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Saikewicz, Moralities and Professionals

by

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ABSTRACT

This essay is concerned with the role assumed by a particular view of morality in a case-study. In this case involving an incompetent, it is thought that a view of the individual as morally autonomous can provide the grounds upon which decision is reached. This perspective not only ultimately leads to incoherence in this case, but also illustrates a view of morality and moral theory which is found to promote irresolvable conflict between theories in contemporary liberal democracy. By seeing morality in a manner unfamiliar to this traditional view, it is suggested that these conflicts can often be avoided and the particular case given a happier solution.

The first chapter is devoted to the identification of the mistaken view of morality as context-independent and of moral theory as collections of absolute principles. This in turn requires a brief historical review which places contemporary moral conflicts as well as this conception of morality within a historical perspective.

Chapters 2 and 3 focus upon the specific case and some responses to it. The second chapter relies heavily on exegetical material. The particular case under study is viewed through the lenses of the courts since this presentation is the source of confusion and subsequent discussion. In the third chapter, responses to that decision are rehearsed and some problems with the selected responses indicated.

Chapter 4 examines the methods of deciding the case employed by the court and shared by some disputants. Some faults are found in their treatment of this case which stem from the perspective adopted.

A solution is provided in the final chapter which makes use of arguments from the preceding section. It is suggested that a solution to this case that meets the constraints of coherence and consistency requires a perspective of morality that recognizes contextual constraints. This recognition in turn provides a means for avoiding some conflicts between moral positions that arise over contemporary moral problems such as the case in question.

CHAPTER I.

There are, in the long history of writings on justice and morality, numerous and variant accounts. And as rich as history is in its variety of perspectives and conclusions, so too is our present situation rich in the various accounts of the requirements of morality and the constituents of justice. Historically, moral criteria have changed in character, scope of employment, and meaning, and with these changes has come a change in the methods of settling disputes. The historical accumulation of views, resulting in a conceptual mosaic, has led to another historical phenomenon which is a feature of this age and others, but not all. The circumstance referred to here is the occurence of conflicting moral viewpoints in fractious debate and the incommensurability of those conceptual frameworks. Nowhere is this condition more obvious than in current disputes in the area of bio-medico-legal ethics. Current social problems identified as moral problems, in particular those issues created by pervasive technological advances, are not solveable by ethical theories alone. The heterogeneity of moral beliefs and practices does not admit of unification and commensurability on strictly moral grounds, and insofar as our current pressing social problems require resolution, some means must be found that leads us out of this state of affairs.

The major part of this thesis is devoted to the study of a case reflecting the conditions just identified. In this case the

principal was a profoundly retarded individual incapable of communication who suffered from a leukemia. The problem arose over whether or not to treat the subject's condition and this in turn engendered a dispute between lawyers, doctors, and philosophers over the issue of which profession should have the authority and responsibility for deciding cases of this type. Each disputant brought to the subsequent discussion a particular viewpoint for deciding this case, and in each case the perspectives rest upon values not compatible with the values of the other perspectives. One view is that only personal, subjective considerations can enter into the decision, another is that non-personal standards can be used, and another is an attempt to restrict the use of non-personal standards by person-specific constraints. Central to this dispute are the differing views of the importance of individual autonomy; restricting, a priori, the use of subjective or non-person-specific criterion in the decision is a means by which the unconditional or conditional importance of individual autonomy is represented. And each disputant affirms the correctness of his or her perspective. Dispute appears intractable and the differences in values and their relative importances irreconcilable. But the role of moral theories in decisions of this sort is not what the disputants think it is, for the plurality of moral viewpoints and their occasional incommensurability changes the predominance afforded to moral theories in cases like the one under study. Understanding the role of moral theories in certain decisions requires understanding the historical setting in which decisions, like the one examined here, occur.

The claims made above must all be supported by argument and the relationships between them, which are initially opaque, made clear. To begin with, the charge of incommensurability must be explained. This in turn requires that the conflicts of values which mark much of the current moral disputes be shown to be actual conflicts, which in turn suggests that the pursuit of the rational justification for objective moral principles must be shown to be misguided. And this is no small task. Correspondingly, much of the following is adumbrated and taut, owing to the dictates of time and space, and the suggestions, in particular with reference to the history of ethics, could be greatly extended were such a treatment to be considered complete. What follows is presumed to be adequate to establish the argument.

The term "incommensurability" was brought into philosophical fashion by Thomas Kuhn in the early '60's and since then has become a catch-word for a variety of positions.[1] Used here, "incommensurability" refers to disparate conceptual perspectives, ways of seeing moral issues and classifying moral issues, which are not reducible to each other or a third perspective and which cannot be systematically ordered.[2] Conflicts between opposing perspectives are not resolvable through appeal to the objective logic, language, or theory of value, which forces agreement. There is no neutral, sub-linguistic way of reporting or describing such an objective logic or theory of value; access to such a realm is limited to the languages of logic and value in which opposing viewpoints are represented. When well-reasoned conclusions conflict, the conflict can be traced back to rival premises.

Each successive step back may be given as a reason for the previous disputed claim, becoming in its turn the source of conflict. But justification and reason giving come to an end, after which there is no independent reason or rational criterion with which to secure final inter-theoretical choice. At this point, the acceptance of values, of perpectives, does not depend on reasons; after all moral reasons have been given by disputants in moral arguments and there are no more moral reasons to give to our opponent to persuade him/her to accept our position, then it seems that there are no more reasons to give ourselves in accepting one position over the other. Underlying the acceptance of some values and perspectives is some non-rational choice. But the seemingly arbitrary selection of viewpoints does not show that dispute or reason giving is a pointless exercise. People do change their value-beliefs as a result of argument, and do give reasons for their views. Moral argument often aspires to be rational and impersonal. People also often do not change their views as a result of argument, but stick to their view adamantly. Given the acceptance and entrenchment of certain value-beliefs and moral conceptual frameworks, the force of moral reasons and their significance depends upon that framework. The domain of justice and morality, and what constitutes moral criteria and moral evidence is relative to the perspectives and the value-beliefs held by the individual or group in question. Individuals accept and weight values and the relative weights given to different values by different individuals can account for individual choice and character.

Given that the acceptance of values occurs and is not always

achieved by finite rational debate, and that individuals or groups accept different values and place different weights upon shared values, it does not follow that any perspective is as good as the next or that all are incommensurable. Such would be the position advocated by some subjectivists. For instance it might be argued that expressions of morality amount to no more than an individual's expression of approval or disapproval. If such a view was acceptable, then it would follow that morality was not public, but private only, and that interpersonal moral conflict was difference of opinion and incapable of rational resolution. Incommensurable conflict on this view could only occur at a personal level. But this view is not acceptable because of what it entails and more. This view not only fails to account for morality in the "broad" sense but does not give a good account of what people do and the occurrence of moral argument.[3] People genuinely disagree over <u>how</u> to decide moral issues and not just <u>who</u> approves or disapproves, and this feature of moral life is an embarrassment for this view. Moral problems that arise "in the world," like the case to be studied here and other bio-medico-legal problems, also act as constraints to the acceptability of moral points of view. Facts, experience, and context can function as evidence in support of moral theories in much the same way that evidence supports, or not, scientific theories. How experience is interpreted and how it modifies the perspective is in turn dependent upon the values and perspectives of the individuals in question. Some moral viewpoints such as theological theories of a transcendent reality attach little or no significance to worldly experience; others,

like utilitarianism, attach great significance to worldly experience. And just as the role of "facts" and experience is relative to the values and perspectives endorsed by individuals or groups, so too is the resolution or incommensurability of viewpoints contingent upon those values and frameworks.

Conflict of values is the basis upon which conflict of moral perspective, and subsequent resolution or incommensurability, depend. Different values "cut up" the world of value in different ways and dictate different conclusions on that basis. The values we endorse make different claims upon us which in turn conflict. These values may come from different social sources (e.g. professional ethics or cultural ethics) or private sources, different societies, or different historical periods of the same society. One value we might adopt could dictate the resolution of all conflicts of values. But such an attitude would be contingent upon that value being part of our value-belief system and not everyone has that attitude towards conflict or that value. Resolution of conflicting values depends upon the values in conflict. So too, then, does incommensurability. In these cases where incommensurable viewpoints come down to a difference in value alone, and there is no reason or third value which can order the opposing values, then incommensurability "widens" as the metaphysical commitments "deepen." When values and the claims they make upon us, exclude by their very nature other values and their correlate claims, then incommensurability depends upon the nature of those values. If the conflict resolves itself to the metaphysical nature of values, which exclude all others as impostors to authority, then the common ground upon which resolution may be

achieved becomes scarce and in some cases non-existent. Consider a dispute over abortion, for example, where opposing values are each categorical and a priori (i.e. the absolute prohibition on taking life vs. the mother's absolute right to privacy). There is nothing about the values involved which will settle this dispute, and if the participants refuse to compromise their positions, the dispute is unresolvable.

A similar situation arises in the case examined in the thesis. The value of individual autonomy is seen by one side as requiring that only personal subjective considerations be admitted into the decision process, and another side allows that impersonal standards may be used in the decision. A third contributor attempts, unsuccessfuly, to resolve this dispute. The arguments each side presents are confused and indecisive in establishing its position. What remains after the exchange is the core of each position, their differing views on the value of individual autonomy and its claims upon us.

Careful attention must be paid to the strength of the account of incommensurability given above. Such an account does not purport to show that incommensurability is in any sense "total." Disputants not only share most of a language in which to describe the source of their dispute, they also share as a result an ontology and activities like reason-giving. In order for incommensurable disputes to be identified, it must be possible for two perspectives to answer "yes" and "no", "true" and "false", etc., respectively, to the same problem. This reading of incommensurability does not entail that there is <u>no</u> rational way of resolving conflicts of values and

perspectives. Nor does it entail that each conflict of value cannot be resolved by appeal to some other value. Such resolution is possible, but contingent upon the particular instance, values, and individuals involved.[4]

Objective moral principles cannot be identified independently of the language of values which also is the language in which conflicts arise. Various values within that language compete for the title of ultimate authority and objective supremacy, but the veracity and success of each claim cannot be determined independently of that language. The language of objective principles is then the language of conflict. The process of rational justification and reason giving does not necessarily resolve conflicts and leaves the final acceptance of value and perspective in the hands of the individual. Conflicts in values remain and are unsettled by appeals to objective principles and rationality. The resolution of these conflicts, and hence their incommensurability, is then contingent upon the values, the context of occurrence, and the individuals involved.

The problem of modern moral theory, and the conflicts arising from opposing authoritative moral claims, is in part a result of the history of ethics. Not only is our history responsible for the values we have inherited and the plethora of viewpoints related to these values, but so too is our peculiar view about the role of moral theories in decisions and the relationship between morality and social context a legacy of the past. Contemporary moral issues are thought by most to be resolveable through the application of rules, and these rules are thought to have a certain ontological status and justification.

Both of these attitudes are not only shared by most of society endorsing incomparable perspectives, but are also by-products of that page out of history entitled the Enlightenment.[5]

One of the key episodes in the history of philosophy, which to a large part created the contemporary concept of the moral individual and the attitudes toward morality promulgated by academic philosophers, was the Age of Reason. Clearly the plurality of today's conceptions of morality is not due solely to this important phase of history; Christian ethics in a variety of forms, and the characteristic forms of teleological and hierarchical justifications survive and flourish in contemporary liberal democracy. But the pursuit to find an independent rational justification for morality in a secular society, the "project of the Enlightenment,"[6] succeeded instead in creating a polymorphous foundation of moral discourse as well as a perception of morality as basically a rule-following game. In the flight from teleological and hierarchical forms of justification of moral beliefs, primarily the rejection of Aristotelian and Christian conceptions of ethics, the destruction of a public, shared justification of ethics was completed.[7]

Although the history of the Enlightenment is not just a history of philosophy and ethics, there are certain writers of the period who are paradigmatic of the time and highspots of the movement. Two of these writers, David Hume and Immanuel Kant, represent the spirit and assumptions common to the time. All of the writers of this period share the approach of constructing valid arguments justifying moral rules and precepts which include reliance upon criteria and conditions external to the individual just then liberated.

Individual autonomy and a conception of human nature as each writer understands it, is the starting place for their respective perspectives which are distinctively Christian in character and content. In both writers we find the peculiar condition of providing rational justification for moral injunctions and beliefs in a particular view of human nature and moral autonomy while rejecting (or strongly questioning) the connection between facts and morality. What results is a view of morality as an independent realm not circumscribed by social context and facts; morality and moral argumentation become timeless and all writers in essence contribute to one single debate. Each perspective assumes that human nature is fixed, an immutable basis for morality.

For Hume, the relevant characteristics of the autonomous moral agent were the passions, since reason could never move us to act. Having rejected theological and teleological constraints on morality, Hume saw the only two alternatives to be reason and passion, and either one or the other, but not both. His own theory led him to exclude variant accounts of both morality and justice which relied upon different moral criteria such as the virtues. Judgements of virtue and vice for Hume are simply the expression of feelings of approval or disapproval. But at the same time Hume recognized that morality and justice required obedience to rules but found difficulty in bridging the gap between adherence to rules (the "artificial" virtues) and self-interest.[8] Whereas Hobbes had recourse to Reason to bridge this gap, Hume's retreat is the implausible introduction of "sympathy." The strength of Hume's account depends mainly upon

the negative arguments he gives against other views and his supposition of what constitutes moral criteria and justifications.[9]

Kant shared basically the same assumptions with Hume over what the nature of morality was. In both writers the individual is morally sovereign and the empiricism shared by both philosophers, the view that the objective world does not "contain" any purposes, designs, values, etc., lead to their united rejection of teleological accounts of justice and morality. Yet in Kant the disappearance of any connection between the precepts of morality and justice and the facts of human experience and social context is complete. For Kant, justice and morality are not derivable from desires, commands, etc., since imperatives conceived in this way are conditional upon these desires, commands, etc. Genuine expressions of the moral law are categorical dictates of the rational will of free individuals. Contingencies of a moral agent are morally irrelevant, insofar as they are idiosyncratic, and so are the consequences of acts. Rather it is acting according to a sense of duty, a notion displaced from any role or function, which renders acts morally worthy. The Kantian "test" or "proof" of Practical Reason, the sole foundation of moral acts, is the universalizability of moral principles to all rational agents. Here we find the most straightforward relation between rules and principles and their indiscriminate application to all men. The move from the a priori innate freedom of all rational moral agents and the equal free will of all, to the equality of moral agents is both short and immediate for Kant. Each moral agent is to be treated as an end and never as a means.[10]

Kant's own theory also depends upon the negative arguments he enlists against other views; he founds his conception upon a peculiar view of reason because of his arguments against founding morality on other considerations. But Kant's attempt of providing an uncontestable rational vindication of morality failed just as surely as Hume's non-rational account did, even though for different reasons. While Hume failed to account for following moral rules with his impoverished limit of moral criteria, Kant's formal constraints of consistency and universalizability are capable of being satisfied by almost any content and there are no criteria enabling us to choose between competing substantive universalizations.[11] Both philosophers employed a certain conception of the individual in their frameworks and both argued for the supremacy of their perspective at the cost of leaving no rational ground upon which to choose between them. Both perspectives find their adherents in contemporary moral philosophy. Under both treatments of the rational requirements of morality, individual autonomy and the independence and irrelevance of social context become necessary features of timeless-morality. Similarly, the emphasis on imperatives and rule-following behavior emerges, particularly at the hands of Kant. And with the perceived failures of both views come fresh attempts at providing ultimate justifications for morality and unified currencies to resolve moral dilemmas.

The history of the development of utilitarianism, from Bentham's formulation to today's adherents, is dense with various treatments and warrants a thick book for adequate coverage. But the interests concerning us here are not the specifics of the history of that movement, but rather what the utilitarian perspective attempts to do, and

that is to provide an account of the final goal of morality and moral deliberation.

Utilitarianism in all of its many forms, seeks to impose external constraints upon the moral agent through moral rules and principles which derive their authority and objectivity from the concept of "utility". On this view, some "state of affairs", some empirical state of affairs, is the goal of moral choice, and the means of achieving this condition are not in principle restricted.[12] Coin tossing, for example, or other typically "non-moral" features of acts, can found a decision. In fact, choices made in deliberate abstraction from empirical considerations are on some views of utilitarianism, irrational. The identity of the agent is of no central importance to this perspective since value resides in the state of affairs to be obtained. As a moral theory purporting to supply the final end or supreme rule of morality, utilitarianism advocates a universal currency of moral conflict, a claim incompatible with the incommensurability thesis.

But the disagreements among utilitarians over how utility is interpreted is evidence that utility is not the ultimate value of which other values are mere expressions. Bentham's original formulation of the pleasure-principle, Mill's emendations to that impoverished account of value, and the latter splintering of utilitarians into "act-", "rule-", "mental-state-", etc. -utilitarians is evidence not only of the polymorphous nature of value, but also of the absence of a unitary account of value.[13] The notion of summing values of such indeterminate nature such as pleasure, or happiness, while the common feature of utilitarianism, cannot overcome

the heterogeneity of moral beliefs and values. The calculus of utilitarianism cannot be the method of ethics, even though it might possibly be a method of conflict resolution. But the occasional use of such an obscure notion as "utility" does not show that such a concept is the only item for resolving conflicts, nor that the conflicting values being resolved are indeed commensurable.[14] The failure of utilitarianism to provide a unified theory of value can be seen again when this perspective is confronted by another which has a hierarchical arrangement of values, the ultimate of which is, by its very nature, independent of summing. Consider some account of inalienable rights, the authority and objectivity of which depend on reason or the intrinsic value of human nature. Not only does such a view place more importance on the individual, but respect for the values central to this view requires the rejection of the utilitarian approach. While "utility" and "rights" both vie for authority, objectivity, and universality, and while each perspective excludes central features of the other, ("summing" on one hand, "unconditional adherence" on the other), there is no appeal to yet a third value to resolve the conflict which is not contingent. So although utilitarianism might claim to provide a universal moral currency and unitary theory of moral value, this claim is itself disputed by other perspectives, and incommensurable conflict resurfaces in another place.

The number of competing moral viewpoints in today's liberal democracy is staggering; to catalogue and characterize each perspective would take years of work and dedication to be done properly.

The rather meagre intention here is to examine some general features of moral theories and perspectives as exemplified by a few select candidates and to leave the cataloguing for more able hands. Just as the viewpoints examined above can, and do, conflict, so too do these and a number of others conflict over debates about contemporary ethical issues. With no shared ideal, no common authoritative moral criterion, appeal to which is final, contemporary arguments are shrill and often interminable. How for instance can we rationally settle a dispute between a Rawlsian and a Nozickian? With Rawls we see a strong re-emergence of Kant's account of morality, in that there is emphasis on rationality, principles, and the transparency of social and personal contingencies.[15] Nozick's account of inalienable rights, principles of acquisition and transfer, and the historical development of society is distinctly Lockean.[16] For Rawls, the limits of distribution are set by needs, for Nozick, by entitlements. Each account presents as a starting point a moral criterion not recognized as authoritative by the other; the inviolability of rights on the one hand, the equality of needs on the other. There is no pre-existing rational calculus by which we may independently assess these two views.

But despite the opposition between moral views over the issues of abortion, euthanasia, and life-or-death decisions in a variety of situations, much is shared by perspectives with incommensurable premises. Not only do such views share a history, they share, as a result of their common ancestry, many premises, even though unordered between perspectives. John Dewey writes:

> Ethical theory...has been singularly hypnotized by the notion that its business is to discover some final end or good or some ultimate and supreme law. This is the common element among the diversity of theories.... They have been able to dispute with one another only because of their common premise.[17]

The preoccupation with rational debate and argumentation over the formulation and extension of rules illustrates participants share a conception of morality as a study of reasoned discovery of principles and rules, appeal to which will be authoritative and the ultimate justification. Participants in such debates view morality as ahistorical and timeless. Experience, both personal and societal, and social context do not determine reasons, or the rules and principles, or the truth. As a result of the pursuit of rules and principles regulating types of acts, morality and concepts of justice tend to become formalistic with little emphasis being placed on characteristics of individuals and society.[18] This is not to say that conceptions of moral individuals do not play some role in these perpectives, since they do and are often a source of incommensurability. Just as conflicting perspectives assign authority to moral criteria in incomparable ways, particular conceptions of moral man may be the source of authority. But frequently the view of the moral individual is not a personal one, despite pretensions to the contrary. Little attention is given to the particular case under this view of morality, except insofar as that particular falls under some rule or heading. And with this formalism of perspectives, the emphasis on rule-following and the independence from social context, the substantive grounds upon which agreement and moral consensus may be secured is minimized. Each formalistic viewpoint becomes a system unto itself defining moral relevance and moral considerations on the basis of particular

concepts of value. With the isolation of each particular viewpoint from social context and each other, choice between conflicting authoritative moral criteria becomes problematic as the grounds for comparison dwindle. Reason, the tool of choice, becomes more and more hindered by this view of ethics, and less effective in selecting between viewpoints in particular concrete social issues.

Yet the tone of gloom and despair may not after all be warranted. Despite the claim that all writers on ethics are contributing to one debate and the belief in the existence of a final and supreme rule, the study of ethics and ethical problems is not ahistorical and beyond social context. The theories that conflict over contemporary issues are themselves products of history, either as previous debates or responses to those debates, or as responses to situations. As a result, the perspectives, the issues they attempt to solve, and even incommensurability, are context dependent.[19] So morality and justice are not isolated from mainstream society and thereby purely academic, despite, as before, the beliefs and practices of professional academics. And there is a benefit to this recognition of context dependence. Once it is recognized by disputants in current debates that the issues and solutions and perspectives share a broad history and social context, then the grounds upon which agreement can be reached widens. The context of these issues may help shape the solutions, perspectives and course of moral disagreement. In the words of Dewey,

> More definitely, the transfer of the burden of the moral life from following rules or pursuing fixed ends over to the detection of the ills that need remedy in a special case and the formation of plans and methods for dealing with them, eliminates the causes which have kept moral theory controversial, and which have also kept it remote from helpful contact with

> the exigencies of practice. The theory of fixed ends inevitably leads thought into the bog of disputes that cannot be settled.[20]

Contemporary moral disputes over life-and-death situations often reflect incommensurable viewpoints, where adjudication between perspectives seems impossible. Just as societies and individuals can engage in intractable dispute, so can groups of individuals like professions. And just as societies and individuals must recognize contextual constraints on perspectives and hence debates, so too must the relevant group of individuals. With the recent advances in technology, life-and-death decisions present unique situations testing the moral-beliefs of individuals and groups of individuals and often incommensurable conflict between viewpoints results. Sometimes these viewpoints are had by separate groups, sometimes they occur within one individual. What follows is a case study of a conflict of viewpoints and how such a conflict may be resolved.

NOTES TO CHAPTER 1

[1]For an example of how such a term may be interpreted, see James Griffin, "Are there Incommensurable Values?", Philosophy and Public Affairs, 7, #1 (1977), pp. 39-59.

[2]Bernard Williams, "Conflict of Values", Moral Luck (Cambridge: Cambridge University Press, 1981), pp. 71-82; Alasdair MacIntyre, After Virtue (Notre Dame, In:University of Notre Dame Press, 1981), p. 8.

[3]How persons or groups come to adopt, accept, etc., values and perspectives is an interesting topic. The influence of experiences upon individuals or collectives and how the variety of experience shape and mold moral perspectives is a study for psychologists. But personal preferences as well as external forces like social values influence the acceptance of values and can serve as limits to the values accepted. Clearly, moral constraints are not just subjective; people can agree on what constitutes good reasons for holding particular views. These reasons may then compel people to change their moral point of view, thereby functioning as a sort of "external" constraint. There are various accounts of the constraints on conduct which compete for ultimate authority, and Subjectivism (in some forms) is simply one of these accounts. Morality in the "broad" sense would take account of these conflicts between variant moral points of view as evidence for what moral decisions look like. For a fuller account of the poverty of some forms of Subjectivism see John Mackie, Ethics: Inventing Right and Wrong (Middlesex, Eng.: Penguin Books, 1977), pp. 15-49.

[4]"Conflicts of value" op. cit., pp. 77-79, and Bernard Williams' "The truth in relativism" in Moral Luck, op. cit., pp. 132-143.

[5]MacIntyre (above) provides a nice account of how the Enlightenment influenced our attitudes to morality, the virtues, and rule-following, the virtue.

[6]After Virtue, p. 138-139.

[7]It should be made clear that what was rejected was the forms of justification of ethics and not the substantive principles or content. Not only was the Christian emphasis on laws and rule following carried over but so were the distinctly Christian attitudes to marriage, family, etc., and the Christian virtues, mainly Aquinas' modified Aristotelian virtues. And this created a peculiar situation for the Enlightenment. The content of Christian and Aristotelian morality was designed to go with a certain form of justification; reasons for moral prescripts had force given in hierarchical and teleological structures respectively. With the rejection of these forms of justification and at the same time the maintenance of these moral strictures it was no longer clear what counted as reasons for

these principles. This situation led to the peculiar situation of the Enlightenment as well as the incommensurability of today's ethical viewpoints. For a fuller account of this interpretation see MacIntyre's After Virtue (above), especially chapters 4,5, and 6, and his A Short History of Ethics (London: Routledge & Kegan Paul Ltd., 1966).

[8]After Virtue, pp. 213-216.

[9]This is an important feature not only of Hume's view but of most others. Negative arguments are brought to bear against all competitors by all views and these often involve confusions over which values are being appealed to as foundations for these arguments. If some values are distinct from others, then it is not clear how arguments against some values are in any way supportive of other values. A good collection which illustrates how Hume's moral theory derives support from the failure of other views and Hume's arguments against other views is D.D. Raphael's British Moralists 1650-1800, Vol I & II (Oxford: Oxford University Press, 1969).

[10]A Short History, op. cit., chapter 14; After Virtue, op. cit., pp. 48-54.

[11]After Virtue, pp. 43-44.

[12]Bernard Williams, "Persons, character and morality" in Moral Luck, op. cit., pp. 3-4.

[13]After Virtue, op. cit., pp. 60-62; Ethics: Inventing Right and Wrong, op. cit., pp. 3-4.

[14]"Conflicts of Values," op. cit. p. 78.

[15]John Rawls, A Theory of Justice (Cambridge, Mass.: Harvard University Press, 1971).

[16]Robert Nozick, Anarchy, State and Utopia (New York: Basic Books, Inc., 1974).

[17]John Dewey, "Reconstruction in Moral Conceptions" in Problems in Ethics, Dewey, Gramlich, Loftsgordon (eds) (New York: Macmillan Co., 1971), p. 295.

[18]Eugene Kamenka, (ed), Justice (London: Edward Arnold Pub., 1979), p. 135.

[19]Isaiah Berlin, Concepts and Categories, Henry Hardy. ed. (London: Hogarth Press, 1978), pp. xvi and text.

[20]"Reconstruction in Moral Conceptions," op. cit., p. 297.

CHAPTER II

On April 26th, 1976, the Superintendent of Belchertown State School, a facility of the United States Department of Mental Health, petitioned the Probate Court of Hampshire County for the appointment of a guardian ad litem for Joseph Saikewicz, a resident of the school. It was requested that the guardian ad litem possess the required "authority to make necessary decisions concerning care and treatment" of Joseph Saikewicz, who was suffering from acute myeloblastic monocytic leukemia.* On May 5, 1976, a guardian ad litem was appointed by a probate judge, and on May 6, the guardian filed a report with the court recommending withholding chemotherapy for Mr. Saikewicz' condition. A hearing on the submitted report was held on May 13 in which the probate judge agreed with the recommendations of the guardian ad litem not to treat. The probate judge reported the decision to the Appeals Court and applied for appellate review. The review was granted and on July 9, 1976, the Supreme Judicial Court of Massachusetts issued a statement reaffirming the Probate Court's decision along with an acknowledgement that the Probate Court was the proper forum for discussion and decision of matters related to withholding life-prolonging treatment for incompetent persons. On September 4, 1976, Joseph Saikewicz died at Belchertown State School of bronchial pneumonia, a complication of his cancerous condition, and on November 28, 1977, the Supreme Judicial Court of Massachusetts issued its opinion.[2]

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* Myeloblastic monocytic leukemia is a cancer in which the immature granulocytes, the myeloblasts, proliferate and remain undifferentiated, and this population is accompanied by white blood cells resembling the monocytic series. The "acute" prefix refers to the incomplete differentiation of the cell type at an early stage (poorly differentiated.)[1]

The condition of Joseph Saikewicz was what gave rise to the particular problem of deciding the case. As a result, both courts placed great weight upon the condition of the ward in reaching their respective decisions.

> Joseph Saikewicz, at the time the matter arose, was sixty-seven years old, with an I.Q. of ten and a mental age of approximately two years and eight months. He was profoundly mentally retarded. The record discloses that, apart from his leukemic condition, Saikewicz enjoyed generally good health. He was physically strong and well built, nutritionally nourished, and ambulatory. He was not, however, able to communicate verbally--resorting to gestures and grunts to make his wishes known to others and responding only to gestures or physical contacts. In the course of treatment for various medical conditions arising during Saikewicz's residency at the school, he had been unable to respond intelligibly to inquiries such as whether he was experiencing pain. It was the opinion of a consulting psychologist, not contested by the other experts relied on by the judge below, that Saikewicz was not aware of dangers and was disoriented outside his immediate environment. As a result of his condition, Saikewicz had lived in State institutions since 1923 and had resided at the Belchertown State School since 1928. Two of his sisters, the only members of his family who could be located, were notified of his condition and of the hearing, but they preferred not to attend or otherwise become involved.[3]

> Saikewicz was profoundly mentally retarded. His mental state was a cognitive one but limited in his capacity to comprehend and communicate. Evidence that most people choose to accept the rigors of chemotherapy has no direct bearing on the likely choice that Joseph Saikewicz would have made. Unlike most people Saikewicz had no capacity to understand his present situation or his prognosis. The guardian ad litem gave expression to this important distinction in coming to grips with this "most troubling aspect" of withholding treatment from Saikewicz: "If he is treated with toxic drugs he will be involuntarily immersed in a state of painful suffering, the reason for which he will never understand. Patients who request treatment know the risks involved and can appreciate the painful side-effects when they arrive. They know the reason for the pain and their hope makes it tolerable."[4]

The probate judge's decision was reached on the basis of various facts about Saikewicz, the nature of his illness and the treatment prescribed,[5] the report of the guardian ad litem, testimonies of a psychologist, a social worker, and a physician, (presenting a clinical team report).

Expert testimony was given by the staff physician of the State School and another physician, and two consulting physicians from another hospital.[6] After considering the various facts and testimonies, the probate judge held that the following particulars weighed in favour of treatment:

> (1) the chance that his life may be lengthened thereby, and (2) the fact that most people in his situation when given a chance to do so elect to take the gamble of treatment.[7]

Considerations identified by the probate judge that weighed against administering chemotherapy to Saikewicz were:

> (1) his age, (2) his inability to cooperate with the treatment, (3) probable adverse side effects of treatment, (4) low chance of producing remission, (5) the certainty that treatment will cause immediate suffering, and (6) the quality of life possible for him even if the treatment does bring about remission.[8]

The Supreme Judicial Court of Massachusetts agreed with the decision to withhold treatment of Saikewicz' cancer reached by the Probate Court. Both courts concluded that the factors mitigating against treatment outweighed the benefits of treatment. The perspectives of the respective courts differ significantly. While the Probate Court is primarily concerned with the particular case before it, the Supreme Judicial Court of Massachusetts is concerned not only with the facts of Saikewicz, but also with the Constitutional issues and legal principles to be employed in cases of relevantly similar natures. The higher court is, in a word, trying to establish a "framework in the law" which will aid in future cases, and is consistent with the letter and spirit of the law. The "broader" perspective of the Supreme Judicial Court of Massachusetts subsumes, as it were, the "narrower" perspective of the Probate Court, and hence the remainder of this section shall be devoted to the examination of the higher court's

opinion.

Identified by the highest Massachusetts court as the "principal areas of determination" are:

> A. The nature of the right of any person, competent or incompetent, to decline potentially life-prolonging treatment.

which is interpreted as a question for Consitutional law;

> B. The legal standards that control the course of decision whether or not potentially life-prolonging, but not life-saving, treatment should be administered to a person who is not competent to make the choice.

and;

> C. The procedures that must be followed in arriving at that decision.[9]

In support of "A" above, the Supreme Judicial Court of Massachusetts asserts that "the substantive rights of the competent and the incompetent person are the same in regard to the right to decline potentially life-prolonging treatment. The factors which distinguish the two types of persons are found only in the area of how the State should approach the preservation and implementation of the rights of an incompetent person and in the procedures necessary to that process of preservation and implementation."[10] The focus of the inquiry then turns to discovering the origin of anyone's right to decline potentially life-prolonging treatment. The origin or foundation of this right is the "sanctity of individual free choice and self-determination" and "regard for human dignity."

> There is implicit recognition in the law of the Commonwealth, as elsewhere, that a person has a strong interest in being free from nonconsensual invasion of his bodily integrity.[11]

It is the particular conception of individual autonomy and sanctity of the individual's interests and choices which is the basis of the

right to decline potentially life-prolonging treatment. The doctrine of informed consent is one means by which this conception of the individual or human is protected (despite the doctrine's inapplicability in Saikewicz[12]):

> As previously suggested, one of the foundations of the doctrine is that it protects the patient's status as a human being.[13]

Similarly,

> ...but arising from the same regard for human dignity and self-determination, is the unwritten constitutional right of privacy found in the penumbra of specific guaranties of the Bill of Rights...
>
> As this constitutional guaranty reaches out to protect the freedom of a woman to terminate pregnancy under certain conditions, Roe v. Wade, 410 U.S. 113, 153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), so it encompasses the right of a patient to preserve his or her right to privacy against unwanted infringements of bodily integrity in appropriate circumstances. In re Quinlan, supra 70 N.J. at 38-39, 355 A.2d 647. In the case of a person incompetent to assert this constitutional right of privacy, it may be asserted by that person's guardian in conformance with the standards and procedures set forth in sections II(B) and II(C) of this opinion. See Quinlan at 39, 355 A.2d 647.[14]

Because of the confusing use of "persons," "humans" and "individuals" interchangeably, it is not clear who or what has these rights and what the foundation of these rights is. That is, "rights", as used by the court in this opinion, does not seem to be strictly a legal concept since it applies to humans, which is a biological term of classification. It is not clear that "persons" is a species-specific term the way that "humans" is; dolphins and chimps may be persons. Identification of persons will depend on considerations other than just biological nomenclature. The use of "individuals" is even less exact than "persons" or "humans"; spatio-temporal location may be sufficient for individuation whereas some form of agency is usually

required for personhood. So claiming that individuals have rights is not the same as claiming that persons have rights. Thus what or who possess rights is confusing, and being unable to identify the whats or the whos means we are unable to tell which characteristics of the relevant group are responsible for these members, and not others, having rights.

According to the Supreme Judicial Court of Massachusetts, the rights to privacy and to nonconsensual invasion are not absolutes, but rather conditional upon the correct identification and satisfaction of State interests. These State interests, distilled from recent decisions, are:

> (1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) the prevention of suicide; and (4) maintaining the ethical integrity of the medical profession.[15]

The preservation of life is deemed by the Supreme Court to be the most significant, and this interest must be reconciled with the individual's right to privacy. This is achieved through the recognition of

> a substantial distinction in the State's insistence that human life be saved where the affliction is curable, as opposed to the State interest where, as here, the issue is not whether but when, for how long, and at what cost to the individual that life may be briefly extended.[16]

Presumably the individual's right to privacy "gains weight" when the affliction is incurable and the prolongation of life is both brief and costly to the individual, relative to the relevant State interest.

> Even if we assume that the State has an additional interest in seeing to it that individual decisions on the prolongation of life do not in any way tend to "cheapen" the value which is placed in the concept of living, see Roe v. Wade, supra, we believe it is not inconsistent to recognize a right to decline

> medical treatment in a situation of incurable illness. The constitutional right to privacy, as we conceive it, is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life. The value of life as so perceived is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice.[17]

Numbers "2)" and "3)" of the State's interests listed above are irrelevant in the case of Joseph Saikewicz. The fourth State interest, maintaining the ethical integrity of the medical profession, is satisfied on two grounds: one, "The probate judge's decision was in accord with the testimony of the attending physicians of the patient"; and secondly, "The decision is in accord with the generally accepted views of the medical profession".[18] There is, then, no State interest which conflicts with the individual's choice and right to privacy.

The question of which legal standards influence the decision encompasses an important subissue, that of whether the highest Massachusetts Court has the "unvarying responsibility" to order treatment under the doctrine of parens patriae or whether that court has a choice to order treatment or to order not to treat Saikewicz.

> We think that principles of equality and respect for all individuals require the conclusion that a choice exists. For reasons discussed at some length in subsection A, supra, we recognize a general right in all persons to refuse medical treatment in appropriate circumstances. The recognition of that right must extend to the case of an incompetent, as well as a competent, patient because the value of human dignity extends to both.[19]

The claim that there is a choice does not deny the State's traditional role of caring for and protecting the "best interests" of the incompetent person, the doctrine of parens patriae. "[A] more flexible view of the "best interests" of the incompetent patient is not precluded under other conditions."[20] The "best interests" of an incompetent

are best understood against a background of what a competent person's interests in a similar situation are:

> The "best interests" of an incompetent person are not necessarily served by imposing on such persons results not mandated as to competent persons similarly situated. It does not advance the interest of the State or the ward to treat the ward as a person of lesser status or dignity than others. To protect the incompetent person within its power, the State must recognize the dignity and worth of such a person and afford to that person the same panoply of rights and choices it recognizes in competent persons. If a competent person faced with death may choose to decline treatment which not only will not cure the person but which substantially may increase suffering in exchange for a possible yet brief prolongation of life, then it cannot be said that it is always in the "best interests" of the ward to require submission to such treatment.[21]

Given this egalitarian perspective, there still remains the problem of determining the substantive choice of the individual; the claim that every individual has the same rights to choose cannot itself supply the content of the choice or ensure that there is, was, or will be a choice.

> Individual choice is determined not by the vote of the majority but by the complexities of the singular situation viewed from the unique perspective of the person called on to make the decision. To presume that the incompetent person must always be subjected to what many rational and intelligent persons may decline is to downgrade the status of the incompetent person by placing a lesser value on his intrinsic human worth and vitality.
>
> This leads us to the question of how the right of an incompetent person to decline treatment might best be exercised so as to give the fullest possible expression to the character and circumstances of that individual.[22]

The court's reasonings thus far are intended to show that there are no countervailing State interests to Saikewicz' right to privacy, had by him and everyone else equally, and that the right to decline treatment in this case, entailed by the right to privacy, is the sole consideration remaining upon which to base a decision in Saikewicz.

The court concludes that the best means by which the integrity and autonomy of the person can be respected, and his character and circumstances represented, is through the doctrine of substituted judgement.

> The court thus recognized that the preservation of the personal right to privacy against bodily intrusions, not exercisable directly due to the incompetence of the right-holder, depended on its indirect exercise by one acting on behalf of the incompetent person.[23]
>
> The problems of arriving at an accurate substituted judgment in matters of life and death vary greatly in degree, if not in kind, in different circumstances.
>
> ...that is, the goal is to determine with as much accuracy as possible the wants and needs of the individual involved.[24]

But with Saikewicz, who was profoundly retarded and noncommunicative his entire life, the determination of almost all of his actual "wants", "needs", etc., past, present, and future, based solely upon knowledge about Saikewicz, is highly problematic. Without any prior indications from Saikewicz as to his desires, etc., there was less evidence available to decide his choice. In this respect, Saikewicz differs from Karen Quinlan, and careful attention must be spent on this difference. In part, the Supreme Judicial Court of Massachusetts seems to recognize this.

> While it may thus be necessary to rely to a greater degree on objective criteria, such as the supposed inability of profoundly retarded persons to conceptualize or fear death, the effort to bring the substituted judgment into step with the values and desires of the affected individual must not, and need not, be abandoned.[25]

What are "objective criteria"? According to the opinion, "...an objective viewpoint [is] not far removed from a "reasonable man" inquiry." In fact, the Supreme Court cites a law professor quoting John Rawls as providing a "philosophical rationale" of substituted

judgement in those cases, such as the one under study, where greater reliance must be placed on "objective criteria" in order to obtain an indication of the "wants", "needs" etc., of Saikewicz.

> In arriving at a philosophical rationale in support of a theory of substituted judgment in the context of organ transplants from incompetent persons, Professor Robertson of the University of Wisconsin Law School argued that "maintaining the integrity of the person means that we act toward him 'as we have reason to believe [he] would choose for [himself] if [he] were [capable] of reason and deciding rationally.' It does not provide a license to impute to him preferences he never had or to ignore previous preferences.... If preferences are unknown, we must act with respect to the preferences a reasonable, competent person in the incompetent's situation would have." Robertson, Organ Donations by Incompetents and the Substituted Judgment Doctrine, 76 Colum. L.Rev. 48, 63 (1976), quoting J. Rawls, A Theory of Justice 209 (1971). In this way, the "free choice and moral dignity" of the incompetent person would be recognized. "Even if we were mistaken in ascertaining his preferences, the person [if he somehow became competent] could still agree that he had been fairly treated, if we had a good reason for thinking he would have made the choices imputed to him." Robertson, supra at 63.[26]

But then it seems as if the court takes a step backwards. After identifying the need to rely upon objective criteria in Saikewicz and at the same time rejecting the reasonable man perspective as direct evidence, the court insists that a subjective interpretation of substituted judgement is both possible and required. This doctrine must be used because of its "straightforward respect for the integrity and autonomy of the individual."[27] Here it becomes clear the importance the court attaches to individualism and autonomy; in the face of being unable to determine Saikewicz' wants and needs, being forced thereby to rely on objective criteria, the court insists on a subjective interpretation of substituted judgement.

The doctrine of substitute judgement is reiterated by the Court as follows:

> We believe that both the guardian ad litem in his recommendation and the judge in his decision whould have attempted (as they did) to ascertain the incompetent person's actual interests and preferences. In short, the decision in cases such as this should be that which would be made by the incompetent person, if that person were competent, but taking into account the present and future incompetency of the individual as one of the factors which would necessarily enter into the decision-making process of the competent person. Having recognized the right of a competent person to make for himself the same decision as the court made in this case, the question is, do the facts on the record support the proposition that Saikewicz himself would have made the decision under the standard set forth. We believe they do.[28]

The Supreme Judicial Court of Massachusetts supported the decision reached by the Probate Court on those grounds cited above.

> [We] are satisfied that the decision to withhold treatment from Saikewicz was based on a regard for his actual interests and preferences and that the facts supported this decision.[29]

The procedures to be followed in arriving at a decision in Saikewicz were, according to the higher court, clear and "readily determined by reference to the applicable statutes."

> The Probate Court is the proper forum in which to determine the need for the appointment of a guardian or a guardian ad litem. It is also the proper tribunal to determine the best interests of a ward.[30]

The probate judge is open to consider the advice or knowledge of any person or group aside from the report by the guardian ad litem. The probate judge makes the final decision however.

> The report of the guardian or temporary guardian will, of course, also be available to the judge at this hearing on the ultimate issue of treatment. Should the probate judge then be satisfied that the incompetent individual would, as determined by the standards previously set forth, have chosen to forego potentially life-prolonging treatment, the judge shall issue the appropriate order. If the judge is not so persuaded, or finds that the interests of the State require it, then treatment shall be ordered.[31]

This closing section of the Supreme Judicial Court of Massachusetts

decision is the most provocative. Aside from declaring the Probate Court the proper forum of such legal cases, the decision goes on to claim that the Probate Court should be the only forum for such issues.

> We take a dim view of any attempt to shift the ultimate decision-making responsibility away from the duly established courts of proper jurisdiction to any committee, panel or group, ad hoc or permanent.[32]

> We do not view the judicial resolution of this most difficult and awesome question--whether potentially life-prolonging treatment should be withheld from a person incapable of making his own decision--as constituting a "gratuitous encroachment" on the domain of medical expertise. Rather, such questions of life and death seem to us to require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created. Achieving this ideal is our responsibility and that of the lower court, and is not to be entrusted to any other group purporting to represent the "morality and conscience of our society," no matter how highly motivated or impressively constituted.[33]

Such a view of course drew the enmity of the medical profession and hospital administrations alike. Not surprisingly most of the subsequent literary furor was directed to just this question of procedure and not other significant features of the decision. The closing statement of the opinion reads:

> Finding no State interest sufficient to counterbalance a patient's decision to decline life-prolonging medical treatment in the circumstances of this case, we conclude that the patient's right to privacy and self-determination is entitled to enforcement. Because of this conclusion, and in view of the position of equality of an incompetent person in Joseph Saikewicz's position, we conclude that the probate judge acted appropriately in this case.[34]

The heavy reliance upon direct quotation from the court's issued opinion in this section is not without reason. It is important to give the arguments in the language of the court because that wording most accurately reflects the attitude and presuppositions of the court. Confusions in the court's reasonings are also captured through the

textual exegesis given above. Since what is of interest here are the arguments presented by the court, careful and fair examination of the arguments requires a fair and accurate presentation of these arguments. Quotation is a means by which this fairness and accuracy may be achieved.

NOTES TO CHAPTER II.

[1]Philip Rubin, M.D., ed., Clinical Oncology (Rochester, N.Y: American Cancer Society, 1978), pp. 245-246. Samuel I. Rapaport, Introduction to Hematology (New York, N.Y.: Harper & Row, Pub. Inc., 1971), p. 178.

[2]Mass. 370 N.E. 2d. 417, pp. 417-420. (hereinafter as Saikewicz)

[3]ibid, p. 420.

[4]ibid, p. 430.

[5]Some of these considerations were cited by the Supreme Court decision and are:

> 5. That the majority of persons suffering from leukemia who are faced with a choice of receiving or foregoing such chemotherapy, and who are able to make an informed judgment thereon, choose to receive treatment in spite of its toxic side effects and risks of failure.
>
> 6. That such toxic side effects of chemotherapy include pain and discomfort, depressed bone marrow, pronounced anemia, increased chance of infection, possible bladder irritation, and possible loss of hair.
>
> 7. That administration of such chemotherapy requires co-operation from the patient over several weeks of time, which cooperation said JOSEPH SAIKEWICZ is unable to give due to his profound retardation.
>
> 8. That, considering the age and general state of health of said JOSEPH SAIKEWICZ, there is only a 30-40 percent chance that chemotherapy will produce a remission of said leukemia, which remission would probably be for a period of time of from 2 to 13 months, but that said chemotherapy will certainly not completely cure such leukemia.
>
> 9. That if such chemotherapy is to be administered at all it should be administered immediately, inasmuch as the risks involved will increase and the chances of successfully bringing about remission will decrease as time goes by.
>
> 10. That, at present, said JOSEPH SAIKEWICZ's leukemia condition is stable and is not deteriorating.
>
> 11. That said JOSEPH SAIKEWICZ is not now in pain and will probably die within a matter of weeks or months a relatively painless death due to the leukemia unless other factors should intervene to themselves cause death.

12. That it is impossible to predict how long said JOSEPH SAIKEWICZ will probably live without chemotherapy or how long he will probably live with chemotherapy, but it is to a very high degree medically likely that he will die sooner, without treatment than with it.

ibid., pp. 421-422.

[6]ibid., p. 419.

[7]ibid., p. 422.

[8]ibid., p. 422.

[9]ibid., pp. 422-423.

[10]ibid., p. 423

[11]ibid., p. 424

[12]ibid., p. 419

The petition alleged that Saikewicz was a mentally retarded person in urgent need of medical treatment and that he was a person with disability incapable of giving informed consent for such treatment.

[13]ibid., p. 424.

[14]ibid., p. 424.

[15]ibid., p. 425.

[16]ibid., pp. 425-26. The use of this distinction by the Supreme Court is an attempt to bring their decision into line with the ethics of the practicing medical profession. For instance, on page 424 of the decision:

> The current state of medical ethics in this area is expressed by one commentator who states that: "we should not use extraordinary means of prolonging life or its semblance when, after careful consideration, consultation and the application of the most well conceived therapy it becomes apparent that there is no hope for the recovery of the patient. Recovery should not be defined simply as the ability to remain alive; it should mean life without intolerable suffering."
>
> Our decision in this case is consistent with the current medical ethos in this area.

[17]ibid., p. 426.

[18]ibid., p. 427.

[19]ibid., p. 427.

[20]ibid., p. 428. Characteristic of much of the analogous reasonings employed by the higher court is the unacceptable argument adduced in favour of a more "flexible" interpretation of "best interests".

> For example other courts have refused to take it on themselves to order certain forms of treatment or therapy which are not immediately required although concededly beneficial to the innocent person. In re CFB 497 S.W.2d 831 (Mo.App.1973). Green's Appeal, 448 Pa. 338, 292 A.2d 387 (1972). In re Frank, 41 Wash.2d 294, 248 P.2d 553 (1942). Cf. In re Rotkowitz, 175 Misc. 948, 25 N.Y. S.2d 624 (N.Y.Dom.Rel.Ct.1941); Mitchell v. Davis, 205 S.W.2d 812 (Tex.App.1947). While some of these cases involved children who might eventually be competent to make the necessary decisions without judicial interference, it is also clear that the additional period of waiting might make the task of correction more difficult. See, e.g., In re Frank, supra. These cases stand for the proposition that, even in the exercise of the parens patriae power, there must be respect for the bodily integrity of the child or respect for the rational decision of those parties, usually the parents, who for one reason or another are seeking to protect the bodily integrity or other personal interest of the child. See In re Hudson, 13 Wash.2d 673, 126 P.2d 765 (1942).

It is not at all clear how the cases cited are supportive of Saikewicz, where treatment, if required at all, was required quickly. Furthermore, there are significant differences between individuals who have never been nor will be competent and those individuals who have been or are expected to become competent. There are different reasons behind some third party protecting the interests of someone capable of competence than a third party protecting the interests of someone incapable of being competent. The differences in expectations are significant, and even though there may be shared reasons in each case, not all the reasons are similar.

[21]ibid., p. 428.

[22]ibid., p. 428. The Supreme Court of Massachusetts does recognize that what most people would do in similar circumstances is relevant in determining the "predilections" of the individual under study. This claim appears on page 429 of the decision in the context of a discussion of Karen Quinlan. Whether this is at all relevant for the case of Joseph Saikewicz depends on his having predilections and of the relevant kind.

[23]ibid., p. 429.

[24]ibid., p. 430.

[25]ibid., pp. 430-431.

[26]ibid., p. 430.

[27]ibid., pp. 430-431.

[28]ibid., p. 431.

[29]ibid., p. 432.

[30]ibid., p. 433.

[31]ibid., p. 434.

[32]ibid., p. 434.

[33]ibid., p. 435.

[34]ibid., p. 435.

CHAPTER III

Responses to Saikewicz have been many in number and varied in position. Some physicians have complained that the decision issued by the Supreme Judicial Court of Massachusetts is a vote of non-confidence against the medical profession. Some lawyers have argued in support of the decision, claiming that societal judgements belong in the courts which represent social consciousness. Some articles emphasize the moral issues of life-or-death decisions, some the legal issue of civil or criminal liability for decisions. All of the arguments extend the significance of Saikewicz far beyond the the particular case, and almost all the disputants agree that the doctrine of substituted judgement adequately achieves the goal of deciding for the patient. The disputes then take the form of an argument over who should decide cases like Saikewicz. A paradigm of such a disagreement will be examined below.

Representative of the medical paternalist viewpoint is Dr. Arnold Relman, editor of the New England Journal of Medicine and Professor of Medicine at Harvard Medical School. Relman attempts to argue against the Saikewicz decision on the grounds that it violates sound medical tradition, does not recognize the highly technical nature of medical facts which require medical experts to interpret and understand them, and will result in the unnecessary prolongation of suffering for terminally ill patients.[1] Relman interprets Saikewicz as requiring "routine judicialization" of life and death decisions involving incompetent patients instead of the traditional resolution of such

problems between the patient's family and the attending physician and his/her impartial colleagues.[2]

Dr. Relman's understanding of Saikewicz is superficial and, in places, incorrect. He collapses the differences between Saikewicz and Quinlan, and indeed other cases involving children into one "basic question": "When patients are physically unable, or legally incompetent, to express their own views, and there is no legally sufficient document to indicate clearly their prior wishes, who should have the authority to decide whether a particular treatment is to be instituted, withheld, or terminated, particularly when that decision may have a decisive influence on the survival of the patient?"[3] The opinion issued by the higher court in Saikewicz recognizes the differences between Quinlan and Saikewicz, on the grounds that there are different compelling state interests in each case, as well as different considerations to be employed in each decision.[4] There are important epistemological differences between Saikewicz and other cases involving incompetents, and Relman's query glosses over the salient features of each. (He is not alone in committing this sort of error.) Furthermore, Relman has misunderstood the scope of Saikewicz. The opinion of the Supreme Court of Massachusetts in no way implies that all cases involving incompetents simpliciter must seek court approval for action, hence that "judicialization" of this "type" (a la Relman) of case is "routine". Some cases require that immediate action be taken, and the court recognizes that in these cases it is impractical to pursue judicial resolutions.[5] It is suggested in the opinion that the legislative branch of society might, after appropriate study, provide some set of guidelines for such emergency situations, but the nature

of these guidelines is left unspecified.[6] (These guidelines might give authority to qualified medical personnel). It is as if Relman fears that Saikewicz will remove all decision-making from the medical profession's hands and place physicians under the thumb of lawyers. Clearly the issue of which profession has authority in deciding Saikewicz is raised by this case, but it is not clear that this issue is settled by this case. Relman's fears may be a bit premature.

Dr. Relman claims that the medical tradition whereby physicians make decisions for their patients is sound. It is not at all clear what he means by "sound" here. If Relman means that the practice of medicine is sound, then presumably he means that it is acceptable and well-founded. But on this reading, it becomes difficult to assess Dr. Relman's argument. Physicians and the practice of medicine have traditionally commanded great respect by virtue of the study and the intellect required to pursue the practice. Physicians used to have some authority in medical matters over what is best for their patient. As of late, the role of physicians has changed. No longer does the decision of the physician "outweigh" the decision of the patient, as the current rash of malpractice suits and the heavy emphasis on informed consent with complete information attest. With the advent of new medical-legal-ethical problems created by advances in medical technology, the acceptability of medical practice and the physician's role is being questioned. Saikewicz is one of many cases in which the role of physicians and the traditions of medicine are being attacked, and simply asserting that medical tradition is sound does not resolve the dispute nor satisfy disputants.

Another possible interpretation of what Relman means by medical tradition being sound is that the principles behind medicine, in particular the ethical principles, are logically sound. That is, the principles upon which physicians base their decisions and assessments are consistent, if sound in this sense, and will not privide contradicting assessments or decisions in any one particular case. Relman claims that doctors are in some sense "bound" to recognize the constitutional rights of patients, and that in Saikewicz, "The goal to be achieved here is the exercise of the patient's Constitutional Right to decide about his own treatment".[7] (Given this recognition, one wonders why Relman argues against the legal system deciding such cases.) Physicians would then be restricted in making and implementing decisions by the rights of the patient. However, in the same argument, Dr. Relman admits that physicians often rely upon some principle of "quality of life" in making decisions. Under this principle, doctors are not categorically bound to prolong life irrespective of the circumstance and conditions in which the patient is likely to live or die.[8] Even though very little is said about how "quality of life" is determined, which standards and considerations determine the final assessment, it is clear that it is life's quality which is important, and for Relman, (and possibly many physicians), "qualities of life" are, or can be, calculated independently of personal wishes. The rights of individuals to decide about their own treatment may clash with the employment of an interpersonal standard of "quality of life": the one requires treatment (no treatment) irrespective of a quality-of-life standard, and the other may require treatment (no treatment) irrespective of individual decisions and rights. In the absence of some ordering of these criteria,

rights and quality of life, some case may generate contradictory decisions, other things being equal, just on whether or not rights or quality of life is given priority. Not that all cases will involve this inconsistency; both criteria may generate the same result. Not, however, necessarily in every case; possibly some case may receive contradictory decisions. If "sound" is taken to mean logically sound, then in this sense, the principles backing medical tradition and practice are not sound.

The Supreme Judicial Court of Massachusetts emphatically rejects one interpretation of "quality of life" which appears to be Relman's interpretation.

> The sixth factor identified by the judge as weighing against chemotherapy was "the quality of life possible for him even if the treatment does bring about remission." To the extent that this formulation equates the value of life with any measure of the quality of life, we firmly reject it. A reading of the entire record clearly reveals, however, the judge's concern that special care be taken to respect the dignity and worth of Saikewicz's life precisely because of his vulnerable position. The judge, as well as all the parties, were keenly aware that the supposed ability of Saikewicz, by virtue of his mental retardation, to appreciate or experience life had no place in the decision before them. Rather than reading the judge's formulation in a manner that demeans the value of the life of one who is mentally retarded, the vague, and perhaps ill-chosen, term "quality of life" should be understood as a reference to the continuing state of pain and disorientation precipitated by the chemotherapy treatment.

Behind this rejection is the intention to base their decision upon sound principles about human value and its protection by rights. Had Relman argued against this portion of the opinion exclusively, rather than trying to endorse a practice based upon principle which may generate contradictory decisions, a stalemate may have developed such as those envisaged in the first chapter. If physicians argued for the

priority of a non-individualistic conception of quality of life, and the courts argued for the priority of rights and the authoritative centrality of individuals, then the resolution of such a disagreement would be more difficult. Such a situation would resemble the conflict between two moral theories mentioned earlier. How "deep" the incommensurability ran would depend upon a closer examination of each theory to determine shared or translatable features of each.

Yet the above argument against the second interpretation of Relman's claim is not conclusive. The alleged inconsistency between principles of personal rights and principles of non-personal qualities of life can be avoided if "quality of life" is given a non-comparative, intra-personal interpretation. On this reading, "quality of life" judgements are about the quality of an individual's life to that individual, irrespective of comparisons across individuals or to standards not specific to the individual in question.[10] In a sense, this interpretation makes quality of life a personal description of one's life and one's attitudes about what quality of life one finds acceptable, etc. If this sense of "quality of life" can be defended, then the principles upon which medical practice rests can be logically sound. But in the case of Joseph Saikewicz, this avenue of retreat is not open. (It is also not the interpretation Relman would argue for.) Saikewicz was profoundly retarded, had never been competent, and was noncommunicative all his life. Judgements made as to what Saikeicz' own substantive choice was could not rest on Saikewicz actually choosing. The higher Massachusetts court realized this in its claim that the doctrine of informed consent did not apply. Against this background, how can

physicians (as well as the courts) reach a decision based upon Saikewicz' assessment that this quality of life is tolerable but that one is not, when our knowledge of the relevant interest is unobtainable? And it is unobtainable. We can neither ask Saikewicz, nor go on past performances. Nothing from Saikewicz could indicate what quality of life was acceptable. Our assignment of some acceptable quality of life to Saikewicz must be founded on other conditions, conditions not covered by the non-comparative reading of "quality of life". If Relman still would want to endorse this line of argument about quality of life, then he must interpret this phrase in a comparative sense. In which case this line of defence does not avoid the earlier objections to medical principles being logically sound.

Another of Relman's arguments in support of the medical paternalist position is contained in the following quote:

> There is nothing more crucial to a physician's professional role than the making of such decisions. His responsibility for the welfare of his patients often requires that he deal with technical medical issues which are of vital importance to his patients but which they are unable to comprehend fully, if at all, and which they must therefore delegate to him. Unless he is willing to assume this decision-making role in the patients' behalf he is not really doing his job.[11]

This argument, too, is difficult to assess. Relman seems to be suggesting that being a physician in the service of others necessitates being a decision-maker; it is just part of his/her job. We can all agree that the physician is responsible for the patients' welfare but balk at the claim that the physician has some categorical moral authority which the patient lacks. It is exactly the traditional role of the physician as an authoritative figure which is under examination and attack from so many quarters. In a sense, the battle lines

are drawn by differing conceptions of authority; does authority in life-or-death issues attach to individuals (patients) or positions (physicians) and roles? Simply asserting one or the other is not very helpful. Furthermore, it is not at all clear what Relman has in mind when he claims that some medical issues are too "technical" to be understood fully by the patient. Most patients would be bored with technical descriptions of neurophysiology; most patients are probably more interested in consequences and recovery. Even so, maybe part of the physician's role is to render such technical information intelligible to the average patient. But it seems as though we have already strayed too far from the topic since the arguments presented were evinced by Saikewicz. For Relman's argument to be germane, we want some identification of the technical medical issues in Saikewicz. And why the emphasis on technical medical issues? Joseph Saikewicz was incapable of fully comprehending non-technical issues as well, so this hardly seems a defence for physicians' roles in Saikewicz. Relman's presentation of this argument illustrates both a lack of understanding of his opponent's position and a misunderstanding of the uniqueness of Saikewicz and how unlike this case is to common patient-physician relations.

Charles Baron, member of the Board of Editors of the American Journal of Law and Medicine and Professor of Law at Boston College Law School, is another respondent to Saikewicz.[12] Baron's suggestion is that Saikewicz does not go far enough to assure the form of investigation and decision which is the basis of the United States legal system. He endorses the Court's rejection of the medical community's assumed authority to make life and death decisions on the grounds that

the legal process is methodologically superior. (The legal process is public and open to scrutiny, and the decisions are "systematic" and constrained to consistency and legal relevance by both the institutional framework and the principles, statues, etc. in the law.[13]) Baron applauds the Court's recognition and emphasis that the power over each individual life "resides in the individual" and the patient has a legally protected right to choose death over life prolonging treatment in the absence of compelling State interests to the contrary.[14] He identifies the problem raised by Saikewicz as a "societal question," one which needs to be dealt with by the elected representatives of the people, i.e., the courts.

Baron's objections to the Supreme Judicial Court of Massachusetts' opinion are not over that court's singular reliance upon the substituted judgement doctrine as the only substantive standard employed in Saikewicz. Rather, Baron is objecting to the procedural environment in which the substituted judgement test is exercised. According to Baron, the attitude of "detached but passionate investigation" which pervades the law requires aggressive advocacy proceedings to ensure that objectivity and fairness of judicial adminstration occur. "Biases" such as costs to family, society and medical institution, as well as "quality of life" (interpersonal) considerations, may be screened out through aggressive advocacy and cross-examination. Zealous representation of "all reasonable arguments" would be an adequate safeguard against the intrusion of these "forbidden factors" entering into the decision.[15] The guardian or guardians ad litem must argue against the position of the petitioners, or, in the absence of petitioners, to argue as aggressively for treatment as against treatment. The

advocacy proceeding will guarantee that all viewpoints and alternatives will be pursued and developed. Thus, in Saikewicz, by challenging the guardian ad litem and arguing for treatment, any biases and bogus arguments will presumably be discovered, and the best solution will be achieved.

Baron's suggestions are quite plausible and helpful here. It seems intuitively clear that certain biases should not influence decisions in Saikewicz-like cases, and that procedural safeguards are a means of ensuring this. Given the subjective character of the substituted judgement test and the attempted discovery of what Saikewicz' actual choice would be, it seems clear that other people's distrust, say, of incompetents should not figure in the solution to Saikewicz. But there are problems here also.

One problem with Baron's suggestions is how we would adjudicate between "all reasonable arguments" over what Saikewicz' actual interests are. It might be reasonable to argue that Saikewicz should receive treatment and also reasonable to argue that he should not receive treatment. Nothing from Saikewicz could settle this dispute; other considerations, say, coherence with settled law and the substituted judgement doctrine, will have to be employed. That is, Baron can no longer hold (and it is not clear that he does so in the first place) that the test of substituted judgement is primarily subjective in Saikewicz as the higher Massachusetts court insists it is. Independent of whether this is objectionable or not, Baron must provide an account of substituted judgement which renders the procedural constraints he suggests effective in ensuring that an objective and fair decision is reached in Saikewicz-like cases. For instance, if the substituted

judgement test in Saikewicz is an objective test not aimed at determining the actual interests of Saikewicz, then reasonable arguments purporting to show Saikewicz' actual interests will not be decisive, although relevant. Determining whether arguments about Saikewicz' interests are decisive or not can be achieved through an advocacy system, but we must know what we are using the procedure for, what its point is, and this does not come just from the constructed procedure. Of course the point of the procedures Baron suggests can be supplied, it is just that it is not.

The above discussion introduces a related issue and a possible rejoinder by Relman. In asking of Baron what the point of his suggested advocacy system is, part of the anticipated response would be that such a procedure excludes certain biases and bad arguments. One of the biases Baron cites is the intrusion of "quality of life" considerations in Saikewicz; such a consideration is "forbidden." But why are quality of life considerations, medical costs, etc., not allowable considerations, biases which must be screened out? By asking this question we are enticing Baron to enter into a discussion over substantive moral issues, thereby opening up the possibility for substantial disagreement on how to decide the substantive issues of Saikewicz. This is how Relman might respond to Baron.

Yet this is not an argument directed against Baron's suggested procedural safeguards so much as one directed against his suggested purpose for these safeguards. Untouched stands Baron's claim that aggressive reason-giving should precede decisions in Saikewicz-like cases. Most moralists, with the possible exception of Emotivists,

would agree to this, as well as most legal theorists, while disagreeing on the content of the reasons given. As such the procedural guidelines presented by Baron are acceptable means for achieving the best possible solution in Saikewicz. The chances of screening out unwanted biases from the decision process are greatly increased by forcing each side of an argument to present as cogent an argument as possible, while leaving room for discussion over what biases are unwanted.

But it is not clear why giving reasons must be "aggressive." Perhaps "thorough" is what Baron has in mind. And it is not clear why opposing positions must be represented. If it is the case that the best reasons for deciding Saikewicz are readily identifiable, then what point is there to representing the opposing candidate which is at best, a lesser contender? In fact, advocacy for the sake of conflict might even complicate the situation in some circumstances. If the competing positions rest on incommensurable values and principles, the multiplication of positions via an advocacy proceeding will not help nor resolve the conflict. An advocacy proceeding is no guarantee that one good argument will remain or that "the truth" will be found. Insofar as an advocacy proceeding is identified with the giving of reasons and the exchanges of ideas, it is likely to be of some benefit. However, to view such a procedure as the method for discovering the right thing to do is misguided.

Another form of paternalism has emerged in the wake of Saikewicz which, or so it is suggested, involves another "professional", the philosopher. Since the issues in Saikewicz are complex moral issues which are independent of the context in which they occur, ethicists and those "trained" in moral reasoning and the pursuit of moral truth

are best qualified to identify, and solve, the moral issues. Moral philosophers, secular and theological, are indispensible to the decision making process in Saikewicz and Saikewicz-type cases. This is the position of Allen Buchanan presented in his article "Medical Paternalism or Legal Imperialism; Not the Only Alternatives for Handling Saikewicz-type Cases."[16]

In his article, Buchanan argues for an "alternative" procedure of decision making in cases involving terminally ill incompetent patients. He claims that it is not the case that either the courts or the medical profession alone can adequately deal with this type of case; the medical profession employs inconsistent principles and the courts are both cumbersome and fail to account for the "unique" moral relation which exists between a family and its incompetent member. A "genuine" ethics committee, which is neither a mere extension of the legal system nor an all-medical administrative agency of the hospital, can provide the correct institutional framework to handle Saikewicz-type cases.

Buchanan's "Alternative View" is based on three propositions. The first is that the family unit, in consultation with the attending physician, has the dominant role in deciding for or against treatment of its incompetent member. The second proposition is that this dominant role is defeasible; the protection of the patient's rights requires that decisions be made within a certain framework which allows discussion, accountability, consistency and impartiality, and allows legal intervention when necessary. (In cases where the family does not enjoy this special status by virtue of their unique moral relation, as in Saikewicz, judicial resolution may become appropriate).[17] The

third proposition is that a "genuine" ethics committee will provide an institutional framework under which the first two conditions above may be satisfied and at the same time buffer the decisions from professional bias and conflict of interest, thereby achieving the formal features of the rule of law. The main function of the ethics committee would be "post hoc", more like a review committee, so will avoid the medical community's objection that the judicial process is too slow and cumbersome.[18]

A peculiar feature of Buchanan's suggested alternative, one which he shares with many writers on the Saikewicz case, is his formation and continual reference to a "Saikewicz-type" of case.[19] For Buchanan, as well as the others, Saikewicz generated the debate and the various solutions suggested by the respective authors. Saikewicz has been used as a paradigm for Saikewicz-type cases and the attempted solutions have been solutions to Saikewicz-type cases. Constructing a type of case on the basis of one instance must be done with great care; the relevant similarities between the paradigm and the other members of the type must be closely specified. That is, we want the solutions to Saikewicz-type cases also to be solutions to Saikewicz and solutions to Saikewicz to be solutions to cases like Saikewicz in all relevant respects, leaving aside for the moment what the relevant respects are. One indication that something has gone wrong with the formation of a type of case using Saikewicz as a paradigm, might be when the solution to Saikewicz-type cases is not a solution to Saikewicz. (The opposite does not hold; if a solution is a solution to Saikewicz then it is a solution to a type of case,

possibly a type with one member.)

In Saikewicz, there was no family unit capable or willing to assume the role which Buchanan assigns to the family unit in his "alternate view." It appears as though for Saikewicz, Buchanan's solution does not account for this; there was no family to speak of which enjoyed a unique biological and social relation. Buchanan's objections against the legal model of Baron, (that this model did not recognize the family in its decision procedure and assign to the family unit a dominant role in the decision making) misfire and are off the point in Saikewicz. Similarly, much of the support for Buchanan's alternative view is lost, since his main objection to the legal model, its failure to account for the family's dominant role in the decision, is simply not a relevant objection in the context of Saikewicz. He has not succeeded then in arguing for his view by successfully arguing against all of the others. Something has gone wrong with Buchanan's construction of Saikewicz-type cases which the "genuine" ethics committee deals with since his solution involves cases with a family unit and in Saikewicz there was no such unit to speak of.

A response tothese criticisms is open to Buchanan. He could argue, and in places it seems he does, that the authority or dominance of the family's role is defeated in this situation as it would be if the family's decision did not respect the rights of the incompetent member or was not in the patient's best interest.[20] In this case, the family does not play a role in the decision, much less an authoritative one, and presumably the decision would be reached by

considering the rights of the individual in question. Thus the role of the family can be defeated either by some substantive principles about the individual's rights or by there being no family unit at all. Yet this looks rather like the model offered by Charles Baron. A salient difference between the two is that Buchanan's ethics committee is "post hoc" and he thinks this avoids an objection to the legal model on the grounds that it is too slow and cumbersome. Indeed Buchanan's institutional framework would avoid this objection but at the cost of "protecting the rights of the patient" after decisions (and possibly irreversible decisions) have been made. This seems a bit odd.

However, even though the ethics committee itself would be more like a review board, the committee would publish general guidelines which would indicate the role of the family, the rights of the incompetent, that the issues are "complex moral issues in a medical context, issues that remain after the judgements of medical expertise all have been made," and that the protection of the patient's rights "requires that decisions be made within a framework that distinguishes between medical judgements (judgments of medical expertise) and moral judgements."[21] The role played by the family unit in Saikewicz has already been discussed. Presumably a list of the incompetent's rights could be compiled using the Constitution, settled law, etc. It is not clear, however, that the guidelines of the committee alone can protect the patient's rights nor that the institutional framework Buchanan presents must have the features he describes, i.e. distinguish facts from values.

The assumptions of Buchanan's argument now stand out in relief.

He assumes that the moral issues in Saikewicz are not context dependent; the moral issues can be removed from the context in which they arise and yet remain the same issue. (This may be what leads Buchanan to hold the peculiar notion of Saikewicz-type cases that he does; the moral issues and problems presented by Saikewicz are not specific to or constrained by the context of Saikewicz but are rather problems of substitute decision making.[22]) Buchanan also assumes that the procedural guidelines of the ethics committee, augmented by a substantive egalitarian rights framework protecting Saikewicz' rights via substituted judgement, can decide Saikewicz when medical judgements are separated from moral judgements.[23]

Comments on the doctrine of substituted judgement in Saikewicz follow in the next section. But what of Buchanan's other claims, that the moral issues in Saikewicz remain unaltered after medical judgements are made, and that the protection of Saikewicz' rights requires the distinction between moral and medical judgements? Both claims are related in that they require a distinction between facts and values and assign a crucial role to a metaphysical conception of rights. The medical facts of Saikewicz do not change the moral issue in this case; the moral issue in this case is simply the protection of Saikewicz' rights which require for their exercise not only the distinction between facts and moral values, but also not assigning any decisive role to medical facts in the decision. But Buchanan gives us very little in support of the fact/value distinction. In fact, there are good reasons to question the distinction. Typically, arguments in support of the distinction refer to the failure to logically derive an "ought-statement" from a bundle of "is-statements". Such a "problem"

for twentieth century analytic philosophy is an inheritance of Kantian philosophy and not, as it is usually thought, a Humean legacy. Defenders of the fact/value distinction, or the is/ought dichotomy, fail to recognize two important features of their commitment; that the distinction is a logical distinction when it rests on the is/ought argument, and that moral problems on this view are not problems of this or that agent's practical choice and decision but are spectator problems concerning the characterization of moral judgements and the relation between statement-types.[24] The study of ethics on this viewpoint becomes not only isolated and a profession, but assigns no significant role to the individual agent's perceptions and attitudes determining the practical choice.[25] (If this is right, then such a position is a strange bedfellow for Buchanan and his insistence on protecting individual autonomy.) It is unlikely that the relation between factual statements and evaluative statements is logical anyway.[26] It is even more unlikely that there is an autonomous realm of values "out there" independent of the realm of facts which is "out there".[27] Such a brief dismissal of the fact/value distinction is almost unforgiveable, but a close reading of the books referred to in the relevant footnotes shows the rejection to be not ill-founded. The practical significance of, as well as the arguments for, Buchanan's use of the fact/value distinction are suspect.

Buchanan does claim that moral decisions are not "reducible" to medical facts, although they may be based in part on them.[28] (It is not clear whether this claim is consistent with his claim that moral issues remain unchanged after medical judgements are made.)

This claim seems acceptable but rather trivial. The failures of reductive analysis are well documented. Buchanan's argument is incomplete if it is intended to prove the fact/value distinction. Because moral issues cannot be "reduced" to medical facts in no way proves the two distinct; another argument showing that medical facts do not "reduce" to moral issues is required as well as some reasons to think that the method of analysis is appropriate. Buchanan's argument here is incomplete. If facts, and in particular medical facts of prognosis, etc., are "soaked" with values, as it seems they are, then reductive analysis will not show the distinction between facts and values that Buchanan's argument requires.

Perhaps Buchanan does not need to argue specifically for the fact/value distinction. Instead he may suggest that adopting the perspective of a theory of individual rights simply requires a separation of facts from values. That is, in order to protect an individual's autonomy, privacy, and moral authority, facts cannot be morally relevant or at least not morally decisive. So in a sense, the concept of rights carries with it the separation of facts and values. (Not all conceptions of rights must entail this separation; for some conception of rights might make rights dependent upon abilities and facts about the agent.) But this interpretation is not problem-free. The primacy of a particular moral theory and a particular conception of the individual as the seat of moral authority has now been exposed. This in itself is not the problem; the problem is how this particular moral theory and conception of man relates to Saikewicz. For now the question arises how the

separation of facts and in particular medical facts protects Saikewicz' rights? Saikewicz did not choose some course of action, did not accept or reject treatment, so we do not know whether, by deciding one way or the other, we are protecting his Right to Die or his Right to Live. If nothing can decide between competing rights, between Saikewicz' Right to Life and his Right to Die, then in what sense can we be said to be protecting his rights? And how do we protect his rights? By not allowing certain facts, possible medical facts, to count decisively in Saikewicz and only allowing certain other facts, say, his actual choices, to count decisively, there is no way to choose between conflicting rights and protect one or the other. It seems as though the perspective is jaundiced here, since we only seem concerned with Joseph Saikewicz' individualism, privacy, rights, autonomy and not Joseph Saikewicz. Buchanan's (and the higher Massachusetts court's) conception of rights is deeply metaphysical; rights are not dependant for their existence upon anything peculiar to the individual, to Joseph Saikewicz. As a result, in Saikewicz, the decision must be reached just through a consideration of his rights, which alone cannot decide the case. It is, in a sense, an attempt to provide a non-practical solution to a practical problem, which looks paradoxical. A theory which "insists" that decisions be reached only by a consideration of rights held equally by all, competent and incompetent alike, encounters difficulties when the relevant rights clash between competing individuals (consider a competition for scarce medical resources between equally situated individuals) or

when, as in Saikewicz, the relevant right requires some form of choice on the part of the bearer of the right for its exercise and no act of choosing is possible at any time. For in these cases, cases requiring a practical solution, the rights in question, unrelated as they are to facts about individuals and society, cannot alone provide a decision.[29]

An important feature of the dispute generated by Saikewicz is that all the disputants share the assumption that substituted judgement is the proper standard to be employed in this case. Given this agreement, the disputants engage over the question of which is the proper method of employing this criterion. For some reason, all of the contributors agree that the doctrine of substituted judgement is a paternalistic doctrine and therefore in need of justification in Saikewicz.[30] What is peculiar about this is that the scope of paternalism does not extend to Saikewicz.

The classification of paternalistic acts and the pursuit of justifying these acts are peculiarities of post-Enlightenment philosophy spawned by the development of a metaphysical conception of man as a rational autonomous moral agent. Why do we need a justification for certain types of actions? Why are these acts "paternalistic"? Answers to these questions will expose the moral theory and conception of moral man operative in the classification of certain acts as paternalistic. Because persons are autonomous rational moral agents, infringements upon their moral autonomy via making decisions for them require justification consonant with this conception of persons and with the theory as a whole. Plausible interpretations of paternalism

commonly make reference to certain features of paternalistic acts. Acting for the good of the subject is not, by itself, a sufficient condition of acts of paternalism. Such a view would not respect the individuality of persons which is, or so the argument goes, a good in itself. A paternalistic act necessarily involves the restriction of an individual's or group's liberty to act at the time of the paternalistic act's taking place.[31] Other writers have found even this characterization insufficient and have extended it to include some interference with the free acquisition of information,[32] with the performance of acts and the ability to perform certain acts,[33] and with the subject's "more settled permanent aims and preferences" or access to primary goods.[34] Yet despite the diversity of conceptions of paternalism, all of them mention, implicitly or otherwise, that interferences with voluntary, chosen actions are paternalistic interferences when done for the good of the rational choosing (or subsequent choosing) subject.

But in the case before us, Joseph Saikewicz was incapable of rational choice and comprehending any information presented to him. Nor is it clear that he was capable of performing or acting freely with the relevant intentions. Saikewicz clearly was unable to give informed consent in the past, present, or future, and was neither a rational agent nor an autonomous agent. Whether he was a moral agent may be a different question. There was no expectation that Saikewicz would become rational or capable of governing his actions freely and in this respect the attitudes toward Saikewicz are not like attitudes toward children or other non-rational, non-autonomous

agents capable of *becoming* rational and autonomous. The subject of paternalist intervention must either *be* rational and autonomous or capable of *becoming* rational and autonomous: Saikewicz was neither. Thus, given the above reading of the minimal requirements of paternalism, Saikewicz was not a subject of paternalistic actions.

The perspective of much of the writings subsequent to *Saikewicz* is jaundiced. If the goal to be achieved in *Saikewicz* is the protection of the patient's autonomy, and the patient cannot achieve this goal, then the institution most capable of achieving that goal should be charged with the responsibility. It becomes in part a matter of efficiency. If the good to be achieved is not the protection of the value of autonomy, but rather is the most efficient allocation of available medical resources, then to a large degree the medical community would be best suited to that task. So who gets to decide cases like the one presently under discussion is intimately connected with the ends and values which are thought to be most important.

Unfortunately, the above suggestion will not solve the problem over *who* decides what to do for Joseph Saikewicz. There is a much deeper problem in this case which the disputants over the who-question fail to examine, but simply assume. *How* to decide what to do in *Saikewicz* takes precedence over who institutes the decision. In a situation where opposing goals, values, and moral criteria conflict and are incommensurable then this problem must be remedied before opposing professional groups can settle their dispute. There must be some means open to the public by which the most effective institution is identified; identifying that means is prior to the identification of

the authoritative group. Even though these professional groups vie for authority in the case of Joseph Saikewicz, their claims are based upon values not commensurable with each other, and this is the site of conflict. Given that no group has pre-ordained authority in cases like Saikewicz, then the group most suited to make the best decision will be the one most able to apply the most acceptable criteria. But this application, as well as the resolution of conflict, depends on an examination into how to decide this case, and this is what shall occupy our attention hereafter.

NOTES TO CHAPTER III.

[1]See "The Saikewicz decision: Judges as Physicians", The New England Journal of Medicine, vol. 298, Mar. 2, 1978, pp. 508-509;

"The Saikewicz decision: A Medical Viewpoint", American Journal of Law and Medicine, vol. 4, 1978, pp. 110-119.

"Correspondence," American Journal of Law & Medicine, vol. 5, no. 2, p. 119-123.

[2]Viewpoint, pp. 114, 118.

[3]ibid., pp. 110-111.

[4]See Mass., 370 N.E. 2nd. 417. pp. 429-433.
In the case of Karen Ann Quinlan the determination of what she would choose (either to remain hooked up to the respirator, etc., or not) were she competent could be aided by facts about what most persons choose in relevantly similar situations. Karen was like "normal" people for a period of her life and hence might have been expected to have desires, etc., similar to most other persons. Hence, what other people choose in life-or-death situations might be quite relevant for deciding what Karen would choose. Yet in Saikewicz, the similarity between Joseph Saikewicz and other competent people is not as close. It is difficult to see how other competent "choosers" could be in relevantly similar situations. The higher Massachusetts court is well aware of the problem of relating choices of other similarly situated persons to what Saikewicz himself would choose.

[5]ibid., p. 433.

[6]ibid., p. 432.

[7]Viewpoint, p. 117.

[8]ibid., pp. 113-114.

[9]Mass., 370 N.E. 2nd 417. p. 432.

[10]This distinction is emphasized by Allen Buchanan in his article, "Medical Paternalism or Legal Imperialism: Not the Only Alternatives for Handling Saikewicz-type cases." American Journal of Law and Medicine, Vol. 5, no. 2, Summer 1979, pp. 97-117.

[11]Viewpoint, p. 114

[12]See "Assuring 'Detached but Passionate Investigation and Decision': The Role of Guardians Ad Litem in Saikewicz-type Cases," American Journal of Law and Medicine, 4 (1978), 111-130, and "Medical Paternalism and the Rule of Law: A Reply to Dr. Relman," American Journal of Law and Medicine, 4 (1979), 337-365.

[13]Rule of Law, pp. 347-350.

[14]The Role of Guardians, pp. 112-113.

[15]Rule of Law, pp. 350-352.
The Role of Guardians, pp. 126-129.

[16]"Medical Paternalism or Legal Imperialism: Not the Only Alternatives for Handling Saikewicz-type Cases." American Journal of Law and Medicine, vol. 5, #2, 1978, pp. 97-117.

[17]ibid., p. 113.

[18]ibid., p. 113.

[19]See for instance ibid., p. 110.

[20]ibid., pp. 110-112.

[21]ibid., pp. 111-113.

[22]ibid., p. 112.

[23]ibid., p. 112.

[24]See an article by Stuart Hampshire, "Fallacies in Moral Philosophy" in Mind, vol. LVIII (1949).

[25]ibid. As well see, by Bernard Williams, "Persons, character and morality", "Moral Luck", and "Utilitarianism and Moral self-indulgence" in Bernard Williams, Moral Luck (Cambridge: Cambridge University Press, 1981) for an extreme view of this.

[26]This claim is nicely substantiated by Stanley Carell in The Claim of Reason (New York: Oxford University Press, Inc., 1979) pp. 313-328 and Must We Mean What We Say? (Cambridge: Cambridge University Press, 1976), pp. 30-31.

[27]ibid.

[28]Alternatives, op. cit., pp. 101-102.

[29]Why is the solution non-practical? Rights, the tools allowed to decide Saikewicz, are not extended to Saikewicz by virtue of any particular fact about him , but the problem posed by Saikewicz is a problem about Saikewicz' condition. The resolution of the problem requires that

more than lip-service be paid to Saikewicz' condition when reaching a decision; assigning ultimate authority to a metaphysical notion of rights a priori is not to recognize the practical epistemological problems of Saikewicz.

[30]Rule of Law, op. cit. pp. 342-343, footnotes 23 and 24, and Buchanan's article, op. cit.

[31]See for instance Gerald Dworkin's paper, "Paternalism", in Morality and the Law, ed. R.A. Wasserstrom (Belmont, Calif: Wadsworth Publishing Co., 1971) especially p. 108.

> By paternalism I shall understand roughly the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced.

[32]Allen Buchanan, "Medical Paternalism", Philosophy and Public Affairs, vol. 7, #4, Summer 1978, Princeton University Press, p. 372.

[33]Bernard Gert and Charles M. Culver, "Paternalistic Behavior", Philosophy and Public Affairs, vol. 6, #1, Fall 1976, Princeton University Press, p. 48.

[34]John Rawls, A Theory of Justice (Cambridge, Mass.: Harvard University Press, 1971) p. 209, pp. 248-250.

CHAPTER IV

The standard of substituted judgement employed by the courts ruling in Saikewicz is a doctrine tailored to fit a particular conception of man within a particular moral theory. Since both the courts and some post-decision disputants collectively agree that substituted judgement is the correct (only?) method of decision making, they also share a conception of Twentieth Century moral man as an autonomous individual who is the source of authority in matters moral.[1] This conception of a moral person as the sole legitimate source of moral authority requires a particular moral theory for its expression, a theory which places the authoritative individual in the "center" of the theory. The theory is then spun around that conception of moral agents, protecting it while remaining consistent with it. The doctrine of substituted judgement can be seen as one strand of the theory and a safeguard of individual autonomy. So far, this meagre outline of the theory is compatible with both some forms of Utilitarian theory and with Rights theories. But whereas some theories might allow a revision of the "center" of the theory, which might then radiate outwards to the periphery, the theory employed by the courts in Saikewicz does not seem to admit to this flexibility. One could imagine a theory about individual rights which placed the same conception of man in the "center" of the theory and resembled the moral theory behind the legal theory and structure which the higher Massachusetts court operated under, but which did not compel the exact interpretation of substituted judgement employed by that higher court. One can imagine that this "other" theory and its

adherents might admit that some cases, including Saikewicz, forced a revision either in the conception of the individual or in the hierarchical ordering of that model of moral man as the sole, autonomous, authoritative source of justified morality. Some cases involving allocation of scarce medical resources to individuals with equal needs and equal rights may require a decision based upon collective criteria, say, which competitor's life may be more beneficial to society. Approaches like this are not ruled out of court when decisions must be reached; a priori excluding decisions based on non-personal criteria is not only dogmatic, but is the first step towards unresolvable conflict at a time when decisions are required. Incommensurable disputes are born by the rigid exclusion of moral criteria and one means for avoiding irresolvable conflict is through the adoption of a more flexible method in the face of incommensurability. The Supreme Judicial Court of Massachusetts' insistence on the adherence to egalitarian principle and the use of substituted judgement as a subjective test exposes that court's inflexible commitment to individual autonomy and authority regardless of the circumstances and context. (It also illustrates the metaphysical notion of rights the court employs: humans have rights by virtue of having "human dignity" and not because of any other facts peculiar to individuals such as incompetence.[2]) Because the higher Massachusetts court ties rights to "human dignity" which is had equally by all humans, it is led to believe that Saikewicz can be adequately decided on the basis of the doctrine of substituted judgement. That is, the moral and legal theory of the courts and the disputants leads them to see Saikewicz a certain

way, as a case explainable by the doctrine of substituted judgement;[3] their inflexible commitment to a deeply metaphysical view of rights and individuals leads them to interpret substituted judgement the way they do in Saikewicz. Yet how the "indirect" exercise of the rights of Saikewicz via substituted judgement protects or is consistent with Saikewicz' autonomy and authority is less than clear. How, for instance, is this individual's, or that individual's, moral autonomy and authority "respected" when that autonomy and authority is consensually dependent, there is no consent, anticipated or otherwise,[4] and a third person decides, acts, etc., for a consenting individual? If it was the case that rights were the kind of things where exercise does not depend upon each unique individual, that is, the kind of things that could be exercised by other people, then rights would not be person-specific and the means by which individual autonomy in moral matters is protected. But the courts seem to think that the rights of Joseph Saikewicz can be exercised by another and still respect the individual autonomy and integrity of Saikewicz. It is not clear how this situation differs from what utilitarians are usually condemned for doing, i.e., not respecting the personal integrity of individuals. The court's conception of rights seems to be intimately tied to choice and the notion of consent, and in the case before us, choice and consent cannot be obtained. But this failure in securing choice and consent does not prove for the court that the decision cannot be rights-oriented and consonant with the view of the individual as autonomous. And this in turn shows either that rights are not person-specific or that they are not dependent upon consent and deeply

metaphysical, or that rights are not necessary to ensure individual autonomy. Either of these conclusions is inconsistent with the claims of the court, although it is uncertain which disjunct can be attributed to the court. This is a general problem of trying to vindicate a particular conception of moral agents as autonomous and authoritative through impersonal non-specific principles. Consent is a means by which an individual's autonomy may be respected, but when this means is impossible, the impersonal framework protecting the notion of consent cannot itself also protect individual autonomy.

The problem confronting the courts in Saikewicz, given its commitment to the substituted judgement test, is arriving at an acceptable calculus of weightings of "objective" and "subjective" criteria. The Supreme Judicial Court of Massachusetts recognized that the substituted judgement test is sensitive to differing circumstances, such as the differences between Saikewicz and Quinlan.[5] The test is never just objective, but rather is subjective, the primary goal being "...to determine with as much accuracy as possible the wants and needs of the individual involved."[6] The goal then is to determine with as much accuracy as possible, the actual interests of Joseph Saikewicz. Although some "objective" criteria can enter into the calculus, the greater court ruling on Saikewicz severely restricted this kind of evidence. In particular interpersonal criteria are not allowed, such as value-of-life comparisons.[7] Some "objective" criteria, such as the court's observation that most people in circumstances like Joseph Saikewicz', i.e. terminal cancer patients, choose not to receive treatment, are relevant only insofar as they determine the predilections of the incompetent patient. (Since it is more likely that Karen Quinlan shared

the attitudes of the majority than that Joseph Saikewicz did, this consideration is more important in Quinlan than in Saikewicz.) The only "objective" criterion that the higher court explicitly mentions is "...the supposed inability of profoundly retarded persons to conceptualize or fear death,...."[8] Given the moral importance the court assigns to individual choice, one can understand why the choices of similarly situated persons cannot be decisive.[9] Substituted judgement is after all, primarily subjective. However it is not clear why the court rules that Saikewicz' inability to conceptualize death is admissible, and objective. Who defines what constitutes this inability, in contrast to the ability, to conceptualize death? This is not an easy question to answer and does not seem to be answerable through citation of some objective standard.[10] Aside from this consideration, Saikewicz' profound retardation defines the problem facing the courts, and given the Supreme Judicial Court of Massachusetts' insistence on a subjective interpretation of substituted judgement plus its egalitarian commitments, it is not clear how this fact about Saikewicz, his inability to conceptualize death, would affect his actual choice or his rights.

The intractable problem the higher court sets for itself in the case under study begins to develop with the claim that all individuals have the same rights, irrespective of contingencies like competence or incompetence. Competents have a right to choose to decline treatment, ergo, so do incompetents. The problem of deciding Saikewicz within the framework set by the higher court is further exacerbated by its insistence that the status of persons is "downgraded" by the failure to allow persons to choose.[11] That is, Joseph Saikewicz'

status as a person and intrinsic human worth, equal to any other human because the value of human dignity is equal, requires that his actual choice between treatment and non-treatment be the effective ground for deciding the case. To subject Saikewicz' choice to the choice of the majority is to assign less value to his life, which, ex hypothesi, cannot be done within the framework adopted by the court.[12] With this rationale the Supreme Judicial Court of Massachusetts rejects the use of a "reasonable man" inquiry.[13] Thus, by its insistence on equality of rights and value of life, as well as the essential subjective character of the test of substituted judgement, the Supreme Judicial Court of Massachusetts has, in the face of Saikewicz' severe incompetence and noncommunicative history, set for itself an intractable problem: how to decide Saikewicz primarily by reference to the subjective, actual desires of Saikewicz when these cannot be determined.

Within this context, the Supreme Judicial Court of Massachusetts produced the doctrine of substituted judgement as follows:

> We believe that both the guardian ad litem in his recommendation and the judge in his decision should have attempted (as they did) to ascertain the incompetent person's actual interests and preferences. In short, the decision in cases such as this should be that which would be made by the incompetent person, if that person were competent, but taking into account the present and future incompetency of the individual as one of the factors which would necessarily enter into the decision-making process of the competent person. Having recognized the right of a competent person to make for himself the same decision as the court made in this case, the question is, do the facts on the record support the proposition that Saikewicz himself would have made the decision under the standard set forth. We believe they do.

The doctrine of substituted judgement is presented in the form of a counterfactual: if the incompetent were competent, and accounted

for the present and future incompetence of her/himself, then she/he would decide for or against treatment. An interesting absence in the Supreme Judicial Court of Massachusetts' formulation of substituted judgement is the inclusion of past incompetence of the incompetent being represented by substituted judgement. After all, this is a salient feature of Saikewicz which serves to distinguish this case from Quinlan and other cases. It is in essence the difference between never having been competent and having been competent. And the inclusion of past incompetence does, as argued below, make a difference to the thought experiment required by the test of substituted judgement, as well as the type of case capable of resolution by a subjective interpretation of the test.[15]

It is not at all obvious that this formulation of substituted judgement is consistent with the Supreme Judicial Court of Massachusetts' claim that the choices of competent persons, although relevant, are not sufficient criteria upon which to base a decision. (Recall the higher court's insistence that the status or dignity of the incompetent is somehow "lessened" by "imposing on such persons" choices made by others, i.e. competents.)[16] Given the higher court's commitment to respect, absolutely, the integrity and autonomy of the individual, competent or incompetent, it is utterly inconsistent for the court to "reduce" the subjective choice of the incompetent to the choice of a competent via the counterfactual formulation of substituted judgement. If it is assumed that choice, integrity and autonomy are, as moral notions, person specific, that is, that moral authority ultimately reduces to the first-person, then choice, integrity, and autonomy, as

moral notions, can not be non-person specific. Moral authority can not be both first-person and third-person specific. But this is what the Supreme Judicial Court's formulation of substituted judgement requires: that we respect the individual's autonomy and integrity and that we make the incompetent someone he/she is not, i.e. a competent. To be consistent with the facts of the case and their moral theory, the higher Massachusetts court should make no reference within their formulation of substituted judgement to the incompetent as a competent. And if the higher court is consistent, then there is nothing left upon which it could base the decision in Saikewicz via substituted judgement.

There is yet another fundamental problem with this interpretation of the standard of substituted judgement which is specific to Saikewicz. How can a competent person "take into account" the present and future incompetence of him/herself or the present or future incompetence of another?[17] Presumably the court is not concerned with the latter disjunct, but it is problematic for similar reasons as the former disjunct is problematic. If a competent person were to "take account" of his/her present incompetence, wouldn't he/she be incompetent? How could a competent person adopt completely the perspective of someone profoundly incompetent and maintain the perspective of a competent? No one can do both at the same time. But it even appears as though we cannot "take into account" the incompetence of someone profoundly retarded while "we" remain competent. (This might not be the case with someone mildly retarded, someone like us in certain ways). If we could understand what it was like to be incompetent like someone

profoundly retarded, then we would have good grounds upon which to determine that individual's wants, desires, choices, etc., and hence good grounds upon which to base a decision using the court's interpretation of substituted judgement.[18] The higher Massachusetts court's perspective requires that we understand the substantial choices of the profoundly retarded like Joseph Saikewicz. But this is the central epistemological problem presented by Saikewicz, and exacerbated by moral theory employed by the court and the interpretation it gives to the standard of substituted judgement. By giving due recognition to our inability of knowing the actual interests and choices of Joseph Saikewicz, it becomes obvious that substituted judgement cannot be interpreted in the manner presented by the Supreme Judicial Court of Massachusetts. And if substituted judgement is interpreted differently, possibly by reference to more objective standards, then either the unalterable conception of man central to the moral theory of the court must be altered, or Saikewicz must be deemed to be outside of the domain of the theory. Something must be done with Saikewicz.

Possibly the interpretation of "taking into account" tacitly assumed here is too uncharitable; possibly what the higher court had in mind was something along the lines of considering an individual's incompetence in the way we consider the other facts of the case. Such an interpretation is not consonant with the higher ranking court's insistence on the subjective nature of substituted judgement. The goal of the substituted judgement standard is to determine the actual interests, etc., of Joseph Saikewicz in order to respect his "intrinsic human worth," and determining his individual choice entails respecting the complexities and uniqueness of his situation.[19] Thus, "taking into

account" the severe retardation of Saikewicz is how the court intended to make substituted judgement subjective: it is how the court tried to be Joseph Saikewicz and thereby discover his actual interests, etc.

The use of contrary-to-fact conditionals is an important tool of reasoning. In a scientific context, contrary-to-fact conditionals are thought to be important for our understanding of scientific laws. There is no form of reasoning specific to morality, science, or law, so if contrary-to-fact conditionals are understandable and useful, then they can be useful for moral and legal inquiry. But there are many well documented problems with analysing contrary-to-fact conditionals and our understanding of this form of the conditional is sketchy. Given this host of problems with contrary-to-fact conditionals, without indulging in an explanation of the exact nature of these problems, it seems best not to place such heavy emphasis on that form of reasoning as the Supreme Judicial Court of Massachusetts did in its formulation of substituted judgment in Saikewicz. That is, the problems with contrary-to-fact conditionals will infect the higher Massachusetts court's use of this conditional in its formulation of substituted judgement. Our understanding of the decision in Saikewicz will be affected by this.

It should be clear why the final court of appeal in Massachusetts represented substituted judgement in the form of a contrary-to-fact conditional (hereinafter "counterfactual"). Given that the test of substituted judgement is interpreted as a subjective test, then "we" are interested in what Saikewicz would choose (to accept

or reject treatment) given that he cannot choose now. Determining Saikewicz' counterfactual choice is how his subjective choice is represented, how his individual autonomy is respected. If substituted judgement was not a subjective test but was determined on the basis of, say, the choice of the majority of similarly situated patients, then it would not be in counterfactual form.

Although there are many problems with counterfactuals in general, and these problems may be reason enough not to adopt that form of analysis, there is still more to be said about the counterfactual rendition of substituted judgement employed in Saikewicz. In particular, given a counterfactual interpretation of substituted judgement, the differences between Saikewicz and Quinlan can be captured by examining the different evidence available in each case. By so doing, a better understanding of "Saikewicz-type" cases may be achieved. A further examination of the counterfactual form of substituted judgement in Saikewicz will also unearth some other difficulties for this perspective.

The Supreme Judicial Court of Massachusetts' formulation of the doctrine of substituted judgement is a counterfactual expressed in the subjunctive mood; the decision is that which would be made by Saikewicz were he competent.[20] Joseph Saikewicz never was and never would become competent given the current state of medical knowledge and technology. Nor was it true, or factual, that Saikewicz could decide or make decisions concerning matters of life or death or other abstract notions. Thus, the antecedent of the conditional "If Saikewicz were competent and could choose, then he would choose to accept

(reject) treatment" is contrary-to-fact. But the general form of the substituted judgement standard is not what makes it counterfactual; Karen Quinlan was competent at some time (prior to her comatose state) and in her case the antecedent was not always false.[21] The histories of both patients become quite important and the basis upon which the differences between both cases can be drawn out.

There is much confusion over the difference between subjunctive conditionals and counterfactuals, and there are good reasons for this confusion. Most frequently the difference has been drawn upon linguistic grounds; the subjunctive involves a verb-mood not found in a counterfactual, and a subjunctive conditional carries with it the implication that the speaker believes the antecedent is false. But subjunctives and counterfactuals are simply two different things. The identifying characteristics of each are themselves not comparable; subjunctive conditionals are identified just by the mood of the verb within the statement and counterfactuals require that the conditional be checked against the facts.[22] A conditional where the antecedent is contrary-to-fact can be expressed in the subjunctive mood or not, and subjunctive conditionals may not be contrary-to-fact, but falsely believed to be so.[23] But of what relevance is this to Saikewicz?

The Supreme Judicial Court of Massachusetts' interpretation of substituted judgement is a counterfactual in the subjunctive mood. The decision to be made is that which Saikewicz would make were he competent but taking account of his own incompetence. The use of the subjunctive mood does express that court's belief that Saikewicz was not competent, which indeed he was not. Similarly with the use

of the subjunctive in the substituted judgement in Quinlan. But in a sense, the subjunctive "masks" the differences between Saikewicz and Quinlan and the different kinds of evidence available in each case. At the time the opinions were issued in the respective cases, both Joseph Saikewicz and Karen Quinlan were incompetent and the subjunctive mood of the substituted judgement test exposes the belief that they are incompetent. But the histories of the two persons are different, and how they came to be incompetent is different. Saikewicz was always incompetent but not so with Quinlan, who was at some time competent and capable of choice. What the subjunctive does not expose is the belief that Quinlan could have chosen prior to her incompetence, and that some choice might be relevant in reaching a decision in this case. That is, if we remove the subjunctive verb from the substituted judgement test and replace it with a verb in the indicative mood so that it reads "If Quinlan is (now) competent, she chooses to accept (reject) life-prolonging measures", then by virtue of Karen Quinlan's past competency, this form of substituted judgement may or may not be counterfactual. If uttered before Quinlan became incompetent it is a standard conditional, and if uttered afterwards, it is a counterfactual. And if the statement is made when Quinlan is competent, then there is the possibility of obtaining "direct" evidence to establish the statement's truth or falsity.[24]

But even if we remove the subjunctive verb and replace it with an indicative verb the substituted judgement test remains counterfactual in Saikewicz: "If Saikewicz is competent, then he chooses to accept (reject) treatment" is contrary-to-fact since Saikewicz never was or would be competent. This is a difference between the two cases,

Quinlan and Saikewicz, and the evidence possible in each case which the subjunctive form of the counterfactual reading of substituted judgement hides.

Such an analysis as that given above also reveals another difference between the two cases. On the one hand, substituted judgement in Quinlan could be determined with a fair degree of accuracy and in accordance with Quinlan's actual expressed desires, thereby maintaining and respecting individual choice and autonomy, as opposed to having substituted judgement in accordance with no expressed desires of Saikewicz, and still maintaining and respecting individual choice and autonomy. All competent people could possibly become comatose like Quinlan and have their prior wishes respected: no competent person could become incompetent from birth like Saikewicz and have their prior wishes respected, since there would not be the wishes to respect. Saikewicz is a "hard case", not only for a counterfactual interpretation of substituted judgement, but also for the moral theory motivating the courts and the metaphysical conception of the individual which the court tries so hard to protect. Quinlan does not present such a tough case for this reading of substituted judgement since her choices can be respected. These two cases differ then in their significance and impact on the method of decision employed by the higher Massachusetts court.

A "Saikewicz-type" case, then, is not just any case involving incompetents and requiring substituted judgement in matters of life and death. Such a crude characterization, but one which is nevertheless popular in the literature, is too indiscriminate; although all

of us possibly could become comatose and hence incompetent like Karen Quinlan, we cannot have been competent and always have been incompetent like Joseph Saikewicz. A Saikewicz-type case involves an individual who never was nor would be competent and who had never indicated what might constitute a choice in a life-prolonging situation. There is no way to determine the individual's choice on purely subjective grounds. Similarly, given a counterfactual formulation of the test of substituted judgement, a Saikewicz-type case is strictly counterfactual and at no time could be otherwise (i.e. have a true antecedent when not in the subjunctive mood at some time when the subject is competent.)

After all is said and done, there still remain considerable problems with counterfactuals; if counterfactuals are true, it is not clear what a set of sufficient truth-conditions looks like, and if "warranted" or justified, it is not clear under what conditions they are justified. But in Saikewicz, despite the problems with counterfactuals generally, there are problems specific to substituted judgement in its counterfactual guise in this case. Given the higher Massachusetts court's insistence on the subjective character of substituted judgement and the inadmissibility of other people's choices, it was argued earlier that the court cannot determine Saikewicz' substantive choice. That is, the Supreme Judicial Court of Massachusetts cannot determine which consequent is true or false (what Saikewicz decides) within their framework of inquiry. There are no reasons to prefer one counterfactual (If Saikewicz were competent he would choose treatment) to its contrary (If

Saikewicz were competent he would choose to reject treatment) when the only admissible interpretation of substituted judgement is subjective, the only good evidence, i.e. his actual choice, can not be obtained. The court's rigid insistence on a subjective interpretation of substituted judgement in the face of our knowledge of Saikewicz' inabilities is opaque. Once it is seen that moral reasoning is reasoning, simpliciter, about morality then requirements of coherence and consistency dictate that all beliefs, factual, medical, moral, etc. be reconcilable. Knowing that Saikewicz can not choose, yet insisting on a solution that depends upon his actual choices does not meet this requirement; it is a solution that somehow ignores what we know about Saikewicz.

NOTES TO CHAPTER IV.

[1]Superintendent of Belchertown v. Saikewicz, Mass., 370 N.E. 2d. 417. p. 431; Allen Buchanan, 'Medical Paternalism or Legal Imperialism: Not the Only Alternatives for Handling Saikewicz-type Cases,' American Journal of Law and Medicine, Vol. 5, #2 (1979): pp. 97-117, in particular, p. 104., etc., and the articles of Baron and Relman, op. cit.

[2]Saikewicz, op. cit. p. 427.

[3]Another way of arriving at the same point is to examine the current preoccupation with the notion of "informed consent." Moral theories which place moral authority in the individual also sanctify individual free choice. (See the higher court's decision, ibid., p. 426). The right to free choice, to privacy, and to informed consent are expressions of this sanctity, as well as the respect for an individual's autonomy and integrity. When, however, an individual is incapable for whatever reason of giving informed consent, theorists do not conclude that there is no freedom of choice hence nothing for the plethora of rights to "protect," but rather, qualifications of consent are introduced in order to keep the conception of man central to the theory and the primacy of free choice. "Hypothetical consent," "subsequent consent," "tacit consent," "informed consent"; all are fabrications to account for the problems which arise in cases where individuals cannot choose directly. All are attempts to maintain a "tight" association between individual moral autonomy and choice when there is no actual or free choice. All are attempts to provide an account of "indirect" choice and thereby justify the enforcement of rights protecting individuals' autonomy and choice when there is no "direct" choice. It is, in a sense, an attempt to institute a standard of substituted choice, consistent with the conception of man inherent in the theory. It is the conception of man, and as a result the theory, which promotes the kinds of solutions examined above.

[4]Clearly, there is no actual consent from Saikewicz, and insofar as subsequent consent depends upon there being actual consent at some time, then there is no subsequent consent either. Hypothetical consent is not actual consent, but must still depend upon evidence from Saikewicz eventually (if this notion is intended to respect his individuality) and this too cannot be had.

[5]Saikewicz, op. cit. pp. 427-430.

[6]ibid., p. 430.

[7]ibid., p. 432.

[8]ibid., pp. 430-431.

[9]ibid., pp. 429-430. See also the court's discussion on admissible factors., p. 431.

[10]For an interesting discussion on the theory-relativity of medical facts and the notion of mental illness, see Joseph Margolis, "The Concept of Mental Illness" in Mental Illness: Law and Public Policy," Brody and Engelhardt, eds. (Dordrecht, Holland: D. Reidel Co.,1980) and Thomas Szasz, The Myth of Mental Illness (New York: Harper & Row, 1974).

[11]Saikewicz, op. cit. p. 426.

[12]ibid., pp. 426-430.

[13]ibid., p. 430. And yet, in a footnote to the sentence denouncing the "reasonable person" viewpoint, the court cites as a "philosophical rationale in support" of substituted judgement, a law professor quoting John Rawls (A Theory of Justice, op. cit. p. 209). This is peculiar since the reasons the court gives for rejecting the "reasonable person" viewpoint apply equally well to a Rawlsian viewpoint. The "reasonable person" viewpoint is found unsatisfactory by the court because individual choice, the choice of Joseph Saikewicz, is not determined by what the majority would do in similar circumstances. To impose upon the incompetent decisions made by other rational persons is to treat the subject wrongly, to downgrade that individual's status as a human being. The Rawlsian position is that we choose for others when their preferences are unknown as they would choose if they were rational. (ibid., p. 209). But this is intended to be an objective viewpoint the likes of which the court has just rejected for its inability to determine the actual choices of the specific individual, Joseph Saikewicz. Just as Joseph Saikewicz' actual choice is not determined by majority decision, so too is that choice not determined by a non-specific criterion like "rationality." The task of determining Saikewicz' actual choice, the subjective interpretation of substituted judgement, is at odds with the supportive rationale of that text.

[14]ibid., p. 430.

[15]This omission by the court appears to be an oversight, although an important one, since at times the opinion does respect such differences between Saikewicz and Quinlan. See for instance, ibid., p. 430.

[16]ibid., pp. 428-429, 426.

[17]Throughout what follows, "incompetence" is taken to refer to the severely retarded, like Joseph Saikewicz. If interpreted this way then the following suggestions are quite "weighty." And great care must be taken when using broad generalizing terms like "incompetent" since this term includes the senile, the demented, the immature, all shades of retardation, etc. To treat the mildly retarded in the same way as the demented, or the severely retarded in the same

manner as the immature would be wrongheaded. "Normal" persons and the mildly retarded have much in common but possibly not "as much" as "normal" persons do among themselves; severely retarded persons have little in common with "normal" persons. Too much is left unsaid here. What is it that we share or don't share with the mentally handicapped? A Wittgensteinian response springs to mind, but it too would leave too much unsaid. Even when the "factual" differences between groups is "found," the normative issues revolving around treatment still remain. A complete account of the differences between persons based on intelligence or intellectual capacity would be too large an enterprise to attempt here and may be of only peripheral relevance. For an interesting account of some of these problems see Daniel Wikler, "Paternalism and the Mildly Retarded," Philosophy and Public Affairs, vol. 8, #4 (1979), pp. 377-392.

[18]For a discussion on this issue see Thomas Nagel, "What is it like to be a Bat?' in Mortal Questions (New York: Cambridge University Press, 1979), pp. 165-180. Oddly enough, the Supreme Judicial Court of Massachusetts seems to recognize this problem at op. cit., p. 430, but does not go on to confront it.

[19]Saikewicz, op. cit. p. 428.

[20]Mass., op. cit. p. 431.

[21]That is, "If Karen Quinlan were competent and could choose, then..." has a satisfied antecedent when Quinlan is competent, and not when not. But the antecedent is temporally indefinite, and in the case of Quinlan by virtue of her past competence, this makes a difference. So when Quinlan is competent, the iteration of this conditional in the subjunctive mood is not contrary-to-fact either when Quinlan chooses or when she has not yet chosen at all, though is capable of choosing. Because the antecedent is temporally indefinite, and because at some definite time Quinlan was competent and at another definite time she was not, determining whether the substituted judgement is counterfactual in Quinlan depends upon the antecedent being temporally definite in its reference to Quinlan's incompetence.

[22]See M.R. Ayers, "Counterfactuals and Subjunctive Conditionals," Mind (1965), pp. 347-364.

[23]ibid., p. 352

[24]And if the statement is counterfactual, then there is still the possibility of obtaining "indirect" evidence in the form of previous conversations, her "living will," etc., expressing Quinlan's thoughts concerning matters of life and death. Saikewicz could not have given "direct" or "indirect" evidence of his desires.

CHAPTER V

It is unlikely that a decision in Saikewicz will achieve complete consensus among those who are familiar with the case. The conflict of values in Saikewicz, the conflict between the unconditional protection of life and respect for individualism and the constraint against the infliction of needless suffering upon one incapable of comprehension, can occur not only between professions, but between and within persons. Reaching a decision in Saikewicz is not an easy task, but a task which nonetheless must be accomplished. Ex hypothesi, a decision must be made over what to do for Joseph Saikewicz, and the choice is between treating his leukemia with chemotherapy and not treating his terminal condition. The occurrence of fractious debate is grounds neither for despair nor the abnegation of responsibility. While an individual's private decision between conflicting values may be reached by preference and conviction, public order demands a public answer and public understanding cannot live with intuition. Given the public nature of Saikewicz, there must be a resolution of the dispute which does not come down to just intuition.[1]

Saikewicz, and Saikewicz-type cases, take place in a particular context against a particular background. The backgound of the decision, the context in which the decision occurs, figure importantly in determining that decision. It is the facts and the social, medical, and legal context surrounding Saikewicz which "assign" or "indicate" weights and priorities of values and the format of the decision. Against this

background various pieces of evidence, which include moral and legal attitudes, used in deciding Saikewicz stand out in greater or lesser relief.

Facts about Joseph Saikewicz are much a part of this background. Much has already been said about Saikewicz' incompetence and inability to communicate, and how these important facets of his condition have accompanied Saikewicz all his life. Against this part of the background the insistence that substituted judgement be subjective, determined on the basis of Saikewicz' actual choice, is incoherent. The severe retardation of Saikewicz rendered him unable to conceptualize and understand life and death issues and the consequences of choosing or foregoing treatment. But there are other facts about Saikewicz that are also important features to be given some weight. Physically, Saikewicz was a strong man and required great effort to restrain.[2] It was reported by one commentator that occasionally Saikewicz would "lash out" at medical personnel displaying signs of fear and aggression.[3] Treatment of the cancer would require that Saikewicz be held down and restrained, thereby reducing his freedom of movement. This in turn increases the chances of contracting pneumonia.[4] Saikewicz was also 67 years old, and his age figured significantly in determining how successful treatment was likely to be in producing a remission.[5]

There are many background facts to Saikewicz which are relative to the state of the medical science at the time in which the case arose. Identifying these facts as "background" in no way prejudges their importance or relegates them to a lesser role in the decision process. The kind of cancer Joseph Saikewicz had determined not only

the type of treatment for the cancer but also the likelihood of cure. Acute myeloblastic monocytic leukemia is a cancer of the blood and marrow where the number of immature white blood cells, the myeloblasts, greatly increase and these cells overpopulate the other cellular constituents of the blood.[6] In its acute form this cancer most often has a rapid development, much more rapid than its chronic form which may develop slowly for years.[7] The acuteness of the malignancy does not afford either the chance to treat slowly over prolonged periods of time or the extended stability during which new advances in technology may be made that might alter the chances for cure.[8] The speed with which the malignancy develops requires that existing treatments or solutions be attempted to arrest the development of the cancer at the time of its diagnosis. For Saikewicz, then, treating his cancerous condition was not a delaying measure in the hope of a medical breakthrough; within the time it would take for his leukemia to prove fatal there was no expectation of a breakthrough.[9]

The typical treatment for this kind of cancer is chemotherapy, the injection of highly toxic chemicals into the bloodstream in order that these toxins can directly enter the myeloblasts and destroy them.[10] Unfortunately such chemicals do not discriminate between white blood cells, but enter all and destroy all equally.[11] The result is that the white blood cell population is almost completely annihilated and the patient must be kept in isolation to minimize the risks of infection which are so great at this time.[12] Transfusions are required in order to restore the proper balance of

cellular components of the blood. Remission, not cure, is achieved in 30 to 50 percent of the time usually lasting from 2 to 13 months on average.[13] The effectiveness of chemotherapy is complicated in cases like Saikewicz where the recipient's age becomes a factor. Older patients (over 60) do not tolerate chemotherapy as well as younger patients and the treatment is less successful.[14] It was suggested in the briefs given to the court that Saikewicz would further exacerbate the problems of treatment because he would not understand what was happening to him and was likely to tamper with needles and injections required for transfusions. And this form of treatment has some rather adverse effects. Nausea, loss of hair, bladder irritation, and tingling in the extremities are some of the results of chemotherapy.[15] Saikewicz' cancer was not a cancer of an organ, like lung cancer, and the treatment required for his leukemic condition was not surgical, as it might have been with a different form of cancer. At the time of Saikewicz, chemotherapy was the prescribed form of treatment, was not a cure for leukemia, and was an unpleasant form of treatment.

The activity of reason-giving is an integral thread in the fabric of community-life and an essential facet of justification in the public sphere of a liberal democracy. Given the number and complexity of the factors to be considered in Saikewicz as well as the case's social importance and public nature, the decision in Saikewicz should reflect the careful consideration and study given to such decisions. The court, as a public forum committed to the practice of justification and reason-giving, seems to be the best environment

at the time Saikewicz arose in which to reach the best decision. How then can the court decide Saikewicz? What factors can enter into the decision and what weights are to be attached to each factor?

Considerations in favour of not treating Joseph Saikewicz are to a large extent, medical factors. The unlikelihood of a cure for Saikewicz' cancer, the high risk of complications resulting from treatment, the unpleasant nature of the treatment and the severity of the bodily intrusion the treatment entails, and the poor prognosis of significant remission stand against subjecting Saikewicz to such sever intrusions during his last days. The medical profession's ethics of comforting the incurably ill rather than attempting to cure with painful results seems to capture not only the tragic nature of Saikewicz, but also a respect for the manner in which Saikewicz' last days should be spent. The inability of Saikewicz to comprehend the point of treatment, i.e. as a means to the prolongation of life for an uncertain time, also stands against instituting chemotherapy. Whatever Saikewicz' experiences were like prior to chemotherapy, his life would be radically altered with that form of treatment and he would not be able to understand why there was a change in his lifestyle; he would simply experience the unpleasant change. Considering that to Saikewicz, such a severe alteration in lifestyle would have no point, if we consider his viewpoint at all, then treatment seems gratuitous.

What sort of considerations weigh in favour of ordering treatment in Saikewicz? One of the State interests cited by the higher Massachusetts court was the preservation of life.[16] That court found

that in cases of incurable disease, the interest in prolonging life must be weighed against the cost to the individual incurred by treatment. It might be the case that "the best interests" of the individual in question do not necessitate the ordering of treatment under the legal doctrine of parens patriae. The "best interests" of the incompetent, and his/her status as a human being, are not respected when the rights and choices afforded to competents allows the competent to decline life-prolonging treatment in similar situations, but not the incompetent. Because the legal system protects the intrinsic value of life of each individual equally, and competents have a right to choose not to accept treatment in a life-prolonging instance, so do incompetents have the right to reject treatment. Thus it is not the State's interest to always order treatment. Clearly the egalitarian premise of such an argument could and should be questioned, for such a perspective will lead, as the court was led, to attempting to discover the actual exercise of either the right to reject or the right to accept treatment by the incompetent. In other words, to see substituted judgement as a subjective test. Regardless of what might be thought of the reasoning behind the court's view of the preservation of life, its conclusion is consonant with the prevailing mores of contemporary society regardless of professional affiliation. When going through a case like Saikewicz, some emphasis or weight should be given to the interests of the individual in question. The perspective of the court is not wholly wrong, but too extreme; the individual's perspective, interests, rights, etc., have a place in deciding what to do in Saikewicz, but neither is that place uncontestable

or central in this case, nor uncontestable or central in principle. Given some place for Joseph Saikewicz' interests and individuality in the calculus of deciding this case, and allowing that nothing operates as a categorical constraint upon deciding, then consequences, rights, attitudes towards the preservation of life, etc., all can be considered and weighed without a prior determination of the weights. Thus, while the preservation of life might, in some particular case, require the ordering of treatment, the determination of that requirement is not unconditional and depends upon that particular case. So in Saikewicz, the preservation-of-life requirement does not compel, a priori, the ordering of treatment of Joseph Saikewicz' condition. The weight of a condition such as preserving life might be less, by comparison, than the costs and benefits to Saikewicz that chemotherapy might bring.

Once the correct attitude for deciding Saikewicz (and other cases as well) is adopted, the attitude of looking and seeing how the various factors and considerations fit together in the particular case, there are still large problems to confront. Since all sorts of factors can in principle enter into the calculus of decision making, the problem of assigning weights and importance to each consideration must be considered in each particular case. In Saikewicz there is no problem of the allocation of scarce resources between equally needy patients, or economic problems of treatment, or other considerations of a social nature. In principle these factors could become important in other cases. But in the absence of such impersonal constraints in the case before us, doing what is best for Joseph Saikewicz is the primary perspective of this case. It was argued above

that the preservation of life does not necessarily compel treatment in the case under study. It might be in Saikewicz' best interests to forego chemotherapy when the prospect of prolongation is dim and the unpleasant consequences of treatment are great. But what constitutes the "best interests" of Saikewicz, who was incapable of communicating his own interests, is problematic. Clearly the determination of his "best interests" must depend on factors and considerations external to Saikewicz, but which express the condition of Saikewicz as best as possible. That is, the point is to determine with as much precision as possible the attitudes and interests of a person, or a group of people, who are similar to Saikewicz in many relevant respects. Ideally, the person we want to compare Saikewicz to is himself, but no advances will be made with this model. One of the constraints on this instance of analogous reasoning is that the subject resembling Saikewicz must have detectable interests, otherwise the major epistemological stumbling block in Saikewicz cannot be overcome. In order to find out what is in the best interest of someone most like Saikewicz so that his individual condition may be represented in the decision, the person or group must have interests. This excludes incompetents as profoundly retarded as Saikewicz, since the same question of determining their best interests arises. But it is also the case that "normal" persons such as ourselves are too unlike Saikewicz by virtue of our capacity to understand the problem and base our choice upon that understanding.

The suggestion here is that the group most similar to Saikewicz

while dissimilar enough to enable the comparison, is the aged patients with terminal cancer facing the prospect of chemotherapy but capable of expressing their attitudes toward their situation. Insofar as this group is communicative they are dissimilar from Joseph Saikewicz. Yet this group shares much with Saikewicz, such as their age and its effects on their attitudes and condition as well as their condition itself; they are cancer victims, possibly with the same cancer as Saikewicz, facing the prospect of a prolonged life for an uncertain period via an unpleasant treatment procedure. This group would be dissimilar from Joseph Saikewicz in that they would be capable of understanding their situation before treatment and comparing it to their hypothetical situation after treatment. That is, the group must fully understand the issue confronting them. In a sense, it is a problem of how much of the decision maker to import into the decision without making the problem personal to the decision-maker. In order to understand which groups'attitudes and interests are most likely to represent the interests of the subject, or hence what is in the subject's best interests, the decision-makers must understand the group being compared to the subject. So the aged patients with acute terminal cancer facing chemotherapy cannot be incompetent; this is not to say that the group must be "fully" competent, but at least competent enough to understand their predicament.

Part of the testimony heard by the probate court was given by a doctor who testified that older patients often decline chemotherapy when informed of the severity of the treatment and the poor prognosis.[17]

Confronted with the prospect of a relatively short period of life remaining, these patients opt for supportive care rather than intensive treatment in their remaining days. It is unlikely that Saikewicz knew he was dying, but this problem becomes less significant when Saikewicz is compared to the group of aged patients described here: these patients do know they are dying and unlike their younger counterparts, choose to forego the rigors of chemotherapy. The costs of chemotherapy seem to override the unlikely benefits for aged patients requiring chemotherapy. Since chemotherapy is obviously not in this group's best interest, and this group has some major similarity to Saikewicz, then chemotherapy is not in Saikewicz' best interest. Since the preservation-of-life requirement in Saikewicz entails the ordering of chemotherapy, which is not in Saikewicz' best interests, prolonging his life is not in Saikewicz' best interests. The preservation of life is a consideration which really is not supportive of the decision to treat Saikewicz, but rather is supportive of withholding treatment.

Considerations such as the Right to Privacy or the Value of Life are so general that they are of no practical value in deciding to order or withhold treatment. The Supreme Judicial Court of Massachusetts claimed that the value of life and human dignity extended equally to all, and that the right to privacy, as an expression of the "sanctity of individual free choice and self-determination" and the value of individual human dignity and life, also extended equally to all. Yet that court recognizes that the right to refuse treatment and bodily invasions, a right subsumed by the more general right

to privacy, is a consensual consideration; its exercise depends upon the personal consent of the particular individual. In Saikewicz, there is no consent and nothing to give substance to the right to privacy. It is not clear whether ordering treatment respects the right to privacy or whether withholding treatment respects the same right; whether the right to refuse treatment or the right to accept treatment can be exercised in the permanent absence of acceptance or refusal. That a third person makes the decision shows that talk of consent-based rights here is superfluous and that what decisions like Saikewicz require is not a dogmatic reliance upon metaphysical conceptions of rights, but a hard-nosed look at what values are involved in deciding these cases, and where, if at all, conflicts arise.

Similarly with the value of life. Just as it is unclear how the general right to privacy is respected or not, by a decision to treat or not, so too it is unclear how the value of life is affected by a decision in a hopeless situation. Neither the quality of life, nor intelligence, nor social standing, affects the value of life and human dignity.[18] In short, the only thing that affects the value of human dignity and human life according to the court is to presume "that the incompetent person must always be subjected to what many rational and intelligent persons..." decide.[19] But when the incompetent cannot decide, and there is no evidence indicating that individual's choice, then someone has to decide and refer to facts like the choices of other people, the consequences of certain decisions, etc. If this means that the value of life of an individual is "downgraded," so be it; the facts of the case make it this

way. But it is hard to see how allowing the natural process of death to occur can affect the value of life when nothing can be done which does not involve other significant costs. The value of life is not "cheapened" if Saikewicz' cancer runs its natural course, nor is it "protected" by ordering chemotherapy at such cost.[20]

In short, the costs to Saikewicz of chemotherapy outweigh the minimal benefits resulting from the treatment. Considering the course of action in the best interests of Saikewicz, a perspective intended to account for his individual situation through the examination of the attitudes of a group closely resembling Saikewicz in many characteristics, the decision to refrain from initiating chemotherapy seems best. Societal interests, such as economic considerations or allocation decisions in a situation of competition for scarce resources, were found not to be influential in this particular case, but could possibly be weighty factors in other similar cases. (Consider a hypothetical case where two individuals, one profoundly retarded and the other a single parent of three young children, compete for a scarce medical resource which only one of them can have. Given that both individuals have some rights and claims, society's interest in protecting the young children may swing the decision in favour of the single-parent.) Neither the rights of Saikewicz nor references to the value of his life were found to be helpful in deciding this case, and did not come down on the side of the decision to treat. The requirement to preserve life was found not to be a categorical constraint on decisions and could be "outweighed" by the consequences of following such a principle.

The clearest indications are in favour of withholding treatment.

This resoltuion of Saikewicz is not the resolution of a conflict of incommensurable values and perspectives by appeal to a third viewpoint; there is no neutral position capable of such resolution. Rather, what this particular solution achieves is the removal of conflict through close attention to the facts of this on particular case. With this perspective, and the spirit of flexibility to allow in principle any considerations to influence a decision, no conflict of values was present; some perspectives are simply non-starters given our commitment to decide this case. The background against which Saikewicz takes place, the commitment to decide to treat or not, and the requirement that all our beliefs and reasonings as a whole be consistent and coherent, supports the decision not to treat Saikewicz' cancer with chemotherapy.

How then does Saikewicz relate to the more general problem identified in the opening chapter? Why is one case given such significance? Addressing the latter query first, the significance of Saikewicz is in one sense great, and in another sense, small. Great because Saikewicz tests our intuitions and values when confronted with the facts and context of this case; to decide this case some values and perspectives must be compromised. This case presents some unique problems for theories, in particular the legal-moral theory of the court, which employs a concept of individual autonomy that rests on consent. Saikewicz illustrates how the facts of the case modify and shape the manner in which the decision takes place and the considerations which can enter into the decision. Restrictions of coherency

and consistency with all our beliefs and knowledge, the "system" as a whole, orients the decision in Saikewicz away from particular models and perspectives. In a sense, Saikewicz shows how moral experience and context can modify the principles and perspectives with which we understand that experience.

The significance of Saikewicz is in another sense, not so great. The relationship between this particular case and the problem of incommensurable values and viewpoints should be clear to the reader. But Saikewicz is only one example of many similar situations in which differing perspectives clash and dispute seems interminable. The debate spawned by Saikewicz between professions vying for authority is likewise born from many other cases occurring within a pluralist liberal democracy. Abortion, euthanasia, capital punishment, just and unjust wars, etc., are topics in which disputants contest positions without a common independent currency in terms of which the conflicting values can be cashed. Saikewicz is another particular case which engenders seemingly intractable argument. The dispute between the medical, legal, and philosophical professions, insofar as these professions can be identified with the views of their corresponding members examined above, focuses primarily on the issue of authority and responsibility for the decision in this case. Such a dispute for authority can arise in a number of cases and the resolution of the problems may be different with differing circumstances. Working out the disputes in these cases, as in Saikewicz, demands that no categorical constraints restrict factors from playing a role in the decision, whether those factors be economic, social,

individual, or whatever. Finding the particular weight of each consideration depends, then, upon a microsopic examination of the background, context, and facts of each case, and paying particular attention to the most minute details will, as it has in this examination of Saikewicz, show the relative strengths of various solutions. Of course, this attitude and perspective to problem-cases is not an algorithm for solving them, but it is a means by which the teeth of incommensurability might be pulled and decisions made in such difficult cases.

And what of the more general problem of incommensurability discussed in the opening chapter? The suggestion here, brought out through an examination of Saikewicz, is that the shared features of experience, the shared beliefs, background, and context of situations in which values, principles, and viewpoints conflict may provide grounds for agreement and a foundation against which further discussion can proceed. The attitude to bring to current public medico-legal problems is a flexible approach to minimize conflict, for pragmatic reasons. Rigid dogmatic adherence to principles can not only instigate a failure to provide a coherent decision, but also exacerbate and deepen the conflict between opposing positions. The greater the emphasis on metaphysical articles of disparate kinds, the greater the reluctance to adjust in the face of conflict, the more problematic and intractable becomes the conflict. By allowing the facts, context, and background beliefs and knowledge to mold the decision or outcome, and by allowing the values in question to alter in significance depending upon the contours of the particular case, not only is the likelihood

of intractable conflict lessened, but the conflict itself may be removed. Dispute and conflict are facts of moral life and not symptoms of pathology. Disputes and dilemmas are data of a kind, evidence to be considered in determining the future conduct of our lives. As evidence, these disputes and their natures must be taken into account and given some weight in situations where a decision must be reached. The fewer a prioristic restrictions on the decision procedure the more likely that some ground for agreement may be reached. A "poly-dimensional" approach to moral experience not only mitigates against formalist theories but provides for cross-theory evaluation on the basis of typically "non-moral" criteria.

Trying to decide Saikewicz on the basis of a subjective criterion which cannot itself be obtained illustrates the limitations of some forms of legal-moral theory. Simply following the requirement of some theory protecting individual rights via consent will not provide a solution in Saikewicz; the situation and occasion of the exercise of that theory is far too complex to be covered by such a general theory. The facts of this case, and the context in which it occurs, affects not only our attitudes and intuitions to a solution but also the weights to be assigned to various theoretical perspectives such as the one represented by the court. Ethical and legal theories are a hybrid offspring of studied relations and our general ideas which regulate our interpretations of behavor; the theories and their domains are not developed independent of those ideas and relations which form the background, history, and context of the theory. A portion of those general ideas which form the background to Saikewicz is the belief

that Saikewicz could not choose, and all the disputants recognize this facet of the case, and this agreement suggests a possible ground for convergence of opinion. Consensus in the judgements of justice and morality not only issue from everyone's affirmation of the same authoritative social perspective but also from the same recognition of what counts as facts in any one particular case. In Saikewicz there is no common perspective of social authority, no consensus on what to do: the legal profession argues to protect individual rights and a conception of human value and considers themselves the most capable of that role, while the medical profession argues for the maintenance of the traditional seat of authority and the employment of impersonal standards of assessment. The ethical expert, the professional philosopher, enters the debate championing rationality and moral expertise as the guarantee to the resolution of dispute. All combatants have their own viewpoint to present and their own account of authority to provide, each of which excludes the other. But while there is no consensus of what constitutes social authority in this case, there is agreement on the facts of Saikewicz. By assigning to those facts some role in shaping how to proceed in this case, how to decide this problem case can be determined, which will go part way to determining who decides, what the socially authoritative institution is. In a situation that necessitates a decision, in the absence of agreement as to social authority for such cases, some grounds must be found upon which to base an acceptable decision. In the case under study those grounds have been identified and a strong case has been made for an approach to similar problem-cases.

NOTES TO CHAPTER V.

[1]This indicates another interesting facet of the dispute surrounding the Saikewicz decision. One concern the contributors share is that of responsibility, primarily legal responsibility. This concern translates into a question of authority for decisions in Saikewicz-type cases: the medical profession feels that they should have authority and legal immunity for decisions and the legal profession disputes this claim. (Insofar as either profession can be identified with the relevant positions examined above.) The legal system is a public agency, subject to public criticism and ideally answerable to the public. Not so with individual decisions by individual physicians; there are cries for doctors' decisions to come "out of the closet" and be subject to peer and public examination. But the public resolution of a conflict between incommensurable values and perspectives to a large extent resembles the resolution of an 'internal debate' of the same kind by a private individual. Justification for the decision stops somewhere, either with intuition or preference, or with an aresponsible agency. It seems as if one is simply more pleasing to the public eye than the other. It is more likely that decisions obtained in a public forum will be reached on the basis of more "acceptable" criteria (biases may be identified more easily) than if that decision were internal and private. This difference is not one of kinds of moral justification, but rather the acceptability of the stopping place, the basis for decisions. Much more could be said about the relation between public and private morality and justification but neither time nor space permits a more complete examination here.

[2]Mass. 370 N.E. 2d. 417. p. 420 (hereinafter as Saikewicz); Jonathan Brant, "The Right to Die in Peace: Substituted Consent and the Mentally Incompetent", Suffolk University Law Review, vol. XI:959, p. 968.

[3]Brant, op. cit., p. 964.

[4]Samuel I. Rapaport, Introduction to Hematology (Hoyasstown, Maryland: Harper & Row Pub., Inc., 1971),p. 167.

[5]ibid., pp. 175-76; Brant, op. cit., p. 967.

[6]Introduction to Hematology, op. cit., p. 178.

[7]ibid., pp. 179, 162, 192; Philip Ruben, M.D. (ed) Clinical Oncology (American Cancer Society, 1978), p. 250.

[8]Since this form of cancer, by attacking the developing white blood cell at an immature stage, greatly reduces the patient's ability to withstand infection, treatment is required quickly to counter the likelihood of death from infection. As well, the median survival with this form of cancer when left untreated is very short, around two months. Clinical Oncology, op. cit., p. 248.

[9]The court noticed this feature of the decision in its opinion. p. 432, op. cit.

[10]Introduction to Hematology, op. cit. p. 167; Brant, op. cit., p. 959.

[11]Introduction to Hematology, op, cit., p. 167.

[12]ibid., pp. 169, 179.

[13]Saikewicz, op. cit. pp. 420-421; Clinical Oncology, op. cit., p. 248.

[14]Saikewicz, op. eit., p. 421; Introduction to Hematology, op. cit., p. 175.

[15]Introduction to Hematology, op. cit. p. 164. Most of these symptoms can be offset by the administration of other forms of cure.

[16]Saikewicz, p. 425.

[17]Brant, op. cit. pp. 469-470. See Introduction to Hematology, op. cit., pp. 175-176.

[18]Saikewicz, op. cit. p. 431.

[19]ibid., p. 428.

[20]It is not clear how a general principle like the "value-of-life-principle" relates to particular lives. Is it really the "value-of-Saikewicz'-life-principle"? It appears as though the principle refers to something impersonal and metaphysical, the value of life, generally. With so very little content to such a principle it is hard to see how it is affected by particular acts, decisions, etc. But if this principle, or more importantly our attitude toward life, is affected by decisions, acts, etc., as it clearly is, then a situation in which the rather meagre life-style of Joseph Saikewicz would be radically altered shortly before death with no apparent benefits by introducing chemotherapy may assault our attitudes more so than the alternative. Recognition of the bounds and limitations of living in some way are essential to valuing life; so too is the recognition of the inevitability of death in tragic situations.

POSTSCRIPT

This result still leaves unanswered the question of who decides, which group is responsible for making the decision. While the end result is important the process by which it is achieved must also be given some discussion which is consonant with what has been said above.

The suggestions here are very general. To begin with, just as there are no a priori restrictions upon the considerations entering into the decision-making process, so too are there no a priori restrictions against any institution being the forum of decision-making. The decision should be made in an environment which encourages reason-giving and the comparison of all viewpoints which enter into the decision process. Some weight must be given to the values and viewpoints of all participants, and arriving at the best decision via some calculus requires understanding competing claims and the values upon which they rest. A forum in which reason-giving flourishes will not of course crank out unassailable decisions or guaranteed solutions. What constitutes a reasonable decision is not independent of conflicting and incommensurable points of view, but is informed by the occurrence of such conflicts. The giving of reasons may end without resolution between viewpoints in which case, this fact as well as others may be appealed to in a decision. Neither Buchanan's ethics committee nor Baron's adversary system can guarantee decisions which achieve consensus, but these institutions may be helpful.

Certain biases are unwanted and will be excluded from the decision. This is where an exchange of reasons is most helpful; in identifying unwanted biases. What sort of considerations count as unwanted biases? No complete list can be given prior to the cases requiring resolution of this kind, but clearly we have some ideas of certain biases which are not relevant. A family's or doctor's dislike for incompetents and a judge's dislike for doctors are two examples which come to mind. Other biases may arise in particular cases which depend upon the participants in the decision process.

There are also factors other than personal biases which will affect the makeup of the forum of decision. The incompetence of judge, physicians or anyone participating in the decision, should stand against those individuals conducting the decision. There are requirements specific to each case which also will affect the character of the decision committee. Such a group of individuals must be sensitive to the context and features of individual cases. Some cases require emergency action in which case the decision-makers must be quick and flexible to respond to the situation. Some cases may require the weighing of societal or collective interests against personal or individual interests in which case, each position must be represented in a negotiation that could take up considerable time. Various factors and various influences may shape and form the decision and the decision-makers but the definitive answer to the "who-question" will depend upon the features of the case in question. The process of deciding cases like Saikewicz must be capable of a multi-dimensional approach since the grounds for decision are multi-dimensional

and relative to the particular case. Given this, then a hospital ethics committee, the courts, or some amalgamation of the two, may function as the decision agency.

There are two other constraints upon the process of decision-making: it must be "ante factum", a decision of what to do, and not simply "post factum" like Buchanan's review committee; and it must be public. In order to decide Saikewicz-type cases, in order to obtain the best result and participate in obtaining these results, decisions must be made by the group responsible for decisions. Reviewing decisions after they have been made and acted upon may not only be too late to do any good, but is also avoiding making the best possible decisions. In order for this committee to participate in the decision-making, participants and contributors must have access to some pre-existing forum in order to inform the committee of the particular case. Thus some members of this collective responsible for dealing must be identifiable and standing; lawyers, doctors, members of the community generally, may hold this post. And this means that the forum for decision be public. Even though conflicts of values and viewpoints can occur within individuals, incommensurable conflicts often occur between individuals. Moral disputes are often interpersonal and it is not clear that any sense can be given to the separation of ethics from public life. Resolution of internal conflicts may be arbitrary, but for resolution of public conflicts over issues of social importance such as the one examined above, public decisions are required that examine the grounds of competing claims; "how" each perspective reaches conflicting conclusions becomes important.

The decision committee and their decisions, then, would have to be public.

Such a characterization of the process of decision making in Saikewicz-type cases and other related problem-cases is not too precise. Since the collective responsible for deciding these cases must be as flexible in its approach as the variety of considerations demands, little can be said about the process which is not general. A more specific characterization of the process of decision-making would require a more specific account of the considerations and factors of the decision.

This has not been an attempt to provide a solution to moral conflict in general. It is highly unlikely that there is one method of solving moral disputes in general, and more likely that solutions to conflicts will have to be tailored to particular cases. And this perspective, trying to find a solution to a particular case, has been the perspective of this thesis.

The solution to Saikewicz provided here is somewhere "between" Utilitarianism and Rights-based solutions. In the flight from Utilitarian or impersonal perspectives to problem-cases like Saikewicz, we need not go as far as the court's account and adopt a subjective perspective, since it produces peculiar results in this case. It is this extreme subjective perspective which has been the primary focus in these pages. The utilitarian and other impersonal perspectives have not been engaged over the solution such views afford. Needless to say, utilitarianism and these other perspectives suffer setbacks over other moral issues which may be indicative of the

acceptability of such viewpoints. So further dispute may arise, and that occurence will be consistent with the aspirations of this thesis to provide a solution, not the solution.

Solutions to Saikewicz which derive from purely moral perspectives lead to conflict and problems in the resolution of the conflict. Moral theories, conceived as collections of ultimate, authoritative principles, conflict and are irreconcilable on moral grounds alone. By considering the context of the problem-case and the conflicts between moral perspectives, some help may be provided that leads out of the troubles created by purely moralist positions. The account given in these pages is a way out of these troubles.

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