

# POSTMODERN PERSONHOOD: A MATTER OF CONSCIOUSNESS

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## ABSTRACT

*The concept of person is integral to bioethical discourse because persons are the proper subject of the moral domain. Nevertheless, the concept of person has played no role in the prevailing formulation of human death because of a purported lack of consensus concerning the essential attributes of a person. Beginning with John Locke's fundamental proposition that person is a 'forensic term', I argue that in Western society we do have a consensus on at least one necessary condition for personhood, and that is the capacity for conscious experience. When we consider the whole brain formulation of death, and the most prominent defense of it by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, we can readily identify the flaws that grow out of the failure to define human death as the permanent loss of the capacity for conscious experience. Most fundamental among these flaws is a definition of human death that reduces persons to the capacity of the brain to regulate purely physiological functioning. Such a formulation would, in theory, apply to any member of the animal kingdom. I suggest that an appropriate concept of death should capture what it is about a particular living being that is so essential to it that the permanent loss of that thing constitutes death. What is essential to being a human being is living the life of a person, which derives from the capacity for conscious experience.*

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## INTRODUCTION

In this paper I propose that we consider the frequently made suggestion that if there is no consensus — among philosophers, the health professions, or the general public — on a set of essential elements or sufficient conditions for personhood, then we must reject personhood as a legitimate basis for the development of a concept and derivatively a definition of death. In the Report of the President's

Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research entitled *Defining Death*, it was asserted:

... crucial to the personhood argument is acceptance of one particular concept of those things that are essential to being a person, while there is no general agreement on this very fundamental point among philosophers, much less physicians or the general public. Opinions about what is essential to personhood vary greatly from person to person in our society — to say nothing of intercultural variations.<sup>1</sup>

On the basis of this assertion the Commission rejected the higher brain death formulations which maintain that our concept of death should be based upon the permanent loss of the capacity for personhood. Instead, it opted for the whole brain death formulation that makes no reference to personhood whatsoever, but asserts that the permanent cessation of *all* brain function is sufficient for a determination that a human being has died.

In the seminal case of *Roe v. Wade*, Justice Blackmun, writing for the Court, maintained that:

We need not resolve the difficult question of when [human] life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.<sup>2</sup>

Neither did the court speculate as to the essence of personhood. For the Court's purposes, it was deemed sufficient to hold that the word 'person' in the Fourteenth Amendment does not include the unborn. The basis for this conclusion derives from the history of American constitutional jurisprudence, however, and not from metaphysical analysis.

I suggest that these two governmental entities, despite the respect and deference which they are due, were much too hasty and ultimately in error when they concluded that personhood is a morass of conflicting opinion that can provide us with no meaningful basis upon which to reach ultimate conclusions about fundamental bioethical issues such as concepts or definitions of life and death. In developing my position on this issue over the last several years, I am

<sup>1</sup> President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Defining Death*, Washington D.C.: U.S. Gov't Printing Office, 1981, p. 39.

<sup>2</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

indebted to many thoughtful commentators. Two with whom I find that my views are almost entirely congruent are John Lizza<sup>3</sup> and Jeff McMahan.<sup>4</sup>

I have chosen to characterize this formulation of personhood, and particularly its implications for our concept of brain death, as 'postmodern' in a very limited sense. The current whole brain formulation of death was touted by its two most prominent proponents—the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, and the President's Commission, as a decidedly 'modern' approach to the problem of determining death in the age of high technology medicine. Furthermore, according to the President's Commission, this modern approach that has been adopted throughout the United States relies upon no consensus position on the essential elements of personhood. In contrast, the position for which I advocate is a significant departure from the whole brain formulation, and it is grounded upon the proposition that the capacity for conscious experience is an absolutely necessary condition for personhood. In that sense only do I describe my view, and that of those who share it, as 'postmodern'.

## THE FORENSIC NATURE OF PERSONHOOD

I begin this analysis with the contention that John Locke was correct when he wrote, in *An Essay Concerning Human Understanding*, that 'personhood is a forensic term'.<sup>5</sup> By that I understand him to mean, among other things, that personhood is a concept which we articulate rather than a condition that exists in nature which we discover. There are however, he would acknowledge, some constraints upon our ability to ascribe the attribute of personhood to any particular type of entity. Locke says, for instance, that the term person 'belongs only to intelligent agents capable of law, happiness and misery'. More specifically, a person is 'a thinking intelligent being that has reason and reflection, and can consider it self as it self, the same thinking thing in different times and places, which it does only by that consciousness which is inseparable from thinking, and essential to it'.<sup>6</sup> This characterization makes it clear that Locke's concept of a person is no mere free-floating honorific. The Commission would

<sup>3</sup> John P. Lizza, 'Persons and Death: What's Metaphysically Wrong with our Current Statutory Definition of Death?', *The Journal of Medicine and Philosophy*, 18 (1993): 351–374.

<sup>4</sup> Jeff McMahan, 'The Metaphysics of Brain Death', *Bioethics*, 9 (1995) 91–126.

<sup>5</sup> John Locke, *An Essay Concerning Human Understanding*, Peter H. Nidditch, ed., Oxford: Oxford University Press, 1975, II. XXVII.26.

<sup>6</sup> *ibid.*, II. XXVII.9.

seem to agree with Locke, since it states that 'personhood consists of the complex activities (or capacities to engage in them) such as thinking, reasoning, feeling, human intercourse which makes humans different from, or superior to, animals or things'.<sup>7</sup> However, when it comes to advocating a particular definition of death, the capacity for engaging in these cognitive activities is nowhere considered.

There is another aspect to the forensic nature of personhood referred to by Locke. Personhood status has been applied only to those actual or theoretical beings who possess or can develop a sense of right and wrong and hence possess the capacity to participate as a moral agent in a moral community. Beings without this capacity, such as animals, fetuses, and the profoundly demented, may be, by virtue of their capacity to experience pain, appropriate objects of moral concern, but not members of the moral community with rights and duties.

## PERSONHOOD AND PERSONAL IDENTITY

Locke's analysis offers another key to the puzzle of the concept of person through his analysis of personal identity. Locke, correctly I believe, insisted on viewing personhood as a matter of possessing certain capacities, and not of membership in a particular species. In other words, we consider human beings to be persons because of their capacity for self-consciousness and development of a concept of right and wrong, rather than because they possess a body of a particular form or genetic composition. Thus when we move from the question of what makes a person to the question of what makes a person at time  $t$  the same person at time  $t_1$ , Locke finds unpersuasive the answer that it is the possession of the same human body. It is, Locke maintains, not the same body, but the same continuing consciousness, which constitutes the criterion for the identity of persons. When used in this sense, consciousness denotes more than simply the sensate awareness of one's surroundings that all animals have to one degree or another. In order for there to be a sameness to consciousness, it must be of a higher order, i.e., self-consciousness. In Locke's words:

For since consciousness always accompanies thinking, and 'tis that, that makes every one to be, what he calls *self*, and thereby distinguishes himself from all other thinking things, in this alone constitutes *personal identity*, i.e., the sameness of a rational Being. And as far as this consciousness can be extended backwards to any past Action or Thought, so far reaches the identity of that *Person*; it

<sup>7</sup> President's Commission, *op. cit.*, p. 38.

is the same self now as it was then; and 'tis by the same self with this present one that now reflects on it, that Action was done.<sup>8</sup>

On Locke's account, some human beings have irretrievably lost or will never have the capacity for personhood at any given moment, or for personal identity over time. Obvious cases would be anencephalic infants and patients correctly diagnosed as being in a persistent vegetative state. The brains of such patients will never develop or have suffered sufficient trauma or degeneration so as to preclude self-consciousness and rationality. Both categories of patient are permanently unconscious because they have no functioning higher brain.

### DISTINGUISHING BETWEEN THE DEATH OF BRAINS AND THE DEATH OF PERSONS

At this point we must return to the President's Commission discussion of brain death. Through its insistence upon a whole brain formulation of death, i.e., cessation of function of the entire brain, including the brain stem, the Commission rejects higher order consciousness, or any consciousness at all, for that matter, as the essence of personhood. The brain is treated not as the organ which sponsors the rational, continuing self-conscious life of the person, but rather as the organ which engenders the body's capacity to organize and regulate itself. Of primary concern here are the homeostasis of body temperature, heartbeat, blood pressure, respiration, and the like. Thus, according to the Commission, human death is 'that moment at which the body's physiological system ceases to constitute a regulated whole.'<sup>9</sup> Through such an analysis, the capacity for conscious experience is reduced to a non-essential, indeed a trivial aspect of human life, and hence is allowed to play no role in the determination of death.

However, there has developed in bioethics an important distinction between human biological life and human personal life. Such a distinction is unintelligible outside of the realm of beings with the capacity not merely for consciousness, but for self-consciousness. Moreover, those who place great emphasis upon that distinction, such as James Rachels<sup>10</sup> and H. Tristram Engelhardt,<sup>11</sup> carefully note that these two dimensions of the lives of human beings are not co-extensive.

<sup>8</sup> Locke, *op. cit.*, II.XXVII.9.

<sup>9</sup> President's Commission, *op. cit.*, p. 33.

<sup>10</sup> James Rachels, *The Ends of Life—Euthanasia and Morality*, Oxford: Oxford University Press, 1986.

<sup>11</sup> H. Tristram Engelhardt, Jr., *The Foundations of Bioethics*, New York: Oxford University Press, 2nd. ed., 1996.

There are, they maintain, many cases in the medical domain in which human personal life comes to an end before, in some instances long before, human biological life. There are also cases in which human biological life comes into existence, but without the capacity to sponsor the human personal life that is characterized by consciousness. The President's Commission appears to dispute this claim, or at the very least to attach no significance to it whatsoever. Yet a patient in a persistent vegetative state, who has undergone what is referred to as higher brain, cerebral, or neocortical death and whose life as a person has ended, may, through the continued application of heroic measures, have their bodily functions sustained for many years.

I take the position that the Commission's whole brain formulation of death fails to provide a meaningful basis upon which to distinguish between the death of a human being and any other species of animal. All such animals have the capacity to auto-regulate their physiological systems as an integrated whole, but none but human beings have ever been considered to have the capacity for personhood. While the Commission might have taken the position that although we do know how persons are distinguishable from other animals, our capacity at this time to accurately determine the permanent loss of the capacity for self-conscious experience is insufficient, that is not what it did. Instead, it dismissed the relevance of the concept of person to human death, and proceeded to recommend a formulation of death (the whole brain) that could just as easily be applied to any animal whose brain is sufficiently developed to enable it to organize and regulate its overall physiological functioning.

The whole brain death formulation has led to a great deal of ambiguity and anxiety in end of life decisionmaking. Patients who have permanently lost the capacity for conscious experience, but who have a functioning brain stem, cannot be treated as brain dead, but must be 'allowed to die' in appropriate cases through the removal of life support. Too often, even patients who do meet the whole brain death criterion are described by medical personnel and lay persons alike as having been declared brain dead at time  $t$ , when life support was removed, and as having 'died' thereafter at time  $t_1$ . This conceptual confusion is, I suggest, a product of the reduction of persons to the integrated functioning of the human body that is inherent in the whole brain formulation of death. The infirmity of the whole brain formulation becomes readily apparent when the Commission attempts to articulate what it is that makes a patient in a permanent vegetative state, but with a functioning brain stem, a living human being while a patient who has undergone whole brain death but is being sustained through artificial nutrition and hydration and mechanical ventilation is nothing more than a 'perfused corpse'.

The critical distinction, according to the Commission, the vital signs of human life present in the former patient but absent in the latter, are that the former can 'breath (without the aid of a respirator), sigh, yawn, track light with their eyes, and react to painful stimulation'. I will return to this point, and the curious significance which the Commission attaches to it, later.

Robert Veatch, in my judgment, is correct when he suggests that death should mean 'a complete change in the status of a living entity characterized by the irretrievable loss of those characteristics that are essentially significant to it'.<sup>12</sup> Such an approach to the conceptualization of death, it would seem, is based upon the premise that the unique attributes of the living organism should carry through and inform the determination that it has died. As I earlier suggested, what is unique about human beings is not their capacity to auto-regulate their physiology, a trait which they share with many other non-human species. What is unique about human beings is their capacity for personhood, for living the self-conscious life of a person. It should be, therefore, the total and permanent loss of that capacity which marks the death of the human being.

## DEATH AND THE CAPACITY FOR CONSCIOUS EXPERIENCE

In *The Foundations of Bioethics* Engelhardt poses a hypothetical case which indicates why the whole brain formulation espoused by the President's Commission is, or upon further reflection, should be problematic for many thoughtful people.<sup>13</sup> A patient is told that test results indicate that the symptoms which brought him in for an examination reveal that he is in the early stages of a grave, progressive neurological disorder that will, within the year, render him permanently unconscious. That is the bad news. There is good news, however, which is that through artificial nutrition and hydration and mechanical ventilation, his life will be sustainable for years thereafter, so long as appropriate nursing care is provided. Several days later, he is called back in to see his physician with late breaking details about his prognosis. The bad news, i.e., the diagnosis of permanent unconsciousness within the year, remains unchanged. However, the good news is even better than was first indicated. It now appears likely that the progression of the disease will spare enough of the brain stem so that sustaining his life indefinitely will only require artificial

<sup>12</sup> Robert Veatch, *Death Dying, and the Biological Revolution*, New Haven: Yale University Press, 1976, p. 25.

<sup>13</sup> Engelhardt, *op. cit.*, pp. 247–248.

nutrition and hydration, but not mechanical ventilation. Thus, echoing the ringing words of the President's Commission, the physician, suffused with excitement, attempts to communicate to the patient the significance of this upwardly revised prognosis. She tells him: 'The contrast between how you would have been and how we now believe you will be is "startling". Rather than lying with fixed pupils, motionless except for the chest movement produced by the respirator, you will breathe on your own, sigh, yawn, track light, though of course not see, and withdraw reflexively when your skin is pricked with a pin, but experience no pain'.

Now Engelhardt, myself, and let us assume this patient, find this new, (improved) prognosis to be utterly without significance. The patient's reaction, in this hypothetical scenario, is that *he* will not be there according to either prognosis. The only life that has any meaning or value whatsoever to him, his personal life of self-conscious experience, will be over within the year according to either prognosis. Indeed, the patient might find the physician's, and the Commission's, rhapsodizing about the wonders of human life conceptualized as permanently unconscious auto-regulation of metabolic processes more than a little macabre. The patient, according to Engelhardt, has embraced the concept of higher brain or neocortical death. To insist that human life goes on in some important way after the death of the self that comes with permanent unconsciousness is to suggest that the term 'person' is indeed nothing but a free-floating honorific that carries no metaphysical significance whatsoever.

### CONSCIOUSNESS AS THE SINE QUA KNOWN OF HUMAN PERSONAL LIFE

Perhaps some of the most rigorous criteria for the status of person were offered by Fletcher in his essay 'Humanness'.<sup>14</sup> Nevertheless, although his life of fifteen criteria includes some debatable ones such as curiosity, idiosyncrasy, and a balance of rationality and feeling, he ultimately acknowledges that all of them flow out of and are dependent upon the last one, which is neocortical function. For he states that 'in the absence of the synthesizing function of the cerebral cortex, the person is nonexistent'. He goes on to take the position that 'what is definitive in determining death is the loss of cerebration, not just of any or all brain function. Personal reality depends on cerebration and to be dead 'humanly' speaking is to be excerebral,

<sup>14</sup> Joseph Fletcher, 'Humanness', *Humanhood: Essays in Biomedical Ethics*, Buffalo, N.Y.: Prometheus Books, 1979, pp. 12–16.



no matter how long the body remains alive'.<sup>15</sup> Like Fletcher, all those who have offered and debated the essential elements of personhood have acknowledged one fundamental fact, that consciousness is a necessary condition for it. No one, to my knowledge, has seriously attempted to argue that we could or should ascribe the status of person to a being or entity that has never had, could never acquire, or has irretrievably lost the capacity for conscious experience. Indeed, much of the tragedy of the anencephalic infants and patients in a persistent vegetative state is that they bear the physiology of the human being, but they permanently lack the most essential feature of the human being, which is its undisputed capacity for living the life of a person, or rational self-consciousness.

Because of the tendency to speak in terms of self-consciousness rather than mere consciousness when discussing persons, I believe that it is important to be precise about the position I am advocating. There can be no self-consciousness without consciousness. Profoundly demented or brain damaged patients may clearly be conscious, but have little or no sense of self. There is certainly no consensus that such patients should be declared dead because of their questionable status as persons. The advocates of higher brain death uniformly maintain that it is the complete loss of the capacity for conscious, not self-conscious experience, that should be the basis for declaring brain death.

### AVOIDING THE TREACHEROUS SLIPPERY SLOPE

The Commission, and other advocates of whole brain death, do not hesitate to offer as one of their principal defenses the argument that higher brain formulations of death put us somewhere on the slippery slope for a host of reasons. Let me begin the discussion of this issue with a disclaimer. Although I have mentioned with approval Locke's linkage of personal identity with the type of continuing higher order consciousness that characterizes persons, I am not advocating, as Green and Wikler did in an often-cited article, that human death should be held to be the loss of personal identity.<sup>16</sup> As the Commission correctly notes, many demented patients and those with other grave cognitive deficiencies experience a loss of personal identity, but certainly ought not to be considered dead. Although it would be beyond the scope of this paper, I believe that a persuasive case can be

<sup>15</sup> The words attributed to this hypothetical physician are taken, almost verbatim, from the President's Commission, *op. cit.*, p. 35.

<sup>16</sup> Michael Green and Daniel Wikler, 'Brain Death and Personal Identity', *Philosophy and Public Affairs*, 9 (1980): 105–133.

made that Locke's concept of continuing consciousness should be interpreted so as to allow the demented to retain some tenuous link with their formerly competent selves.

Another slope problem in this area is the argument that medical science does not yet possess the tools to definitively determine when the capacity for all conscious experience has been permanently lost. An initial response to this concern about false positive determinations of higher brain death is that false positives are prevalent throughout medicine, including current determinations of whole brain death. Truog and Fackler report that many patients have been declared brain dead under the whole brain formulation when in fact it was not the case that there had been complete cessation of all brain function.<sup>17</sup> Furthermore, the argument in support of higher brain death as the appropriate demarcation of the end of human personal life must begin at the level of conceptual analysis. A major problem in the bioethical debate over personhood and its implications for brain death is the failure to carefully establish and maintain distinctions among concepts and definitions of death and criteria and tests for death. We may reasonably arrive at a consensus that our concept of death, and its articulation by way of a definition, should be based upon the permanent loss of the capacity for human personal life as characterized by rational, self-conscious experience, before we are scientifically able to identify medical criteria for death so conceived, or sufficiently reliable tests that will tell us when those criteria have been met. Indeed, perhaps the major fault in our approaches heretofore is that we have adopted and applied criteria and tests that thereafter wander in search of a carefully articulated concept and definition that is never forthcoming.

Robert Veatch<sup>18</sup> and Karen Gervais<sup>19</sup> have also suggested that our diverse and pluralistic society should not be monolithic in its approach to death. In other words, while we should strive for a consensus position that most people can understand, appreciate, and accept, we may also wish to allow for conscientious objectors. There are those who for religious, cultural, or purely personal reasons believe that every human heartbeat is sacred, and that their conscience would be shocked if they were to be declared dead with what they judge to be such blatant prematurity. The suggestion, then,

<sup>17</sup> Robert D. Truog and James C. Fackler, 'Rethinking Brain Death', *Critical Care Medicine*, 20 (1992): 1705–1713.

<sup>18</sup> Robert Veatch, 'The Impending Collapse of the Whole Brain Definition of Death', *Hastings Center Report*, 23 (1993): 18–24.

<sup>19</sup> Karen Gervais, *Redefining Death*, New Haven: Yale University Press, 1986, p. 213.

is that a person ought to be presumed to accept the higher brain definition, but that she may indicate through a written directive that some other definition should apply. This option, if exercised, might nevertheless be predicated on the ability of the individual or her family to pay for the costs of sustaining her physiological functioning, since it would be unlikely that insurance would cover such continuing medical interventions on a patient who meets the generally accepted definition of death.

## CONCLUSION

The debate over various formulations of death highlights the ambiguities in the use of the concept of person in bioethics. As I have suggested, these ambiguities largely relate to what should be the requisite sufficient conditions for personhood. While this debate may be ongoing and without a strong consensus, to the best of my knowledge no one is suggesting, not even the President's Commission, that the capacity for conscious experience is not a necessary condition for personhood. Indeed, if consciousness were not a necessary (and hence presupposed condition for personhood), most of the discussion of the subject of personhood would become completely unintelligible, as well as much of moral philosophy. If we can arrive at a strong consensus (as opposed to unanimous agreement) on this point, that the capacity for personhood is what gives meaning, purpose, and distinctiveness to human life, then we should decide that death will be determined upon the basis of the end of human personal life (consciousness), which cannot be artificially sustained by medical technology, and not human biological life, which can be, but without good reason.

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