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Beyond the Public Journalism Controversy

Public journalism—the term “civic journalism” is also becoming common—is a movement that has taken hold over the last few years at several newspapers across the country and among some theorists of the trade. Its development has been anything but predictable; as my colleague Peter Levine has written, “diverse ideals and projects” are often advanced in its name. For this reason, trying to figure out what exactly public journalism is, and how it differs from the kind of journalism with which it is contrasted (for lack of a better term, I shall call it traditional journalism), can be frustrating.

It can also be contentious. Sometimes, proponents seem to regard public journalism simply as a synonym for good or in-depth or serious journalism—probing the issues that voters really care about, say, rather than providing horse-race election coverage—leading a bystander to wonder why anyone would oppose it. But those who revile public journalism—and among traditional journalists there seem to be many—naturally describe it in different terms.

Two features of public journalism stand out. One is its proponents’ ready acknowledgment that their values shape what they do. In contrast to the “just the facts, ma’am” stance of the traditional journalist intent on maintaining objectivity, neutrality, and detachment, public journalists believe their values not only do, but ought to, shape their reporting. More specifically, they see themselves not as adopting the iconoclastic stance

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of much contemporary journalism—where the point is not simply to state the facts but to expose them—but as playing a role in creating what Jay Rosen, the leading academic theorist of public journalism, calls “a

Public journalism asserts its reliance on “the people” as a source of decisions about what stories and issues to cover.

healthy public climate.” Journalists, Rosen insists, shouldn’t just report the news; there’s “also the job of improving the community’s capacity to act on the news, of caring for the quality of public dialogue, of helping people engage in a search for solutions, of showing the community how to grapple with—and not only read about—its problems.”

The other noteworthy feature of public journalism is its asserted reliance on “the people”—the readers of a newspaper or the viewing audience—as a source of decisions about what stories and issues to cover. “In a democracy,” writes Arthur Charity, “the public arena ought to be arranged on the public’s own terms. So public journalists have invented ways to let Americans set the terms of the ‘national debate’ themselves.”

Examples of public journalism include the *Charlotte Observer*’s decision to tap its readers for ideas about how to cover the 1992 presidential campaign; the same paper’s “Taking Back Our Neighborhoods” project, aimed at identifying the sources of crime in Charlotte and encouraging the community to find solutions; a project in Madison, Wis., to increase public deliberation through town-hall meetings, debates among candidates, and interactive civic exercises; and the efforts of the *Huntington Herald-Dispatch* in West Virginia to galvanize its community to deal with vanishing jobs and a crumbling economy.

However admirable these projects appear to some, many hard-nosed journalists recoil from them. “When journalists begin acting like waiters and taking orders from the public and pollsters, the results are not pretty,” David Remnick wrote recently in the *New Yorker*. Reacting to the *Norfolk Virginian-Pilot*’s mission statement, which exhorts its journalists to revitalize a sick democracy and to “lead the community to discover itself and act on what it has learned,” Remnick responds: “Excuse me while I run screaming from the room.”

Leonard Downie, executive editor of the *Washington Post*, is slightly more restrained but no less critical: “Too much of what’s called public journalism appears to be what our promotion department does.” The sole responsibility of journalists, he says, is to give people “as much as possible of the information they need to conduct their lives.”

My aim in this essay is to sort out the issues that divide public journalists from their critics—or seem to—and to see how far we can go in resolving the controversy between them.

Public Journalism as “Nice” Journalism

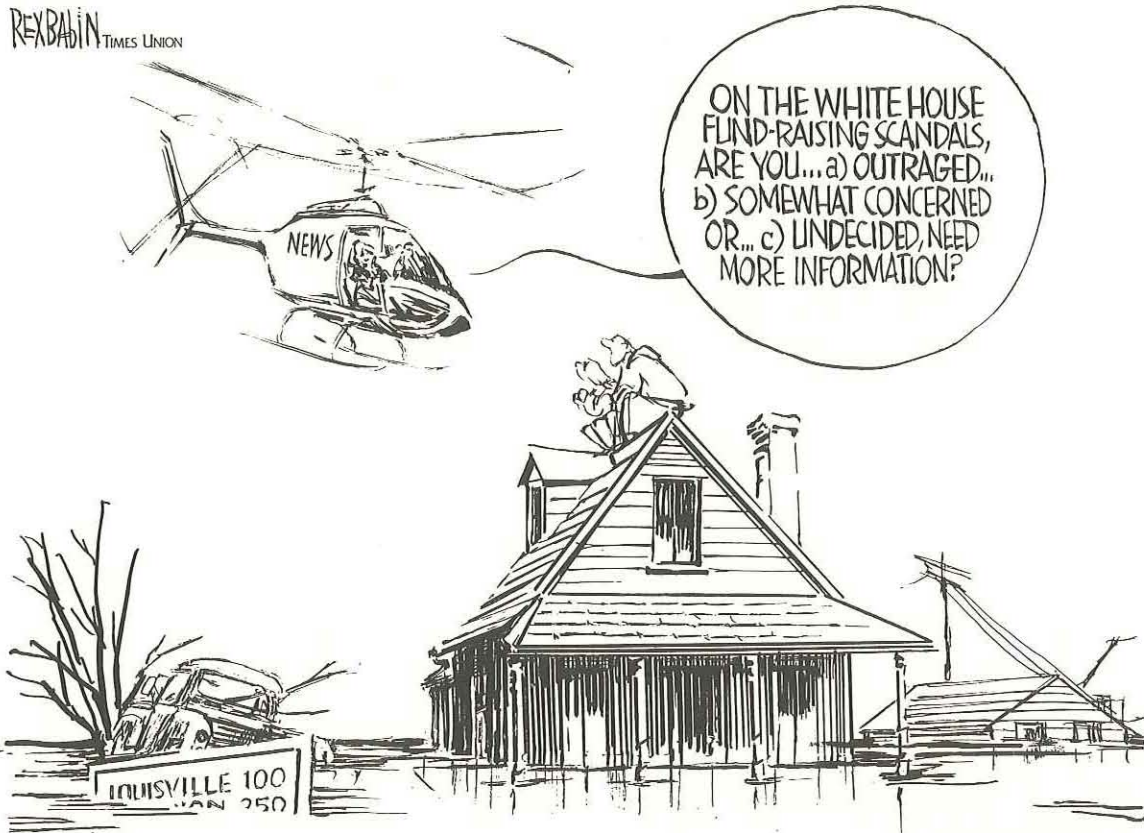
Begin with public journalism’s assertion that journalists should help foster a healthy public climate, that they should participate in the public’s search for solutions to social and political problems. This might seem a rather innocuous claim. Who, after all, could be against a healthy public climate; who could oppose solving our society’s pressing problems? The only question, we might think, is how best to achieve these goals.

Traditional journalists who object to this commitment to health and solutions seem to have two things in mind. One is a fear that journalists will become lapdogs rather than watchdogs—that public journalism is “nice” journalism, exhorting reporters to *accentuate the positive, eliminate the negative*. And nice journalism, it can be inferred, is not good journalism. Without necessarily going so far as to claim that good news is no news, the critics believe that much news is bad news, and that public journalists aim to bury the bad news. (Or that even if they do not *aim* to bury the bad news, that will be the upshot of their rose-colored view.)

The good news/bad news controversy is harder to evaluate than might at first appear. For one thing, it’s not always easy to tell the good news from the bad news. Consider this example. A recent *New York Times* story headlined “New Test Finds 2 in 3 Know Basics of Science” began this way: “In what education officials hailed as progress toward meeting national goals in science, a test of fourth, eighth and 12th graders from across the country showed that 2 in 3 have a basic understanding of the subject.” The same day, the headline on the front page of the *Washington Post* read, “U.S. Students Do Poorly in Science Test.” The lead: “A rigorous new test of what American students know in science has revealed that many of them are not demonstrating even basic competence in the subject in certain grades.”

Is the difference between public journalism and traditional journalism that one sees the glass as half-full, the other as half-empty? How do we decide whether two out of three students demonstrating competence is a lot or a little, something to be celebrated or deplored? We may be able to find no answer better than “Compared to what?” Whether we should be optimistic or pessimistic depends in large part on which way the trend is going. But even that may be difficult to determine.

More often, perhaps, the dispute is not so much about how to spin a particular set of facts but which facts to spin at all. The question is sometimes put in terms of



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reporting on solutions versus reporting on problems. For example, as part of its two-year "Taking Back Our Neighborhoods" project, the *Charlotte Observer* devoted considerable energy and resources to "talking and writing about solutions" to neighborhood crime, according to assistant managing editor Jim Walser. The paper tried to draw "a picture of what had worked in other neighborhoods that had faced similar problems," and it emphasized "local revitalization efforts."

Do traditional journalists mean to say that stories of this kind, that focus on "solutions," aren't newsworthy? It's hard to believe that they do. Solutions are solutions to problems, and without understanding the problems to be solved you could hardly report workable solutions. The *Observer's* project began by analyzing crime statistics for every neighborhood in Charlotte. The paper identified the ten most violent neighborhoods and conducted polls asking residents, among other things, what *they* saw as the problem and what their lives were like. This is not just feel-good journalism.

On the other hand, it would be equally absurd to maintain that stories about "problems" that do not also emphasize solutions are not newsworthy. Again, it's hard to believe that public journalists would disagree. So what's the dispute? Is it simply a matter of emphasis? Isn't there room for both—for many—kinds of stories?

Neutrality versus Engagement

What really worries the critics of public journalism is perhaps something else—something that goes to the heart of the traditional conception of the journalist's role. They fear that the seemingly laudable commitment to contribute to a healthy public climate and to help the public solve its problems pushes journalists over the line from their proper stance of detachment to an improperly engaged posture, and thus hampers their ability to report the news fairly and without bias.

Now, one response to this objection would be explicitly to challenge the traditional journalistic commitment to detachment, to embrace wholeheartedly a conception of the journalist as an advocate, a passionate political animal who seeks to bring about social change. And certainly we can think of journalists—I. F. Stone comes to mind—whose commitment to a cause in no way undermined their fidelity to truth. How that balance between the desire for a particular social goal and the unwavering commitment to truth can be maintained is an interesting and important question, but answering it is not necessary to counter the current charge against public journalism.

The reason is that this objection to public journalism rests on two related confusions. One is a confusion about different levels on which one might or ought to

be value-neutral. It makes sense to say that journalists should not allow their political beliefs to distort their coverage. In attempting to provide the public with useful information, journalists must be careful not to cast those whose beliefs they share in too favorable a light or to give those with whom they disagree short shrift. But from these platitudes it does not follow that a journalist must be value-neutral about whether her society solves its problems or not. Why would someone become a journalist in the first place if she didn't care whether the country survived or thrived? (Well, there might be lots of reasons—excitement, the desire for celebrity, a love of words—but surely public-spiritedness might be among them.)

The second point emerges from the first. It is impossible to make sense of the special privileges allocated to the press in our society—privileges of which journalists constantly remind us, trotting out the First Amendment at every opportunity—except on the assumption that the press is supposed to serve some important public good. Why is the press exempt from restraints and restrictions that fall on others? Because we believe that the information journalists provide contributes to the search for truth, to democratic citizenship, and to the solution of social problems. If journalism doesn't serve these goals, then it is nothing more than a business (some would agree immediately) and deserves no special protections. Press freedom rests on foundations that are not value-neutral.

So the criticism that public journalists' commitment to a healthy public life represents a departure from standard and defensible journalistic norms of detachment is misguided. Journalists must remain detached in the sense that their particular political views must not distort what they say. But no one thinks they should be indifferent to the welfare of their community or their society, and their concern about such matters is a legitimate motivation in choosing what issues to cover and in what manner.

Setting the Agenda

Perhaps the thorniest question in the controversy about public journalism concerns decisions about what's news and where these decisions come from. Proponents often suggest that the terms of public discussion, and the standards for what is newsworthy, ought to be set by the public: the people are supposed to let it be known what they are interested in or find important, and journalists are then to follow their lead in deciding what stories and issues to cover.

Critics of public journalism find this approach problematic, and it's easy to see why they might be worried. What sort of commitment to the public's interests do public journalists make? Are they indeed, in

Remnick's phrase, "acting like waiters and taking orders from the public and pollsters"?

A look at what newspapers have actually done in the name of public journalism suggests that the answer is no. Consider, again, the *Charlotte Observer's* series "Taking Back Our Neighborhoods." The impetus for the project, as Walser describes it, came from editors and reporters who felt that the standard police blotter approach to reporting urban violence didn't fully capture the problem or the experience of people in the affected communities. As the series developed, *Observer* staff continually had to make judgments about how to report events at the neighborhood level. Who were the local activists whose stories ought to be told? How could the success of revitalization efforts be judged, and which ones could serve as models for other communities? At many levels, essential decisions had to be made by the journalists themselves, not at the behest of pollsters.

More worrisome, to many critics, is the approach the *Charlotte* paper took in covering the 1996 Senate race between Jesse Helms and Harvey Gantt. The *Observer* convened citizen panels that identified issues they wanted to see the candidates address, with the understanding that reporters would emphasize those issues

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in their stories. (Reporters were free, however, to cover other issues as well.) The paper didn't merely send pollsters door to door, tabulate the surveys, and then allow people's unreflective judgments to guide its coverage—although you might get that idea from listening to some of public journalism's critics. Instead, it offered citizens an opportunity, through a process of deliberation, to develop their views about what issues were important.

Contrary to Remnick's view, then, these public journalists didn't simply take orders from the public. They responded to beliefs that had been submitted to deliberation and dialogue—procedures meant to transform mere public opinion into the informed and reflective judgments of citizens.

But some critics take public journalism to task for reasons just the opposite of Remnick's. According to Michael Kelly, the citizen panels convened by the *Observer* identified eight important issues, but the *Observer* decided to concentrate on only four. Moreover, Kelly notes that although the panels ranked Taxes and Spending equal in importance with Families and Values, the *Observer* chose to ignore the latter,

which was clearly a more contentious, divisive issue. (The “nice” journalism issue rears its head again.) Kelly argues on this basis that the paper’s stated commitment to having citizens set the agenda was not entirely sincere—and that under cover of the citizen panels, the paper actually imposed its own agenda, limiting its coverage to those issues that *it* felt were most important and had less potential for turning ugly.

The Existential Journalist

It now becomes clearer why the controversy about public journalism is hard to grasp: although traditional journalists protest public journalism’s deference to the public as a source of decisions about what to cover, they may also object upon learning that public journalism isn’t as deferential as it appears. The first objection is that when journalists allow the public to set the news agenda, they cede their independence and an essential part of their role, becoming followers where they should be leaders and allowing others to usurp their autonomy. The second objection is that, in practice, public journalists take *too active* a role: what they should do—what journalists have traditionally done—is let others set the news agenda and not assume this task for themselves. To do otherwise is to abandon the journalist’s tradition of detachment and objectivity.

These contradictory objections reflect an unresolved tension in traditional journalists’ understanding of how they should go about their business. Journalists want to be independent of external pressures, whether from elites or from the public at large—but not so independent that they can be accused of setting the political agenda. They want to be responsive to external events, but not so responsive as to be manipulated—whether by politicians and spin doctors or by the unwashed public with its vulgar demands. And so public journalists get it from both sides: accused by some of arrogance and agenda-setting, by others of subservience and passivity.

For many journalists, it is almost an article of faith that their job is simply to “report the facts.” But this supposition is naive. The problem is not that there are no facts (no postmodernist am I) but that there are way too many. Leonard Downie’s assertion, cited earlier, that all journalists should do is give people “as much as possible of the information they need to conduct their lives” is only slightly more viable. By speaking of what is *needed* to conduct one’s life, Downie implicitly acknowledges that choices must be made to determine what, of the vast quantities of information out there, is “needed.”

When traditional journalists rely on stock phrases to describe the act of deciding what to cover, they fail to address the fundamental, it is tempting to say existential, significance of that act. The question of selection—

which facts and which stories, out of the vast if not infinite number available, a newspaper or news program should report—is the single most important question confronting journalists and news organizations, and constitutes the true heart of the problem of objectivity. News organizations have managed to convey to their audiences the illusion of inevitability, from Walter Cronkite’s famous sign-off, “And that’s the way it is, Tuesday, January 13 . . .,” to that authoritative look about the front page of the daily paper.

Now, the public journalist might assert that this is precisely his point—that the news could be, and should be, different than it is, that there should be less coverage of certain sorts of events and issues and more coverage of other sorts of events and issues. Nevertheless, the rhetoric of public journalism—like that of traditional journalism—oversimplifies the process by which news *becomes* news.

It is not enough to say, as Arthur Charity does, that “the public arena ought to be arranged on the public’s own terms.” For even public journalists, as we have seen, must *decide* what’s news; they can never pass this

The rhetoric of public journalism—like that of traditional journalism—oversimplifies the process by which news becomes news.

responsibility along to anyone else, whether the public or the politicians. Journalists cannot abdicate autonomy of judgment; in this, their predicament parallels the one in which we all find ourselves. That someone (no matter who) says something is never sufficient reason for believing it; that someone (no matter who) commands something is never sufficient reason for doing it. Always required is the individual judgment on the part of the listener or the commanded that this person ought to be believed or obeyed. For the journalist, the judgment takes the form: this is worth reporting.

There is a danger that journalists will take this view in the wrong way. It is not a license to do just as you please. It does not render reporters immune to criticism, on the grounds that “it’s up to us to decide,” or that “we journalists are the experts here; we know better than anyone else.” The autonomy principle does not mean there are no criteria for good journalism. And public journalists have rendered a valuable service in reminding us what some of these criteria are: that the well-being of people and communities is an essential component of good journalism, and that ordinary people are often especially well-placed to play a role in defining the issues that need coverage.

But two caveats are in order. First, ordinary people are not the sole authorities in these matters—not the

sole authorities in answering questions, and not the sole authorities in framing the questions to be answered. Second, defenders of public journalism beg important questions in speaking of the people or the public or the community, as if these were well-defined and uncontested concepts. The question is always which people or which community, out of all those that come within the news organization's ambit, shall have their voices heard or their concerns addressed.

Civic Connections

Public journalism has emerged alongside a revival of interest in civil society and civic participation. There are at least three connections. First, by improving the quality of news coverage—for example, by replacing coverage of political strategy with analysis of substantive issues—public journalism hopes to change the nature of public discussion of politics. At the same time, it seeks to give the public an enhanced role as an actor in the public sphere rather than just a spectator of debates among elites. In so doing, public journalism reinterprets the cliché about a free press giving citizens in a democratic society the information they need to make decisions. The press, public journalists say, can also give citizens *opportunities* to make decisions (by organizing or acting as catalyst to public meetings and discussions) and new ways to *conceive* the choices before them.

Finally, public journalism rejects the model of the journalist as outsider, the neutral observer who tells us how things are but plays no further role in public life. I have been questioning the coherence of this model, arguing that it makes no sense to think of the role of informant as being as passive as the model suggests. We might then see public journalism as making a virtue of necessity, or rendering explicit what has been implicit: reporters do shape public discourse and guide public life, and therefore they might as well do these things self-consciously. The journalist is also a citizen—perhaps a citizen first and then a journalist; at the very least a citizen and a journalist at the same time.

In thinking about these connections, we may find ourselves wondering how exactly public journalism differs from more traditional approaches. Don't these ideas sound familiar? Haven't we heard them a million times in connection with the justification of the First Amendment and the role of the press in a democratic society? Haven't theorists of the media been talking for

years about the agenda-setting function of the press? I've met reporters who are angered by what they take to be the meaning of public journalism but who (in the spirit of Molière's *bourgeois gentilhomme*) seem to have been public journalists all their working lives—covering underreported communities and telling stories from the point of view of those communities' members.

We may suspect that much of the disagreement between public journalists and their critics is terminological. Such tiresome disputes persist when people speak in vague generalities. Although they may sometimes disagree when they get down to cases, my guess is that, more often than not, journalists will reach consensus about what constitutes *good* journalism. Or at least they should.

—Judith Lichtenberg

A longer version of this essay will appear in the Working Paper Series on Civil Society, a project of the Institute and the National Commission on Civic Renewal. The Commission and associated research activities are funded by a grant from the Public Policy Program of the Pew Charitable Trusts. Sources: Peter Levine, "Public Journalism and Deliberation," *Report from the Institute for Philosophy and Public Policy*, vol. 16, no. 1 (Winter 1996); Jay Rosen, "Public Journalism as a Democratic Art," in *Public Journalism—Theory and Practice: Lessons from Experience* (Kettering Foundation, 1997); Arthur Charity, "Public Journalism for People," *National Civic Review*, vol. 85 (1996); *Civic Lessons: Report on a 1996 Evaluation of Four Civil Journalism Projects Funded by the Pew Center for Civic Journalism* (Pew Charitable Trusts, 1997); Arthur Charity, "What Is Public Journalism?: Five Communities, Five Examples," *National Civic Review*, vol. 85 (1996); David Remnick, "Scoop," *The New Yorker* (January 29, 1996); Michael Kelly, "Media Culpa," *The New Yorker* (November 4, 1996); Tony Case, "Public Journalism Denounced," *Editor and Publisher* (November 12, 1994); Judith Lichtenberg and Douglas MacLean, "Is Good News No News?," *Report from the Institute for Philosophy and Public Policy*, vol. 8, no. 4 (Fall 1988); "New Test Finds 2 in 3 Know Basics of Science," *New York Times* (October 22, 1997); "U.S. Students Do Poorly in Science Test," *Washington Post* (October 22, 1997); Michael Kelly, "Media Culpa," *The New Yorker* (November 4, 1996); "Charlotte Observer: 'Taking Back Our Neighborhoods,'" *Newsletter of the National Commission on Civic Renewal*, vol. 1, no. 2 (Autumn 1997); Judith Lichtenberg, "In Defense of Objectivity Revisited," in *Mass Media and Society*, 2d ed., edited by James Curran and Michael Gurevitch (Edward Arnold, 1996).

A Question of Priorities: Human Rights, Development, and "Asian Values"

Last October, in a gesture timed to coincide with a state visit to Washington by Chinese President Jiang Zemin, China became a signatory to the International Covenant on Social, Economic, and Cultural Rights (ICESCR). Like much else in U.S.-China diplomacy, the decision to sign the treaty was open to multiple interpretations. On one level, Chinese leaders were conceding the existence of universal human rights, whose protection is not merely an "internal matter" or a cultural norm. But in doing so, they hoped to forestall American criticism of their human rights record—and even to embarrass the United States, which had only just signed (and has yet to ratify) the 30-year-old treaty. Moreover, these same leaders conspicuously refused to sign the International Covenant on Civil and Political Rights (ICCPR). This allowed President Jiang to appear unyielding to outside pressure, while reaffirming his government's view that the struggle for development and social-economic rights should take precedence over the exercise of civil-political rights.

Asian activists have departed from the standard approach of the major international human rights organizations.

More recently, China has hinted that it might take a more balanced view. In an interview shortly before the annual meeting of the U.N. Human Rights Commission, the Chinese foreign minister suggested that eventually his government would sign the ICCPR. In response, the United States dropped its support of a resolution criticizing China's human rights practices. But most observers doubt that the foreign minister's remarks signaled a genuine change in policy, and there has been no retreat from official statements asserting the priority of social-economic over civil-political rights.

China's emphasis on social-economic rights has been echoed by other Southeast Asian leaders, and defended as an expression of "Asian values." But this does not mean that all Asians agree with it. Prior to the International Human Rights Conference in Bangkok in

1993, Asian human rights groups issued a joint declaration demanding "a holistic and integrated approach to human rights." In particular, they insisted that people must not be compelled to sacrifice their civil and political freedoms in exchange for promises of economic well-being. "One set of rights," they pointedly warned, "cannot be used to bargain for another."

It is not difficult to see why these Asian groups uphold the doctrine that human rights are indivisible. From their own monitoring activities, they know that serious abuses of social-economic rights—exploitation of workers and peasants, lack of assistance to the poor and needy, failure to provide adequate education in poor rural regions—are often committed by the very governments who claim to give priority to these rights. They are not deceived, therefore, by the claim that citizens in these countries have won protection of their social-economic rights by forfeiting their civil-political liberties. Moreover, these activists often campaign for civil-political freedoms that can help to expose and correct violations of social-economic rights. In urging governments to tolerate criticism of official policies, to safeguard freedom of expression, and to begin democratic reforms, they recognize the extent to which the two sets of rights are interrelated.

A New Challenge

By making social-economic rights an explicit part of their agenda, however, the Asian activists have also departed from the standard approach of the major international human rights organizations. These organizations have long recognized the distinction, embodied in the covenants, between two classes of rights. But unlike the Chinese leadership, they have appeared to assign priority to civil-political rather than social-economic rights. Amnesty International, for example, has campaigned to "free all prisoners of conscience," "ensure fair and prompt trials for political prisoners," "abolish the death penalty, torture and other cruel treatment of prisoners," and "end extrajudicial executions and 'disappearances.'" Its members have not usually been urged to write letters to protest lack of protections of the right to food, housing, medical care, or education.

Such priorities are consistent with the founding mission of these organizations: to monitor political repression in totalitarian countries during the Cold War. Human Rights Watch was created as "Helsinki Watch" in 1978 to defend "freedom of thought and expression, due process and equal protection of the law," to document and denounce "murders, disappearances, arbitrary imprisonment, exile, censorship and other abuses of internationally recognized human rights" in the Soviet Union and Eastern Europe. But as these groups have devoted greater attention to human rights violations in the developing countries of Asia, their emphasis on civil-political rights has made them vulnerable to charges of cultural imperialism. Governments of these countries have been able to dodge criticism by noting Western activists' apparent lack of interest in

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social-economic rights, and to respond that *they* are concentrating on the promotion of these rights instead.

For this reason, some human rights organizations are now asking whether they ought to adopt a more "integrated" and balanced approach. Their aim is not to retreat from advocacy for civil-political rights, but rather to address social-economic rights more consistently and forcefully than in the past. In exploring this option, they must reassess one legacy of international human rights law: the idea that civil-political and social-economic rights are two distinct classes of rights, and that civil-political rights should take precedence since social-economic rights can only be progressively realized. This essay offers a historical and conceptual analysis of this legacy.

The Affordability of Rights

The two international covenants on human rights were adopted in 1966, almost twenty years after the United Nations' Universal Declaration of Human Rights. Although the covenants were a historic landmark in making international human rights standards legally binding, they also planted the seeds for much dispute about priority. The usual assumption has been that if there are two sets of rights, there must be a hierarchical relation ordering them.

In general, the language of these documents seems to recognize an *absolute* obligation to respect civil-political rights, but only an *imperfect* obligation to respect social-economic rights. Civil-political liberties are treated as relatively independent of economic

resources, while social-economic rights are not. For example, the ICSECR obligates each state "to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized" (Article 2.1). In contrast,

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the ICCPR obligates states more stringently. Each is to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized" and "take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to [these] rights."

This wording gives legitimacy to the interpretation that full respect for social-economic rights is largely a matter of resources, whereas full respect for civil-political rights is largely a matter of self-restraint on the part of governments. When resources are simply not there, poor developing countries should not be expected to honor their obligation to protect social-economic rights, which often requires extensive public provision and services. Protection of civil-political rights, however, remains their absolute obligation, since such protection requires only toleration of individual liberties.

The covenants, then, assume that the two classes of human rights can be distinguished according to their affordability. But when we examine civil-political and social-economic rights, we do not find that the most "expensive" rights appear in one class, and the "cheap" rights in the other. Rather, there are expensive rights (as well as cheap ones) in both categories. For example, poor societies may not have the necessary resources to build legal institutions that safeguard everyone's right (as specified in the ICCPR) "to a fair and public hearing by a competent, independent and impartial tribunal established by law," "to have adequate time and facilities for the preparation of his defense," "to defend himself in person or through legal assistance of his own choosing" or "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it" (Article 14). Implementing these rights requires large public expenditures and well-trained judges, lawyers, and law enforcement officers.

Other civil-political freedoms, it is true, are not so expensive to implement. The right to free expression

can, under normal peaceful circumstances, be duly respected if a government refrains from interfering with its exercise. Likewise, the right not to be tortured and not to be held in slavery, the rights to freedom of thought, conscience and religion, and the right to freedom of association do not need significant public expenditures to be enjoyed. Nor is the cost prohibitively high for a host of other basic civil-political rights,

Certain social-economic rights are relatively independent of available resources and can be immediately protected.

such as the right to liberty of movement or the right to peaceful assembly (though countries afflicted by political violence may have to spend public funds on security personnel to protect the peace when people exercise these rights).

Still, the distinction between rights that must be "progressively achieved" and those that can be immediately protected does not correspond neatly to the distinction between social-economic rights and civil-political rights. Certain social-economic rights are relatively independent of available resources and can be immediately protected. Workers' right to form autonomous unions, and the right of men and women to enter freely into marriage, are two examples.

Degrees of Urgency

Another way to support the distinction between the two classes of rights, and to justify a priority-ranking based on that distinction, is to say that violations of rights in one category are more profoundly destructive of human life and dignity than violations of rights in the other category. To judge this claim, we must consider the *range* of rights encompassed under each covenant.

As our earlier discussion indicates, the civil-political rights enumerated in the ICCPR include the right to life, the right not to be held in slavery or servitude, and the right not to be subjected to arbitrary arrest or detention; the rights to freedom of thought, conscience and religion; and the rights to freedom of movement, expression, association, and peaceful assembly. The social-economic rights enumerated in the ICSECR (I have chosen not to address cultural rights here) include each person's right to work; to form and join trade unions; to enjoy an adequate standard of living, including "adequate food, clothing and housing" and "the continuous improvement of living conditions"; the right "to the enjoyment of the highest attainable standard of physical and mental health"; and the right to education.

Now, it is hard to imagine anyone believing that *all* the civil-political rights recognized in the ICCPR should be given priority over *all* the social-economic rights recognized in the ICSECR, or vice versa. Human rights groups, for instance, have never contended that the right to free legal counsel is more important than the right not to be starved. Similarly, those who criticize such groups for emphasizing civil-political rights are presumably not hoping that Amnesty will abandon its campaigns against torture and capital punishment in order to lobby for health insurance reform and paid vacations for everyone. What the critics presumably have in mind is a fundamental core of social-economic rights (to basic subsistence, for example) that they think should be accorded as much importance as, say, the right not to be arbitrarily detained.

All sides, I believe, should be able to accept some rough priority-rankings *within* each of the two sets of human rights. The right not to be tortured should inspire a more stringent prohibition than, say, the right of the accused to have a public hearing. But this example yields a further lesson as well. Human rights are interrelated; if an activist group is trying to prevent torture and "disappearances," one strategy is to insist on public hearings for accused persons. Some seemingly less urgent rights may thus be important because of their instrumental role in securing other, more urgent rights. In choosing their objectives and

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tactics, then, human rights groups cannot simply select the most urgent rights and campaign exclusively for them. Decisions about what issues to emphasize will not rely solely on judgments of how critical individual rights may be for protecting life and the dignity of the human person.

The Interdependence of Human Rights

So far, we have examined two rationales for giving priority to one class of human rights over the other. The first emphasized resources, asking how promptly a society could afford to implement particular human rights. The trouble with this approach is that the differences in affordability *within* each category are as significant as any differences between them. The second approach tried to determine which class of rights was more fundamental or necessary to human life and dignity. But here again, we found that degrees of importance vary within each category, as well as between them.

We will now consider a final approach, which may be understood as a variant of the first. Some advocates of a distinctively "Asian way" of economic modernization tend to stress that protection of human rights is contingent upon successful economic development. But then, they go on to make two further claims:

1) Any meaningful exercise of civil-political rights depends on the attainment of social-economic rights, and so must be deferred until the latter have been realized. In the words of one Chinese government statement, "The right to subsistence is the most important of all human rights, without which the other rights are out of the question."

2) The economic development necessary to protect social-economic rights can only be achieved by tightening up controls over civil-political freedom. This argument has also been made by Chinese authorities. For example, in an official statement issued two years after the Tiananmen Square crackdown in 1989, the government claimed:

The people's right to subsistence will still be threatened in the event of a social turmoil or other disasters. Therefore it is the fundamental wish and demand of the Chinese people and a long-term, urgent task of the Chinese government to maintain national stability, concentrate their effort on developing the productive forces, ... strive to rejuvenate the national economy and boost the national strength.

The statement assumes that the exercise of civil-political freedoms would disrupt "national stability" in a way that threatens economic development. It also assumes that development can be counted on to secure "the people's right to subsistence." How shall we assess these various claims?

In contemporary theories of liberal democracy, one can find strong statements suggesting that without basic social-economic rights, civil-political freedom is indeed out of the question. "It is true," wrote the late Isaiah Berlin, "that to offer political rights, or safeguards against intervention by the state, to men who are half-naked, illiterate, underfed, and diseased is to mock their condition; they need medical help or education before they can understand, or make use of, an increase in their freedom." John Rawls, no less concerned about an imbalance between liberty and equality, developed his two principles of justice to address it. The first principle governs civil-political liberties; the second guarantees the "worth of liberty," acknowledging the importance of social justice and economic well-being in determining whether the first-principle liberties have any actual value.

But liberal social democratic theory does not rest with the observation that civil-political liberties depend on the protection of social-economic rights; it also understands the extent to which this latter group of rights depends upon the first. At least a subset of civil-political rights is indispensable for securing basic subsistence rights (if not all social-economic rights)

and therefore essential for human life and dignity. It is this principle of *mutual dependency* that is missing from the emphasis on the priority of social-economic rights over civil-political liberties.

When rapid development in an authoritarian society becomes a national priority and an end in itself, overriding civil-political liberties, those who are subjected to social-economic injustice (which may sometimes be hard to avoid) will have no say in policy-making and no power to protect themselves. An authoritarian government will have little incentive to create even a modest "safety net" for its poorest and most vulnerable citizens. On the other hand, it will have a strong incentive to relax regulations on its labor market and

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employment protections, and to restrict workers' rights to bargain and to form autonomous unions, in order to exploit the country's cheap labor advantage in a global economy. Maximization of aggregate growth and neglect of the poor tend to work neatly together. Thus, it is false to assume that economic development translates *automatically* into protection of social-economic rights.

It is equally false to assume that suppression of civil-political rights *necessarily* enhances sustainable economic development. Without democratic accountability, the ruling elites are virtually unbound in their power to advance personal interest through their political control of bank loans, public funds, tax revenues, and vital investment information. Cronyism becomes endemic. The government-business-bank alliance in East Asia, for example, has fostered institutional corruption and nepotism and is opposed to the fair and open dealings that are key to free trade. Bad-faith loans, inefficient resource distribution, and the control of information vital for free trade, cultivate unfairness and public distrust of the system, threatening governance and social stability in times of economic crisis.

Strategies for International Monitoring

Recently, major human rights organizations have begun testing new waters in their monitoring work to recognize the complexity of human rights violations, where social-economic rights and civil-political rights are often intricately entangled. Amnesty International has investigated and reported on violations arising from China's population policies, for example. The focus of such investigations remains on civil-political



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rights violations such as violence against women and arbitrary detention. But there is also a recognition of the special vulnerability of women, given their unequal social, economic, and political status in Chinese society. Human Rights Watch/Asia has reported on child abuse in Chinese orphanages and forced relocation in the Three Gorges Dam Project, again with a focus on abuses of civil liberties and violations of the human person. Moreover, in a 1996 letter to Board members, Human Rights Watch executive director Kenneth Roth proposed new policies on monitoring social, economic and cultural rights. He sought and received approval to experiment with "a very limited incursion into the ESC [social, economic and cultural] rights field"—that is, only "in situations in which there is a clear connection to violations already within our primary CP [civil-political] rights mandate."

In arguing for this experiment, Roth did not seek to erase the distinction between the two classes of rights. Echoing the language of the international covenants, he maintained that civil-political rights impose "a more absolute obligation," whereas social-economic (and cultural) rights must be "progressively realized"

in accordance with available resources. Civil-political rights, he went to say, have "greater clarity," and the expertise developed by Human Rights Watch in "exposing and highlighting" rights violations is "better

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in their monitoring work.*

suited to CP rights." It was for these reasons that he favored making the incursion into social-economic-cultural rights a "very limited" one.

On prudential grounds, the cautious approach outlined in the letter is understandable. It would be unfair to expect a specialized organization to extend its mandate into a new area all at once. One must also remember that much of the effectiveness of human rights monitoring lies in shaming abusive governments into action by publicizing their violations through public

media and international forums. Certain civil-political rights violations have the "clarity" that makes such publicity effective. In contrast, criticism of a nation's failure to provide for indigent children or the homeless may be less stigmatizing, particularly in the case of poor countries where the causes of deprivation—social, economic, and political—are numerous and complex.

However, the principled reasons for limiting the experiment are less persuasive. As we have seen, the distinction between civil-political rights and social-economic rights is not supported by the distinction

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between "absolute" and "imperfect" obligations, or between rights that can be immediately implemented and those that can only be progressively realized. Not all civil-political rights can be immediately implemented, whereas some social-economic rights can. Human Rights Watch confronts this reality when it

monitors problems associated with prison overcrowding in poor countries, or with the devastated judicial system in Rwanda. In such cases, it acknowledges that certain civil-political rights are expensive and can only be progressively realized, at least in some contexts.

It is important for human rights groups to make a realistic assessment of their strengths and effectiveness in specific areas of civil-political rights and social-economic rights, rather than adhering to a principled partition between the two. In the process, they may decide that certain basic rights, however crucial, fall outside their mandate; the principle that human rights are indivisible does not commit activists to monitoring and protesting and seeking redress for violations of every right recognized by the covenants. But such decisions are best justified on prudential or strategic grounds. They do not follow from controversial categorical differences between civil-political and social-economic rights.

There is every reason to think that human rights organizations can gain strategically, and improve their overall effectiveness, by taking on certain social-economic rights abuses—restrictions on union rights, failure to eradicate child labor, failure to promote women's educational and economic opportunities, and failure to provide even minimal assistance for the poor—in carefully chosen contexts. Such a move would draw international attention to a secret well-guarded by authoritarian governments in Asia: their record of violating social-economic as well as civil-political rights. It would also address the concerns of Asian activists who have justly called for a more inclusive approach to human rights monitoring around the world.

—Xiaorong Li

Debates about censorship are changing.

Censorship and Silencing Practices of Cultural Regulation

Edited by Robert C. Post

An outstanding set of essays—from the perspectives of law, cultural theory, feminist studies, literature, and anthropology—that present dramatic new developments in the conceptualization of censorship, advancing the argument that the state is not the only agent of censorship.

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Sources: Information Office of the PRC State Council, "Human Rights in China," *Beijing Review* (November 4–10, 1991); Onuma Yasuaki, "On the Need for an Intercivilizational Approach to Evaluating Human Rights," a paper presented at the Carnegie Council on Ethics and International Affairs workshop "Human Rights Initiatives," held in Japan, Thailand, and South Korea (1994–1996); Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (Oxford, 1969); John Rawls, *A Theory of Justice* (Harvard, 1971); Kenneth Roth, "Proposed Policy on Economic, Social and Cultural Rights," Human Rights Watch internal memo (September 12, 1996).

Trials on Trial

Research ethics generally fails to capture public attention and scrutiny. But a debate over clinical trials in developing countries moved suddenly into the public domain last fall, when an editorial in the *New England Journal of Medicine* criticized studies designed to test the efficacy of antiretroviral drugs in reducing mother-to-infant transmission of HIV. The editorial objected to the trials because they included placebo-control groups, in which HIV-infected pregnant women were given a dummy pill rather than the drug zidovudine (AZT). The criticism was especially pointed because in nine of the fifteen trials then under way, funding had been provided by U.S. health agencies—the National Institutes of Health (NIH) and the Centers for Disease Control and Prevention (CDC).

Recently, the CDC announced that it was stopping a placebo-controlled trial in Thailand, not because of ethical objections, but because the question under study had now been answered to the agency's satisfaction. Data from the trial showed that short courses of AZT, administered prenatally and during delivery,

All clinical research on human subjects strives to balance the interests of the study subjects in receiving the best available treatment for their illnesses against the interests of society in acquiring the most dependable information at the earliest time. One can grasp this tension by thinking about one's own experience *as a patient*. When ill or in pain, the patient wants the best available treatment. Since a controlled clinical trial requires the random assignment of patients to two or more arms of the study offering different therapies, it is only when there is no reason to believe that one therapy is superior that it is not against the patient's interest to participate. If one treatment is better, why should a patient take a chance of not getting it? At the same time, *as a patient* one depends on the doctor having

As a patient, one hopes that prior patients have participated in studies that show clearly and decisively what treatment is best.

All clinical research on human subjects strives to balance the interests of the study subjects against the interests of society.

reduce mother-to-infant transmission of HIV by one half. As a result, other trials supported by the NIH and CDC will no longer treat HIV-infected pregnant women with placebos. Both critics and defenders of the trials are pleased with this development; the critics because use of placebos has been halted, the defenders because the trials produced decisive, reliable data that policymakers in developing countries can use.

The Basic Dilemma

The research that sparked the controversy presents the classic conflict inherent in all studies of promising new therapies carried out on human subjects. As we shall see, the fact that these trials were conducted in developing countries does add complexity to the issue. But the basic dilemma of appropriate research design is familiar.

reliable information about what treatments are useful. One hopes that prior patients have participated in studies that show clearly and decisively what treatment is best.

The AZT trials in developing countries replay this classic dilemma. The HIV-infected woman wants the therapy most likely to prevent transmission of the disease to her infant. The community (including its public health policymakers) wants reliable information about the effectiveness of treatment so that it can implement programs to help the many other infected pregnant women and their babies.

Several facts about these trials heighten the familiar conflict, however. HIV infection is a deadly disease. Hence, the use of a placebo in the case of HIV especially compromises the interests of the study subject (here, the baby). Since the subject in these trials cannot provide consent, participation requires consent by surrogate (the mother). Yet in cases involving surrogate consent, researchers generally have a special responsibility to safeguard the well-being of the dependent.

The interests of the community are also substantial. HIV infection rates in many developing countries are extremely high. For example, in Kampala, Uganda,

one-sixth of the adult population is infected. In addition, most developing countries have few resources available for public health. It is thus imperative to know whether a treatment is effective before diverting extremely scarce resources from other health programs.

The use of a placebo was especially controversial because an effective means of reducing the likelihood of transmission has been identified. In 1994, the results of a study carried out in the U.S. and France demonstrated that administering AZT to the mother pre- and perinatally, and to the infant after delivery, dramatically reduced transmission. This regimen, known as the ACTG 076 protocol, cut the incidence of HIV transmission from mother to child by two thirds. As a result of the clear benefit of the 076 regimen, it is the recommended treatment for HIV-infected pregnant women in the developed world.

Unfortunately, 076 is not practical for developing countries. Women in these countries usually do not seek prenatal care as early as the regimen envisioned. Many of these countries lack intravenous equipment used to deliver AZT perinatally. The drug-related cost of the 076 regimen, and of the requisite health care delivery systems, is too high for most developing countries. Moreover, 076 required that women not breast-feed their children, since breast-feeding increases the likelihood of HIV transmission. This is no small matter in countries where polluted water may make formula dangerous and the increased immunity provided by breast milk is especially valuable.

These two facts—the dramatic success of 076 and its impracticability for developing countries—led researchers to the following question: would a different regimen of antiretroviral drugs be effective and useful in the developing world? Researchers created several different shorter courses of treatment that did not depend on the use of IVs and did not require that women refrain from breast-feeding. Next, they needed to design studies to evaluate these courses of treatment. With the exception of one Harvard-NIH study in Ethiopia, all the original NIH- and CDC-sponsored research tested a particular short course regimen against a placebo. The controversy turned on whether this research design was ethically permissible.

The Equipoise Standard

According to the generally accepted standard, clinical research on human subjects is only permissible when scientists don't know what therapy is best. The state of medical knowledge must rest in "equipoise." Placebo-controlled trials are permitted, therefore, only if scientists don't know whether the new therapy is better than nothing. Actually the standard is slightly more complex, in that side effects and other harms are considered along with anticipated benefits. But the

basic principle remains. A placebo-controlled trial is permissible when it is unclear whether a new therapy is better, counting burdens as well as benefits, than no treatment.

The equipoise standard offers a resolution of the tension between individual and communal interests inherent in all clinical trials. On its face, the standard seems to rank the interest of the individual in treatment above the interest of the community in knowledge. Only when the patient has nothing personally to lose by getting one therapy rather than another are researchers permitted to use the patient to advance the common good.

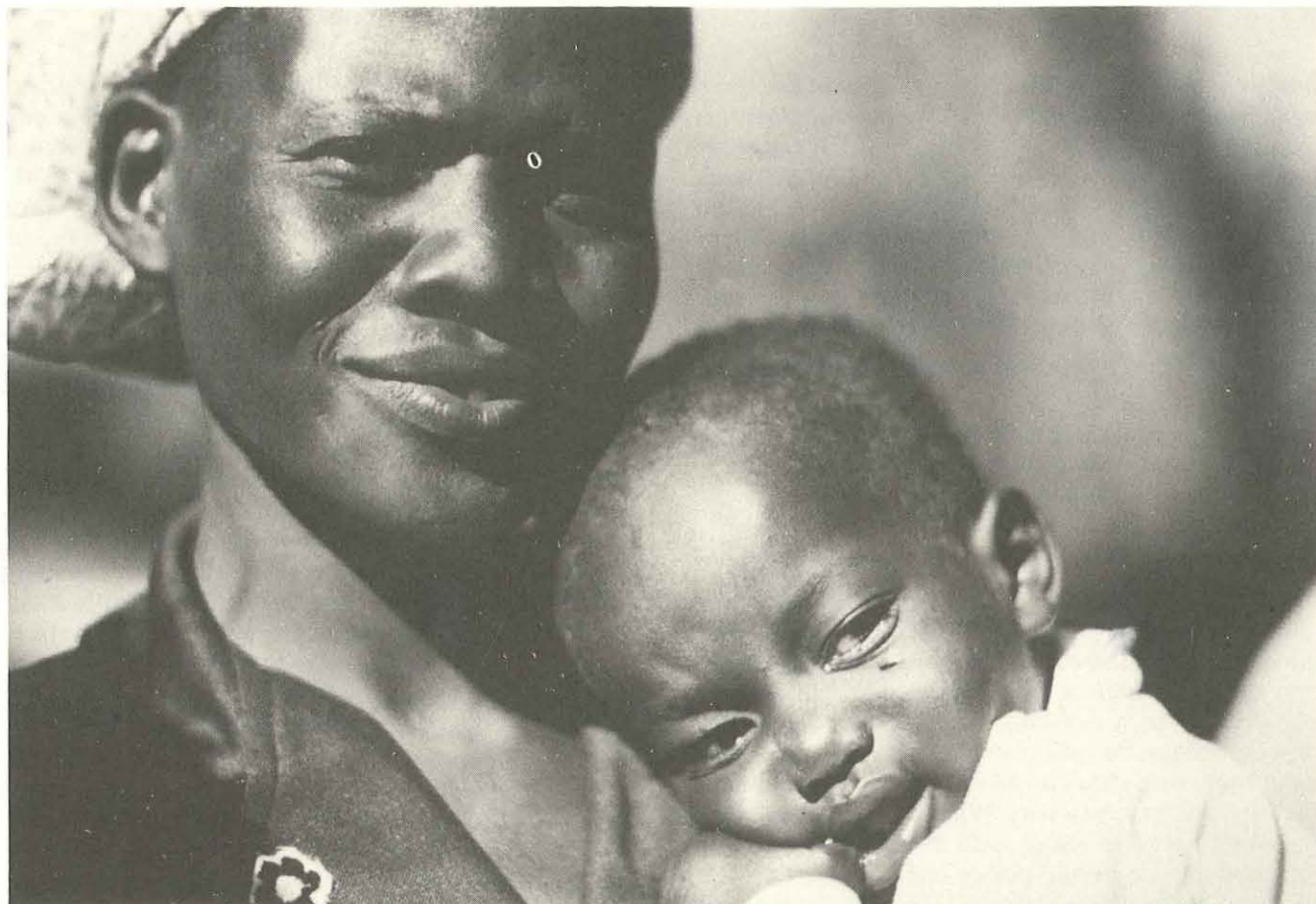
However, this preference for the individual over the community is only apparent. In practice, communal interests trump individual interests. The equipoise standard requires that no patient in a trial get a treatment *known* to be inferior. If we don't *know* that a new therapy is better than the old until we have tested it in a rigorous clinical trial, then patient interest is not sacrificed by participating in such a trial. Until the results are in, we have equipoise. But this argument neglects the patient's perspective. For the patient, well-grounded *belief* is also valuable. If a new therapy is probably better than the old, the patient's interests are sacrificed in a trial where there is a chance she won't receive it.

So, while the articulated standards place the interests of the individual above those of the community, this commitment is eviscerated by the manner in which the equipoise standard is actually employed. The level of certainty required to unsettle equipoise is key. Today,

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benefits, than no treatment.*

the research scientist's standard of knowledge prevails. For the scientist, a hypothesis is proved on the basis of a randomized clinical trial. Moreover, the probability that the results of the trial are due to chance must be less than one in twenty. These are stringent criteria. By importing this certainty standard into the ethicist's understanding of equipoise, we undermine it. Since the patient wants whichever therapy is *believed* best, she sacrifices in joining a trial to establish, for others, that the therapy really is best.

As Samuel Hellman and I have argued elsewhere, clinical research is often ethically problematic because of a conflation of roles. In doing clinical research, the doctor acts simultaneously as a physician and as a scientist. Each of these roles rightly requires a different degree of certainty before action can be taken. In the AZT trials,



Kay Chernush
Archival photograph/World Bank

there is yet a third role in the picture, that of the public health official. The ethical quagmire of these trials is the result of the conflict between these three roles.

Medical researchers rightly aim at knowledge in itself and therefore correctly employ very stringent criteria. Before closing a question and moving on, the

*The equipoise standard must
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of when information is valuable
to the patient.*

research scientist must be very sure to have the right answer. Public health officials aim at communal well-being. Because they are under time pressure that the scientist is not, a public health official may employ a slightly less rigorous standard for considering a hypothesis proved. But as public health decisions affect large numbers of people and require the expenditure of often very limited societal resources, communal interest demands a still quite rigorous standard for

medical knowledge. The physician treating an individual patient works toward the health of that patient. As a result, the degree of certainty a physician requires before acting is considerably lower. From the perspective of patient health, the doctor ought to provide that treatment which is most likely to be best.

The articulated standards for ethical research on human subjects command that the role of the physician must predominate. For example, the World Health Organization's Declaration of Helsinki, which is widely recognized as authoritative, provides that "the interests of the subject must always prevail over the interests of science and society." However, this public commitment to put the interests of the individual over those of the community is but empty rhetoric unless researchers interpret the equipoise standard in a way that supports it. For the interests of the study subject to trump communal concerns, the equipoise standard must incorporate the physician's understanding of when information is valuable to the patient.

Ranking individual over communal well-being will have its costs. For example, to test the efficacy of short course AZT therapies, researchers must adopt a study

design without a placebo control. Critics of the trials suggested testing short courses against the 076 regimen. But this design may not be helpful. If the short course therapy proved less effective than 076, as is likely, investigators would still not know whether the short course was more effective than no treatment at all. Alternatively, one could give all study participants short course therapy. Researchers would then evaluate how the results compare with background data on

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communal well-being
will have its costs.*

transmission rates from the particular country. The information gathered in this way would be useful and informative, but less certain and reliable than information attained with a placebo control. Differences between the study population and the general population would not be controlled for, and might be relevant. Moreover, data on general rates of transmission within a country may vary. What this means in practice is that studies using such data may have to be repeated before public policy can be based on the results. This lost time may well cost lives as we wait for more certainty before taking action.

Were These Trials Ethical?

The controversial NIH and CDC trials randomly assigned HIV-infected women to either a short course of AZT or to a placebo. To assess whether these trials were ethical, we need to answer two questions. First, how strong were the reasons, pre-trial, to believe that the short course therapies would be more effective than no therapy at all? Second, was that belief strong enough to disturb equipoise?

Prior to the trials, scientists knew that the 076 regimen had been extremely successful in the U.S. and France. They also knew that some participants in the 076 study hadn't received the full regimen but showed some benefit nonetheless. Still, a short course administered in developing countries might be less effective. Oral intake of the drug might not work as well as IVs. Breast-feeding might destroy the gain of treatment. And, finally, other background health and nutrition problems might make AZT simply less effective in the developing world than it proved to be in Western countries. In part, the debate about these trials is over the significance of these differences.

But that is only a part of the disagreement. Given that researchers have *reason to believe* that the short course will decrease the likelihood of transmission—as

they must, or there would be no incentive to conduct the trials in the first place—what follows? For the study's defenders, the fact that the therapy shows promise provides a reason to do the trial, but no more. For the critics, the belief that the therapy will work means that randomization to placebo is unethical. In this disagreement we see the two issues (familiar from introductory philosophy classes everywhere) that I have been discussing.

First, critics and defenders disagree about the appropriate balance between individual interest and communal well-being. Peter Lurie and Sidney Wolfe of Public Citizen, joined by Marcia Angell of the *New England Journal*, condemned the use of babies born to women in the control group for the benefit of babies to be born tomorrow. Study defenders Harold Varmus (NIH director) and David Satcher (then CDC director, recently confirmed as Surgeon General) emphasized the enormous devastation wrought by HIV in these countries and the great need for a decisive answer to an important research question.

The second familiar philosophical issue is epistemological. Critics and defenders of the trials disagree about the value of information not yet validated by a randomized trial. Research scientists, steeped in the values of science, rightly assert that before a trial we

*Critics and defenders disagree
about the value of information
not yet validated by a randomized trial.*

don't know whether a new therapy is valuable. Patient advocates assert that we don't need to *know*. Of course, the scientist doesn't really know that the trial-validated conclusion is accurate, either. The standard of a clinical trial (less than a one-in-twenty probability of a chance result) itself reflects a judgment about the usefulness of this information and the costs of demanding more. Since scientific information is produced by induction, we deal always in degrees of certainty.

The real question that these and other trials raise is: How certain must the physician-scientist be that a new therapy is valuable before a randomized trial becomes unethical? There is a continuum stretching from a doctor's hunch to reasonable belief to solid conviction. Instead of asking when we know that the new therapy is better than the old, we should ask how much certainty it makes sense to demand, given the intended purpose. In practice, even the defenders of the trials recognize this. On the basis of the Thai study, the CDC is stopping the placebo arm of a trial in the Ivory Coast, and NIH is stopping the placebo arms of all of its studies. But there is an important difference

between the women enrolled in the CDC-Thai study and in these others: the Thai women did not breast-feed. So, should we say that we still don't know whether short course will be effective in other countries where breast-feeding is the norm? In stopping the other trials on the basis of the Thai study, the CDC and NIH demonstrate that they too recognize that we make a moral judgment when we decide whether randomization to placebo may continue. As the level of our

*We make a moral judgment when
we decide whether randomization
to placebo may continue.*

confidence in the effectiveness of short course increases, the interests of the babies in that therapy become more insistent, and thus it becomes harder and harder to sacrifice their welfare for the welfare of other babies born tomorrow.

Thus, the two philosophical questions are intertwined. If our aim is community welfare, we need a fairly high level of certainty before taking action. The actor must have a solid conviction that short course therapy will reduce transmission rates significantly in order to justify spending scarce resources and treating thousands of people. But if our purpose is to treat the individual patient, a well-grounded belief is enough. Each HIV-infected woman wants the best chance for her baby to be HIV-free. Research results prior to the controversial trials surely gave her and her doctor good reason to believe that short course therapy would be of value.

In order to fulfill our commitment, as stated in the Helsinki Declaration, to placing individual interests over communal well-being, the physician's certainty standard must prevail. If a doctor would recommend short course therapy over no treatment, then randomization to placebo is unethical.

The Clash of Worlds

These trials also raise a special problem, however. Their aim is not the usual aim of clinical research: a medically superior therapy. Instead, their goal is to find an effective therapy practical for general use in countries where health resources are extremely limited. The equipoise standard is built to handle a different kind of case. In general, researchers look for new therapies that will produce better results: more health, fewer side effects, less pain. In that context, one can only test such a therapy in a randomized trial if the physician does not have good reason to believe that one therapy will offer more to the individual patient.

But in the trials under discussion, scientists are looking for a regimen that will work for a specific population. They recognize that such a therapy might not work as well as 076 works in a different population. Given this research goal, equipoise (in its usual sense) is impossible. The researcher simply cannot say she does not have good reasons to believe one treatment (here 076) is superior. The best known therapy for the individual, however, is not practical for general use.

This same paradox explains the debate over the ethical requirement that all study subjects "be assured of the best proven diagnostic and therapeutic method," as the Helsinki Declaration requires. The trials have been criticized on the grounds that use of placebo denied participants the "standard of care" established for HIV-infected pregnant women. But this argument may prove too much. If the principle articulated in the Helsinki Declaration requires that all study participants get the standard of care in the developed world, then trials of short course therapy against a control

*The commitment to individual well-being
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available anywhere in the world.*

arm getting 076 are also unethical. While short course therapies may be highly effective, there are still good reasons to believe they may be less effective than 076. Therefore, participants getting short course would get less than the standard of care.

An ethical requirement that each study participant get as good as is offered in the developed countries would make it impossible to test new therapies in any manner. Each participant would be required to receive 076. This counterintuitive result should make us reconsider the argument that produced it. Where the research goal is to find a practical therapy for general use that may be less effective than treatment available elsewhere, the usual interpretations of both the equipoise principle and the standard of care principle are inapt. Surely we do not wish rigid adherence to these principles to entail that no testing of the much-needed short course therapies is permissible at all. This result would serve neither individual nor communal interests.

Rightly understood, these standards require researchers to put the individual patient's interest ahead of the community's need for medical information. In the special case where adherence to the letter of the standards would frustrate the interests of both the individual and the group, we ought to adhere to the principle from which these standards emanate, rather than to the standards themselves. We can suspend the standards, but not the core principle. Here that principle

would clearly prohibit randomization to placebo. The commitment to individual well-being entails that the investigator treat the research subject simultaneously as a patient. In practice, such a standard does not require that researchers give each woman the best therapy available anywhere in the world. But it does require that researchers studying transmission rates also treat the patient (woman and infant) in a manner designed to reduce transmission.

—Deborah Hellman

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Biology, Consciousness, and the Definition of Death

When does a human life end? This question used to be answered quite easily. According to the traditional standard, which has only recently been questioned, a human being is dead when her heart and lungs have irreversibly ceased to function. In some cases, permanent loss of consciousness may precede cardiopulmonary failure. But the interval between these two events has typically been a matter of hours or days, and the traditional standard regards only the latter event as definitive.

Today, however, the development of mechanical respirators, electronic pacemakers, and other medical technologies has created the possibility of a greater temporal separation between various system failures—a patient may lose consciousness a decade or more before his heart and lungs fail, for example. Meanwhile, interest in the availability of transplantable organs has provided an incentive not to delay unnecessarily in determining that a person has died. (Current law, it need hardly be said, embraces the so-called "dead-donor rule": organs necessary for life may not be procured before donors are dead, since the removal of such organs would otherwise cause death—that is, kill the donors—violating laws against homicide.)

Two landmark reports helped to generate a movement away from exclusive reliance on the traditional

standard: the 1968 report of the Harvard Medical School Ad Hoc Committee and a 1981 presidential commission report, *Defining Death*. This second document included what became the Uniform Determination of Death Act (UDDA). Today all fifty states and the District of Columbia follow the UDDA in recognizing *whole-brain death*—irreversible cessation of all functions of the entire brain—as a legal standard of death. The UDDA doesn't jettison the cardiopulmonary standard, however. Instead, it holds that death occurs whenever *either* standard (whichever applies first) is met. One important consequence of this change is that an individual can be legally dead even if her cardiopulmonary system continues to function. If a patient's entire brain is nonfunctioning, so that breathing and heartbeat are maintained only by artificial life-supports, that patient meets the whole-brain standard of death.

Some philosophers and scientists have argued that the whole-brain standard does not go far enough. Several leading authors on the subject have advocated a *higher-brain* standard, according to which death is the irreversible cessation of the capacity for consciousness. This standard is often met prior to whole-brain death, which includes death of the brainstem—that part of the brain which allows spontaneous respiration and heartbeat but is insufficient for consciousness. Thus, a

patient in a permanent coma or permanent vegetative state (PVS) meets the higher-brain, but not the whole-brain, standard of death.

Should society embrace the higher-brain standard? Should laws be changed so that permanently unconscious patients can legally be declared dead? This essay offers both conceptual and pragmatic grounds for rejecting such a change. However, it will also argue that the linkage between definitions of death and policies regarding life-supports and organ procurement is less strict than some observers might suppose. In other words, a rejection of the higher-brain standard does not imply an endorsement of policies that would prolong life at any cost.

A Biological Perspective

One way to approach the issue of defining death is to consider it from a biological perspective. The concept of death applies not only to humans, but also to nonhuman animals and plants; it is a biological fact that all organisms live and die. In asking what death is, then, it seems logical to ask what is common to all instances of death. The answer will provide the core meaning of the term "death."

What happens when a human, dog, squid, bee, or tulip dies? In each case, the organism breaks down in a fundamental way. Particular systems may break down before others, and the events from the first major system failure to eventual putrefaction clearly involve a process. But somewhere in the continuum that includes both dying and disintegration, the organism as a whole ceases to function. Charles Culver and Bernard Gert have helpfully defined death as "the permanent cessation of functioning of the organism as a whole." The phrase "organism as a whole" does not mean literally the entire organism (since loss of a limb or spleen, say, is compatible with life); it refers to the integrated functioning of most or all of the important subsystems (organ subsystems, in the case of all but the most primitive animals). This, roughly, is the core meaning of "death" as seen from a biological perspective.

Both of the currently recognized standards of death are arguably compatible with this organismic concept. Under the cardiopulmonary standard, death occurs when a patient's heart and lungs have permanently ceased to function—that is to say, when they no longer support each other or other organ systems. Under the whole-brain standard, a patient is dead when her brainstem no longer orchestrates her vital functions. In either case, the appeal is to the role of a particular organ or system in the functioning of the organism as a whole.

In contrast, the higher-brain standard is clearly not compatible with the organismic concept of death.

Consider a patient in a permanent vegetative state. Her mind is gone, but her brainstem continues to function. Her heart beats spontaneously, maintaining normal blood pressure. Body temperature continues to be regulated, and other organ systems function as usual. From a biological standpoint, it would appear that this

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organism continues to function as a whole, despite her permanent unconsciousness. Thus, from this standpoint, the higher-brain standard of death appears incorrect. It must receive support from a different perspective, to which we now turn.

A Person-Based Perspective

Higher-brain theorists contend that human death cannot be adequately understood by assimilating it to organismic death in general. This claim can be defended in two different ways.

First, it might be argued that there is no core meaning shared by all correct applications of the term "death." The various uses of the term, on this view, bear only a "family resemblance" to one another. In a family, a certain characteristic feature (e.g., above-average height) may be shared by most but not all members, while another common feature (e.g., brown eyes) is shared by a different set of family members, and so on, without any single, definable family "look" being shared by all. Similarly, there might be no essence common to the deaths of all organisms that can be invoked in an effort to illuminate human death.

Second, it might be argued that even if there is a core meaning of "death" applying to all organisms, a *reconstruction* of the term may be justified in the human case. Sometimes the original meaning of a term is justifiably extended or reshaped to fit certain practical interests or changing circumstances. The original meaning of "conversation," for example, may have required that two individuals be able to hear or at least see each other. But the rapid exchange made possible at great distances by e-mail seems to justify applying the term "conversation" in this context. Perhaps a reconstruction of the term "death" is justified in its application to the special case of human beings.

From the present perspective, then, the core-meaning argument does not settle the question of the nature of human death. A more promising approach, on this view, is to take seriously the fact that we are not only organisms; we are also *persons*. According to one promi-

nent argument for the higher-brain standard, the capacity for consciousness is *essential* to persons—essential in the strict philosophical sense of being necessary: Any being lacking this capacity is not a person. It follows that when someone permanently loses the capacity for consciousness, there is no longer a person associated with the body. The person who was, is no more—that is to say, she is dead. Thus, the argument goes, *human* death is captured by the higher-brain standard.

While this essentialist argument may represent the most prominent case for the higher-brain view, there is also an important value-based alternative, which runs as follows. Human persons value consciousness as necessary for any meaningful existence. When we permanently lose consciousness, we lose all possibility of such an existence: We can no longer think or feel, enjoy relationships with loved ones, pursue projects, or act at all. When we no longer know we exist, there is no point to existing; when we are not aware of life, life has no meaning for us. Because human beings regard consciousness as a precondition for all meaning and value, the permanent loss of the capacity for consciousness is rightly regarded as human death.

Problems with the Person-Based Approach

We have seen that human death can be conceptualized from a biological perspective and from a person-based perspective, with only the latter supporting the higher-brain standard. Can we reasonably select between these two approaches? The case for favoring the biological concept of death begins with a critique of the person-based approach.

First of all, it is an approach that faces certain unresolvable tensions. Here is one example. Since human beings *are* organisms as well as persons, the concept of organismic death clearly applies in the human case. (This, I should say, is a fact acknowledged by some higher-brain theorists, even though it undermines the “family resemblance” thesis.) As we have seen, however, permanent unconsciousness is not definitive of organismic death. Thus, if the higher-brain standard is correct, then in PVS cases there are *two* deaths—one of the person and a later death of the organism—for a single human being. This is somewhat odd, since we are accustomed to believing that there is just one death associated with every human being. The oddity is reflected in the phraseology of Tristram Engelhardt, a higher-brain theorist, who describes the permanently unconscious as “biologically living corpses.”

A difficulty that faces the essentialist argument in particular concerns its appeal to the concept of a person. The capacity for consciousness is held to be necessary for personhood. But this capacity cannot be *sufficient*, since many animals that clearly are not persons (e.g., other mammals, birds) have the capacity for

consciousness, too. So what other capacities are necessary? The philosophical tradition that requires consciousness for personhood traces back at least to Locke, who held that persons also possess the traits of self-awareness over time and rationality. This tradition, recently championed by Derek Parfit, consistently requires some psychological capacities beyond mere consciousness to distinguish persons from such conscious nonpersons as gerbils and blue jays. Thus Parfit holds that a person must be “self-conscious, aware of its identity and continued existence over time,” while Engelhardt states that “[w]hat distinguishes persons is their capacity to be self-conscious, rational, and concerned with worthiness of blame and praise.” (It may be tempting to say that a person is any *Homo sapiens* with the capacity for consciousness. But this move has been consistently rejected as chauvinistic; we may reasonably ask whether individuals outside our species—such as *Homo erectus*, the Great Apes, the computer HAL in 2001, and God—were or are persons.)

Where is the problem? The essentialist argument assumes not just that persons are essentially beings with the capacity for consciousness, but also that *we are essentially (necessarily) persons*. Without this second assumption, one could hold that we continue to exist, to live, after losing personhood (including the capacity for consciousness)—the very point that the higher-brain theorists wish to deny. Now the assumption that we are essentially persons, combined with the point that personhood requires psychological capacities in addition to consciousness (say, rationality and self-awareness), has a peculiar implication. Since newborns lack the psychological capacities in question,

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newborns are, strictly speaking, not persons (even if we often casually refer to them as persons). But if we are essentially persons, meaning we cannot exist as nonpersons, then *we* did not exist as newborns; the newborns in question were our organismic predecessors. This is a strange result, since we all believe that we were born.

The greatest difficulty with the essentialist argument is that the way it reasons about death is pernicious. By assuming that we are essentially persons, and defining death as loss of personhood, the argument logically invites an expansion of those humans to be counted as dead. Again, analyses of personhood standardly require more than the capacity for consciousness, so the present line of reasoning suggests that some highly subnormal



"Will that be all, sir?"

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yet conscious human beings—for example, the most severely demented individuals—are actually dead.

The value-based alternative to the essentialist argument also has its vulnerabilities. First, in its effort to define meaninglessness as death, it conflates two concepts whose distinctness cannot simply be erased by definitional fiat. One might agree that a future of permanent unconsciousness would be devoid of meaning and value, but that doesn't show that one wouldn't be alive in such a state. The higher-brain theorist might reply that, even so, the fact that existing in a permanently unconscious state would be meaningless is sufficient reason to *regard* that state as death. But this, too, turns out to be a pernicious way to argue. For while it is reasonable to think that a meaningful existence requires the capacity for consciousness, it is no less reasonable to hold that the former requires a modicum of self-awareness and some ability to socialize with others (or at least the prospect of developing these, as with newborns). The fact that some severely disabled individuals are neither self-aware nor able to socialize

casts doubt on this whole way of thinking about life and death.

Finally, any effort to base a standard for human death on "our" values confronts the problem of value pluralism. While liberal intellectuals, and perhaps a majority of Americans, are likely to regard a future of permanent unconsciousness as meaningless, many people—some of them religious fundamentalists—would disagree. For the dissenters, biological life in PVS or permanent coma is at least *life* and therefore valuable (perhaps infinitely so). For at least some of these people, such a state is meaningful because it is a gift from God, a gift that must not be thrown away through active killing—or defined away with a new definition of death.

Definitions and Policy

Since the higher-brain standard might be viewed as a basis for enacting liberal policies regarding end-of-life medical care and organ donation, rejecting this

standard may seem tantamount to embracing conservative policies. This is not so.

It is firmly established, both in case law and in medical ethics, that competent adult patients have the right to refuse life-supporting medical treatments, even artificial nutrition and hydration. By the same token, an

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appropriate surrogate can refuse life-supports on behalf of the legally incompetent if there is sufficient reason to believe the patient would have refused treatment in the present circumstances. Because of this broad legal and moral right to refuse treatment, life-supports that are unwanted or are considered unhelpful—including life-supports for permanently unconscious patients—can be terminated without first declaring the patient dead.

What if a family or another surrogate requests life-supports for a patient who has become permanently unconscious? Would not honoring such requests necessitate major expenditures on care that many people believe to be futile? It would, but the public need not fund such care. While there are compelling arguments for the thesis that society should ensure all citizens access to health care (an obligation our society sadly fails to meet), there is no support for the claim that the public must fund *all* desired care. What is owed is some basic package of health care benefits, and it is reasonable to include in such a publicly funded package only care that everyone can agree is beneficial. Thus, treatment that is arguably futile, including life-supports for the permanently unconscious, need not be covered.

On the other hand, if a patient's family is willing to pay for such care, or subscribes to a private insurance scheme that covers it, it should be provided (at least if there is no shortage of available hospital beds and other critical supplies). In such a case, the family or insurance company does *not* consider the treatment futile—no doubt because it successfully prolongs the patient's life (which the family or insurance company considers a substantial benefit) without causing any suffering.

Rejecting the higher-brain standard entails neither forcing patients to have treatment they don't want or need, nor making the public pay for care that many consider futile. But since permanent unconsciousness often precedes death as determined by an organismic standard (whole-brain or cardiopulmonary), doesn't rejecting the higher-brain approach mean that we must often delay before procuring donor organs?

Not necessarily, because in principle this issue can be addressed at another level. Without adopting the higher-brain standard, we *could* obtain organs from the permanently unconscious if we allowed an exception to the dead-donor rule in this sort of case. However, permitting any exception to the rule would provoke legitimate slippery-slope concerns. That is, if we were to allow one exception, predictably there would be pressures—economic and otherwise—to make additional exceptions.

How one reacts to this prospect depends both on one's ethical judgments about such possible exceptions and on one's degree of trust in the medical profession, legislators, and the broader public. I, for one, am not inclined to abandon the dead-donor rule, even for a class of patients who are permanently unconscious. However, prospective organ donors can already (through advance medical directives, for example) refuse life-supports, including nutrition and hydration. This means that even if we retain the dead-donor rule, the practical loss of rejecting the higher-brain standard of death—not getting some organs quite as soon as we otherwise might—is very modest indeed. And as we have seen, several considerations, both conceptual and pragmatic, favor this position.

—David DeGrazia

David DeGrazia, associate professor of philosophy at George Washington University, is the author of *Taking Animals Seriously: Mental Life and Moral Status* (Cambridge University Press, 1996) and coeditor (with Thomas A. Mappes) of *Biomedical Ethics*, 4th ed. (McGraw-Hill, 1996). Sources: John Locke, *Essay Concerning Human Understanding*, 2nd ed. (1694), Bk. II; Derek Parfit, *Reasons and Persons* (Clarendon Press, 1984); Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Death, "A Definition of Irreversible Coma: A Report of the Ad Hoc Committee," *JAMA*, vol. 205, no. 6 (1968); U.S. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Defining Death: A Report on the Medical, Legal, and Ethical Issues in the Determination of Death* (Government Printing Office, 1981); Lawrence C. Becker, "Human Being: The Boundaries of the Concept," *Philosophy and Public Affairs*, vol. 4, no. 4 (1975); Michael B. Green and Daniel Wikler, "Brain Death and Personal Identity," *Philosophy and Public Affairs*, vol. 9 (1980); Edward T. Bartlett and Stuart J. Youngner, "Human Death and the Destruction of the Neocortex," in *Death: Beyond Whole-Brain Criteria*, edited by Richard M. Zaner (Kluwer, 1988); Charles M. Culver and Bernard Gert, *Philosophy in Medicine: Conceptual and Ethical Issues in Medicine and Psychiatry* (Oxford University Press, 1982); H. Tristram Engelhardt, Jr., *The Foundations of Bioethics*, 2nd ed. (Oxford University Press, 1996); David DeGrazia, "Great Apes, Dolphins, and the Concept of Personhood," *Southern Journal of Philosophy*, vol. 35 (1997).



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