The Social Construction of Death, Biological Plausibility, and the Brain Death Criterion

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thoughtful people not just as friendly but essential to sound judgment and decision making. Instead, one person’s facts have become another’s propaganda. We need only recall the infamous Republican Congressman and Nixon loyalist Earle Landgrebe, who in an exasperated fit of candor during the Watergate proceedings declared: “Don’t confuse me with the facts. I’ve got a closed mind” (Benko 2012).

Even for those inclined to view medical data as fact, recently reported instances in which awareness has been detected through functional magnetic resonance imaging (fMRI) in patients diagnosed as vegetative suggest that mistakes can be made. While false positive determinations of brain death may be mercifully rare, reports that individuals who meet brain death criteria can nevertheless have their “vital signs” and physiologic systems artificially maintained for months thereafter lend credence to those who seek to persuade the general public that brain-dead patients are merely profoundly disabled but not beyond hope for some measure of recovery (Shewmon 1998). From this perspective, public policy grounded on a legal or moral fiction of “as good as dead” will likely be deemed not simply unwise but unconscionable, regardless of how many authoritative figures in the health professions and bioethics sign on to it. As to these and other contentious issues, the goal of a deliberative democracy in the midst of a secular-pluralist peaceable society eludes us still.

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definition of death as the irreversible end of personal experiencing and interacting, deeming the ongoing integrated functioning of the organism (and the spontaneity of heartbeat) to be irrelevant because of ventilatory and other support (Gervais 1986).

Any criterion for determining death presupposes an answer to the question: What is so essentially significant to human life that its irreversible loss is death? People differ in their answer to this question. Despite this, people can accept the use of the brain-death criterion for determining death either because they agree with the consciousness-based concept of death underlying it, or because they consider the combination of irreversible unconsciousness and the necessity of perpetual mechanical support to be death. For others, a conscience clause in a determination of death statute would enable people to clarify their wishes concerning life-sustaining treatment and organ donation in the event of brain death.

When the President’s Commission constructed its arguments in 1981, it insisted that the irreversible loss of the integrated functioning of the organism as a whole was the single unified concept of death that legitimated the use of the brain death criterion and the traditional use of the cardiopulmonary criterion (TC). Many of us now agree that brain death does not fulfill this concept of death, and some of us believe brain death reflects a different understanding of human death (Gervais 1986). In my view, the first big error in the promotion of brain death as death was the failure to acknowledge that implicit in the adoption of the BDC was a different definition of human death.

The BDC directly diagnoses that relevant parts of the brain are destroyed, treating ongoing heart and lung functioning as irrelevant to the determination. As traditionally applied in preventilator times, the TC directly diagnoses that the heart and lungs have irreversibly ceased to function. A person is dead, but according to a different concept of death, in the two cases. But in both cases, the person is irreversibly unconscious—a point relevant to the practices of controlled and uncontrolled donation after cardiac death (cDCD and uDCD). These practices occur while cardiac function remains reversible and without knowledge of the status of the brain, thus departing from both concepts of death. I assume that most people considering declaring themselves organ donors assume that they would be dead (and therefore irreversibly unconscious) during organ procurement. Since there is no guarantee of this under current practice, cDCD and uDCD should only be done as exceptions to the Dead Donor Rule, under a living donation approach that assures anesthesia.

I favor this approach to cDCD and uDCD because it enables these practices to continue but does not exacerbate and perpetuate what Frank Miller has rightly called the “crisis of incoherence” that has plagued the definition of death debate since the adoption of the brain death criterion. Current cDCD and uDCD practices have deepened the crisis. DCD donation can only be coherently addressed as an expansion of living donation, and ironically, only then will adequate protections for these donors be potentially assured. Potential donors/surrogates should be invited, in a value-neutral way uncharacteristic of current organ procurement practices, to consider living donation through a process of full disclosure and fully informed consent to the multiple, complex modifications in end-of-life best practices DCD requires. I believe that controlled exceptions to the Dead Donor Rule can afford donors and their loved ones greater autonomy and protection from potential harms.

Technological support of the human organism has forced the normative question on us: What should we consider human death to be? What biological/functional changes signify the end of a life? As a standard of coherence, “biological plausibility” returns us to using the traditional heart and lung criteria in the old-fashioned way. Since the public has not questioned the plausibility of considering brain death to be death, it seems wrong to attack it for reasons of biological implausibility. It also seems wrong to assert, as a biological fact, that brain death is death. It is a statement that is the conclusion of both metaphysical and normative reflection (Gervais 2014).

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A Legal Fiction with Real Consequences

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In “Changing the Conversation About Brain Death,” Truog and Miller (2014) summarize doubts that have been expressed for decades about whole brain death, and argue forcefully that brain death is not equivalent to biological

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