# THE LAW OF LIFE AND DEATH

*Elizabeth Price Foley*

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*To Patrick and Katy,*
*with love and eternal thanks.*

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# Contents

# Introduction

> The boundaries which divide Life from Death are at best shadowy and vague. Who shall say where the one ends, and where the other begins?
>
> —Edgar Allan Poe, The Premature Burial (1844)

Are you alive? What makes you so sure? Admittedly, it would be hard to read this book if you were not alive. But an ability to read is not a reliable proxy for life; many living creatures are illiterate or otherwise unable to read. So what is it that defines one's status among the living? Is life biological—something akin to "I am breathing" or "My heart is beating"? Is it spiritual, as in "I have a soul that animates my body"? Or perhaps the definition of life should be more intellectual, such as "I think, therefore I am"?

If asked, most people would probably define life by these physical, spiritual, or intellectual references. Moreover, most people would assume that, whatever definition of life one employed, death would be its antithesis. So for example, if one used an intellectual definition of life, death would occur when the relevant intellectual characteristic disappeared, perhaps consciousness or the ability to reason.

But the seemingly incontrovertible notion of life and death as antonyms presents an array of potential pitfalls and ambiguities. Say that society decides to define life by reference to the physical characteristic of cardiopulmonary (heart and lung) function. If death is the absence of cardiopulmonary function,

how long must we wait, after the heart and lungs stop, before death can be declared? If a person's heart stops, is the person automatically dead after the passage of a certain number of seconds or minutes, or do medical providers have a duty to attempt resuscitation? If resuscitation must be attempted, how long must or should these measures be taken before death can be declared? Do individuals, their families, or perhaps even medical providers have a right to refuse resuscitative attempts? If so, under what circumstances? Moreover, if society accepts cardiopulmonary function as the defining characteristic of life, is a person with irreversible brain damage whose cardiopulmonary function is being artificially maintained alive? Put another way, is it cardiopulmonary function that matters (even if artificially maintained), or must the function be spontaneous (unaided)? If the mere existence of function matters, does this mean that we must maintain individuals on life support indefinitely, no matter the cost, or can we turn off the machines? If spontaneity is what matters, is a person who receives technological support, such as a pacemaker, technically dead? Similarly, if cardiopulmonary function is the hallmark of life, does this mean that a fetus is a living person so long as its heart is beating? If so, would this imply that aborting such a fetus is the legal equivalent of murder?

It seems so basic, so simple, to assume that life and death are antithetical legal concepts—to say that someone who is alive cannot be dead, and vice versa. But as the preceding questions show, strict adherence to conceptualizing life and death as mutually exclusive may create results that society is not willing to accept. Yet it is hard to declare, with a straight face, that life and death are not the opposite of each other. It would also highlight the possibility that an individual may be considered alive for one legal purpose but not for another. Individuals could get caught in a strange kind of legal limbo, not fully alive, but not fully dead either. And it implies legal cognizance of multiple tiers of personhood, with higher-tier persons receiving greater legal protection than lower ones. A fetus, for example, might be considered living for some limited legal purposes, yet not be entitled to the same legal status and protections as a nine-year-old boy or a forty-three-year-old lawyer. A baby born without an upper brain may be considered alive, but may not be entitled to the same treatment or rights as a seventy-year-old woman with severe dementia. Is such a result legally acceptable, or must each living person enjoy the same rights and privileges as all other living persons? More specifically, are

all living persons "legal" persons? Is there a difference, in other words, between being "alive" and being a "person" under the law?

Perhaps more importantly, if we insist on defining life and death as mutually exclusive concepts, we necessarily have to resolve a preliminary question: Which should come first, the proverbial chicken or the egg? Should the law anchor its analysis to a definition of life (thereby defining death as life's absence), or rather to a definition of death (thereby defining life as death's absence)? Which one is easier to define: life or death?

Perhaps tellingly, *Black's Law Dictionary* does not contain a definition for life. It does, however, define death as the "ending of life."[1] If this is our analytical structure—a definition of death as the antithesis of life—then a failure to agree on a definition of life will lead to massive intellectual confusion and evasion. If death is the antithesis of something that is left undefined, there is trouble brewing ahead.

But before you condemn the law for this glaring analytical deficiency, I ask you to consider whether it would be wise to demand a unitary, mutually exclusive definitional relationship between life and death. Governmentally imposed, one-size-fits-all definitions of life and death may deeply offend individual autonomy. Each of us, after all, has contemplated the meaning of life and death and arrived at our own basic understandings. Some of us formed them while sitting in a college philosophy or biology class, some while sitting in a house of worship, and some in moments of deep personal reflection, perhaps following the birth or death of a loved one. The definitions of life and death we internalize reveal a lot about who we are as individuals. They tell a story of the social, cultural, religious, political, and economic environments in which we live.

Given this wide variation in personal experiences and preferences, is it normatively desirable to have a univocal legal approach to life and death? Perhaps not, yet I suspect that most people believe there is a unitary law out there somewhere that defines one's status as living or dead for all purposes—the kind of black-and-white law that can be looked up and understood quickly by a skillful lawyer. But they would be (pardon the pun) dead wrong. Although the concepts of life and death are omnipresent in law, they have been devised in a wide variety of contexts, ranging from constitutional to contract law and from crimes to torts. Each context contains its own set of concepts and defi-

nitions of life and death that are often remarkably amorphous, often inconsistent, and sometimes bordering on the incoherent.

The range of legal questions is staggering. And in a surprising array of contexts, the law of life and death is still far from settled. Despite this lack of clarity, the law marches on, functioning as it must, grappling with a range of important legal questions that hinge on a definitive determination of whether someone was alive or dead at a specific moment in time. The law does not enjoy the luxury of debating difficult questions without the need to assign definitive answers, as do other disciplines such as philosophy or ethics. The law must provide an answer when properly asked a question. There is no "maybe" X is dead, or "maybe" X is alive. For purposes of interpreting contracts, determining inheritance, assigning monetary liability, declaring constitutional rights, or potentially sending someone to prison, the law cannot equivocate.

But just because the law must provide answers when questions are properly posed does not mean that the answers will always be consistent with legal decisions from other contexts. It also does not mean that all salient questions about life and death will be answered by the law. Many life-and-death questions—ones with significant legal implications—are never brought before the courts or become the subject of legislation. Many decisions are made privately by individuals, their family or loved ones, their medical providers, or some combination thereof. Indeed, the law often explicitly punts many of the difficult questions to these other non–legal decision makers, with little or no recourse to those who disagree with the decisions that are made.

Even when the law has tried to articulate answers to disputed questions, these answers have been ignored or lost in translation due to pragmatic, religious, or ethical considerations. In short, the law must sometimes provide answers to these perplexing life-and-death questions, but the answers are not simple, not always consistent across legal contexts, and often spawn even greater ambiguity.

This book will examine the law of life and death, offering a broad overview of the law's ambiguities and inconsistencies and the profound implications that flow therefrom. But lest you throw your hands up in the air and assume that you will not derive any useful answers from reading this book, I ask you to consider embracing these ambiguities and inconsistencies for the intellectual richness they offer. As it turns out, there are fascinating reasons for the frustrating fluidity of this area of the law, and these reasons tell a story

all their own. The law's inability to provide simple answers to the seemingly simple questions, "Is X alive?" and "Is X dead?" is perhaps its greatest virtue. Fluidity may be frustrating, but it is often the only rational approach, in a pluralistic society, to questions about which there is passionate disagreement.

Surprisingly, there are few books that explore life and death from the perspective of the law. It is not that lawyers have stayed on the sidelines while life-and-death topics have been debated. There have been numerous well-researched legal books and journal articles focusing on discrete issues such as abortion, organ transplantation, and euthanasia. And of course there have been many more books and articles exploring these topics from other important disciplinary perspectives such as medicine, ethics, theology, and philosophy. Yet there have been only a handful of books that have attempted to tackle these issues within the larger context of the law, examining overarching connections, justifications, and themes.

The lack of attention to the law of life and death is remarkable given law's ubiquity and centrality to our lives. Because of the incredible variation in personal conceptions of the meaning of life and death, ultimately it is the law—not philosophy, morality, ethics, or any other discipline—that arguably matters most in pragmatic terms. There generally is no ability, after all, to choose your own, customized legal definitions of life and death (though some have argued forcefully that there should be). The definitions that are used have been chosen on a societal, not a personal, level. So while we may each have our own ideas of the meaning of life and death, the law must pick a definition and impose it upon us all. It is the law of life and death—in the richness and vastness of its multitude of contexts—that determines our entry and exit from the human community.

The good news is that, in the vast majority of situations, the law and most individuals' personal preferences are in agreement. A person walking down the street whistling a tune, a tiny baby crying for milk, and a ninety-nine-year-old blind and deaf man with an artificial heart valve are all alive in the eyes of the law. A stillborn baby, a body burned beyond recognition, decapitated in a car accident, or discovered putrefied in the woods, are all dead. But of course not all cases are so easy.

It is this vast gray area—the realm of discovery about society's values—that is the focus of this book. By examining the law's approach to life and death, *in toto,* we may come to understand these challenging issues in a more

meaningful and productive way. We may also begin to see and appreciate them in a broader cultural and political context. Indeed, there is perhaps no better way to fully appreciate the cultural divide that our society faces than to study how our laws define life and death. On issues such as abortion, medical research, and punishment of injury to fetuses, U.S. law has assigned a high value to life (or at least its potentiality), influenced by a belief that life itself, without regard to the quality of that life, is the most important consideration. On issues such as informed consent, advance directives, and organ transplantation, by contrast, the law has assigned a high value to dying (or at least to controlling its circumstances), influenced by a belief that the quality of life, rather than life simpliciter, is the most important consideration. The clash between these values has created an odd mix of law, sometimes pro-life, sometimes pro-death. If we can spot these influences at work, perhaps we can improve, or at least better understand, the laws relating to life and death and, ultimately, society itself.

# I

## Statutory and Common Law Life

That it will never come again
Is what makes life so sweet.

—Emily Dickinson

It is a miracle that happens hundreds of thousands of times each day. Sperm meets egg. Their chromosomes begin intertwining, forming a unique genetic combination. The mysterious, awe-inspiring process of rapid cell division begins. Within a short time, if all conditions are right, the growing embryo will find a cozy spot on the uterine wall and attach, securing a life-giving bond with its mother. Somewhere between sixteen and twenty-one weeks after conception, the mother will begin to feel kicking or moving inside the womb. After about twenty-one weeks, the fetus may be able to live independently of its mother, though it may require extraordinary medical care. After thirty-five weeks, the fetus is considered full term.

We have all passed through these stages, each critical in our development. Out of all of them, when did your life begin? When did you become you? Conception, implantation, quickening, viability, live birth, consciousness, or when you became capable of rational decision making—all are plausible answers; none is dominant. Despite all the time, money, and energy spent, shockingly little consensus has been reached on the fundamental question of when life begins. Much of the division is due to deep religious, ethical, and philosophical differences that likely will never be resolved.

This book is not going to rehash these religious, ethical, or philosophical views on life. Instead, this book is about law. What does the law say about when life begins? The law is its own unique discipline, and more often than not, particularly in a republican form of government, the law represents a compromise among competing views. Unlike other disciplines such as philosophy or religion, the law does not have the luxury of equivocation. The law must answer when asked: Is X alive? Being alive (or not) has significant legal consequences that necessitate an answer; maybe is not an option.

But defining whether X is alive is harder than it seems. *Black's Law Dictionary's* refusal to define life is revealing. It signals that there may be more controversy surrounding life than death. Adopting a single definition for life would have heavy implications for divisive issues such as abortion, birth control, in vitro fertilization, and stem cell research. If the law defined life to begin at conception, for example, the legality of all of these activities would be brought into serious question.

The legal definition of death, by contrast, is arguably less political, due to the genesis and nature of the definitions of death that have been devised thus far. Historically, death was determined by the cessation of heart and/or lung function (cardiopulmonary death). Later, the law expanded the definition of death to also include cessation of the functioning of the entire brain (brain death). These definitions are the products of much debate and discussion within the scientific community and represent scientific consensus on when death occurs.

Once the criteria for death are satisfied, an individual is declared dead. What happens to a body after the declaration of death—for example, removal of organs, use in medical research, burial, cremation, et cetera—is relatively uncontroversial because society generally accepts the death criteria as trustworthy, morally justified, and not politically motivated. There is heated debate about quality of life—who would be "better off" dead, or who is "as good as" dead. But despite using the word "dead" in these descriptions, such debate is really about life, not death. The enormous controversy swirling around Terri Schiavo, for example, centered on her quality of life and the belief by many that she would be better off dead, not that she *was* actually dead. Like all patients in a permanent vegetative state (PVS), Terry Schiavo clearly was not legally dead. In terms of existing legal doctrine, her case highlighted the nature and extent of the right of the living to refuse medical treat-

ment when it no longer comports with their wishes. Schiavo, in other words, illustrated the rights of the living, not controversy over the definition of death.

As Chapter 4, "Brain Death," will reveal, there is some opposition to the current definition of brain death—some think brain death should be eliminated entirely; others think it should be broadened to include PVS patients like Terry Schiavo. But at present these are mostly academic debates; ordinary people are not clamoring for brain death reform. Even those who oppose the concept of brain death are probably not losing much sleep worrying about it, for the simple reason that the vast majority of deaths do not involve brain death. Moreover, brain death opponents can lessen their concerns by refusing to consent to organ donation. If one is not an organ donor, this will significantly reduce any pressure health care providers may feel to declare brain death in the first place. Similarly, those who support brain death but think it should be defined more broadly (for example, higher brain death) can effectuate their preference by executing an advance directive (for example, a living will or health care power of attorney) that refuses medical treatment such as ventilation or nutrition when they lose higher brain function.

There is, in short, no real moral outrage associated with the application of the legal definition of death. Individuals have a certain amount of control over how their death will be declared, and this lessens any urgency of altering the status quo. In addition, because society generally perceives the legal definition of death as derived from dispassionate medical consensus, there is no overt connection between it and political ideology.

A legal definition of life—if one existed—would be a different situation. Picking a moment in time when life begins would have clear political consequences on a wide array of legal issues such as homicide, abortion, and stem cell research. Pro-life groups have proposed statutes and constitutional amendments that would define life as existing from the moment of conception.[1] If these laws were enacted, they would anger a significant portion of the population that supports contraception, abortion, or stem cell research, or believes life begins at some later point in time.

But what if the law picked a definition of life that was not based on religious or political viewpoints? In other words, what if life was defined—like death—by reference to generally accepted biological criteria? If a biological definition of death can be incorporated into law, could it likewise form the

basis of a definition of life that would be accepted as morally just and not politically motivated?

The first step in dealing with this inquiry is to determine whether there is, in fact, a scientific consensus on the criteria for life. The short answer is yes, there does appear to be a set of biological criteria that identify the existence of life. Some scientists think certain criteria are more important than others, yet most agree that life (at least as known here on Earth) has identifiable characteristics. These characteristics include a genetic structure, metabolism, regeneration, homeostasis, and adaptation.[2]

A genetic structure—usually, a double helix DNA—is now accepted as the basic blueprint possessed by living organisms. Metabolism indicates that an entity is taking in substances from the environment, such as oxygen or sunlight, and using them to keep the entity functioning. Regeneration roughly refers to reproduction, whereby members of the life form have at least the potential (even if unexercised) to continue the life form's existence, given the right set of circumstances. A life form should also be able to maintain homeostasis, meaning an ability to protect against external toxins and regulate internal processes, such as blood, water or salt levels, or temperature. Adaptation describes the life form's ability to alter itself in response to a changing environment. Unlike homeostasis, which addresses a life form's basic ability to maintain, adaptability refers to its ability to change, such as through mutation or selection, or even to undergo simple physiological alterations, such as forming calluses on the hands or feet.

Application of the life criteria is not always easy. Scientists are not in agreement, for example, regarding whether viruses possess enough of these criteria to be classified as living organisms. Fortunately, some things are clear. Human beings exhibit all of these criteria and are clearly alive. Rocks, on the other hand, exhibit none of the criteria and consequently are not alive, not even the pet rock variety.

If there is a general consensus about the criteria for ascertaining life, why are they not used as the basis for law? Once again, politics lurks large. If biological criteria were the basis for the legal definition of life, there would be obvious and immediate implications for issues such as abortion, contraception, and stem cell research. An embryo has a genetic structure, metabolism, regenerative and adaptive potential, and at least some degree of homeostatic ability. Depending on which of these biological criteria were considered more