

inconsistent with a conception of sexuality as expressed within monogamous marriage only, and primarily oriented toward its natural end or purpose, procreation.

The most general moral precept of the natural law is "do good and avoid evil." Evil must always be avoided, even if avoiding evil will bring about great harm. As St. Paul put it, "Do not evil that good may come." The commission of an evil deed, such as the murder of an innocent person, can never be condoned, even if it is intended to advance the noblest of ends.

THE DOCTRINE OF THE DOUBLE EFFECT

The doctrine of the double effect (DDE) was formulated in response to the recognition that an act may have both a good and a bad effect. Are we to shun such an action because of its bad effect? For example, administering morphine to a dying cancer patient may be necessary to ease his or her pain, but it may also depress respiration and hasten death. Must a doctor refrain from using the most effective pain medication because it might also kill the patient? Would this count as "doing evil (causing death) that good (relieving pain) may come"?

According to Catholic doctrine, the permissibility of the action depends largely on whether the bad effect is intended, or merely foreseen and permitted to happen. In addition, it must also be the case that

1. The act itself is not intrinsically wrong.
2. The good effect is produced directly by the action and not by the bad effect.
3. The good effect is sufficiently desirable to compensate for allowing the bad effect.²²

Applying these conditions, the use of pain-relieving drugs that may also shorten life can be justified. The physician's purpose is not to kill, but rather to ease pain, although he or she foresees that death is a possible, or even likely, result. Giving drugs for pain relief is not intrinsically wrong; indeed, it is a central function of the physician. The good effect—the relief of pain—is produced directly by the administering of the drug, and not by the bad effect: namely, the patient's

death. And lastly, when a patient is both terminally ill and suffering, the desirability of relieving suffering compensates for the shortening of his or her life. Thus, the DDE can be a useful tool for justifying an action that has a bad effect.

Double-effect reasoning has sometimes been incorrectly and speciously used. Someone who shoots a person at point-blank range cannot use the DDE to mitigate his or her responsibility, saying, "I didn't mean to kill him, only to get him out of the way." One is guilty of killing a person even if death is not desired in itself, but only as a means to achieve an end. Recently, a Michigan jury used such specious reasoning in their acquittal of Dr. Jack Kevorkian, who was accused of violating the state's assisted-suicide law when he helped a terminally ill man to die by carbon monoxide poisoning. The law made an exception for physicians who administer pain relieving drugs that may cause death. The jury accepted Kevorkian's argument that he did not intend to cause the man's death, but only to relieve his suffering. This reasoning, however, is a perversion of the DDE. Carbon monoxide, unlike morphine, is never offered as a means of pain relief. It has no medical use at all. It causes death, and death causes cessation of pain, but this is bringing about the good effect by means of the bad effect, which violates the second condition of the DDE. Thus, the DDE cannot be used to justify Dr. Kevorkian's act or to sustain his claim that he did not intend to cause the man's death. After the acquittal, law professor Yale Kamisar characterized the jury's decision as "confused." However, it seems likely that the decision was less the result of confusion about the appropriate application of double-effect reasoning, and more the result of their belief that Dr. Kevorkian was *right* in doing what he did, and should not be punished.

Critics of the DDE argue that the principle is confusing and difficult to apply. It is not always easy to know whether a result is intended or merely foreseen, or whether it is brought about (impermissibly) by means of the bad effect or (permissibly) by the morally neutral action. The concepts of "means" and "intention" need to be made clearer before the DDE can give clear guidance.

Some theorists doubt that the DDE has moral significance even if it can be clearly and correctly

22. "Double Effect," *New Catholic Encyclopedia*.

applied. They note that the whole point of the doctrine is to avoid the counterintuitive implications of an absolutist ethic that insists that some acts (like directly causing the death of an innocent person) are absolutely wrong, regardless of reason or context. However, why should we assimilate garden-variety murder with causing the death of a terminally ill patient who wants to die? The solution, these critics say, is to recognize that causing death is not always wrong. If death is desirable, why should it make any difference *how* death is brought about—whether indirectly, by pain relief, or directly, by carbon monoxide?

ORDINARY VERSUS EXTRAORDINARY TREATMENT

Another influential distinction devised by Catholic medical ethicists is the distinction between “ordinary” and “extraordinary” treatment. Ordinary treatment is considered obligatory, while there is no obligation to provide extraordinary treatment. How are these two types of treatment to be best defined?

This question is complicated because there are various different grounds that have been used to distinguish ordinary and extraordinary treatments. For example, “ordinary” treatment may be viewed as routine or standard care, while “extraordinary” treatment is considered unusual. This distinction has the advantage of providing an empirical definition, based on current medical practice. However, it is not clear that this basis has moral significance. If a treatment is helpful to a patient, what difference does it make that it is unusual, or even unique? For this reason, some people prefer to think of the distinction between ordinary and extraordinary treatment as being a distinction between “beneficial” and “nonbeneficial” treatment.

Understood this way, the ordinary/extraordinary distinction is context dependent. Treatment such as a respirator may be ordinary in one context (e.g., to sustain a patient through a severe bout with a respiratory disease), but extraordinary in another (e.g., to sustain the life of a severely brain-damaged patient in a persistent vegetative state [PVS]). This makes the normative assumption that a PVS individual is not benefited by continued existence with no hope of recovery to con-

sciousness. Someone who regards biological life itself as valuable will not agree that the use of a respirator to sustain the life of a PVS patient is “nonbeneficial,” and so will not classify the treatment as extraordinary. However, this reasoning raises serious doubts about the usefulness of the distinction. If our moral views determine whether a treatment is to be classified as ordinary or extraordinary, the distinction itself cannot provide moral guidance.

Despite this difficulty, doctors and laypeople alike often use terms like “extraordinary” and “heroic” to characterize treatment they regard as inappropriate. Rather than regarding these classifications as morally significant in themselves, it is important to understand the moral presuppositions lying behind them. It is these presuppositions—not the shorthand labels that stand for them—that need discussion and debate (see “In the Matter of Claire C. Conroy,” Part Two, Section Three).

“RIGHTS-BASED” APPROACHES

The idea that, simply by virtue of being human, people can have rights regardless of the legal system under which they live, has ancient roots. The Stoic philosophers recognized the possibility that actual human laws might be unjust. They contrasted conventional laws with an unvarying natural law, to which everyone had access through individual conscience, and by which actual laws could be judged.²³ Later, the spread of the Roman Empire provided a system of law that applied to all people, whatever their tribe, race, or nationality. Christianity also incorporated the idea of natural law as the paramount standard by which all social institutions and laws should be judged.

However, neither the ancient Greeks, nor the Romans, nor the medieval Christians made the transition to natural rights. The notion of natural rights had its heyday in the seventeenth century, with writers like Grotius, Pufendorf, and Locke. Rights also played a crucial role in the American and French revolutions in the late eighteenth century. However, states Brenda Almond, “In the

23. Brenda Almond, “Rights,” in *A Companion to Ethics*, edited by Peter Singer (Basil Blackwell, 1993), 259.

nineteenth and early twentieth centuries, . . . appeal to rights was eclipsed by movements such as utilitarianism and Marxism, which could not, or would not, accommodate them."²⁴

Appeal to natural rights revived in the aftermath of World War II, during the Nuremberg trials. Some theorists argued that since the actions of the accused were not contrary to German law (indeed, were required by it), the trials had no legal basis, but were merely a cynical attempt by the victors to punish the losers. Others maintained that the trials were a return to principles of legality and justice in the aftermath of Nazi barbarism, and that these principles have their foundation in both international and natural law.

Natural or human rights unquestionably occupy an important role in contemporary international moral and political debate. Apartheid, the death penalty, and female genital mutilation, to take just a few examples, have all been condemned as violations of human rights. Discussions of abortion, euthanasia, access to health care, the treatment of animals and the environment, and our obligations to future generations are typically framed in terms of conflicting moral rights.

Some see "rights talk" as unnecessary and vague. Bentham regarded the notion of moral—as opposed to legal—rights as "nonsense," and the notion of natural rights as "nonsense on stilts."²⁵ According to Bentham and other legal positivists, legal rights can be explained as claims that will be upheld by the power of the state. Legal rights can be identified because they stem from legislative acts or judicial decisions. So-called moral rights have no such legitimation, and it is partly for this reason that positivists regard them as empty rhetoric. According to utilitarianism, to say that someone has a moral right to something is only a shorthand way of saying that he or she *ought* to have it, and ought to be protected in his or her possession of it. There is, then, a role for moral rights in utilitarianism, but it is completely derivative from the principle of utility. To some extent, rights can serve as barriers against the application

of overall utility. For example, utilitarians might, on grounds of utility, take property rights very seriously. They will agree that individuals should not be deprived of their property, unless this is essential to the general welfare, and even then there should be compensation. In other words, while utilitarians reject the Lockean idea of a "natural right to property," they are likely to agree that there are good utilitarian reasons to create something very like our existing system of property rights.

Rights-based critics of utilitarianism maintain that its conception of rights gives insufficient protection to individuals, whose happiness may be sacrificed for the benefit of the many. In *Taking Rights Seriously*, Ronald Dworkin offers a penetrating critique of the positivist analysis of law, as well as the utilitarian morality intimately linked to it. Rather than seeing rights as a device to achieve net utility, Dworkin sees rights as "trumps," as claims that supersede other kinds of claims. Similarly, Robert Nozick conceives of rights as "side constraints," which place limits on the things we may do to achieve goals.

In *Anarchy, State, and Utopia*, Nozick presents a libertarian view that is fundamentally opposed to utilitarianism.²⁶ He thus joins Kant, Rawls, and Dworkin in this opposition, holding that an action that is unfair or that violates someone's rights cannot be right, even if it does achieve the greatest net happiness. Happiness might be maximized by forcing people to volunteer their time to work in hospitals, or by making them donate blood or spare kidneys, but they have no obligation to do so according to Nozick; indeed, they have a right not to do so.

Nozick is equally opposed to Rawls's contractarianism. The central question of distributive justice is, "How should the goods of society be distributed?" According to Nozick, this question misconceives the issue because it implies that the goods of society—money, property, services—are there simply to be distributed, like manna fallen from the heavens. Instead, these goods already belong to people who have invested their labor in them, been given them, or traded something for them. Taking goods away from those who are entitled

24. Ibid.

25. From *Anarchical Fallacies: Being an Examination of the Declaration of Rights Issued During the French Revolution*. Cited in Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 184.

26. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

to them violates their rights, and so is fundamentally unfair.

Another important feature of libertarianism is the distinction between negative and positive rights. Libertarians maintain that the only rights are negative rights: rights to be left alone, rights not to be interfered with. They reject positive rights—rights to be helped—because recognition of such rights would infringe on the freedom of individuals to spend their time and money as they choose. An example of a positive right is a right to an education. Libertarians oppose taxation generally on the grounds that it deprives individuals of their legitimate property; thus, they oppose taxation for the creation and support of public schools. However, they recognize the need for an army to defend a country from foreign enemies, for a police force to protect citizens against aggression and attack, and for a legal system to uphold contractual agreements. Taxation to support these purposes is regarded as legitimate.

Libertarians reject the idea of a right to health care, since health care is regarded as a positive right—a right to be given certain treatment. However, it is not clear why they assume this distinction to have such moral significance. If it is legitimate to tax people for a police force that will protect their lives, why isn't it equally legitimate to tax people to provide them with health care, which is also often necessary for survival?

Perhaps the biggest objection to libertarianism is that it works to the disadvantage of those who, through no fault of their own, are born into poverty. Poverty limits people's life chances. The poor typically get substandard health care, inferior schools, and inadequate housing. These disadvantages make it unlikely that they will have an equal opportunity to obtain the goods of society: jobs, money, and material goods. Rawls attempts to compensate for life's initial unfairness, but libertarianism reinforces it.

In a rights-based approach, the fundamental question in our opening case study would be whether Jim Lasken has a right to end his life, and to ask his doctor for help in doing so. Those who oppose voluntary euthanasia and physician-assisted suicide maintain that Lasken has no such right. They see a distinction between the established right to refuse medical treatment, and an affirmative right to seek help in dying. However, this interpre-

tation was disputed for the first time by a federal judge on May 3, 1994, when Judge Barbara F. Rothstein found Washington state's assisted-suicide law unconstitutional. Rothstein held that the law places an undue burden on the Fourteenth Amendment interests of terminally ill, mentally competent patients. Moreover, she found that the law "unconstitutionally distinguishes between two similarly situated groups"; namely, those on life-support and those not on life-support. Washington permits terminally ill patients to hasten their deaths by allowing removal of life-support systems, yet bars physicians from giving medication that would bring about the same results. Rothstein wrote that from "a constitutional perspective, the court does not believe that a distinction can be drawn between refusing life-sustaining medical treatment, and physician-assisted suicide by an uncoerced, mentally competent, terminally ill adult."²⁷

Rights play an important role in moral discourse. Without the notion of individual rights, it would be difficult—if not impossible—to express our convictions about informed consent, protections for research subjects, and other such issues. However, this should not lead us to conclude that the application of individual rights is always appropriate, or that such rights are the only relevant factors.

The area of treatment refusal presents an obviously inappropriate instance of invoking the right to self-determination. Suppose that a patient enters an emergency room screaming from the pain of severe burns. The attending physicians conclude that, although her burns are serious, she will recover if given immediate and sustained treatment. Suddenly the patient, on the verge of shock, rebuffs the efforts of the medical staff on the grounds that she has a right to "die with dignity." Clearly, in this sort of case it would be wrong for the medical staff to honor the claimed right to refuse treatment. Not only is the woman mistaken in her belief that she is about to die, regardless of treatment, but her capacity for self-determination has itself been substantially impaired or temporarily eclipsed by her recent trauma. To honor her refusal would be tantamount to treating this incompetent person as though she were competent, with morally disastrous results.

27. *National Law Journal* (May 16, 1994): A6.

The above example demonstrates limits to the scope of the right of self-determination; namely, that it should be restricted to competent individuals. Conflicts between individual rights and the welfare of other persons—including, on occasion, the welfare of the entire community—constitute another set of problematic issues of libertarianism. For example, some libertarians argue that people should have the right to do whatever they please, so long as they do not violate anyone's rights. On a small-scale, interpersonal level, this principle is extremely problematic. Imagine a jilted lover who decides on impulse to marry another woman, not because he loves her, but merely to spite the woman who rejected him. We might all agree that this man has a right to marry whomever he chooses, but is "having a right" the same as "doing the right thing"? Obviously not, since the decision to marry out of spite will predictably inflict great suffering upon his unsuspecting bride.

On a broader social scale, libertarians often assert that individual freedom should include the right to shoot heroin, smoke crack cocaine, and take any other accurately labeled drug, so long as an individual freely chooses to do so. If our liberty is to mean anything, so the argument goes, it must encompass the right to take risks. To allow the government to decide what we may or may not put into our own bodies is to give up control over them. It is analogous to slavery.²⁸

The trouble with a libertarian approach to the drug problem is that it ignores social consequences, and focuses only on individual rights. Drugs have destroyed many inner-city neighborhoods. Some of the related problems—such as crime due to illegal trafficking—might be solved by legalization, but not all of them would. Drug addiction has contributed to a skyrocketing rate of child abuse and neglect, because addicts—especially crack addicts—make notoriously poor parents. In addition, drug abuse by pregnant women is connected with dramatic increases in infant mortality, congenital syphilis, and HIV-positive infants. Serious students of the drug problem realize that hard questions remain even after the right of the

28. Walter Block, "Drug Prohibition: A Legal and Economic Analysis," in *Drugs, Morality, and the Law*, edited by Steven Luper-Foy and Curtis Brown (New York: Garland Publishing, Inc.), 199–216.

individual to go to the devil has been invoked. What, for example, is the causal connection, if any, between unemployment, poverty, and ghetto conditions on the one hand, and hard drug addiction on the other? Would not an important consideration be if widespread use of drugs could be shown to reinforce racism and poverty? When unthinkingly waved as a trump, the right to self-determination can mask injustice and justify inequity.

We also need to ask what the effect of legalization on access and consumption would be. Some say that it would have little effect, since it is already so easy to obtain drugs in certain areas. At the same time, it should be remembered that three times as many Americans abuse alcohol as use illegal drugs, largely because of availability. From a public health perspective, if the end result of legalization is higher addiction rates, this is a serious argument against it. Astonishingly, this consideration has no bearing at all on a libertarian view. For the libertarian, the level of addiction in society is irrelevant; the only thing that matters is whether the individual has made a free and voluntary decision to use drugs. Once again, the individual's freedom is everything, and the impact on society is ignored.²⁹

Rights are important, for they protect individuals from—as Mill called it—"the tyranny of the majority." Nevertheless, an overemphasis on rights can sometimes exacerbate conflict. For example, to justify criminal punishment of women who use drugs during pregnancy, conservatives appeal to fetal rights. At the other extreme, some feminists and civil libertarians insist that a woman has a right to control her own body during pregnancy, regardless of the harm she causes to her future child. A recognition that mother and fetus are a unit, whose interests are generally promoted together, might be preferable to a rigid rights-based approach.

COMMUNITARIAN ETHICS

For all their differences, Hobbes, Mill, Kant, Rawls, Gauthier, and Nozick share the belief, bequeathed to us by the Enlightenment philosophers of the

29. Bonnie Steinbock, "Drug Prohibition: A Public-Health Perspective," in *Drugs, Morality, and the Law*, 233–234.

eighteenth century, that people should find moral rules in the application of reason to practical conduct. For this tradition, which we shall call "liberal individualism," ethical truth must be sought not in the vagaries of history, tradition, and religious faith, but rather in the universal tenets of rationality. Whether ethical norms are conceived in terms of enlightened self-interest, maximized utility, or the recognition of autonomy and human rights, they are viewed by this tradition as objective and universal, applicable to all times and places.

Another important theoretical strand connecting these theorists is their commitment to the individual as the unique focal point of moral concern. In utilitarianism, the collective preferences of each individual determine right and wrong. Everyone is to count as one, and nobody for more than one. However, the interest of the community as a whole may conflict with any particular individual's interest. Thus, a perennial problem for utilitarianism is the conflict between individual rights and the welfare of society as a whole. By contrast, "rights-based" Kantian and contractarian moral theory, as well as Nozick's brand of libertarianism, are committed to the notion that the rights and dignity of the individual should never (or rarely) be sacrificed to the interests of the larger society. Indeed, the whole point of social organization, of the "social contract," according to this tradition is the advancement of the *individual's* interests, rights, and happiness.

An important corollary of this view is the claim that, since different individuals will naturally have different values and conflicting visions of the good life, a truly liberal society will not—indeed cannot justifiably—adopt any particular conception of the good life to the exclusion or diminution of others.³⁰ Thus, a liberal society must remain "neutral" with regard to these competing conceptions of value and the good. To do otherwise—for example, by imposing a religion-based test on what kind of literature people should be allowed to read—amounts to a serious form of tyranny.

This ethical consensus on rationalism and individualism has had a profound impact on the development of contemporary biomedical ethics.

30. Ronald Dworkin, "Liberalism," in *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 181–204.

Recently, however, the consensus has been challenged by a number of critics who can usefully, if somewhat uneasily, be lumped under the common banner of "communitarianism."³¹ According to communitarian ethical theorists, all of our guiding ethical norms, rules, principles, theories, and virtues can be traced to distinct ethical traditions and ways of life. They argue that it is impossible for us to "bootstrap" ourselves outside of time and space in order to discover some eternal realm of ethical insight. Rather, they claim, history, tradition, and concrete moral communities are the real wellsprings of our moral thought, judgment, and action. As Aristotle put it, we are social beings; our values, our conceptual schemes, our very identities are engendered, shaped, and nurtured within the confines of community.

Within this countertradition, ethical truth is thus particular, not universal. In contrast to the liberal claim that society must remain neutral vis-à-vis competing conceptions of the good life, communitarians argue that if any progress is to be made on a host of public controversies, ranging from pornography to the treatment of dying patients, we will have to begin not with abstract statements of rights, nor with an attempt to promote the good of all by promoting the good of each, but rather with some conception of common meanings, with a vision of what we take to be a "good society." Necessarily, our conception of this good society will crucially depend upon our own history, traditions, institutions, and customs.

Communitarians reject both the rationalism of liberalism's approach to method and their claim to value neutrality. In opposition to individualistic utilitarianism, they offer the idea of a *common good*.

31. See, for example, Alasdair MacIntyre, *After Virtue* (Notre Dame, IN: University of Notre Dame Press, 1981). Reprinted in *Contemporary Moral Problems*, 4th ed., edited by James E. White (St. Paul, MN: West Publishing Company, 1994). See also Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); Charles Taylor, "Atomism," in *Philosophical Papers*, vol. 2 (Cambridge: Cambridge University Press, 1982); Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983); Shlomo Avineri and Avner de-Shalit, eds., *Communitarianism and Individualism* (Oxford: Oxford University Press, 1992); and, for a good general overview, Stephen Mulhall and Adam Swift, *Liberals and Communitarians* (Oxford: Basil Blackwell, 1992).

That is, where utilitarianism looks to the welfare of all individuals taken together, communitarianism looks to the *shared* values, ideals, and goals of a community. Where utilitarianism asks, "Which policies will produce the greatest happiness, on balance, of all of the individuals in society?" communitarianism asks, "Which policies will promote the kind of community in which we want to live?" The difference is subtle, but real. Against rights-based approaches, communitarians reject the penchant for elevating the individual above the social group or community. According to communitarians, the tendency of liberalism to focus so insistently on individual rights—to the exclusion of other social interests—can give rise to circumstances that a good society would not, and should not, tolerate.³² Take, for example, the practice of some very large corporations with deep community roots—firms employing thousands of workers in relatively small cities—of simply pulling up stakes to search for cheaper labor markets in Mexico. In a society that gives pride of place to rights of ownership, such companies are given total freedom of movement; but the social costs of such rights and freedom can be enormous and often devastating to the affected communities, adding to unemployment, poverty, and the disintegration of neighborhoods and families. A good society, it is argued, would focus not only on individual rights, but also on the good of the larger community.

The dominance of liberal individualism within bioethics has recently been challenged on a number of fronts. Daniel Callahan has brought a communitarian perspective to debates over health care issues, such as rationing and reform (see Part Six, Section Two). According to Callahan, the combination of our desire to provide universal access to care, the burgeoning cost of high-tech medicine, and the sharp rise in the population of the elderly force some very hard choices that may decide who will live. Instead of starting, in standard liberal fashion, with individual wants, needs, interests, and rights, Callahan urges us to begin by asking what kind of society we wish to have—or as one of

32. See, e.g., Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991).

his book titles puts it, "What kind of life?"³³ To get at this big question, Callahan must confront some other very difficult and controversial questions, such as, What ought to be the goals and virtues of elderly persons? Should they seek individual happiness, or devote themselves to the education and welfare of future generations? And what ought to be the goals of medicine at various stages of the life cycle? Should medicine seek, at great expense, to forestall death for the very old with the latest high-tech devices, or should it merely try to provide dignified terminal *care*? Clearly, all this talk about goals and virtues necessarily implicates us in a quest for common meanings and values. Rather than ruling such questions off-limits due to the strictures of liberal neutrality, Callahan claims simply that we *must* address them as a community if we are to act responsibly. Failure to do so, thus allowing each person to chart his or her own course, could well vindicate individual freedom of the elderly at the expense of the young.

How might a communitarian interpret our case of physician-assisted suicide? This is a difficult question to answer in light of the remarkable diversity among communitarian thinkers. For communitarians such as Alasdair MacIntyre, the emphasis upon history, traditional practices, and virtues leads to the wholesale abandonment of liberal individualism and the embrace of a rather "conservative" political agenda. More moderate communitarians, on the other hand, some of whom are politically quite "progressive," stress the importance of social meanings and communal values while attempting to preserve a more modest role for the language of individual rights.

Some communitarians, then, might approach the case of Dr. Brody and Jim Lasken by stressing the customary and time-honored prohibition of

33. Daniel Callahan, *What Kind of Life?* (New York: Simon and Schuster, 1990). See also his *Setting Limits* (New York: Simon and Schuster, 1987). For a recent attempt to develop a comprehensive communitarian theory of bioethics, focusing specifically on end-of-life and access to health care issues, see Ezekiel Emanuel, *The Ends of Human Life: Medical Ethics in a Liberal Polity* (Cambridge, MA: Harvard University Press, 1991). A communitarian theory of organ transplantation is advanced by James Lindemann Nelson in "The Rights and Responsibilities of Potential Organ Donors: A Communitarian Approach" (Part Six, Section Three, this volume).

assisted suicide and euthanasia in all Western societies. They might argue that, in spite of individuals' strong claims to liberty in this area, the claims of society are stronger. The needs of many suicidal patients might well be met in ways other than by killing them, and society will be a better place if it acknowledges the sanctity and inviolability of human life. A similar argument might be mounted by physicians who could point to their own traditional professional commitments and values: "We heal; we don't kill. That's who we are as doctors; that's how we have always been."

An alternative communitarian reading of the case might reach the same conclusion, but for very different reasons. One could argue, for example, that even though individuals have a powerful claim of self-determination in this matter, the social costs of allowing a right of assisted suicide in a society distinguished by widespread poverty, lack of access to health care, and discrimination against vulnerable minority groups would be prohibitive. While the first communitarian response to our case has a distinctly conservative political flavor, the second might issue from a highly progressive, even Marxist, critique of existing social relationships.

An overall evaluation of communitarianism is an exceedingly complicated matter, due to the disparate character of the theorists and theories lumped under its banner. For the purposes of this brief introduction, however, we venture the following conclusions and recommendations. (1) We agree with the claim that all ethical principles, rules, and virtues grow out of concrete historical traditions and derive their meaning and weight from those traditions. Thus, although our moral principles might extend very far indeed in both space and time, they are not the products of disembodied "reason." (2) The emphasis upon the communal dimension of our moral lives should be viewed as a welcome corrective to the largely asocial invocation of individual rights. We should worry a lot more about the "ecology of rights,"³⁴ the kind of society, neighborhood, and family life within which rights are developed and claimed.

On the negative side, (3) the more hardcore communitarians' wholesale rejection of liberal rights in favor of traditional practices and virtues is especially problematic. Curbing the socially destructive

invocation of property rights is one thing, but limiting the freedom of individuals, in the name of communal values, to read pornography, obtain contraceptives, have abortions, or engage in homosexual relationships is, to us, a more disturbing prospect.³⁵ Finally, (4) it must be noted that an emphasis upon community, neighborhood, family, and traditional values will always express a preference for some *particular conception* of family, neighborhood, and community. For minority groups and women struggling to assert their own, quite varied, conceptions of individual and cultural identity, the communitarian impulse must learn to appreciate and respect such differences within our increasingly cosmopolitan societies.³⁶

FEMINIST ETHICS

Just as communitarianism started as a critique of certain assumptions in liberal theory, so too the idea of a feminist ethic stems, in part, from a critique of traditional ethical theories as representing the experiences of men, not women. Feminist approaches to morality seek to correct this underlying bias.

Feminism is not a monolithic theory; thus, there is no one definition of "feminist ethics." Rather, feminism incorporates a variety of social and political beliefs, and there are even differing conceptions of feminism itself. All varieties of feminism are characterized by a concern for the welfare of all women, and a belief that women have historically been—and continue to be—oppressed by patriarchal societies. As Alison Jaggar writes, "Feminist approaches to ethics are distinguished by their explicit commitment to rethinking ethics with a view to correcting whatever forms of male bias it may contain."³⁷ They all seek to unmask and challenge the oppression, discrimination, and

35. See Amy Gutmann, "Communitarian Critics of Liberalism," *Philosophy and Public Affairs* 14 (1985): 308–322.

36. See Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990); and Marilyn Friedman, "Feminism and Modern Friendship: Dislocating the Community," *Ethics* 99 (1989): 275–290.

37. Alison M. Jaggar, "Feminist Ethics: Some Issues for the Nineties," in *Contemporary Moral Problems*, 4th ed., edited by James E. White (St. Paul, MN: West Publishing Company, 1994), 61.

34. Mary Ann Glendon, *Rights Talk*, 136–144 (see note 32).

exclusion that women have faced. Feminist approaches to ethics are political, in the sense that they are keenly aware of imbalances of power between women and men, rich and poor, healthy and disabled, white people and people of color, and first world and third world peoples.

Feminist approaches to ethics are also marked by attention to the so-called "private sphere," including reflection on intimate relations, such as affection and sexuality, which were ignored by modern moral theory until quite recently. Finally, feminist ethics, rather than seeing women as less fully developed versions of men, insists on taking the moral experience of all women seriously. Modern feminists also warn against the tendency to make generalizations about "women" based on the experience of the relatively small group of middle-class white women. Many feminists today emphasize that sexual oppression is only one form of oppression, and that all forms—whether based on gender, class, race, or disability—must be acknowledged and fought.

Some issues, such as abortion and reproductive technology, are traditionally conceived as "women's issues," and many feminists have written on these topics. However, feminist approaches to bioethics are not limited to this sphere; feminist thought has influenced thinking about the health professional-patient relationship, informed consent, experimental trials, disability, access to health care, and other issues.³⁸

One issue that divides feminists is whether virtue is "gendered"; that is, whether there are virtues that are specifically female and male. Many feminists reject this approach, as the idea of "feminine virtues"—including selflessness, devotion to family needs, and submissiveness to men—has long been linked with the oppression of women. Nevertheless, many nineteenth-century women, including many who were concerned with women's emancipation, believed not only that there were specifically female virtues, but also that women were morally superior to men and that

society could be transformed through the influence of women. Today, some feminists regard many of the evils of society—war, violence, racism, the destruction of the environment—as the result of specifically male faults, such as aggression.³⁹ They believe that the "feminine" virtues of kindness, generosity, helpfulness, and sympathy can serve as a corrective to these evils.

A related issue on which feminists divide is the meaning of sexual equality. Are men and women treated equally when they are treated the same? Jaggar states that "By the end of the 1960s, most feminists in the United States had come to believe that the legal system should be sex-blind, that it should not differentiate in any way between women and men."⁴⁰ However, this version of equality does not always promote women's interests. A notorious example is "no-fault" divorce settlements that divide family property equally between husband and wife. Here, equal distribution leaves many women much worse-off financially, because women—who often shoulder most of the family responsibilities, such as housework and caring for children—typically have much lower job qualifications and less work experience than men. Divorce settlements that do not take social realities into account are egregiously unfair, and moreover reinforce sexual inequality. At the same time, the alternative way of seeking equality, by providing women with special legal protection, appears to promote sexual stereotypes.

Feminists continue to debate the correct interpretation of equality, even while some feminists reject the entire concept of equality as part of an "ethic of justice" that is characteristically masculine, relying on rules and abstracting from particular, concrete situations, instead of responding to immediately perceived needs.⁴¹ Such feminists suggest an alternative "ethic of care,"⁴² stressing connectedness, the importance of human relation-

38. See Susan Wolf, ed., *Feminism and Bioethics: Beyond Reproduction* (New York: Oxford University Press, 1995); Helen B. Holmes and Laura Purdy, eds., *Feminist Perspectives in Medical Ethics* (Bloomington: Indiana University Press, 1992); and Susan Sherwin, *No Longer Patient* (Philadelphia, PA: Temple University Press, 1992).

39. Mary Daly, *Gyn/Ecology: The Metaethics of Radical Feminism* (Boston, MA: Beacon Press, 1978).

40. Jaggar, "Feminist Ethics," 63 (see note 37).

41. *Ibid.*, 64.

42. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982); Nell Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (Berkeley: University of California Press, 1984).

ships, empathy, and an acknowledgement of dependency. It shares with virtue ethics the conviction that undue emphasis on moral rules obscures the crucial role of moral insight, virtue, and character in determining how to deal with ethical issues.

Some feminists have claimed that the ethic of caring fails to give enough attention to moral principles. Virginia Held reminds us that "an absence of principles can be an invitation to capriciousness."⁴³ Moreover, issues such as economic justice "cry out for relevant principles. Although caring may be needed to motivate us to act on such principles, the principles are not dispensable."⁴⁴ Without such principles, the claims of those unrelated to us, or different from us, may go unheeded. Moreover, it is not clear that an ethic of care would ensure the rights of women to equality and fair treatment.⁴⁵

The emphasis on the importance of emotions is seen by many (and not just feminists) as a welcome balance to the sort of moral theory that completely ignores feeling. At the same time, taking emotion as a guide can often degenerate into a "do what feels good" kind of subjective relativism.⁴⁶ The problem of relativism remains a difficult one for feminism. On the one hand, many feminists join with postmodernists and communitarians in rejecting the Enlightenment notion of a universal morality, valid for all people at all times and places. This notion ignores the particularity most feminists regard as essential and too long ignored by Western ethics. On the other hand, however, feminists are understandably concerned that their critique of the oppression of women not be dismissed as a single point of view.⁴⁷

The problem of relativism for feminists is poignantly posed by the practice of clitoridectomy, or female "circumcision." This practice, common among certain groups in Africa, involves the exci-

sion of the clitoris. Sometimes the vulva is sewn up as well. The clitoris is removed to reduce sexual pleasure and remove temptation to sexual activity; the lips of the vulva are sewn up to ensure that the young woman will remain a virgin until her marriage. The circumcision is usually done when a girl reaches puberty, although it is also often performed on very young children. It is performed without anesthesia, using unsterilized razor blades, while the girl is held down by older women. It frequently causes life-threatening blood loss and infection. It can lead to painful intercourse, infertility, and difficult childbirth.

Ironically, the frigidity or infertility caused by the mutilation leads many husbands to shun their brides. . . . Doctors throughout Africa recognize the harmful effects of female circumcision but feel powerless to stop a practice so entrenched in custom and tradition. Many organizations are campaigning against it, and the new African Charter on the Rights of Children includes items condemning circumcision. Governments in Sudan and elsewhere have passed laws against it, but they are seldom enforced.⁴⁸

Despite this opposition, many Africans continue to regard female circumcision as an important cultural and religious ritual.

The practice of female circumcision poses a dilemma for feminists. On the one hand, feminism is committed to multiculturalism; that is, to the view that no culture has a monopoly on the right way to live, and that the voices of all people must be heard. On the other hand, feminists must reject a practice they regard as patently contrary to the interests of women. Not only is clitoridectomy painful and dangerous, but its justification stems from suppositions antithetical to feminist thought: that women are male property, that female virginity must be preserved, that women ought not to have sexual feelings, that adultery is a male prerogative, and so forth. Is there a way out of the dilemma, a way to remain faithful to feminist ideals without rejecting multiculturalism?

We think that there is a way out. As suggested earlier, we need to develop an interpretation of

43. Virginia Held, "Feminism and Moral Theory," in *Contemporary Moral Problems*, 4th ed., edited by James E. White (St. Paul, MN: West Publishing Company, 1994), 75.

44. *Ibid.*

45. *Ibid.*, 76. See also Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993).

46. Jaggar, 68 (see note 37).

47. *Ibid.*, 67.

48. *Time* (Fall 1990), 39. Cited in Joel Feinberg, *Freedom and Fulfillment: Philosophical Essays* (Princeton, NJ: Princeton University Press, 1992), 199.

multiculturalism that does not imply relativism. Keeping an open mind about the practices of other cultures, and attempting to understand them "from within," does not commit us to unqualified acceptance of these practices, particularly when they conflict with our deepest values and principles. For feminists, a core value is the conviction that women are full human persons, entitled to equality and justice. Clitoridectomy is not compatible with the recognition of women as free and equal members of society; indeed, it contributes to women's oppression, and is thus opposed by many African women and men. Western feminists can support these Africans in this struggle, and not be guilty of arrogance, smugness, or cultural imperialism.

VIRTUE ETHICS

Like communitarianism and feminism, virtue ethics—at least in its contemporary form—can be seen as a response to or critique of rule-based ethics, because such conceptions of ethics leave out considerations of character. In a virtue approach to ethics, the focus is on neither the right action in a particular situation, nor what general moral rules can be adopted to determine the right action. Rather, virtue ethics focuses on the sorts of characteristics, traits, or virtues a good person should have, then connects these characteristics to right action, because someone who has certain moral virtues—such as courage, temperance, wisdom, and justice—will naturally act in certain ways. In addition, and perhaps more importantly, someone who has these character traits will be unable to act in certain ways.

Aristotle may be considered the originator of virtue ethics. According to Aristotle, all intentional human action has a purpose or a goal. One works to earn money, one eats to sustain life. But these are not ultimate goals. Why seek to earn money? Why seek to sustain life? There must be some end, some ultimate goal, to which these secondary ends are means. The ultimate goal for Aristotle is *eudaimonia*. *Eudaimonia* is often translated as "happiness," but it has a force that is not at all like happiness, much less comfort or pleasure; it means the best possible life or the most desirable sort of life. We can disagree about *what* sort of life *eudaimonia* is, but there's no disagreement that *eudaimonia* or

the best sort of life is what we all want. The central question for Aristotle, then, is: What is the best life for a person to lead?

To answer that question, we must consider a person's *telos*, or function or reason for being. It was inconceivable to Aristotle that everything in creation except humanity should have a function. Moreover, he thought it self-evident that our *telos* should be found in what makes human beings distinctive; namely, reason. The best sort of life for a person is a life in accordance with reason. Most of the *Nicomachean Ethics* implies the necessity of an active life in accordance with rational principles—a life that involves practical wisdom (*phronesis*) and moral virtue, as well as *sophia*, or theoretical wisdom. Aristotle was struck by the notion that reason directs us to a course of moderation between extremes. For example, the person who has too much fear is a coward; the one who has too little is foolhardy or rash. The mean is courage. Thus, Aristotle concluded that virtue is always a mean between two extremes.

In one sense, living a life in accordance with the virtues (or human excellences) can be seen as instrumental, as a means to an end; namely, *eudaimonia*. However, the relationship between the virtues and the *telos* of a person is internal, not external. The *telos* of humans as a species determines which of the human qualities are virtues. Moreover, as Alasdair MacIntyre explains, "The exercise of the virtues is itself a crucial component of the good life for man."⁴⁹

In order to understand what's right, noble, and just, one must have a proper upbringing. One must have cultivated good habits, such as consideration for others, truthfulness, and self-control. One becomes just and temperate by doing just and temperate things. It isn't simply that virtue takes practice. Rather, by acting in certain ways, we come to understand what is noble and just, and why. The ultimate goal is to understand the principles incorporated in the virtues, but knowing how to behave is at least a beginning. Moreover, someone who does not have this beginning cannot possibly understand or act on the principles. Arguments by themselves can never make a person good. That's a matter of character, and character is developed by actions over time.

49. MacIntyre, *After Virtue*, 17 (see note 31).

Someone of good character regards noble actions as worthwhile in themselves, while someone who lacks a good upbringing will regard such actions as painful, to be done only to avoid punishment or to gain some advantage, such as getting money, power, or friends. In short, the nonvirtuous person only recognizes essentially external, contingent reasons for being good. By contrast, Aristotle was aware that possession of the virtues does not always enable us to achieve external goods. Thus, becoming a virtuous person is essentially ironic. We cultivate our own virtues, and teach our children to be virtuous people, thinking that this will lead us all to achieve *eudaimonia*, the best kind of life. Yet, as MacIntyre expresses it, “notoriously the cultivation of truthfulness, justice and courage will often, the world being what it contingently is, bar us from being rich or famous or powerful.”⁵⁰ Such virtue can even require us to risk our lives. Consider the people of Le Chambon in France who saved hundreds of Jews from the Nazis.⁵¹ Asked afterward why they did what they did, they responded simply that the Jews needed help. Having developed such virtues as compassion and hospitality, they regarded helping others as the obvious thing to do. Not-helping was not a possibility; it was never even considered.

Whereas Aristotle assumes that we can define the good life for man *qua* man, Alasdair MacIntyre considers that concept too abstract. The good life can be defined only for particular individuals, in light of their historical context. The good life for a fifth-century Athenian general is not the same as for a medieval nun or a seventeenth-century farmer. MacIntyre thinks that the individual’s particular social identity, which is in turn a function of a person’s various roles, must also be considered. “I inherit from the past of my family, my city, my tribe, my nation, a variety of debts, inheritances, rightful expectations and obligations. These constitute the given of my life, my moral starting point.”⁵² MacIntyre considers both utilitarianism and Kantianism defective in failing to take account of the “stories” that constitute human lives.

50. MacIntyre, *After Virtue*, 21 (see note 31).

51. See Philip Hallie, *Lest Innocent Blood Be Shed* (New York: Harper & Row, 1979).

52. MacIntyre, *After Virtue*, 205 (see note 31).

There are other advantages to a virtue-based ethical approach. Utilitarianism tells us to do the act with the best overall consequences, yet sometimes this act turns out to be ignoble or unjust. Kant insists that someone who acts from duty—that is, in accordance with the categorical imperative—acts rightly even if he or she derives no pleasure in such action. Indeed, if one does the right thing solely out of sympathy, according to Kant, one’s action has no moral worth. Acting from sympathy is no better morally than acting from self-interest. This is very difficult for most people to accept. Surely Aristotle is closer to the truth in insisting that having appropriate feelings, such as sympathy and compassion, are part of moral goodness.

Nevertheless, it is unlikely that virtue ethics can entirely substitute for a principled approach. Virtue ethics instructs us to first become compassionate, honorable, truthful, and so forth; then we will act correctly. But very often even honorable and decent people do not know the right thing to do. Certainly it will not help much to tell Dr. Brody to act as a compassionate, honorable, truthful person would act. As a compassionate person, she no doubt wishes to spare Jim suffering. However, acting compassionately may require her to violate the Hippocratic Oath, which would be inconsistent with the virtue of fidelity. Moreover, if she does help Jim, she may have to dissemble to avoid going to jail. Is it permissible to lie in order to save someone great pain, or is such a good outweighed by the lie’s incompatibility with truthfulness? For virtue ethics to provide guidance, it must tell us how to rank particular virtues when they conflict.

MacIntyre, emphasizing the importance of role responsibilities, would have Dr. Brody ask herself whether assisting a suicide is the sort of thing a doctor—and specifically, a doctor in the late twentieth century—ought to do. This question has no obvious answer. However, this objection is not specific to virtue theory, since no ethical theory, not even utilitarianism, can churn out obvious answers.

Consider the question of whether doctors have a duty to treat HIV-infected patients (see Part One, Section Three). Virtue-based approaches to this question seek to specify the goal or good of medicine and the virtues (e.g., competence, courage,

fidelity) that are necessary to attain that good.⁵³ Physicians, it may be said, are not just another self-interested trade; not only their economic rewards and social status, but also the history and tradition of their trade, impose certain obligations on them. Willingness to expose oneself to risk is part of what it means to be a physician. As Arnold Relman puts it, "the risk of contracting the patient's disease is one of the risks that is inherent in the profession of medicine. Physicians who are not willing to accept that risk . . . ought not to be in the practice of medicine."⁵⁴ Although limits of the duty to put oneself at risk need to be defined, a virtue-based approach establishes a duty to treat over doctors' rights to decide whom to treat and what risks to take.⁵⁵ Indeed, one of the shortcomings of a narrowly contractualist approach to the doctor/patient relationship, an approach that specifies numerous duties *within* that relationship, is its silence on the question of whether doctors have moral and professional obligations to *establish* relationships with needy, dangerous, or HIV-infected patients.

A virtue-based approach to ethics seems to supply an important dimension to ethical discussion, but not a full-blown theory. Like communitarianism and feminism, virtue ethics largely serves as a reminder of areas too often overlooked. Communitarianism reminds us that a community can have a good above and beyond the interests of its individuals, warning against excessive individualism.⁵⁶ Feminism reminds us that conventional moral views often incorporate power imbalances, especially those related to gender, race, and class. Virtue ethics reminds us that knowing "the right thing to do" depends on being the right sort of person, a judgment that cannot be determined independent of historical situation and social roles.

53. John Arras, "The Fragile Web of Responsibility: AIDS and the Duty to Treat," *Hastings Center Report* 18, no. 2 (special supplement, 1988): 12.

54. *Cardiovascular News* (August 1987): 7. Cited in Arras, *Ibid.*, 14.

55. Norman Daniels argues that a virtue-based approach to the question of the duty to treat implies a contractualist theory. See "Duty to Treat or Right to Refuse?" *Hastings Center Report* 21, no. 2 (1991): 36-46.

56. A kind of communitarianism imbues Dan E. Beauchamp's *The Health of the Republic: Epidemics, Medicine, and Moralism as Challenges to Democracy* (Philadelphia, PA: Temple University Press, 1988).

NONMORAL CONSIDERATIONS

The dizzying array of moral theories and perspectives presented above make it hard enough to decide how to act in a given situation. We suggested that it is not a question of determining which moral theory is correct; all of them contribute to an extraordinarily complex moral reality. Still, in deciding what to do, one must decide when utilitarian considerations should prevail, or when one ought to adhere to absolutist principles; when to appeal to principles and when to seek guidance in virtues; when to abide by universal, impartial considerations and when to concentrate on personal relationships and feelings.

As if the moral dimension of decision making were not complicated enough, there is another dimension we have not so far discussed: the "non-moral" dimension. How should we think about the political, personal, prudential, economic, or legal implications of our actions? According to one school of thought, moral reasons are the "best" reasons; they always "trump" other considerations. Thus, if it would be morally right to do something, then one ought to do it, even if it would have adverse nonmoral consequences. More recently, philosophers like Bernard Williams⁵⁷ and Susan Wolf⁵⁸ have argued that one is sometimes entirely justified in overriding impartial moral reasons to pursue a significant personal goal or defining relationship. Conceivably, many of the considerations left out of traditional ethics can be recovered if we take seriously the idea, advocated by feminists and others, that personal relations and feelings are as important to ethics as universal and impartial principles. Nevertheless, however broadly ethics is conceived, there will always be the possibility of conflict between moral and nonmoral considerations. In such cases, how are we to decide what to do?

Consider, once again, Dr. Brody. Suppose she decides that the morally right thing to do is to help Jim Lasken. Helping him is breaking the law. She could be prosecuted and go to jail; even if she is not convicted, she could lose her license to practice

57. Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge, MA: Harvard University Press, 1985).

58. Susan Wolf, "Moral Saints," *Journal of Philosophy* (August 1982): 419-439.

medicine. It seems clear that these are important considerations and that it would be absurd (as opposed to noble) for Dr. Brody to completely ignore them. Whether her personal risk should override her view of the morally right action depends, in part, on the degree of the risk. If the risks of discovery, prosecution, and punishment are sufficiently low, and if she believes that it is morally right to help Jim, Dr. Brody should perhaps be willing to risk legal and professional repercussions. In other situations, doing the morally right thing might ask too much of a person. The hard thing in life is having the wisdom to figure out when nonmoral actions are justified.

MODES OF MORAL REASONING

The above survey of moral theories suggests the richness and diversity of our repertoire of ethical language and concepts. The task for this section is to show how these disparate and sometimes conflicting elements of morality figure into the moral judgments that we make. What should we *do* with all this ethical "raw material"?

Many of the enumerated theoretical perspectives—such as utilitarianism, Kantianism, and rights-based theories—articulate basic moral values, principles, and rules at a fairly high level of abstraction. We are told, for example, to maximize happiness, respect persons, honor patients' rights to confidentiality, and so on. But we are also told—for example, by the partisans of an ethic of care—to de-emphasize such abstractions in favor of a heightened caring responsiveness to individual people and situations. An important question arises, then, about precisely how these generalities are, or should be, brought to bear in specific cases. In the language of the philosophical tradition, it is a question about the relationship between the universal and the particular.

This is also a question about the nature of moral justification. In pointing out the importance of happiness, personhood, rights, virtues, caring, etc., each of the above theories contributes to our search for ethical *warrants* or reasons that tend to *justify* our actions. When called upon to justify or defend individual actions or social policies, how do—or how should—we respond? Insofar as it

makes sense to pursue ethical certitude about our actions, where does such certitude lie: in our philosophical or religious theories, in our pre-theoretical convictions of right and wrong generated by our history and culture, or perhaps in some combination of these two areas?

THE PRINCIPLES APPROACH

One tempting response to these questions is to hold that justification in ethics is a matter of deducing the best and most comprehensive ethical theory from the foregoing list, and deriving this theory's correct conclusions. Thus, one should throw in his or her lot with, say, utilitarianism or Kantianism and then "apply" this theoretical framework to the facts at hand. Understood in this way, bioethics has been described as a kind of "applied ethics," as though philosophers and theologians do all the ethical heavy lifting, while others simply apply their findings to this or that set of factual circumstances. Tempting as it is in its simplicity, this conception of bioethics must nevertheless be rejected.

First, although this approach identifies philosophical theory as the ultimate locus of moral certitude, it is far from clear what the "best and most comprehensive" ethical theory is. Indeed, after centuries of moral debates, we still disagree, sometimes vehemently, about justice and the nature of the good life. Second, as we have seen in the application of various theories to our case of physician-assisted suicide, theories are often stated at such a high level of generality (e.g., "Maximize happiness," "Respect persons") that they are capable of generating contradictory answers to the same moral questions. Third, this way of understanding "theory"—i.e., as an abstract construction built upon one or two overarching values—tends to obscure the extraordinary richness and diversity of the moral life. So, even if one of the enumerated "standard" theories were miraculously to attract a consensus, the result would be more impoverishing than liberating. To repeat, ethical theories as we understand them are best viewed as partial perspectives on a complex moral reality.

A powerful alternative to theory-driven approaches to bioethics emphasizes the role in moral reasoning of a small cluster of middle-level

ethical principles. Instead of pursuing difficult and highly divisive foundational issues, the partisans of the "principles approach" (or "principlism") begin with our common moral experience and the manifest importance of keeping a short list of moral duties. Originally developed by Professors Tom Beauchamp and James Childress in their justly influential book, *The Principles of Bioethics*,⁵⁹ and later endorsed by prestigious governmental ethics commissions,⁶⁰ the method of principlism rapidly became the dominant mode of "doing bioethics" in the United States.

Stated in their popular tongue-twisting, Latinate formulations, these norms include the principles of autonomy, beneficence, nonmaleficence, and justice. In simpler terms, the core principles of bioethics bid us to (1) respect the capacity of individuals to choose their own vision of the good life and act accordingly; (2) foster the interests and happiness of other persons and of society at large; (3) refrain from harming other persons; and (4) act fairly, distribute benefits and burdens in an equitable fashion, and resolve disputes by means of fair procedures.

In contrast to the partisans of applied moral theory, who tend to reduce the sources of normative guidance and criticism to a single overarching value (for example, Kantian respect for persons or the maximization of utility), the principlists settle for a small cluster of "middle level" norms, each one consistent with a number of ethical theories, no one of which enjoys automatic supremacy over the others. They reject the notion that serious moral conflict can always be resolved by appeal to a higher moral standard provided by some ultimate theory. Instead, they frankly admit the necessity of "weighing and balancing" the various principles against one another in each concrete moral situation.

While each principle articulates a serious moral duty, these duties are not absolute. They are, in the words of the late philosopher W. D. Ross, *prima*

facie obligations.⁶¹ This means that the ethical principles are indeed binding, but on any given occasion one principle may eclipse another with which it conflicts. So we say that a given principle is binding *prima facie*, or "at first blush," but that in the final analysis, all things having been considered, the pull of another principle might turn out to be even stronger. Importantly, however, even when a principle is outweighed, it usually continues to exert a strong moral pull on our behavior; it does not simply become irrelevant.

The conflict between the demands of confidentiality and the protection of public health in the context of AIDS provides a useful example of how principlism could be applied. On the one hand, physicians swear an oath to uphold the confidentiality of their patients. Since Hippocrates, this duty has been utterly central to the vocation of physicians. Without assurances that their often embarrassing secrets are safe with the doctor, patients will be reluctant to speak frankly about their symptoms or medical history, and in some cases may avoid seeking medical attention to the detriment of their condition. A doctor's violations of confidentiality thus might be seen as violating the principles of beneficence and nonmaleficence.

The principle of autonomy provides further warrant for a doctor's confidentiality. Patients have a right to determine who knows what about their medical history. When physicians or nurses share this information with others who do not have a legitimate medical need to know, they rob their patients of control over information that is rightfully theirs. Combined, then, the principles of autonomy, beneficence, and nonmaleficence make an exceedingly strong case for respecting patient confidentiality.

But now suppose that you are a physician caring for a bisexual male infected with the AIDS virus. Your patient admits to having regular unprotected sex with his fiancée, who does not suspect his HIV status, yet he insists upon absolute confidentiality out of a (well-founded) fear of losing her. On one hand, you feel the pull of your duty to respect confidentiality; but, on the other hand, your patient's behavior is placing another human being in mortal

59. Beauchamp and Childress, *The Principles of Bioethics* (see note 6).

60. National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research* (Washington, D.C.: U.S. Government Printing Office, 1978).

61. W. D. Ross, *The Right and the Good* (Oxford: Clarendon Press, 1930).

peril and you are in a unique position to protect this unsuspecting, vulnerable person.

This ethical dilemma, discussed at greater length in Part One, Section Three, effectively illustrates the *prima facie* character of the principles approach. As a physician, you are clearly bound by your duty of confidentiality, but you are also bound to prevent grave harm to highly vulnerable people, especially when you are in a unique position to do so. According to principlism, you cannot simply invoke a supreme value that always wins; you must instead undertake the difficult task of weighing and balancing conflicting values. In this case, you might decide that the principle of autonomy is outweighed by the prevention of harm to others. The risk is great, the projected harm exceedingly grave, and your patient's insistence upon his autonomy might be discounted as self-contradictory and hypocritical in light of his irresponsible disregard of his fiancée's autonomy, as well as her life.

On balance, then, your *prima facie* duty to respect your patient's confidentiality might fall short as a duty *all things considered* in this particular situation. But this does not mean either that these rival concerns will always prevail in similar circumstances or that confidentiality simply becomes irrelevant once it is outweighed. If your patient is an HIV-infected woman who (credibly) claims that her abusive, drug-taking, and possibly HIV-infected boyfriend will kill her should he discover her secret, you will most likely find another way to solve the problem than by violating your patient's confidentiality. And even when you decide that, all things considered, confidentiality must yield to another principle, such as the prevention of harm, confidentiality continues to exert moral influence by setting the terms of legitimate disclosure. Even though the bisexual's fiancée has a right to know the truth, the same cannot be said of his employer, the other patients in your waiting room, or the members of your weekly poker game.

OBJECTIONS TO THE PRINCIPLES APPROACH

In spite of its enormous success, the method of principlism has recently been criticized on a number of fronts. Although some of these objections lack merit, others pose important challenges to

principlism. As we shall see, principlism has nevertheless proved itself remarkably adaptive in responding to many of these complaints.⁶²

1. Principlism Is Mechanistic and Vacuous.

Although astute commentators like Beauchamp and Childress have wielded principlism in a thoughtful, carefully nuanced, and fruitful manner, in less skilled hands this method has tended to degenerate into a ritualistic incantation of empty abstractions. Bioethical literature abounds with superficial claims that "the principle of autonomy (or of beneficence, or of the 'best interests' of the patient) *requires* that we do such and such." The problem with this common locution is that it ignores the difficulty (or the vacuousness) of passing immediately from very abstract statements of principle to very concrete conclusions about what to do here and now. Quite apart from the vexing problem of rank ordering *competing* principles in morally complex situations, we first have to determine what these abstract formulations of principle actually mean.

What does it mean, for example, to invoke the moral principle that caregivers should always seek the "best interests" of all patients, including severely impaired newborns? How are the interests of such a child to be assessed, and according to which conception of the good? Some argue that life is sacred and that continued life is always in the child's interest; others contend that a life of constant suffering is not a life worth living; while still others advance a conception of the good based on more complex notions of human flourishing and dignity, which might sanction nontreatment decisions even given the absence of pain and suffering.⁶³

Whatever the merit of these individual suggestions, the point is that unless we *interpret* "the principles of bioethics," they will merely play the

62. The following account of the role of principles and cases in moral argument is based upon John Arras's more extensive discussion in "Principles and Particularity: The Roles of Cases in Bioethics," *Indiana Law Journal* 69, no. 4 (Symposium on Emerging Paradigms in Bioethics, Fall 1994): 983-1014.

63. See Ezekiel Emanuel, *The Ends of Human Life*, 70-87 (see note 33).

role of empty "chapter headings,"⁶⁴ doing little, if any, actual work in moral analysis. Unless we furnish principles with a definite shape and content—Which principle of justice? Which conception of autonomy?—they will merely lend a patina of objectivity to bioethical debates while masking the need to pin down arguments and choices defining the substance of those principles.

2. Principlism Founders on the Problem of Moral Conflict. Other critics call attention to principlism's inability or unwillingness to provide a rationally defensible framework for settling conflicts between competing principles. Clearly, such critics have a point here. Unlike utilitarians or Rawlsians who could settle, at least to their own satisfaction, the inevitable conflicts of the moral life using some overarching principle of "lexical ordering," the principlists forthrightly admit that their moral principles do not come with pre-established theoretical weights; consequently, conflicts have to be settled through a subtle process of weighing and balancing of principles in the midst of real cases, an approach to conflict resolution that some philosophers regard as excessively subjective. We believe, however, that there is wisdom in the principlists' modesty. Their critics have neither established the clear superiority of any monistic theory, such as utilitarianism, nor have they produced a convincing account of why, within more pluralistic systems, certain favored values such as utility or liberty should *always* prevail over all other competing values in a myriad of convoluted real world situations.

3. Principlism Is Deductivistic. Another group of critics, the partisans of a more "case-driven" mode of analysis, object to the apparently unidirectional movement from principles to cases within principlism. Although a careful analysis of Beauchamp and Childress's early editions of *The Principles of Bioethics* might well suggest a more complicated relationship between principles and cases in the process of moral justification, earlier editions of their book gave the distinct impression that theory justifies principles, that principles justify moral

64. K. Danner Clouser and Bernard Gert, "A Critique of Principlism," *Journal of Medicine and Philosophy* 15 (1990): 227.

rules, and that rules justify moral judgments in particular cases.⁶⁵

This "top down" conception of moral reasoning has been faulted for ignoring the pivotal role of intuitive, case-based judgments of right and wrong. To be sure, the judgments in question are not to be confused with just any responses to cases, no matter how prejudiced, ill-considered, or subject to coercion they might be. Rather, the critics have in mind something more akin to John Rawls's notion of "considered" moral judgments;⁶⁶ i.e., those judgments about whose genesis and moral rectitude we feel most confident, such as that slavery is wrong. It is precisely these judgments, they claim, that give concrete meaning, definition, and scope to our moral principles, thus providing us with critical leverage in refining their articulation.

The ultimate point of this criticism is that the relationship between principles and cases is dialectical or reciprocal: the principles provide normative guidance and the cases provide considered judgments that, in turn, help shape the principles, which then provide more precise guidance. Another way of putting this, following Rawls's terminology, is that principles and cases exist together in creative tension or "reflective equilibrium."⁶⁷ One can thus insist on a robust role for principles in moral reasoning without being committed to a "top down" or deductivistic approach.⁶⁸

CASUISTRY OR "CASE-BASED" REASONING

The renaissance of casuistry, or "case-based" reasoning, in practical ethics has stressed the pivotal role of the particularity of cases, while de-empha-

65. Beauchamp and Childress, *The Principles of Biomedical Ethics*, 1st edition (1979), 5.

66. Rawls, 47 (see note 18).

67. Rawls, 20ff, 48–50.

68. The principlists' response to this line of criticism has been to embrace it, over time, with increasing forthrightness and enthusiasm. Although they may have been slower than others to discern the formative and critical roles of case analysis with regard to principles and theories, Beauchamp and Childress (4th ed.) now embrace reflective equilibrium as the methodology of principlism, and emphatically denounce deductivism for precisely the same reasons given by their critics. See chapters 1–2 (see note 6).

sizing the role of theory and routinized appeals to "the principles of bioethics."⁶⁹ According to its leading proponents, a casuistical method must begin with a typology or grouping of cases around paradigmatic instances of a moral rule or principle. In the area of research ethics, for example, the atrocities of Nazi medicine still serve to exemplify unethical dealing with human subjects. From this signal case, one then branches out to analogous cases of greater complexity and difficulty, such as research on children or the demented elderly, proceeding by a method akin to "moral triangulation." As one goes from case to case, responding to the particularities of different settings, treatments, and categories of research subjects, principles emerge and become increasingly refined and complex.

Crucially, the casuists contend that whatever "weight" a principle might have vis-à-vis competing principles must be determined not in the abstract, but rather in response to the particularities of individual cases.⁷⁰ Suppose, for example, that physicians and nurses at a nursing home wish to study the refusal to eat of many elderly patients with Alzheimer's disease. Further suppose that informed consent to participate in the study cannot be expected from this impaired patient population. According to the dictates of our paradigm case—e.g., the infamous and lethal experiments of the Nazi doctors—the principle of respect for persons always requires the free and informed consent of the research subject. But according to the casuists, whether the principle of autonomy should prevail over the principle of beneficence in nursing home research—a result that many consider the primary lesson of Nazi research atrocities—will be determined in the context of a nuanced investigation into the "who" (enslaved ethnic populations versus patients with Alzheimer's disease); the "what" (experiments designed to kill versus studying and filming patients' eating behaviors); the "where" (death

camp versus a regulated nursing home with a competent research review board); and the "when" (after capture and before execution versus after the consent of family, the loss of decision-making capacity, and the approval and ongoing oversight of an ethics committee). Rather than assigning a timeless relative weight to a certain principle, casuistry holds that the weight lies in the details. In this hypothetical situation, a proposed protocol might be so far removed from our paradigm of unethical research, and the potential benefits to future patients might be so great, that our moral approval may be justified even without the patient's consent.

Presented in this way, the casuistical method obviously has much in common with the method of the common law. Indeed, given the pivotal and ubiquitous role of legal cases in the recent history of bioethics—a history punctuated by such names as Karen Quinlan, Claire Conroy (see Part Two, Section Three), Nancy Cruzan, Helga Wanglie (Part Two, Section Four), and Baby M (Part Four, Section Two)—it was entirely natural for bioethicists to begin drawing parallels between case-based reasoning in ethics and in law. In both casuistry and law, we seem to reason from the "bottom up" (from specific cases to fleshed-out principles) rather than from the "top down" (as in most versions of applied ethics); the principles themselves are consequently "open textured," always subject to further revision and specification; and our final judgments usually turn on a fine-grained analysis of the particularities of the case.

To many ethicists, this account of reasoning in both ethics and law accurately describes how we actually think, both in clinical situations and in the classroom; that is, we tend to see cases, which serve as a kind of shorthand, as exemplars for moral analysis and assessment. "This is a Quinlan-type case, except instead of a ventilator the issue is a feeding tube (or antibiotics, or the sustainment of minimal conscious awareness, or a family insisting that everything be done, etc.). How does each different variable alter the case? Is it so different that it should dictate an alternative result?" Instead of ritualistically invoking the mantra of principles, casuistic ethicists thus urge us all to conform our rhetoric to our actual practice.

Just as the casuists insist that the weight of principles resides in the details, they also insist that

69. See, e.g., Albert Jonsen and Stephen Toulmin, *The Abuse of Casuistry* (Berkeley: University of California Press, 1988); John D. Arras, "Getting Down to Cases: The Revival of Casuistry in Bioethics," *Journal of Medicine and Philosophy* 16 (1991): 29–51; and Baruch Brody, *Life and Death Decision Making* (New York: Oxford University Press, 1988).

70. Albert Jonsen, "Of Balloons and Bicycles, or the Relationship between Ethical Theory and Practical Judgment," *Hastings Center Report* 21 (1991): 14–16.

moral certainty resides in our responses to paradigmatic cases, rather than in abstractions of theory or principle. We are much more confident in our knowledge that torturing and killing Jews to learn about hypothermia is wrong than we are in our assessment of which moral theory or constellation of moral principles best explains why. We would, in fact, be much more likely to switch our allegiance to a different moral theory or set of principles than to change our judgment on what the Nazi doctors did. Indeed, were a moral theory to approve of the Nazis' experiments, we would most likely take that specific judgment as sufficient reason to reject the theory.

Although some extreme casuists reject principles entirely, more moderate versions of casuistry make room for principles, theories, and cultural norms, while still insisting on the priority of the particular. Instead of imposing a false choice between principles and responses to cases, these ethicists envision, in the words of Martha Nussbaum, a "process of loving conversation between rules and concrete responses, general conceptions and unique cases, in which the general articulates the particular and is in turn further articulated by it."⁷¹ Principles play a role, then, but rarely—if ever—as mere axioms from which to deduce moral conclusions. Indeed, whatever validity or usefulness general principles might have depends upon the insight, moral sensitivity, and casuistical skill that mediate their "application" to the particulars of a case.

At this point it should be clear that principlism and the emerging paradigm of casuistry are not necessarily as antithetical as their respective partisans often suggest. On the contrary, chastened principlists who have abandoned deductivism, and moderate casuists who admit a role for principles and general norms, could endorse Martha Nussbaum's dictum with equal enthusiasm; it is, after all, just another way of calling for reflective equilibrium between principles and cases.

According to this emerging consensus, then, moral justification lies not in the correspondence

between our moral theories and some sort of moral bedrock, such as nature or God's will; rather, justification resides in the coherence or "fit" among the whole network of our considered judgments and the principles and rules that emanate from them. Insofar as our most confident moral judgments cohere with the system of norms built upon them, they can be considered justified. Contrary to deductivism, moral certainty does not lie in either principles or theory; and contrary to extreme casuistry, certainty does not lie only in our responses to paradigmatic cases. Instead, we believe that any moral certitude lies at the intersection between our abstract norms and our responses to cases.

Judgments that conflict with well-established moral norms, even judgments that might have once seemed unassailable, should be subjected to further scrutiny. Even though it might have once been "plain as day" that African-Americans deserve second-class status or that doctors should never assist patients to commit suicide, the principles of respect for persons or individual autonomy might well prompt us to rethink—and in some cases reject—what was once thought to be our moral bedrock. By the same token, as we have seen, principles develop out of reflection on our considered judgments and acquire their precise meaning and weight within the crucible of contextualized judgments.

It should be noted, however, that even though we speak of reflective "equilibrium" and the "system" of coherent judgments and general norms, the moral life will always be more dynamic and less tidy than these terms imply. The uneasy balance between particular judgments and general norms will most likely never reach equilibrium. Our considered judgments are in a state of constant, if glacially slow, flux, and our concepts, principles, and rules are always merely provisional—always subject to further expansion in scope, specification of meaning, and fluctuation in importance vis-à-vis other general norms. The best we can hope for, then, is a constant striving for greater and greater coherence. Complete coherence—a total seamless system of morality—is most likely beyond our grasp, kept out of reach by both the limitations of our mental capacities and the inherent fragmentation among the values that constitute our complicated moral lives.

71. Martha Nussbaum, "The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality," in *Love's Knowledge: Essays on Philosophy and Literature* (New York: Oxford University Press, 1990), 95.