Religious Traditions and Public Policy*

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If public policy is at all to be informed by religious tradition it must begin with the cardinal religious value: Truth. So fundamental is truth that no religion, and indeed no cognitive discipline, would be conceivable unless truth be assumed as a meta-principle.

The term "truth" is used in this context not in the sense of truth-telling, but in the sense of truth-recognition. Every moral system recognizes that, under certain conditions, communication of a falsehood is not only devoid of odium, but constitutes a moral imperative. A maniac wishes to know which button, when depressed, will release a nuclear device. In that case the morally mandated response is clear to all; in other situations the same clarity may not obtain. Truth-telling in the physician-patient relationship is a case in point. Curiously, or perhaps not so curiously, it is usually the physician who advocates full disclosure, while the theologian may be quite prepared to clothe the lie with moral sanction.

Although communication of a falsehood to another individual may, at times, be justifiable and even commendable, self-deception ought never to be condoned. Thus, recognition and acknowledgement of factual verities must constitute the first step in the formulation of public policy.

With the possible exception of abortion, the establishment of criteria for defining the time of death and the question of withholding treatment from terminally ill patients are the two most widely debated issues in bioethics today. Yet it is a fundamental misperception to regard these as two issues rather than as dual aspects of a single issue.

The ongoing debate concerning adoption of so-called "brain death" criteria involves absolutely no controversy with regard to

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either factual or ontological matters. Definitions, by their very nature, are tautologies. The common law definition of death as the "total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereupon, such as respiration, pulsation, etc." does little more than provide verbal shorthand for statements affirming or negating the presence of those phenomena. Those criteria, then, simply establish the truth-conditions which must exist in order to render the proposition "X is dead" a true statement. The truth of the statement lies in the satisfaction of the criteria, nothing more and nothing less.

The term "death" does not denote a state or a phenomenon semantically distinguished from the criteria employed in its definition. The term itself is descriptive rather than prescriptive and hence its use is entirely a matter of convention.

The theologian may speak of death as occurring upon departure of the soul from the body. If so, he is making a highly significant ontological statement. If he further employs the common law definition of death he, in effect, declares that "total stoppage of the circulation of blood, and a cessation of the animal and vital functions consequent thereupon" are merely the physical symptoms of a metaphysical event which cannot be perceived directly. Since metaphysical events are not subject to empirical confirmation or disconfirmation, our hypothetical theologian's assertion cannot become a subject of medical dispute. Indeed, a logical positivist adopting the verification principle of meaning would say that the theologian assertion is neither true nor false, but is bereft of meaning. Certainly, the clinical physician in urging adoption of neurological criteria of death, does not at all pretend to possess some esoteric knowledge of the perambulation of the soul which is denied to the theologian. Indeed, the physician in question may deny the existence of the soul. Whether or not he commits theological, metaphysical or lexicographical error in doing so is open to debate, but he surely does not commit the fallacy of self-contradiction.

The theologian, if he is inclined to make a statement equating death with departure of the soul from the body, understands the terms in question in precisely the same manner as they are understood by ordinary mortals. He, however, makes an additional assertion which is neither empirical nor descriptive in the physical sense, but which is causal in nature. The theologian asserts the

existence of a causal connection between the physical events denoted by the term "death," viz., "total stoppage of the circulation of blood, and a cessation of the animal and vital functions consequent thereupon" and the metaphysical phenomenon of the soul's departure from the body. I do not know whether our theologian intends to assert that it is the metaphysical event which is the cause of the physical effect or, conversely, that it is the physical phenomenon which causes the metaphysical event. We may presume, I believe, that there is little theological import in resolving the question of "Which came first, the chicken or the egg?"

But the association of chickens and eggs has profound import in fowl husbandry and one may similarly presume that the putative departure of the soul from the body at the time of death is not without theological ramifications. Thus, one understands why, for the theologian, use of the term "death" involves more than a mere convention. To be sure, the theologian well recognizes that words derive meanings through common consensus. However, were the term "death" to be used in common parlance solely as a synonym for the onset of *rigor mortis,* he would be constrained to coin his own term (perhaps "meta-death" or "soular death") for the use as a needed verbal shorthand in theological and moral discourse, and in the process he would perforce augment the esoteric jargon of his discipline.

The foregoing is intended neither as a theological excursus nor as a tongue-in-cheek manner of exposition by means of trivialization. The point is clear: Definitions are tautologies. Definitions are conventions. Hence definitions are not subject to dispute other than in the purely lexicographical sense of dispute about how words are actually used in common, scholarly or scientific parlance.

Definitions do no more than facilitate communication. Having agreed to use certain words to denote certain persons, things, places, or phenomena we must then decide what we want to say *about* them. A "table" is defined as a "smooth, flat slab fixed on legs." Fine, but nothing in that definition compels anyone to put food upon the table at meal time, or to use the table as a surface upon which to support writing materials. Assuredly, knowledge of the meaning of the word "table" does not dispatch any person to a furniture store to buy a table posthaste. Man is defined by Aristotle

as a rational animal. Yet acceptance of that definition does not compel the conclusion that cannibalism is odious or that carnivorous behavior is morally acceptable. The moral judgment that *homo sapiens* should be accorded certain privileges and immunities must be established on grounds which are other than semantic in nature.

Let us assume, *arguendo,* that dolphins are rational creatures. Would it then follow that dolphins are human beings? Neither the zoologist nor the man in the street would answer in the affirmative. Would dolphins be entitled to nondiscriminatory treatment together with fellow rational creatures, i.e. *homo sapiens?* An Aristotelian moralist might well answer this question in the affirmative. It would turn out that, for him, rationality is not the definition of humanity but the sufficient criterion for certain treatment. The question of dignity, privileges and immunities to be accorded members of various species within the animal kingdom is a matter falling within the province of moral philosophers, theologians, legislators and jurists. Pinpointing the physical or cerebral attributes which distinguish various species from one another is the task of the zoologist. Reporting how words are used in either common or scholarly discourse, whether such words be used with precision or imprecision, is the task of the lexicographer whose conclusions constitute a *non sequitur* insofar as scholars in other disciplines are concerned.

The definition of the term "death" is no different from the definition of any other term. The task of defining the term properly belongs to a lexicographer whose findings are essentially reportorial in nature. Other than in an Orwellian 1984 society fin which we may well be living) definition by means of legislative fiat is nonsensical. More significantly, the act of definition provides no basis whatsoever for moral conclusions of any nature. To be sure, common usage, which serves as the progenitor of any formal definition, *may* reflect a *vox populi* moral stance which influences language usage. However, it can hardly be claimed that there must exist a necessary causal connection which mandates the inference of a moral cause from a semantic effect. Moreover, even were that to be the case, any *argumentum adgentem* of such nature would of necessity be subject to scrutiny through the prism of moral theory.

There is nothing mysterious or mystical about the use of most words in human discourse. Nor, with regard to most words, is there

anything arcane about the parameters of usage-and hence the definition-of any given term. The common law definition of death is nothing more than the adoption for legal purposes of the term as it was-and continues to be-used in common parlance. To be sure, that definition is a tautology-as is every definition. But words are assigned certain meanings because they are needed as a form of verbal shorthand for the communication of concepts. The term "death," particularly as predicated of human beings, was made synonymous, not with decomposition of the body, the onset of putrefaction, or with *rigor mortis,* but with the cessation of respiration and cardiac function, precisely because it is at that stage that the human organism is beyond medical treatment. As such, it is no more than an empirical statement, devoid of any value judgment. Moralists of bygone ages were perfectly capable of debating the issue of euthanasia, both active and passive, despite this definition-or better, because of the definition. It is precisely because death is defined in terms of criteria which reflect the empirical impossibility of continued medical treatment that there is room for debate concerning withholding of treatment (passive euthanasia) or overt "negative treatment" (active euthanasia) at a stage prior to death when treatment, both positive and negative, is yet efficacious.

Time of death statutes are not lexicographical exercises. Any attempt to categorize them as merely legislative reflection of more precise language usage is an act of intellectual or moral dishonesty and possibly both. Neither is it correct to state that such statutes reflect advanced scientific knowledge and expertise. It must be emphasized that there is absolutely no medical, scientific or factual issue involved in the "time of death" controversy.

Definitions for legal purposes do not – and need not – reflect common usage. A definition for statutory purposes is designed to influence, not speech, but conduct. Adoption of neurological criteria of death for legal purposes generates a legal state in which a patient manifesting such criteria enjoys the rights, immunities and privileges, not of a human being, but of a corpse. It is a statement, not of ontological fact, but of how society wishes to treat a human being in that particular physiological state. This is no more than the legislative embodiment of a value judgment. Essentially, it is a decision to withhold treatment from a person manifesting a given clinical profile. It is not a judgment that further medical treatment

will be of no avail. There is no requirement, legal or moral, that a physician must employ therapy which is entirely useless and represents nothing more than an exercise in futility. It is precisely because the patient is not beyond medical treatment that a determination not to employ treatment is advocated, i.e., it is precisely because bodily functions, including, but not limited to, cardiac activity and body metabolism, can be preserved by continued medical treatment that a decision not to treat is advocated.

The term "Time of Death Statute" is a misnomer. The only accurate term is "Withholding of Treatment Statute." The sole question worthy of debate is: Should treatment be provided for an irreversibly terminal patient who manifests clinical symptom x, y or z?

That question poses a moral issue, not a question of medical fact or judgment. The physician is uniquely qualified to diagnose illness, to describe the physical damage suffered by the patient, to make a judgment with regard to the probable prognosis and to assess available modes of therapy. But, subsequent to determination of those clinical matters, the decision to treat or not to treat is a value judgment, not a medical decision.

Adoption of a brain death statute is nothing other than a moral judgment to the effect that there is no human value which augurs in favor of the preservation of the life of an irreversibly comatose patient. That is a question with regard to which reasonable men may differ. It is certainly a question with regard to which religious traditions have differed.

The attempt to justify withholding of treatment under the guise of redefinition of terms is a thinly-veiled attempt to secure moral and emotional approbation for a policy which would otherwise be greeted with repugnance and even indignation. It is the deeply held conviction of many, and probably of the majority, that all human life is sacred and inviolate. Withholding of treatment has the effect of snuffing out human life. Any *ad hoc* decision to act in such a manner involves a great deal of soul-searching and frequently engenders feelings of guilt. On the other hand, no one advocates medical treatment or continuation of life-support systems for a corpse. Pronouncing a person dead has the emotional effect of removing any aura of further moral responsibility. Such a process is, however, intellectually dishonest. In a less than fully informed world lexicographical sleight of hand may affect popular

perception, but it should not be permitted to affect the universe of moral discourse.

The argument in favor of withholding treatment from the irreversibly comatose patient can be formulated in one of two ways. It may be asserted that such life is entirely devoid of value and of no moral significance. There are some who would clearly espouse such a position. Those who do so bear the burden of formulating in a clear and precise manner the necessary attributes of humanhood which are correlative with human life endowed with value and moral significance. There is surely no reason for accepting neurological dysfunction as the sole point of demarcation serving to distinguish between life which is morally significant and life which is devoid of value. It is no accident that many of those who adopt the radical "no value" approach are quite willing to accept other quality of life tests and to adopt the position that in absence of a certain quality threshold, preservation of life is not a value and generates no imperative. They then differ among themselves only in regard with the nature or threshold of the quality of life which is to constitute the dividing line.

If religious traditions exercise any meaningful role in the formulation of public policy it is in the presentation of a value system against which proposed policies must be evaluated. It would, of course, be incorrect to assume that all religious traditions speak with one voice with regard to every aspect of any broad moral issue. Nevertheless, universal affirmation of the sanctity of human life in all of its guises is the cornerstone of all religious teaching. The isolated utterances of some theologians which may lend themselves to such interpretation notwithstanding, it is difficult to find a religious figure of standing who would accept the thesis that any human life is utterly devoid of value. Were adoption of the policies under discussion to be possible only if predicated upon a value judgment negating the sanctity of such life, those policies would be in opposition to the traditions and values propagated by the world's major religions over a period of millennia.

However, the argument in support of withholding treatment from an irreversibly comatose patient may be formulated in an entirely different manner. It is not necessary to deny the moral value of human life even in a moribund and non-sentient state in order to advocate, in a morally cogent manner, a policy of non-treatment. Arguably, such a policy might be justified on the

grounds that it is designed to further other values which, at least under the given circumstances, are more compelling.

A moral system, by virtue of its very nature, must posit a set of values. Yet no moral system can demand that its adherents promote each and every value in every conceivable situation. Truth-telling is a value. But surely, all ethicists would agree that not only is telling a lie in order to conceal the location of a dangerous weapon from a madman not a violation of any moral code, but is morally mandated. Every moral maxim must be understood as qualified by a *ceteris paribus* clause. The posited value is clearly a moral *desideratum* and in a Utopian universe would always be achievable. But in the real world, moral values are frequently in conflict with one another in the sense that not all moral values can possibly be pursued or achieved simultaneously. Insofar as the example of the madman and the dangerous weapon is concerned, both truth-telling and preservation of life are values which ought to be promoted. But it is impossible to have one's moral cake and to eat it also. Truth-telling in that situation will result in loss of human life. Preservation of life will entail a lie.

What does a moral agent do when two values come into conflict with one another? Every system of ethics must either establish a hierarchical ranking of the values it posits or must formulate canons for decision-making which enable a moral agent to adjudicate between competing values. When the conflict is between truth-telling and preservation of life the dilemma is readily resolvable. Assuredly, in a system of weighted values, a white lie pales into insignificance when measured against the value of human life.

In other situations the resolution of conflicting claims that arise from competing values is far less obvious. The Declaration of Independence speaks of men as endowed by their Creator with certain "unalienable rights," a phrase which is synonymous with what philosophers speak of as principles of natural law. The underlying notion is that every individual is created by God and endowed by Him with certain prerogatives which are inalienable in nature. Those rights, in the eyes of our founding fathers, include "life, liberty, and the pursuit of happiness." In the philosophy of John Locke this notion was phrased a bit differently. Locke spoke of life, liberty and the enjoyment of property. To the American mind, the concept of happiness is apparently reducible, at least in

part, to enjoyment of property. The "unalienable rights" of which the Declaration of Independence speaks represent fundamental values. Individuals are endowed with life and have a God-given right to have that life safeguarded and protected. Individuals are endowed with liberty, and no person ought to interfere with the personal autonomy of any other human being. Individuals are entitled to the pursuit of happiness and to the undisturbed enjoyment of their property.

However, in the real world, the value known as preservation of life frequently comes into conflict either with happiness or with its analogue, preservation of property. After all, society has access only to a finite amount of material resources, or so we are told. What happens when preservation of life simply costs too much? Preservation of life may be deemed to cost too much in terms of the expenditure of resources and services in prolonging that life. Alternatively, preservation of life may cost too much in emotional coin, because the patient is in pain, the family in a state of anguish, or the physicians experience frustration because, their diligent ministrations notwithstanding, they are incapable of effecting a cure. What happens when a conflict arises between preservation of life and promotion of happiness? Happiness and elimination of pain are, after all, but two sides of the same coin. In the real world such values often come into conflict with one another.

Well-intentioned individuals may differ with regard to the proper resolution of such dilemmas. Different religious traditions have certainly presented divers answers. A moral system which distinguishes between "ordinary means" versus "extraordinary means" or which sanctions the withholding of "heroic measures" has not rendered a decision that human life which requires heroic measures or extraordinary means for its preservation is of no moral value. Rather, it has recognized that certain factors render the mode of treatment heroic or extraordinary by virtue of the fact that those factors represent other values which must be compromised or sacrificed in order to preserve the life in question. The pain and suffering, or even the inconvenience involved, may be such a confliction value. The sheer cost of treatment may constitute such a value. The emotional distress and suffering caused to others may be such a value. A position which states that a woman suffering from cancer of the cervix need not submit to a gynecological examination at the hands of a male physician asserts that preservation of

feminine modesty is such a value. In each instance the sanction provided for withholding treatment involves a decision that preservation of life is indeed value but is, in effect, but one value among many. Hence, under certain circumstances, preservation of life is rendered subservient to preservation of other values.

It is clear that the Catholic tradition asserts that preservation of life is but one value among many. Jewish tradition, on the other hand, teaches that preservation of life is of paramount value and that virtually all other values are rendered subservient to the transcendental value of preservation of human life.

Certainly, public policy should recognize that different religious systems resolve moral dilemmas in different ways. It is established public policy in our country that diverse systems of religious values be recognized and accommodated. Indeed, such accommodation is constitutionally mandated save in the face of compelling state interest. In manifold areas pertaining to employment, education and family law such accommodation is required by virtue of legislative fiat and/or judicial mandate. Diverse value systems are certainly entitled to the same recognition and accommodation in matte pertaining to bioethical issues.

Recognition of the claims of diverse religious traditions is essentially a matter of civil liberty. For this reason it is certainly arguable that the State should not interfere with an individual's right to be treated as a living human organism even though he may be comatose or be in a so-called vegetative state, but that the State is under no parallel obligation to force treatment upon such persons against their previously announced will. Nor is the State necessarily compelled to treat the termination of the life of such a person as an act of homicide to be punished in the appropriate manner set forth in the penal code. The State need merely acknowledge that it respects and accommodates the religious and moral beliefs of all of its citizens and will not treat a person, or allow him to be treated, in a manner which is repugnant to him. Of course, one who interferes with the legally protected civil liberties of another is a lawbreaker. But society may well declare the appropriate punishment to be that which is prescribed for violation of civil liberties, rather than that provided for homicide. Thus there is no anomaly between adoption of neurological criteria of death in a criminal code and incorporation of a so-called "religious exemption" provision in other areas of law.

The selfsame principles of liberty and personal autonomy as well as the provisions of the Free Exercise Clause of the First Amendment should serve to guarantee that even when statutes provide that neurological criteria may be employed for purposes of pronouncing a patient dead or, more accurately, that neurological criteria may be employed for purposes of withholding further treatment, such criteria should not be utilized for the purpose of removing or denying life-support mechanisms in violation of a patient's religious or moral convictions.

To be sure, the first amendment has long been understood as providing absolute immunity with regard to matters of religious belief but not as providing absolute license in matters of religious practice. As early as 1879 the Supreme Court ruled in *Reynold vs. United States* that a free exercise claim could not be asserted as a defense against prosecution for violation of the statutes prohibiting the practice of bigamy. Yet not every state interest or concern can justify the placing of a burden or restriction upon the right to practice one's religion freely. Thus in *Schneider vs. State* the Supreme Court ruled that the state's interest in preventing the littering of public streets cannot justify a municipal ordinance which would effectively ban dissemination of religious literature. More recently, in *Sherbet vs. Verner,* the Supreme Court ruled that the state must ordinarily grant exemption from provisions of law in order to permit the free exercise of religion. Once a claimant has shown that the challenged regulation imposes some significant burden upon the free exercise of his or her religion, it becomes incumbent upon the state to demonstrate that the regulation, or the denial of an exemption, is necessary in order to protect a compelling state interest. Such accommodations can be denied, the Court declared, only in the face of "some substantial threat to public health, safety, peace or order."

It is quite difficult to identify a state interest which is compelling as to warrant application of neurological criteria of death in violation of a patient's free exercise rights. It must be remembered that the harvesting of organs even in order to save the life of others, laudable as that purpose may be, is not sanctioned by law other than upon the previously granted consent of the deceased or of the next of kin. Hence the need to preserve the life of another person cannot constitute a compelling state interest under such circumstances since, in matters pertaining to organ transplants, that

goal may readily be thwarted. It may also be contended that allowing a patient to occupy a bed in an ICU renders that bed unavailable for use by another patient for whom the availability of such a bed may literally be a matter of life and death. Assuredly, the state does have a compelling interest in preserving life and in restoring its citizens to good health. Yet, as applied to the matter under discussion, the argument is entirely specious.

Nothing in current law or administrative regulations prevents hospitals or health care professionals from exercising their own judgment in deciding how to allocate scarce medical resources or in deciding which patient to treat when all patients cannot be treated. It is tragic that triage decisions must ever be made, yet emergency room personnel are not infrequently called upon to make such decisions and do so in accordance with their own best medical judgment. Similarly, patients may be removed from the ICU and placed elsewhere when other patients have greater need of, or may derive greater benefit from, the ICU facility. It is not at all argued that a free exercise claim can be asserted when to do so would prevent the exercise of sound medical judgment and thereby rebound to the detriment of others.

Moreover, the law has long recognized that, even when a free exercise claim cannot be asserted in order to compel privileged treatment, there exists a "zone of permissible accommodation" within which the law may legitimately accommodate religious practices. Thus, a school may institute a program of released time in order to facilitate religious instruction, Sabbath observers may be exempted from restrictions against commercial activity on Sunday, conscientious objectors may be exempted from military service, etc. In a pluralistic society, recognition and respect for the religious convictions and practices of others is a social value of the highest importance. It may cogently be argued that exemption from a requirement that death be pronounced on the basis of neurological criteria, when such determination would violate sincerely held religious convictions, is a constitutionally protected right. But, even if not constitutionally mandated, such religious convictions are no less deserving of accommodation than are matters of far less pressing concern.

There is another area, in particular, in which public policy ought to be informed by religious tradition. The fundamental values recognized in the American constitution are "life, liberty and the

pursuit of happiness." Although religious traditions have differed with regard to the resolution of conflicts which arise between the competing claims of life and the pursuit of happiness, they are far closer with regard to the adjudication of competing claims presented by espousal of preservation of life on one hand and of liberty on the other.

The concept of a Natural Death Act is, on the surface, nothing more than the logical outgrowth of a libertarian ideal. Man's personal affairs are his own concern. As long as his actions do not infringe upon the rights and freedoms of others the State should maintain a *laissez faire* attitude. Why, then, should this not extend to the individual's autonomy with regard to his very life? Ostensibly, this is the philosophical commitment which finds legislative expression in the Natural Death Act. As stated in the preamble of the California statute this legislation is enacted in the "interest of protecting individual autonomy" and is designed to assure "the dignity and privacy which patients have the right to expect." As presented in this declaration of values, personal freedom is allowed untrammeled expression. The competing claim of preservation of life is not acknowledged even for purposes of negation.

The touchstone of a democratic society is the concept of individual freedom and personal autonomy. Democratic societies are certainly dedicated to the maximization of personal freedom and find it necessary to justify any violation of personal privacy and any intrusion into the personal affairs of their citizens. These democratic traditions stand diametrically opposed to the absolutism which is the hallmark of the autocratic systems of government whose excesses cause so much human suffering.

No one will dispute the claim that personal freedom and individual autonomy are religious values as well. Yet, it is readily apparent that, in a hierarchical ranking of values, the values of personal freedom and autonomy do not occupy a position within a religiously oriented ethical system identical to that which they occupy in a secular system of values. That certainly is the case insofar as Jewish tradition is concerned. The "religious" view with regard to the parameters of personal autonomy are eloquently expressed in the writings of the sixteenth-century rabbinic authority, Rabbi David ibn Zimra (Radbaz), the author of one of the principal commentaries on Maimonides' classic compendium of

Jewish law, the *Mishneh Torah*. Radbaz formulates his thesis regarding personal autonomy by focusing upon what appears to be a contradiction between two fundamental principles of Jewish law.

There is a principle of Jewish jurisprudence which provides that an individual may appear before a court and make a statement prejudicial to his own financial interests and that such statement will be accepted without question or qualification. This is true even if the statement is contradicted by the testimony of a hundred trustworthy and credible witnesses. For example, Mr. A. may appear in court and say, "I have borrowed $100 from Mr. B. on such and such a day and I have not returned the money." The court will order him to return the money even if a hundred witnesses appear and testify that the story of the loan is a complete fabrication.

However, with regard to criminal procedure, Jewish law contains a provision which goes far beyond the Fifth Amendment. The Fifth Amendment provides simply that an individual cannot be compelled to give testimony against himself. Nevertheless, confessions of guilt are not barred and, indeed, are commonly accepted by American courts. Jewish law declares not only that a witness can not be compelled to testify against himself, but that, in criminal matters, any statement which is prejudicial to the interests of the defendant is inadmissible if the statement comes from the mouth of the defendant himself. No individual can be convicted on the basis of his own testimony and no individual is accorded credence in declaring himself to be a criminal.

Radbaz's problem lies in the obvious contradiction presented by these two rules. Either a person is to be granted credence with regard to statements prejudicial to his own interests or he is to be regarded as lacking credibility with regard to his own deeds. If his statements are to be given weight, they should be given the same weight in criminal matters as they are given in matters of jurisprudence. On the other hand, if statements made by an individual are regarded as untrustworthy and unreliable insofar as they pertain to himself and to his own interests, such statements should be dismissed out of hand in civil proceedings just as they are in criminal matters.

The answer, as Radbaz phrases it, is really very simple. After all, observes Radbaz, an individual's material possessions and financial resources are his to dispose of as he wishes. A person

money is his own. If he wishes, he is at perfect liberty to make a gift of his funds to another person. If he chooses to invoke the judicial process as an instrument of accomplishing that end, the law will be happy to accommodate him. It may be nothing more than a charade, but there is more than one way to skin a cat and more than one way to bestow a gift. Accordingly, if a person wishes to make a gift to another by harnessing the judicial process in order to do so, so be it. However, in confessing guilt, an individual who faces prosecution on criminal charges and who, if found guilty, is subject either to corporal or capital punishment, is not giving away his money but is disposing of his body and his life. Judaism teaches that man has no proprietary interest either in his life or in his body. Man's body and his life are not his to give away. The proprietor of all human life is none other than God Himself. As Radbaz so eloquently phrases it: "Man's life is not his property, but the property of the Holy One, blessed be He."

What then is the legal status of the relationship which exists between man and his body? In order to understand Jewish teaching with regard to the various problems that were raised earlier, it is helpful to draw an analogy. It should be recognized that personal privilege as well as personal responsibility, as it extends to the human body and to human life, are similar to the privilege and responsibility of a bailee with regard to an object with which he has been entrusted.

A bailee is an individual who has accepted an object of value for safekeeping. It is his duty to safeguard the object and to return it to its rightful owner upon demand. Judaism teaches that, with regard to his body, man is but a steward charged with preservation of this most precious of objects and must abide by limitations placed upon his rights of use and enjoyment. Hence, any claim to absolute autonomy is specious.

This moral stance is reflected in the mores of society at large, although not to the same degree. Despite our society's commitment to individual liberty as an ideal it recognizes that this liberty is not entirely sacrosanct. Although there are those who wish it to be so, self-determination is not universally recognized as *the* paramount human value. There is a long judicial history of recognition of the State's "compelling interest" in the preservation of the life of each and every one of its citizens, an "interest" which carries with it the right to curb personal freedom. What the jurist calls a "compelling

state interest" the theologian terms "sanctity of life." It is precisely this concept of the sanctity of life which, as a transcendental value, supersedes considerations of personal freedom. This is implicitly recognized even in the drafting of the Natural Death Act; else such legislation would grant its citizens unequivocal authority to terminate life. Were autonomy recognized as *the* paramount value, society would not shrink from sanctioning suicide, mercy killing or indeed consensual homicide under any and all conditions.

Jewish tradition certainly recognizes liberty as a value, but defines freedom and liberty in a very particular way. The Mishnaic dictum, *"Ve-lo attah ben horin le-hibbatel mimmennah" (Ethics of the Fathers* 2:16) is rendered by the 15th century commentator Isaac Abarbanel, not in the usual manner as "Nor are you free to desist from it," i.e., from obedience to the Law, but as "Nor in desisting from it are you a free man." Freedom, declares Abarbanel, is not to be defined as license to do as one wishes; freedom is the ability to develop human potential, to fulfil the human *telos.* Freedom is the absence of constraint which would interfere with such realization. Hence casting off the yoke of law is not an act of freedom but its antithesis. The concept is very similar to what the British philosopher T.H. Green called "positive freedom."

This is true for other religious traditions as well. Liberty, as the term is conventionally understood, is a paramount value only when it does not conflict with other divinely established values. In secular terms, personal autonomy must give way to preservation of the social fabric. The state has an interest, which is entirely secular in nature, in the preservation of the life of each of its citizens. Absent other competing interests, it may assert its authority in compelling the preservation of a life against the wishes of a citizen despite the deprivation of liberty which is entailed thereby because public policy accepts the moral thesis that the preservation of life be regarded as a superior value taking precedence over the right to privacy and the value of personal autonomy.

Our society, for good moral reasons, has refused to recognize that the right to autonomy and personal privacy is of sufficient breadth that it may encompass a "right" to dispose of one's life as one wishes. It is clear that such a claim could not be sustained even were it to be predicated upon religious belief. Courts have consistently intervened and have refused to allow parents to withhold medical treatment from minor children and, in doing so,

have refused to acknowledge that a right to family privacy constitutes a barrier to intervention by the state. In numerous cases, courts have ordered blood transfusions despite objections by parents on grounds of religious conviction. Recently, in the case of a child suffering from bone cancer, the Supreme Court of the state of Tennessee ordered administration of chemotherapy despite religious objections interposed by a clergyman parent.

Cases of this nature test the outermost limits of a policy of accommodation of religious beliefs and practices. The Tennessee case, in particular, generated a great deal of debate and evoked much sympathy for the parents, particularly because the issue of familial privacy was coupled with infringement upon religious liberty.

Yet imagine the following hypothetical: a group of Aztec Indians cling to the belief that health and prosperity can be assured only by sacrificing the heart of a young maiden to a pagan sun-deity. An adolescent girl, fully convinced that she will earn eternal merit and bliss thereby, grants consent to her father to perform the sacrificial ritual. Our society would surely intervene to prevent the parties to act in such a manner. Nary a dissenting voice would be raised in protest despite the clear violation of otherwise constitutionally guaranteed rights.

The *parens patriae* doctrine is a legal formulation of the ranking of values within an ethical system. Liberty is not regarded as the paramount value in all situations.

Preservation of life, at least in some circumstances, is perceived as constituting a higher value than protection of individual autonomy. The "compelling state interest" which is present in such cases is of sufficient moral force to warrant denial of the free exercise of religion. As applied in cases of this nature, that too, paradoxical as it may sound, reflects the influence of the dominant religious tradition upon formulation of public policy.

The issue becomes much more complex when quality of life considerations are added to complicate the moral dilemma. Insofar as adults are concerned, society, through the judicial branch of government, has been willing to allow considerations of individual autonomy and respect for personal privacy to be given precedence over preservation of life when the quality of the life to be preserved has been diminished significantly. In *Quinlan* the court dealt with what is essentially a matter of the balancing of two antagonistic

value claims and recast the matter in nonmoral terms in declaring that the State interest in preservation of life diminishes in direct proportion to the diminution of the quality of the life in question.

At the same time, the courts have shown utmost reluctance to apply a similar approach in the case of minors. This disparity is strikingly evident in the juxtaposition of two decisions handed down by the Court of Appeals of New York on the same day, March 31, 1981. In the famed Brother Fox case the court authorized the withholding of medical treatment prolonging the life of Brother Fox who was judged to be in a "chronic vegetative state" with no reasonable chance of recovery. Simultaneously, in *In Matter of Storar* the court ordered the administration of blood transfusions to a profoundly retarded fifty-two year old man with terminal cancer of the bladder. This order was issued against the wishes of the patient's mother who refused consent on the ground that the transfusions would only prolong the patient's discomfort. In *Storar* the court equated the status of a profoundly retarded individual with that of a minor and declared that the patient's guardian could not make a determination to decline blood transfusions, just as the parents or guardian of an infant could not so decide.

In a 1979 decision in *Berman vs. Adler* The Supreme Court of New Jersey declared:

One of the most deeply held beliefs of our society is that life – whether experienced with or without a major physical handicap – is more precious than non – life... Nowhere... is there to be found an indication that the lives of persons suffering from physical handicaps are to be less cherished than those of non-handicapped human beings. We recognize that... [her] abilities will be more circumscribed than those of normal, healthy children and that she, unlike them, will experience a great deal of physical and emotional pain and anguish. We sympathize with her plight. We cannot, however, say that she would have been better off had she never been brought into the world. Notwithstanding her affliction, [she] by virtue of her birth, will be able to love and be loved and experience happiness and pleasure – emotions which are truly the essence of life and which are far more valuable than the suffering she may endure. To rule otherwise would require us to disavow the basic assumption upon which our society is based. This we cannot do.

These principles are not negated by the recent decision of the New York courts in the matter of Baby Jane Doe. News reports to the contrary, the Appellate Division of the New York Supreme Court did not rule that parents have the right to withhold lifesaving therapy from their child. The case tried in the courtroom was not the case tried in the pages of the newspaper. The courts did *not* rule that there exists a right of familial privacy which bars judicial interference even when the life of a child is threatened. The *parens patriae* doctrine is far too deeply ingrained in the common law tradition to permit any such finding. The appellate court simply ruled that, when alternate forms of therapy are available, it is the parents who have the right to choose which therapy should be administered. That, too, is good sense and good law – at least in theory.

Application of this principle to the case of Baby Jane Doe is another matter entirely. The "conservative therapy" chosen by the parents was administration of antibiotics and palliative treatment. Chances of survival for any significant period of time are nil; were the surgical route pursued, longevity anticipation would be greatly enhanced. Treating spina bifida with antibiotics instead of by surgery is not very different from treating cancer with aspirin rather than by means of chemotherapy. Any physician would candidly concede that such "alternate therapy" is tantamount to non-treatment.

Surely the court knew this as well. As Voltaire remarked, hypocrisy is the homage vice pays to virtue.

Why, then, the subterfuge? Why not call a spade a spade and espouse a doctrine which permits passive euthanasia with parental consent? The answer must lie in the fact that, when confronted by a moral dilemma, society prefers not to make hard choices between competing values when each value deserves to be upheld on its own merits.

That does not mean that given the same, or perhaps slightly altered, circumstances, the decision of Baby Jane's parents to withhold consent for surgery may not have been justified – but on entirely different grounds. All hazardous medical procedures which, if unsuccessful, may precipitate death present a harsh choice: the gamble of a brief, but uncertain, life-span for the sake of uncertain, but much enhanced, longevity. Every moment of life, no matter how ephemeral, is sacred and endowed with infinite

value. A prudent person does not lightly risk the loss of that which is greatly valued even for the possibility of greater gain. A bird in hand is indeed worth two in the bush. Such a gamble is discretionary at best and is warranted only when the risk-benefit ratio is favorable. But the values to be weighed are life versus life, not life versus privacy, or life versus liberty.

To be sure, in a pluralistic society, disparate value judgments with regard to newly-arising questions of moral concern are to be anticipated. Public policy must be formulated within broad parameters of social morality to allow for diversity within unity. The strength of American democracy lies in its system of law which reflects a keen sensitivity for the accommodation of diverse value systems in forging "one nation, under God, with liberty and justice for all."

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