the health authority and physician.⁷⁹³ As the matter involved a child, the court was entreated to examine the issue through the lens of her best interests – a legal strategy with origins in the power dynamic between parents and children.⁷⁹⁴ The best interests strategy recognises a child is often without the wherewithal to behave judiciously and autonomously.⁷⁹⁵ Given that all children enter the world without capacities and obtain those capacities at variable rates, parents are, by virtue of the social and legal system that prevails in the common law tradition, endowed with the responsibility of guiding the child's social development and entry into adulthood.⁷⁹⁶ A child's social development is managed according to the juridico-ethical standard of their best interests, informing minimal standards of education, nourishment, and health required to successfully integrate with society.⁷⁹⁷ The strategy of best interests has been absorbed into the State's *parens patriae*

⁷⁹¹ *Gilleck v West Norfolk and Wisbech Area Health Authority*, [1986] 1 AC 112 (UK) [*Gilleck*].

⁷⁹² *Ibid.*

⁷⁹³ *Ibid.*

⁷⁹⁴ *Ibid.*

⁷⁹⁵ *Ibid.*

⁷⁹⁶ *Ibid.*

⁷⁹⁷ *Ibid.*

jurisdiction, which is their authority to govern and adjudicate the affairs of those who are vulnerable due to age or disability.⁷⁹⁸

The House of Lords found that as a child acquires the intelligence to sufficiently understand the significance of medical decisions, the best interests demand less of parents, and parental rights and duties diminish.⁷⁹⁹ The child correspondingly gains greater power to effect decisions of their own, without interference from parents or the State.⁸⁰⁰ In this sense, the child patient may utilise a strategy of consent to except a physician from tortious wrongs.⁸⁰¹ For the House of Lords, this was consistent with their approach in *R v D*, [1984] 2 All ER 449 (UK), which held that a mature minor with sufficient understanding and intelligence could consent to leaving with someone other than their parents excepting the impugned individual of the tort of kidnapping.⁸⁰² Although this contrasted with the decision of *R v Howes* (1860), 1 E&E 332, which held that a minor could not consent to kidnapping notwithstanding her intelligence, Lord Brandon said, “social customs change, and the law ought to, and does in fact, have regard to such changes when they are of major importance”.⁸⁰³ This was similarly put by Lord Denning in *Hewor v Bryant* [1969] 3 All ER 478 who said:

I would get rid of the rule in [*Re Agar-Ellis v Lascelles* (1883) 24 Ch D 317] and of the suggested exceptions to it. That case was decided in the year 1883. It reflects the attitude of a Victoria parent towards his children. He expected unquestioning obedience to his commands. If a son disobeyed, his father would cut him off with 1s. If a daughter had an illegitimate child, he would turn her out of the house. His power

⁷⁹⁸ *Ibid.*

⁷⁹⁹ *Ibid.*

⁸⁰⁰ *Ibid.*

⁸⁰¹ *Ibid.*

⁸⁰² *Ibid.*; Also see *R v D*, [1984] 2 All ER 449 (UK) [*R v D*].

⁸⁰³ *R v D*, *ibid* at 457; Also see *Gilleck, ibid.*; *R v Howes* (1860), 1 E&E 332 (Eng QB).

only ceased when the child became 21. I decline to accept a view so much out of date. The common law can, and should, keep pace with the times. It should declare in conformity with the recent report on the Age of Majority (Report of the Committee on the Age of Majority (CMND 3342) under the chairmanship of Latey J, published in July 1967), that **the legal right of a parent to the custody of a child ends at the 18th birthday and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child the other he is. It starts with a right of control and ends with little more than advice...**[my emphasis]⁸⁰⁴

Given the strategy of consent could be legitimately used by a mature minor with sufficient understanding and intelligence, the physician's duties of care and to protect life were consequently owed to her.⁸⁰⁵ This included contraceptive advice and treatment entailed by the physician's duties.⁸⁰⁶ These opposing strategies were thereby balanced according to the contract formed between physician and child patient, including deliberation over the means and ethics of the medical procedure.⁸⁰⁷ Standards of understanding and intelligence were similarly held by the Alberta Court of Appeal in the identical case of *JSC v Wren*, 1986 ABCA 249 [JSC].⁸⁰⁸

This was expanded by the Supreme Court of Canada in *AC v Manitoba (Attorney General)*, 2009 SCC 30. In this case, a child refused life-saving medical treatment on the basis of religious beliefs.⁸⁰⁹ While prior cases involving the tort of battery have long established that a patient's objection to treatment obligates a physician's respect no matter the supposed irrationality of the decision, the fact the matter involved a young child was

⁸⁰⁴ *Hewor v Bryant* [1969] 3 All ER 478 (UK) at 582.

⁸⁰⁵ *Gilleck*, *supra* note 791.

⁸⁰⁶ *Ibid.*

⁸⁰⁷ *Ibid.*

⁸⁰⁸ *JSC v Wren*, 1986 ABCA 249 [JSC].

⁸⁰⁹ *AC v Manitoba (Attorney General)*, 2009 SCC 30 [AC].

comparatively novel.⁸¹⁰ Section 25(9) of Manitoba's *The Child and Family Services Act*, SM 1985, c 8 established the presumption the best interests of a child 16 years or older will be best effected by allowing the child to make decisions of their own, unless it could be shown that the child does not understand the decision or appreciate its consequences.⁸¹¹ In this sense, the best interests strategy propounded by the legislation mapped neatly onto the parameters indicated by *Gilleck* and *JSC*. However, the child at issue here was 14 years old. The question was whether it was also in her best interests to allow her to object to treatment on the basis of her religious beliefs.⁸¹²

The Supreme Court acknowledged autonomy was important to medical decision-making, and that ordinarily a physician would be bound to respect a patient's consent as an extension of their personal sovereignty. It also acknowledged that the best interests standard was a means of balancing a child's sovereignty with the prevailing good of protecting vulnerable children from harm. But to that extent, the best interests standard was a sliding scale whose power over children diminished with a child's maturity, intelligence, and understanding. However, these features of the child patient were not to be judged absolutely. Their maturity, intelligence, and understanding would be determined on the

⁸¹⁰ *Ibid* at para. 40; Also see adult cases in *Fleming v Reid* (1991), 4 OR (3d) 74 (Ont CA); *Malette v Shulman* (1990) 72 OR (2d) 417 (Ont CA); *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 (SCC); *T (adult: refusal of medical treatment), Re*, [1992] 4 All ER 649 (CA); Also see child cases *D(TT), Re* (1999) 171 DLR (4th) 761 (Sask QB); *H(T) v Children's Aid Society of Metropolitan Toronto* (1996) 138 DLR (4th) 144 (Ont Gen Div); *Alberta (Director of Child Welfare) v H(B)*, 2002 ABPC 39, upheld 2002 ABQB 371, affirmed in 2002 ABCA 109, leave to appeal refused [2002] 3 SCR vi (SCC). It is important to note that despite recognising the right to refuse treatment in mature minor cases, the courts retain significant control over that determination. See generally, Shawn H.E. Harmon, "Body Blow: Mature Minors and the Supreme Court of Canada's Decision in *A.C. v Manitoba*" (2010) 4:1 McGill J L & Health 83.

⁸¹¹ Manitoba, *The Child and Family Services Act*, SM 1985, c 8, s. 25(9).

⁸¹² *AC*, *supra* note 809.

circumstances of each case, including the seriousness of the decision, including its potential effect on their life and health. The court provided the following list of features to look to:

As all of this demonstrates, the evolutionary and contextual character of maturity makes it difficult to define, let alone definitively identify. Yet the right of mature adolescents not to be unfairly deprived of their medical decision-making autonomy means that the assessment must be undertaken with respect and rigour. The following factors may be assistance:

- [1.] What is the nature, purpose and utility of the recommended treatment? What are the risks and benefits?
- [2.] Does the adolescent demonstrate the intellectual capacity and sophistication to understand the information relevant to making the decision and to appreciate the potential consequences?
- [3.] Is there reason to believe that the adolescent's views are stable and a true reflection of his or her core values and beliefs?
- [4.] What is the potential impact of the adolescent's lifestyle, family relationships and broader social affiliations on his or her ability to exercise independent judgment?
- [5.] Are there any existing emotional or psychiatric vulnerabilities?
- [6.] Does the adolescent's illness or condition have an impact on his or her decision-making ability?
- [7.] Is there any relevant information from adults who know the adolescent, like teachers or doctors?⁸¹³

Accordingly, by considering the context in which a child patient was to make a decision – including circumstances attendant to the treatment itself, their own capacities, their relations to others, and the import of their condition to the decision, among other factors – the State's and parental responsibility as wardens of their best interests may be fettered, and their strategy of consent supported.

This is similarly put by jurist Joan Gilmour, in describing the tension between autonomy and the welfare principle underlying the best interests standard:

While a mature minor can consent to medically recommended treatment, the extent to which he or she has the power to consent to a treatment that is not beneficial or therapeutic remains unclear. The argument that a minor can only consent to care that would be of benefit (or refuse that which is of little or no benefit) is sometimes referred to as “the welfare principle”. It suggests that a mature minor can only make

⁸¹³ *Ibid* at para. 96.

those decisions about medical care that others would consider to be in his or her interests; as such, it challenges the extent of the commitment in law to mature minors' interests in self-determination and autonomy. [...] [The welfare principle] reflects uneasiness with autonomy as the overriding value that the law advances in this context, rather than protection of the minor's life and health as one who is still vulnerable.⁸¹⁴

The “distinction between principles of welfare and autonomy narrow considerably” as the adolescent's capacity for decision-making improves until “[collapsing] together”.⁸¹⁵

The cases of *Gilleck*, *JSC*, and *AC* demonstrate what factors are presumed in circumstances of competent adults. Adult patients are taken to have the capacity to contract.⁸¹⁶ As observed above, with *Marshall* and *Allan* this includes the ability to come to a mutual agreement about the services to be rendered between a physician and patient, inclusive of the opportunity to deliberate over those choices affecting one's body. What reasons from *Gilleck*, *JSC*, and *AC* indicate is that, in the context of medical care, an adult patient is presumed to be able to contemplate information pertaining to therapies available to them, and the context in which a preferred treatment would be performed.⁸¹⁷ An adult patient is also presumed to be capable of coming to a decision free of coercion or undue influence by others, balancing emotional or psychiatric vulnerabilities, or not be unduly motivated by one's condition.⁸¹⁸ Put in a different way, adult patients are taken to have the intelligence and maturity to come to a sufficient understanding of the circumstances under

⁸¹⁴ Joan M. Gilmour, “Death and Dying” in Mary Jane Dykeman et al., eds, *Canadian Health Law Practice Manual* (loose-leaf), 8.01, at paras. 8.52-8.54.

⁸¹⁵ *AC*, *supra* note 809, at paras. 83 & 84; Also see Joan M. Gilmour, “Death, Dying and Decision-making About End of Life Care” in Jocelyn Downie, Timothy Caulfield, and Colleen M. Flood, eds, *Canadian Health Law and Policy* (Toronto: Carswell, 2011).

⁸¹⁶ See *AC*, *ibid* at para. 81.

⁸¹⁷ *Ibid* at para. 96; *Gilleck*, *supra* note 791; *JSC*, *supra* note 808.

⁸¹⁸ *AC*, *supra* note 809.

which therapies would be effected – conditions the court requires for the strategy of consent to be supported by law.

ii. Non-contractual Strategies

But even in adulthood, there are circumstances in which the quality of a competent patient's consent is compromised. The therapeutic relationship envisioned by the courts in *Marshall* and *Allan* assume the physician and patient enter mutual agreement as equal parties to a contract. As equal parties, the physician and patient may deliberate together about a medical condition and its treatment, arriving to considered decisions about what accords with their respective interests: the patient's interests with their personal sovereignty, and the physician's interests in providing treatment.⁸¹⁹ However, the Supreme Court of Canada's reasons in *Norberg v Wynrib*, [1992] 2 SCR 226 (SCC) [*Norberg*] demonstrate circumstances in which the contractual principles undergirding deliberative communication fail. Where there exists a discrepancy of power between parties to contract, the court imposes further obligations on physicians to guarantee the quality of consent procured in the therapeutic relationship.

In *Norberg*, a young woman in her late teenage years saw a physician for pain medication.⁸²⁰ Due to the combined circumstances of a prior abscessed tooth, physicians who were eager to prescribe medication, and proximity to a sister with a drug addiction,

⁸¹⁹ As stated earlier, it is understood that physicians are not only agents of medical care but are participants in other cultural systems. Their actions in the therapeutic context may thereby be affected by cultural motivations alien to providing treatment. Those interests may in fact cause harm to and oppress patients, either individually or as part of a systemic effect of the institution. Those power interests may undermine deliberative communication.

⁸²⁰ *Norberg v Wynrib*, [1992] 2 SCR 226 (SCC) [*Norberg*], at paras. 2 & 3.

the patient had developed an addiction to pain medication.⁸²¹ Having been denied services by prior physicians, the patient went to Dr. Wynrib with the hope of renewing her supply.⁸²² The physician assisted under the pretext of an injury to the patient's ankle, but after two years confronted the patient about the apparent lack of medical need.⁸²³ The physician proposed a salacious exchange for the unabated supply of pain medication: sex for pills.⁸²⁴ The patient agreed.⁸²⁵ A number of years later, after she successfully managed her addiction, the patient brought a suit against the physician for committing the tort of battery.⁸²⁶

Justice La Forest of the Supreme Court, with Justices Gonthier, and Cory concurring, held that the recipient of otherwise unlawful force could consent to the battery committed against them, but that the consent could be vitiated in circumstances that compromised their ability to consent deliberately.⁸²⁷ This went beyond circumstances in which force or its threat was expressly made, or if the consent was issued while under the influence of a substance.⁸²⁸ Consent could also be vitiated if it were provided in a situation where the patient possessed less power than the applier of force, and this difference in power was shown to interfere with their ability to freely consent:

The alleged sexual assault in this case falls under the tort of battery. A battery is the intentional infliction of unlawful force on another person. Consent, express or implied, is a defence to battery. Failure to resist or protest is an indication of consent

⁸²¹ *Ibid* at paras. 2 & 3.

⁸²² *Ibid* at paras. 2 & 3.

⁸²³ *Ibid* at paras. 3 & 4.

⁸²⁴ *Ibid* at paras. 4 – 6.

⁸²⁵ *Ibid* at paras. 4 – 6.

⁸²⁶ *Ibid* at paras. 7 – 9.

⁸²⁷ *Ibid* at para. 26.

⁸²⁸ *Ibid* at para. 26.

“if a reasonable person who is aware of the consequences and capable of protest or resistance would voice his objection”; see Fleming, *The Law of Torts* (7th ed., 1987), at pp. 72-73. However, the consent must be genuine; it must not be obtained by force or threat of force or be given under the influence of drugs. Consent may also be vitiated by fraud or deceit as to the nature of the defendant’s conduct. The courts below considered these to be the only factors that would vitiate consent.

In my way, this approach to consent in this kind of case is too limited. As Heuston and Buckley, *Salmond and Heuston on the Law of Torts* (19th ed., 1987), at pp. 564-65 put it: “A man cannot be said to be ‘willing’ unless he is in a position to choose freely; and freedom of choice predicates the absence from his mind of any feeling of constraint interfering with the freedom of his will.” A “feeling of constraint” so as to “interfere with the freedom of a person’s will” can arise in a number of situations not involving force, threats of force, fraud or incapacity. The concept of consent as it operates in tort law is based on a presumption of individual autonomy and free will. It is presumed that the individual has freedom to consent or not to consent. This presumption, however, is untenable in certain circumstances. A position of relative weakness can, in some circumstances, interfere with the freedom of a person’s will. Our notion of consent must, therefore, be modified to appreciate the power relationship between the parties.⁸²⁹

He went on to describe how contracts also presume this unfettered expression of personal sovereignty, although acknowledged the law of contract had already responded to discrepancies of power through strategies of duress, undue influence, and unconscionability “to protect the vulnerable when they are in a relationship of unequal power”⁸³⁰ Given that contract law had already developed strategies to respond to perturbations of equality between transacting parties, Justice La Forest suggested they could be redeployed in the context of battery to vitiate the illegitimate use of consent.⁸³¹ Specifically, he wished to insert the doctrine of unconscionability to the tort of battery.⁸³²

⁸²⁹ *Ibid* at paras. 26 – 27.

⁸³⁰ *Ibid* at para. 28.

⁸³¹ *Ibid* at para. 29.

⁸³² *Ibid* at para. 29.

Justice La Forest relied on three cases to illustrate the doctrine of unconscionable transaction.⁸³³ First referring to the British Columbia Court of Appeal in *Morrison v Coast Finance Ltd.* (1965), 54 WWR 257, he cites Justice of Appeals Davey's factors undergirding the strategy of unconscionability:

... a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are **proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger.** On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable...[my emphasis]⁸³⁴

Then he refers to English Court of Appeals in *Lloyds Bank Ltd. v Bundy*, [1975] QB 326 (UK), citing Master of Rolls Lord Denning's generalised principle of "inequality of bargaining power":

I would suggest that through all these instances [i.e., duress of goods, unconscionable transactions, undue influence, undue pressure, salvage agreements] there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of any one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relief the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independence advice. But the absence of it may be fatal.⁸³⁵

⁸³³ *Ibid* at paras. 30 – 33.

⁸³⁴ *Morrison v Coast Finance Ltd.* (1965), 54 WWR 257 (BCCA) at 713, as cited in *Norberg, ibid* at para. 30.

⁸³⁵ *Lloyds Bank Ltd. v Bundy*, [1975] QB 326 (UK) at 339, as cited in *Norberg, ibid* at para. 31.

And finally he refers to the Ontario Divisional Court in *Waters v Donnelly* (1884), 9 OR 391 (ONDC), in which it was stated that a fiduciary relationship between the parties is unnecessary to vitiate an unconscionable contract between parties:

... if two persons, **no matter whether a confidential relationship exists between them or not**, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress, or reckless, or wildness, or want of care, and when the facts shew that one party has taken undue advantage of the other by reason of the circumstances I have mentioned, a transaction resting upon such unconscionable dealing will not be allowed to stand... [emphasis by La Forest J]⁸³⁶

Taken together, Justice La Forest adapted the strategy of unconscionability to the tort of battery to vitiate the consent provided to a physician in the course of a therapeutic relationship:

It must be noted that in the law of contracts proof of unconscionable transaction involves a two-step process: (1) proof of inequality in the position of the parties, and (2) proof of an improvident bargain. Similarly, a two-step process is involved in determining whether or not there has been legally effective consent to a sexual assault. The first step is undoubtedly proof of an inequality between the parties which, as already noted, will ordinarily occur within the context of a special “power dependency” relationship. The second step, I suggest, is proof of exploitation. A consideration of the type of relationship at issue may provide a strong indication of exploitation. Community standards of conduct may also be of some assistance [...] If the type of sexual relationship at issue is one that is sufficiently divergent from community standards of conduct, this may alert the court to the possibility of exploitation.⁸³⁷

By contrast, Justice McLachlin of the Supreme Court, with Justice L’Heureux-Dubé concurring, rejected Justice La Forest’s reliance on contractual strategies to address the wrong complained of. While contractual principles may provide serviceable concepts to understanding some aspects of the therapeutic relationship, such as consent to medical

⁸³⁶ *Waters v Donnelly* (1884), 9 OR 391 (ONDC) at 401, as cited in *Norberg*, *ibid* at para. 32.

⁸³⁷ *Norberg*, *ibid* at para. 41.

treatment, Justice McLachlin argued that additional dynamics between the physician and patient rendered this model inexact.⁸³⁸ Instead, a wider set of power interests between a physician and patient were balanced through a stratagem of fiduciary duty.⁸³⁹ From within a fiduciary model of communication, the court could best balance the strategies entailed by the therapeutic relationship to protect a patient's sovereignty from a physician's wrongful interference.⁸⁴⁰ Relying on reasons from the Supreme Court of Canada in *Frame v Smith*, [1987] 2 SCR 99 (SCC), *LAC Minerals Ltd. v International Corona Resources Ltd.*, [1989] 2 SCR 574 (SCC), and *Canson Enerprise Ltd. v Boughton & Co.*, [1991] 3 SCR 534, Justice McLachlin defines the required conditions of a fiduciary relationship as follows:

“(1) [T]he fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (3) the beneficiary is peculiarly vulnerable or at the mercy of the fiduciary holding the discretion or power.” [...] That one party in a fiduciary relationship holds such power over the other is not in and of itself wrong; on the contrary, “the fiduciary must be entrusted with power in order to perform his function”: [Tamar Frankel, “Fiduciary Duties”], at p. 809. What will be a wrong is if the risk inherent in entrusting the fiduciary with such power is realised and the fiduciary abuses the power which has been entrusted to him or her. As Wilson J noted in [*Frame v Smith*], at p. 136 [SCR], in the absence of such a discretion or power and the possibility of abuse of power which it entails, “there is no need for a super added obligation to restrict the damaging use of the discretion or power”.⁸⁴¹

Unlike the contractual model favoured by Justice La Forest, a fiduciary model of communication assumed imbalance in the power interests between physician and patient.⁸⁴² The model takes the physician to possess greater cultural and political capital

⁸³⁸ *Ibid* at para. 61, 64 – 65.

⁸³⁹ *Ibid* at para. 65 – 68.

⁸⁴⁰ *Ibid* at para. 65 – 68.

⁸⁴¹ *Ibid* at paras. 70 & 72.

⁸⁴² *Ibid* at paras. 71, 72, 76 – 78.

than the patient conferring influence and persuasion advantages that a patient cannot capably detect and consider.⁸⁴³ Furthermore, physicians are necessarily experts with access to knowledge patients cannot reasonably be expected to possess as laypeople.⁸⁴⁴ The physician's erudition goes further than adding to their cultural or political station, it also requires a patient to rely on the physician to access the social good – convalescence – desired.⁸⁴⁵ Put in other words, the patient is required to depend on a physician's exclusive professional capacities. It demands the patient's dependence on the expertise and ability of another.⁸⁴⁶ In this way, a power imbalance forms an ordinary but dangerous part to the therapeutic process.⁸⁴⁷ While contractual principles may demand the patient enjoy the opportunity to deliberate with their physician about the course of treatment, power imbalances existing between physician and patient may be exploited, such as in *Norberg*, intentionally or unintentionally upending the quality of that communication. Instead of relying upon strategies of unconscionability availed by the law of contract *post hoc*, the fiduciary model attempts to redistribute the power imbalance from the relationship's inception by imposing obligations on the physician to act in the interests of the patient.⁸⁴⁸

As Justice McLachlin said:

I think it is readily apparent that the doctor-patient relationship shares the peculiar hallmark of the fiduciary relationship – trust, the trust of a person with inferior power that another person who has assumed superior power and responsibility will exercise that power for his or her good and only for his or her good and in his or her best interests. Recognising the fiduciary nature of the doctor-patient relationship provides

⁸⁴³ *Ibid* at paras. 71, 72, 76 – 78.

⁸⁴⁴ *Ibid* at paras. 71, 72, 76 – 78.

⁸⁴⁵ *Ibid* at paras. 71, 72, 76 – 78.

⁸⁴⁶ *Ibid* at paras. 71, 72, 76 – 78.

⁸⁴⁷ *Ibid* at paras. 71, 72, 76 – 78.

⁸⁴⁸ *Ibid* at paras. 98 – 99.

the law with an analytic model by which physicians can be held to the high standards of dealing with their patients which the trust accorded them requires.

The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently, the law seeks a balance between enforcing obligations by awarding compensation when those obligations are breached, and preserving optimum freedom for those involved in the relationship in question. **The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other.**⁸⁴⁹

Relying on legal scholar Tamar Frankel, Justice McLachlin states the fiduciary relationship may arise voluntarily such as with contracting parties.⁸⁵⁰ This would satisfy many instances of a patient coming to a physician for care for non-emergent needs.⁸⁵¹ However, this is the limit to the similarity enjoyed between contractual and fiduciary relationships.⁸⁵² According to Frankel, fiduciary relationships are unlike contractual ones in that the needs of both parties are not met.⁸⁵³ The needs of the beneficiary of the therapeutic process, the patient, are the exclusive concern of the fiduciary model.⁸⁵⁴ Accordingly, any breach of this obligation will right the wrong committed against the patient, but will not address any unmet needs perceived by the physician.⁸⁵⁵

⁸⁴⁹ *Ibid* at paras. 65 – 66.

⁸⁵⁰ *Ibid* at para. 67; Also see Tamar Frankel, “Fiduciary Law” (1983) 71 Calif L Rev 795 [Frankel].

⁸⁵¹ *Norberg, ibid* at paras. 67 – 68.

⁸⁵² *Ibid* at paras. 67 – 68.

⁸⁵³ Frankel, *supra* note 850.

⁸⁵⁴ *Ibid*.

⁸⁵⁵ *Ibid*.

The asymmetrical threat of legal remedy thus preserves the patient's independence from the physician by servicing the patient's power to resist the physician's opposing strategies.⁸⁵⁶ The fiduciary model obligates the physician to accord with the patient's power interests, notably those aggregated around the strategy of consent. This enables the patient to depend upon the power of the physician for the purposes of treatment without fear of unwanted interference with their interests. Put in the words of Frankel, this "[combined] the bargaining freedom inherent in contract relations with a limited form of the power and dependence" necessary for the therapeutic relationship; or, in the words of Foucault, diminished the dominating tendencies of a physician and construed their power productively to the advantage of the patient.⁸⁵⁷ For Justice McLachlin, to rely exclusively on contractual principles in balancing a physician and patient's interests would diminish the obligations owed in therapeutic contexts.⁸⁵⁸

Accordingly, the fiduciary model responds to the reality of inequality in social relations.⁸⁵⁹ It responds by structuring our legal relations in a compensatory manner, addressing disparities between parties who come together asymmetrically for some social purpose.⁸⁶⁰ It is intended to correct for this disparity of power by adding further obligations on the fiduciary who is depended on.⁸⁶¹ These obligations relate to the treatment of the beneficiary by guaranteeing the fiduciary promotes the beneficiary's interests, and does not

⁸⁵⁶ *Norberg, supra* note 820, at paras. 67 – 68.

⁸⁵⁷ See Frankel, *supra* note 850; Conway, *supra* note 52.

⁸⁵⁸ *Norberg, supra* note 820, at para. 68.

⁸⁵⁹ See Frankel, *supra* note 850.

⁸⁶⁰ *Ibid.*

⁸⁶¹ *Ibid.*

abuse their position of power over them.⁸⁶² Deliberative requirements of consent still factor in the therapeutic relationship between physician and patient, but strategies of fiduciary duty are used to circumscribe the physician's discursive obligations.

In this way, as observed by the Ontario College of Physicians and Surgeons Disciplinary Committee in *Re Dawson*, [2012] OCPSD No. 34 [*Re Dawson*], a physician cannot discuss subjects that do not relate to treatment with the patient without careful consideration of its potential impact their interests.⁸⁶³ In *Re Dawson*, a physician repeatedly provided religious literature to patients seeking contraceptive care in addition to refusing care on the basis of conscientious belief.⁸⁶⁴ While the physician could legitimately withdraw from the therapeutic relationship on the basis of conscientious belief if he made proper and successful referrals to willing health care providers, the disciplinary committee said ambushing patients with religious conversation fell outside the physician's fiduciary duty to the patient.⁸⁶⁵ Similarly, although forming part of a previous complaint, the physician's prior sexual advances on patients were prohibited.⁸⁶⁶

The majority of the court did not favour Justice McLachlin's use of fiduciary duties, preferring the contractual strategies of Justice La Forest. However, fiduciary duties have been inserted in subsequent decisions about the patient-physician relationship.⁸⁶⁷ While the

⁸⁶² *Ibid.*

⁸⁶³ *Re Dawson*, [2012] OCPSD No. 34 [*Re Dawson*].

⁸⁶⁴ *Ibid.*

⁸⁶⁵ *Ibid.*

⁸⁶⁶ *Ibid.*

⁸⁶⁷ See e.g., *B(D) v Beesley* (2000), 144 Man R (2d) 227 (MBQB); *Bras v Pietraszek*, [2005] OJ No. 1659 (ONSC); *McDonald-Wright (Litigation Guardian of) v O'Herlihy*, [2005] OJ No. 1636 (ONSC).

therapeutic relationship between a physician and patient is oft considered contractual in basis, in the sense it is voluntarily entered into and may be terminated at the request of either the physician or patient, these cases consistently show that fiduciary duties motivate the genesis and imposition of obligations on physicians that are not contractual in nature. These added obligations are fiduciary in nature, as described by Justice McLachlin, insofar as they attempt to safeguard the patient against abuse of physician power. In this sense, the deliberative communication envisioned by *Marshall* and *Allan* are retained, but the physician has added duties as a deliberative participant to ensure the patient's sovereignty is properly respected in matters as personal as medical treatment.

Deliberative Ideals in Post-Mortem Donation

From the arguments I have set out above, it would appear that the laws of battery are the product of many legal strategies coalescing. These strategies include consent and duties to treat, aggregating around the opposing power interests of the patient and physician, respectively. Through contractual and fiduciary principles, the resulting balance of these opposing strategies is a deliberative process, in which a patient's and physician's divergent interests are reconciled through egalitarian, participatory communication.⁸⁶⁸ This ideal is approximate, in that it does not perfectly reflect the abstracted conditions of communicative reason described by Habermas.

It is approximate in that patients suffer from disadvantaged positions relative to the physicians that treat them, and this inequality upends egalitarian ideals. For example, physicians possess information and capacities that patients do not, both of which are vital

⁸⁶⁸ See Ezekiel J. Emanuel & Linda L. Emanuel, "Four Models of the Physician-Patient Relationship" (1992) 267:16 JAMA 2221 [Emanuel & Emanuel].

to the therapeutic process but delimit a patient's ability to comprehend and participate in communication with a physician. Relatedly, physicians benefit from a significant degree of power over their patients, by virtue of political and cultural status held by physicians in society. The power that follows this status can affect the conduct and perception of the physician, potentially shaping their discursive practices. It can also affect the conduct of patients, causing reticence and deference to physicians who are assumed to be furnished with omniscience. In this sense, the notion that a patient and physician are equal participants in a discursive event is undercut from the beginning.

Furthermore, as communication between a physician and patient uniquely pertains to the patient's body, the legal strategies deployed guarantee conditions not envisioned by Habermas' deliberative ideal. These departures reflect the position that decisions about the body remain that of the patients, no matter the supposed irrationality of their decision, especially from the perspective of the physician. The body is not the shared demesne of the patient and physician, with decisions selected meritoriously according to the strength of arguments. The body is the solely within the bailiwick of the patient. Accordingly, the legal strategies intend to correct for both the discursive inequalities between patient and physician, and foster participatory communication by empowering the patient's resistance while enfeebling the physician's power.

Despite these deviations, it is clear that the patient's full participation in the therapeutic process is fundamental to medical law.⁸⁶⁹ This full participation is deliberative, in the sense it relies on fulsome communication between physician and patient.⁸⁷⁰ The

⁸⁶⁹ *Ibid*; Also see Irvine, Osborne, & Shariff, *supra* note 784.

⁸⁷⁰ *Ibid*.

contractual and fiduciary relations imposed by courts structures this participation in a manner that maximises the deliberative process by: (1) ensuring their sustained and mutual engagement prior to medical treatment being issued; (2) while minimising those effects that would undermine a patient's equal and meaningful participation. To this extent, Habermas' deliberative ideal is reproduced in the strategies of Canadian medical law and may service critique of the effect of legal fictions on post-*mortem* donation.

However, as stated before, the law of battery does not apply to those who are dead. Since post-*mortem* tissue donation takes place after a fact of death has been determined, a tort of battery cannot be committed against a deceased donor. But the dead donor is not without the benefit of law. The strategy of consent continues to factor in provincial organ and tissue donation acts, in the sense that organs and tissue cannot be procured post-*mortem* without the donor's direction. Consent is considered so important, Manitoba's *Human Tissue Gift Act* and Nova Scotia's Bill 121 prohibit family or any other substitute decision-maker from making post-*mortem* decisions contrary to the donor's wishes.⁸⁷¹

In the Manitoban scheme, a proxy's interference with a donor's post-*mortem* wishes is prohibited by ensuring a proxy's direction is only effective where the dying or deceased individual did not make a direction.⁸⁷² In the event that a direction was issued by the dying or deceased individual, then a proxy's direction could only take effect if the original direction was ineffective.⁸⁷³ That original direction is ineffective if the dying or

⁸⁷¹ See Manitoba's *Human Tissue Gift Act*, *supra* note 25, ss. 2(3) & 4(4); Bill 121, *supra* note 60, s. 12(6).

⁸⁷² See Manitoba's *Human Tissue Gift Act*, *ibid* at s. 2(3).

⁸⁷³ *Ibid*.

deceased individual was incapable of understanding the nature and effect of the decision.⁸⁷⁴ The tissue donation agency is also responsible for determining whether, in the event a direction was not made by the dying or deceased individual, whether to approach a proxy for direction.⁸⁷⁵ A request will not be made if there is reason to believe the dying or deceased individual actually objected to use of their body, the person would have objected if living, or if the use of the body would have been contrary to the person's beliefs.⁸⁷⁶

The proposed Nova Scotian scheme makes use of similar provisions; however, it also directly prohibits a proxy from making a direction where they have reason to believe the dying or deceased individual would have objected.⁸⁷⁷ Section 12(6) states:

No person shall give consent under this section if the person has personal knowledge that the individual who died or whose death is imminent would have refused to give a consent.⁸⁷⁸

Both statutes also impose duties on physicians to refrain from procuring tissue if there is reason to believe it would have been against the directions of the donor.⁸⁷⁹ Section 3(5) of Manitoba's *Human Tissue Gift Act* states:

Upon the death of a person in respect of whom a direction is given under this section, the direction is full authority for obtaining possession of the body, and the use of the body or the removal and use of any tissue or specified tissue from the body, as the case may be, for the purposes specified in the direction, but **a person shall not act upon the direction where the person proposing to act has reason to believe**

⁸⁷⁴ *Ibid.*

⁸⁷⁵ *Ibid* at s. 4(4).

⁸⁷⁶ *Ibid.*

⁸⁷⁷ See Bill 121, *supra* note 60, s. 12(2). Note that unlike the Manitoban scheme, the Nova Scotian scheme does not put any obligations on a tissue donation agency.

⁸⁷⁸ *Ibid* at s. 12(6).

⁸⁷⁹ Manitoba's *Human Tissue Gift Act*, *supra* note 25, s. 3(5); Bill 121, *ibid* at s. 14(2).

(a) that the use of the body or the removal and use of the tissue from the body after death **would be contrary to the religious beliefs** of the deceased person or **that the deceased person, if living, would have objected thereto**; [...] [my emphasis]⁸⁸⁰

Section 14(2) of Nova Scotia's Bill 121 states:

No person shall act on a consent given under Section 11 or 12 if the person has
 (a) knowledge that the donor subsequently withdrew consent; or
 (b) where a consent was given by a substitute decision maker under 12(2), knowledge of an objection by the donor or by a person of a higher priority category as the substitution decision maker.⁸⁸¹

These provisions employ similar strategies to the law of battery, in that they express a narrative that mimics the importance of protecting autonomy and bodily integrity. Relatedly, they mimic the idea that the body is the property of a person. As property, the disposition of the body or its parts is the sole prerogative of the donating individual to the extent their legal personality survives death in legislation. There becomes a statutory right to direct the use of one's own body after death that binds others, unless that use is not practicable, financially feasible, or needed.⁸⁸² That right is carried out by a registered intention, or with the assistance of a proxy. Accordingly, body parts can only be severed from the person – live or dead – if the intending donor voluntarily expresses a donative intention through consent. That expressed intention authorises certain uses of the human body, obligating the physician to carry out donation procedures in a manner that is consistent with the direction given. By consequence of these statutes, the donative intention holds, in the sense it does not extinguish, despite a determination of death.

⁸⁸⁰ Manitoba's *Human Tissue Gift Act*, *ibid* at s. 3(5).

⁸⁸¹ Bill 121, *supra* note 60, s. 14(2).

⁸⁸² See Manitoba's *Human Tissue Gift Act*, *supra* note 25, s. 5(1); Bill 121, *ibid* at s. 14(4).

Despite the use of consent, the donative nature of the legal strategy as a whole imposes few obligations on others. The gift is not a mutual exchange. It is unilaterally effected by the donor without the donor materially benefiting.⁸⁸³ The physician can only extract the tissue if authorised, but otherwise there are no other obligations owed to the intending donor. There is no requirement that the physician offer full information about donative practices.⁸⁸⁴ There is no requirement that certain procedures be followed.⁸⁸⁵ There is only the requirement to take tissue consistent with the donor's direction, much like a person could not ordinarily apprehend my jazz records unless I directed a person to do so. By contrast, a contract imposes obligations on both parties. The doctrine of consideration holds, assuming no other issue, that an enforceable contract results from the exchange of reciprocal acts or promises between contracting parties. Understandably there is some strategic overlap between contracts and gifts in the sense that both can entail the transfer of property or commission of a service between sovereign persons. But they are not coterminous.

If post-*mortem* donation relies exclusively on a donative framework to structure legal relations, it may explain why Manitoba's and Nova Scotia's legislation put higher standards for consent in *inter vivos* contexts than post-*mortem* contexts. While *inter vivos* donation is also constructed with the commission of a gift, the medical procedures necessary to effect the donative act are carried out on live patients. Given their living status,

⁸⁸³ Except any benefit of knowing, while alive, that wishes will be followed after death.

⁸⁸⁴ Contra Bill 121, *supra* note 60, s. 13. Section 13 requires at a minimum an explanation of the donation process, the process of determining death, POI, and other information. In the absence of this information, an intending donor or their proxy are not permitted to authorise the post-*mortem* use of their body.

⁸⁸⁵ *Ibid*, s. 15. Section 15 leaves the tests to determine death to be established by the medical profession "from time to time".

any medical interference invokes the law of battery including those requirements for deliberative communication. There is consequently a congress of legal strategies that embolden the strategy of consent in the context of *inter vivos* donation, which are not availed with post-*mortem* donation. Without the application of battery, and its contractual legal framework, in post-*mortem* contexts, obligations owed to the intending donor appear to be lessened.

However, language around consent in Manitoba's and Nova Scotia's legislation suggest that post-*mortem* donation does not depend solely on a donative legal framework. Both rely on a strategy of consent, which may allow for ideas about communication to be imported to post-*mortem* contexts, in the sense that consent, as a strategy, is intricately bound with experiences of communicating. First, the strategy of consent presupposes the experience of autonomy. Its use may indicate that a value of autonomy, not property, is principally advanced by donation of body matter. Second, the insertion of autonomy into the post-*mortem* context may obligate fuller communication to the extent it facilitates the exercise of autonomy; a mimicry of autonomy in the *inter vivos* context. By contrast, if a donative legal framework did apply exclusively in post-*mortem* contexts, it could be expected that bodies, organs, and tissue would be dispensed through a will. This would better align with an understanding of the body and its constituent parts as chiefly one's property, as it would reflect the idea that tissue donation is something to be achieved by unilateral action of the donor. Accordingly, the use of consent may suggest that standards of deliberative communication could be extended to post-*mortem* contexts if the case was properly made.

I cannot make that case here. An account of why deliberative communication *should* apply in post-*mortem* tissue donation would distract me from the object of my thesis. Instead, for the time being, I will take for granted the standards of deliberative communication in the law of battery and assume their application in the context of post-*mortem* tissue donation. In this sense, I understand it is not reflective of the state of the law today, but I believe the observations made above are still instructive to the critical programme I am prepared to now complete.

Conclusion

Regardless of what the law is today, I believe the deliberative ideals produced in the context of battery can be informative to the analysis of legal fiction. The law of battery establishes that full communication and consent must occur in advance of a medical procedure if alive. In the absence of either, an intervention with the human body is not authorised if alive. I would like to critique the effect of legal fictions with the assumption that prior to a determination of death, an intending donor's consent to post-*mortem* donation practices should occur in an environment of deliberative communication. Prior authorisation would supersede a determination of death, in that it would effectively govern subsequent use of the body. If standards of deliberative communication are somehow stifled when that authorisation is made, then the quality of that authorisation is problematic. In this sense, I would like to explore the implications for law if this position can be accepted. Whether deliberative ideals are suitable for post-*mortem* contexts must be explored in future research programmes, but for the time being I believe it is a helpful standard by which I can evaluate the effect of fiction on consent practices.

Chapter 5: Warring Systems and Fatal Fictions

The seemingly disparate topics covered so far converge with the systems-theoretic analysis of legal fiction. Past chapters identified the material necessary to pursue a systems-theoretic analysis that explores the effect of legal fiction on consent to post-*mortem* tissue donation. Specifically, Chapter 2 furnished me with a methodology to examine law; Chapter 3 identified the communicative properties constituent to the legal fiction of death; and Chapter 4 explored standards of deliberative communication between lay and medical communities. Whereas prior scholarship has concentrated on the function of fiction absent robust theoretical grounding, understanding law as a social system of communication will endow me with the theoretical mettle to provide a fuller, or at least different, account of its effect. I believe I am able to give a fuller account because a systems-theoretic analysis seeks understanding of how relatively autonomous social systems interact with each other. Since a legal fiction intends to, by misrepresentation, convey a fact to a lay audience that effectuates a desired social response the legal communication must be understandable to such an audience.⁸⁸⁶ In this way, the study of legal fiction is about how information moves from one social system to another. It is about communication within and between systems of social action.

The methodology discussed in Chapter 2, and deployed in subsequent chapters, indicated my theoretical presuppositions. I understand law as communication between actors.⁸⁸⁷ It conveys ideas through language, conceptualised as speech acts, which have

⁸⁸⁶ See generally about legal fictions with Fuller (1967), *supra* note 38; Quinn, *supra* note 41; Also see generally about the semiotic legal perspective with Van Schooten (2012), *supra* note 41; Van Schooten (2014), *supra* note 41.

⁸⁸⁷ See Van Schooten (2012), *ibid*; Van Schooten (2014), *ibid*.

effects on behaviour.⁸⁸⁸ Some of those ideas are descriptive in that the speech act describes facts found in the physical world.⁸⁸⁹ Some of those ideas are prescriptive in that the speech act describes how one should act in the physical world.⁸⁹⁰ To the extent law's message is understood by an audience, it may cause a change in behaviour consistent with its descriptive and prescriptive themes.⁸⁹¹ However, as we noted from Foucault, speech acts are never exercised free of force.⁸⁹² All language asserts an understanding with the intent of imposing it on others.⁸⁹³ Language is coupled with action strategies which seek to resist the speech acts of others and promote their interests.⁸⁹⁴ Therefore, law is similar to other forms of communication, in that it is coupled with action strategies that instantiate outcomes consistent with its authors' interests.⁸⁹⁵ As Cover said, law extirpates competing worldviews for the sake of its own stability often through the sanction of violence.⁸⁹⁶ The *nomos* of law hinges on its capacity to control.⁸⁹⁷

This led me to a critical legal method consistent with such presuppositions.⁸⁹⁸ Such a method enabled my analyses in Chapters 3 and 4, which together sought to describe the

⁸⁸⁸ *Ibid*; Also see Deflem (2013), *supra* note 142; Habermas (1998), *supra* note 42.

⁸⁸⁹ *Ibid*.

⁸⁹⁰ *Ibid*.

⁸⁹¹ *Ibid*.

⁸⁹² See Foucault (2000a), *supra* note 42; Also see Jacopo Martire, "Habermas Contra Foucault: Law, Power and the Forgotten Subject" (2012) 23 L Crit 123 [Martire].

⁸⁹³ *Ibid*; Also see Benjamin (1986), *supra* note 58; Cover (1986), *supra* note 42.

⁸⁹⁴ See Foucault (2000a), *ibid*.

⁸⁹⁵ *Ibid*; Also see Unger (2015), *supra* note 42.

⁸⁹⁶ Cover (1983), *supra* note 51; Cover (1986), *supra* note 42.

⁸⁹⁷ *Ibid*.

⁸⁹⁸ See Van Schooten (2012), *supra* note 41; Van Schooten (2014), *supra* note 41; Unger (2015), *supra* note 42.

speech acts and corresponding action strategies in law. In the case of the legal fiction, I suggested the *nomos* of the legal definition relates to an action strategy of biopolitics.⁸⁹⁹ Futility becomes the value by which death is determined. In the case of the therapeutic relationship, law has gradually expanded deliberative obligations between physicians and patients in the context of care.⁹⁰⁰ A *nomos* of deliberative communication is created from contractual and fiduciary action strategies. Having identified and set out those speech acts and action strategies, I must now relate them to each other to complete my understanding of legal communication and the effect of fiction on consent. Relating these various parts together requires me to build a substantive theory of law consistent with the presuppositions discussed before. The substantive theory, a systems theory, will suggest how information is shared between differentiated social systems. It will attempt to reconstruct a model of legal communication from the parts insofar discussed by bridging what has been left ignored: their interaction. Put less abstractly, it will offer a model by which I can understand how information is exchanged between law, patients, and medical professionals.

Systems Theory of Law

A systems theory asserts that society is differentiated into smaller systems corresponding to specific social functions.⁹⁰¹ Each subsystem has its own set of rules or

⁸⁹⁹ See generally Esposito (2008), *supra* note 72; Esposito (2015), *supra* note 72; Foucault (2008), *supra* note 72; Lemke, *supra* note 72.

⁹⁰⁰ See generally Deflem (2013), *supra* note 142; Emanuel & Emanuel, *supra* note 868; Habermas (1998), *supra* note 42.

⁹⁰¹ See Teubner (1984), *supra* note 42; Teubner (1992), *supra* note 42; Teubner (1993), *supra* note 42; Also see King (2013), *supra* note.87; Luhmann (1990), *supra* note 87; Luhmann (1995), *supra* note 87; Niklas Luhmann “Law as a Social System” (2006) 65:3 Rev Cambridge L 721

cultural norms that regulate behaviour in a manner that furthers the social function it serves.⁹⁰² This includes a web of symbolic referents that are used in language to communicate meaning, form beliefs, and develop plans of action.⁹⁰³ For example, Talcott Parsons thought modern society was differentiated into at least four subsystems: the economic, political, community, and moral values.⁹⁰⁴ Each was tasked with providing a certain social output crucial to instantiating and maintaining an integrated and stable society.⁹⁰⁵ The economic system provides the necessary referents, rules, and norms to produce economic activity.⁹⁰⁶ The political, community, and value systems do the same for social action in their respective spheres.⁹⁰⁷ Altogether, the subsystems enable society to adapt to changes in the environment, produce an integrated social collective, guide social action toward instrumental goals, and endure beyond the death of individual social actors. The extent to which a subsystem's capacity to adapt, integrate, guide, and propagate social

[Luhmann (2006)]; Richard Nobles & David Schiff, "Using Systems Theory to Study Legal Pluralism: What Can Be Gained?" (2012) 46:2 L & Soc Rev 265 [Nobles & Schiff (2012)]; Van Schooten (2012), *supra* note 41; Van Schooten (2014), *supra* note 41.

⁹⁰² *Ibid.*

⁹⁰³ *Ibid.*

⁹⁰⁴ See Matthieu Deflem, "The Boundaries of Abortion Law: Systems Theory from Parsons to Luhmann and Habermas" (1998) 76:3 Soc Forces 775 [Deflem (1998)]; Habermas (1984), *supra* note 42; Habermas (1985), *supra* note 42; Talcott Parsons, "Culture and Social System Revisited" (1972) 53:2 Soc Sci Quarterly 253 [Parsons (1972)]; Also see generally Talcott Parsons, *The Structure of Social Action* (Talcott Parsons, *The Social System* (Toronto, ON: Collier-Macmillan Canada Ltd., 1964) [Parsons (1964)]. I must acknowledge that Parsons may seem like a strange choice of theorist to lead with given lack of critical credentials; however, Parsons is valuable in that he founded a systems sociology that has been fundamental to the develop of systems theories of law.

⁹⁰⁵ *Ibid.*

⁹⁰⁶ *Ibid.*

⁹⁰⁷ *Ibid.*

action erodes, it corresponds with the instability of society.⁹⁰⁸ Equilibrium is achieved by the successful operation of each system.⁹⁰⁹

For Parsons, law is an extension of the community.⁹¹⁰ Law is “any relatively formalised and integrated body of rules which imposes obligations on persons playing particular roles in particular collectivities”.⁹¹¹ It services society by steering the adaptive, integrative, guiding, and propagating functions of subsystems through administrative and judicial interpretation, legislation, and the enforcement of legal sanctions.⁹¹² Through the judicially-derived common law or proclamation of statutes law can:

1. Adapt subsystems to emerging changes in environmental conditions – for example, the law may undergo change to adapt the societal community to shifting norms of sexuality by legalising homosexual acts and offering protection against discrimination;
2. Bring people together with legal frameworks that ward against pernicious conduct and encourage the formation of a collective - for example, law may prohibit behaviour that society considers antisocial, such as hate speech, while affording legal protections and rights to social minorities and political associations;

⁹⁰⁸ *Ibid.*

⁹⁰⁹ *Ibid.*

⁹¹⁰ *Ibid.*

⁹¹¹ See Talcott Parsons, “Jurisdiction” in Leon H. Mayhew, ed, *Talcott Parsons on Institutions and Social Evolution* (Chicago, IL: University of Chicago Press, 1982), 179-86, at 184 [Parsons (1982)].

⁹¹² *Ibid.*; See Deflem (1998), *supra* note 904.

3. Achieve instrumental goals through structuring social action – for example, law may prohibit international passage where the traveller has a specified communicative disease. The instrumental goal sought is the promotion of public health by minimising the spread of infection; and
4. Maintain patterns of social action over time – for example, norms may endure beyond a generation by their promulgation in legal and other political institutions. This creates stable patterns of social action that persist despite changes in environmental conditions, unless adaptation is required.⁹¹³

Law enjoys relative autonomy from the political, economic, and fiduciary subsystems.⁹¹⁴ For example, Parsons suggests law cannot be reduced to capitalist systems of economy as some Marxists insisted.⁹¹⁵ Law structures social actions in a manner that is not coterminous, and occasionally belies, the maximisation of profit.⁹¹⁶ Similarly, law is not the mere expression of political power.⁹¹⁷ Legislation is coupled with political processes, but adjudication depends on the purported separation of law from political processes, determined according to self-referential legal principles.⁹¹⁸ Finally, the fiduciary

⁹¹³ *Ibid.*

⁹¹⁴ *Ibid.*

⁹¹⁵ *Ibid.*; Also see e.g. Georg Lukács, “Legality and Illegality” in *History and Class Consciousness: Studies in Marxist Dialectics* (Cambridge, MA: The MIT Press, 1971), 256-271; Evgeny Pashukanis, “The General Theory of Law and Marxism” in P. Beirne & R. Sharlet, eds, *Selected Writings on Marxism and Law* (London, UK: Academic Press Inc., 1980), 32-131; Also see generally Martin Krygier, “Marxism and Law” (1983) 6 UNSW L J 238

⁹¹⁶ See Deflem (1998), *ibid.*; Parsons (1982), *supra* note 911.

⁹¹⁷ *Ibid.*

⁹¹⁸ *Ibid.*

system provides law with its moral grounding.⁹¹⁹ The values that animate and compel the acceptance of law find their origin in the cultural and moral values of this system.⁹²⁰ However, law is underdetermined by the cultural and moral values of society.⁹²¹ Law's relative autonomy allows legal principles to diverge from social mores.⁹²²

In this sense, subsystems communicate openly with each other through the assistance of law.⁹²³ Law acts as a means of communication between the community and differentiated social systems.⁹²⁴ It creates impetus for and regulates social action within subsystems, steering it toward the accomplishment of adaptation, integration, guidance, and latency.⁹²⁵ To the extent law informs social action meaningful to a given subsystem, law and subsystems work together to maintain a stable and integrated society.⁹²⁶ Communication between parts sustains a healthy whole.⁹²⁷ This for Parsons is what systems mean for society – systems maintain a state of homeostasis for the whole of a society, whose capacity to adapt, integrate, guide, and propagate social action can no longer be achieved by the community alone.⁹²⁸ The social differentiation characteristic of modern society has demanded complex social responses.⁹²⁹

⁹¹⁹ *Ibid.*

⁹²⁰ *Ibid.*

⁹²¹ *Ibid.*

⁹²² *Ibid.*

⁹²³ *Ibid.*

⁹²⁴ *Ibid.*

⁹²⁵ *Ibid.*

⁹²⁶ *Ibid.*

⁹²⁷ *Ibid.*; Also see Parsons (1964), *supra* note 904.

⁹²⁸ *Ibid.*

⁹²⁹ *Ibid.*

Habermas adapts Parsons in the development of his systems theory. For Habermas, members of a community initially interact within the lifeworld, which is consonant with Parsons' system of societal community.⁹³⁰ The lifeworld is a culturally bounded system of communication that is unencumbered by the demands of any specific task or function; but, discourse within it relies on referents, rules, and norms availed by a community's cultural background.⁹³¹ That background is often regional, and historically embedded in a specific time and place.⁹³² The cultural background that social actors rely on to communicate is the consequence of prior argument that has achieved consensus and has been sedimented in social institutions and norms.⁹³³ Speech acts rely on the lifeworld to convey meaning that integrates society to achieve concerted social action, pattern social action through the provision of institutionalised norms, and socialise social actors who participate within the culture.⁹³⁴

Habermas assumes that the first societies of antiquity were totally constituted by the lifeworld; but, as their demography expanded, social action began to differentiate and specialise.⁹³⁵ In modern society, differentiation led to the development of systems of communication concentrated on particular tasks.⁹³⁶ This is unlike communication in the lifeworld, which is culturally-bounded by its referents, rules, and norms but otherwise open

⁹³⁰ Habermas (1984), *supra* note 42; Habermas (1985), *supra* note 42.

⁹³¹ *Ibid.*

⁹³² *Ibid.*

⁹³³ *Ibid.*

⁹³⁴ *Ibid.*

⁹³⁵ *Ibid.*; Also see Deflem (2013), *supra* note 142.

⁹³⁶ *Ibid.*

to numerous subjects and purposes.⁹³⁷ For example, the economic system favours speech acts and action strategies that guarantee the maximisation of profit.⁹³⁸ Instead of open (albeit, culturally bounded) communication, discourse is centred on referents, rules, and norms that service that economic system.⁹³⁹ A system of governance also differentiated from the lifeworld, concentrating communication on the achievement of administrative control.⁹⁴⁰ Habermas characterised the referents, rules, and norms of social systems collectively as *media*, in the sense that communication was *mediated* by something other than argument.⁹⁴¹ For Habermas, that media was a communicatively deficient sign that circumvented the deliberative style of communication – a style that availed speech acts with broad range of cultural referents.⁹⁴² For an economic system media was often money and the institutions devised around money.⁹⁴³ For an administrative system media could include the rise of technocratic expertise and representational democracy in place of participatory governance.⁹⁴⁴ The sign restricted the referents available to speech acts so that the information conveyed related solely to the instrumental function served by the system.⁹⁴⁵ Communication is uncoupled from the lifeworld to the extent subsystems dominate social action.⁹⁴⁶ In this sense, the lifeworld is no longer coterminous with society.

⁹³⁷ *Ibid.*

⁹³⁸ *Ibid.*

⁹³⁹ *Ibid.*

⁹⁴⁰ *Ibid.*

⁹⁴¹ *Ibid.*

⁹⁴² *Ibid.*

⁹⁴³ *Ibid.*

⁹⁴⁴ *Ibid.*

⁹⁴⁵ *Ibid.*

⁹⁴⁶ *Ibid.*

Unlike Parsons, Habermas thought systems represented a pathological aberration that if left unfettered could usurp the lifeworld entirely.⁹⁴⁷ The instrumental functions of systems may facilitate technological and administrative progress necessary to accommodate demographic complexity, but they also, incidentally, suppress argument.⁹⁴⁸ Instead, communication becomes reliant on media that favours outcomes consistent with their underlying systems.⁹⁴⁹ Systems did not work together to constitute a healthy whole.⁹⁵⁰ Instead, systems are institutions of unadulterated power that enduringly destabilise society to their advantage.⁹⁵¹

Law can be a means to bridge the chasm between the lifeworld and subsystems.⁹⁵² Like Parsons, Habermas suggests law is an extension of the lifeworld.⁹⁵³ Law is comprised of the cultural referents, rules, and norms availed by the lifeworld.⁹⁵⁴ This cultural substratum becomes sedimented in the institutions of law that then structure social life generally.⁹⁵⁵ In addition, law can structure the social action of other systems according to cultural background produced from deliberative communication.⁹⁵⁶ In this way, law can steer the subsystems in directions consistent with communicative power – speech acts and action strategies that arise from a public in rational communication. Law can also resist the

⁹⁴⁷ *Ibid.*

⁹⁴⁸ *Ibid.*

⁹⁴⁹ *Ibid.*

⁹⁵⁰ *Ibid.*

⁹⁵¹ *Ibid.*

⁹⁵² See Deflem (2013), *ibid*; Habermas (1998), *supra* note 42.

⁹⁵³ *Ibid.*

⁹⁵⁴ *Ibid.*

⁹⁵⁵ *Ibid.*

⁹⁵⁶ *Ibid.*

use of media by creating public space in which participatory communication can occur.⁹⁵⁷ However, law is perennially endangered by the effect of other social systems. Law may be coopted and used to advance functions meaningful to a subsystem alone.⁹⁵⁸ For example, law may couple with an administrative system and be used to steer social action to the instrumental advantage of that subsystem itself.⁹⁵⁹ It is also possible, although Habermas vacillates throughout his career, for law to become a system onto itself, severing from the lifeworld and becoming reliant on itself for propagation.⁹⁶⁰ A *legal system* may be problematic to the extent it circumvents, or supplants, participatory communication.⁹⁶¹ Although, Habermas suggests law that separates from the lifeworld completely, whether on its own accord or by the influence of another subsystem, loses its moral basis.⁹⁶²

By contrast, Teubner argues that law in modern society is a distinct social system.⁹⁶³ Law is a system of communication that relies exclusively on legal referents, rules, and norms for its propagation.⁹⁶⁴ These form a set of customs that service both procedural and substantive functions for social action, in the sense that the legal system:

1. Provides social actors with the symbolic material necessary to communicate meaningfully in legal institutions – without the ability to communicate meaningfully, social actors would not be able to coordinate social activities

⁹⁵⁷ *Ibid.*

⁹⁵⁸ *Ibid.*

⁹⁵⁹ *Ibid.*

⁹⁶⁰ See Deflem (2013), *ibid.*

⁹⁶¹ *Ibid.*

⁹⁶² *Ibid.*

⁹⁶³ See Teubner (1984), *supra* note 42; Teubner (1992), *supra* note 42; Teubner (1993), *supra* note 42; Also see Nobles & Schiff (2012), *supra* note 901.

⁹⁶⁴ *Ibid.*

for the production, interpretation, and enforcement of law.⁹⁶⁵ These include rules pertaining to the use of legal precedent, argument, and other procedures needed to interact with the legal institutions; and

2. Establishes the values that direct the production, interpretation, and enforcement of law – such values are substantive in that they offer legal communication a guiding vision for social action.⁹⁶⁶ For example, the principles of dignity, autonomy, and freedom animate the legal entitlements propounded by legal communication. Their articulation guide law making, whether through legislation, judicial interpretation, or administrative action.⁹⁶⁷

In both their procedural and substantive functions, these customs allow legal communication to assign judgements of legality to social conduct.⁹⁶⁸ Put in other words, legal discourse is able to communicate about whether behaviour is legal or illegal.⁹⁶⁹ Such a judgement is not reached with the assistance of information external to the legal system.⁹⁷⁰ It relies exclusively on legal referents, rules, and norms to come to the decision.⁹⁷¹ In this sense, law is self-referential.⁹⁷²

⁹⁶⁵ *Ibid.*

⁹⁶⁶ *Ibid.*

⁹⁶⁷ *Ibid.*

⁹⁶⁸ *Ibid.*

⁹⁶⁹ *Ibid.*

⁹⁷⁰ *Ibid.*

⁹⁷¹ *Ibid.*

⁹⁷² *Ibid.*

Teubner referred to the legal system as autopoietic in nature.⁹⁷³ Autopoiesis invokes the metaphor of biological cells, which are able to autonomously reproduce and maintain their biochemical environments.⁹⁷⁴ Law and other social systems similarly reproduce and maintain their environments independently.⁹⁷⁵ For example, biological cells have membranes that distinguish intracellular and extracellular environments. The membranous division fetters the flow of chemical information between environments, only permeable to biochemical agents at receptive points along the membrane wall. Social systems are similar in that they are communicatively closed, disregarding most information external to them.⁹⁷⁶ Communications rely exclusively on the referents, rules, and customs belonging to the social system, like the cell relies on biochemical processes internal to it.⁹⁷⁷ These customs provide meaning to language, directing social action to the service of that system.⁹⁷⁸ Their use reproduces and maintains its structure.⁹⁷⁹ Accordingly, a legal system will not communicate directly with a political system, and *vice versa*.⁹⁸⁰ The law refers back to its own customs.⁹⁸¹ Social action interacting with such a system only refers to legal customs.⁹⁸²

⁹⁷³ *Ibid.*

⁹⁷⁴ *Ibid.*

⁹⁷⁵ *Ibid.*

⁹⁷⁶ *Ibid.*

⁹⁷⁷ *Ibid.*

⁹⁷⁸ *Ibid.*

⁹⁷⁹ *Ibid.*

⁹⁸⁰ *Ibid.*

⁹⁸¹ *Ibid.*

⁹⁸² *Ibid.*

However, social systems are not totally closed. There is communication between them, but this requires a system to translate information external to its environment into symbols recognisable to its system.⁹⁸³ Put in other words, a legal system may respond to changes in another environment but it must first make sense of that change in a language familiar to it.⁹⁸⁴ This involves a process of transduction, in which a signal is received at the boundary of the system and then transformed into another set of signs.⁹⁸⁵ These signs rely on legal referents, rules, and norms specific to the system.⁹⁸⁶ Therefore, when the work of activists provokes political progression on the subject of abortion, the law will disregard this system of communications unless it is able to consider the subject in its language.⁹⁸⁷ This may happen at particular channels – or put in the language of biological cells, receptors – such as legislation, judicial opinion, or directive of an administrative actor.⁹⁸⁸ Prior to proclamation of a statute or publication of a judicial opinion, the law is ignorant of changes in its environment.⁹⁸⁹ This model of communication accounts for the observation that law often appears discordant with political or technological progress, especially where law lags behind change in its external environment.⁹⁹⁰ It is also possible that law may

⁹⁸³ *Ibid.*

⁹⁸⁴ *Ibid.*

⁹⁸⁵ *Ibid.*

⁹⁸⁶ *Ibid.*

⁹⁸⁷ See Deflem (1998), *supra* note 918.

⁹⁸⁸ See Teubner (1984), *supra* note 42; Teubner (1992), *supra* note 42; Teubner (1993), *supra* note 42; Also see Nobles & Schiff (2012), *supra* note 901.

⁹⁸⁹ *Ibid.*

⁹⁹⁰ *Ibid.*

impose ideas not representative in the political or cultural environment, requiring their respective systems to accommodate.⁹⁹¹

Law and other social systems may couple together, too, to facilitate communication in a process of symbiosis.⁹⁹² By coupling, Teubner is principally interested in how a system may come to depend on aspects of its external environment, such as another system, for intersystem communication.⁹⁹³ For example, the legal system often couples with the political system to create institutions that, at least in part, function as a channel for intersystem communication.⁹⁹⁴ The legislature and judiciary, for example, are institutions that allow for social actors interacting with the political system to simultaneously interact with the legal system.⁹⁹⁵ Both institutionalise processes that allow the transduction of political communications into legal communications.⁹⁹⁶ Legal communications also benefit from the effect of political power that establish the apparatuses of punishment that accompany legal sanctions.⁹⁹⁷ These apparatuses of punishment may involve the deprivation of liberty, the infliction of physical harm, or extraction of wealth through fines.⁹⁹⁸ This buttresses the effect of legal communications.⁹⁹⁹ Similarly, law couples with political activity to the extent the judiciary determine the legality of political action, either

⁹⁹¹ *Ibid.*

⁹⁹² *Ibid.*

⁹⁹³ *Ibid.*

⁹⁹⁴ *Ibid.*

⁹⁹⁵ *Ibid.*

⁹⁹⁶ *Ibid.*

⁹⁹⁷ *Ibid.*

⁹⁹⁸ *Ibid.*

⁹⁹⁹ *Ibid.*

by virtue of a constitution, statute, or common law.¹⁰⁰⁰ Social actors interacting with the political system come to govern their processes in a manner that coincides with the legal terrain.¹⁰⁰¹ This can legitimate the social actors interacting with political institutions entrenching their positions of power. Law and political power then become entangled to the extent these institutions of transduction wed social action together allowing the systems to operate in concert.¹⁰⁰² Law and politics become inseparable from each other abetting and shaping their respective communications.¹⁰⁰³

The advantage of Teubner over Habermas and Parsons, is that Teubner does not see legal communication as unidirectional.¹⁰⁰⁴ Put in other words, he does not follow a stimulus-response model of law in which law communicates an idea and it correspondingly causes a response in its subjects.¹⁰⁰⁵ This assumes a direct effect of law on those it is supposed to govern.¹⁰⁰⁶ Instead, communication between law and other social systems is diffused and indirect.¹⁰⁰⁷ Legal communications depend on the receptivity of other social systems, and how law's output is transduced into an input meaningful to another system's environment.¹⁰⁰⁸ While law can be coupled with instrumental goals to service certain objectives, and thereby law can express a distinct message to other social systems,

¹⁰⁰⁰ *Ibid.*

¹⁰⁰¹ *Ibid.*

¹⁰⁰² See Cover (1986), *supra* note 42; Foucault (2000a), *supra* note 42.

¹⁰⁰³ *Ibid.*

¹⁰⁰⁴ See Teubner (1984), *supra* note 42; Teubner (1992), *supra* note 42; Teubner (1993), *supra* note 42; Van Schooten (2012), *supra* note 41; Van Schooten (2014), *supra* note 41.

¹⁰⁰⁵ *Ibid.*

¹⁰⁰⁶ *Ibid.*

¹⁰⁰⁷ *Ibid.*

¹⁰⁰⁸ *Ibid.*

understanding law as communication necessitates attention to the conditions under which actors find themselves.¹⁰⁰⁹ That includes the systems that social actors are principally interacting with, whether that is their lifeworld or a specialised subsystem, and how law's message is understood through that system.¹⁰¹⁰

Van Schooten stresses this diffusive model of legal communication in her theory of institutional semiotics.¹⁰¹¹ Relying on Bernard Jackson and Jerome Bruner's idea of semiotic groups, Van Schooten suggests legal communication is affected by conditions of understanding among collectives of social actors.¹⁰¹² Social actors can be divided into semiotic groups whose cultural referents, rules, and norms are specific to them and self-referential.¹⁰¹³ Actors interact with these semiotic groups, making use of their customs to inject meaning into their communications.¹⁰¹⁴ Van Schooten draws a parallel between Jackson and Bruner's idea of semiotic groups and the systems of Teubner, suggesting that legal communication indirectly structures social life.¹⁰¹⁵ The narrative expressed by law and the effect the speech act has on social life depends on how that speech act is understood by the semiotic group.¹⁰¹⁶ In this way, semiotic groups are parallel to Teubner's application

¹⁰⁰⁹ *Ibid.*

¹⁰¹⁰ *Ibid.*

¹⁰¹¹ Van Schooten (2012), *ibid*; Van Schooten (2014), *ibid.*

¹⁰¹² *Ibid*; Also see Jerome Bruner, *Beyond the information given* (London, UK: George Allen & Unwin, 1974) [Bruner (1974)]; Jerome Bruner, *Acts of meaning* (Cambridge, MA: Harvard University Press, 1990) [Bruner (1990)]; Jackson (1988), *supra* note 42; Jackson (1990), *supra* note 42; Jackson (1995), *supra* note 42.

¹⁰¹³ *Ibid.*

¹⁰¹⁴ *Ibid.*

¹⁰¹⁵ *Ibid*; Also see Teubner (1984), *supra* note 42; Teubner (1992), *supra* note 42; Teubner (1993), *supra* note 42.

¹⁰¹⁶ See Van Schooten (2012), *ibid*; Van Schooten (2014), *ibid.*

of systems theory.¹⁰¹⁷ However, Van Schooten is open to plurality of social systems or semiotic groups, unlike Teubner, which may arise under more formal or informal conditions of differentiation in a society.¹⁰¹⁸ What Teubner may treat as a complete economic or political system may actually be better differentiated into smaller social systems or semiotic groups.¹⁰¹⁹ Similarly, Habermas' lifeworld may be accurately sundered into a multiply of semiotic groups organised around shared values. What then becomes important to the analysis of law in society is a careful description of the conditions of understanding, and the transduction of signals between different collectives.

Intersystem or intergroup communication is not peaceful. As I have discussed earlier through Foucault and Cover, the narrative conveyed in communication, including law, displaces competing referents, rules, and norms.¹⁰²⁰ The *nomos* of law comes at the cost of extirpating other possible understandings of law in society.¹⁰²¹ It asserts a specific vision of social life that is not serviceable to others.¹⁰²² Intersystem communication then represents a potential danger to systems, and the relative impermeability of social systems represents an expression of resistance. To redeploy the biological metaphor, these autopoietic cells may communicate with each other for mutual advantage, but these cells take their own propagation and maintenance as their principal object. Porous boundaries allow for the diffusion of cells' internal environments making them indistinguishable from

¹⁰¹⁷ *Ibid.*

¹⁰¹⁸ *Ibid.*

¹⁰¹⁹ *Ibid.*

¹⁰²⁰ See Cover (1983), *supra* note 51; Cover (1986), *supra* note 42; Foucault (2000a), *supra* note 42.

¹⁰²¹ *Ibid.*

¹⁰²² *Ibid.*

the extracellular environments they are embedded in. In order to sustain themselves, cells must be selective as to the biological information permitted over their cellular membranes. Similarly, the success of a social system or semiotic group depends on its capacity to respond to its environment by selectively communicating with other systems, while resisting the supplanting force of opposing ideas.¹⁰²³

This brings me to a systems theory that I think best accords with my methodology. It is sensitive to law's semiotic nature as communication, first set out in the context of this manuscript by Habermas and then revised with Foucault. It is jointly constructivist, in understanding law and other social systems hermeneutically from the position of the social actors who communicate from within them; and critical in that it can link up with the critical legal method borrowed from Unger and van Schooten. To the latter point, it is important that the systems theory does not pretend to approach law and society in a totalising manner. By totalising, I mean the application of systems theory that mistakes the social organisation it describes as a universal and atemporal fact. Parsons, Habermas, Teubner, and van Schooten are helpful in that regard, in that each respond to the existence of systems as a consequence of social actors.¹⁰²⁴ As historical conditions change, the composition of society and its social systems may also change. Regardless, the systems-theoretic analysis is a helpful model by which one can understand communication in a differentiated society. The systems theory enables me to reconstruct the effect of legal fictions in a manner that is sensitive to this differentiation.

¹⁰²³ See Teubner (1984), *supra* note 42; Teubner (1992), *supra* note 42; Teubner (1993), *supra* note 42.

¹⁰²⁴ *Ibid*; Habermas (1984), *supra* note 42; Habermas (1985), *supra* note 42; Parsons (1972), *supra* note 918; Van Schooten (2012), *supra* note 41; Van Schooten (2014), *supra* note 41.

The Ecosystem

There are a few social systems interacting when it comes to a legal definition of death. A legal definition, to the extent its expression originates from law, necessitates a legal system. That legal system can be understood as autopoietic in nature referring back to its own customs to substantiate legal communications.¹⁰²⁵ Those legal communications, such as a legal definition of death, inform actors about the legality of social action.¹⁰²⁶ Accordingly, legislation informs social actors as to when it is legal, and correspondingly illegal, to conduct *post-mortem* tissue practices – after, and not prior to, a determination of death. As part of this, the definition also engages other social systems or semiotic groups that:

1. Inform the direction of legal communications by coupling with the legal system – for example, a system of biopolitics, or biopolity, that has coupled with law to achieve goals instrumental to the protection of life and health, and negation of disease and death.¹⁰²⁷ This system underlies the legal fiction of death discussed in Chapter 3. A legal system has also coupled with a lay community and medical system to create an interstitial system between them. This interstitial system is known as a therapeutic relationship and structures communication between lay and medical systems in a manner that promotes deliberative communication, as discussed in Chapter 4.¹⁰²⁸

¹⁰²⁵ See Teubner (1984), *ibid*; Teubner (1992), *ibid*; Teubner (1993), *ibid*.

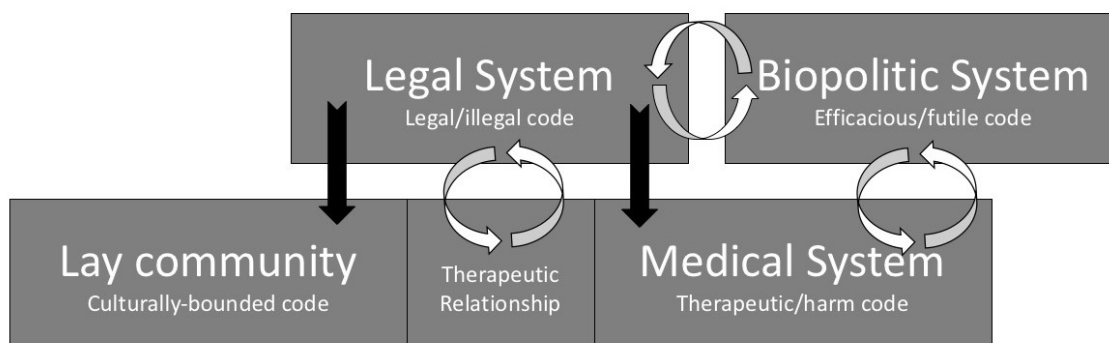
¹⁰²⁶ See Van Schooten (2012), *supra* note 41; Van Schooten (2014), *supra* note 41.

¹⁰²⁷ See generally Esposito (2008), *supra* note 72; Esposito (2015), *supra* note 72; Foucault (2008), *supra* note 72; Lemke, *supra* note 72.

¹⁰²⁸ See generally Deflem (2013), *supra* note 142; Emanuel & Emanuel, *supra* note 868; Habermas (1998), *supra* note 42.

2. Interpret the legal communications and respond to the law's understood meaning – that includes a social system of medical doctors and personnel who treat patients and administer the procedures necessary to determine death, and the patients who express donative intentions. These are understood as the medical system and lay community, respectively. The medical system and lay community provide referents, rules, and norms specific to their system that frames social action. This includes actors' frame of understanding of legal information.

Figure 1: Intersystem communication relating to the legal definition of death.



Gray boxes indicate autopoietic systems. White circular arrows indicate coupling between systems allowing for reliable intersystem communication. Black notched arrows indicate directed communication of legal fiction from one system to another. Specifically, black notched arrows refer to the flow of information conveyed by a legal definition of death.

The legal system's autopoietic character does not mean it ignores information external to it.¹⁰²⁹ The legal system can be coupled with other systems, allowing for reliable exchange of information between environments.¹⁰³⁰ Coupling between systems requires

¹⁰²⁹ See Teubner (1984), *supra* note 42; Teubner (1992), *supra* note 42; Teubner (1993), *supra* note 42.

¹⁰³⁰ *Ibid.*

channels of communication between systems to be institutionalised.¹⁰³¹ The legal system may then depend on the function of those institutions to react to new information.¹⁰³² In this way, changes in the political system may inject new referents, rules, and norms for the legal communications.¹⁰³³ For example, provincial and territorial legislatures allowed their respective legal systems to react to changes in medicine by defining death as brain death. The legal system was thereby able to react to shifting realities with end of life care. Legal cases also represent an institutionalised channel of intersystem communication to the extent judges rely on information external to the legal system to assist with make determinations of law and fact.

This coupling of the systems allows for the legal system to transduce information external to legal communications into a form comprehensible to legal discourse.¹⁰³⁴ Such a transduction appears to have taken place between the legal system and a political system centred on a biopolitical style of governance. As described in Chapter 3, the legal definition of death conveys a narrative of futility that is consistent with the interests of a biopolity. A biopolity is characterised by its use of legal and political institutions to promote the life and health of the populous, and eliminate the possibility of disease and death.¹⁰³⁵ The definition of death services this style of governance by allowing the boundary of life and death to be under its control.¹⁰³⁶ Determining death at an earlier point along the continuum

¹⁰³¹ *Ibid.*

¹⁰³² *Ibid.*

¹⁰³³ *Ibid.*

¹⁰³⁴ *Ibid.*

¹⁰³⁵ See Esposito (2008), *supra* note 72; Esposito (2015), *supra* note 72.

¹⁰³⁶ *Ibid.*

of dying may free up resources that can be reallocated to other social or public health programmes, and may avail the state with viable organs and tissue. This *nomos* does not originate from law itself, but is the consequence of intersystem communication between law and a biopolity, largely determined by the activity of transplant physicians. As a biopolity emerges from the historical conditions of the modern state, it comes to use the legislature as a means of implementing its speech acts and action strategies in law. Legal communications can thereby contribute to the power interests of the biopolity by overlaying its legal-illegal code on the efficacious-futile code used by the biopolity.

The biopolity is also coupled with the medical system to the extent that biopolitical action strategies depend on medical information to promote population health.¹⁰³⁷ Medical information provides the biopolity with contemporary understandings of human physiology, and observation of successful therapeutic interventions.¹⁰³⁸ With respect to the latter, it appears that authors measure therapy's success by its capacity to abate disease and pain, and the absence of incidental harm. This is assessed with respect to their understanding of physiology.¹⁰³⁹ The biopolity then appears to transduce this information into biopolitical language of efficacy and futility, as least as it pertains to the legal fiction of death. This enables the biopolitical system to organise its speech acts and action strategies in a manner that improve life outcomes of its governed population, and ward against fatal consequences.¹⁰⁴⁰ The health of the general population may then be

¹⁰³⁷ *Ibid*; Also see Foucault (2008), *supra* note 72; Lemke, *supra* note 72. It is important to note that while I refer to a monolithic medical system, it is probably more appropriate to attribute the development of discrete groups within the medical system, such as transplant medicine.

¹⁰³⁸ *Ibid*.

¹⁰³⁹ *Ibid*.

¹⁰⁴⁰ See Esposito (2008), *ibid*; Esposito (2015), *ibid*.

immunised against potential maladies.¹⁰⁴¹ In turn, the coupling between biopolitical and medical systems allows for biopolitical information to inform medical practice.¹⁰⁴² Ideas of therapy and harm used in medical practice can thereby overlap with biopolitical judgements of efficacy and futility.¹⁰⁴³ This is often possible given that both systems are fundamentally interested in the preservation of life and health, which allows the idea of what is therapeutic to share conditions with biopolitical assessments of what is effective.¹⁰⁴⁴ Notions of efficacy and futility may then instruct the administration or ethics of medical care.¹⁰⁴⁵

At the boundary of the medical system and lay community is an interstitial system, described in Chapter 4 as the therapeutic relationship. The interstitial system is the product of law coupling with the action strategies of the medical system and lay community. Specifically, the system balances competing strategies of consent and therapy within a legal framework. The legal framework is both contractual and fiduciary in nature, giving shape to the legal relations between physician and patient through the affordance of rights, claims, and duties. It is interstitial in the sense it is not fully independent of law, medicine, or the lay public. It is an institutionalised channel of communication that allows for lay and medical communications to be understood and related together. That institution envisions deliberative communication as a means to best balance patient and physician interests.¹⁰⁴⁶

¹⁰⁴¹ *Ibid.*

¹⁰⁴² *Ibid.*

¹⁰⁴³ *Ibid.*

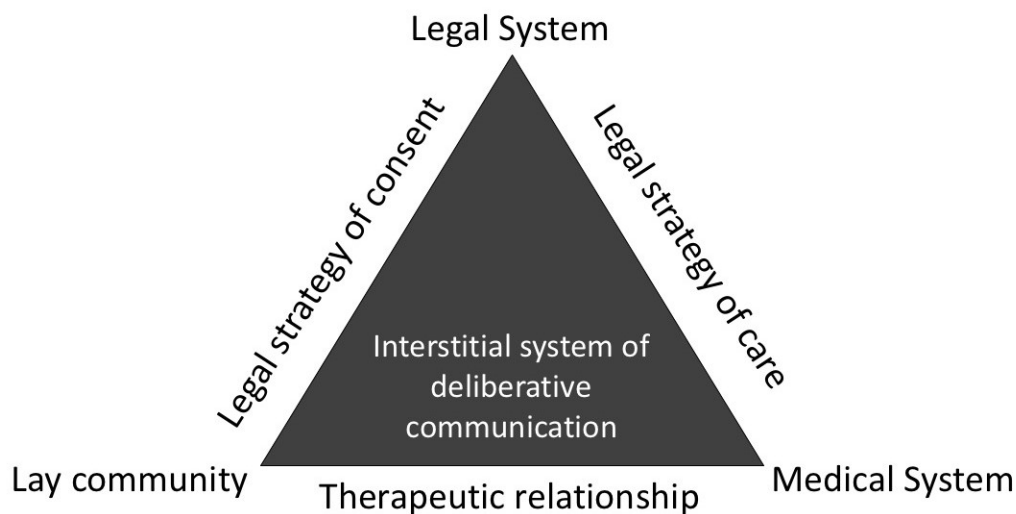
¹⁰⁴⁴ *Ibid.*

¹⁰⁴⁵ *Ibid.*

¹⁰⁴⁶ See generally Deflem (2013), *supra* note 142; Emanuel & Emanuel, *supra* note 868; Habermas (1998), *supra* note 42.

Accordingly, the interstitial system results from the transduction of opposing communications into a set of standards that approximate egalitarian, participatory discourse. While these standards may not be reflected elsewhere in the lay, medical, or legal systems, this transduction is achieved principally through the legal-illegal code. In this way, the therapeutic relation has referents, rules, and norms of communication that distinct from other social systems, but they principally depend on their expression through a legal-illegal code.

Figure 2: *Interstitial system of deliberative communication.*



Gray triangle represents the bounds of the interstitial system of deliberative communication. Systems are represented at the points of the triangle. Flat edges of triangle represent the intersystem communication between systems.

Taken together, these systems and institutions of intersystem communication may form the social environment that the legal definition of death communicates within. The legal definition may obtain its *nomos* from the interaction between legal and biopolitical systems. That is then conveyed to the lay community and medical system. The questions I will now ponder are: (1) how this information may be conveyed from the legal system and

taken up by the lay community and medical system; and (2) how this may interfere with the interstitial standards of deliberative communication. The effect of a legal fiction of death may then be understood within the theoretical lens of intersystem communication.

Fiction as Intersystem Communication

It is now possible to reconstruct the effect of legal fiction through a systems-theoretic lens. Against the backdrop of an ecosystem divided into further subsystems, legal fiction may be understood as a channel of intersystem communication. It is a means to transduce information specific to a legal system into a set of inputs understandable to another social system. It may then be taken up by social actors and inform their behaviour in a manner consistent with the fiction's authors. The systems-theoretic approach is helpful in this regard, in that it better approximates how legal information relates to society.¹⁰⁴⁷ It understands that the effect of law, including legal fictions, is not a direct response to a stimulus.¹⁰⁴⁸ Law structures social life indirectly through its capacity to penetrate subsystems.¹⁰⁴⁹ The consequence of law on social life is often aided by apparatuses of punishment, but this coupling between law and politics does not demonstrate a direct effect of law. Rather, it shows the indirect relationship between law and social life – a relationship mediated by communication. The legal fiction improves on the effect of law by reducing signal interference as it is transduced from one system to another. Fiction ensures the message of law is not radically altered by the internal code of the receiving system,

¹⁰⁴⁷ See Teubner (1984), *supra* note 42; Teubner (1992), *supra* note 42; Teubner (1993), *supra* note 42; Van Schooten (2012), *supra* note 41; Van Schooten (2014), *supra* note 41.

¹⁰⁴⁸ *Ibid.*

¹⁰⁴⁹ *Ibid.*

approximating the direct flow of information envisioned by the stimulus-response model. This is done through the function of media, as characterised by Habermas, and a strategy of deception, lessening a legal system's dependency on punishment to effect desired outcomes.

As a strategy of deception, a legal fiction can create a channel of intersystem communication where it would otherwise not succeed. As stated before in Chapter 3, a legal fiction is a misrepresentation that brings about an outcome consistent with its unstated motivations.¹⁰⁵⁰ It achieves this by conveying a message that is understood by the audience, or receiving social system, in a manner that triggers a response.¹⁰⁵¹ The response is made without awareness of the authors' intentions, who may be advantaged by its commission. This may operate similarly to a cell and virus. A biological cell's outer membrane is generally not permeable to external biological matter, but the receptors on its outer membrane may open channels when activated.¹⁰⁵² When those channels are activated, certain biochemical processes are triggered within the cell.¹⁰⁵³ The receptors are normally sensitive to a particular extracellular molecule; however, a virus may possess a similarly structured property that activates the receptors.¹⁰⁵⁴ Successful binding with the receptors

¹⁰⁵⁰ See Fuller (1967), *supra* note 38.

¹⁰⁵¹ See Van Schooten (2012), *supra* note 41; Van Schooten (2014), *supra* note 41.

¹⁰⁵² See T.J. Wickham, R.R. Granados, H.A. Wood, D.A. Hammer, & M.L. Shuler, "General analysis of receptor-mediated viral attachment to cell surfaces" (1990) 58:6 *Biophys J* 1501 [Wickham et al., (1990)].

¹⁰⁵³ *Ibid.*

¹⁰⁵⁴ *Ibid.*; Also see biology e.g., Keith R. Jerome, "Viral Modulation of T-Cell Receptor Signaling" (2008) 82: 9 *J Virol* 4194.

then triggers a response in the virus that allows it to penetrate the cell and coopt the cell's inner machinations.¹⁰⁵⁵ The cell may then be used as a host for the virus' replication.¹⁰⁵⁶

Similarly, the legal fiction of death may appear to coincide with a lay idea of death. Despite this coincidence, the fiction may misrepresent death in that it does not identify how or why it has been defined. At best it conveys that death takes place when specific criteria are met, but the process of selecting those criteria is left unstated. By consequence, social actors interacting in the context of a lay community may react to the legal fiction without full awareness of what it defines. They may instead rely on an understanding availed from within their lay community, or a specific semiotic group they belong to, when interpreting the word *death*. The use of lay understanding may induce the patient to form a donative intention that they would not otherwise make if afforded full information. For example, a patient may consent to DCD without understanding how the determination of death is practiced, or why it emerged in the context. With that understanding, the patient may choose to direct post-*mortem* donation practices differently. The fiction thereby invades the lay community by appearing consistent with the community's symbolic referents. It may then direct social action in a manner consistent with its underlying motives. By consequence, the legal system effectively circumvents the issue of intersystem communication, and the possibility that a system may resist its message, and commands conduct from the nuclei of the other social systems.

The legal fiction may also affect the conduct of physicians without their knowing. For example, the Royal College of Physicians and Surgeons of Canada set standards of

¹⁰⁵⁵ *Ibid.*

¹⁰⁵⁶ *Ibid.*

education for medical residents. One of their publications describe the definition of death; however, it does not fully inform physicians *how* or *why* the criteria were selected.¹⁰⁵⁷ There is some measure of discussion of brain death and its emergence from changing conditions of care in the mid twentieth century; however, the author merely identifies the brain as the physiological correlate for cognitions necessary for life.¹⁰⁵⁸ It disregards the idea that the definition relates to a biopolitic action strategy of futility.¹⁰⁵⁹ Accordingly, the fiction, by virtue of its poverty of language, can also coincide with an informationally-deficient medical idea of death. This may allow physicians and other medical personnel to determine death without considering what it reflects, or what consequences it has, beyond its relevance to therapeutic care. The fiction may thereby direct social action in the context of a medical system in a manner consistent with its underlying motives, by encouraging early determinations of death.

While the fiction itself establishes a channel of communication between social systems, reliance on the fiction displaces deliberative communication between a patient and physician about conditions of post-*mortem* organ and tissue donation. The only guidance the legislation provides is that a legally-authorized donation must take effect following death. The legislation presents the word, *death* in the context of post-*mortem* tissue donation as if its symbolic content is incontestable. In Manitoba's *Human Tissue*

¹⁰⁵⁷ See Jeffrey G. Betcher, "Diagnosing Death" *The Royal College of Physicians and Surgeons of Canada*, online: http://www.royalcollege.ca/portal/page/portal/rc/common/documents/bioethics/section5/case_5_4_e.html.

¹⁰⁵⁸ *Ibid.*

¹⁰⁵⁹ *Ibid.*; Paradoxically, perhaps, this is even though medical information services biopolitic communications. While medical and biopolitical systems are coupled, individual actors may not be aware of the mutual influence.

Gift Act, for example, there are no legal obligations on the physician to inform the patient about the processes involved in tissue donation.¹⁰⁶⁰ There are no obligations on the physician to inform the patient about what the definition of death entails, or to retrieve informed consent for POI. A patient may be told that they may elect to donate their tissue after death; however, they may not converse with a physician or other health care provider prior to needing to make a donative intention.¹⁰⁶¹ The legal fiction identifies whole brain death as the relevant criteria, but it does not explain how or why its criteria were selected, when the *how* or *why* may be important to forming that donative intention. Further, the act is silent on POI, which may radically affect the process of dying to the benefit of organ and tissue donation. Again this may be a material fact that alters a patient's donative intention. Accordingly, relying on the legal fiction to communicate the requisite conditions for post-*mortem* organ and tissue donation allows material aspects of the practice to not be explained. Its language lacks the specificity needed to selectively inform other social systems. This amounts to a restriction in communication as conceived by the therapeutic relationship.

Restricting what is communicated, and limiting opportunities for communication, enable the fiction to steer behaviour in a manner consistent with its biopolitic content.¹⁰⁶² This includes guiding a donor to issue a directive authorising post-*mortem* organ and tissue donation. The steering effect takes place because the fiction constrains the range of responses available to other social systems. The donor may thereby be induced to authorise

¹⁰⁶⁰ See Manitoba's *Human Tissue Gift Act*, *supra* note 25.

¹⁰⁶¹ There are currently no obligations for communication between physician and patient to discuss tissue donation, especially when a potential donor registers their post-*mortem* direction on a Manitoba drivers licence.

¹⁰⁶² See generally Habermas (1984), *supra* note 42; Habermas (1985), *supra* note 42.

the donation practices. This violates the standards set out in the interstitial system, in that it fails to bring the donor and physician together in participatory, egalitarian communication.¹⁰⁶³ The donor is unable to make effective use of a legal strategy of consent because not all the material information is available to them. Instead, the power interests of the biopolity are advanced by the physicians' action strategies of therapeutic care, informed by judgements of futility endemic to biopolitical communications. This represents the collapse of the contractual framework envisioned by the interstitial system.

Lastly, the fiction may also maintain distinct social systems, including a biopolitical system, which preserves the biopolitical strategy of defining death. The self-propagation of social systems depends on the integrity of their internal referents, rules, and norms.¹⁰⁶⁴ If foreign referents, rules, and norms enter that social system, then its underlying culture may be diluted and eventually collapse.¹⁰⁶⁵ Maintaining the boundaries of social systems is thereby important to maintaining the distinct social functions served by each system.¹⁰⁶⁶ Each system only opens its environment to information external to it if that information can be transduced into language amenable to its functions.¹⁰⁶⁷ The constraint imposed on social life from within the social system prevents variable conduct, which may otherwise frustrate the function the system serves.¹⁰⁶⁸ Similarly, a biopolitical system is advantaged by preserving its distinction from lay and medical communities. While coupling with other

¹⁰⁶³ *Ibid*; See generally Habermas (1998), *supra* note 42.

¹⁰⁶⁴ See Esposito (2015), *supra* note 72; Also see Luhman (1990), *supra* note 87; Luhmann (1995), *supra* note 87.

¹⁰⁶⁵ *Ibid*.

¹⁰⁶⁶ *Ibid*.

¹⁰⁶⁷ *Ibid*.

¹⁰⁶⁸ *Ibid*.

systems may allow a legal fiction to influence post-*mortem* donative practices, the collapse of social systems would challenge the feasibility of its biopolitical strategy; in the sense that biopolitical strategies enjoy the relative absence of competition or critique. If social systems collapse, social life takes place entirely within a lifeworld or an undivided social community, and the possibilities for social action diversify.¹⁰⁶⁹ There may be less stable, prescribed social norms in the absence of social systems – in that social life becomes contestable in a Hobbesian disorder.¹⁰⁷⁰ If the subject of defining death is opened up to this contest, its underlying motivations may also be challenged, frustrating the biopolitical narrative the definition serves.

Therefore, the biopolitical system may opt to preserve its relative autonomy from the rest of society through use of a legal fiction of death. The legal fiction allows those boundaries between social systems to be maintained, whilst effecting a targeted biopolitical strategy of preserving health. If a more explicit legal device was used, or if parties were invited to deliberate over conditions of death, the system's control over the conditions of human death may be opposed with greater incidence. Therefore, by jointly suppressing deliberation and appealing to the interpretive codes of lay and medical communities, a legal fiction may produce a fog of war that maintains the relative autonomy of its system. This then conceals its life preserving strategies behind the communicative boundary of the biopolitical system.¹⁰⁷¹

¹⁰⁶⁹ *Ibid.*

¹⁰⁷⁰ *Ibid.*

¹⁰⁷¹ See generally Esposito (2015), *ibid.*

In contrast to Manitoba, Nova Scotia's Bill 121, if proclaimed, would require physicians to inform a patient or their substitute decision-maker of the procedures entailed by post-*mortem* tissue donation, including the criteria for determining death.¹⁰⁷² It would establish a minimum amount of information that must be shared between a physician and patient prior to consent.¹⁰⁷³ This includes:

- (a) an explanation of the donation process;
- (b) an explanation of the determination of death process;
- (c) an explanation of pre-death transplantation optimising interventions and why they are used, except in cases where the substitute decision maker is being asked for consent after the person has died;
- (d) what organs or tissue can be donated;
- (e) that by consenting to donation after death for transplantation, the individual or substitute decision maker authorizes the information sharing of the individual's personal information between persons and organisations engaged in the donation, procurement, or transplantation of organs and tissues for the purpose of facilitating organ and tissue donation and transplantation across jurisdictions; and
- (f) an explanation of additional tests and procedures conducted to determine medical suitability and confidentiality protections and potential notification requirements regarding this information.¹⁰⁷⁴

Furthermore, death is defined as:

[T]he irreversible cessation of the functioning of the organism as a whole as determined by the irreversible loss of the brain 's ability to control and coordinate all of the organism's critical functions. [...] [Critical functions are] respiration and circulation, endocrine and homeostatic regulation, and consciousness.¹⁰⁷⁵

It would also impose obligations on the physician to obtain informed consent with respect to POI.¹⁰⁷⁶ Consent to post-*mortem* tissue donation would not imply consent to

¹⁰⁷² Bill 121, *supra* note 60, s. 13.

¹⁰⁷³ *Ibid* at s. 13.

¹⁰⁷⁴ *Ibid* at s. 13.

¹⁰⁷⁵ *Ibid* at s. 2.

¹⁰⁷⁶ *Ibid* at s. 10.

POI.¹⁰⁷⁷ Further, as noted above, POI would need to be explained to the donor prior to consent.¹⁰⁷⁸ Accordingly, while Manitoba fails to replicate the interstitial system of deliberative communication in its statutory framework, Bill 121 may approximate it. Its approximation is near in the sense there is no obligation to explain the historical origins of the definition, and its relation to a biopolity is not considered. To this extent, the effect of legal fiction may persist in that it can steer donative intentions that may not otherwise be made. Nonetheless, Bill 121 represents an improved standard of communication that would better inform patients about the conditions under which DND, DCD, and POI are done. This could attenuate the effects of the legal fiction, by ensuring the patient that the legal definition is not equivalent to a lay understanding of death, and better situates it in relation to the donation process. If I accept deliberative communication as the standard by which donation practices should be carried out, dead or alive, then statutory frameworks like Bill 121 are an important step in the right direction.

In expressing deliberative standards of communication, the interstitial system installed by Bill 121 may also render the communicative boundaries between legal, lay, and medical systems comparatively permeable. As an institution of intersystem communication, the therapeutic relationship eases transduction of signals across systems in a manner that jointly promotes sovereignty and biopolitical interests in preserving life. It thereby mirrors the strategic outcomes of the law of battery, in that Bill 121 guards an individual from the excess of biopolitical communality: defining death at a time that promotes the viability of organs and tissue, and judiciously preserves resources. It ensures

¹⁰⁷⁷ *Ibid* at s. 10.

¹⁰⁷⁸ *Ibid* at s. 10.

that the legitimate object of advancing population health does not come at a cost to cultural values of individual sovereignty, transforming the dominating power of biopolitics into a productive application of power. In this sense, the Foucauldian ethic spelled out in Chapter 2 is applied to legal fiction, transforming it from a device of deception into one of utility.¹⁰⁷⁹ The idea of fiction as a device of utility was Fuller's second definition of legal fiction.¹⁰⁸⁰ The idea of legal fiction as utility may be possible where its use is accountable to a knowledgeable public; however, this may be an idealistic position to strike. A legal fiction will always be vulnerable to coupling with power, in which case its application in an egalitarian, participatory manner may be tenuous.

But while the boundaries between legal, lay, and medical systems may become comparatively permeable with Bill 121, it is also important to note that the interstitial system allows for systems to maintain their distinction. For example, the interstitial system in the law of battery has not eliminated lay or medical understandings; rather, it has combined their respective action strategies to enable a more deliberative model of interaction between physician and patient. In this sense, the system of biopolitics underlying the legal fiction may not be eliminated with the interstitial system, and may continue to inform the definition of death. The division between social systems is retained, but the heightened standards of consent attenuate the biopolitical strategies, dulling the sword of its *nomos*.

¹⁰⁷⁹ See Foucault (2000a), *supra* note 42; Foucault (2000b), *supra* note 53; Owen, *supra* note 52.

¹⁰⁸⁰ See Fuller (1967), *supra* note 38; Also see Vaihinger, *supra* note 38.

Conclusion

Through the systems-theoretic approach I have proposed a model by which legal information is conveyed and influences social life. Such a model relies on a biological notion of signal transduction across the boundaries of social systems. The model lends to the analysis of legal fiction by understanding how it improves law's capacity to directly structure social life. This is accomplished in part by exploiting deficiencies in language and displacing deliberative communication. Nova Scotia's Bill 121 reflects a possible model by which these destructive consequences of legal fiction can be countered. Principally, it does so by reinforcing a therapeutic relationship with provisions that oblige a minimum standard of informed consent. While this information is not perfect in that it does not require the historical origins of the determination of death to be surveyed, especially its relation to biopolitics, the provisions may empower patients to have a more thorough understanding.

Chapter 6: Conclusion

A legal fiction of death is a technique that services a biopolitical strategy of governance. The definition itself may be informed by biopolitical language of futility. Such language seeks the preservation of life by determining when human life has ended. This determination may allow for the movement of viable tissue from a body that cannot make productive use of it to an ailing patient who can. It may also determine when resources and support are no longer aiding in the convalescence of the body and could be reallocated to others in need. This logic to the definition of death exemplifies an aspect of the biopolity in its fundamental interest in making sacrifices that allow for improved population health and the sustained livelihood of the community.¹⁰⁸¹ These assessments of futility may now seem obvious and perfectly reasonable in light of the social goods brought about by organ and tissue donation; but, this manifest sense of correctness in the reader, and certainly in me, may only evidence the permeation of biopolitics. Its apparent correctness, and the seeming impossibility of defining death otherwise, does not itself deny that the definition exhibits political notions of life, dying, and the relation of a body to a human.

Furthermore, as noted in the immediately preceding chapter, the effect of legal fiction may exhibit a logic of biopolitics. Social systems guard against foreign referents, rules, and norms that may disturb their fundamental logic by maintaining selectively permeable boundaries.¹⁰⁸² Each system closes its internal environment to information external to it unless that information can be transduced into language amenable to its

¹⁰⁸¹ See Esposito (2008), *supra* note 72; Esposito (2015), *supra* note 72.

¹⁰⁸² *Ibid*; Also see Luhmann (1990), *supra* note 87; Luhmann (1995), *supra* note 87.

functions.¹⁰⁸³ This imposition of constraint on social life guards against the excess of indeterminacy, or individualism, which may frustrate the function a system serves.¹⁰⁸⁴ The legal fiction maintains those boundaries between social systems, while effecting a targeted biopolitical strategy. It does so by easing transduction of information between systems through misrepresentation, and suppressing deliberative discourse through the use of media. This allows the language of futility to influence post-*mortem* donative practices without the awareness of and challenge from the lay community. Without the legal fiction, the biopolity risks rejection of the criteria used to determine death and an attenuated rate of consent to post-*mortem* tissue donations. This may belie the effort to preserve the health and lives of the community.

However, the social good of post-*mortem* tissue donation should not easily override the significance of personal sovereignty in Canadian law. Personal sovereignty is such an important value in the common law that it affords the right to patients to deny medical treatment notwithstanding a physician's judgement of their reasons.¹⁰⁸⁵ This strategy of consent resists the strategy of care that would otherwise be imposed by physicians in the interest of preserving life and preventing death.¹⁰⁸⁶ Both strategies are balanced in a manner by contractual and fiduciary legal frameworks that produce a deliberative standard of communication between physician and patient.¹⁰⁸⁷ This interstitial system, as I described in Chapters 4 and 5, allows for the medical system and lay community to interact

¹⁰⁸³ *Ibid.*

¹⁰⁸⁴ *Ibid.*

¹⁰⁸⁵ *Allan, supra* note 76.

¹⁰⁸⁶ *Ibid.*; Also see *Marshall, supra* note 76.

¹⁰⁸⁷ *Ibid.*; See generally Deflem (2013), *supra* note 142; Emanuel & Emanuel, *supra* note 868; Habermas (1998), *supra* note 42.

productively in a manner that does not restrict freedom but may simultaneously achieve therapeutic interests. Similarly, I believe a standard of deliberative care could be expected of post-*mortem* tissue donation and ward against the unilateral application of strategies of biopolitics. The biopolity should not be permitted to exert their power interests freely as that would come at an unmitigated cost to personal sovereignty. As it pertains to the treatment of the body and one's death, biopolitical strategies should be sought openly so that patients may govern their deeply personal affairs, including the approach of their biological death, with full and adequate knowledge.

This is exemplified by Nova Scotia's Bill 121, which if proclaimed would impose standards that approximate the deliberative standard of communication I argue should inform the determination of death and donative practices. It would set conditions for full communication between a physician and patient about tissue donation, the criteria for a determination of death, and the function of POI.¹⁰⁸⁸ It would ensure patients are knowledgeably consenting by better understanding the legal language comprised by the definition of death.¹⁰⁸⁹ It would ensure the inviolability of the person is protected against POI without the patient's consent, and that their bodily property is not wrongfully interfered with in the context of DND or DCD.¹⁰⁹⁰ It would also allow for the therapeutic benefits, and biopolitical strategies, of tissue donation to be preserved to the extent these do not interfere with the directions of the donating patient.¹⁰⁹¹ In this way, Bill 121 would balance the power interests of the donor and physician in a manner that transforms their

¹⁰⁸⁸ See Bill 121, *supra* note 60.

¹⁰⁸⁹ *Ibid.*

¹⁰⁹⁰ *Ibid.*

¹⁰⁹¹ *Ibid.*

opposition into productive social action. In the absence of such a legal scheme in Canadian jurisdictions, such as Manitoba, the legal definition continues to operate as a fiction to the detriment of some of the most important values held in Canadian health law and policy.

A potential consequence of imposing a deliberative standard of communication is that more donations may not be exercised. Patients may disagree with the conditions under which death is determined. The criteria may be contrary to an individual's cultural, theological, or other moral values, especially if informed of the historical conditions that led to the present definition of death; however, the opportunity for individuals to disagree with biopolitical strategies is a potential consequence of protecting liberty and autonomy. The individual may choose to act in a manner inconsistent with a programme that benefits a larger community, because a cultural bond of solidarity may be lacking. However, such consequences should not be resolved through deception. The deception of a legal fiction interferes with personal sovereignty. Instead, a society concerned with incidence of organ and tissue donation should consider the institutions and cultural change necessary to encourage decision-making that benefits the community. For example, a donative scheme based on mandatory choice, if implemented in tandem with a robust public education strategy, could facilitate meritorious decision-making.¹⁰⁹² This could operate within the boundaries of deliberative communication, while potentially producing the registration of more donative intentions.

¹⁰⁹² See e.g., Jamie Lindermann Nelson, "Do we all have a responsibility to donate our organs?" in Wayne Shelton & John Balint, eds, *The Ethics of Organ Transplantation* (Oxford, UK: Elsevier Science Ltd., 2001); Jamie Lindermann Nelson, "Donation by default? Examining feminist reservations about opt-out organ procurement (2010) 3:1 Int J Fem App Bio 23; Robert Veatch, "Routine Inquiry About Organ Donation – An Alternative to Presumed Consent" (1991) 325:17 New Eng J Med 1246.

Relatedly, it is possible that I have not explored all the legal fictions that engage post-*mortem* tissue donation. I suspect there is a second legal fiction that inspires the very notion that bodily material may be *donated*, operating in tandem to the fiction of death to produce tissue donation programmes. The legal concept of donation expresses ideas about a human's relationship to others and to the State. It expresses ideas that address how one relates to the body, their own or that of another. As legal communication, these ideas must, like the definition of death, originate from the social activity of its populace, and must be historically determined. Also, its ideas must be subject to power interests, vulnerable to the coupling of other social systems. On this basis, I suspect the legal concept of donation may similarly service a biopolitical strategy of governance in the interest of promoting tissue donation. I also suspect this strategy is unknown to the general populace and effectuate biopolitical outcomes as a fiction. How biopolitical strategies manifest, especially in opposition to other power interests, may then influence the specific donation schemes that are produced. For example, a voluntary donation scheme, mandatory choice scheme, and presumed consent scheme may result from differentiated programmes of power that prioritise different balances of action strategies. These differentiated programmes of power may, in part, make use of a legal fiction to advance their action strategies.

Accordingly, I believe it would be prudent to research how a biopolity, and other social systems, inform the legal structures of tissue donation and affect consent to donation. I think my critique can only be completely made in the context of an examination of the institutional structure of different donation schemes, and the possibility that a legal fiction of donation contributes to their expression. I cannot give a complete account of how the definition of death affects consent to organ and tissue donation without considering these

potential effects. Such issues go beyond the scope of this thesis, which is why I only mention them summarily here, but undoubtedly should be explored in the space they require. Until then the above reconstruction of the legal fiction of death only examines part what is at stake in the context of post-*mortem* organ and tissue donation. It is one of many interlocking pieces that contribute to consent to organ and tissue donation, and to the very legal and political structures that make donation possible.

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