IS BIOETHICS BROKE?: ON THE IDEA OF ETHICS AND LAW "CATCHING UP" WITH TECHNOLOGY

MICHAEL H. SHAPIRO*

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* Dorothy W. Nelson Professor of Law, University of Southern California. Thanks to Professor Roy G. Spece, Jr., and to my research assistants, Mark Lemke, Daniel Houser, and Christopher Perkins.

INTRODUCTION: THE TOPIC—WHAT DOES IT MEAN?

A. In General

In its grandest form, the topic of this Symposium is "Law and Technology in the New Millennium," and the subtopic I was asked to address is "Do law and ethics have to catch up with science and technology?"[1] Whatever one

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1. To be precise

> The theme of the symposium is whether technological developments have outstripped the ability of legal ideas, processes, institutions, and the profession to address some of the issues presented by those developments. . . . The question [is] whether the advances in medical technology, such as those in the areas of genetics or transplantation, have surpassed the ability of the current legal framework to address them.

E-mail from Kristyn E. Kimery, Symposium Editor, *Indiana Law Review*, Volume 32 (Jan. 21, 1999) (on file with author). The idea has been expressed many times. *See, e.g.*, Courtney S. Campbell, *In Search of a Reason to Clone*, 12 MED. HUMAN. REV. 80 (1998) ("A commonplace lament of contemporary bioethics is that ethics and law are continually racing to catch up with scientific research.").

understands by the latter formulation, it is a sprawling subject. I will try to impose some order on it by addressing the following questions and issues:

1. Some Constituent Issues.—The question "Do law and ethics have to catch up with science and technology?" is not entirely bereft of meaning, though it is hard to say what it is. This is not meant as a complaint about the symposium framers' formulation; it is frequently heard in all quarters—from persons on the bus, scientists, and professional commentators. Its very awkwardness is instructive. It seems reasonable to assume that something coherent and important underlies the question, though when stated more rigorously it might be less catchy. Trying to unearth this something leads to several groups of questions concerning: (a) what constitutes progress in moral behavior; (b) what constitutes progress in moral theory or philosophy; (c) certain aspects of law and legal theory and what constitutes progress in these spheres; (d) the idea of scientific and technological change or progress and how it differs from that of moral and legal change or progress; (e) how these distinct inquiries are linked; (f) whether these different domains of progress are sufficiently commensurate to allow us to compare rates of progress; and, finally, (g) what a coherent reconstruction of "law and morality lagging behind technology" might mean, if anything.

Of course, being led to these issues is one thing; resolving them is another, and in some cases it is impossible.

2. The Planned Analysis.—I will focus upon biological technologies and some of the legal, moral, and general philosophical discourses applied to them. We often call these discourses "bioethics" or, for our purposes, "bioethics and law." This is a field that must be evaluated when asking whether law-and-ethics have lagged behind science-and-(bio)technology. Perhaps such probing can help explain what is outpacing what and on what sort of roadway.[2]

Although in various contexts the terms "moral" and "ethical" have different meanings (the latter is often applied to canons of professional behavior, for example) I use them interchangeably here.

2. "Technology assessment" is a related field of inquiry that has been pursued, from time to time, by the federal government. The Congressional Office of Technology Assessment ceased to exist on Oct. 1, 1995. *See Newt's Science Breakfast Club?*, 270 SCIENCE 223 (1995). The Office of Science and Technology Policy (in the Executive Office of the President), 42 U.S.C. § 6611 (1994), formed the National Bioethics Advisory Commission within the Executive Branch. The Commission was to be "charged to consider issues of bioethics arising from research on human biology and behavior, and the applications of that research." National Bioethics Advisory Commission Proposed Charter, 59 Fed. Reg. 41,584 (1994). The Commission has since produced various reports and studies. *See, e.g.*, CLONING HUMAN BEINGS: REPORT AND RECOMMENDATIONS OF THE NATIONAL BIOETHICS ADVISORY COMMISSION (1997).

Some readers may view bioethics as a subcategory of "technology assessment." If the latter phrase is interpreted broadly, this might be so. Others may think the reverse—that technology assessment is a part of bioethics. Some assessments are oriented toward listing and quantifying certain kinds of agreed-upon sets of risks and benefits rather than probing into normative and legal foundations and applications. However, the former Office of Technology Assessment regularly addressed distinctively bioethical issues in the course of its assessments. *See, e.g.*, OFFICE OF

The "disciplines"[3] of bioethics and of bioethics and law are hard to characterize because of the multiplicity and diversity of their spheres of activity and of their practitioners' pursuits. There is no unitary "bioethics." Nevertheless, the assembled fields have a near-defining characteristic: because of the technological rearrangement of basic life processes, the resulting issues are hard to track within our existing normative and legal architecture. Still, the assemblage is not ineffable, and I will try to show why many of the problems generated by biological technologies are structurally different from those driven by other technologies.

As is often so, what is distinctive or novel depends in part on the level of abstraction involved and on the features of existing baselines. There is nothing new about human reproduction, but acquiring precise knowledge of certain traits of developing offspring through prenatal screening is novel. Investigating why bioethical problems seem particularly intractable at any of these levels may explain why some think we are being outrun by our technologies.

After mentioning the singular characteristics of some bioethical problems, I will then outline how bioethics has dealt with them, but I will do this by addressing and critiquing the critiques of bioethics. I will also try to elaborate

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TECHNOLOGY ASSESSMENT, INFERTILITY: MEDICAL AND SOCIAL CHOICES 35-37 (1988).

3. It may seem fussy to comment on this term, but doing so illustrates some analytical problems that have to be faced here. It is too simple to say the discipline is whatever we say it is because we have to decide what we *ought* to say it is. To compare and contrast the disciplines of chemistry and physics is not that hard, even conceding their obvious links and the perennial efforts of some physicists to reduce everything to physics. But the discipline of bioethics? In our context, it refers at least to systematic study of several fields with a view toward understanding the material issues and making recommendations for appropriate action or inaction. Specifying these fields is dealt with briefly in the text. Bioethics of course implicates a formidable array of other, independent disciplines: the study of law and legal process; philosophy generally and moral and political theory in particular; the social and behavioral sciences; and the physical and biological sciences. Because we are in an academic legal setting, it is especially appropriate to ask whether legal analysis of the body of legislation, common law, administrative processes, and the nature of other legal systems is part of bioethics. I think it is and it seems to be so regarded by many, but I would not want to be responsible for defending this to the editorial board of the Oxford English Dictionary. For their take on "discipline," see IV OXFORD ENGLISH DICTIONARY 734-36 (2d ed. 1989). As indicated in the text, the term will refer to the systematic study of the legal, medical, scientific, philosophical, social, political and economic problems I describe; the literature reflecting and communicating this study; the body of common law, legislation, administrative regulation, and custom in dealing with these problems; and the various institutions constructed to aid in assessment and decision making, such as ethics committees, Institutional Review Boards, Government-sponsored Commissions, etc. In this sense, the U.S. Supreme Court was "doing bioethics" when it decided *Vacco v. Quill*, 521 U.S. 793 (1997) (holding that under the circumstances there was no equal protection violation in banning assisted suicide); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding that under the circumstances there was no liberty interest in securing assistance in suicide); and *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) (dealing with the nature of the liberty interest in refusing medical treatment).

upon possible meanings of the we-must-catch-up-with-technology exhortation and indicate some major confusions of expression or thought that it reflects.

If I achieve anything in this paper, it will be a "meta-showing" about our ethical and legal theories and behaviors and about how we can and should do the catching up we are urged to do. The "showing" is this. (a) Saying that {morality/moral philosophy/law} must catch up to {science/technology} reflects our discomfort with certain aspects of our technological societies. Nevertheless, (b) it seriously misconceives the nature of, and connection between, these differing domains to talk this way, at least without substantial qualification. (c) The only forms "progress" can take here, improvements in moral behavior aside, involve (i) incremental improvements in our thinking about critical moral and legal concepts that (ii) may allow individuals to better discern morally and legally relevant considerations and (iii) heighten the prospects for consensus, but do not and cannot provide determinate answers for all serious moral and legal issues. Such progress may facilitate individual reflective decision, although the decisionmakers may recognize both that others may decide otherwise and that individual views may not reflect an objective moral reality.

The main progress in such circumstances, then, is not that greater efforts dazzlingly reveal moral truths that all must acknowledge, but that individual moral agents acting in good faith will believe that their positions are adequately defended.[4]

These efforts to characterize and reconstruct the catch-up admonition bump into a fundamental problem in jurisprudence and in legal philosophy generally: analyzing the link between moral evaluation and legal process, especially formal adjudication.[5] Laws and judicial decisions, after all, are often criticized for failing to follow the right moral path or of being insensitive to morally relevant perspectives. The former complaint, standing alone, is generally no basis for concluding that law has to catch up with technology; the right moral path is often precisely what is contested. The latter protest suggests a basis for reforming law but presupposes some agreement on what the morally relevant perspectives are.

I will not review the history of bioethics,[6] although I will consider past examples of putative catching-up, as well as possible future ones. Of course, recording certain developments as progress presupposes some resolution of what "progress" means. There may be some consensus, however, that the workings

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4. This is not "moral relativity." *Cf.* William A. Galston, *Value Pluralism and Political Liberalism*, 16 PHIL. & PUBLIC POL'Y. 7, 8 (1996) ("Value pluralism is not an argument for radical skepticism, or for relativism. The moral philosophy of pluralism stands *between* relativism and absolutism."); Dan W. Brock, *Public Moral Discourse*, *in* SOCIETY'S CHOICES: SOCIAL AND ETHICAL DECISION MAKING IN BIOMEDICINE 215, 236-37 (Ruth Ellen Bulger et al. eds., 1995) (discussing moral relativism); *see also infra* note 268 (discussing "justificatory relativism").

5. For a recent lucid commentary on this problem, see Kent Greenawalt, *Too Rich, Too Thin*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 1 (Robert P. George ed., 1996).

6. For historical reviews and analyses, see generally DAVID J. ROTHMAN, STRANGERS AT THE BEDSIDE: A HISTORY OF HOW LAW AND BIOETHICS TRANSFORMED MEDICAL DECISION MAKING (1991) and ALBERT R. JONSEN, THE BIRTH OF BIOETHICS (1998).

of the discipline have altered thought and conduct for the better in some areas. As Jonsen and Toulmin observe, "[t]he medical profession [prior to the 1960s] had slowly achieved a moral preeminence that almost ruled out debate about medical ethics."[7] That very debate transformed notions about physician authority and informed consent, a change that should count as progress by those who consider autonomy an important value. Furthermore, those renovated notions, whether viewed as new normative insights or old insights made more salient, seem linked to advances in legal and medical behavior, although it is hard to fix the direction of causality. Our conceptual understanding, the quality of our moral deliberations, and our behavior seem to have improved, a point that can tentatively be accepted even without a coherent theory of progress—which may never be available. Cases such as *Cobbs v. Grant*,[8] replacing disclosure customs of physicians as the informed consent standard with a needs-of-the-reasonable-patient standard; the crystallization of rights to and against treatment; the development of Institutional Review Boards; the specific articulation of slighted perspectives and voices; the very recognition of certain ethical and legal problems in health care; and the development and use of biological technologies—all are advances of sorts.[9] However, thinking this is all progress does not make it so; we cannot stop here.

B. Dissing Bioethics: A First Look at Why It Don't Get No Respect (or at Least Not a Lot)

Some specific and oft-made criticisms of bioethics and of bioethics and law[10] will be laid out briefly as I move along. Here I note one of my conclusions in advance. To ask "What is wrong with bioethics?," a question that seems to presuppose that ethical and legal progress lags behind science and technology, is hugely ambiguous. A claim that bioethics as a discipline is seriously infirm may mask a series of different beliefs and viewpoints. For example, such a claim could result from a substantive, bottom-line disapproval of proposed conduct, or of a state of affairs, rather than from a consideration of which bioethical

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7. ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING 304-05 (1988).

8. 502 P.2d 1 (Cal. 1972) (adopting the "reasonable patient standard" for informed consent, in place of exclusive reliance on physician practice).

9. For example, the development of the informed consent doctrine has its dark side. Candidates for imperfections include burdens of disclosure that may be too onerous resulting in misallocation of medical resources and increases in health care costs; excessive reliance on the "informed consent," i.e., the disclosure papers to be signed, as the entire process of securing fair assent; adoption of informed consent standards that simply ratify current practices, good or bad; and so on.

10. Recall that "bioethics" here includes whatever other disciplines and forms of social ordering that inform and partly constitute its deliberations. There is a minor problem about whether critiques of bioethics are themselves part of bioethics—a kind of self-referential puzzle—but it is well worth ignoring.

processes of reasoning and argumentation are deficient. As for the latter, one may think that bioethical processes are logically flawed; empirically unrealistic; perspectivally incomplete, i.e., akin to "false consciousness";[11] laced with conflicts of interest, dishonesty, or corruption; oriented toward upholding the establishment and its values; oriented toward up-ending existing values to further radical goals; mired in theory and thus insufficiently attentive to situational particulars and the need for bottom-line conclusions; mired in situational details, inadequate heuristic guides, and ad hoc battle plans, and thus insufficiently attentive to theory, and so on. (If indeed bioethics is, or is doing, all these things, it cannot be all bad.)

I will conclude that, for the most part, no such core deficiencies in bioethics exists—nothing to match, say, a healing theory that disavows the germ theory of disease, or a school of cosmology that ignores gravitational effects. There is, for example, nothing in bioethics akin to moral, legal or public policy analysis premised upon the notion that certain minorities have only the merest touch of the elevated mental and emotional capacities of the majority, and are thus far less entitled to the respectful consideration of others.[12]

If bioethics is not so bereft, in what sense is something "wrong" with it? True, if results seem consistently wrong to any given observer, then the substance and procedure residing within the discipline should be scrutinized. However, if the complaints are largely result-oriented, then the disagreement[13] is really about

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11. I use this term several times here. It is frequently used to describe a group's general thought patterns and ideologies when they are formed without adequate knowledge of or attention to important moral/political perspectives. The elite in any society, for example, may have no adequate idea of the needs, aspirations, abilities, suffering, or indeed the human worth of persons in other classes. This sort of perspectival insufficiency also applies to persons, say, those brought up to think that the only proper role for women is childbearing and homemaking. *See generally* RAYMOND GEUSS, THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL §2, at 12 (1981). For an example of applying the term to individuals, see Gerald Dworkin, *Autonomy and Behavior Control*, HASTINGS CENTER REP., Feb. 1976, at 23, 25 ("[A]uthentic behavior leaves no room for 'false consciousness.'"). *Cf.* THOMAS NAGEL, THE VIEW FROM NOWHERE 5 (1986) ("[O]bjectivity allows us to transcend our particular viewpoint and develop an expanded consciousness that takes in the world more fully."). However, note Nagel's later remark that "the detachment that objectivity requires is bound to leave something behind." *Id.* at 87. Nagel also discusses these issues in Thomas Nagel, *Moral Epistemology*, *in* SOCIETY'S CHOICES: SOCIAL AND ETHICAL DECISION MAKING IN BIOMEDICINE 201 (Ruth Ellen Bulger et al. eds. 1995).

12. Recall *Plessy v. Ferguson*, 163 U.S. 537 (1896), and its claim that the sense of insult, injury, and stigma felt by black persons because of racial segregation in public transportation was simply their own construction of the situation and had no standing as a constitutional harm.

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

Id. at 551.

13. Pinpointing the disagreements present in moral disputes can be pretty difficult. *Cf.*

these results, and not primarily about deficiencies in the discipline. Opponents of the result will likely think ill of the quality of *any* discussion that defends it or *any* procedure that produces it, even if the discussion is relatively well-rounded and thoughtful. They may single out a stage of assessment at which they would have taken a different path, but this hardly establishes the infirmity of the process. If, for example, they complain that there is "too much emphasis on autonomy as opposed to community," this is simply a moral-theoretic disagreement, however well- or ill-thought out, about autonomy and community. If the disciplines' typical member overvalues autonomy, why is the discipline necessarily at fault? From the perspective of bioethics, one might symmetrically ask, "What is wrong with anti-bioethics? Why do you under-value autonomy?"

As suggested, for some observers, *any* process that reaches a moral conclusion they think wrong necessarily entails that the process is defective at some point. Of course, something may indeed be wrong. If the players on a little league team persistently run the bases clockwise, their training is probably askew. Defenders of mass murder or genocide are mistaken at the core. But, for those who rank-order certain claims (say, of autonomy) higher or lower than other kinds of claims (say of community) to ask, "What is wrong with the contents of your thoughts and the processes of your mind?" is lamentably arrogant, and, far worse, conceptually and normatively confused. For those who think that many bioethicists are systematically using the wrong tools, or assigning the wrong ranking to values under a governing standard that these bioethicists are too purblind to apprehend, the answer is simple: recruit more persons who think like you to get into the arena. Although I am not identifying a field of thought with its membership, a field may generate a differently-oriented literature with a change in personnel, while still remaining the same field.

Admittedly, there is not always a clear distinction between disagreeing with an outcome and attacking the processes and disciplines that yielded it. It may be hard to distinguish between the local football team improperly executing its tasks even with the best training, on the one hand, and the inadequacy of the overall football plans hatched by the coaches on the other. However, we manage with hazy distinctions in every field, a matter I return to later in discussing what could constitute progress in a given field.

The core point is that many critics of bioethics who disagree with particular outcomes believe they result from an incorrect moral ordering. If gender and cultural differences are improperly de-emphasized in the hands of various

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Nagel, *supra* note 11, at 206 (describing conflicts between natural rights theory and rule-utilitarianism).

> The disputants may agree roughly on their substantive moral judgments of central cases, but they disagree over what is fundamental and what is derivative: They disagree, in other words, about the correct moral *explanation* of those substantive intuitions in which they agree. And this may in turn be connected with disagreements about less obvious substantive questions, which will be decided differently by the extension of different justificatory principles.

Id.

participants, the proper response is not "there is something wrong with the field's methods as such," but "let us recruit personnel with different views." I suppose, however, one could plausibly say that a field is flawed because it is heavily populated with the wrong people, but one must distinguish between rival conceptual and normative systems and a field's current membership. Neither can be reduced to the other. The U.S. Congress is not fundamentally flawed because at any given time it has more Democrats than Republicans or the reverse. Neither the Senate nor the House of Representatives is fundamentally flawed simply because the former acquitted President Clinton on much the same evidence that the latter used to impeach him. Perhaps it is acceptable to say loosely that "there was something wrong with Congress during the reign of the Republicrats," or "there is something wrong with bioethics as long as the male chauvinists in the field outnumber the female chauvinists," but such claims are misleading because much could be changed through the substitution of personnel without even remotely reinventing anything. True, one might say that if the wrong crowd is attracted in the first place, then there is something inherently wrong with the field, but this requires supporting evidence and analysis.

C. Some Clarifications Concerning Catching-up, Kinds of Critiques, and Ethical Theory

1. Critiques of Discourse vs. Critiques of Technological Uses and Their Underlying Knowledge, Theoretical and Technical.—Debates about technology and how we manage it often seem to shift without notice between critiques of ethical and legal evaluation, on the one hand, and critiques of the technological uses that draw our attention and dismay, on the other. Those who object to acquiring or using certain kinds of knowledge may criticize those who secured or applied it. They may also criticize writers who discuss these enterprises but fail to denounce them; or legislatures and courts that do not properly react; and possibly the false consciousness of a somewhat demented public.

If the critical reactions derive from a failure within bioethics to deal with material problems, or from infirm perception or reasoning, then the criticisms are at least partly well taken. However, if the disagreement stems from deep differences in values, it is misleading and question-begging to say that the discipline, or some segment of it, is at fault for anything other than taking a different position from that of its critics. Of course, those in deep moral disagreement are very likely to find their opponents guilty of material omissions and failures of insight. Although it is sometimes hard to separate critiques of applied technology from critiques of technology assessment, complaints about a technological use and complaints about how we morally and legally assess it are not the same.

2. "Standard Ethics" vs. "New Ethics."—Some may ask whether bioethics is just standard ethics applied to certain problems in biological science and medicine or is some distinct and peculiar addition to ethical theory. One might ask a parallel question about legal theory. What are the differences between a novel application, a revision, or a replacement of a conceptual structure in moral or legal analysis? In some cases, there may be no difference, and if there is, it

may make no difference under the circumstances. Does the idea that separating and restructuring basic life processes "fragment" our preexisting concepts suggest that we need something new in ethics and law to guide us?[14] When half of a child's genes come from one woman but gestation occurs in another, who is the "natural mother," given the separation of begetting and bearing? If a man carries a fetus to term, as we are told may one day be possible, is he the natural mother? If we resort to the original intentions of the parties to the reproductive process, is this "new," or an application of existing moral and legal notions of procreational autonomy? When one's human identity as a functioning person is permanently lost but her body endures, who or what, if anything, is dead and who or what is not? Would recognizing this condition as death reflect new ethical theory, or a creative application of extant notions of what the death of one party means to others—the irrevocable absence of her conscious, interacting presence? Is what is "new" the intensity of our focus on some problem set? Think, for example, of a renewed interest in determinism and responsibility stimulated by findings of the inverse correlation between low levels of the neurotransmitter serotonin and poor impulse control; or of special attention to the possible moral claims of future generations, occasioned by the threat of irreversible changes that we pose to the human gene pool or the environment. Here, our moral-analytic tools and concepts have not changed at their core: our interests have changed, and we have creatively elaborated familiar ways of thought.

On the other hand, pursuing questions about the novelty of what we are doing is an enterprise with rapidly diminishing returns. The principal benefit of asking, "What's new?" is that it secures our attention on matters relatively less investigated. In most circumstances, however, the appellations "new" and "old" convey only marginal information. For whatever benefit they provide, one must locate precisely at which point in an ethical or legal argument structure some idea or maneuver might plausibly be called new.

Thus, new biological knowledge, techniques, and entities that escape our evaluative frameworks change the domain of ethics and law, and this may shift our attention and inspire conceptual reconstruction. This does not mean, however, that ethics has been radically transformed. Metaethics and normative ethical theory do make progress of sorts (see Part IV), but they have not morphed into some ineffable new kind of moral analysis. If the complaint about ethics and law being laggards is that they have not renovated themselves into different kinds of structures, it is hard to understand it.

It is only at the lower levels of abstraction, then, that the question concerning "new" versus "old" ethics might be fruitful. Bioethical problems are novel, even

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14. *See infra* Part II.B; *see also* Ronald M. Green, *Method in Bioethics: A Troubled Assessment*, 15 J. MED. & PHIL. 179, 184 (1990) (stating that "[t]he third objection to characterizing bioethics as having moral philosophy as its core discipline stems from the challenge to received theory posed by the unusual and often novel questions raised in this field" and concurring with Clouser's view that new technology "presses ethics 'not to find new principles or foundations, but to squeeze out all the relevant implications from the ones it already has.'") (quoting K. Danner Clouser, *Bioethics*, *in* 1 ENCYCLOPEDIA OF BIOETHICS 115, 125 (Warren T. Reich ed., 1978)).

radical in some respects, but not so in others, and not at every level of generality.[15] We all will thus continue to refer to the most general abstractions, e.g., good, bad, right and wrong; to rely on certain fundamental concepts of moral analysis, e.g., justice, fairness, autonomy, liberty, equality, and utility; to formulate moral theories embedding these notions; and to appraise these theories from a metaethical framework and apply them to real world problems.[16] That is, at the threshold, moral and legal analysis of technology will bring all the modern tools of philosophical and jurisprudential analysis to the problems at hand. Still, one notices differences of emphasis and order of difficulty in various bioethical problems. Such difficulties may inspire rethinking of conceptual structures and hierarchies in novel ways. Because of this, in some hard-to-specify sense, the ways in which we think may indeed change.[17] Changes in emphasis, placing previously sub-visible matters in italics, noticing things previously only dimly perceived—all are properly called changes in thinking, possibly sea changes. Such changes have long been under way as part of the development of bioethics and of moral and legal analysis of technology generally. The content of moral and legal analysis and the issues under discussion evolve through an ongoing cycle of revision and reconstruction. Whether we will view the results as truly new normative insights is unforeseeable.

Sometimes these new insights are inspired by changes in factual understandings that radically shift our attention. At some point, for example, a critical mass of persons in any political unit may come to realize that racial or minority groups are not just slightly more elevated than primates found in the wild, but actual persons who think, feel, and can be hurt emotionally and physically. In a later section, I discuss what might count as moral progress, and whether such partially fact-driven insights should be so considered.

To the extent that one separates secular ethics from theological analysis, much the same holds: there may be different emphases and applications, but there is no "new theology," however stretched the present framework might be.[18]

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15. Daniel Callahan suggests that bioethics "represents a radical transformation of the older, more traditional domain of medical ethics," while at the same time raising questions that "are among the oldest that human beings have asked themselves." Daniel Callahan, *Bioethics, in* 1 ENCYCLOPEDIA OF BIOETHICS 247-48 (Warren T. Reich ed., 1995). *Cf.* Robert L. Holmes, *The Limited Relevance of Analytical Ethics to the Problems of Bioethics*, 15 J. MED. & PHIL. 143, 145 (1990) (discussing bioethics as a "branch of applied ethics" in the sense he specifies, and also as belonging to "substantive morality"—the process of making moral judgments).

16. *See generally* Green, *supra* note 14, at 180, drawing on Clouser, *supra* note 14, at 116.

17. *See* Michael H. Shapiro, *Law, Culpability and the Neural Sciences, in* THE NEUROTRANSMITTER REVOLUTION: SEROTONIN, SOCIAL BEHAVIOR, AND THE LAW (Roger D. Masters & Michael T. McGuire eds., 1994).

18. *Cf.* Green, *supra* note 14, at 182-84 (theologians in bioethics use the methods of philosophical analysis).

3. The Demand for Answers and an End to OTOHs (E-Mail Jargon for "On the One Hand" and "On the Other Hand").—

a. If others can answer the questions facing their disciplines, why can't you?—The complaint that current ethical analysis is a turtle chasing a hare often rests on a simple matter: such analysis may not provide answers, at least definitive this-is-the-way-it-is-and-must-be answers, to difficult moral issues. If a medical laboratory can determine cell counts within a narrow range of uncertainty, or that the fibula is fragmented, or that your zorch is inflamed, why is ethics unable to yield definitive answers? If it cannot, what good is it?

Here is a brief illustration of the sorts of expectations some have when appealing to the discipline of bioethics for answers.

> Scientists trying to map genes think they are on the verge of figuring out how to build an artificial life form.
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> J. Craig Venter hopes to salvage DNA from dead bacteria to construct an artificial organism. His interest centers on a tiny bacterium called Mycoplasma genitalium. It lives in the human genital tract and lungs, causing no known disease, but has the distinction of having fewer genes than any other organism mapped so far, making it a good model for figuring out precisely which genes are essential for life.
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> "We are attempting to understand what the definition of life is," said Dr. Venter of Celera Genomics Corp. in Rockville, Md. . . . "We are trying to understand what the minimum set of genes is."
>
> Before he goes any further, Dr. Venter said he wants advice from experts on ethics and religion. "We are asking whether it is ethical to synthetically make life," he said.[19]

Well, he's asking you a question. What's the answer? O.K., you can do OTOH and OTOH for a while. Scientists and auto mechanics do this, but they come up with real answers a fair proportion of the time: it *was* the transmission; there *really are* tiny life forms that can infect us and make us sick. Why are you unable to answer Dr. Venter's question? You really have fallen behind; you have to get up to speed, or we will have to replace you with smarter or differently educated people. Yes, that's it. Remember how the physicists and chemists took over the life sciences and turned them into molecular biology and explained life, in a manner of speaking, and started raking in Nobel Prizes? After Watson and Crick came Baltimore and Temin and Gilbert and so on. We will find people better than you are. We will recruit the scientists themselves, who obviously know about *progress* and *answers*. All you know is how to endlessly incant "OTOH, OTOH." You are either not a respectable *discipline* or not a *respectable* discipline. A *respectable discipline* takes questions and answers them, or at least tells you what an answer would look like. You people cannot even agree on what

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19. *Geneticists Plan Attempt to Create Artificial Life*, WALL ST. J., Jan. 25, 1999, at B2.

you are looking for, never mind what might constitute evidence of it.

These remarks reflect some serious misunderstandings, but it is no simple task to define them because there is no clear answer to why there are no clear answers. Indeed, entire fields of study try to explain why certain matters cannot be fully explained. Even though the call for definitive answers is naive, it is not stupid. Any account of this indeterminacy implicates huge domains of thought about how we ought to—and do—make moral and legal decisions, and about what might constitute advances in these processes. Progress in the quality of moral reflection, if there is any, is incremental and hard to identify. Indeed, given the very premise that answers are hard to find, how could we ever agree on what counted as progress without begging our questions? Whatever progress occurs may also be largely disvalued because it may not yield unique answers either. Moreover, the very idea of progress in moral reflection may be viewed as backward by some intuitionists and pragmatists. Not all serious moral decisions are made from the top-down, leading us to some final moral insight and judgment. Decisions are often bottom-up or at least bi-directional processes in which there is an initial notion of what is right or wrong or good or bad. Justification or rationalization is then sought, if sought at all, at the levels of normative ethics and some forms of metaethics.

Just as legal theories at various levels can be manipulated to yield different outcomes, conceptualizations at those levels can often be applied to justify inconsistent judgments. Moreover, if one's intuition yields a clear and apparently certain judgment, there may be little incentive to bother with inspecting possible justifications.[20] So, even if one thinks she has the right answer, the moral cacophony may remain. We either have answers without justification, or justifications without answers.

b. The moral "oracle": Expertise and democracy.—When the touted expert fails to deliver The Answers, our disappointment and anger are compounded because of our expectations.[21] We rely on forestry experts to tell us what rates of timber harvesting and reforestation are required to keep the forest in a more or less steady state. But whom do we ask to tell us if saving the forest is more important than saving jobs in the local economy? Economists? Philosophers? Lawyers?

Although some may think that ethics experts have special knowledge about rightness and goodness, that view is doubted by many, including most ethical theorists and "ethicists." Indeed, some modern democratic movements seem to reject the very possibility of special moral insight or expertise.[22] Perhaps it

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20. *See* Holmes, *supra* note 15, at 149-50; *see also* Baruch A. Brody, *Quality of Scholarship in Bioethics*, 15 J. MED. & PHIL. 161, 170 (1990) (discussing upwards-down and downwards-up models of moral analysis).

21. Perhaps this is linked to the view that happiness does not necessarily increase with technological development. *See* Charles Frankel, *The Idea of Progress*, *in* 6 ENCYCLOPEDIA OF PHILOSOPHY 483, 486 (Paul Edwards ed., 1967).

22. *See* Nagel, *supra* note 11, at 212 (contrasting scientific and moral expertise). Nagel states that

would be too strong to call it a mass delusion, but many within democratic systems think that one person's views on most matters are as good as another's. In particular, bottom-line moral conclusions are thought to be as fit for one citizen as for another if one assumes that the relevant situational facts are available to all. It may well be true, for example, as Professor Robert Holmes urges, that neither meta-, normative, nor applied ethicists can "make better moral judgments in particular situations than anyone else."[23]

Nevertheless, the romantic view persists in some quarters that courts, and perhaps some other officials, have special access to moral truths, either by virtue of training or special aptitude or both (see Part III.G.2.b). The basic rationales for free speech in a republic are not founded on a belief that personal views are equal across the board. They do include a belief that the "marketplace of ideas" is an effective way to avoid tyranny despite the presence of much junk commentary.[24] Our very penchant for recognizing rights suggests that we all need protection against implementation of the alarming views of others. Still, outside of religious contexts, there is only limited scope for strong deference to moral or even policy expertise, at least as far as the more populist citizenry is concerned.[25]

> there is much less room for expertise with regard to the moral and evaluative aspects of policy. Moral judgments are everyone's job, and while some people are better at them than others, the reasons behind them ought to be made available, for the purposes of public choice . . . . We do not live in a theocracy, where some people are thought to have a privileged and direct line to the moral truth.

Id. See also Scot D. Yoder, *Experts in Ethics? The Nature of Ethical Expertise*, HASTINGS CENTER REP., Nov.-Dec. 1998, at 11, 12 (providing a useful review of the idea of moral experts).

23. Holmes, *supra* note 15, at 147. *See also* Yoder, *supra* note 22, at 12. Yoder challenges what he sees as three assumptions regarding ethics expertise:

> The first is that in order for there to be expertise in ethics there must be objective moral knowledge . . . . The second is that ethics expertise is ethics expertise—that there is a single type of knowledge or set of skills by virtue of which the academic scholar, the ethicist involved in public policy formulation, and the medical ethics consultant can all claim to be experts. The third is that professional expertise is equivalent to or at least requires specialization.

Id. Yoder states that "[t]he key is to see that expertise in ethics is connected with justification—a claim to ethics expertise is not based on the truth of one's judgment but on one's ability to provide a coherent justification for them." *Id.* at 13.

24. J.S. Mill's endorsement of plural voting, i.e., greater voting power for superior persons, reflects a different view of democracy. *See* John Stuart Mill, *Representative Government*, *in* UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 376, 381-90 (Dutton & Co. 1950). Mill seems to have had some later reservations about the recommendation; *see also* DENNIS F. THOMPSON, JOHN STUART MILL AND REPRESENTATIVE GOVERNMENT 100 (1976).

25. *See generally* Yoder, *supra* note 22; Jan Crosthwaite, *Moral Expertise: A Problem in the Professional Ethics of Professional Ethicists*, 9 BIOETHICS 361 (1995); Richard Delgado & Peter McAllen, *The Moralist as Expert Witness*, 62 B.U. L. REV. 869 (1982); Colloquy, *Bioethics, Expertise, and the Courts*, 22 J. MED. & PHIL. 291 (1997). For a discussion of the distinction

Moral expertise, however, may unearth a variety of paths to our bottom lines, and knowledge of these options is precisely where the expertise lies. Yoder quotes Ruth Shalit, a critic of the offerings of ethicists, who says that "[t]he philosopher's recommendation depends on a set of criteria that is not agreed upon, but varies from culture to culture and, more and more, from individual to individual."[26] However, this observation does not defeat the notions of expertise or progress in ethics and ethical theory. On the contrary, it helps reveal the very stuff of moral analysis, the competing criteria in question.[27]

Thus, the suggestion that "[t]he expertise of the moral philosopher leads to informed moral judgments, not necessarily to the right answer,"[28] seems sound, provided that one understands that the phrase "informed moral judgments" may itself be contested. "Informed by what?", a skeptic may ask, and perhaps claim that a purported moral judgment is not properly informed because the criteria used to determine morality are improper, or because they have not been ordered properly so that conflicts can be dealt with adequately. Knowledge of this layer of uncertainty is itself part of a body of ethical understanding, and thus of moral progress, however paradoxical this may seem. Much the same applies to defending ethical expertise and progress as "facilitating" the "coherent justification"[29] of moral problems. What amounts to a coherent justification may be in dispute.

In thinking about moral expertise, focus again on the final moral judgment about particular conduct or a specific state of affairs. Robert Holmes may be right about "moral equality at the decision point," but with this critical qualification. Unless one is a thoroughgoing intuitionist who believes in direct observation of moral reality—of the truth value of moral claims in particular situations[30]—one's final moral judgment ought to be consciously informed by the recognition of morally relevant factors. Once revealed, they may seem obvious, but there are many obvious matters hidden from sight. How many of us always consider the moral relevance of conflicts of interest? Critics of Health Maintenance Organizations (HMOs), for example, emphasize the internal incentive systems that create conflicts of interest for physicians. Do they also realize that fee-for-service has its own obvious built-in conflicts of interest, such as physician incentives to overtreat and overcharge? Moral analysis can bring

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between "doing ethics" and "doing policy," see Brock, *supra* note 4, at 218-19.

26. Yoder, *supra* note 22, at 13.

27. "Criterion" is a somewhat obscure term itself, but here it refers to matters of moral relevance as defined and expressed in rules, principles, standards, and even in maxims and moral heuristics generally. Although it is not a primitive term, I take it as such for now.

28. Yoder, *supra* note 22, at 14.

29. *Id.* at 14, 16.

30. *See* WILLIAM K. FRANKENA, ETHICS 14-15 (2d ed. 1973); *see also* Loretta M. Kopelman, *What Is Applied About "Applied" Philosophy*, 15 J. MED. & PHIL. 199, 203-08 (1990); *cf.* JEFFREY STOUT, ETHICS AFTER BABEL 157 (1988) ("The intuitionist and the theorist of moral sense leave us at the mercy of our feelings and hunches. The answer is not, however, to ignore feelings and hunches altogether. Without them, ethical theory loses contact with the data of moral experience.").

the obvious to mind and render the nonobvious obvious. It cannot, however, always resolve indeterminacies at the point of decision, and here, expertise may well run out.

Thus, even if experts and non-experts are equal at the penultimate decision point, the skills of nonexperts may nevertheless be aided by the experts' moral analyses. The ideas of knowledge, expertise, and progress in moral inquiry do not and cannot rest on a belief in an objective moral reality that always provides firm and certain answers. There may be a moral reality, but it is a reality different from other realities, despite the parallels among them, and its reality cannot be reduced to some other form of reality.[31]

4. Technology and Psychic Overload from "Too Many Options."—There is at least one sense in which the claim that "technology has outrun ethics and law" is not that puzzling. People often complain of having too much information or too much choice[32] and perhaps even too many ethical theories on the philosophy supermarket shelves. The "too much" label is a somewhat tendentious description; we may well be better off overall with more information and opportunities.

Nevertheless, increased choice and knowledge bear certain costs, at least for some decision makers—e.g., a sense of oppression from a felt responsibility to assure the best outcome by canvassing all options and considering all information. It's easier and quicker to buy cereal from a convenience store than from a supermarket. The annoying but useful occurrence of regret also plays a central role here. There are many stores and many toasters. Hidden somewhere out there, alongside "the truth," is the "best toaster"—the perfect combination of function, quality, appearance, ease of operation, range of choice, and price. But, games and contests aside, seriously trying to find it through a complete search of every toaster on sale in the vicinity and beyond evidences derangement. Most of us will "satisfice." We may vaguely wonder if we made the best buy, because we certainly did not canvass all the choices, but this is unlikely to ruin our day.[33]

The problem with biomedical technology, however, is not simply that we have more options and information of the same sort that we had before—more toasters, more cereal, and more vehicles. We have new *kinds* of choices: choices over the traits of offspring (prenatal and preconception testing; cloning); choices concerning control of mind and behavior (antipsychotic drugs; intellect-

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31. *See* Yoder, *supra* note 22, at 13.

32. *See, e.g.*, Gerald Dworkin, *Is More Choice Better Than Less?*, 7 MIDWEST STUD. IN PHIL. 47 (1982); Michael H. Shapiro, *Fragmenting and Reassembling the World: Of Flying Squirrels, Augmented Persons, and Other Monsters*, 51 OHIO ST. L.J. 331, 349-50 (1990) (suggesting that "[n]ew choice may . . . be too much choice.").

33. *See generally* David M. Grether et al., *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 301 (1986) (arguing that "the information overload idea—that too much information causes dysfunction—is a myth. Instead, when choice sets become large or choice tasks complex relative to consumers' time or skill, consumers satisfice rather than optimize."). "But they'll satisfice" does not answer the claim about dysfunction; it only partly *explains* why dysfunction may occur.

enhancing drugs); choices about lifesaving efforts (organ transplantation); and so on. Furthermore, we have new, possibly exaggerated visions of ourselves, our powers, and our progression. We may see our thought and behavior as less "free" and more "determined," and worry over the blurring of the boundaries between ourselves and other forms of life, or even machines. We encounter new difficulties of description and evaluation that may seem deeper and reflect far greater dangers than do those arising from choice in other contexts. The fact that we cannot get a precise fix on what these dangers might be makes matters worse because of the very namelessness of the risks. The range and difficulty of choice over matters we have never or only marginally dealt with before may seem to exceed our capacities for rational choice. What *is* that wretched state in which one permanently loses all faculties of thought and feeling, but one's bodily functions continue? Should we choose to say it is death because the person we knew seems irretrievably gone, despite his body's endurance? Who is the natural parent of a cloned offspring, or is there even any such thing?

This expanded range of choice reflects moral/conceptual difficulties, not just an increase things to choose from. However, this is not what prevents moral and legal analysis from gaining on technology. Such analysis does not progress or advance in the same way as technology. They are not even on the same race track. Determining how Sarah Jr. shall be constructed when we have her germ line in hand in an early embryo cannot be answered just by gathering more information, or running brilliant experiments, or even by getting smarter.

5. The Quality of Debate "Within" Bioethics.—Saying that many bioethical debates are weak is different from saying that bioethics is itself infirm because of inattention to substantive material matters, conflicts of interest,[34] false consciousness, the need to replace elderly paradigms, etc. The problems of bioethics, as I argue, don't go that deep. But there is a problem, not with bioethics' foundations, but with the quality of many debates within bioethics. Quality here concerns systemic analytical weaknesses that affect reasoning in all fields, as well as particular bad habits more associated with bioethics than with other fields.

I am not offering a demonstration of this backed by an extensive sampling of the now immense bioethics literature. A few examples of flawed arguments that are often repeated will do for now. True, this lack of rigor impairs the quality of my own argument, but quality is not an all-or-nothing matter.

Consider the debate about objectification, an important idea concerning a central premise of bioethical analysis. We are rightly concerned with the risk of transforming our view of ourselves as persons into a view of ourselves as manipulable objects. It is said that bioethics undervalues risks of objectification—our descent from persons to objects. Objectification, however, is one of the most heavily discussed issues in bioethics. Indeed, in bioethics

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34. *See* Peter D. Toon, *After Bioethics and Towards Virtue?*, 19 J. MED. ETHICS 17 (1993). *See generally* CONFLICTS OF INTEREST IN CLINICAL PRACTICE AND RESEARCH (Roy G. Spece, Jr. et al. eds., 1996) [hereinafter CONFLICTS OF INTEREST]; Miles Little, *Research, Ethics and Conflicts of Interest*, 25 J. MED. ETHICS 259 (1999).

more people credit the risk of objectification than discount it. If something is wrong with bioethics here, it is that it overestimates that risk. In any case, search the literature for articles that do more than throw the term around. You will find some—but they do not characterize the field.

Instead, you will find material suggesting that simply using the term "products" to refer to children born of artificial technology indicates that we have already plunged into the abyss and are treating, say, babies born of invitro fertilization ("IVF") as things to be used as we wish.[35] There is zero evidence to back this up; there is not even evidence to support the colorable view that investing heavy monetary, physical, and psychic resources in creating the child will result in intrusive parental control designed to assure a proper return on the investment. Even the term "objectification," used to describe a legitimate concern of bioethics, has itself been reduced to an analytically used slogan.[36]

You will also find writing that likens the life support maintenance of a dead pregnant woman until delivery of her child to using her as a flowerpot.[37] The

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35. *See* BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 19 (1989) (claiming that "our society is also coming to think of children as products" and offering an example—the use of the phrase "*the products of conception.*"); *see also* DOROTHY NELKIN & LAURENCE R. TANCREDI, DANGEROUS DIAGNOSTICS 17 (1989):

> These metaphors of the body and mind ["systems," "chemical building blocks," "hardware," "software"] have, in effect, objectified the person, who becomes less an individual than a set of mechanical parts or chemical processes that can be calibrated or well defined. This objective image of the person has encouraged the use of biological tests as means of classification and as instruments of control.

Id.

36. For an example of the inflated use of the idea, see the quotations from scientists in Sarah Lyall, *A Country Unveils Its Gene Pool and Debate Flares*, N.Y. TIMES, Feb. 16, 1999, at F1. Iceland, with an unusually homogeneous genetic pool said to be derived from Viking settlers over 1100 years ago without much additional genetic infusion, is now debating a new law "giving an Icelandic biotechnology concern the right to develop a giant database combining the health records, genealogical backgrounds, and DNA profiles of every person in Iceland." *Id.* One observer, a scientist, said: "'It is not right to use a population as a commodity in this way. . . . I fear that we could be used as a well-defined guinea pig population in the future.'" *Id.* Another scientist said: "'It's akin to treating people as objects rather than human beings . . . . I flatly reject the notion that you have to make concessions on patients' rights in order to do human genetic research.'" *Id.*

Is the objection that this plan will benefit a private company? Would the critics withdraw their objection if the government were doing this? None of us believes that people should be treated as "guinea pigs," but what does this plan have to do with such treatment? A broad-based social experiment in sharing medical information might not be a great idea and might violate people's rights, but not every bad idea is bad because it objectifies, and not every invasion of rights constitutes objectification. The critics' characterizations are all but useless. To the extent that such indefensibly broad characterizations are offered in bioethics, then *pro tanto*, the discipline is infirm. But of course, the discipline as a whole also includes commentaries such as mine.

37. "To what extent . . . should the common good of refusing to perpetuate images of women

metaphor is clumsy and offensive. Children aren't flowers or any other sort of object, living or nonliving. Is the risk of objectification here so clear that we are to suffer *two* human deaths instead of one? Where the burdens on a woman's *living* body are not at stake, there is no reason not to view a developing fetus as a person-on-the-way—indeed, we must.[38]

Still more writing urges us to discount serious reasoning and instead to evaluate new reproductive technologies on the basis of how repugnant the process and the product seem.[39]

You will even find circular arguments suggesting that certain actions or processes are simply wrong, apparently by definitional fiat or arbitrary stipulation. For example, "Surrogacy 'necessarily' commodifies women."[40]

None of this establishes that bioethics requires either reconstruction or deconstruction. It just suggests that some discussants should do a better job,

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as maternal backgrounds or flowerpots constrain a prospective father's preference for sustaining a postmortem pregnancy for more than a few days?" Hilde Lindemann Nelson, *Dethroning Choice: Analogy, Personhood, and the New Reproductive Technologies*, 23 J.L. MED. & ETHICS 129, 134 (1995). The reduction-to-flowerpots argument is also raised in Barbara Katz Rothman, *Reproductive Technologies and Surrogacy: A Feminist Perspective*, 25 CREIGHTON L. REV. 1599, 1603 (1992) (associating the idea with Caroline Witpick: Women are "just the flowerpot in which men plant it [i.e., "the little person"].."). The implication seems to be that only the men are interested in the little flower persons—reproduction is their idea.

38. Martha Field writes that "[i]t may seem peculiar that the state has a greater interest in preventing the fetus from being harmed than from being killed, but such is the case. . . . Nothing in Roe v. Wade contradicts the existence of a strong and legitimate state interest in the health of newborns. . . . The different and stronger state interest that exists when the mother intends to carry to term also helps to explain why the trimester system that applies to abortion has no application to controls on the mother-to-be." Martha A. Field, *Controlling the Woman to Protect the Fetus*, 17 LAW MED. & HEALTH CARE 114, 123-24 (1989).

39. *See generally* Leon R. Kass, *The Wisdom of Repugnance*, THE NEW REPUBLIC, June 2, 1997, at 17.

40. Isabel Marcus et al., *Looking Toward the Future: Feminism and Reproductive Technologies*, 37 BUFF. L. REV. 203, 214 (1988) (quoting Barbara Katz Rothman) ("Surrogacy *entails* the notion that one can rent a womb and can affix an arbitrary price tag on pregnancy, often $10,000.") (emphasis added); *see also* 2 ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES, PROCEED WITH CARE: FINAL REPORT OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES 683-84 (1993).

> The premise of commercial preconception contracts is that a child is a product that can be bought and sold on the market. . . . The commodification of children *entailed* by preconception arrangements ignores these essential values [that children are not commodities or instruments]. . . . Commercial preconception contracts *by their nature*—the exchange of money for a child—contradict one of the fundamental tenets of the Commission's ethical framework.

Id. (emphasis added). Perhaps the thought behind these remarks is less conclusory than their textual presentation suggests, but it requires some non-conclusory explanation.

which is probably true of most disciplines and most writers.[41] The questionable quality of particular debates does not impeach the discipline, and perhaps not even the author.

6. The Inside/Outside Perspectives.—A distinction is sometimes drawn between persons outside the bioethics discipline who comment on its qualities and those inside it—the people doing bioethics.[42] There are some puzzles here: does one become an insider by pursuing a critique of the inside? If one wants to change a discipline, should one join it and seek change from within, or stay outside and mount an attack? How could we tell the difference? Perhaps the criterion is that one remains outside, regardless of the critique, as long as one insists that she is not a bioethicist. If the critique of bioethics is within bioethics, then how infirm can bioethics be if it contains within itself the appropriate counter-considerations? Yet if the critique is itself badly flawed, then locating it within bioethics compromises the disciplines' status by adding a misguided sub-discipline. I have nothing further to say on this because, though amusing for its self-referential paradox, it is not to the point here.

7. Does the "Technological Imperative" Make Catching Up Impossible?—The point here is simple. It is hard to catch up with a target moving away from you at a greater velocity than yours. Worse, the target technology is not only going to keep moving, it will inevitably accelerate.

Here the difficulty becomes apparent. Unless people see technology literally as a sentient entity holding humanity in its tractor beam, they will instead believe that technological developments are a result of people's actions and thus can be controlled. However, "technological imperative" is not that nonsensical a concept. It refers to matters of individual and social psychology. If enough people share an ethic of "progress" (in certain senses), believe humanity can and should strive to acquire knowledge and to control at least some aspects of nature, want labor-saving tools, and are willing to make heavy financial and emotional investments in science and technology, then resistance to all technological development in a human population of more than five billion is futile.

The right question of course is not about halting all technology, as the Unabomber seemed to prefer (even as he used technology to blow people up), but halting or heavily regulating particular technologies. That too is difficult. It is true that we have used atomic weapons in war only once, and that many are trying to stamp out the development and use of pathogenic agents and poison gas, but one cannot confidently say that these areas will continue to represent success stories. "Catching up," by sharply attenuating the technological imperative thus requires a striking and unlikely change in human behavior. Of course, this does not bar the possibility that specific areas of technological development can be controlled.

In any case, as I said earlier, catching up is not simply about our trying to

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41. To the extent that the mistaken criticisms of the foundations of bioethics are part of the corpus of bioethics, one might well mount a case that bioethics is bruised, but not broke.

42. *See* K. Danner Clouser & Loretta M. Kopelman, *Philosophical Critique of Bioethics: Introduction to the Issue*, 15 J. MED. & PHIL. 121 (1990).

accelerate our thinking or regulating. If it means anything, it means working harder at unearthing the most important issues governing an expanding set of technological capabilities. In some cases, it may refer to the even more basic accomplishment of recognizing that there is an issue and starting to think about it. One might view any of this as catching up, but there will be no checkered flag to mark success or failure.

I. THE ASCENT OF TECHNOLOGY AND THE DECLINE OF HUMANITY: ON THE DISTINCTIVENESS OF BIOETHICS

A. The Descent

One of the central critiques of applied life science technologies[43] is easy to state, but hard to interpret and confirm. The complaint is that technological power over fundamental life processes results in a decline in the moral qualities of human interaction.[44] In particular, technological progress causes human regress by reducing people to objects.[45]

But what is this human decline about? It is not about a reversion to lower primatehood and a return to our home in the trees. Perhaps it is more like our becoming drones in the Borg hive.[46] The plunge toward objecthood can only refer to changes in our attitudes about what personhood and human interaction should entail and thus to changes in how we come to treat each other. Fears of such retrograde slides are reflected in bioethics commentaries denouncing technology-assisted objectification, especially in the fields of reproduction, genetics, and performance enhancement, though transplantation and control of dying are not far behind.[47] Here, biotechnology is not alone; assessments of other

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43. I make no effort to define "technology" precisely. One definition that I have quoted elsewhere is this: "Following the Dutch philosopher Piet de Bruin, I define technology as the control of nature by way of combining its forces according to a design conceived of by human understanding. The resulting combination is a new work of nature that can be used as a means to realize a specific end." T. Maarten T. Coolen, *Philosophical Anthropology and the Problem of Responsibility in Technology*, *in* TECHNOLOGY AND RESPONSIBILITY 43-44 (Paul T. Durbin ed., 1987). The apparent oxymoron "new work of nature" calls attention to the difficulty of defining "natural" and "artifactual" and distinguishing one from the other.

44. By "technological power" I mean both what can be done and the very idea that such power is possible and is likely to be developed sooner or later if there are no preventive efforts.

45. I leave aside whether and to what extent this applies beyond life science technologies.

46. In *Star Trek: The Next Generation* (Twentieth Century Fox Television Broadcast), the Borg is a huge collective unit made up of formerly separate individuals. They were "assimilated" into the collective mind, although enough individuation remains, to allow Borg "drones" to be restored to independent personhood. I refer, of course, to Seven of Nine, in the *Voyager* series.

47. *See* Martha C. Nussbaum, *Objectification*, 24 PHIL. & PUB. AFF. 249, 262 n.20 (1995) (a critical analysis of objectification arguments); *see also* Michael H. Shapiro, *Illicit Reasons and Means for Reproduction: On Excessive Choice and Categorical and Technological Imperatives*, 47 HASTINGS L.J. 1081 (1996) (a critique of objectification arguments against the use of

technologies often present this same view of human devolution.[48]

The indictment of applied biology is often accompanied by claims that bioethics is infirm because it has failed to stop or even slow the onslaught of personhood-impairing technological advances. It has failed because its intellectual structure is impoverished or beholden to the wrong groups or values and so hastens our decline.[49] This is so whether bioethics is viewed as a scholarly discipline, a body of law and legal practices, a set of customs and clinical practices, a set of attitudes and perspectives held by various groups, or any or all of these.[50] Whatever it is, it is said to lack relevant perspectives, embrace the wrong values and value priorities, use the wrong paradigms and models and other modes of thought, and to be patriarchal and too oriented toward establishment culture.

The task here is to expose the vulnerabilities of these attacks.[51] In this "critique of the critique" of biological technology and bioethics, I will complain, among other things, about how debates on the uses of life science technologies are framed and pursued in confused, confusing, and often misleading terms.[52]

B. Is Bioethics Distinctive and on What Notion of "Distinctiveness"?: A Definitional Inquiry

One way of entering this meta-critique may seem roundabout but is not. To critique the critique of bioethics requires some account of what bioethics is. I will try to show why bioethical problems are exceptionally troublesome, and this requires identifying what causes the trouble.

The explanation lies largely in a showing of how practices which radically rearrange life processes to suit specific wants generate conceptual and normative monsters:[53] persons, entities, relationships, situations, and behaviors that escape

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reproductive technologies).

48. *See generally* Bruce Mazlish, *The Fourth Discontinuity*, 8 TECH. & CULTURE 1 (1967); BRUCE MAZLISH, THE FOURTH DISCONTINUITY: THE CO-EVOLUTION OF HUMANS AND MACHINES (1993).

49. *See* Susan M. Wolf, *Shifting Paradigms in Bioethics and Health Law: The Rise of a New Pragmatism*, 20 AM. J.L. & MED. 395, 397 (1994). *See generally Is Bioethics 'broke'?—Critiques of Bioethics*, *in* MICHAEL H. SHAPIRO ET AL., BIOETHICS AND LAW: CASES, MATERIALS AND PROBLEMS (2d ed. Part I forthcoming 2001).

50. On defining bioethics as a field, see also Callahan, *supra* note 15, at 250-51 (distinguishing sub-branches of bioethics: theoretical, clinical, regulatory and policy, and cultural).

51. For attacks on technology generally, see JACQUES ELLUL, THE TECHNOLOGICAL SOCIETY (1964); VICTOR FERKISS, THE FUTURE OF TECHNOLOGICAL CIVILIZATION (1974).

52. These infirmities do not warrant an inference that foundations, paradigms, or perspectives are fatally flawed. My complaints are thus not inconsistent with my defense of bioethics. The disagreements here represent value differences or what I think are insufficiently rigorous or otherwise faulty argument structures. This is not fatal to the discipline as a whole. It is not even necessarily fatal to the specific work under attack.

53. *See* David Bloor, *Polyhedra and the Abominations of Leviticus: Cognitive Styles in*

the major abstractions we use to describe, explain, and evaluate human actions and circumstances.[54] Of course, we encounter daily anomalies that do not fit nicely into our conceptual bins, but the failures recited here are special not only because they fit so poorly, but because they deal with foundational matters: whether we will come into or continue our existence, in what form, and under what constraints and circumstances.

Why the emphasis on an arid inquiry into classification? Classification is at the core of human thinking, but this broad proposition is not of special concern here. What does concern us is that there is a major difference between problems that challenge our principal conceptual implements and those that do not. To be sure, this also involves a classification problem; the issues we face are not neatly distinguishable on the basis of the gravity of their challenge to our main concepts. Some classification problems seem to remove the flooring, others merely cause light tremors, still others are resolved without much notice on our part, and some elude these classifications also.

The big ticket challenges, however, do seem different from the usual sort of classification problems that we encounter, whether in legal disputes or ordinary daily living. Our conceptual system is not assaulted because we cannot identify a clear boundary between negligence and due care, or between due and undue process. Nor is everyday language fatally flawed because there is no clear border between being tall and not being tall. Few would claim that we should abandon all concepts and distinctions because some of their applications are unclear, indeterminate, or change with time. Even simple conceptual vagueness, however, can lead to serious normative/conceptual problems as the world changes. Six-footers used to be giants and still are among some groups, but among other groups—think of the N.B.A.—six feet is pretty short. Do persons projected to be no more than six feet tall need growth hormone? Do early embryos from short people require genetic enhancement?

Similarly, as we saw, it is no garden-variety puzzle to be unable to identify a single natural mother when a fertilized ovum from one woman is gestated by another woman, who of course has no genetic connection to it. Here, the very structure of elemental notions like "mother" is in question. The concept itself has been fragmented as a result of our reconfiguration of the reproductive process.[55]

Mathematics, *in* ESSAYS IN THE SOCIOLOGY OF PERCEPTION 191, 197-98 (Mary Douglas ed., 1982) (relying on IMRÉ LAKATOS, PROOFS AND REFUTATIONS: THE LOGIC OF MATHEMATICAL DISCOVERY (1976) (discussing mathematical "monsters")).

54. It should be clear from this that I do not use "bioethics" to refer to all moral and legal problems within the realms of medical ethics, health care, and biology. *Cf.* Ezekiel J. Emanuel, *Where Civic Republicanism and Deliberative Democracy Meet*, HASTINGS CENTER REP., Nov.-Dec. 1996, at 12 (suggesting the inclusion of matters of health care coverage within medical ethics, and asking, "Is there a relationship between defects in our medical ethics and the reason the United States has repeatedly failed to enact universal health coverage?").

55. *Cf.* JONSEN & TOULMIN, *supra* note 7, at 320-21.

After a sex change, the everyday presuppositions built into the term "marriage" (notably,

This divide-conquer-and-confuse aspect of some biological technologies leads us to other characteristics of bioethical problems. Among the more notable are the reinforcement of the idea of the determinate, predictable, controllable, algorithmic person; the introduction of new purposes for our old life processes, as in producing fetuses to provide transplantable tissue rather than to reproduce; providing opportunities to further existing purposes with greater precision, as in controlling behavior with psychotropic drugs; and, more generally, substantially increasing our control over life processes, enabling greater predictability of traits and behavior. The very existence of such choice over matters not previously under our control is itself something of a conceptual anomaly. Think, for example, of being able to determine the entire genome of a person-to-be through cloning, or of being able to heavily influence particular traits. If we can "construct" a person through technological alteration of her physiological system or her germ line, what sort of being should we construct?[56] What new or strengthened purposes *ought* to be installed for life functions? What purposes for reproduction should be added or extended? The possibility of bone marrow transplantation suggests having babies—not just fetuses—to provide compatible tissue for transplantation. The prospect of cloning may inspire reproductive acts resting on the (mistaken) view that clones are locked into some common fate shared by all who have their defining genome. A given act of cloning may thus reflect the novel purpose, not simply of having children, but of perpetuating a line of identical persons raised to pursue some sharply bounded set of tasks requiring that their talents be matched to their assigned roles in life. Here, then, biological technology restructures reproductive processes in a way that generates anomalous lineage relationships, reinforces the images of persons as determinate entities, and provides us with additional reasons, possibly mistaken or objectionable, for using procreational mechanisms.

So, the arguably distinctive features of classic bioethical problems are that they involve, at the most abstract level, the directed revision of life processes and what this entails: the idea of the determinate person; the substitution of new purposes in using human capacities; and the general expansion of choice in constructing, controlling, and predicting life processes, in partial displacement of the natural randomness of life.

These distinctive features of bioethics are not fully independent. The core idea is still the reordering of life processes into unclassified forms, giving us relationships (e.g., gestational mothers and "their" children and the children's "genetic parents"); entities (such as cryopreserved embryos); and powers (over our own fundamental structures, individually and collectively) that we often do

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the assumption that the partners to a marriage contract have permanent and definite genders) are so deeply undercut that this term, as it stands, no longer covers all the relevant practical problems. We must now ask ourselves what its moral force is, in future, to be.

Id.

56. *See generally* JONATHAN GLOVER, WHAT SORT OF PEOPLE SHOULD THERE BE? (1984) (examining the moral dilemmas involved in controlling human traits).

not know how to deal with. Some believe that this transforms our vision of persons as free into an anti-vision of persons as machine-like or lower-animal-like—predictable, explainable, and controllable.

As we saw, all these features of bioethics create an ever-increasing range of choices over matters we traditionally regarded as fixed or as changing only very slowly over time. This expanded set of choices will not be universally viewed as a benefit simply because it promotes autonomy-as-opportunity.[57] In matters of creating and maintaining life, the very existence of choice over what formerly was given offends many, conveying images of the reduction of persons to a set of manufactured modules.

I do not argue that these considerations distinguish everything in or out of the realm of bioethics, but they suffice here. They all do a number on our conceptual system, making it especially difficult to know what to make of a given problem,[58] and there is only so much that moral, legal, and policy analysis can do. This is the gist of the response to the complaint that bioethics, as it stands, is inadequate to the task before it—perhaps inadequate even to define the task. But to say this reflects confusion about what the task could be.

II. IS BIOETHICS "BROKE?": ELABORATING ON ITS DISSING

A. Preface

Critiques of bioethics have centered on several purported defects of the discipline. Some complaints are about its intellectual structure—particularly the dominance of a given set of perspectives to the exclusion or devaluation of others. Both scholarly works and legal outcomes may exhibit this dominance, enhanced by mutual interaction. Other complaints, not entirely independent, deal with the internal processes of the discipline. I emphasize the scholarship and law here, but do not entirely ignore the latter.

Here, then, are some of the specific complaints.[59] The first three are closely

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57. *See* Shapiro, *supra* note 32, at 349-50.

58. As part of the defining aura of bioethics, one might also invoke the idea of "forbidden knowledge" of the very springs of life and behavior. Whether we think that some form of knowledge should be avoided is partially a function of the hostility we have toward the technology that rests upon the knowledge. There may also be a general demoralization effect in knowing, say, of the physical foundations of our thought and conduct or of our evolutionary antecedents. Still, the idea that some sorts of knowledge should not be sought or possessed, while hardly limited to life sciences, seems to have a particular application to them, and is, to some extent, independent of the actual uses of the technologies involved. Some are disturbed, for example, by claims that human emotion and thought are strongly linked to workings of neurotransmitters. For a more general account of issues in limiting scientific research, see generally General Topic, *Forbidden Knowledge*, 79 MONIST 183 (1996).

59. I do not claim to be exhaustive here, and concede that the account reflects my own perspectives. There is no help for this: we can only see from where we stand, while trying to imagine how it is to stand elsewhere—a point well made by Nagel. *See* NAGEL, *supra* note 11, at

linked: excessive focus on the use of formal rules, principles, and standards; an obsession with autonomy and rights, to the exclusion of other frameworks of thought; and overlegalization.[60] Other major changes include insufficient attention to community, responsibility, and duty; and undervaluing or ignoring circumstances that threaten the very possibility autonomy, individuality, and appropriate recognition of rights.

In turn, these circumstances are said to include oppression based on disfavored traits such as race, ethnicity, gender, religion, sexual preference, disability, and stage of life; and oppression (including coercion, exploitation, and undue influence) within professional relationships in which powerful elites exercise authority. Here, the concern arises from the structure of crystallized relationships— physician and patient; researcher and subject; lawyer and client; agent and client (as in brokerage for surrogacy relationships); one contracting party and another (surrogacy is again an example, and physician-patient relationships have a contractual aspect); and, more grandly, institutions and their personnel on the one hand (government, hospitals, HMOs, prisons, mental health facilities, etc.), and persons, families or other groups, on the other. Conflicts of interest are of special concern here. Autonomy, individuality, and rights are also weakened by oppression stemming from one's status within important personal relationships, such as husband and wife or other couplings; parent and child; kinship and cultural groups; and the various communities to which one belongs. Again, conflicts of interest require particular attention.

Such failures are presumably why we are told that bioethics needs some "paradigm shifts." (As I note later, pragmatists might complain about overemphasizing "paradigms" in the first place.)

B. Kinds of Critiques: Outcomes and Bottom-line Disagreements; Philosophical/Value Disagreements; Ideological Differences; and Mistakes

1. Outcome and Process.—Before commenting on the charges just mentioned, we must ask how to characterize the principal critiques of bioethics, or even whether they are rightly called critiques of *bioethics* as opposed to commentaries or complaints about something else.

One can plausibly criticize a discipline as conceptually and normatively impoverished because it fails to consider all material matters; that it proceeds illogically, incoherently, or otherwise carelessly or irrationally; that it is beset by conflicts of interest and imbalances of power; that it is biased, rigidly constrained by ideology, afflicted with false consciousness; and so on.

It is less plausible, however, to complain because one simply disagrees with an outcome, without express regard to the approach used; or because (unthinkingly) the critic and the criticized assign different meanings to the same

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5 ("[O]bjectivity allows us to transcend our particular viewpoint and develop an expanded consciousness that takes in the world more fully.").

60. A rights orientation is often viewed as law-inspired, perhaps even when dealing with moral rights.

terms or concepts used in the decision making process. For example, rights-talk by one party may be at a different level of generality from that used by another; or a claim about prima facie rights might be taken as an absolute claim by another; or a claim about non-interference rights might be conflated with a claim about rights to affirmative assistance.

It is particularly important to see both the separations and the connections between outcomes and the processes that led to them. Process and outcome are not the same, but they are not completely distinct either. "Outcome" can be described in ways that reflects aspects of its origins and "process" can be formulated to embrace certain outcomes.[61]

Now, at some point in seemingly identical processes, persons reaching different outcomes must diverge on something, including identification or use of criteria. This can happen at any point. One must thus determine at what stage or level of abstraction or particularly a process is being attacked, whatever the conclusion. Something may well have gone wrong, in the critic's eyes, whether at the end or earlier in the process. But, the critic may mistakenly look only to the outcome to determine that the field is radically infirm.

Consider this exchange: "No, I reject physician-assisted suicide because it is too likely that life will be lost when it should not be." "Wrong, it is not that likely." If this is a disagreement on the rough probability of erroneous suicide is, neither side can, without more, rightly complain of the quality of the other side's moral analysis, unless their moral frameworks have distorted their empirical lenses. On the other hand, if the disagreement is about whether a certain error rate is too great to bear, or about what even constitutes an error, it is likely to be a moral disagreement. It would be inappropriate, however, for the one side to say that the other side's position is radically infirm solely because, using the same basic moral architecture, it arrives at a different moral conclusion.

Of course, the differences may start at the beginning. The disputants may strongly disagree on what sorts of lives should or should not be lost, a disagreement more likely to rest on value differences than on factual disputes. Or they may agree on certain threshold matters (e.g., on which values are the dominant ones) and then disagree on either factual issues (e.g., how do physicians actually behave in end-of-life situations?) or particular value issues (say, about whether limiting a patient's suffering morally edges out the risk that she will die weeks or even months too soon). These outcome differences are hardly trivial, but it vastly overstates the case to say that the one side or the other is invoking the wrong paradigms or is indifferent to various legitimate interests.

So, outcome disagreement does not warrant mutual accusations that the processes behind the conclusions must have broken down because of design defects or flawed reasoning. There are kinds and degrees of breakdown and ultimate failure. Additionally, there may be irremediable disagreement on what even constitutes failure of any sort. Failure has a complex structure and taxonomy. An analogy, for example, may yield different results for different

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61. "Process," in this context, includes the substantive criteria used to describe and to evaluate.

analogizers. The analogy is not broken down or useless because of this.

Consider, for example, the idea of a commercial transaction as applied to human reproduction. A surrogacy arrangement can be as much a commercial exchange as the purchase of a clothes dryer. But saying this and abruptly ending the analysis is an immense descriptive and normative/conceptual error. Some indeed use the comparison to attack surrogacy as causing or constituting human commodification (the commercial version of objectification) by stressing the similarities between the two transactions—and then stopping without considering their differences. It is hard to see how the analysis could possibly be complete without doing both; there is no other rational way to deal with a purported parallelism. Moreover, the analogy is mishandled if one does not see that what even counts as "similarity" or "difference" may be contested. If a commentator or a discipline characteristically fail to confront both similarities and differences and the difficulties in recognizing them as such, then its decision making processes are indeed infirm. Making comparisons with blinders on may reflect bias and prejudgment, conflicts of interest, lack of time for reflection, or lack of acuity. Disagreement about the results of the comparison, of course, does not nullify its worth; one's final judgment, however, is far better informed.

Moreover, an analogy may be useful in some contexts and not in others. For example, some nontrivial constitutional value probably applies to most forms of assisted sexual reproduction—artificial insemination ("AI"), IVF, etc.: with respect to sexual union in the general biological sense, they are identical. The social relationships involved may vary, but few doubt the status of these processes as human reproduction entitled to some constitutional protection.

Some commentators, however, think that human asexual reproduction is so radically different that all constitutional bets are off: it is outside the Fourteenth Amendment's procreational autonomy ballpark. Its distance from paradigmatic sexual reproduction cannot be measured because the notion of "distance" does not readily apply. What is contested here is the very status of sexual recombination as a defining characteristic of human reproduction; the birth of a child is, for some, not enough to trigger constitutional protections of procreation.

For such observers then, comparison to a paradigm may work pretty well for AI, IVF, and even posthumous reproduction, but not for human cloning.[62] The paradigm does not help establish anything one way or the other, or so one might argue. The asexual nature of cloning drives some critics to say, in effect, that it makes no sense to talk of the linear distance between sexual and asexual reproduction: they are utterly distinct and rival processes that should not bear the same designation—"procreation."

The upshot is that use of analogy or comparison to a paradigm need not be universally serviceable; the processes are not completely worthless merely because they sometimes fail. Much the same applies to entire disciplines: if the discipline reaches a decision different from yours, it will take a lot more beyond this bare fact to establish a failure of process and an impeachment of its

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62. *See* Michael H. Shapiro, *I Want a Girl (Boy) Just Like the Girl (Boy) That Married Dear Old Dad (Mom)*, 9 S. CAL. INTERDISC. L.J. (forthcoming 1999).

practitioners.

2. Warring Philosophical Movements or Dispositions.—To explain outcome disagreement as the result of differing processes (understood as modes of reasoning and evaluation) may understate the gulf separating antagonists. One movement may claim to be at war philosophically with how another proceeds, as when a pragmatist complains of fixations on abstractions—not particular abstractions but abstractions generally—as opposed to the particularized circumstances and context of a case. Another standard example is the contrast between consequentialism (utilitarianism is its best known theory) and nonconsequentialism. Even if the distinction is somewhat overdrawn[63] (and for some it is not exhaustive) the two arenas are quite different.

3. Disagreements over the Status of Particular Values, Such as Autonomy, Fairness, Justice, Equality, Privacy, and Utility.—To invoke autonomy without attending to countervailing considerations[64] is a moral error. As I have said elsewhere, autonomy is not everything. But if one is faulted for relying on autonomy at all by others who think that it is largely immaterial, this deep moral disagreement is, again, not well characterized as resting on mistakes or errors on either side. Much the same can be said of persons who differ on the placement of autonomy in the hierarchy of values.

4. Disagreements About Matters of Fact—or Are They?—Disagreement on material facts also accounts for discord on how to evaluate and respond to actions and situations. However, apparent strife over facts often masks serious moral/philosophical disagreement. Few scholars need to be reminded about the role that cognitive perspectives, frameworks (normative and otherwise), schemas, scripts, and the like play in our perceptions. A purported statement of fact may represent a partial or overinclusive vision generated by one's attitudes and values. In this sense, the factual claim is normatively ambiguous.[65]

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63. *See* Samuel Freeman, *Utilitarianism, Deontology, and the Priority of Right*, 23 PHIL. & PUB. AFF. 313, 348 (1994) (observing that "the teleology/deontology distinction does not mark a contrast between moral conceptions that take consequences into account and those that do not. No significant position has ever held consequences do not matter in ascertaining what is right to do.").

64. The primary meaning of "countervailing considerations" concerns jeopardizing or injuring interests that might be harmed by an exercise of autonomy (including at least some harms to the actor, under most political/moral philosophies). These considerations can be taken to include the presuppositions or preconditions of autonomy: competence; authenticity; voluntariness and absence of coercion and undue influence; (possibly) deliberation; and (possibly) no false consciousness. (These elements are not of equal import, either as a matter of theory or in specific situations, but there is no reason to refine the specification here.) If any of these presuppositions do not hold, a variety of interests are imperiled, including that of the actor. For clarity, referring to the presuppositions as a particular subset of countervailing considerations seems better.

65. Simple-sounding statements such as "Doing *x* poses significant risks that have been scientifically validated" are classic examples. What risks are "significant" rests in part on value judgments; what is "scientifically validated" rests on value judgments about what risks of factual error we are willing to tolerate. For example, a requirement that a randomized clinical trial display a result that is no more than five percent likely to be a matter of chance as opposed to therapeutic

5. Semantic Confusion.—In any dispute, there may be misunderstanding of the meanings of basic terms. "X has a right to advocate action Z" can be taken as the statement of a simple absolute, a defeasible prima facie statement, or a bottom-line conclusion taken after considering all countervailing considerations (e.g., the risk of a riot or other unlawful conduct). Perhaps some complaints about excessive attention to rights take the claims of right in an absolute or bottom-line sense when this is not intended. The moral premises underlying these different kinds of rights claims can be quite different.

The claim that bioethics is badly in need of repair is thus no simple matter to (dis)confirm. There is repair and there is repair. A leaky faucet that runs dirty water because the household pipes are old is one thing; a poisoned reservoir is something else. From my viewpoint, if bioethics is in some disarray (I have strongly criticized the anti- technology viewpoint),[66] it is not because the discipline as a whole has missed major points, needs paradigm replacements, or is impermissibly indifferent to relevant moral, political, and factual considerations. It is because some of its practitioners hold value-orderings different from mine that lead them to downgrade considerations I find compelling and in turn lead them to present what I see as loose and incomplete arguments. At that level of abstraction, my own critique of bioethics is in some ways the reverse of what now appears to be the standard critique, which complains of immoderate attention to abstractions, especially autonomy, and to legal rights and processes.[67] However, my critique does not suggest that the field is now oblivious to abstractions and to law; I do not mean to make the same sort of all-or-nothing error I am complaining that others make.

The critique of bioethics that I am opposing here in some ways parallels better-known critiques of Western culture generally: complaints about excessive attention to particular values (primarily autonomy), identifiable rules, principles and standards, and so on. Fortunately, I cannot presently relate what I say here

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efficacy is not based on some universal constant that defines scientific validity. *See* Brock, *supra* note 4, at 221.

> It is not that the common intuitive distinction between moral considerations, such as promise-keeping, and nonmoral considerations, such as financial costs, is mistaken. The mistake is in thinking that moral judgments can avoid weighing the two when they come into conflict; when that occurs, the financial cost becomes a morally relevant consideration in the moral judgment about whether the promise ought to be kept.

Id.

66. *See, e.g.*, Shapiro, *supra* note 47; Michael H. Shapiro, *How (Not) to Think About Surrogacy and Other Reproductive Innovations*, 28 U.S.F. L. REV. 647, 664-67 (1994).

67. *Cf.* Stephen Darwall et al., *Toward Fin de siécle Ethics: Some Trends*, *in* MORAL DISCOURSE AND PRACTICE: SOME PHILOSOPHICAL APPROACHES 3, 32 (Stephen Darwall et al. eds., 1997) (observing that "debate has now extended even to the metaphilosophical level, as philosophers have asked with increasing force and urgency whether, or in what ways, theorizing is appropriate to morality.").

to such global commentaries.[68]

C. Excessive Focus Within Bioethics on the Application of Rules, Principles, and Standards; Formalism

1. Abstractions and Formalism.—

a. Generalizations in general.—If the complaint is that bioethics or other disciplines rely to any significant extent on "abstractions"—in particular, to rules, principles, and standards—it is absurd, and I doubt anyone really thinks otherwise, despite some loose talk. Distinctively human thought and decision making are generally impossible without abstractions. This holds whether the abstractions are formed and used nonconsciously, and whether we can even articulately state them. Pragmatists, as I understand them, do not deny any of this.

What, then, is the claim of over-attention to generalities all about? The push is for lawyers, judges, legislators, agencies, scientists, physicians, and commentators to pay more attention to particular individuating circumstances and less attention to the logic of the relevant abstractions. Of course, one must necessarily deal with both. Whether some level of abstract discourse is over or under-done may rest on contested moral/conceptual issues that are familiar in law, philosophy, and public policy. When one claims, for example, that "the rule should be bent to do equity in particular situations," one is likely to think that the rule itself should be clearly (re)formulated to cover the contested situation. To say, then, that one is overdoing the abstractions and underdoing the facts is at bottom to call for a review of what particular circumstances are material in light of selected abstractions, perhaps in the form of rules, principles or standards. There may, of course, be disputes on the interpretation of the abstractions and on the very choice of abstractions, but the point remains that the abstract statement that one is being too abstract *itself* rests on the abstractions selected and interpreted. Its bare articulation may simply be a loose way to state a moral preference. Depending on the circumstances, abstractions can even remain unmentioned. Everyday characterizations of right, wrong, good and bad do not generally require a display of theoretical underpinnings, but these abstractions remain part of the hidden infrastructure of moral justification.

This account may not dispel reservations about "the rarified air of conceptual analysis," the results of which may or may not bear on "provid[ing] solutions to practical moral problems."[69] However, there is little to support a claim that bioethics is lost in the clouds or the Platonic realm of Forms. Decisions are made despite uncertainties at every level of abstraction, and it is entirely possible to "compartmentalize" one's decision process at particular levels, insulating it from

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68. *Cf.* Constance Holden, *Reason Under Fire*, 268 SCIENCE 1853 (1995) (quoting Sandra Harding, "who thinks Newton's *Principles of Mechanics* reflects patriarchal, exploitative Western thinking, and therefore might as well be called 'Newton's Rape Manual'").

69. *Cf.* Holmes, *supra* note 15, at 144.

other levels.[70] Sometimes it is the Forms that require attention—what they are, what they mean. Sometimes they are rightly taken as given, and it is the particular circumstances that require attention. For example, in *Davis v. Davis*,[71] the court, after identifying the governing abstraction of procreational autonomy, held that Mr. Davis should not be compelled to risk becoming a genetic father because the burden on him would be greater than that imposed on his former spouse.[72] The court therefore disallowed the implantation of the cryopreserved embryos he shared with his former wife, who wished to see them implanted in other women.[73] Presumably, if the issue again arises, the abstraction can be taken as given and everyone can concentrate on the particulars. This is, in fact, often desirable: we cannot give our full attention to every level of discourse even for a single pressing decision. However, for full validation, at some point every level requires attention to every other level, or justification for particular decisions will be incomplete.[74]

b. Who has missed what?; examples.—Here is a rule: "If you file your complaint sounding in tort more than a year after the injury was inflicted, your claim is time-barred." There is no provision for tolling. It is a flat rule that admits no individuating circumstances—even the fraudulent conduct of the physician or other tortfeasor.

In some cases, this rule seems unfair; potential plaintiffs may have many plausible excuses—e.g., inability to find a lawyer, fraudulent concealment, and so on. However, the limitations rule says, "too bad." The legislature has decided that attention to individuating circumstances is inappropriate here because it is inefficient and excessively burdens physicians as well as others. The argument against this is not about whether we use abstractions, but about using the wrong ones or using sound ones inappropriately. Some may urge that it is too hamfisted to rely on "efficiency" and "excessive burdens" because it bars just claims against wrongdoers.

So, the competing fairness and efficiency arguments from patients and physicians reflect, in part, value disputes, and some of them rest on empirical

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70. *Cf. id.* at 151 (describing the view that bioethical issues "can be analyzed in a way that is largely neutral with regard to such commitments [to normative and metaethical theory]").

71. 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993).

72. *See id.* at 598-604.

73. Mr. Davis had a special fear of being a father with incomplete access to his children because as a child he suffered from parental absence. *See id.* at 603-04. The former Mrs. Davis had remarried and did not want to implant the embryos in herself. *See id.* at 590.

74. *Cf.* Holmes, *supra* note 15, at 145 ("Solutions to these [moral] problems may be thought to require the findings of any or all of the other three areas of philosophical ethics [metaethics or moral epistemology; normative ethics (i.e., concerning "the correct principles of rightness like utilitarianism or Kantianism") and applied ethics].). Holmes also characterizes the current views on G.E. Moore's metaethical analyses ("[m]uch of twentieth-century ethics has departed from Moore in this belief that the question of metaethics (particularly with regard to the meaning of ethical concepts) must be answered before one can effectively tackle the questions of normative ethics."). *Id.* at 146.

issues concerning physician and patient behavior under different rules. The argument at this stage is not that a rule (an abstraction) was applied—it is that the *wrong* rule was applied.

The complaint about using abstractions is thus a complaint that morally relevant individuating circumstances are being shorted by particular rule. The call for action, then, is not to quit the use of abstractions but to make them more responsive to the varieties of different situations. Sometimes particulars *should* be shorted, sometimes not; *that* is the dispute—what the very nature of the rule and its elements should be. Despite some hyperbolic remarks by philosophical and legal pragmatists, it is unconvincing to argue (using abstractions, of course!) that moral and legal reasoning *simply* require close attention to particular facts, circumstances, and situations. Oliver Wendell Holmes, Jr., did indeed say that "[g]eneral propositions do not decide concrete cases."[75] But, neither do "particular" propositions; one needs both.

Now, for which bioethical issues or subdomains have bioethicists paid too much attention to abstractions? Or, better yet, when have they wrongly failed to formulate the proper abstractions—those that make outcomes depend on morally relevant particulars? For example, what issues in death and dying reveal this moral error? The physician-assisted suicide ("PAS") debate? *Who has missed what issues?* The Oregon law does not *require* screening of PAS applicants for depression.[76] I believe this is an error because of the likelihood that depression will distort a person's thinking generally, and her perception of her own settled preferences in particular. "Mood" and "thought" do not exist in disconnected universes.

No one has "missed an issue" here. Nearly everyone knows of the risks of depression-induced distortions of mind—"distortions" in the sense that one's announced decisions may differ from one's future settled preferences. Why not *require* psychiatric evaluation and treatment? As far as I know, psychiatrists do not have direct pipelines to The Truth, but they and their medicines have been shown to be reasonably effective (though even this is contested) in treating depression. Perhaps PAS supporters place too low a value on loss of life. Perhaps *I* place too low a value on the avoidance of suffering. Perhaps I overestimate the risks of abuse—or have an overly expansive view of what abuse is. Perhaps the others underestimate the risks and have an unduly narrow view of what constitutes abuse. Perhaps I am too fearful that institutionalized PAS will engender increasing impatience with disability and infirmity. Perhaps the others aren't fearful enough. We seem to have different dispositions concerning what risks of error we should bear. Recall that the parties in *Bouvia v. Superior Court*[77] and *Thor v. Superior Court*[78] changed their minds about wanting to die. Ms. Bouvia is alive as of this writing, and Howard Andrews, the prisoner-patient in *Thor*, died of other causes.

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75. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

76. *See* Death With Dignity Act, ORE. REV. STAT. §§ 127.800-127.897 (Supp. 1998).

77. 225 Cal. Rptr. 297 (Cal. Ct. App. 1986).

78. 5 Cal. 4th 725 (1993).

Moral/factual disputes of this sort are not evidence of a field's "breakdown" or its failure to take into account critical concepts, interests and perspectives. As for missed issues: One could say, trivially, that if two persons disagree, *something* is being "missed"—not seen, not felt, or insufficiently appreciated; someone "does not get" *something*. Prolonged absence of consensus is not evidence of a field's fatal flaws, however. If anything, it is some evidence that consensus is unlikely to or *cannot* be achieved, given the major collisions of value and the absence of overarching moral algorithms that can settle the disputes.

Obviously, sometimes something *is* missed, or at least one can plausibly think so. But in many cases, even claims that are incomplete or confused should nevertheless be made for the illumination they bring. In the debate over PAS, for example, some critics of the practice insist that patient screening for clinical depression be mandatory. Their position is that the distortions of mood and thought entailed by such depression is incompatible with any rationally plausible autonomy ideal. Failure to require such screening undervalues autonomy and overvalues the goal of avoiding suffering in its various forms. Perhaps so. But one of the few discrete issues largely missed in the PAS debate is that severe, long-standing, refractory depression is arguably more of an indication *for* PAS than for blockading it. This point has long needed to be made and the obvious value tensions further analyzed. Yet that deficiency alone impeaches neither the debate nor bioethics as a field; the initial point about screening for depression, incomplete as it was, inevitably leads to the question of what to do about unmanageable mental conditions, and beyond that to PAS for incompetent patients.

This foreshadows a point already mentioned and to be expanded later. In many cases of value conflict, it is impossible in principle to achieve theoretical moral closure with whatever moral theory or theories we are armed, even if we achieve (transient?) consensus. This instability or indeterminacy is *built into* the conceptual and normative structures we use, from foundational levels on down. The disputes will no more be settled than all the digits of π will one day be identified.[79] This is not a nihilistic announcement:[80] such indeterminacy is very

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79. *Cf.* 1 FRIEDRICH A. HAYEK, *Was Socialism a Mistake?*, *in* THE FATAL CONCEIT: THE ERRORS OF SOCIALISM 6, 8 (W.W. Bartley III ed., 1988).

> Although I attack the *presumption* of reason on the part of socialists, my argument is in no way directed against reason properly used. By "reason properly used" I mean reason that recognises its own limitations and, itself taught by reason, faces the implications of the astonishing fact, revealed by economics and biology, that order generated without design can far outstrip plans men consciously contrive.

Id.

Cf. Holmes, *supra* note 15, at 144.

> [M]uch of the analytically inspired work on bioethics has as little practical value for the answering of the basic moral questions of bioethics as Aristotle thought Plato's account of the good to have for conduct in general. This is not to disparage such ethics or to deny its intrinsic theoretical interest; it is only to suggest that more should not be

far from making these structures meaningless; indeed, it is logically linked to their very usefulness as abstractions.

Consider now an example in assisted reproduction. What have commentators failed to track in their literature? What have judges and lawmakers failed to grasp? What have bioethics practitioners generally overlooked? The legal system may have remained silent on various matters, but this does not entail unawareness, and may or may not be a sign of lack of courage. Who, anywhere in the field, has simply assumed that "whatever is, is right" and acted blindly to ratify the Patriarchal Establishment? The literature spills over with commentaries about objectification, commodification, exploitation, marginalization, dehumanization, and so on. Is *contesting* the claim that such feared processes will occur or that they are always to be regretted a sign of intellectual and moral collapse? Perhaps that side just doesn't get it. On the other hand, some think that too much is made of bare opportunities for reproductive choice (they read it as "license") and not enough of individual coercive or exploitative situations that compromise true autonomy. Perhaps they undervalue autonomy as opportunity for choice. Perhaps this side—or even both sides—don't fully get it (whatever "it" might be).

Another example from a different arena is behavior control. In *Washington v. Harper*,[81] the U.S. Supreme Court, though purporting to recognize an important "liberty interest" in refusing antipsychotic drugs, upheld the state's power to treat prisoners with such medications over their objection, if medically indicated—and *without regard to whether the prisoner's refusal was competent.* Before that, some cases in the lower courts held precisely the opposite: competent objection was decisive.[82]

Once again, who is missing what? Where is the fatal flaw? Did the *Harper* Court overvalue the expertise and interests to be furthered by medical and correctional officials and undervalue autonomy? Are those who object to the *Harper* result overvaluing autonomy, and if so, what form of autonomy?

Now, I do not wish to over-defend *Harper*. It is very far from a paragon of right reason. One of its principal flaws is its underestimation of the gravity of the conflicts of interest involved in the situation: the psychiatrists at the diagnosis/treatment level are reviewed by peers who are affiliated with the institution; the review panel staff are members of the institution and have duties to further both institutional purposes and the interests of patients-prisoners.

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expected of it than it is capable of delivering.

Id.

I add here, as in the text, Holmes' qualification to his "limited relevance of analytical ethics" argument: the careful workings of bioethical and related legal analyses may settle a given problem *for any given decisionmaker.*

80. On nihilism, see Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 3-5 (1984) (discussing several senses of "nihilism," including, nihilism as "anything goes" and as a view that no consistent principles unify legal reasoning).

81. 494 U.S. 210 (1990).

82. *See, e.g.*, Keyhea v. Rushen, 223 Cal. Rptr. 746, 754-55 (1986).

Although the Court did not cite the Hippocratic Oath in direct response to the conflict of interest charge, it may have thought that the Oath all but solved the problem, thus grossly overestimating the Oath's influence and even the extent to which it is taken by physicians.[83] Nevertheless, the issues were ventilated, even if judicially mishandled. In any case, the deficiencies of formal education are hardly unique to bioethics.

In a moral dispute, as I said, one side or another is (not) seeing or (not) feeling something—perhaps something big, perhaps just a sliver. At any stage of argument, including the penultimate steps, whatever drives one side toward result X and whatever drives the other side toward not-X, separate minds have not fully "met." Perhaps individual minds barely met within themselves. This is so with all moral disagreement and does not establish terminal intellectual disarray among the warring parties. The "he doesn't get it" rhetoric may thus be inappropriate in many cases.

Thus, if the objection concerns inattention to particular circumstances that may affect application of the abstractions, that is one thing: such failures may be irrational unless resource constraints require exclusion of further factual inquiry. Sometimes the more fundamental objection is to the use of the wrong abstractions—although in some cases, little is gained and something may be lost by substituting one set of abstractions for another. But neither of these is an objection to the use of abstractions.[84]

What is mainly at stake is identifying *which* abstractions should apply and *which* particulars are morally and legally material given these abstractions. The two inquiries are strongly linked in complex cyclical ways that are hard to

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83. The conflicts of interest were pointedly described in Justice Stevens' concurring and dissenting opinion. *See Harper*, 494 U.S. at 251-57 (Stevens J., concurring in part and dissenting in part). He noted that the panel members "were regular staff of the [Special Offender] Center, an institution for mentally disordered convicts." *Id.* at 253. The Court mentioned the Oath in response to the argument that the treating physician might use psychotropic drugs for inappropriate purposes (apparently pure behavior control, without reference to the presence or absence of disorder). *See id.* at 223 n.8. Justice Stevens rightly derided the claim. *See id.* at 245 n.11. For a strong criticism of the way in which the *Harper* majority dealt with the conflict of interest issues, see CONFLICTS OF INTEREST, *supra* note 34, at 66-68.

84. *But see* Stanley Fish, *When Principles Get in the Way*, N.Y. TIMES, Dec. 26, 1996, at A27. Fish criticizes Herbert Wechsler for analyzing the segregation cases in light of principles of association, and complains about asking whether affirmative action is fair or is reverse racism. The right questions, he urges, are "whether the schools should be shut" and asks of affirmative action, "[d]oes it work and are there better ways of doing what needs to be done?" *Id.* But how does one think about whether the schools ought to be shut? What does it mean to ask whether affirmative action "works"? What are the criteria for "working"? Isn't the "working" of affirmative action precisely what some people complain of and others endorse? There is no escape from principles and abstractions generally, and probably no escape from conceptions of fairness and freedom of association in particular. The proposed replacement of questions is worse than useless; it muddles things still more by removing one set of obscure abstractions (say, fairness) and installing an even more obscure set ("Does it work?"). This isn't progress; quite the reverse.

specify. The hunt for material particulars entails reference to the moral or legal abstractions *by which materiality is determined.* However, it *also* requires closely inspecting the living circumstances, both to confirm what they are and to search for new insights—perhaps facts that vividly call attention to what might have been overlooked as material under the reigning abstractions. Attention to particular circumstances thus provides feedback into the system of abstractions, producing adjustments and even major revisions.[85]

Here I make another forward reference, this time to the discussion of "overlegalization" and the evils of adversary legal systems. Resorting to law and legal disputations is a prime mechanism for searching out new perspectives and frameworks of thought and to determine what lenses the protagonists are using to see and judge the world. That is at the core of what lawyers and judges *do*,[86] although they often do not do it well. Law and its abstractions, rightly viewed and practiced, do not strangle the intellect or distort our affect—they do precisely the opposite. This may often be done at an excessive price, and other social mechanisms for communication and decisionmaking may sometimes do it better.[87] Moreover, some professional personnel are ill-suited for the task. (Walk into a few courtrooms and listen to the lawyers and judges.) However, given the immense variations in our personal circumstances, deliberation and some degree of contention about abstractions and their applications are essential in determining how to formulate our rules.

c. Formalism: More on abstractions and concretions.—The appropriate complaint concerning abstractions, as I just argued, is about the rational skills used in selecting them and joining them with "concretions." Certain flaws in pursuing this process are often faulted as "formalist."[88] I cannot interpret that concept at length here, but something should be said about it because of complaints—perhaps not framed in terms of "formalism"—that bioethics is indeed burdened by its practice.

Three preliminaries: First, we need to discard the strange claim that we are all formalists because we insist that human thought generally, including moral and legal argumentation, must satisfy basic rules of logical inference. Everyone is constrained in this way, even those who go on about logic being just another belief system. If P implies Q and P is true, then Q is true; if Q is false, then P is false. No one is a "formalist" in some pejorative sense for acknowledging these claims. If that is all it takes to make one a formalist, everyone is a formalist. Insisting that a conclusion follow from its premises is not the mark of benighted bioethical (or other) analysis.

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85. *See* Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1 (1998) (discussing cognition in judicial problem-solving).

86. *See generally* Michael H. Shapiro, *Lawyers, Judges and Bioethics*, 5 S. CAL. INTERDISC. L.J. 113 (1997).

87. *See generally* STEPHEN P. GOLDBERG ET AL., DISPUTE RESOLUTION 149-53 (1985).

88. *See generally* Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) (arguing that the term "formalistic" should not be used as a blanket condemnation of a decision-making process).

Second, although there seems to be some precedent for it,[89] "formalism" is not used here to refer to having a rule-based legal system *at all* as opposed to something else such as lotteries or potentates' whims. Those who use the term that way may in fact have in mind a rule-based legal system *of a certain sort*—one in which the rules do not sufficiently address or allow for a variety of material considerations, or at least are so interpreted. One might then assert that the law-makers are "formalist"—although "rigid" or even "morally impoverished" might be better descriptions.

Third, legal formalism has properties shared with any mode of applying rules, including the most preferred modes. To have a rule-governed system at all, which is a critical aspect of at least most versions of the rule of law, the rules must bind or channel independently of irrelevant variables. Thus, principles of equality, however difficult to apply, require rules providing that for given purposes persons are to be treated alike despite certain variations among them. Race, ethnicity, and gender are irrelevant under the rules conferring the right to vote. The same equality principles also require that for given purposes persons

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89. *Cf.* AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW: HALAKHIC PERSPECTIVES IN LAW—FORMALISM AND FLEXIBILITY IN JEWISH CIVIL LAW 3-4 (1991). The author states that

> [T]he glory of the law—its sublime generality—is its very undoing. For in its passion for uniformity and stability, the law enlists the aid of formalism. Its indifference to persons may produce heartlessness; its impartiality, injustice; its rigid consistency, absurdity. How inadequate may the predictable rule appear! The primary meaning of formalism refers to the theory of the practice of rigid adherence to prescribed external forms.

Id. The author argues that

> according to the Rabbis, legal formalism has been one of the plagues of mankind from its inception. The dispute between Cain and Abel was engendered by each one's inordinate insistence upon his legal rights. [The author then quotes the Bible]: "One took the land and the other the movables. The former said, 'The land you stand on is mine,' while the latter retorted, 'What you are wearing is mine.' One said 'Strip;' the other retorted, 'Fly. . . .'"

Id. at 21-22.

Both passages require reconstruction. The first is certainly on the mark in noting, in effect, that the governance of rules bears risks of error in two directions: in failing to follow the generality of the rule, one risks its very status as a rule, or as a rule of a particular sort; but in failing to take account of material matters bearing on the evaluation of the outcome, one risks unfairness and injustice. However, this does not mean *having a rule at all* should be dubbed "formalist." One can have good rules and bad ones, and either sort can be interpreted in proper and improper ways. The second passage is about insisting on the enforcement or implementation of one's rights. This may be "rigid," "inflexible," and "mean-spirited," and perhaps, speaking very loosely, "formalistic," but this usage does not reflect the usual jurisprudential meanings of "formalism." Both Cain and Abel may have been jerks (who knows what *really* happened between them?), but not necessarily formalists. To say that in certain situations one should not stand on her rights is more a commentary on the status or application of the right or on the right-claimant's character than on the merits of different interpretive theories.

are to be treated differently because of their variations. Incompetent persons cannot execute valid wills. Persons who do not know French ordinarily should not be hired to teach it. The supposed "inflexibility" or "rigidity" here is not an objection—it is virtually the whole point. Stolid fixity is chosen to constrain both government and individuals in the rule-specified ways. Assuming the substantive soundness of the rules at stake, equality, fairness and justice require that irrelevant particulars be ignored. Discretion to take these particulars into account is precisely what is to be avoided. Some rule-systems are *supposed* to be flat-footed or hamfisted. Indeed, in such cases the rule scheme and its applications are unlikely even to be called "formalist" (or "inflexible" or "rigid") because of the pejorative aura of these terms. If formalists are more oriented toward abstractions than particulars, this is a predilection to be preferred in the appropriate contexts and with appropriate limitations; it takes all kinds.

To call a form, style, or instance of legal reasoning "formalist" is thus more than a description; it is at bottom a moral complaint, even if dressed as a matter of pure legal theory. The main substance of the complaint, at least for our purposes, is that formalist decision making rests on an impoverished set of morally relevant factors. That is, the characterization and evaluation of conduct, conditions, and processes within a given legal interpretive system regularly exclude morally relevant matters. Formalism can be ascribed to interpretation of law, to law making, and possibly to the particular law itself, although the former seems the best fit. (The two do not necessarily run in parallel. For example, a legislator constructing a rule sensitive to many particulars may nevertheless be a formalist in interpretation.) Similar remarks apply to characterizing moral reasoning as formalistic.

(i) Formalism in legislative or administrative rule-making.—Consider a legislatively created set of sentencing guidelines (ignoring constitutional limitations). The law provides for fixed sentences—not a range but a specific penalty, no more and no less, for all persons convicted of specified offenses. No facts are material except whether the elements of the offense have been satisfied and no defenses have been shown. There is, of course, always wiggle room—the prosecutor's decision to prosecute and for what; what evidence to introduce; and the wide and largely unreviewable discretion lodged in juries and indeed in judges, whether they are engaged in fact-finding, law-applying, or even law-finding. However, in the main, the fixed penalties do not take account of, and forbid consideration of, any factors not specified in the definition of the offense. If killing your spouse is capital murder because you satisfied the elements of the crime and no defenses have been made, the fact that you were continually and severely battered by her cannot be used to avoid the death penalty. Of course, from a judge's standpoint, her application of the sentencing guidelines is not rightly called "formalistic;" she is simply following the rules laid down by a legislature acting, from its moral perspective, to create a "formalist" system of legal rules.

Consider a parallel example: a rigid administrative rule that no one over sixty-five can receive a heart transplant. (Leave aside the question of whether this example violates existing federal or state laws.) Assume that the average five-year survival rate for those patients has been shown to be noticeably lower

than for recipients under sixty-five. Thus, there is greater organ "waste." On the other hand, to individuate the conditions of heart patients over sixty-five will be costly and may result in less or lower quality health care for others. Again, we have a formalist system.

(ii) Formalism in common law rule-making.—Courts are the most common targets of formalism charges. Their decisional law may fail to take account of proper individuating circumstances—perhaps even when one might think the legislature meant to be rigid, as in the above examples. Think of a judicially crafted informed consent rule based on physician custom: whatever it is that physicians characteristically disclose or withhold under specified circumstances determines what any given physician must or need not disclose to a patient, regardless of her particular needs or circumstances. How one describes the rule may vary: the rule is "informed consent is required," but it is applied in conformity with physician custom, not the needs of the reasonable patient. Or, the mode of "application" can be built into the rule: "informed consent requirements are satisfied only if the physician's disclosures conform to physician custom under parallel circumstances."[90]

So, if physicians customarily do not volunteer the five-year survival rate for liver transplantation to their patients, it need not be disclosed, though, if it is specifically requested, it may have to be. Calling the rule and its application "formalist" is a clumsy way of expressing criticism of the prevailing rule on its merits. Suppose, however, the rule is defended on the ground that the cost of highly individuated predictions for each patient is too great, and that insisting on it would raise prices for medical services generally and thus make the worst off even worse off. Perhaps the formalism is justified—or is "justified formalism" an oxymoron? Flat rules, one should recall, are *often* appropriate or even required. Perhaps neither they nor the courts that apply them should be called formalist. Anyone accused of a sufficiently serious crime has a right to a fair trial, no matter how clear her guilt appears to be. Would you prefer a more nuanced rule to save money when everyone knows the wretched person is guilty?

Formalism in adjudication or rule-making thus embodies a moral purblindness and inflexibility that both reflects and leads to overconfidence in one's understanding of abstractions. Formalism is, in at least in part, defined by a simplistic view of the content of these abstractions. It embodies a heroic belief that our categories can be easily and comfortably applied. There is a lack of situational focus—a failure to take account of enough relevant variables. Such inattention to morally material factors distorts the proper uses of abstractions and leads to wrongheaded outcomes. There is an insufficient degree of receptivity to new normative insights in the interpretation of major value concepts and an willingness to consider revising or replacing existing rules, principles and standards.[91] Legal segregation of the races in public facilities and institutions is

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90. The "reasonable patient standard" was adopted in *Cobbs v. Grant*, 8 Cal. 3d 229 (1972).

91. It remains difficult, however, to state whether any given interpretive path is "formalistic." One can mine the standard example of the battery-powered tricycle in a park governed by a rule forbidding the operation of motor vehicles within it. Is it formalistic to rest

almost always wrong, but in a prison race riot it would be crazy not to separate antagonists by race until things cool down.[92] Penalizing such separation would represent a clumsy, dangerous, and formalist application of the general rule.

In general, then whether one thinks a process is "distorted" because it is formalistic depends on one's moral framework, and not merely on matters of description. Whether "the situation" is sufficiently individuated is ultimately a moral issue concerning what criteria should be taken as material in judging it. One is not being "formalistic" in any pejorative sense when one insists that the only criteria for being a voter in general elections in a democracy are citizenship and adult status (specific disqualifications and administrative requirements aside). Differentiating certain particular situations is exactly what one is *not* supposed to do when recognizing who has the perquisites of personhood and is seeking to exercise them in various situations. Just when such differentiations are called for may be contested—e.g., the distribution of seats in an educational program. But it is often quite clear which is which.

(iii) Formalist interpretive theories applied by adjudicators.—One can also think of formalism as the selection or rejection of particular interpretive theories. While this perspective is implicit in the preceding remarks, it deserves separate mention. Indeed, the most common target of a charge of formalism is a court that is interpreting either a canonical text (constitution, statute, regulation) or the semi-canonical text of a prior rule of decision accepted as precedent.

Suppose, for example, one holds that the Eighth Amendment's ban on cruel and unusual punishment, like other constitutional phrases, must be understood first (and if possible, exclusively) by reference to the Framers' intent. In turn, that intent is to be revealed by appropriate historical research, which shows that the Framers' paradigms were P_1, P_2,... P_n—where "n" is a pretty small number—and that is all. The only scope for "expansion" lies in a very narrow criterion of "strong resemblance" to any P_i. A judge then says, "I am sorry. I must rule this way. The practice of impressing prisoners into involuntary service in testing new mind-altering drugs, even when the prisoner is not disordered, is very risky and an offense to human dignity. It treats prisoners like lower animals or even mere things. But that 'dehumanization' criterion is not written into the Eighth Amendment; I am bound by the meaning of the constitutional text. I cannot simply ask, 'What is this list of P_is about?' 'What is the authorizing generalization that explains why the Framers hit on these?' If that generalization is what they meant to implement, they should have said so. But the text's meaning is defined primarily by reference to its authors' intentions, and all I can find are specific instances that they mentioned. I am not free to ask, 'What is the

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solely on the separate denotations of "motor" and "vehicle"—possibly leading to a ban on the tricycle? Or to deal with "motor vehicle" as a combination term bearing a narrower sense—likely resulting in allowing the tricycle to operate?. Is it formalistic to downgrade legislative history as evidence of legislative purpose? Or is it the other way around?

92. *See* Lee v. Washington, 390 U.S. 333, 334 (1968) (upholding a lower court order invalidating Alabama laws requiring prison segregation; the Court rejected the state's claim that the lower court's decision ignored matters of security).

best most coherent theoretical/philosophical account of cruelty that would both explain the Framers' examples and also properly serve us in light of present views about human suffering and its causes and effects.'"

Is this judge a formalist for having picked too restrictive a theory of interpretation, one that locks us into an earlier world of only partial relevance to our own? That too is a moral decision of sorts, usually characterized as a matter of legal/political philosophy. The formalist stance excluding new moral insights also excludes from Eighth Amendment scrutiny new sanctions that were not only unknown in the Framers' time, but also cause unforeseen kinds of impacts viewed now as serious harms. For example, a technique of prolonged total sensory deprivation may be far more damaging than standard solitary confinement, but might not be cruel and unusual punishment because it isn't on the Framers' list of forbidden punishments and might not even have been thought of by them as a harm.

(iv) Formalism and being stuck at lower-level abstractions.—When encountering principlism or casuistry (see Part III.C.2-3), the principles, maxims, or other decision making guides will sooner or later run out. If the decisionmakers fail to consider the deeper rationales behind the guides, one might accuse them of formalism because they are failing to consider all matters material to reaching a right or acceptable answer. Formalistic failures can arise from not attending either to matters below or above the level of abstraction in use, although, ultimately, the materiality of what is "below" will be affected or determined by what is "above."

(v) Formalism and bioethics.—Much the same can be said about the interpretation of other key concepts—e.g., equality, liberty, due process—whether as embedded in the Constitution or as freestanding moral concepts analyzed independently. Of course, depending on one's interpretive theory, the latter may inform the former in various degrees. These basic values are critical to bioethics, even if one uses a principlist heuristic. All the major players in principlism (see Part IV.C.3.a.i) know full well that the very choice of principles is ultimately justified, *if at all*, by more general theories.[93] They also know that the best resolution of any number of cases will remain hard to specify under principlism. However, a given analyst's narrow range of application of a short list of critical values suggests a rigidity of view owing more to visions of Platonic Forms than to the detailed realities of daily life. Some may still believe, for example, that legal segregation of the races does not violate a principle of equality where the facilities are "equal."[94] This is "formalist" (read "narrow" or

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93. *But cf.* Toon, *supra* note 34, at 17.

> Disenchantment with the results of medical philosophy arises largely because too much has been expected and claimed for bioethics. An example of the result of placing an excessive burden on a concept unable to sustain it is what Clouser and Gert call principlism; the notion that beneficence, autonomy, justice, and non-maleficence could solve ethical problems rather than be a useful framework for clarifying them.

Id. (citation omitted).

94. Plessy v. Ferguson, 163 U.S. 537 (1896). *Brown v. Board. of Education*, 347 U.S. 483

"morally purblind") because it fails to understand and properly value the harms done to the nondominant segregated group—the notion of harm is read too thinly. Even if the harms are rightly valued, their bearing on equality is unappreciated—because the reigning notion of equality is not rich enough.

Consider next an example from the jurisprudence of death. In the Ninth Circuit's opinion in *Compassion in Dying v. State of Washington*,[95] the court characterized earlier refusal/withholding-of-care decisions as being governed by the principle that one has the right to time one's death. From this, one infers a right against interference with a physician's voluntary decision to help a patient who wishes to die by supplying the means for a patient to self-destruct.

There is certainly a "creative," perhaps even a "romantic" aspect to this line of analysis.[96] It was innovative lumping: we are told that refusal of care and assisted suicide both go to timing of one's death. It was also hamfisted lumping: we are also told that there is no difference between refusal of care and self-administration (or even administration by another) of a death blow. This is the intellectually elite, supposedly sounder philosophical view of the action/omission distinction, but it is very far from being universally embraced by the public or by precedent or tradition—and this is a critical factor in current forms of *constitutional* adjudication. The Ninth Circuit's leap has a distinctly formalistic aspect: it ignores varying situations—such as the differences between "letting die" from pathological processes clearly "on the job" and affirmatively causing death by administering a death blow.

In the well-known classroom example of someone jumping off the 100th floor and getting shot dead while passing the fiftieth floor, there is little doubt that death was caused by the affirmative act at the fiftieth floor (compare ingesting the lethal prescription drug), rather than the process already in place that was begun by the leap from the 100th floor (compare the pre-existing medical condition). The Ninth Circuit court took the more general concept of the time of one's death to relate these different kinds of cases, after peremptorily dismissing the rationality of the distinction. I am not joining issue here with those who think that the distinction collapses in matters of terminal illness. I am commenting on constitutional interpretation which, by tradition, searches for unmentioned liberty interests by relying heavily, but not exclusively, on matters of "tradition" and "history," even where tradition and history are equivocal or indeterminate.

(1954), held otherwise for public education without flatly overruling *Plessy*, which concerned segregation on railroad trains.

95. 79 F.3d 790 (9th Cir. 1996), *rev'd*, Washington v. Glucksberg, 521 U.S. 702 (1997) (holding that the right to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause).

96. "Romanticism" in judicial style is a topic addressed by some legal historians. *See, e.g.*, MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 152-62 (1994). Although Glendon does not suggest a formal definition, she uses the term "romantic" after characterizing several Justices noted for "their daring, imagination, sensitivity, and zeal for fairness . . . ." *Id.* at 152.

As we saw, flat-footed rules may well be justified, whether or not one translates flat-footedness into an ascription of formalism. Many states have an explicit or implicit ban on assisted suicide.[97] No exceptions are made, even in cases that cry for the relief of suffering and satisfy the most rigorous criteria of informed consent without the faintest whiff of undue influence. Without plunging deeply into the debate, it is enough to say that such a rule has at least a colorable justification based on the risks of error in individual cases, the costs of individuation, and the learning effects from the communicative impacts of a visible, explicitly authorized death-by-request practice sanction.

Now consider an example from transplantation. At one time, most physicians involved in transplantation would flatly refuse to allow donations from strangers and would rarely proceed even if the source was a friend of the patient.[98] What visions of reality and what moral standards account for this? Is the idea that "only persons with deep psychological problems would undergo the mutilation and loss of an organ for anyone other than a close relative—one's child, spouse, siblings, and parents. Autonomy doesn't extend to crazy persons." This is a very blunt rule, not calibrated to variations in circumstances. It fixes on a generality and refuses to consider if the rule embodying it might be missing something. If Mother Theresa had offered a kidney to a nun she did not know—or even a total stranger—would she have been excluded under this standard? Perhaps not, because she was perceived as relevantly different from most persons. If she was crazy or driven, she was crazy or driven in a different way—one sanctioned by religion and generally approved.

Consider next an example from assisted reproduction—gestational surrogacy once again. Perhaps we should say there simply is no "natural mother" because the classic criteria of motherhood—genetic connection plus gestation—point to two women. A court might then resolve the case on the default standard of the best interests of the child, leaving aside the (possibly) autonomy-promoting "parenthood-by-intention" theory as a judicial excrescence unsupported by legislation. The two women might then receive joint custody, or one might receive primary custody with visitation by the other, and so on.[99] This position may be wrong, but it is not necessarily formalist. Perhaps the opposing view that the role of initial intentions as presumptively decisive is wrong, but again, why

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97. *See, e.g.*, CAL. PEN. CODE § 401 (West 1999).

98. See generally the discussion of donation by strangers in Carl H. Fellner, *Organ Donation: For Whose Sake?*, 79 ANN. INTERNAL MED. 589 (1973); Aaron Spital, *When a Stranger Offers a Kidney: Ethical Issues in Living Organ Donation*, 32 Am. J. Kidney Dis. 676 (1998). For more recent developments, see George Hatch, *Astounding Act: A Fisherman Saves the Life of His New Friend by Donating a Kidney*, L.A. TIMES, June 30, 1991, at B3 ("The astounding act of generosity surprises both men even now."); Gina Kolata, *Unrelated Kidney Donors Win Growing Hospital Acceptance*, N.Y. TIMES, June 30, 1993, at C14. On success rates for such donations, see Paul I. Terasaki et al., *High Survival Rates of Kidney Transplants from Spousal and Living Unrelated Donors*, 333 NEW ENG. J. MED. 333 (1995).

99. This seems to be Justice Kennard's position in her dissent in *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993).

is it formalist? It assumes that under the governing state law there must be exactly one natural mother, and this is far from a purblind position. It seems inappropriate to saddle either standpoint with the dreaded "formalist" label.[100]

The "formalist" epithet may better characterize some of the critics of bioethics than those the critics criticize. Consider the lumpish opposition to new reproductive techniques based on the theory that they "objectify" or "commodify" persons. With some notable exceptions,[101] the complaints are made with little or no accompanying argument about what these predicates mean, or about the causal mechanisms for the processes. They ignore dissimilarities and speak only of parallels between, say, buying an appliance and pursuing a surrogacy.

So, formalism does not consider enough morally relevant variables, factors, dimensions, and perspectives—from the framework of a moral theory that renders them relevant. If formalism is said to be logically linked to jurisprudential matters rather than to moral disagreements between formalists and their opponents, then one must ask: which jurisprudential rules apply? What—beyond basic rules of logic—justifies those rules? It may be a sort of value impoverishment that allows formalists to think that clear lines separate what is subsumed and what is not subsumed within a concept. Or perhaps they are simply less willing to acknowledge systematic vagueness and open texture[102] as inescapable features of major abstractions and of language generally. This leads to what others may view as odd splittings (segregation is not a forbidden inequality) and inappropriate lumpings (the right to refuse treatment entails the right to suicide assistance because both involve the abstraction "the right to time your death").[103] To a nonformalist, then, the range of application of a formalistically interpreted abstraction may be too broad as well as too narrow.

Finally, there is a link between formalism and the next topic—principlism. Formalists are faulted because their inappropriate use of abstractions rests on

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100. On formalism, see, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1870-1960 (1992):

> It aspired to import into the processes of legal reasoning the qualities of certainty and logical inexorability. Deduction from general principles and analogies among cases and doctrines were often undertaken with a self-confidence that later generations, long since out of touch with the inarticulate premises of the system, could only mistakenly regard as willful and duplicitous.

Id. at 16, "[J]udges and lawyers of the nineteenth century clearly believed that there were identifiable bright-line boundaries that judges could apply to a case without the exercise of will or discretion . . . ." (He argues that this is too easily caricatured.) *Id.* at 18.

101. *See, e.g.*, Nussbaum, *supra* note 47, at 262; Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

102. The phrase is linked to Dr. Friedrich Waismann. *See Verifiability*, *in* LOGIC AND LANGUAGE [1st Series] 117, 119 (Antony Flew ed., 1968). *See generally* Michael Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981).

103. *See* Compassion in Dying v. State of Washington, 79 F.3d 790 (9th Cir. 1996), *rev'd*, Washington v. Glucksberg, 521 U.S. 702 (1997).

inadequate attention to particular variations from case to case. Principlism, however, deals with mid-level abstractions, generally avoiding the more general concepts that supposedly explain and justify them. If this avoidance is carried out to a fault, then the middle principles may be incompletely understood and inadequately applied. Formalists, then, can wrongly fail to move, whether "down" or "up," or "sideways."

2. Principlism.[104]—There is a particular analytic technique within bioethics (but applicable in various forms to many disciplines) called "principlism." It concentrates on four intermediate principles—autonomy, beneficence, nonmaleficence, and justice. At one end, it leaves deeper moral theory aside to the extent possible; at the other, it eschews specific rules.[105]

There is nothing wrong with managing one's scarce psychic and physical resources by taking "shortcuts" and using crystallized modes of thought to think matters through. This can be efficient in the sense that it achieves a rational balance between accuracy of judgment in a given case, and the costs imposed when seeking perfection. These thinking tools are too loose to be algorithms, but they can be quite serviceable in advancing the decision making process. Their use is akin to "satisficing," as choice theorists might put it,[106] and is perfectly

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104. Despite principlism's focus on a particular set of concepts, it does not seem "formalist" in the sense of embracing a hamfisted, rigid interpretive stance. Formalism does not mean "dealing with concepts and abstractions"—a ludicrously expansive understanding that would apply to all reasoning. Nor should it be identified with the idea of abiding by authoritative rules. *Cf.* Schauer, *supra* note 88, at 510 ("Once we disentangle and examine the various strands of formalism and recognize the way in which formalism, rules, and language are conceptually intertwined, it turns out that there is something, indeed much, to be said for decision according to rule—*and therefore for formalism.*") (emphasis added). Perhaps what is meant here is "and therefore for certain aspects of formalism." Being rule-governed is simply a threshold—a necessary condition for being formalist, but not a sufficient one—although one might say that some exercises of formalism are so perverse that rule-governance itself is compromised. Later, Schauer concludes:

> It may be that, in practice, to condemn an outlook as formalistic is to condemn neither the rule-based orientation of a decisional structure nor even the inevitable over- and under-inclusiveness of any rule-based system. It may be to condemn such a system only when it is taken to be absolute rather than presumptive, when it contains no escape routes no matter how extreme the circumstances. Such a usage of "formalism" is of course much narrower than is commonly seen these days.

Id. at 548.

In any event, at least some accounts of principlism have avoided heavy-handed denunciation of the use of higher abstractions in moral theory. *See* Raymond Devettere, *The Principled Approach: Principles, Rules and Actions*, *in* META MEDICAL ETHICS: THE PHILOSOPHICAL FOUNDATIONS OF BIOETHICS 27, 35-37 (Michael A. Grodin ed., 1995).

105. *See* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 37-38 (4th ed. 1994). Principlism is not about the use of principles generally, but about using specific intermediate principles in particular contexts for certain purposes.

106. For an explanation of satisficing and "bounded rationality," see HERBERT SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE

rational. Indeed, it may be morally mandatory and empirically inevitable. One major task of this approach is overconfidence that one has selected the right principles, applied them correctly to the situation, and thus successfully avoided turning to basic moral theory. However, in morally difficult cases—a prime characteristic of distinctively bioethical problems—the conflicts within and between the principles cannot be settled, if settleable at all, without moving up to higher and perhaps ultimate levels of abstraction. If this is understood and acted upon by looking "upward" in such cases, then there is, in principle, nothing wrong with principlism. Using heuristics is a key aspect of many decision making processes, and every field of thought probably has its principlist analogue for various tasks. If the limitations of shortcuts are not understood and properly managed, then they might well be called formalist, not because they fail to deal with particulars, but because they do not move to the higher abstractions that inform the middle principles.

Thus, to the extent that bioethics is attacked for harboring a principlist line of thought, the criticism is misplaced. The problems lie in understanding the limits of limiting oneself to principles without reference to theory at one end and to specific rules on the other. Although the apparent simplicity of the principlist agenda may mislead some, this is not fatal to the enterprise. Of course, one has to pick the right principles. But if the very choice of principles is contested, the protagonists are back in the more spacious (and time consuming) realms of moral philosophy.

3. Casuistry and Pragmatism: Preferred Modalities?—

a. Maxims and postulates.—The bioethics version of principlism bears comparison with an account of casuistry that addresses many issues in bioethics.[107] This approach uses abstractions of even lesser generality than "principles." Instead, procedural postulates—"maxims"—requiring use of "paradigms" and "analogies" are followed to allow comparisons between particular cases, with close attention given to "circumstances," such as who, what, where, etc. In this sense, casuistry's level of abstraction is notably lower than that of principlism.

In theory, casuistry has a presence in several aspects of the critiques and defenses of bioethics. Has casuistry always been a part of establishment bioethics (if not known by that name) and thus part of what is being examined, or is it a weapon revived by the critics against overly abstract and arid modes of thought pursued by established institutions? In writings on clinical ethics and behavior at the bedside, one often finds apothegms or "formulas," such as the Kantian injunction against mere use of persons as means, and apothegms. While Kant is viewed as being at the apex of high moral theory, the no-mere-use-of-persons formula (i.e., the second formulation of his Categorical Imperative)[108]

ORGANIZATIONS, at xxviii-xxxi (3d ed. 1976).

107. *See* JONSEN & TOULMIN, *supra* note 7. For a comparison of principlism and casuistry, see BEAUCHAMP & CHILDRESS, *supra* note 105, at 92-100.

108. A common translation of the Formula is: "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means but

often seems to be invoked without much analysis of the what the formula means. It is thus used less as high theory or a principlist principle and more as a casuistical maxim, although it may be a direct implication of principlism. Even more frequently invoked is the so-called Hippocratic "do no harm" maxim,[109] which is far more specific than the no-mere-use formula.

Still, there can be no *a priori* rejection of casuistry. It too can be a rational part of decision making. Although the issues at stake in bioethics are among the most serious and difficult matters one can address in law and ethics, our resources are finite and we must ration our time. The methodologies of principlism and casuistry are inevitable, whether or not so recognized and named, and, if their respective places and limitations are understood (a big "if"), unobjectionable.

b. Pragmatism.—Pragmatism has been enjoying a renaissance, at least among legal scholars.[110] It strongly criticizes concentrating on rules, principles, standards, and their embedded concepts and higher theoretical underpinnings. Perhaps many pragmatists are antifoundationalists—analysts who are skeptical about the existence of sound bases for our systems of thought and evaluation—but this is not entailed by their positions, which require that we ordinarily not get mired in matters of ultimate value.

It is true, as pragmatists emphasize, that much everyday decision making is done without explicit attention to particular abstractions. Indeed, such abstractions may be almost inaccessible to our conscious minds and may require exceptional acuity to discern through introspection. Despite their relative obscurity, however, abstractions influence patterns of thought and behavior that nonconsciously reflect these rules. If so, it is no surprise that much of our conduct can be rationalized in the sense that one can reconstruct thought and action to reveal rational substructures, despite the disorder and "gaps" in our conscious thinking.

At least when pressed, legal pragmatists do not deny the existence or effect of abstractions, and it is hard to see how they could.[111] It would be incoherent to

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always at the same time as an end." THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY 38-39 (1992) (discussing "the second formulation of the Categorical Imperative").

109. "Above all do no harm." See the discussion of this phrase in BEAUCHAMP & CHILDRESS, *supra* note 105, at 189 (describing the formulation as a maxim). According to Veatch, the derivation of the form and priority of the phrase are not entirely clear. *See* ROBERT M. VEATCH, A THEORY OF MEDICAL ETHICS 22, 159-62. (1981) (discussing the Hippocratic tradition).

110. *See, e.g.*, Catharine Pierce Wells, *Improving One's Situation: Some Pragmatic Reflections on the Art of Judging*, 49 WASH. & LEE L. REV. 323 (1992) (discussing pragmatism and formalism in adjudication).

111. *See, e.g.*, Catharine Wells, *Situated Decisionmaking, in* PRAGMATISM IN LAW AND SOCIETY 275 (Michael Brint & William Weaver eds., 1991). Wells states:

> [A] belief in situated decisionmaking does not entail the abandonment of structuring methods such as reason, generalization, and abstraction. Instead, it recognizes that there is more to legal decisionmaking than the mechanical application of these techniques

draw a sharp contrast between "rule-bound" thought and "situated" decision making. Indeed, the very idea of situated decision making, understood as involving only particulars and no abstractions, makes no sense. All rational thought requires, *at some stage*, the conscious or unconscious selection, interpretation, and use of abstractions. Even a quick, unreflective decision about whether to cross the street involves application of learned generalities based on our prior knowledge of direction, velocity, distance, and other variables bearing on the relationship between oneself, the street, and vehicular traffic. The maxim "look both ways before you cross" does not stand alone as a foundationless adjuration.

So what is the force of the pragmatist critique—not just against bioethics, but against much legal and moral reasoning and decisionmaking? Its point relates back to the notion of what is material to moral and legal analysis. What is material depends on the generalizations that govern the matter at hand. But whether material matters are indeed implicated in a given matter requires close attention to the details of human situations. Which "details" we see depends on prior abstract understandings, our frameworks of perception, and other variables, such as salience. A prime virtue of pragmatism is that it mandates the avoidance of premature filtering and exclusion of particulars—in direct contrast to formalism. Attention to particulars can result in important insights that lead to the formulation of new abstractions and new domains of relevance and the reformulation of rules, standards, principles, maxims, and heuristics. Given scarce resources, we cannot always undertake such reconstruction, but it remains something of an ideal: coming to see that the abstractions already in place are incomplete or otherwise misconceived is central to progress in any scientific or normative field. The pragmatic push toward a less-filtered scrutiny of what we perceive spurs, as we saw, a continual cycling between the selection and the application of abstractions. It also helps us identify and revise or partly neutralize internalized cognitive frameworks that affect our very capacities for perception and evaluation.

> and, for this reason, it sees all legal reasoning as 'situated' in the sense that it operates within a structure that is constructed by the decisionmaker's own unique mode of participation in the ebb and flow of human events.

Id. at 289. If pragmatism is simply anti-formalism, then most reflective persons are pragmatists.

See also Brock, *supra* note 4, at 226-28, discussing "particularism," which holds that moral reasoning in practical and policy contexts begins and remains with the specific concrete case under consideration. *See id.* at 226. This seems similar to various accounts of pragmatism. Brock later states that

> [t]he central and fatal problem for particularism . . . is that it is incompatible with the very process of having and offering reasons for our moral judgments, which is the principal feature distinguishing morality from mere expressions of simple taste or preference. Some, at least partial or fragmentary, moral theorizing is an unavoidable part of moral reasoning, of making and offering reasons for moral judgments in practical and policy contexts.

Id. at 228.

Thus, as a matter of rational pursuit of real-life decision making and adjudication, asking "What happened" often seems an appropriate starting place. How else would one know where to look in the realm of categories and concepts? Still, asking what happened does not divorce us from abstractions—description itself presupposes general frameworks.[112]

4. Insufficient Empirical Research, Beyond Characterization of Particular Situations.—Is it silly to complain that bioethics is insufficiently empirical, in the rigorous methodological sense of investigation the nature of human practices and interactions and states of affairs? After all, if one wishes to do behavioral or anthropological research, why pursue bioethics? It is not a science (behavioral or otherwise).

But it's not so silly. Think, for example, of problems of informed consent. One might well start with asking, "Whose informed consent?" The patient's? The nuclear family's? The extended family's? The matriarch's? The underlying question at this stage is, "What *is* the unit of autonomy in *this* transaction?," not "What ought to be the autonomous unit on objective, cross-cultural moral grounds?" What features of decision making are altered if attitudes toward individuality and community differ from culture to culture, assuming we can even identify discrete "cultures" (which in any case may be evolving)? What has happened when these cultural variations were ignored or even overridden by "mainstream" medical decision making processes? Have there been attempts to alter the viewpoints of "outlier" groups and individuals—the "culturally displaced"? If so, what happened?

These questions would not have arisen unless troubling incidents had occurred or been anticipated, but we cannot know the nature and extent of the problems without empirical research. Wearing a bioethicist's hat is not incompatible with doing such research, although the likeliest path would involve collaboration with trained investigators. Furthermore, whatever studies have already been done are likely to be sought out by or brought to the attention of bioethicists, lawyers, lawmakers, and judges. But bioethics and affiliated disciplines have a scarce resource problem of their own: how much time and effort to devote to investigating cultural variables and the variable roles of autonomy—or any other area of behavioral research. One cannot evaluate organ and tissue transplantation without knowing of supply shortfalls and demand variables, the status of medical/surgical technology, facts about queuing and distributional practices, and so on. One cannot assess the issues of genetic privacy without knowing what current and projected practices are, what genetic testing and fact-gathering turn up, and the status of security/access technology.

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112. *Cf.* Green, *supra* note 14, at 182. Green observes that bioethics is strongly attentive to empirical/situational issues and is heavily interdisciplinary, but that

> while ethics and moral philosophy may sometimes represent a relatively small part of the actual work of bioethics, they form in a sense the confluence to which all the larger and smaller tributaries lead, and, more than any other single approach, the methods of ethics and philosophy remain indispensable to this domain of inquiry[.]

Id.

How easy is it to hack into existing medical record files? What sorts of questions do employers and insurance companies request? How often and in what ways are they answered? And what is the business entity's response to these answers with respect to the nature of employment or insurance offered or denied?

Roaming the field of bioethics reveals many other contexts where rational analysis would be greatly aided by empirical information. Shouldn't we worry about errors in following or declining to follow advance directives or requests for PAS?[113] What do we really know about how accurately people gauge their *future* mental states?[114] (Of course, even if the forecasters are inaccurate, this does not establish that anyone else could make better predictions for them.)

Are bioethicists remiss in not seeing the need for research and observation beyond the situation at hand, and calling for or even pursuing such investigations? I see no evidence of this. There has been a fair amount of empirical research called for and/or pursued by persons who view themselves as doing bioethics.[115] Moreover, if a given scholar is interested in thinking about, say, the dimensions of decision making incompetence, she can make a useful contribution by searching out the structure of that notion without doing a lick of empirical research. Sooner or later, she may come up with testable propositions, perhaps concerning the nature of the decisions taken by people afflicted with mania, depression, and the delusions associated with florid schizophrenia and how they compare *inter se*. If she does not, so what? Division of labor, which no doubt preceded fire and the wheel, remains appropriate in moral and legal analysis, as it is elsewhere. If there are some who offer conclusory views or arguments that require empirical support and none is available, they can rightly be upbraided for it, but this does not taint the entire field. Nor is there anything wrong with offering hypotheses for others to test. Still, to the extent that any area is burdened by lack of information, it would be a clear case of "progress" if more personnel recognized the need and spurred the search for the relevant data.

Are there any instances in which a writer, on-the-line actor, or an entire movement has, with great assurance, made a claim that cannot be supported without empirical inquiry and failed to recognize or call for such inquiry, mistakenly believing that no factual investigation is required? Probably. One possible current example is the belief that PAS is urgently needed because so

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113. *Cf.* Vicki A. Michel, *Suicide by Persons with Disabilities Disguised as the Refusal of Life-Sustaining Treatment*, 7 HEC FORUM 122 (1995).

114. *See generally* Philip J. Hilts, *In Forecasting Their Emotions, Most People Flunk Out*, N.Y. TIMES, Feb. 16, 1999, at F2.

115. *See, e.g.*, Else Bjør et al., *Can the Written Information to Research Subjects Be Improved?—An Empirical Study*, 25 J. MED. ETHICS 263 (1999); Leslie J. Blackhall et al., *Ethnicity and Attitudes Toward Patient Autonomy*, 274 JAMA 820 (1995) (some groups adhere to a family-centered model of decision making); Rafael Dal-Ré et al., *Performance of Research Ethics Committees in Spain: A Prospective Study of 100 Applications for Clinical Trial Protocols on Medicines*, 25 J. MED. ETHICS 268 (1999). *See generally* Tony Hope, *Empirical Medical Ethics*, 25 J. MED. ETHICS 219 (1999).

many patients suffer intractable pain.[116] The first several patients using the Oregon PAS law apparently were far more concerned with loss of autonomy and independence than with physical pain.[117] Not everything that needs to be done has been done, a mere generation or two into the discipline of bioethics.

Finally, a simple insight understood by any student of evidence: "relevance" and "materiality" are functions of the governing issues and their location in the conceptual map of rules, principles, standards, maxims, paradigms, and analogies governing the case. Rational selection of empirical issues for investigation presupposes conceptual analysis, which is part of the mission of bioethics. True, a "naked interest" in finding out about some aspect of the world may produce findings that spur new conceptual analysis. Even then, however, what one or finds ultimately is deemed material (if at all) only within the abstractions inspired by the findings.[118]

D. Insufficient Focus on the Most General Abstractions

Perhaps there is some rule of Newtonian symmetry in critiquing "disciplines": for most complaints there is an equal and opposite one. For every soldier in the bioethics army gazing abstractly at the cosmos to no apparent effect, there is another fixedly studying her toes, to equal effect. The complaint that abstractions are *in*sufficiently addressed is frequently found in the reproaches against principlists and casuists.[119] If a rigid focus on abstractions is formalistic, perhaps so also is a rigid focus on apothegms, rules of thumb, and details. The point of the complaint is that however useful it is at some stage to confine one's attention to "intermediate" principles, or to rules or maxims or particular situations, higher-level theory is needed for certain essential tasks: justifying the selection of principles, rules, maxims, and facts; rank-ordering them; interpreting them; and dealing with their internal incoherences and conflicts with each other. This entails a continuous cycling between the higher and lower conceptual and factual reaches.[120] The obvious but non-decisive

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116. *See* Arthur E. Chin et al., *Legalized Physician-Assisted Suicide in Oregon—the First Year's Experience*, 340 NEW ENG. J. MED. 577 (1999).

117. *See id.* at 582.

118. *See generally* Brody, *supra* note 20, at 162-65.

119. *See infra* Parts II.E.2-3, III.C.3.a.i.

120. *See* Green, *supra* note 14, at 189, 190, 195. The author states that:

> How, . . . when principles are in conflict, is it possible to make progress in normative discussion unless one has at hand some procedure for establishing priorities among principles, and how is that procedure defended apart from a more basic understanding of the moral reasoning process? . . . . [M]oral analysis cannot be confined to a process of identifying and applying moral principles, however sophisticated this process might be, when the essential work of deriving the basis, meaning, and scope of these principles is left undone . . . . Until that perhaps utopian day when theorists develop an indisputable correct method of moral reasoning, applied work must always remain in conversation with moral theory as [a] whole. Bioethics will progress methodologically

response by principlists and casuists is likely to be that the higher theoretical abstractions may be of little or no assistance in doing any of these tasks and in given cases, this may well be true.

E. Excessive Focus on Autonomy

This reproach to bioethics was mentioned earlier and I add only a few points. It is an especially annoying criticism of "establishment" bioethics. Whether the focus on autonomy is overdone depends on the meanings of "autonomy" and their locations in a value hierarchy. To the extent that autonomy rests on opportunities to pursue one's preferences,[121] deference to it in given areas may depend on the intensity with which these preferences are generally held. There may be domains of choice in which many persons are more or less indifferent to various outcomes, although they might want to retain personal choice in these matters. Moreover, if pursuit of certain preferences raises risks to others (and perhaps the actor also), strong deference to autonomy might be unjustifiable. It is not as if autonomy was all of a piece in every sphere, mindlessly invoked as the preeminent or sole value whatever the circumstances.

I suspect that few persons in Western culture think autonomy is a weak or immaterial consideration in moral, political, or legal analysis. The fact that autonomy "loses" in a particular case against competing concerns does not eliminate its materiality, even in that contest.[122] The more common argument is that too many parties view autonomy in a naive way, or rate it too highly in some area even after reflection, or are simply obsessed with it.

The idea that love of autonomy may be extravagant is thus far too general, and its strands of meaning should be separated. Libertarians and communitarians

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if it retains this insight . . . .

Id. This necessary interaction between the various levels of "theory" and "application" is thus somewhat different from that between theory and application in mathematics. In practical mathematics, it is rarely necessary to test foundations, as observed in Loretta M. Kopelman, *What Is Applied About "Applied" Philosophy*, 15 J.Med. & Philos. 199, 200 (1990). She also argues that in many cases, higher theoretical concepts "applied" in philosophy are changed by the application, and that therefore applied ethics is not "derivative." *Id.* at 200-02. This seems akin to arguing that a rule of decision applied in adjudication is "changed" by all or some of its applications. This is a tricky proposition, but it need not be dealt with here.

121. This is of course not the whole of autonomy. *See generally* Michael H. Shapiro, *Is Autonomy Broke?*, 12 LAW & HUMAN BEHAV. 353 (1988) (reviewing CHARLES W. LIDZ ET AL., INFORMED CONSENT: A STUDY OF DECISIONMAKING IN PSYCHIATRY (1994)).

122. *Cf.* BERNARD WILLIAMS, MORAL LUCK 73-74 (1981) (stating the "[t]he [obligation] that outweighs has greater stringency, but the one that is outweighed also possesses some stringency . . . ."); Bernard Williams, *Ethical Consistency*, *in* ESSAYS ON MORAL REALISM 41, 49 (Geoffrey Sayre-MCord ed., 1988) ("It seems to me a fundamental criticism of many ethical theories that their accounts of moral conflict and its resolution do not do justice to the facts of regret and related considerations: basically because they eliminate from the scene the 'ought' that is not acted upon.").

are far apart in their rankings of autonomy, but this is largely a matter of serious moral disagreement, not necessarily some blunder of thought or deficit in moral sensibility. A field is not "weak" just because many of its protagonists do not share the critics' moral stances.

Of course, if the field were exclusively defined by one polarized view or the other, then we could rightly complain about the narrow views of its personnel. A field dominated by rigorous libertarians might seem to others to reflect an indifference to human suffering and an unduly narrow range of perspectives. It would be more like a special interest group or political party than a discipline, and for that reason, its moral stature would be impaired. Much the same holds for uncompromising communitarians. "Progress" here would consist of coming to see that one's framework is too shallow to allow balanced insights. Perhaps it even makes sense to say that re-staffing such fields constitutes or facilitates a partial "catching up" of ethics and law with technological change. In any case, neither form of rigidity dominates bioethics.[123]

An "obsession" with autonomy may involve assigning insufficient value to certain countervailing considerations.[124] Talking without qualification about the right to speak freely disregards the harms from, say, false defamatory statements of public officials and figures, fraud in advertising, incitement to unlawful acts, and disturbing the peace of a residential community.

Are too many of autonomy's countervailing considerations ignored or ranked too low in bioethical discourse? I don't think so. On the contrary, it is often the critics of the supposed autonomy-obsessed who make the opposite error by failing to deal with autonomy attentively. In *Matter of Baby M*,[125] for example, the court flatly asserted that the surrogate mother's consent to the transaction was irrelevant. There was little argument, no recognition that asserting the irrelevance of consent is in tension with a fundamental moral and constitutional value—virtually nothing. Moreover, I see no evidence that surrogacy's defenders consistently ignore the risks of coercion, duress, undue influence, false consciousness, the incentives supplied by low income, risks of regret, harm to the

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123. *See* AMITAI ETZIONI, THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY (1996) (offering his version of communitarianism); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 137-160 (1962) (expressing a libertarian vision); *see also* EZEKIEL J. EMANUEL, THE ENDS OF HUMAN LIFE: MEDICAL ETHICS IN A LIBERAL POLITY 5-6 (1991) (commenting on such perspectives). *See generally* Christopher Heath Wellman, *Liberalism, Communitarianism, and Group Rights*, 18 LAW & PHIL. 13 (1999).

124. For our purposes, countervailing considerations include "preconditions" for sound exercise of autonomy as well as opposing values. I am distinguishing here between competing values arrayed against autonomy, and the presuppositions or preconditions for an exercise of autonomy in its ideal forms (whatever they might be)—e.g., competence, authenticity, voluntariness, and certain others. Perhaps these preconditions for autonomy can also be viewed as arrayed against it in certain ways: they pit naked expression of preferences against the interests of the actor (a paternalist perspective) and also against whatever risks to others are posed by incompetent, coerced, impulsive, or unduly influenced choices. See also the next subsection.

125. 537 A.2d 1227, 1249 (N.J. 1988).

child, racial type-casting, wide-ranging objectification, and so on.[126] Nor is there any evidence that students of organ transplantation, physician-assisted suicide and euthanasia, and the withholding of life-prolonging care have been consistently overlooking similar material matters. The literature and the case law are available for anyone to inspect. Most of the cases involving termination of lifesaving care, for example, expend major resources not only on investigating what patients seem to want, but on determining how far these expressions can be credited, given the tableaux of circumstances.[127] Things of course are never seen all at once and we will never be finished finding and assessing new things, but bioethics is clearly on the job.

Let us turn now to another example of supposed excessive attention to autonomy. I expect many or most critics of bioethics would view, say, *Johnson v. Calvert*,[128] as reflecting undue emphasis on autonomy in accepting the parenthood-by-intention theory. But what exactly is the *error* here—the wrong theory or principle, or the theory or principle misapplied, or the false paradigm or analogy, or the impoverished moral sense that must be enriched by the critics' protests? What points were missed? What was it that the majority and its supporters did not understand? How do the critics know that they themselves do not understand? Surely autonomy in planning reproduction is not immaterial, even if one finds some plans inappropriate. Was autonomy rated too highly in *Johnson*? Or was it applied without due attention to risks of regret, undue influence, coercion, false consciousness, race (Anna Johnson was black—and Regina Crispin was Filipino), harm to children, to the particular parties involved, to women generally, and to the overall social fabric, which is weakened because of the reinforcement of the attitude that persons are things to be used? Some decision makers value autonomy enough to accept risks of regret and other harms, but this does not make them morally benighted or guilty of clear error.

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126. *See generally* PAUL LAURITZEN, PURSUING PARENTHOOD: ETHICAL ISSUES IN ASSISTED REPRODUCTION, at ix-xxi, 3-67 (1993) (discussing "basic opposition to reproductive technology." The author states that in considering in vitro fertilization, "[beyond] the simplest case . . . within a marriage where care is taken to avoid destroying or risking embryos . . . we discover that the worries about the commodification and mechanization of reproduction [discussed earlier by the author] become increasingly grave." *Id.* at xix. Nevertheless, Lauritzen concludes that "the basic opposition to reproductive technology is misplaced." *Id.* (discussing IVF and artificial insemination using sperm from one's husband)).

127. *See, e.g.*, Cruzan v. Missouri Dept. of Health, 497 U.S. 261 (1990); In Matter of Quinlan, 355 A.2d. 647 (N.J.), *cert. denied*, 429 U.S. 922 (1976); *see also* Matter of Farrell, 529 A.2d 404 (N.J. 1987) (careful evaluation of the preferences and condition of woman with amyotrophic lateral sclerosis who wished to withdraw care).

128. 851 P.2d 776, 851 (Cal. 1993). *See generally* Note, *Maternity Blues: What About the Best Interests of the Child in* Johnson v. Calvert, 24 SW. U. L. REV. 1277 (1995) (criticizing what the author calls "the 'intended procreator'" test). The case involved a dispute between the genetic parents of a child and the gestator. The court ruled that under California's Uniform Parentage Act, the "natural mother" was the genetic mother in this case because of the original expressed intentions of the parties initiating the procreational process.

To be sure, the critics of surrogacy are not so benighted unless, at the threshold, they simply dismiss autonomy considerations under the prevailing circumstances. Some seem to do so (once again, see the *Baby M* opinion), although in some spheres of conduct there is no starting presumption of autonomy, or only a weak one. Your decision to keep custody of your newborn rather than abandon her is not simply one of your options. Perhaps the more serious risk is not that of overstressing autonomy, but of letting it slide. Jay Katz, for one, has suggested that "[t]oday the idea of patient autonomy is once again in retreat."[129]

I doubt, then, that discussions of autonomy have been morally or intellectually flawed, one side or the other (or both) not getting the point of discussion. A somewhat more plausible critique is that not enough persons holding different value rankings are writing and doing bioethics. This may not be correct, but in any event no discriminatory barriers to entry into this field exist. One should thus remain skeptical of the view that paradigms must be shifted or displaced, rather than progressively made more sophisticated (a hard line to draw, but there is a difference).

On the other hand, I do not think that the field of bioethics is flawed from within simply because it has its share of contributors who (in some eyes) undervalue autonomy. What might impair the field, if anything, is that the protagonists' understanding of autonomy and its countervailing values may be too blunt to be properly illuminating. If this is true of some writers, judges or legislators, however, it is not true of others.

1. Ignoring the Preconditions for the Exercise of Autonomy.—I make only two points here. First, it is hard to find evidence that either ethical or legal analysis in bioethics is tainted by a near-total failure to consider what I referred to earlier as autonomy's presuppositions: competence; voluntariness (entailing absence of coercion and undue influence); authenticity; perhaps consistency of preferences and richness of perspectives (no false consciousness); and, where appropriate, deliberation. However, a more precise attack is worth mentioning: the claim that these preconditions have been too narrowly interpreted. Thus, authenticity—the idea that one's conduct reflects "one's *own* actions, character, beliefs, and motivation"[130]—may be too easily assumed in a society where (say) patriarchy can inflict inappropriate attitudes, beliefs, and perspectival limitations on women.[131] Perhaps the idea of coercion is, as some argue, too narrowly

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129. Jay Katz, *The Nuremberg Code and the Nuremberg Trial: A Reappraisal*, 276 JAMA 1662, 1665 (1996). Katz, however, was discussing experimentation with human subjects.

130. RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 238 (1986) (emphasis added).

131. The extent to which patriarchy continues to prevail in the West is contested, although few doubt its massive influence. *Cf.* Paula Span, *Did Feminists Forget The Most Crucial Issues?: Wanting a Man and Children Does Not Make You a Non-Feminist, Anne Roiphe Contends*, L.A. TIMES, Nov. 28, 1996, at E8 (noting that in her book, FRUITFUL: A REAL MOTHER IN THE MODERN WORLD (1996), Anne Roiphe complains of feminist writings promoting "the view of the world as a giant evil patriarchal system").

construed to ignore the effects of low income, class, gender, and race. This accounts in part for the ascent of concepts such as "false consciousness."

Second, there may be a legitimate moral dispute about the proper understanding of autonomy's presuppositions. Authenticity, for example, can be viewed as something of a paradoxical notion. We can understand, in a pre-theoretical sense, that the preferences of someone who has been "programmed" through rigorous behavioral conditioning are not entirely his own. We can also understand that general socio-cultural conditions can systematically warp someone's development—as when women are trained from birth to obey men and confine themselves to childrearing and household chores. The result is a false consciousness in which many women do not understand that they have, or should have, a larger range of options.

Of course, arguments resting on the fact that some persons are burdened by narrow perspectives about themselves, their choices, and the demands of community are double-edged. Can we simply dismiss the wants and interests of all persons raised in such non-ideal conditions? De-conditioning the "brainwashed" is one thing (though not free of controversy); excluding several generations of falsely conscious women from full participation in a society is another. Few individuals or groups are uniformly non-autonomous. It is a wedge into totalitarianism to say that the preferences of millions of persons are to be ignored because they were improperly raised or educated, rendering many of their inclinations "false" because they stemmed from a politically skewed culture that systematically messed with their heads. *All persons* are heavily influenced by their surroundings. It is all too easy to impair autonomy by claiming to further it through such exclusions.[132]

As for coercion and undue influence, I suggest that it is inappropriate to claim that one is necessarily coerced when one's circumstances are straitened. "Your money or your life" is one thing. "Would you like to make some money having a child for me?" is something else. Concerns about the social, economic and environmental conditions that limit choice and move people to do things that they would not do if they were better off do not justify disregarding their choices within that prevailing adverse situation. Impoverished persons are not necessarily made better off by restricting their options. One might argue that permitting certain choices within adverse situations improperly ratifies those conditions and thus encourages their continuance. But this is more an argument about strategies to bring about social change than an argument about autonomy. The notion that the output of bioethics maintains improper incentives to avoid social improvement is a reason for repopulating it with opposing troops, not for radical substitution of paradigms.

It may also be that claims of coercion and undue influence are proxies for worries about exploitation. But this takes us far afield, and, in any event, is closely related to issues of objectification, reduction, and mere use.[133]

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132. For a more extended discussion of the possibilities of damaging autonomy by addressing some of its aspects and not others, see Shapiro, *supra* note 121, at 353-401.

133. These ideas are discussed more extensively in Shapiro, *supra* note 47.

2. Inattention to Ideas of Community and Responsibility.—It is rare that analysis in any branch of bioethics fails utterly to attend to matters of community and responsibility; the field is not dominated by minimal-state libertarians constantly quoting Robert Nozick.[134] Discussion of "biological" treatments for mental disorder or for neutralizing dangerous persons inevitably pits matters of autonomy against community protection (to identify just one of the conflicts involved), and neither gets short shrift in either case law or the bioethics literature.

Illustrations are not hard to find. In *Washington v. Harper*,[135] for example, the interests of the prison community and the community-at-large overcame the prisoner's interest in avoiding forced treatment that intruded on his immediate and short-run autonomy. Of course, the distinction between institutional/communitarian interests and personal interests is not a sharp one; indeed, the Court thought that compelled therapy would promote the prisoner's "medical interests," despite the arguable intrusion on autonomy.[136] The Court here was again somewhat simplistic, but it at least saw the point.

Discussion of innovative methods of reproduction is another example. The literature has, from the start, dealt heavily with threats to women and to feminist values, risks to children, and impacts on community beliefs and values. Debates about the non-use of lifesaving medical and nonmedical care and about assisted suicide and euthanasia have also, from the start, addressed risks to normative structures concerning community attitudes favoring strong protection of life; they have not just confined themselves to autonomy and relief of suffering. The oft-invoked "slippery-slope" analysis, when used correctly, must include the "learning effects" of various practices and institutions, including legal regimes and their implementation, on the community.[137]

Much the same can be said about the fields of genetic control, organ transplants, and virtually anything else identified as "bioethical." Scrutiny of the literature does not support the claim of inattention to matters beyond self-regarding fixations on autonomy and rights. Genetic technology's threats to employment opportunities, health care, social status, and so on bear on both individualistic and community-oriented values. Despite the restrictions on personal autonomy imposed by prohibiting commercial markets in organs for

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134. *See generally* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

135. 494 U.S. 210 (1990).

136. *See id.* at 222-23, 231 (referring to the prisoner's "medical interests" and non-medical "interests").

137. *See generally* Michael H. Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, 55 U. PITT. L. REV. 681, 713-30 (1994). "Learning effects" refers, loosely put, to changes in attitudes, values and beliefs arising from awareness and observation of or participation in social institutions, and from observed behavior generally. "The idea is that some regulation reflects, implements, reinforces or 'expresses'—and thus teaches—certain values, attitudes and beliefs. It does so by repeatedly being perceived through certain frameworks, in much the same way that any human conduct is perceived and, possibly, learned from over time." *Id.* at 713 (footnote omitted).

transplantation, these markets are nevertheless prohibited because of concern for the preconditions of autonomy (e.g., undue influence, "coercive" financial circumstances, authenticity); and the risks of objectification, erosion of socially preferred attitudes, and racial/ethnic caste-formation.[138]

An analytical sidebar is called for here. The contrast between personal autonomy and community constraints is easy to overstate. There is a clear overlap between them. Simplistic denunciations of a literature or discipline as favoring one to the exclusion of the other are hard to defend. Indeed, a purported attack on autonomy by communitarians may in fact count as a partial defense of it. For example, the community's worries over the objectification of low-income groups within a legal market for organs clearly bear on the autonomy of each potential seller. With a legal market for organ sales, the group's overall social and economic status may decline further, thus decreasing their members' autonomy by reducing their opportunities. In turn, each individual exercise of autonomy in choosing to sell an organ contributes to the learning effects upon the community and thus creates long-term autonomy risks to the individuals within it. What these learning effects might be, however, depends on many variables. Our practices and institutions have multiple learning effects that impair autonomy in some senses and promote it in others. I do not say that this mixture of conflict and confluence of values is always clearly discerned by participants and auditors, but the mixture exists, and the discipline's words and actions reflect this.

Debates about genetic control reflect the same implicit or explicit attention to these conflict- and conflation- ridden values. A quick look at the growing literature on human cloning reveals a strong focus on the supposed negative impacts on both communitarian and individual concerns.[139] Although I view the quality of analysis as weak, it contains no systematic, delusional exclusion of relevant categories of thought. My dim view of the merits of this sub-literature does not lead me to denounce the discipline generally nor even to think that this literature is demented.

3. Inattention to Matters of Culture, Ethnicity, Race, and Gender.—If this claim of inattention is plausible, it is no more so here than in most other realms of discourse and action. Dominant groups in any society—and the dominated

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138. *See id.*

139. *See, e.g.*, GREGORY E. PENCE, WHO'S AFRAID OF HUMAN CLONING? 138, 141-46 (1998) (discussing the possibility of adverse changes in social attitudes); *id.* at 100-101 (discussing personal liberty); Dan W. Brock, *An Assessment of the Ethical Issues Pro and Con, in* CLONES AND CLONES: FACTS AND FANTASIES ABOUT HUMAN CLONING 141 (Martha C. Nussbaum & Cass R. Sunstein eds., 1998) (discussing possible individual and social benefits and harms). On cloning, see generally Lori B. Andrews, *Is There a Right to Clone? Constitutional Challenges to Bans on Human Cloning*, 11 HARV. J.L. & TECH. 643 (1998); CLONING HUMAN BEINGS: REPORT AND RECOMMENDATIONS OF THE NATIONAL BIOETHICS ADVISORY COMMISSION (1997); Brock, *supra*. For an earlier but still important work, see generally Francis C. Pizzulli, *Asexual Reproduction and Genetic Engineering: A Constitutional Assessment of the Technology of Cloning*, 47 S. CAL. L. REV. 476 (1974).

themselves—often fail to attend to the importance of and differences among various cultures, races, genders, and other groupings. Yet the very birth of bioethics as a field was marked in part by uncovering the Tuskegee syphilis research on uninformed and untreated black men, as well as identifying other, non-racially restricted experimentation on human subjects.[140] It was also spurred by recognition of the need to sort individuals as recipients of lifesaving dialysis treatments or organ transplants.[141] Bioethics was race, gender and culture-sensitive from the start and has remained so. Moreover, for the past several years, a great deal of scholarship has been devoted to the impact of race, sex, and culture on the physician-patient relationship, the process of informed consent, the delivery of health care, attention to the needs of future generations, and so on.[142] It remains unclear what, as a matter of moral and legal policy, we ought to do in any given case: should we defer to ideas that the autonomous unit is an extended family headed by a matriarch or patriarch, or should we focus largely on the individual patient? Should we evangelize for personal autonomy and insist that the patient herself make the critical choices? As I said, the issues have long been vetted and are attended to in increasingly sophisticated ways. Compared to the similar lack of success outside the field, the failure of bioethics to resolve fully the issues attending multiculturalism is hardly a major flaw.

4. Inattention to the Risks of Reifying Autonomy, on the One Hand, and Compounding Professional Hegemony, on the Other.—It may seem ironic that some critics who complain of excessive attention to autonomy also complain of health care providers and institutions exercising inappropriate control over one's life. Of course, there is no necessary contradiction here. One can believe autonomy is overvalued in some contexts and also believe that its proper value is threatened in other contexts. In any event, the clear and open recognition of

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140. *See generally* JAMES H. JONES, BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT 4-6 (expanded ed. 1993); ROTHMAN, *supra* note 6, at 70-84, 183.

141. *See generally* David Sanders & Jesse Dukeminier, Jr., *Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation*, 15 UCLA. L. REV. 357 (1968).

142. *See* TRANSCULTURAL DIMENSIONS IN MEDICAL ETHICS (Edmund Pellegrino et al. eds., 1992); Margaret Olivia Little, *Why a Feminist Approach to Bioethics?*, 6 KENNEDY INST. ETHICS J. 1 (1996) (part of *Special Issue: Feminist Perspectives on Bioethics*); Edmund D. Pellegrino, *Is Truth Telling to the Patient a Cultural Artifact?*, 268 JAMA 1734 (1992); Maura A. Ryan, *The Argument for Unlimited Procreative Liberty: A Feminist Critique*, HASTINGS CENTER REP., July/Aug. 1990, at 6, 8, 9; *see also* NORMAN DANIELS, JUST HEALTH CARE (1985); Leslie J. Blackhall et al., *Ethnicity and Attitudes Toward Patient Autonomy*, 274 JAMA 820 (1995) (some groups adhere to a family-centered decision making model); Darryl R.J. Macer et al., *International Perceptions and Approval of Gene Therapy*, 6 HUMAN GENE THER. 791 (1995); Mei-che Samantha Pang, *Protective Truthfulness: The Chinese Way of Safeguarding Patients in Informed Treatment Decisions*, 25 J. MED. ETHICS 247 (1999). *Cf.* Peter T. Kilborn, *Filling Special Needs of Minority Patients*, N.Y. TIMES, Feb. 14, 1999, at 16 (referring to the views of Dr. Louis Sullivan, former Secretary of Health and Human Services during the Bush administration: "'A white physician can be just as effective.' But Dr. Sullivan said familiarity with patients' race and heritage led to better care.").

autonomy can discourage the consolidation of excessive power in the hands of health care professionals. A concurrent qualification is that if autonomy is not handled with adequate sensitivity to its preconditions and countervailing considerations, we may make things worse in many ways. Autonomy, rightly understood, is not promoted when incompetent, coerced, or unduly influenced persons are left to their unfettered choices.

Happily, there is a three-in-one example of a lament about autonomy and bioethics, combining complaints about rational autonomy, promotion of the medical establishment's hegemony, and the very ideal of rational thought.

> In recent years there has been an increasing critique of that philosophically based, predominantly abstract, rationalistic, mode of reasoning in bioethics, known as principlism. Unfortunately, however, the response to this debate through postmodern scholarship has, as Wolf observes, "scarcely been found in bioethics to date." . . . I will argue that the process of reifying and applying autonomy as an abstract principle avoids or suppresses an understanding of the evidence which points to power and control being an important characteristic of bio-medical discourse. The danger is that the naive rational application of the principle of autonomy within the substantive rationality of the powerful discourse of bio-medicine will only have a legitimizing effect which would affirm rather than challenge the status quo. The risk is that bioethical "talk" about autonomy may only create the illusion of providing the self-determining protection supposedly afforded to the individual by the application of this principle. By engaging in such rhetoric, bioethicists are unwittingly undermining the very value they profess to support. [There is then a quotation referring to "the oppressive status quo".][143]

We are lucky to find so many questionable notions all in one place, and, as an added fillip, in a text replicating a "postmodern" literary style. This critique surely merits its own critique.

First, the opening account of principlism uses the phrase "reifying and applying autonomy as an abstract principle." Principlism tries to avoid "reification" of autonomy as an "abstract[ion]" by viewing it as a mid-level principle that contends with other mid-level principles—beneficence, nonmaleficence, and justice. Has principlism been conflated here with abstract philosophical thought generally?[144]

We are also told in the quoted passage that "response to this debate [about reifying autonomy] through postmodern scholarship has . . . 'scarcely been found'" in bioethics.[145] It is not said just what is absent. It is very clear that there

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143. Pam McGrath, *Autonomy, Discourse, and Power: A Postmodern Reflection on Principlism and Bioethics*, 23 MED. & PHIL. 516-17 (1998) (citations omitted).

144. *See* BEAUCHAMP & CHILDRESS, *supra* note 105, at 15 (describing levels of generality—ethical theory, principles, rules, and particular judgments).

145. *Id.* at 516.

is no deficit of critical analysis of the limitations and risks of using the term "autonomy" loosely, and, to turn matters around, it is "naive" to think otherwise. Perhaps the author thinks that anyone who offers a critique of autonomy is not in the field of bioethics, so the field stands infirm for lack of appropriate internal critiques.

As for affirming the status quo, the postmodern ideological position is apparently that the prevailing conditions embrace too much medicalization and physician control and implement a biomedical technological imperative oblivious to variant circumstances. But whether the status quo is truly "oppressive" depends on a set of value judgments that require far more attention to context than is provided. There is no automatic benefit from challenging the status quo. If conditions are morally wanting—as when the status quo is patriarchal and a given practice consolidates this situation without compensating benefits—they should be challenged. If they aren't wanting in some respect, however, one might rock the boat a bit to encourage review and rethinking, but trying to dislodge the status quo would be an unsupportable maneuver.

Apparently it is not all applications of autonomy but only its "rational application" that is risky. What is the idea here? Is "rational" a synonym for "formalistic" (something of a swear word, as already mentioned)? What is the *foundation* for the complaint about medical hegemony? That there is no such thing as medical expertise to which anyone need defer? That too many physicians are Republicans?

The author believes that autonomy talk can delude us into thinking we are being protected by the rational principle of autonomy. This is true: such delusions are possible. This is also old news. Dithering on about peace, freedom, equality, and whatever, can inspire a false sense of confidence. But why would one think that autonomy talk within bioethics is lulling anyone into a comfortable but false belief that things are more or less OK?

Perhaps the problem lies partly with autonomy's internal tensions, which have long been mined by opposing sides, all claiming to be vindicating autonomy. Some see forced treatment of the competent but mentally disordered as constitutive of oppression. Some even see such treatment of incompetent patients as oppressive. The problem is that there are autonomy "vectors" pulling different ways. Forced treatment of mental disorders may promote long-run autonomy by enhancing a patient's opportunities. It is doubtful that this is oppression where the patient is incompetent. Whether it is oppression where the person is competent but diminished by ameliorable illness is far less clear. Can this idea of long-run autonomy be abused? Think of casually invoking it to shut patients up whether they are competent or not, and even when they are not that ill? Absolutely. "Autonomy" and "incompetent" are dangerous terms, especially when paired in an effort to treat objecting patients by invoking the vision of a more autonomous and presumably more satisfying future. Perhaps the medical establishment malevolently installed these concepts in their treatment protocols to fortify their powers.

But critics of autonomy and of the medical establishment can also threaten autonomy. Suppose a competent patient delegates some important medical decisions to her provider (although we would say that a reasonably autonomous

person would not do so because it compromises the self-directional aspect of autonomy). We point this out to her, and she responds that as far as she is concerned, the pursuing-my-preferences element of autonomy trumps the self-direction aspect. She prefers to delegate. Insisting that she decide interferes with her autonomy-as-freedom-to-implement-ones-own-wishes. Perhaps she argues that she self-directedly decided to give up some self-direction. One can do this in health care as well as in home construction, although the respective risks to autonomy may be quite different. There are no important values that cannot be turned against themselves. If the particular sense of the value is not specified, it may be wrong to say that invoking the value misleads us into thinking it is being promoted. Talking about equality without specifying whether it refers to some form of equality of opportunity or some form of equality of outcome may make all the difference in the world. If one is fixed on equality of outcome, then when others extol the promotion of equality—for them, equality of opportunity—the two sides are at cross-purposes. Talking blandly about how our society promotes equality, freedom, or justice thus does not tell us what is going on or who is being misled in what way by existing work in bioethics. Assuming we do not abandon autonomy—after all, it is only its "rational application" that is condemned—what are the alternative forms of action and rhetoric? (I return to this point shortly, when inquiring into the author's preferred modes of operation.)

Consider next the author's complaint about "the modernist notion of revering principle over context . . .."[146] But "context" cannot be identified, parsed, understood, identified as relevant, and relied upon without reference to "principle." We wouldn't know what to look for as "context." If we look for sick, suffering patients, we do so partly because we are wired up that way, but also because of principles embodying duties to relieve the suffering. Otherwise, the asserted context is just a mass of incoherent sensations. Of course, principle cannot lead us to a decision without premises about particulars. That there are formalists who need to attend more to situational circumstances is already known. Is *that* what this claim is about? To say that "autonomy must be contextualized"[147] states either the elementary idea that abstractions do not provide conclusions without concretions (the context, circumstances, particulars of the situation, etc.), or makes the factual claim that autonomy is *regularly* applied flatfooted and abusively because providers fail to consider individualized patient needs. This is not supported, except by unpersuasive anecdotes concerning the burdens of wearing hospital gowns (a universal complaint) and having blood drawn more than one wishes.[148] The fact that power is abused is an unfortunate fact of life, but there is little evidence that the prevailing bioethics rhetoric compounds rather than reduces the abuse, or that postmodern rhetoric would reduce it better.

Of course, much—perhaps everything—rests on what constitutes abuse or other improper treatment of patients. Drawing blood whenever it is needed,

146. McGrath, *supra* note 143, at 518.

147. *Id.* at 522.

148. *See id.* at 521-22.

which McGrath laments,[149] is not a persuasive example. If it is done without permission or done impolitely, there is no serious issue: the medical staff is not supposed to do that. However, formal informed consent rituals are not ordinarily invoked here because most persons know that blood draws may be imperative for diagnosis, monitoring, and successful treatment. And it is "rational autonomy," that insufferably dangerous notion, that is responsible for establishing the requirement of permission, if not civility, in the first place. The very complaints about blood draws and drafty hospital gowns rest rather heavily, if not exclusively, on autonomy to pursue our preferences to be pain free and retain our dignity by being clothed on all four of our sides.

Oddly, McGrath refers favorably to the crystallization of the right to refuse treatment, a major right deriving partly from autonomy considerations and seems assign some credit for this the workings of bioethics over an extended period.[150] So what's the beef here? If the author favors a presumption against the use of "reductionist," "medicocentric"[151] biomedical technology, there is next to nothing offered to support this. It appears simply as an outgrowth of an ideological indisposition toward medical technology, which not everyone shares *and which must be defended.* It is simply not enough to point out, as nearly everyone now knows, that medical technology as applied to the dying may or may not be beneficial or desired. Nor can one rest on the well-known inclination of some medical personnel to use medical means even when not called for. What, then, is the preferred alternative to "reductionist" and "medicocentric" medicine? No technology is risk-free—but *not* using technology is also not risk-free.

The closest approach by the author to a recommendation of what to do is hard to follow. McGrath describes the operation of a particular hospice, stating:

> In the discourse of [the hospice] the idea of autonomy is not a bioethical principle to be applied to difficult situations, but a "way" of continuously responding to the needs of the client and his family. . . . "Basically what I see Karuna [the hospice] as doing is offering people a choice." [quoting a "participant" (patient) in the hospice] This commitment to a broader notion of choice does not mean that members of this organization are not respectful of the more limited perspective of information giving and nonjudgmental support . . . .[152]

But this alternative vision is not "alternative"! As far as I can understand the quoted remarks of the hospice participant, they are exactly what our vilified principle of autonomy calls for in that context. The passage is difficult to follow, however. What is meant by saying autonomy is "not a bioethical principle" but a "way"? What "broader notion of choice" is at work?

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149. *Id.* at 521 (quoting a patient statement from THROUGH THE PATIENT'S EYES: UNDERSTANDING AND PROMOTING PATIENT-CENTERED CARE (Margaret Gertis et al. eds., 1993)).

150. *See id.* at 523.

151. *Id.* at 518.

152. *Id.* at 525-26. The author quotes remarks such as "[o]ffer them the best options, best information, what the likely outcome of those options . . . they can make whatever choice." *Id.*

Puzzlingly, the author then complains about "just giving information and asking for signatures on a consent form," and extols "choice by doing."[153] Perhaps she has reduced autonomy solely to information-giving. It is more than that. Moreover, one can autonomously decline to receive certain information.[154] Although there may be limits to our rights to refuse information, no serious autonomy scholars say simply that autonomy requires that you receive relevant information whether you like it or not.

And what is "choice by doing"? It seems to be twenty-four hour "holistic" care with counseling and psycho-social support.[155] Where is the choice by doing here? Who is doing/choosing what? The patient isn't doing anything—everyone else seems to be hovering around her all the time. Can she refuse this omnipresent caring, or does entering the hospice—an establishment of its own—require her to buy into what it does? If so, is this a vindication of autonomy?

One concludes, not that the principle of rational autonomy is infirm, but that people do not regularly practice what they preach: physicians abuse their power and patients misuse the system. That is hardly the fault of bioethics—though it must attend to how real-world health care systems (like all systems) may fail, and to consider what fail-safe mechanisms to install. The hospice in question may provide more "holistic" and "spiritual" care (this would seem to involve beneficence at least as much as autonomy), but this is largely a matter of highly variable personal preference or taste. In any event, the "richer notion of autonomy"[156] the author endorses is not only not unknown to bioethics, it is, from what I understand of her account, the dominant notion. Its contrast with the supposedly objectionable "'clear and distinct idea' . . . articulated [in a] principle"[157] is not made clear. Is she asserting that her idea is *not* "clear and distinct"—or simply that it is not embedded in a principle—merely in a "way"?

F. Excessive Attention to Rights

While the critique of rights parallels the complaints about making too much of autonomy, it goes beyond it. This is no surprise because the actual vindication of autonomy and other values is often accomplished through recognition of legal rights enforced by the coercive power of the state. Indeed, talk of rights in any field using any moral characterization (e.g., "natural rights") is likely to devolve (not "reduce") to matters of law. If rights analysis is taken seriously, legal recognition and enforcement are inevitably considered, if not always implemented.

Criticism of rights-based systems may rest on a mistaken notion of how the term "rights" is being used. It may describe a bottom line conclusion that has

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153. *Id.* at 526.

154. *See* Shapiro, *supra* note 121, at 382-83.

155. *See* McGrath, *supra* note 143, at 526.

156. *See id.* at 528.

157. *Id.* (quoting ALBERT R. JONSEN, THE NEW MEDICINE AND THE OLD ETHICS (1990)).

already taken account of claims of presumptive right *and* countervailing considerations in a particular category of case; or it can refer to the starting presumption before countervailing matters are dealt with; or it may be used to describe a "trump" or absolute of sorts that rigorously excludes countervailing considerations. Other rights may be absolutes. Think of the constitutional bans on bills of attainder,[158] or the Thirteenth Amendment's ban on slavery.[159] (Of course, the meanings of "bill of attainder" and "slavery" may be sufficiently doubtful that one is not sure what is "absolutely" forbidden.) To the extent that the rights recognized are viewed as absolutes rather than presumptions, the countervailing considerations, such as they are, are built into the articulation of the right.[160] In the United States, the "logic" of rights can take any of these forms, although it may be hard to tell from the text. In matters of constitutional law, the initial invocation of a right is, far more often than not, best understood as a presumptive or *prima facie* claim.

One can of course claim rights for all sorts of things—e.g., non-interference with and even affirmative access to physician-assisted suicide, abortion, food, employment, health care, insurance, shelter, and so on. One can also focus on such rights while failing to consider matters of duty or responsibility, injuries to others, injuries to communities, and injury to the rights-claimants themselves. As one might expect, sharp contrasts between rights-talk and responsibility/duty-talk are dangerous. Sometimes duties and responsibilities are the correlatives of rights held by others. And sometimes they may track "interests" of others that do not rise to matters of right. In any case, depending on what philosophical or

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158. U.S. CONST. art. I, § 9 cl. 3, 10 cl. 1.

159. *Id.* amend. XIII.

160. The parallels to the categorization vs. balancing issue in constitutional law are obvious. *See generally* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992). *But cf.* John Ladd, *Legalism and Medical Ethics, in* CONTEMPORARY ISSUES IN BIOMEDICAL ETHICS 1 (John W. Davis et al. eds., 1978). Ladd discusses rights-talk as against "responsibility" talk:

> [A] responsible decision [in bioethics] may require consideration of such different things as risks and benefits, other relationships, concerns, needs and abilities of persons affected by and affecting the decision. In addition, . . . it is usually necessary to "weigh" a number of factors against each other; the final decision often requires what we generally call "judgment". . . . Decisions based on rights, on the other hand, are quite different. They do not permit taking into account most of the considerations mentioned, and they do not involve the same kind of weighing, deliberation, judgment, etc., that is called for in cases of responsibility.

Id. at 27-28. As an across-the-board matter within legal discourse, this is not the best way to describe matters. Much depends on what is meant by "the same kind of weighing . . . ." Adjudication of fundamental liberty interests may downgrade various state interests as uncompelling or unimportant, at least in the case at hand, but at the threshold of argument, the ultimately outweighed interests are material—and remain so for future cases. The nature of the connection between the government's action and its asserted or supposed goals is also evaluated within the standard of review being applied.

even religious system of thought we invoke, the two different forms of talk have major links.

There are two complaints about rights-based implementation of interests that are particularly relevant here. One is that the claim of right, whether against the state or private parties, concerns something that the claimant—or possibly anyone—should not receive or be able to avoid, simply upon making the claim. The second complaint is that although a given interest ought to be promoted, it is generally better pursued by means other than claiming legal or perhaps even moral rights, whether viewed as presumptive, bottom-line, or absolute.

As to the first complaint, whether what is claimed as a right (to receive or avoid) is a fit one for rights recognition depends upon the political theories and philosophies dominating the scene. A fair example might contrast a right against interference by the government publishing with one's writings, with a right to a minimum income, adequate housing or abortion. The first is essential to a democratic republic. The rest are contested. Such rights are written into some constitutions, but, in the view of most, not our own.

As to the second complaint, it would be coherent to argue that we should be able to receive affirmative assistance in dying, but that openly formalizing this by recognizing and enforcing a constitutional right to such assistance is too perilous (not to mention unjustified by a right reading of the constitution). It would encourage a weakening of pro-life values, have an excessive error rate, lead step by step to non-voluntary euthanasia, devalue not only persons who are terminally ill but non-terminal disabled persons as well, and ultimately expand to suicide-on-demand for everyone.[161] Whether this argument is sound is not the point: I am merely giving an illustration of an argument against vindicating as a matter of right what everyone concedes is an interest—the avoidance of

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161. *See generally* Sam Howe Verhovek, *Oregon Reporting 15 Deaths in 1998 Under Suicide Law*, N.Y. TIMES, Feb. 18, 1999, at A1. This article suggest that in these first 15 cases, that most of the decisions to seek and use physician-assisted suicide were based on feared losses of control and autonomy generally, not on severe physical pain or discomfort. *See id.*; *see also* Chin et al., *supra* note 116, at 577 ("[T]he decision to request and use a prescription for lethal medication was associated with concern about loss of autonomy or control of bodily functions, not with fear of intractable pain or concern about financial loss."); Wesley J. Smith, *Dependency or Death? Oregonians Make A Chilling Choice*, WALL ST. J., Feb. 25, 1999, at A18 (1999 WL-WSJ 5442052). Smith states that none of the first 15 persons who died as a result of Physician-Assisted Suicide ("PAS") was pushed into this by intractable pain or suffering. The patients evidently had strong beliefs in autonomy and suicide was chosen because of fears of future dependence. The author states that this was not the expected result—that choosing PAS would be a last resort against unrelenting and intolerable suffering. *See id.* He indicates that pain was not a factor in a single case of PAS among this group. *See id.* He also suggests that "legalization in Oregon has actually widened the category of conditions for which for which [PAS] is seen as legitimate." *Id.* In his discussion of disabled and elderly persons, he concludes the "dehumanizing message is that society regards such lives as undignified and not worth living." *Id.* The author notes that the information about PAS came from physicians who did the prescribing, not from those who did not assist their patients in dying. *See id.*

suffering, particularly severe suffering at the end of life.

The critique of rights recognition—especially legal rights—might benefit from addressing the idea that a legal right is linked to the possibilities of enforcement (whether or not one thinks there are "rights without remedies"). This of course involves matters of legal process and legal coercion. Some matters should not be embraced by such processes. No one has a right that another person fall in love with her/him. How would it be enforced? On the other hand, a child has a right, if not to the love of her parents, then to adequate nurture and support which may indeed include presenting an appearance of loving the child. This can be enforced, if clumsily.

There is thus something to the claim that vindicating certain interests should not take the form of recognizing enforceable rights against specified parties. The dispute is about what sorts of interests ought to be the subject of legal rights and what sorts should not, whether they have a role as moral rights. Have claims of right, as extolled in the bioethics literature and as vindicated in laws or regulations or judicial decisions, been overdone and oversold? If so, which rights, and in what ways overdone? It is not obvious that bioethics is guilty of this, but it is inappropriate to single out bioethics as the sole or main culprit. Legislatures, courts, and government agencies may be equally responsible, quite independently of bioethics commentaries. The argument against rights covers a far broader segment of law and commentary than that housed in bioethics. This, of course, does not let bioethics off the hook. Perhaps it should have leapt off the rights bandwagon. Yet it remains unclear what rights should not have been recognized or what the fallout from such recognition has been.

There is another interpretation of the rights critique that deals less with legal rights and more with bedside conversations and patient-physician and patient-institution relations. Suppose a patient, before an examination, announces to the physician that she has a legal right to be examined with due care as defined by prevailing medical custom, to be given the information a reasonable patient would want to know under the circumstances, and to be treated with dignity. All true. But why say it? Is it to put the Fear into a physician of a patriarchal bent?

But this view of the rights critique does not show it in a better light. Few question the point that as a matter of civilized human interaction, it is usually unnecessary and often counterproductive to *start out* with what is in effect a demand, although this may well happen.

It seems intuitively clear that there is a connection between protests about rights claims and about "overlegalization."[162] The latter occurs (in part) when matters that should not be the subject of legal rights (or powers or privileges or other legal relations) and procedures are nevertheless implanted in that domain. So, a few remarks on overlegalization are in order.

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162. *See* Alexander Morgan Capron & Vicki Michel, *Law and Bioethics,* 27 LOY. L.A. L. REV. 25, 35-36 (1993) (The authors briefly review multiple aspects of "bioethics" and its historical origins; note the critique of "rights talk" but indicate that many legal commentators "resist over-legalizing the field"; the authors also urge that a central concern of law and bioethics "is to discern the limits of law as a mechanism to structure concepts and relationships in health care").

G. *Overlegalization*

1. What Is It?—"Overlegalization" may refer to several processes and outcomes: the use of formal procedures; the substantive nature and scope of regulatory fields or of particular legal rules; the application of certain legal relations—rights, powers, privileges, immunities—to certain situations; the specific legal/analytic techniques involved in a dispute; the idea of invasion of individual or familial privacy and autonomy through legally authorized or immunized intervention by "outsiders"—a breach of the "public/private" border; the asserted improper transformation of "moral" issues into legal issues; or the announcement and implementation of any principles, standards and rules that cut against firm community norms.

One can thus see some obvious and towering ambiguities in complaints of overlegalization. "This isn't fit for legal regulation" is quite different from "You set up the substantive and procedural rules improperly." The latter is not best described as "overlegalization" and I will not so consider it here. The term generally suggests that the state has gone beyond the proper limits of law-governance, rather than simply making a mistake in constructing the law in a particular way. The fact remains, however, that a claim of overlegalization may inappropriately be applied to matters dealt with nonoptimally by formal legal mechanisms that are otherwise rightly in place.[163]

But what does it means to suggest that some province of human action should be beyond legal intervention, perhaps even of an "informal" or "alternative" sort? It does not seem to be a call for anarchy. It does not even seem to be a claim that there are areas utterly beyond "the rule of law." Although it may seem paradoxical to say so, complaints about overlegalization are in a sense complaints that the rule of law itself is impaired or has failed because it has subjected autonomous persons to inappropriate regulation, in violation of some basic principle.

It is also difficult to know what to make of private ordering "outside" law

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163. *See* Daniel Callahan, *Escaping from Legalism: Is It Possible?*, HASTINGS CENTER REP. Nov.-Dec. 1996, at 34. "Legalism, may, then, be defined as the translation of moral problems into legal problems; the inhibition of moral debate for fear that it will be so translated; and the elevation of the moral judgments of courts as the moral standards of the land." *Id.* Callahan attributes this, at least in part, to an "enormous moral vacuum in this country, which for lack of better institutional candidates has been left to the law to fill." *Id.* at 34-35. This may roughly describe "overlegalization," but I do not think that "legalism," whether excessive or not, encompasses all "translation of moral problems into legal problems." For one thing, there are no true "translations" of this sort. For another, "doing law" entails the entry, in one form or another, of moral norms, either in enacting or interpreting and applying laws. The announcement of legal norms may also reinforce the moral status of important values. *See also* George J. Annas, *Facilitating Choice: Judging the Physician's Role in Abortion and Suicide*, 1 QUINNIPIAC HEALTH L. J. 93 (1996) (complaining about too much law in bioethics, and characterizing bioethics as, at least in part, dealing heavily with analysis of the physician-patient relationship).

and courts, without the direct influence of particular rules, but nevertheless "within" classic domains of law and probably operating under its influence ("within its shadow"). One thinks of Ellickson's description of "informal norms of neighborliness" that may differ in content and impact from legal rules.[164] Some "informal" norms are nevertheless part of a "customary" legal system. "Law," even as we use it in "developed" contemporary culture, is not confined to courts or legislatures or law enforcement officers in action. But here we are skirting the edges of the dreaded question–what is law? All I do here is mention, not the well known jurisprudential literature, but the less well known work of legal anthropologists. They do not settle the conceptual issue about the range of "law," but their work illustrates the possible varieties of what might rightly be called "law."[165]

The idea that overlegalization is best viewed as the wrongheaded assimilation of moral issues into the law contains a kernel of sense but is nevertheless not apt. A simple example of inappropriate moral-to-legal assimilation would be to *legally* enforce all promises—not just the usual sort of contractual "promises," but even promises to pick up one's socks or meet someone for dinner.

Still, the stronger the moral right or duty, the more we must consider the possibility of making these moral relations matters of law, in the sense that they are part of formal community "ordering."[166] Among the most important legal principles and rules are those whose moral status is *so* elevated that they seem to *require* legal ratification, in certain contexts whether by constitutional command, legislative or regulatory action, or formal adjudication: procedural fairness (notice, opportunity to be heard, and so on); freedom of speech and religion; varieties of autonomy and privacy, equality, justice, fairness . . . .

The moral/legal barrier is also breached by the necessities of rightly interpreting legal texts. We take interests we value highly (on whatever grounds) and *make* them legal rights of various sorts. We may select a canonical description embodying the moral right and implant it in a constitution or other law; or a common law court may select any of several alternative formulations

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164. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES at viii (1991).

165. *See* Sally Falk Moore, *Epilogue* to SYMBOL AND POLITICS IN COMMUNAL IDEOLOGY 210 (Sally Falk Moore & Barbara Myerhoff eds., 1975). The authors state that rituals, laws, customs, etc., are used "to fix social life, to keep it from slipping into the sea of indeterminacy." *Id.* at 221-22. This passage of course contrasts "laws" with these "other" things, but at the same time suggests their strong parallels. On distinguishing law from custom, see generally E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN 18-28 (1954).

166. *See* COUNCIL ON THE ROLE OF COURTS, THE ROLE OF COURTS IN AMERICAN SOCIETY 85 (Jethro K. Lieberman ed., 1984) (referring to "[d]isputes that should not be settled privately because society has an important stake in governing them by authoritatively imposing public standards . . . ."); *see also* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (arguing that a major function of formal adjudication is "to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.").

to recognize and enforce it. In whatever verbal form the "phase-change" from morals to law is accomplished, interpretation will be required and interpretation is influenced (admittedly a "weasel word") by prevailing moral dispositions.

We should now run through several of these distinct but overlapping meanings of "overlegalization." Some meanings have a complex empirical core. For example, some overlegalization claims require us to ask whether certain behavior been subjected to legal ordering in a way inconsistent with the culture's own norms.

This is a good point at which to mention what might initially appear to be a paradox. What is the "remedy" for overlegalization? Telling the legislature or agency to undo what it has done is one maneuver. Another remedy is to state, *as a legal/constitutional matter*, that some arena of behavior has been overlegalized. If the state insists that no one may use contraceptive devices to prevent pregnancy, it has violated a fundamental liberty interest.[167] The state has intruded where it doesn't belong, and this is a matter of constitutional dimension. The inquiry into norms often takes place within the investigation of "tradition" as a technique for discerning unmentioned fundamental liberty interests in constitutional law.[168]

Is governmental action that is inconsistent with certain important traditions really a case of overlegalization to be vindicated by resorting to the legal/constitutional notion of a fundamental liberty interest? The term is probably not precise enough to allow a definitive answer. Whatever the description, there is *some* sense of overlegalization that refers, roughly, to the law going where no law ought to go, at least in our culture. Obviously, overlegalization in this sense, and probably all its senses, will bump into difficult evaluative matters. It may be unverifiable whether legal ordering has exceeded traditional limits to legal ordering. This is especially so when cultural values and beliefs vary sharply within the social system. The issue is thus far from purely empirical. The degree and gravity of the government intrusion cannot be fixed by some objective measurement. Whether limits are exceeded—and indeed what the limits are—ultimately rests on value analysis. To make matters still more complex, any discussion of the meanings of "overlegalization" must take account of law as both reflecting and shaping cultural practices. If overlegalization has endured, community sentiments may have been altered. If so, are the relevant matters no longer overlegalized?

Before reviewing some varieties of overlegalization, two points: First, overlegalization charges are sometimes misleading proxies for what is really meant: "the wrong legal decision was made for this class of cases." Second, overlegalization may and sometimes should be recognized and vindicated *legally*.

a. Having legal rules (whether legislative, administrative, or common law) dealing with personal matters that should be left to private ordering.—"Private"

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167. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 687-88 (1977).

168. *See* Laurence H. Tribe & Michael C. Dorff, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990) (examining the idea of tradition and its vagueness and ambiguity).

may refer to individual persons, families, groups, even communities, and perhaps to businesses and institutions of certain sorts.[169] Whether legal ordering has wrongly intruded into the private realm is obviously a partial function of governing moral theories, customs, and traditions. In any liberal polity, for example, the supposedly overlegalized fields can be defined very broadly—reproduction, sex, medical care, death decisions, control of mind and body, choice of life work, and so on.

There is an oddity about this: how can truly private matters lose their characterization as such by societal practices pointing in other directions? If overlegalization simply depends on practice—how one's neighbors think and act—it doesn't establish much of a limit. If things aren't overlegalized, they're "overcustomized," at least from the point of the view of the outlier who wants to be left alone. But oddity isn't fatal. We are not in a state of nature; we live, as individuals, in societies. What we leave for autonomous self-rule and what we do not is ultimately decided not by a solitary self, but by the assemblage of selves that becomes a community. Relying on natural law or moral reality does not alter the situation, for their contents again will not be determined solely by the individual claimant. Whether some form of regulation represents "overlegalization" is thus in part a matter of law and custom.

There is yet another layer of difficulty in addressing overlegalization. Most of our decisions, serious or otherwise, bear on both the public and private domains. At first glance, how one disposes of personal and household waste materials is a private concern. But final disposition is usually presumptively lodged in local government. Of course, what is thought to bear on the "public domain" varies sharply across societies. Some groups seem to regulate in certain domains of choice to a noticeably greater degree than does the United States (e.g, specifying permissible and impermissible names for children).[170]

More relevant to our concerns are two examples from bioethics. First, transplantation of organs or tissue from one family member to another may be viewed as intensely private and presumptively insulated from outside scrutiny. Yet the risks of intrafamilial exploitation, undue influence, or conflicts of interest are such that external scrutiny was exercised by courts from the start. The role of judicial oversight may have declined here, as it has in control of death and dying. This was to be expected. Initial rulings provided some degree of clarity and predictability, especially concerning whether transplants from live donors could even take place without risk of prosecution for mayhem or child abuse. Here again our nonparadoxical paradox appears, this time concerning the decline in judicial oversight: to preserve a domain from legal ordering may require an exercise in legal ordering stating that further legal ordering would be out of place.

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169. For more extensive analysis, see Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 5 (1992).

170. *See, e.g.*, Tyler Marshall, *Germans' Wish Is a Command*, L.A. TIMES, Dec. 28, 1992, at A1 (discussing Germany's establishment of "quiet times" between 1:00 p.m. and 3:00 p.m.; regulation of children's names; restrictions on hours of business operation).

Second, if someone learns she has a genetic predisposition for developing a serious disorder, whose business is it beyond her own? In a liberal regime, this is a matter of private self-knowledge; its contents presumptively need not be disclosed to anyone. But that presumption may be overcome by the interests of family members who may benefit from knowing of possible genetic risks to them and their nuclear families; by prospective employers who are not anxious to invest in the training of an employee doomed to an early death or extended debilitation; or by insurers wanting to—and perhaps being legally obliged to—reduce their costs by not issuing health or life polices to persons at far greater than average risk for impairment or death. Overlegalization charges are no slam dunk here either.

b. Vindicating certain interests through the mechanism of formal legal rights, powers, etc.—The complaint here is about several matters: the heavy-handedness of the mechanism for pursuing the interest; the adverse effect on other interests arising from the (excessive?) focus on rights, privileges, immunities, and powers; the decline in the role of private voluntary interaction in addressing disputes; and the expression of a "message" that the interest protected by the claim of right is more important than it really is—indeed, it may be thought by some to be too lowly to merit legal protection at all.

Both of these aspects of legalization—having legal rules apply at all and formally vindicating certain legal interests created by these rules—require public or semipublic procedures.[171]

c. Subjecting matters of choice that should be resolved intuitively and according to the situation at hand, instead of by rules and rule-governed resolution mechanisms.—This third aspect of overlegalization was mentioned earlier in referring to pragmatist critiques of bioethics. It is bad enough, it is argued, to resort to rigorous deliberation using dominating abstractions. Using legal rules on top of that makes things still worse.

The nature of this branch of overlegalization is suggested by Carl Schneider, who writes that "the idioms of the law are often less apt than they might appear. They have arisen in response to needs for social regulation, but the systemic imperatives that shape the law are sometimes a poor pattern for bioethical discourse."[172]

All true, as a single day in law school can convincingly show. But "less apt than they might appear" and "poor pattern for bioethical discourse" *compared to what?* If legal language is clumsy in some cases, normative discourse may be no better equipped to deal with the detachment of parts of life processes and their recombination into new forms—the basic stuff of bioethics. Having two natural mothers (gestational surrogacy) or no natural parents at all (cloning?); justifying the removal of an organ from a healthy child to give to her dying sibling, or

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171. As a possible example of overlegalization in several senses, note the controversy concerning formal discipline for supposed misconduct by small children. *See, e.g.*, Paul Dean, *The Death of Common Sense?*, L.A. TIMES, Nov. 8, 1996, at E1.

172. Carl E. Schneider, *Bioethics in the Language of the Law*, HASTINGS CENTER REP., July-Aug. 1994, at 16, 18.

determining whether we should permit or encourage assisted suicide and voluntary euthanasia; expanding the notion of death to apply to human organisms whose bodies function spontaneously but in total separation from their permanently lost identities—these are as awkward for moral as for legal analysis.

To be sure, the very process of implanting an acute moral/conceptual problem into a legal framework is problematic—*is* there a constitutional fundamental liberty interest in assisted suicide? *Does* a disabled prisoner have a right to refuse nutrition and hydration.[173] These inquiries illuminate the moral issues and enrich philosophical analysis. Heuristic illumination is not the final point, however. The point, again, is that one may need formal legal ordering at the threshold in order to attenuate its intrusive grip later on: The law may and sometimes must formally vindicate the charge of overlegalization, and then withdraw until needed once more.

d. Varying from traditional patterns of human interaction—including the formation of personal relationships based on kinship, friendship, and mating—and making them matters of formal agreement by contract or other legal/commercial devices.—The charge that new reproductive techniques "commodify" women, children, mating, sex, and society generally is closely linked to the use of legal and commercial mechanisms in certain interpersonal transactions. Thus, legal enforcement of commercial surrogacy is compared to prostitution as an agreement that "monetizes" sex; it is also compared to the sale of children or other persons, whether as part of family formation or of slavery.

The connection between overlegalization and commodification, then, is that the former may be a causal factor in producing the latter. The imposition of legal ordering of the sort linked to mercantile deal-making does not, on this view, vindicate personal autonomy and privacy in reproduction; it instead diminishes persons and converts the exchange of services from a matter of friendship or kinship to one of "greed"—for money or children. (The epithet "greed," of course, reflects a prior determination that legal enforcement of a transaction involving commercial exchange is inappropriate.)

e. Finally, the idea that, within the legal field, the wrong legal neighborhood has been chosen, e.g., opting for criminal sanctions when civil or administrative sanctions would do as well or better; and opting for formal adjudication rather than informal dispute resolution.—Barber v. Superior Court[174] might be offered as an example. In *Barber*, two physicians were prosecuted for murder. They had withdrawn medical treatment, including artificial nutrition and hydration, from a permanently unconscious patient.[175] More spectacular examples are Prohibition[176] and present-day drug bans, although the view that the wrong legal

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173. One has such a right in California. *See* Thor v. Superior Court, 855 P.2d 375 (Cal. 1993) (recognizing a fundamental common law and possibly a state constitutional right to refuse treatment, and explicitly embedding philosophical accounts of the status of autonomy into its legal argument structure).

174. Barber v. Superior Court, 195 Cal. Rptr. 484 (Cal. Ct. App. 1983).

175. *See id.* at 486.

176. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

neighborhood has been selected for recreational drugs remains controversial. One thinks also of the close monitoring of physicians who prescribe certain medicines thought likely to be abused—e.g., analgesics, and stimulants for attention deficit disorder. Those who do not view these measures as overlegalization are likely to regard failure to enact and rigorously enforce them as underlegalization. For present purposes, it is immaterial which characterization is the better one; the point is that whether something is over- or underlegalized is a function, first, of moral evaluation of the conduct in question, and second, of the parallel evaluation of promulgation and enforcement of rules.

2. Further Applications to Bioethics: Law and Courts.—

a. Private ordering.—The idea of overlegalization is a legitimate tool of moral, policy and legal analysis. Mistakes have of course been made by all groups, even from their own internal viewpoints, not just in selecting the contents of legal rules, but in imposing legal rules on some fields of conduct at all. The power of private ordering is sometimes underestimated, and it can work its ways while dislodging (without contravening) legal rules. As Ellickson has suggested, informal mechanisms are often used among landowners and merchants to adjust their relationships, often in ways quite different from what would be an expected result of litigation.[177] Nevertheless, even if "private ordering" in some form is acceptable or even preferable in some area, it would be a mistake to assume that all forms of legal ordering in the field are inappropriate. Although it may be unfortunate in some cases that a heavy-handed legal regime displaces private ordering to some degree, a legal backdrop in some form may be necessary or useful to the (now semi-) private ordering.

How do these observations bear on bioethics and, more generally, on how we are to deal with millennial technologies?

It is hard to credit the broad claim that bioethical analysis has been systematically mistaken in opting for the use of legal regimes in displacement of whatever would otherwise arise in private ordering. If it has indeed been mistaken in that way, it is no more at fault than other Western disciplines in looking so frequently to The Law. Subjecting identifiable areas of behavior and conflict to law raises most of the fundamental moral/philosophical issues that were raised during the preceding millennia. No sweeping complaint of overlegalization is likely to be borne out: the only rational way to proceed is with an area-by-area search.

The most prominent current examples of complaints about overlegalization concern death and dying,[178] and possibly the use of socially and technologically

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177. *See* ELLICKSON, *supra*, note 164, at viii (observing that "after only a few interviews I could see that rural residents in Shasta County were frequently applying informal norms of neighborliness to resolve disputes even when they knew that their norms were inconsistent with the law."). The study focuses in part on the cattle industry. Of course, "inconsistent with the law"—with the substantive outcome had formal law been invoked—does not here mean "against the law."

178. *See* PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 247

innovative reproductive methods. Similar charges were lodged early on against certain emerging organ transplantation practices. Joseph Goldstein, for example, complained strongly that the family in *Hart v. Brown*[179] had been required to submit its planned inter-sibling transplantation for judicial vetting.[180] He believed that this invaded familial privacy.[181] Perhaps he was right. Or perhaps he underestimated the risk of parental favoritism among siblings and the possibility of parental lack of good faith. Then again, perhaps those risks are outweighed by the cascading risks of outside intrusion.[182] In any case, it seems reasonable to ask why parents should have to seek state permission to preserve the integrity of their family by arranging for one sibling to save the other sibling's life, when the "donor" sibling is likely to undergo arguably only modest risk and temporary, if serious, discomfort. The question, however, is hard to answer: *Hart v. Brown* is not an univocal example of too much law.

Much the same protest was made against formalizing the decision process in medical nontreatment cases, and is now implicitly made in proposals for physician-assisted suicide, who is now permitted in Oregon.[183] Few proponents of physician-assisted suicide favor requirements of judicial authorization or mandatory psychological screening. But as already suggested, formal resolution of disputes arising at the beginning of an innovative practice may serve to establish patterns and to reinforce autonomy and privacy values so that recourse to legal processes will occur less often and less intrusively.

An obvious illustration of the need to compare overlegalization with underlegalization is assisted reproduction. Enforcement of surrogacy contracts is viewed by critics of surrogacy as overlegalization, which exacerbates whatever "commodifying" effects the transactions have. But this is strongly, though not inevitably, correlated with calls for legislation prohibiting, restricting or regulating the practice. Here, the critics of bioethics, most of whom oppose

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(1983) [hereinafter PRESIDENT'S COMMISSION] (stating that "[a]s made clear throughout this Report, the Commission believes that decisionmaking about life-sustaining care is rarely improved by resort to courts."). *Cf. Barber*, 195 Cal. Rptr. at 486 (holding that there is no legal requirement for judicial approval before life-sustaining treatment is withdrawn. "[In another case,] Justice Fleming observed that 'prosecution of a lawsuit is a poor way to design a motor vehicle.' By analogy it appears to us that a murder prosecution is a poor way to design an ethical and moral code for doctors who are faced with decisions concerning the use of costly and extraordinary 'life support' equipment."). (quoting Self v. General Motors Corp., 116 Cal. Rptr. 575, 579 (Cal Ct. App. 1974)). As I argue in the text, however, some formal adjudications represent a plausible way to announce and reinforce behavioral norms and ideals. *See infra* Part III.G.2.b.

179. 289 A.2d 386 (Conn. Super. Ct. 1972).

180. *See* Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645 (1977).

181. *See id.* at 669.

182. *See generally* Gavison, *supra* note 169, at 1, 12, 37 (noting the objections to familial privacy arguments when the context is intrafamilial abuse).

183. *See* Death With Dignity Act, OR. REV. STAT. §§ 127.800-127.897 (1998) (*amended by* 1999 Or. Laws 423).

surrogacy, do not complain of overlegalization in the form of prohibition; they complain of overlegalization as the enforcement of surrogacy contracts, and of nonprohibition as *under*legalization. Once again, the underlying complaint is that the legal regime protected or banned the wrong thing, not that it acted in some way at all.

b. Overlegalization and "catching up".—We now need to relate matters of over- and underlegalization to the symposium's animating idea that law and ethics must "catch up" to science and technology. Some cases seem pretty easy. Enterprises that cause negative externalities beyond a certain baseline have to pay for harms they cause. If you run a research laboratory investigating infectious agents, you have to implement serious containment and other safety measures. When dangerous new enterprises are begun and they seem to escape existing legal means of public protection, the law "catches up" with technology, in a simple sense, by acting to reduce the danger. Whether this is better accomplished by civil litigation, criminal prosecution, regulation, institutional oversight, or some combination of these routes also raises over- and underlegalization issues, but there is no reason to examine this here.

In other cases it is not so clear how law might catch up with technology. One possibility is affirmatively ordering a field in a reasonably coherent way—or so it may seem to supporters. Once again, Oregon's physician-assisted suicide law is, to such supporters, a legal response that seizes the day and offers a clear example of gaining ground on technology. On some views, much the same would apply to bans on surrogacy, human cloning, animal gestation of human embryos and fetuses, and the construction of transgenic sentient beings. In other cases, law's gains on technology may be via removing itself or declining to enter a given area: a community's choice to keep law and legal process as far away as possible from a given field might well be considered a form of catching up. Repealing laws banning surrogacy or cloning would so count in my book. What is over- or under-legalization thus depends on the nature of the conduct in question, its moral assessment, the content of the substantive legal rules in place, and what procedural and remedial devices are used. For example, damages for breaching a surrogacy contract's provision prohibiting abortion might well violate *Casey v. Planned Parenthood*,[184] but either way it is a far cry from specific performance, which would, by comparison, constitute immense overlegalization.

In any region of bioethics, the over/underlegalization claim can be defended only if the countervailing considerations are carefully inspected. In some cases, legalization, including formal adjudication, may promote a sound adjustment to novel problems that our biotechnological capacities bring us. Indeed, as suggested, the very imposition of legal ordering in *some* rational form is often rightly viewed as constituting moral and legal progress.

To our eyes, the "rule of law"[185] is essential in both directing human behavior

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184. 505 U.S. 833 (1992).

185. For analysis of the idea of rule of law, see generally Gregory C. Keating, *Fidelity to Pre-Existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1 (1993).

and doing the exact opposite—to leave behavior alone. Complaining of overlegalization is ordinarily not about rejecting the rule of law, but about the operational consequences of particular ways of implementing the rule of law. If certain forms of autonomy and privacy are constitutionally guaranteed, the rule of law requires avoidance of heavy legal regulation of personal choice. On the other hand, the rule of law also requires that, in the first instance, law enforcement officers firmly protect exercises of free speech rights against threatening protesters.[186]

We need law to allow people to be left alone. We now need to examine cases in which it is not obvious that classic legal mechanisms—judicial process, legislation—are necessary for a minimally adequate society. It is not clear, for example, whether "judicial supervention" is called for in certain matters of intrafamilial decision making, such as organ transplantation and death and dying. The issues merit some additional comments that bear both on these particular contexts and on the very nature of the rule of law.

c. Rule of law via rule of courts: When legal "progress" may consist of public ordering by formal adjudication rather than either private ordering, on the one hand, legislation or administrative rule-making, on the other.[187]—Government regulation in various forms—particularly formal adjudication—may suggest without establishing the influence of rational principle, whatever the subject matter. It may dispel or mask an aura of arbitrariness or anarchy and, depending on the circumstances, this may be a significant gain. This seems especially true of judicial decision making which can reinforce rationality ideals by calling upon the domain of principle to attack and manage various forms of contingency and indeterminacy. It may have other effects too—for example, offering comfort and reassurance to certain parties, relieving them of a sense of oppression and responsibility deriving from an

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186. *Compare* Feiner v. New York, 340 U.S. 315 (1951) (upholding the disorderly conduct conviction of a speaker who was threatened by a member of the audience), *with* Cox v. Louisiana, 379 U.S. 536 (1965) (reversing the breach of peace conviction of demonstrators who had drawn a hostile audience).

187. *But cf.* ROGER B. DWORKIN, LIMITS: THE ROLE OF THE LAW IN BIOETHICAL DECISION MAKING (1996). Prof. Dworkin critiques the law's role in bioethics, stating that "our [legal institutional] tools for dealing with social problems posed by rapid change in biology and medicine are limited at best." *Id.* at 18. But he also argues that "[t]o suggest that the law has no role to play in the area of biomedical advance would be both stupid and unrealistic." *Id.* at 2. What I say here is not necessarily inconsistent with his views: He may be stressing what is absent from the glass, while I am addressing what's in it.

See generally Schneider, *supra* note 172, at 18 ("The idioms of the law are often less apt than they might appear. They have arisen in response to needs for social regulation, but the systemic imperatives that shape the law are sometimes a poor pattern for bioethical discourse."). But the division and rearrangement of life processes that I stressed earlier makes matters difficult not only for law, but for ethical analysis. The least-worst course, in some cases, may be to remit the matter to formal adjudication in order to achieve some degree of closure, even if imperfect and possibly transient.

"excess" of options, and so on.

There are, of course, opposing considerations. Intrafamilial lifesaving decisions pose serious value problems. But critics of formal adjudication address a particular subclass of personal value problems—ones in which they believe the issues are *so* serious and involve matters of *such* intensely personal concern that resolving them is a matter belonging exclusively to autonomous persons (or, if incompetent, their proxies) who should be able to act with their physicians without judicial interference, guided only by existing penal laws and rules of professional conduct. On this view, then, a life-and-death issue, whether in transplantation or the use of life-prolonging medical care, is a major aspect of deciding on personal medical care, which is presumptively an individual or family decision.

As we saw, however, protecting these choices may require the community's agreement that the decisional sphere is one for the individual and/or family and not the community. Indeed, the community is obliged to keep the zone of choice clear of legal interference. The private choices do not stand solitary, however. Their cumulative effects may threaten the very regime of private choice if they appear to reflect an unacceptable incidence of undue influence, coercion, or fraud. A rational community would monitor the preconditions for choice, accepting some risk of intrusions on autonomy and privacy: there are no costless ways of proceeding here. The community would also try to assure that the countervailing issues are not only not forgotten, but are acted upon in suitable cases. Important private choices thus inevitably abut the legal system.

> [S]ociety has a significant interest in protecting and promoting the high value of human life. Although continued life may be of little value to the permanently unconscious patient, the provision of care is one way of symbolizing and reinforcing the value of human life so long as any chance of recovery remains. Moreover, the public may want permanently unconscious patients to receive treatment lest reduced levels of care have deleterious effects on the vigor with which other, less seriously compromised patients are treated.[188]

> Even for patients who do not favor such [life-prolonging] treatment for themselves, encountering some degree of resistance to their wishes is a reminder that their lives are important to others.[189]

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188. PRESIDENT'S COMMISSION, *supra* note 178, at 184-85 (footnotes omitted).

189. *Id.* at 108; *see also* Rasmussen *ex rel.* Mitchell v. Fleming, 741 P.2d 674 (Ariz. 1987).

> The question of whether to refuse or discontinue treatment is not simply a medical issue to be left to the doctors; although the medical evidence is in many ways determinative, the final decision incorporates a range of ethical, moral, and societal values which should not be left solely to doctors, family members, or representatives of the court . . . . Such decision making requires the final validation—not necessarily by adversarial hearing—and the detached and neutral inspection of a judicial officer, accountable to

Probing the nature of the value reinforcement (or attenuation) worked by judicial intervention may help explain *both* why we resort to courts *and* complain about doing so and will probably continue to do both.

We learn from what we see, and what we see embraces the operation of institutions and practices. Empirically confirming this is difficult and often impossible, but the claim is nonetheless plausible because it is founded on elementary aspects of human learning. We are entitled to rely on these basics, despite the mass of variables that hinder study.[190]

This inquiry into learning effects concerns, at the start, legal ordering *as* legal ordering, without particular reference to its substantive content. In particular, to take a somewhat anthropological view, it is about the role of formal adjudication as a visible mechanism for overtly principled decision making.

This is not meant to be an opaque, empty procedural orientation. I am not suggesting that "just letting the courts figure it out, however they do it" can regularly provide a satisfactory justification of various forms of legalization. Order for order's sake is not the point. But rule-governedness via formal adjudication transcends matters of particular substantive content, and I proceed on that understanding.

One might think, however, that the rule of law, via courts or otherwise, is ill adapted for use in conceptual regions dominated by heavy indeterminacy. Perhaps talk about courts invoking the realm of principle makes little sense where matters are so chaotic and uncertain that no principles are, or could be, available. To say otherwise would be dishonest, or so one might argue. The life/death choices involved in transplantation and non-use of life-prolonging medical care are well known for resisting clear resolution.

Yet however paradoxical it sounds, resort to a formal body bound to deal with principle as best it can may be useful precisely *because* the principles at stake, as applied to major value issues, appear to resist consistent, determinate application, and perhaps even identification. Law as the reign of principle (not just naked process) whose nature is intuited by special parties may be of central importance where there is general normative confusion about basic values.[191] An

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the law, and therefore to the public.

Id. at 692 (Feldman, V.C.J., concurring). The court upheld a trial court's conclusion that the patient's best interests were promoted by do-not-resuscitate and do-not-hospitalize orders entered on the medical chart. *Compare In re* Quinlan, 355 A.2d 647 (N.J.), *cert. denied*, 429 U.S. 922 (1976) (suggesting circumstances where judicial review is unnecessary), *with* Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977) (disagreeing with the *Quinlan* court).

190. *Cf.* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 820-21, 824 (1994) (stating that "[i]f the law wrongly treats something—say, reproductive capacities—as a commodity, the social kind of valuation may be adversely affected. . . . It is appropriate to evaluate the law on this ground. . . . I do suggest that the expressive function [of law] is part of political and legal debate.").

191. Despite indeterminacy, there may be no general *perception* of confusion. This may be

arena apparently resistant to law because of interminable, insoluble value collisions and murky facts may be a prime candidate for the rule of law precisely because of these conditions.

Conflict, indeterminacy, paradox, and contradiction involving major values thus seem both to call for and resist the rule of law as implemented by courts. The parties at the bedside, some of whom may be affected by fear of liability as well as by moral puzzlement, may invite the judicial rule of law even though this impinges on intensely personal matters. The resistance of the problem to *their* reasoned analysis does not, for them, exclude courts; it *calls* for courts to penetrate the mystery, not just to apply an (imaginary) algorithmic science of law. Perhaps this view of courts is excessively romantic, but it is hard to deny some degree of "charismatic authority" based on a belief in their mastery of matters too deep for the untrained. This is not, however, an "oracular" view of courts, at least on the primary meaning of the term. Courts are not primarily viewed as transmitters of messages from another realm.[192]

Still, the vision of law as replacing chaos with principle fits uneasily with the view that principled reasoning is often at least partly indeterminate, and the fit is even worse when we address the more numbing forms of indeterminacy. The apparent paradox here is that rational principle may fail us when we need it most. Easy cases need the courts less than hard cases do, but if hard cases involve intractable indeterminacies, rational principle alone may not yield an acceptable result, thus leading some to conclude that the use of courts is irrational. On this view, courts are especially inappropriate when their services are especially important.

Yet, they are not inappropriate, because we (or some of us) see courts as having special insight into principle—an insight demanded when the principles defiantly resist the tasks laid on them, and when the issues seem to test major values unwilling to provide answers. Exactly how is it that X is/isn't a Y for purposes of Z? How is it that inaction is/is not killing, that affirmative action violates/promotes "the" ideal of equality, that forced medication of the mentally disordered does/does not promote their autonomy? Courts know, so it is said. They have access to "the normative patterns or order revealed or ordained [by them]," as Weber put it.[193] But if they do know, they know something

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due in part to institutions such as courts. For an account of why lawyers and judges might be useful in contexts when important classificatory schemes are under assault, see Michael H. Shapiro, *Lawyers, Judges and Bioethics*, 5 S. CAL. INTERDISC. L.J. 113 (1997).

192. Perhaps the appropriate "location" of courts is somewhere between mastery of automobile repair (most people can learn at least some of the rules with appropriate training) and mastery of theoretical physics (most people cannot get beyond whatever serves as first base). If one believes in objective moral reality, one *may* also believe that it takes special ability and training to divine what it is, and that not everyone can learn to do it.

193. MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 328 (A.M. Henderson & Talcott Parsons trans., 1964). The full description reads: "Charismatic grounds—resting on devotion to the specific and exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by

mysterious.[194] After all, does anyone really have a nifty decision procedure that always fills in the non sequitur between the statement of the general rules and the conclusion by identifying the true and correct premises? Pursuing "reflective equilibrium" or "coherence theory" or "dialogue"[195] is fine for awhile, but these processes do not take you all the way to closure and are easily tossed around as academic buzzwords. If it were otherwise, we would often have the resolution we sought in the first place, instead of being caught in a process-substance cycling or some other limbo.[196] There is a normative leap to be made. Trying to find it as a deductive consequence of other propositions leads to infinite regress or a search for stopping points. But those stopping points are themselves mysterious, and not clearly identified through moral intuition or revelation (at least in "hard" cases). Reason itself is laced with mystery. Some mechanism is needed to find an end point.

High indeterminacy, then, does not necessarily make the matter unfit for courts.[197] It may indeed make courts the only possible decisionmaker, for they enclose the mystery of the normative leap within the forms of reason, thus transforming the contingent into the unquestionable.[198] Law as formal adjudication cannot be limited to some supposed domain of consistent principles;

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him (charismatic authority)." *Id.* at 328. *See also id.* at 358-63 (discussing charismatic and other authority); MAX WEBER, 2 ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 760 (1978) (stating that " . . . innovation in the body of legal rules may also occur through their deliberate imposition *from above*.") (emphasis in original; footnote omitted).

194. There are objections to this use of "mysterious." It connects reason with magic, which is precisely one of the things with which it is to be contrasted. But if we do not know how to fill in all the premises, the appearance of someone else doing so seems to suggest "mystery."

195. JOHN RAWLS, A THEORY OF JUSTICE 48-51 (1971) (explaining reflective equilibrium); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1240-43 (1987) (coherence theory); BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 43 (1980) (dialogue).

196. Here is what I mean by "process-substance cycling": An absence or failure of substantive criteria for decision making suggests reliance on processes for identifying decision makers in a procedurally appropriate manner. They can then decide how to deal with the problems at hand. It is therefore tempting to finesse substantive problems by relying on procedure, but this is itself an unreliable process. The ultimate decisionmakers must ask themselves how to decide, and are likely to notice the lack of guiding standards and seek outside assistance from their creators and others. If their creators are consulted, they will still have no criteria, and this is at least partly why they delegated the decision making in the first place. The matter is thus sent back down. Thus the phrase "process-substance cycling." Moreover, the very criteria for selecting the decisionmakers are likely themselves to be contested, in part because of the difficulty of selecting and linking their respective characteristics to the nature of the problems defying reasoned resolution. This can torpedo the very effort to rely on "process."

197. One might think otherwise, given doctrines of nonjusticiability in federal constitutional law and elsewhere, but the issue is not to the point here.

198. *See* Sally F. Moore & Barbara G. Myerhoff, *Introduction: Secular Ritual: Forms and Meanings*, *in* SECULAR RITUAL 3, 22 (Sally F. Moore & Barbara G. Myerhoff eds., 1977).

its function is also to deal with the "unprincipled," in a way that makes it seem principled. Courts offer the contribution of open, principled adjudication to value reinforcement. Judicial resolution may attack several sources of contingency[199] in lifesaving and help dispel any aura of conflict of interest—say, parental favoritism among siblings that leads to imposing unjustifiable risks or burdens of care on some to benefit others.

If life-affirming values are sufficiently important, then resolving the meaning of "life-affirming" and testing pro-life values against other values in particular cases requires reasoning, not arbitrary or random action. This is one reason for going public with disputes that many prefer to keep private. To render lifesaving noncontingent, the decision favoring it must be seen as the product of right reason. Reducing the appearance of arbitrary contingency in lifesaving by the use of reason thus can preserve favored values under siege: individual and familial autonomy and privacy. Though other techniques dispose of disputes, they may reduce contingency less if they appear ad hoc or arbitrary; they produce no basis for future understanding, nor do they inspire confidence that, say, lifesaving is preeminently valuable. Thus, to fail to apply reason is to say the issue is unimportant.

This does not fully answer the charge that applying reason through judicial oversight intrudes on what seems to be an intensely private matter. Moreover, the outcome may seem all the worse to the losers because they lose on the merits. It is a striking feature of death and transplantation decisions that they seem at once to call for both private decision and public scrutiny. *The very reason for the personal importance of the decision is a prime source of the community's interest in it*—the continued existence of one of its members and, by implication, all of its members, present and future.

Despite the strong claims for noninterference, the calls for judicial application of principle remain. Principle tells us where to find the edge we teeter on when reason seems to run out. Not just any edge will do. When we reach the edge, we have judges with us—masters of the normative leap, a leap the untrained or uninsightful cannot make. In many cases, as we saw, indeterminacy, autonomy, and privacy do not necessarily make a matter unfit for courts. On the contrary, they make courts, or some other entity openly using reason, the least worst decisionmaker because the indeterminacy must be attacked in a principled way in order to maintain a value structure.

Of course, the whole project may backfire, making things seem even more arbitrary and confused. Rulings widely perceived as unjust or lunatic damage the integrity of the adjudicative institution and its mission. If this risk inspires us to move private choice underground, we return to the specter of contingency—a world in which life is so little valued that we trust it to a set of unconnected private battles that may or may not form a coherent pattern of life or death decisions. With invisible decision processes having visible outcomes (say, secret meetings by shamans in smoke-filled rooms), we do not know if life and pro-life

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199. For explanations of the meanings of "contingent," see Shapiro, *supra* note 137, at 738-39.

values have been compromised by improper wishes for private gain, by a darts game, or by witchcraft, rather than by slogging through the claims of beneficence, autonomy, and so on, in promoting life and family. How important can life and life's sanctity be? Isn't life something important enough, and easily enough eroded, to merit noncontingent support through the consistent effort to apply principle?

And what, finally, of autonomy and privacy? Legal nonintervention generally and judicial nonintervention in particular seem to affirm privacy and autonomy. When regulators choose not to regulate, the ideal of personal choice is reinforced. The indeterminacy created by nonregulation is just what is needed to promote autonomy, or so one might argue.[200]

But suppose judicial pronouncements favor autonomy and privacy, as many now do in both the transplantation and the death and dying fields.[201] (There are of course cases in which it is not clear how far autonomy is favored or disfavored. *Cruzan v. Director* is one of these.)[202] Do such formal statements promote these values more than judicial nonintervention—no courts saying anything? (Recall that nonintervention here refers not to a negative judicial decision, but to no judicial participation at all.) A reasoned view that autonomy somehow prevails in a conflict with other values may reinforce it to a greater degree precisely because the decision is a product of special insight applied by public, authoritative deciders, sensitive to their own limitations. Yet leaving the matter to a court that might have decided against autonomy cuts the opposite way.

Legalization can obviously not only promote ideals of reason, autonomy and privacy, but communitarian interests as well.[203] A court is after all, a community product. This in turn may promote a rationality ideal because the image of a

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200. If the sort of autonomy endorsed is "familial autonomy" or "parental autonomy," it is hard to say just what values are being vindicated, particularly when there are intra-family clashes. There is, in effect, a problem of specifying the "unit of autonomy." *Cf.* Parham v. J. R., 442 U.S. 584 (1979) (upholding parental decision to place child in mental health facility after psychiatric review).

201. *See generally* Curran v. Bosze, 566 N.E.2d 1319 (Ill. 1990) (denying a request for bone marrow testing of children to determine if they were compatible with their half brother); ALAN MEISEL, THE RIGHT TO DIE 83-84, 262-63 (2d ed. 1995).

202. *See* Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990). Although there is some confusion about this, the Supreme Court did recognize or concede (however grudgingly) a liberty interest in competently refusing medical treatment. This was not assumed *arguendo*. The problems for the Court arise when the patient is incompetent and where artificial nutrition and hydration—which some believe are not "medical treatment" but forms of basic sustenance—are involved. Missouri had required that the evidence be clear and convincing that withdrawal of care would be consistent with Ms. Cruzan's wishes while she was competent. *See id.* at 265. The Missouri Supreme Court thought the evidence inadequate, and the resulting judgment was upheld by the U.S. Supreme Court. *See id.*

203. Again, no sharp divisions here; the community's interests include promoting the autonomy and privacy of its members.

central decider—the community—may suggest the idea of coherence, consistency, and caring. This communitarian aspect of judicial intervention is easily understood: "by assembling, and ultimately by sharing responsibility for the decision, they [the community members] once again bind themselves to one another."[204]

But here too, the messages are mixed. Consider medical nontreatment. It may well be that resorting to courts affirms the community by assigning it important decisions, and also affirms certain specific values by having the community, via the courts, endorse them. But a decision favoring nontreatment can be taken to exclude the patient from the community, and so seems to impoverish it: the patient is "thrown away." And where messages are mixed, many of them will get lost. Further, the perceived connection between courts and community (or certain communities) may be weak. Courts may be viewed as intruders, alien to one's prime community.

It is thus unsurprising that we resort to courts to make death-and-dying and other decisions *and* regret the need to do so. There is no inconsistency here. Using courts and grumbling about it reflects the underlying value conflicts, the fear of indeterminacy and of exposing it rather than resolving it, and perhaps our dim awareness of the varying communicative impacts of using or not using courts. Doing X may affirm some values, and complaining about doing X may affirm some conflicting "oughts." Perhaps sometimes we ought to do both, and indeed we do.[205]

H. Bioethics as We Know It Ratifies Establishment Practices and Values and Fails to Question Foundations to a Sufficient Degree

Seedhouse, writing about health care rationing, says that "bioethics accepts uncritically the context which generates the problems it tries to deal with."[206] This is not so. The bioethicists I know and/or whose works I read are largely a self-selected group with an orientation toward "out-of-the-box" thinking. Perhaps Dr. Seedhouse has encountered a sample with sharply different characteristics. I do not plan to do any empirical research on this. I assume that "accept[ing] uncritically the context . . . " is a species of automatically supporting establishment values. Now, if a discipline expresses near universal preference for every significant aspect of the status quo, what is the problem? If the discipline's approval was automatic, their decision making process was unreasonable and possibly dishonest. If it was not automatic and its outcomes remain widely disputed within the field, then the complaint about "secular

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204. Sally Falk Moore, *Selection for Failure in a Small Social Field: Ritual Concord and Fraternal Strife Among the Chagga, Kilimanjaro, 1968-69*, *in* SYMBOL AND POLITICS IN COMMUNAL IDEOLOGY 109, 121 (Sally Falk Moore & Barbara G. Myerhoff eds., 1975).

205. *See* Michael H. Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555 (1988).

206. David Seedhouse, *Why Bioethicists Have Nothing Useful to Say About Health Care Rationing*, 21 J. MED. ETHICS 288, 291 (1995).

establishmentarianism" is better understood as the critic's adverse judgment about the existing value system, or about a particular outcome, or perhaps as a complaint that the establishment is pathologically risk averse in its resistance to change.

Still, the claim of uncritical acceptance of "context" is not utterly vacuous. Some of the criticisms of technologically and socially assisted reproduction ("TSAR") suggest that it is an establishment plot to promote existing conditions, such as patriarchy, the objectification of women and children, and the technological imperative generally. Assuming *arguendo* that these are indeed dominant establishment institutions, then anyone who endorses or fails to oppose TSAR is ratifying the status quo.[207]

There are several facets to this criticism of support and ratification of prevailing establishment sentiments. One is that bioethicists ought to view themselves as part of the "loyal opposition" and should regularly question the status quo—its bottom-line answers, its rules of justification, its processes, and so on—and they do not do this enough. This is the least cutting objection. The loyal opposition idea seems plausible, but I think a loyal opposition already resides in the discipline. I see no evidence that the discipline regularly defers to "What Is" via some conservative reflex. Moreover, in any deliberative literature, many, if not most writers will assume a Devil's advocacy of sorts to test their own claims, some of which may or may not concur with then-current legal and ethical terrain.

Still, such questioning and advocacy may not go far enough for the critics because the questioners and advocates may really accept the rules, principles or outcomes in question. How far up the crooked, *n*-dimensional ladder of abstraction must one go in questioning the status quo in order to escape the charge of knee-jerk establishmentarianism?

A stronger claim may be that establishment institutions, or some major parts of them, are badly flawed—that too many bioethicists buy into them—and that the right moral, conceptual and legal infrastruture should be imported into a new establishment. How many is too many? This is just another way of "critiquing" bioethics without expressly noting one's bottom-line disagreement with many of its practitioners—whether it is a disagreement over procedures, standards, or whatever. I have already dealt with this, saying that such a critique is wide of the mark unless some infirmities can be shown to characterize the literature, the judicial decisions, the legislation, and whatever else we include in the "discipline." The establishment in fact is far from monolithic and is continually under amendment.

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207. See the description of similar and related views in BARRY R. FURROW ET AL., HEALTH LAW 834 (1995) (describing the anti-surrogacy arguments made by others who claim that "such a change in the nature of the reproductive processes dehumanizes the surrogate mother and harms the relationship between the child and the mother. This leads to the commodification of babies, who are treated as a market commodity not substantially different from sofas, pork bellies, or anything else that can be traded for money."). As I argue here and elsewhere, this extravagant idea has no serious empirical or conceptual support.

Another element of the complaint about pro-establishmentarianism may be that, whatever outcomes are sanctioned or recommended, *foundational* values are not called into question in reaching these outcomes. But this position is quite unclear. First, what are the foundational values? Unless there is some realm of dark ethical theory that we have yet to discern, these values are captured by high-order abstractions that are familiar to us all. I am not sure that any given list is exhaustive, and I am also not sure that the membership listings all reflect the same level of abstraction so that comparisons are coherent. But the usual suspects are utility, justice, fairness, equality, autonomy or its cousins, liberty and freedom, and possibly, duty, responsibility, and virtue.

What does testing foundations consist of in this context? Should we question the ultimate normative importance of the values? By hypothesis, these values are basic. They are the criteria for normative judgment, and there is nothing beyond that which normatively validates *them*. Sooner or later, one stops where the crooked ladder seems to end; there is no infinite ascent or regress. Some values are viewed as so basic that all or most of the others are considered derivative. There are utilitarians who, in a sense, reduce all other value candidates to utilitarian foundations. Justice is promoted because it serves utility, not justice. Vindicating justice claims is simply a method of promoting utility. Is this the problem—that most bioethicists are utilitarians? It doesn't seem so. Even if most bioethicists are utilitarians, bioethics would still not be infirm unless the utilitarians never even addressed competing moral theories and dealt with all issues in a purblind way. Where is this occurring as a consistent practice? In academics, at any rate, while there are a fair number of utilitarians, there are not a lot of dumb ones—driven maybe, dumb, no.

As for affirmatively ratifying establishment values such as autonomy, several questions arise: Do too many persons defer too strongly to autonomy? What forms of autonomy? In what areas of medical technology should autonomy be less respected? In what spheres does it have more than equal time? There may indeed be some who have over-emphasized patients' short-term autonomy to resist treatment as opposed to their long-term autonomy in the form of eventual greater functionality, and so resolved doubts against required treatment for mental disorders. On the other hand, there is no doubt that resolving doubts the other way poses serious risks of abuse and of expansion of involuntary treatment. There are those who perhaps too easily take widespread patient concurrence in treatment as undue influence and thus as impaired consent. But I see no objectionable dominance of the one group over the other.

I suggest, then, that there is no overriding "autonomy is everything" principle dominating the field. Even if there were, there might be wide variation over specifics because of the competing internal strands of autonomy: opportunity to pursue preferences; self-direction; and its underlying presuppositions, including competence, authenticity, and voluntariness.

Take, for example, a complaint that because autonomy as a value is *e pluribus unum*, it should not get more than its fair share of attention. Perhaps there was an initial failure to adequately draw out countervailing considerations and preconditions. If this indeed occurred, it was quite a while ago, and, according to careful historical analysis, not everything can be done in a day. But

whether or not any value gets more than its fair share of attention or is short shrifted is certainly not a purely empirical question. The central question concerns moral analysis of the status of autonomy (or of any other value under review). The significant attention that it continues to draw might indeed be the attention it deserves, all things considered.

So, does bioethics, in fact, inappropriately ratify the status quo because "it" thinks autonomy outweighs equality or some other value in more circumstances than critics do? Perhaps autonomy-lovers have misread the official metric (the standard autonomy unit is in a sealed container in the Smithsonian). This reflects a fundamental moral dispute, however, and it is not best described by saying that any of the protagonists holds an inherently flawed position. Autonomy mavens do not have a monopoly on bioethics, nor do egalitarians, partisans of justice and fairness, utilitarians, Kantians, positivists, pragmatists, and so on, at any level of generality.

Finally, this "establishment" argument may be couched in a call for a change in paradigms. The critique may be founded only in part on disagreement with outcomes. It may be an attack on reasoning paths thought to appeal to the wrong exemplars and analogies. Different routes may lead to the same final destination, but if routes are good for more than one trip, they must be sound independently of any particular result.[208] This requires no separate discussion, however. It is included in the earlier account of general discussion about the nature and content of the dreaded secular establishmentarianism.

I mention only briefly the position that the phrase "buying into the establishment" suggests conflict of interest or rigid partisan agendas. The point bears mentioning from time to time, but it is of minor consequence here. Clinical researchers must disclose whether they are on the payroll of a manufacturer of the drug, biologic, or device being investigated. Bioethicists may sometimes encounter conflict of interest problems, but the scale is quite different. They must disclose who has retained them, if anyone, and the fact that they are being paid, and possibly how much. If they are designated spokespersons for some institution, this must also be disclosed. Being devoted to a theoretical or ideological stance, however, is different. People who are loyal Kantians do not presumptively have to disclose this, and in any case, their condition will soon become apparent. Not that there is anything wrong with being devoted to Kant; I used to set my watch by his daily walks.

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208. *See generally* P. Lance Ternasky, *Salvaging Moral Progress*, 49 PHIL. EDUC. 126, 128 (1993) ("For those arguing for [moral] progress, it comes as no surprise that the dominant ethical theories often disagree dramatically in principle but converge when making application to actual cases.").

I. Bioethics Bears the Smell of the Lamp[209] *and Offers No Practical Guides*

The claim that bioethics offers no practical guides is extremely weak. For one thing, the discipline—and *any* branch of thought—must deal with abstractions. Here, they are in the form of rules, standards, principles, maxims, bromides, and conceptual constructs such as hypotheses, theories, conjectures, thought experiments, analogies, paradigms, and so on. A given professional contribution may be too abstract to provide practical guidance down to the final decision level, but a discipline without such contributions is likely to bear foundational deficiencies beyond what one would normally expect. To the extent that the critical claim is a complaint that bioethics engages in unnecessarily extended reflection and deliberation, it should with due reflection and deliberation be dismissed.

Second, the complaint about the lack of practical applicability is closely related to the complaint that few or no answers are forthcoming, a matter to which I earlier referred. In many cases, it is, in principle, impossible to arrive at a unique right answer to which all contending parties are likely to assent; this is the nature of the abstractions under siege.

Finally, the literature contains many contributions by persons who address themselves to the clinical or technological setting and suggest particularized factors and variables that the principles may or must consider.[210] This may even offer bottom-line answers in various cases. Complaining that there remains a dearth of clear and convincing answers, however, is likely to reflect a deep misunderstanding of what ethical, legal, and policy analysis is.

J. There Is No Unified Theory Underlying Bioethical Analysis and Problem Solving[211]

If a commentator offers a theoretical contribution that purports to be sound, coherent, and useful, but whose theoretical underpinnings are substantially in conflict *inter se* and no discussion of their possible reconciliation is offered, then one may rightly complain of a certain intellectual disarray, if not of fatal errors. This is one frequent criticism of principlism.[212] However, the lack of a truly

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209. *Cf. id.* at 126 (describing a world of incommensurability that results in contradictory ethnocentric systems and stating that "if this is the most we can expect, then the interminable debates between divergent theoretical camps may be principally viewed as entertainment for academics.").

210. *See generally* ALBERT R. JONSEN ET AL., CLINICAL ETHICS: A PRACTICAL APPROACH TO ETHICAL DECISIONS IN CLINICAL MEDICINE (4th ed. 1998).

211. *See generally* Clouser & Kopelman, *supra* note 42, at 124 (discussing the lack of a unified view of bioethics).

212. *Id. See also* K. Danner Clouser & Bernard Gert, *A Critique of Principlism*, 15 J. MED. & PHIL. 219 (1990). The authors state that no argument "exists to support the role of principles in the hierarchy they [Beauchamp and Childress] propose," *id.* at 231, and that "with principlism, disagreements are often not only unresolvable, but one often does not even know what the basis of the disagreement is or what changes in facts would produce agreement." *Id.* at 234. Clouser and

unified theory that provides clear answers in every area is not a fatal error in bioethics any more than in other fields. The error, quite the contrary, would be to think that such a theory is possible.

K. So Is Bioethics Broke or Not?

I do not see that bioethics needs, or is undergoing, paradigm shifts. This is not a claim that everything in the field is to remain the same for eternity. Nor is it a claim that there can be no "progress" or useful new paradigms or lines of thought. But to say that we should attend more to responsibility and duty than to rights, or to think of community needs and not just autonomy needs, or that law is over- or under-present, is not necessarily an attack on foundations or existing paradigms. It may be a shift in emphasis in recognition of considerations that, in any field, may be underdeveloped for a time. Conceptual systems do not spring complete from any individual's or discipline's heads. There is also the usual reservation that whether prior analytics are overdone or underdone may rest less on comparative time sheets than on moral and policy differences.

Let us draw out this idea of assigning differential "weights" to liberty claims as against community claims. The very idea of assigning weights to competing considerations and then "balancing" them *itself* reflects a dominating paradigm, not only in constitutional law, but in other fields of law and in moral reflection. In many arenas, balancing is not simply a useful paradigm, *it is a core of rationality*. It is an effort to judge the worth of a course of conduct by considering its good and bad aspects and impacts—whether we speak of them as intrinsic or instrumental, or refer to consequences, or to value or duty impairments, which are also consequences of a sort.[213]

It is too loose a use of the word "paradigm" to say there is a paradigm shift in withdrawing weight from, say, a liberty claim, or adding weight to a community claim. Indeed, such "interior" shifts within a conceptual argument structure are often *contrasted* with paradigm shifts, although, as ever, the

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Gert add that "[w]e believe, in the sense given to 'principle' by [William Frankena] and by Beauchamp and Childress, that for all practical and theoretical purposes there are no moral principles." *Id.* at 235. They also urge, more generally, that "it is a moral theory that is needed to unify all the 'considerations' raised by the 'principles' and thus to help us determine what is appropriate." *Id.* at 228.

213. This general formulation belongs both to consequentialist and nonconsequentialist theories. Rational moral reflection is not confined to balancing "utiles"; one "balances" in deciding whether to break a promise to one person or satisfy a conflicting obligation, despite the perils of incommensurability. Thus, comparing value gains with value losses is not characteristic solely of consequentialism. Conflicting duties can be compared and balanced—so also with conflicting rights and conflicts between duties and rights. *Cf.* NOZICK, supra note 134, at 28-29 (discussing "the utilitarianism of rights").

On incommensurability, see generally Richard Warner, *Topic in Jurisprudence: Incommensurability as a Jurisprudential Puzzle*, 68 CHI.-KENT L. REV. 147 (1992); Sunstein, *supra* note 190.

distinction is blurry edges. Nevertheless, the call for reassignment of weights reflects moral disagreement at an important if non-cosmic level. Tricking a clinically depressed but technically competent person into taking antidepressants may, for one evaluator, vindicate "true" autonomy because it maximizes long run opportunities for self-directed rational pursuit of one's settled, authentic preferences. For another, it is an exercise in private or public paternalism and is never justified. This is a substantial dispute,[214] but if one switches from the one view to the other, this is likelier to result from re-valuing the competing aspects of autonomy, not from an earth-shattering change in moral perspective. A field is not necessarily reinvented by switching sides—although one could speak of "sub-paradigm" switches: from long run to short run, "future self" to present self, more paternalism to less paternalism. Whatever these switches are called, however, establishing a need for them does not establish that the discipline is broken. The same holds true even if it is shown that the field has too many hard-nosed libertarians, or too many equally hard-nosed paternalists.

Reassignment of weights generally reflects both factual and moral/conceptual matters. Thus, if we are told by bioethics' critics that we have been assessing, weighing, and balancing *the wrong things*, then *what are the things missed or to be replaced?* On the other hand, if we are told we have been testing the right things after all but *assigning the wrong weights*, or that we have been *using an inaccurate scale or balancing mechanism*, how then are these errors to be corrected?

So, rival views concerning the identification, ordering, weighing, and balancing of values are one thing—significant, but not mind-numbing. On the other hand, matters are far more serious if the deficiency is failing to identify the material moral issues, or failing to analyze them and instead relying solely on mental/intestinal sensations of "repugnance,"[215] rejecting weighing and balancing and instead applying, absolute rules at a high level of generality. If these latter failures were endemic to bioethics, I would concur with the critics' final conclusions and calls for repair, though probably for different reasons and contemplating different kinds of remedy.

What, then, drives the critique of bioethics?

1. Disagreement with Outcomes.—In significant part, it seems to be disagreement with bottom-line conclusions, whether with a commentator's conclusions, a court's rulings, a legislature's enactments, an ethics committee's recommendations, and so on. But this is not an adequate basis for an ascription of brokenness. Reflective critics are likely to inspect the inputs that yielded the output, presuming that bad conclusions stem from bad thinking tools and techniques.

2. Inappropriate Methods/Concepts of Analysis and Valuation.—One can claim that any given outcome reflects a wide variety of mistakes. The outcome may derive, for example, from a mistaken value-ordering within a moral

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214. *See generally* Michael H. Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237 (1974).

215. Kass, *supra* note 39, at 17.

hierarchy, but this too does not automatically mean that the system of thought embracing a particular ordering is seriously faulty, nor that the ordering itself is incoherent. Far more seriously, it may also derive from completely excluding important considerations, rejecting crucial paradigms, failing to credit major perspectives, or from conflicts of interest. If so, something is indeed broken. This is just what we would say, for example, if health care commentators took no account of the role of patient preferences or of patients' exclusion from health care services, or if they assigned zero value to community interests, or completely discounted differences among racial, ethnic, gender, and other groups.

The critique thus implicitly embodies either a bare objection to an outcome or a moral or conceptual dispute. The latter sort of debate often includes claims that one's opponents "don't get it": they have missed material moral issues, are misled by the wrong paradigms and analogies, are mindlessly rooted in the establishment, etc. I think this is generally not the case. Beyond its rhetorical usefulness when vented by ideologues, insisting that "they don't get it" is often just a misleading way to beg the question.

L. A More Suitably Limited Critique of Bioethics Which, if Implemented, Would Clearly Count as Some Progress

1. Loose Talk.—This Article is not a whitewash of bioethics. There are matters to complain about. I referred earlier, for example, to the questionable quality of debates on various issues.[216] One can also complain that there is a tradition in some areas of bioethics to buy into *sub*-establishments—e.g., the long-standing opposition to some or all TSARs.[217]

The sub-establishment themes are that TSARs promote male domination, professional domination, objectification of particular women, of women generally, of children, and perhaps everyone and everything within range. Value theories are not identified clearly, or if they are, are largely undefended; inferential leaps and conclusory arguments carry the day.[218] Despite all these deficiencies, however, the anti-TSAR articles, judicial decisions, or commentaries may remain in other respects insightful, useful, and, most importantly, sources of important perspectives that others may miss. I cannot recommend that a part of bioethics be temporarily shut down for repairs just because it is, more than not, mistaken in its judgments about assisted reproduction.

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216. *See supra* Part I.

217. This point exhibits the dangers of arguments about ratifying or buying into the establishment. If you attack the establishment consistently over an extended period and gather a substantial, nontransient following, you have created yet another establishment or sub-establishment of sorts. This line of criticism of bioethics does not seem well thought out. The characterization is largely a tendentious way of labeling opposing views.

218. For expansion of these views, see generally Shapiro, *supra* note 47; Shapiro, *supra* note 66.

Consider, for example, Annas's view on certain modes of assisted reproduction:

> Both clinics and courts like contracts, because they seem to put private, procreation-related decision making in the hands of the married couple and permit the courts simply to interpret and enforce voluntary agreements. [1] The problem, however, is that much more than contract law is at stake in these cases. The courts are not simply affirming the contents of a contract but are implicitly making profound and wide-ranging decisions about the status of embryos, the interests of children, and the identification and responsibility of their parents. [2] The inadequacy of contract analysis in this area can be seen by the fact that no court has ever forced any person to fulfill the terms of a surrogate-mother contract, a custody contract, or a marriage contract by requiring that the parties be bound by the contractual terms regardless of their current wishes or the best interests of the children involved.[219]

There is much to learn from these remarks, and much to lament.

Concerning [1], the view that the courts, in enforcing contracts, are implicitly (it seems pretty explicit) deciding serious value issues: embryo status, children's interests, and parental identification. This is not generally an *objection* to contract litigation (or any other sort of litigation); it is one of the *rationales* for formal adjudication. The problem, for some, is that the issues were decided the wrong way, not that they were decided at all, and/or that the underlying transactions should never have occurred. *York v. Jones*,[220] for example, dealt with cryopreserved embryos as property, more specifically as the subject of a bailment contract. Perhaps some think the case should have gone the other way by saying it was contrary to public policy to view embryos as "property" in the sense that they are subject to someone's right to control. This too would have been a decision about embryonic status, although a pretty lame one that gravely impairs procreational autonomy.

Claim [1], then, is 180° off, at least in some cases. Every time a contract (or severable contractual term) is upheld or invalidated because of or despite public policy, a common law court is necessarily making value-laden judgments. These considerations are not "more than contract law," but an integral part of it. It is thus not apt to say "more than contract law is at stake," as if the law of contracts were a discrete, autonomous region having little connection with the major policy issues of the day. "Contract law" cannot be dismissed as some separate irrelevancy: it is intrinsic to how we live. "A matter of contract" is sometimes

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219. George J. Annas, *The Shadowlands—Secrets, Lies, and Assisted Reproduction*, 339 NEW ENG. J. MED. 935, 936 (1998). The case references are to *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998) (a gestational surrogacy case) and *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) (concerning custody and use of frozen embryos after divorce).

220. 717 F. Supp. 421 (E.D. Va. 1989) (ruling that genetic parents of a cryopreserved embryo had a contractual right to remove it from the storage facility so they could try implantation elsewhere).

used as an epithetic claim (as in "love is not matter of contract"), but there is no *reductio ad absurdum* one can make here; *there is no inherent contradiction or incoherence in applying contracts to certain matters of intimate association or personal choice*. Which ones are appropriate for contractual arrangements and which ones are not is contested, but the answers are not obvious. The error here is to reduce the idea of contract to everyday mercantile matters such as purchasing appliances. "Contract law" is thus used as an epithet or rhetorical flourish. But contract law is about holding persons responsible for what they say they will do in a variety of settings, and such responsibility is a critical component in vindicating basic values such as autonomy, justice and fairness.

Now, as a jurisprudential matter, one can—one *must*, as a good jurisprude—ask whether the courts in contracts or other cases are to make "independent" moral judgments as the community's delegates, or whether they are to make complex empirical judgments about how the community ranks certain moral claims. *Thor v. Superior Court*,[221] not a contracts case but a dispute about constitutionally protected "fundamental rights," suggests the latter, though the matter is open to doubt. (Such heavy issues are not confined to constitutional cases: they can come up in litigation of any sort, including contracts.)

Finally, for completeness' sake, I note that courts, on a daily basis, adjudicate matters concerning "the interests of children" by examining settlement agreements—contracts—dealing with custody and child support. They are open to judicially authorized revision, but they are far from being contractual nullities.

Concerning **[2]**: assuming *arguendo* that courts have never specifically enforced a surrogacy contract or any of the others mentioned, it does not follow that contract law is "inadequate" in this area. Indeed, Annas should be arguing that contract law does exactly what he wants it to do—refuse to enforce surrogacy contracts. In any case, there is no adequate explanation of "inadequacy"; it is simply a conclusory observation.

Although it is technically true that courts have not enforced surrogacy contracts *as such*, what is left out of this account suggests precisely the opposite of what Annas claims about contract law's usefulness.[222] In *Johnson v.*

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221. 855 P.2d 375, 383 (Cal. 1993). As mentioned earlier, the court ruled that a prisoner's choice to refuse lifesaving care was a fundamental common law right and perhaps a state constitutional right. *See id.* at 381. The court investigated contemporary philosophical accounts of autonomy and its moral ranking and incorporated these "findings" into its reasoning. The court said that "[g]iven the . . . legal and philosophical underpinnings of the principle of self-determination, as well as the broad consensus that it fully embraces all aspects of medical decisionmaking by the competent adult, we conclude" that a physician has no duty to treat an objecting patient, assuming the refusal is informed. *Id.* at 383. This might be interpreted as an empirical determination of the community's values, supplying a key premise in the court's argument. Such an investigation is critical in (dis)confirming "tradition" under the Fifth or Fourteenth Amendments in order to decide whether a claim involves a fundamental liberty interest. To be sure, it might also be viewed as an application of the court's own views on the moral status of various ideals, such as autonomy. However, the distinction, in practice, seems very hard to draw.

222. At a later stage of the article, Professor Annas does point out that "[t]hese courts

Calvert,[223] the California Supreme Court ruled that custody of a child belonged to the genetic parents in a gestational surrogacy case because they were the intended rearing parents. The court took the view that when genetics and gestation are divided between two women, identifying exactly one "natural mother" requires looking to the parties' intentions at the time of agreement.[224] The agreement here, even though not enforced as such, was *all but conclusive* on the question of what that intention was.[225] The contractual perspective was thus hardly "inadequate" or peripheral. It was central to the court's conclusion. Contracts do not have to be enforced *qua* contracts for them to have a powerful effect and to adequately show what needs to be shown under a governing rule of decision.

Now, examine the claim in the same article criticizing the role of courts in assisted reproduction:

> **[3]** The California court's most important insight was that courts have an extremely difficult time making meaningful public policy in the realm of assisted reproduction because they are limited to deciding individual disputes after the fact, and that the legislature, which ideally can foresee and prevent disputes, is therefore the preferred law-making body in this area.[226]

The term "therefore" ought to be restricted to valid arguments, and none is in evidence here. If courts find it hard to make public policy judgments "because they are limited to deciding individual disputes after the fact,"[227] one would think this difficulty is not confined to assisted reproduction: all adjudication is impeached when public policy seriously intrudes. But the claim is hard to fathom. The theory of common law development and the U.S. Supreme Court's hostility to "advisory opinions" rest partly on the notion that before *general* rules of decision are announced, the court should be able to see how possible rules and

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arguably did as well as they could, and reliance on prior contracts as a way to resolve controversies in assisted reproduction has also been espoused by leading legal commentators." Annas, *supra* note 219, at 937 (footnote omitted).

223. 851 P.2d 776, 787 (Cal. 1993).

224. *See id.* at 782.

225. *See In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 900 (Cal. Ct. App. 1994):

> [T]he [California Supreme Court] did not actually hold that the gestational surrogacy contract at issue in Johnson v. Calvert was enforceable as such. Rather, the court stated that such a contract is a proper basis on which to ascertain the intent of the parties because it does not offend public policy "on its face." In Johnson v. Calvert the function of the surrogacy contract was to serve as a vessel in which the parties could manifest or express their intention. The gestational surrogacy contract was never held to be enforceable per se.

Id. (citations omitted).

226. Annas, *supra* note 219, at 936. Annas is referring to *Buzzanca v. Buzzanca*, 72 Cal. Rptr.2d 280 (1998), a surrogacy case.

227. Annas, *supra* note 219, at 936.

their variations play in the concrete matters before them, incrementally adjusting the rules as new facts and perspectives come up in new cases. The entire body of the common law originally developed this way—through deciding disputes "after the fact," i.e., after a dispute arose that could be presented in specific form to a court. Once again, talking about the supposed infirmities of adjudication seems in reality an expression of hostility to the underlying transactions.

As for the *non sequitur* that legislatures are the "preferred law-making body in this area" because they can "foresee and prevent"[228] disputes: First, absolutely nothing is shown about why "this area"[229] is more fit for legislatures than courts. Second, that the legislature is able to foresee and prevent disputes does not establish that it is the preferred law making body. While knowing in general terms what the future might bring is pretty handy, the lack of concrete knowledge which in some partial form may be before a court cuts the other way. True, a court can be overly swayed by particulars; however, courts, as we know them, decide on the basis of general rules, principles and standards, whether recognized as explicitly or implicitly preexisting, or openly created in a case of "first impression." In doing so, courts look to the future as well as the past, and in articulating and applying their selected abstractions often assess the expected impacts of their rulings. In many cases, courts can "foresee and prevent" as well or better than legislatures.

Third, we can certainly find tasks and problems fit only, or primarily, for legislatures. Tax codes are not created *in toto* by common law courts, although they may obviously have a spectacular impact on the legislature's prior work. We can also find matters that are fit only for courts. Adjudications of guilt and imposition of punishments are generally prohibited by constitutional provisions disallowing bills of attainder.[230] But beyond such polar cases, there is no satisfactory theory available that decisively establishes for all kinds of disputes, past, present, or future, whether they can be dealt with more or less effectively by legislatures as opposed to courts. The idea that legislatures are inherently better at deciding how to handle TSARs has no foundation in jurisprudential theory, legal philosophy, historical analysis, or anything else. One might have made much the same claim about whether transplantation of organs from live sources, adult or child, competent or incompetent, should be permitted. What theory shows us that legislatures would have been better than courts in making the initial foundational decisions?[231] Even authorization to rely on "brain death" criteria, though now universally dealt with in the United States through adoption of the Uniform Anatomical Gift Act,[232] can in principle be established through

228. *Id.*

229. *Id.*

230. Conviction by the Senate following Presidential impeachment by the House is not an exception.

231. *See, e.g.*, Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969) (authorizing transfer of a kidney from a mentally impaired sibling to his brother).

232. UNIF. ANATOMICAL GIFT ACT, 8 A.U.L.A. 29-62 (1987).

common law adjudication, as in *Lovato v. District Court.*[233]

Perhaps in various cases legislation, while not indispensable, would further goals of predictability and help avoid disputes. But a series of judicial decisions may do the same. Nor is there any basis for the view that critical policy and value-laden analyses, whether styled as moral decision making or reliance on perceived community norms, are better made by legislatures than courts. It is sometimes worth recalling that courts, as ideally viewed, are meant to exclusively inhabit the universe of principled decision making; legislatures are not. While we prefer legislation to be rational and, when not horse-trading or pork-barreling, to rely on principle as do courts, our preferences are regularly frustrated by reality. The claim of legislative superiority is thus not only not made out, but it is in tension with reality.

Elsewhere, Annas points out: "The court's opinion [in *Buzzanca*], for example, gives no guidance on what should happen if the gestational mother or the egg donor changes her mind and wants to be designated the legal mother with the rights and responsibilities to rear Jaycee."[234] One could argue that under *Johnson v. Calvert* the matter would be resolved by reference to original intentions. The implication seems to be that if a legislature had considered the problem, it would have anticipated this and, because it is not bound by judicial rules against deciding cases not before it, would thus have saved us a lot of problems. Is it true that legislation generally has fewer gaps and unanticipated problems than a judicial rule of decision? Even if this were to some extent true, would this overshadow the benefits of a court's focused attention on the singular and vivid facts of the case before it?

Annas also asks: "**[4]** Must obstetricians and hospitals locate and interpret contracts to determine who a child's legal mother is at the time of birth? Do commerce, money, and contracts really have more to say about motherhood than pregnancy and childbirth?"[235]

Sometimes, having skills in assembling words in rhetorically effective ways is dysfunctional. (Think of Justice Holmes, the master rhetorician of U.S. law, in *Buck v. Bell.*)[236] One is inspired to shout, with Annas that *of course* mere matters of the market, of trade, of (gasp) contracts cannot tell us about (sigh) motherhood, pregnancy, and childbirth!

Sounds good, but question-begging allusions often do—that is why we write and read them so often. What is it that pregnancy and childbirth "say" about motherhood? Cases such as *Johnson v. Calvert* are litigated *precisely because pregnancy and childbirth do not tell us what we need to know*, unless one begs the question by *stipulating* what is *contested*: that gestation trumps genetics regardless of anyone's intentions about their respective roles, and therefore

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233. 601 P.2d 1072 (Colo. 1979) (ruling after looking to proposals for legislative action, including failed bills).

234. Annas, *supra* note 219 , at 937.

235. *Id.*

236. 274 U.S. 200 (1927) (upholding the constitutional validity of a statute authorizing involuntary sterilization of a supposedly mentally impaired person).

pregnancy and childbirth "say" "Mother."

What *can* we say about motherhood and its relation to pregnancy and childbirth? We can say that pregnancy and childbirth just aren't what they used to be *when we are talking about gestational surrogacy*. The entire problem rests on the division of genetics and gestation. To assume that "contracts" and "commerce" have little or nothing to say about true motherhood simply ignores the central moral/conceptual difficulty concerning how to determine whether our exactly one natural mother is to be the genetic source or the gestational source. Asserting that "but for" the gestational mother the child would not exist is bootless. But for the genetic mother, the child would not exist either.[237]

Now, there are some who simply assert that *obviously* it is the gestational mother because the gestational mother nurtured the child.[238] I do not doubt the formation of emotional bonds by the gestator, but these gestation-beats-genetics commentaries rarely even *refer* to the supposedly peripheral role of the genetic mother. That flaw is fatal to the soundness of the argument, and if such glaring omissions were consistently made across an entire field, then, *pro tanto*, the field would be "broke." To fix one's gaze exclusively on the pregnancy and childbirth; to systematically ignore the very genesis of the decision to procreate; to fail to explore common understandings of the idea of "my own child"; to fail to inquire into the state of mind, the expectations, the bond-from-afar, of the two persons who exclusively formed the child's genetic template and who await the child's birth so that he can be integrated into their family—this is utterly incomplete analysis. Although I disagree strongly with the weight of scholarly authority that automatically favors gestation, the overall field of bioethics, including its legal processes and scholarship, has not systematically ignored the interests of genetic mothers. Particular arguments may be "broke," but the field is not.

Annas concludes:

> **[5]** If we consider the best interests of children more important than the best interests of commerce, children will be best protected by a universal rule that the woman who gives birth to the child is the child's legal mother — with, among other things, the right to make treatment decisions on behalf of the child and the responsibility to care for the child. **[6]** I believe this not because it is the traditional or natural rule but

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237. *But see* George J. Annas, *Assisted Reproduction: Who Is the Mother?* (response to letter), 340 NEW ENG. J. MED. 656 (1999) (responding to letter to the editor).

238. *See, e.g.*, Rothman, *supra* note 37, at 1607.

> We need to reject the very concept of surrogacy. We need to reject the notion that any woman is the mother of a child that is not her own, regardless of the source of the egg and[/]or of the sperm. Maybe a woman will place that child for adoption, but it is *her* child to place. Her nurturing of that child with the blood and nutrients of her body establishes her parenthood of that child. Trying to find a moral stance that recognizes the viewpoint of women in these various patriarchal traditions is not an easy task.

Id.

> because the gestational mother is the only one of the three potential mothers [as in *Buzzanca*] who must be present at the child's birth and available to make decisions on behalf of the child. [7] She is also the only one of the three potential mothers who has a personal relationship with the child.[239]

[5]: Annas's statement that the best interests of children are more important than the best interests of commerce registers a false opposition. "The best interests of commerce"? What does this refer to? Commerce is commerce in *something*. Here, it concerns an arrangement designed to create a nuclear familiar through a form of TSAR in which someone is paid for reproductive services. It is unsound to focus on the exchange of wealth while systematically ignoring the creation of a nuclear family. If the point is that some methods of family formation are illegitimately placed "in commerce," that point must be confirmed, and to this point it hasn't. Using "commerce" as a conclusory epithet, but without additional analysis of the supposedly baleful effects of exchanging money or other value, is all but useless. "Commerce vs. best interests" is thus a comparison much too tendentious to be helpful.

Item [6] offers prudential reasons for saying that the birthmother is the legal mother. You *know* who the birthmother is. But if the genetic sources get caught in traffic—or even if they do not—how do you *know* they are really the selfsame genetic sources mentioned in surrogacy contract? You cannot *see* genetic motherhood the way you can *see* childbirth.

There is some risk here, not overwhelming, but nonzero. Now, are we going to overturn a novel way of forming a nuclear family, to which all the parties agreed, because of the small chance that the gestational mother, or a stranger, will claim that she is in fact the genetic mother, leaving us all hopelessly confused without the vaunted bright-line rule that gestation proves all? And, if this unlikely scenario *does* come up (as unlikely scenarios have a way of doing), there are relatively quick and accurate scientific methods to determine who's whom. This is annoying and costs money, but it will not happen in a large fraction of cases and the asserted risks simply do not outweigh the benefits, *except for those who place small value on the interests of genetic parents who want a family*. Here again, we see that the central moral question has been begged: What is the relative valuation of *supplying ova in order to become a genetic mother* and *being the gestator of a child*? A low value assigned to the former leads almost automatically to assigning custody to the gestator, and explains why custody is decided on the basis of an unlikely and minor delay in identification. If the value of reproductive planning by a genetic mother and father is near zero, then even a minor risk of confusion vastly outweighs it.

So, the proposed pragmatic rule favoring gestation not only avoids the hard moral choice—it *presupposes* that it has been settled, and thus adds little or nothing to rational debate on the issue.

[7] Next, we have Annas's argument that the gestational mother is the only

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239. Annas, *supra* note 219, at 937 (footnote omitted).

one with a "personal relationship" to the child. Is it hard to see the circularity here? What does "personal relationship" mean? It must mean, in this context, that the pre-child developed inside the gestator's body. So, "I have a personal relationship with this child" means "this child's body was locked into and growing in mine." Genetic connection, however, is evidently no basis for a personal relationship. After all, what about anonymous sperm donors or even egg donors? No personal relationships there, right? Why aren't all problems this easy?

But we are not dealing with anonymous suppliers of gametes. We are dealing with someone who supplied half the child's genes *on the understanding that this procreational contribution would be realized through the custody and companionship of the child.* Genetic determinism may be false, but if "Genes-*'R'n't*-Us"—if they *aren't* everything—they sure as hell aren't nothing. Environmental determinism is at least as false as genetic determinism. Why this intended connection via genetics and companionship is not a personal relationship—different, to be sure, from the gestational connection—is not apparent. It is obvious that, once again, a rhetorical display rests on begging the central question: Is the gestational relationship the true personal relationship, and the genetic relationship the imposter—or the reverse? Note that nothing whatever is said about one of the prime elements of the personal relationships in question here: the nature of the psychological bonds of the genetic and gestational mothers with the child in any given case, and in general.

Perhaps the baleful influence of Oliver Wendell Holmes, Jr. really is at work here. He has caused generations of imitators to struggle for their Black Belts in Rhetoric. They have all failed. What's more, Holmes himself failed. (No time to show this and the margins are too small, but I have a great proof.) Give it up.

Finally Annas states: "**[8]** [A] bad way to protect the children who have been conceived and born with the assistance of the new reproductive techniques is simply to provide the adults involved with what they want."[240]

Is it a bad way to protect children born the more-or-less regular way to let their parents keep them *just because that is what the parents want?* Why, the very idea is ridiculous. It's time to institute Plato's Republic and stop all this procreational autonomy foolishness and install the true protector of all, the Republic. Let the parents get together, let the child be born, and then the Philosopher Kings will take over and the child will be raised *properly.*[241] The idea that children's interests might be promoted *precisely by providing the adults*

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240. *Id.* at 938.

241. *See* PLATO, THE REPUBLIC AND OTHER WORKS, Book V, 151 (B. Jowett trans., Dolphin Books 1960) ("The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be."). *Cf.* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 286 (Cal. Ct. App. 1993) (quoting *Adoption of Kelsey S.*, 823 P.2d 1216, 1234 (Cal. 1992) ("We simply do not in our society take children away from their mothers--married or otherwise--because a 'better' adoptive parent can be found")).

who planned their existence with what they want is ridiculous, right?

Now, substitute TSAR for regular procreation. What are the exact reasons for rejecting out of hand what the parents want? There are no exact reasons. There are speculations about objectification, dehumanization, exploitation, and a large number of other slogans indigenous to the TSAR literature. But what is truly demoralizing about this last quoted statement, which is shared by many in the business of commenting on TSARs, is the offensive dismissal of individual and parental reproductive autonomy. Who cares about it anyway? They *want* a child? Who do they think they are to claim that "simply" wanting a child carries any weight in this Republic?

None of these complaints suggest that the pursuit of bioethics is gravely impaired. They do indicate that certain aspects of its practice can stand some serious repairs. Careful analysis will, I think, suggest that many of the asserted risks of life science technologies are greatly exaggerated.

2. Refocusing on Interpersonal Bonds in an Age of "Investing" in Genetic and Nongenetic Human Engineering Plans: The Risks of Reduction.—All biological technologies used on ourselves and our possible and actual children ought to be assessed for their risk of eroding noncontingent bonds. "Bonds" here refers to the sense of duty and feelings of affection we have for our children, whatever their traits, and for each other as persons.[242] It is not silly to wonder whether, say, altering physical and mental traits in living persons, or altering the germ line to produce or augment specific attributes, may lead to viewing individual worth as contingent on whether the engineering plan "succeeded." Different technological and social arrangements for reproductive engineering pose different levels of such risks: It is one thing to pursue IVF or surrogacy when used simply to relieve infertility within a standard family (there, the investment is in money, time, some physical discomfort, and emotional distress). It is another to plan human trait alteration. I do not propose flat bans on the latter; I simply say they pose greater risks because *planning* a trait makes that trait more salient, and possibly more valuable or fearful in our eyes. Ideally, we are more oriented toward viewing most traits as simply one of many. We thus can avoid one form of "reduction" in which whatever value one has as a person is ascribed to the single trait or traits in question. But ideals are one thing, reality another. Reduction is the core mechanism of "objectification," and, if we are concerned about (de)valuing people in this reductionist way it requires close attention.

Although focusing on the precise mechanisms of reduction may be helpful, this too has its limitations. Yet another paradox is at work in reduction analysis: We are at risk for reducing people to specific traits because these traits are useful to us or, in any case, were planned or "ordered up." This is not good. But what is the alternative? How do we value people in the preferred way? After all, we do not bond to disembodied entities.[243] We choose friends and colleagues on the

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242. *See* Shapiro, *supra* note 137, at 683-87.

243. *See* Hans Jonas, *Against The Stream: Comments on the Definition and Redefinition of Death*, *in* PHILOSOPHICAL ESSAYS: FROM ANCIENT CREED TO TECHNOLOGICAL MAN 132, 139

basis of a variety of traits, although usually in a nonspecific way. How would we ordinarily respond to the question: "Why do you like X"? Specificity here might suggest a diminished view of the person. How would we respond when the person's attributes derive from germ-line control?

It appears, then, that the very process to be feared—reduction of persons to things—rests on attending to traits, but that attending to traits is central to desirable valuation of persons. The (partial) resolution of this tension would be to mark out the differences in how we address traits when we improperly reduce persons as opposed to properly valuing them.[244]

III. THE IDEA OF PROGRESS IN ETHICS AND LAW, AND SCIENCE AND TECHNOLOGY: IF BIOETHICS WERE BROKE, HOW WOULD WE FIX IT?

A. Preface: The Domains and Senses of Progress

1. Advancement, Stasis, Regress, and Falls.—There is a sizeable literature on the idea of progress and how that idea has progressed, or has at least changed. But much of it is of limited use for my purposes—comparing the ideas of progress in moral and legal theory and their applications to human behavior, science, and the life sciences and technologies in particular.

Historians of both the concept and the fact of progress often note its contrast with earlier, quite different visions of human life: stasis or even regress in human affairs, perhaps in a fall from some golden age.[245] Whether we have "fallen" or "regressed" or stood pat, however, is as much a matter of evaluation as it is of fact. "Progress," like many of our major concepts, is normatively ambiguous, and thus so is "catching up." Whether X ought to catch up with Y depends on valuations of X and Y and the moral and nonmoral costs of catching up. Whether X has indeed caught up, gained on, or even exceeded Y, is also a matter of value and fact.

Some of the critiques of contemporary technology seem to reflect the view that we have indeed fallen from better times, that we are now static or backsliding, and that the misnamed "progress" of technology is a major malefactor. We will not progress or rise from our fall unless we abandon at least some of our major technological aberrations. The prospects, on this view, are pretty gloomy. Who would be willing to give up polio vaccines and the complete compact disk collection of Beethoven's works?

2. Categorizing Progress.—We can map categories of progress onto

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(1974).

244. The issues of reduction and valuation are discussed more extensively in Shapiro, *supra* note 66.

245. *See* DANIEL SAREWITZ, FRONTIERS OF ILLUSION: SCIENCE, TECHNOLOGY, AND THE POLITICS OF PROGRESS (1996); Daniel Callahan, *Challenging the Mythology of Progress*, 12 MED. HUMANITIES REV. 92 (1998) (reviewing SAREWITZ, *supra*). *See generally* ROBERT NISBET, HISTORY OF THE IDEA OF PROGRESS (1980); Frankel, *supra* note 21, at 483; Morris Ginsberg, *Progress in the Modern Era*, 3 DICTIONARY OF THE HISTORY OF IDEAS 633 (1973).

whatever classification scheme we use to describe ourselves and our doings. We can refer to our habits of thought and feeling; our behaviors; our social, political, economic, and cultural circumstances; the physical environment generally; the assorted branches of science and technology; and so on. As soon as one starts this taxonomic exercise, it is obvious that particular notions of progress, though linked, may be sharply different. "Intellectual progress" and "applied technological progress" are not the same. One also notices that how fields of endeavor are sorted may hugely influence the proper ascription of progress, regress, or stasis. Focusing on precisely defined enterprises can yield easy attributions of progress or failure, narrowly understood. The Human Genome Project, for example, will be completed within a few years. We will have progressed in accumulating knowledge—the location and sequencing of all our genes. How quickly we will move in using this knowledge for improving medical therapeutics is unclear, and whether such advances will always constitute "progress" in a moral sense is also uncertain. The same reservations apply, with even greater force, to enhancing human traits.

One can also distinguish progress as applied to different fields of thought and behavior and to different kinds of progress within that field. Progress in physics is different from progress in philosophy, and there are different sorts of progress within each field. Subsuming Newton's gravitational theory within Einstein's was progress, but of a different form than confirming the existence of elementary particles. Many of Rawls' contributions marked progress in philosophy, but so did the long-standing recognition that basic concepts such as justice and autonomy come in sharply conflicting versions. The latter is a piece of conceptual analysis that may or may not help decisionmakers in reaching a conclusion, whatever illumination it bestows. The former is meant to guide decisionmakers to at least certain general conclusions about the structure and institutions of a liberal political system.

Here the primary comparisons among different kinds of progress are, as I have said, between science and technology of any sort, on the one hand, and moral and legal theory and application, on the other. A related inquiry would inspect progress in human behavior, but here the difficulties are not in recounting facts (people do keep killing and rescuing each other), but in morally characterizing what they do. Some might recommend yet another inquiry: whether we have uncovered a better way to accomplish a given goal. "*Progress* is . . . defined as 'the end point, temporary or permanent, of any social action that leads from a less to a more satisfactory solution of the problems of man in society.'"[246] This does not seem to be a separate project, however; at some point,

246. LESLIE SKLAIR, THE SOCIOLOGY OF PROGRESS at xiv (1970).

> If we wish to control the sex of our children, then the biological solution is undeniably more satisfactory than infanticide, whether it is considered innovational or non-innovational progress. In terms of the sociological ethic, *if* we want to control sex then given that the choice is between some form of infanticide or some efficient biological solution the latter clearly satisfies human needs, individual and social, better than the former.

the goal itself has to be tested under a more general concept of progress.

A major source of both insight and confusion in thinking about progress is the enlightenment-era view held by many that "the methods and spirit of science should be applied to all fields. In consequence, the idea of progress came to include a concept of social and moral progress."[247] After all, sound moral analysis reflects rational thought just as science does. If so, one would expect important links between moral analysis and scientific reasoning—and the parallels are indeed striking. But so are the differences.[248] One can press the analogy too far, blinded by the vision of science and mathematics as the paradigms of rational thought.

Although many of the issues remain disputed, our topic requires attention to these domain differences. Empirical observation and testing undergird both science and moral analysis, but in quite different, if overlapping, ways. One way of seeing this is to think of the existing range of indeterminacy—of fact and theory in science, and of theory and application in moral analysis. The extent of scientific indeterminacy is regularly and clearly diminished by both grand discoveries and small findings.

Although we may sense improvement of sorts in moral or legal thought and understanding, and a corresponding marginal reduction of indeterminacy, these are sharply different from advancement in science. Whether moral and legal indeterminacy have been reduced is itself notoriously indeterminate. Moral and

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Id. at 222

See *id.* at xiv, for a definition of the innovational/non-innovational distinction. The former refers to "the production of new things, ideas and processes, with maximum *impact* on society." The latter is "progress by means of the maintenance and diffusion of familiar things, ideas and processes, with minimal *impact* on society. The term *impact* is used in a special sense to signify the effect that the different types of progress have on social structures." *Id.*

247. Frankel, *supra* note 21, at 484. *See generally* SKLAIR, *supra* note 246.

248. *See* Nagel, *supra* note 11, at 202-03 (comparing and contrasting the aims of moral and factual knowledge, stating that "both require transcendence of a purely personal point of view to one that is more shareable and objective. But the convergence sought by moral thought is practical and motivational, whereas the convergence sought by factual and scientific thought is convergence of belief—convergence on a true account of how things are, or a common picture of the world. The pursuit of moral knowledge, therefore, must proceed by the development of our motives and practices, not of our beliefs and descriptions."); Ternasky, *supra* note 208, at 127 ("Note that movement toward the truth [in science] is measured not by reference to the theory but by the strength of the corresponding evidence."). This contrast may be too sharply drawn: what counts as evidence may be theory-dependent. *See also* P. Lance Ternasky, *Moral Realism Revisited: On Achievable Morality*, 42 EDUC. THEORY 201, 204-06 (1992) (discussing "the relation between science and ethics" and "objectivity in ethics"); Jeffrie G. Murphy, *The Possibility of Moral Philosophy* (unpublished manuscript described in MICHAEL H. SHAPIRO & ROY G. SPECE, JR., BIOETHICS AND LAW: CASES, MATERIALS AND PROBLEMS 78-79 (1981)). *See generally* RICHARD B. BRANDT, ETHICAL THEORY: THE PROBLEMS OF NORMATIVE CRITICAL ETHICS 242-44 (Arthur E. Murphy ed. 1959). For additional discussion and citations, see Leslie Sklair, *Moral Progress Revisited*, 31 PHIL. & PHENOM. RES. 433 (1971).

legal progress may rest on appreciation of new facts or a heightened appreciation of old facts (assuming this is a meaningful distinction), but they do not *consist* of finding or appreciating these facts. Sometimes simply being confronted with a new problem, recognized as such, is a form of progress.

In many ways, then, the indeterminacies of fact and theory in science do not cohere with those in law and morals. The indeterminacy of major concepts of moral and legal analysis—justice, fairness, due process, equality, liberty—is built into their structure and in principle can never be fully "resolved." Indeed, it is difficult even to posit what could be meant by saying: "Now we've got it—the answer to how to reconcile equality and fairness, liberty and justice, etc., in general, and for all time." The areas of indeterminacy in science carry the potential for becoming progressively and substantially smaller concerning particular issues. (In some sense, of course, science opens up new areas of indeterminacy by its very discoveries and confirmations.) True, we may remain forever confused by "beginnings" (did a "singularity" "cause" the "infinitesimal" point to go bang?) and "endings" (what could it mean to say the universe has ended?). In part, these are scientific/conceptual problems, not just matters of not knowing "the facts." But these "edge" problems and other embedded limitations in scientific theory are different from our across-the-board, in-your-face, daily confrontations with the intractable concepts of legal and moral theory. In any case, one cannot simply "extend[] the standards and methods of the sciences to all domains," as some enlightenment thinkers evidently believed.[249]

One can also "think small" in trying to sort different forms of progress. Thus, we can talk about progress in solving or gaining on discrete tasks. This leaves us vulnerable to the charge that we cannot really know if we have made progress without looking at the Big Picture. But we can answer, as we often do, that we do what we can at the moment. In science and mathematics, one can speak of *settling* a specifically characterized problem, though sometimes conceding some wiggle room or margin of error. How fast does light go? We seem to have a pretty good grip on this, but perhaps not to the *n*th decimal point. We have less of a grip on the Hubble Constant and because of observational limitations, there may be a limit to how accurate we can be. On the other hand, the expression $(x^n + y^n = z^n)$ *really* has no positive integer solutions where $n > 2$ (or so we are told).

But "solution" is here a weasel word, particularly when one is thinking small. There was a "solution" in *Johnson v. Calvert*[250]: custody was awarded to the genetic parents because that was the original deal (yes, "deal") and the particular case was over. But whether it was a solution in any other sense is less clear. Many commentators think the outcome was wrong. In particular, many think that the criterion of "contractors' intent" is morally flawed—even if we call it "procreators' intent." The larger problem, existing beyond the law of that case,

249. Frankel, *supra* note 21, at 484. *See also* Holmes, *supra* note 15, at 157 (stating that "just as science cannot by itself yield answers to moral problems, ethical analysis that looks to science for its model cannot do so either.").

250. 851 P.2d 776 (Cal. 1993).

remains undiminished. One can draw parallels to science here, where all results, from the inflationary universe to the microbial origins of strep throat, remain theoretically open. In moral analysis, however, there is no clear *program* for determining when previously accepted views have been disconfirmed. Even the vaguer sciences—think of paleontology and the supposed saurian origins of birds—can provide descriptions of what would count as (dis)confirmation, even if closure is unlikely because of the incompleteness of the natural record.

What is the point for us? Was *Johnson v. Calvert* "progress" because it legally resolved a dispute? Progress for whom or what? Was it legal, moral, or intellectual progress? Was pinning the result on "procreational intent" progress, regress, or neither? Perhaps it was progress in the simple sense that it provided a vivid illustration of one way of working through the problem by identifying material issues and then resolving them. Bioethics, in this sense, has been developing a large treasury of insights, rules and precedents. It is not that results do not matter—far from it. It is that the complex mixture of commentaries and legal outcomes do not represent some gross deficiency in any of the branches of bioethics. The field has been (imperfectly) progressing from its start, and continues to do so.

It seems necessary, however, to distinguish progress along different fronts: "overall" progress does not usually happen all at once. Moreover, truly massive, transformative shifts do not often occur in law or ethics[251] and are not everyday or even every-century events in science. Thinking small is probably the only sensible way to *start* talking about progress in human behavior—although one certainly cannot end there, for smaller events may cascade into larger events bearing unintended consequences. The more effective are our public health and health care systems, the greater the population pressure (other things remaining equal, which they might not). The greater the range of choice over some matters, the more burdened some decisionmakers become. True, some modern standards of impermissible violence seem to be clear improvements—e.g., the general ban

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251. Note Rawls's comment stating:

> [T]he extraordinary deepening of our understanding of the meaning and justification of statements in logic and mathematics made possible by developments since Frege and Cantor. A knowledge of the fundamental structures of logic and set theory and their relation to mathematics has transformed the philosophy of these subjects in a way that conceptual analysis and linguistic investigations never could . . . . The problem of meaning and truth in logic and mathematics is profoundly altered by the discovery of logical systems illustrating these concepts. Once the substantive content of moral conceptions is better understood, a similar transformation may occur. It is possible that convincing answers to questions of the meaning and justification of moral judgments can be found in no other way.

RAWLS, *supra* note 195, at 51-52. Aside from the phrase "a similar transformation may occur" (how similar?), which seems somewhat overdone, this seems a plausible account of what "progress" might be in moral analysis. But it remains quite distant from advances in logic, which belong to mathematics as much as to philosophy. The comparison can easily be pushed too far if care is not taken to distinguish between what would count as "convincing answers" in widely different fields.

on dueling and various blood sports. To which one can respond with a few simple words, such as "The Balkans" and "East Africa."

Clearly, then, characterizing progress has concurrent aspects involving description, value judgments about changes already in place, and, most importantly, an ideal of striving toward whatever is deemed advancement in a field. Progress often embodies a perfectionist ethic that applies itself to individuals, groups, tasks, disciplines, and to human thought and conduct generally.

B. The Search for Final Answers and the Impossibility of Progress (in That Sense)

1. Setting Up a Search.—Investigating moral, legal, and scientific progress sucks people into infinite loops. As we saw, one must ask, "Progress in *what*?", and the opportunities for tendentious characterization are endless. Are we addressing perfectibility of human conduct or of our normative and philosophical systems of thought? How are the ideas of progress in science or technology different from those of progress in philosophy, behavior, or anything else?

There is no way to think about progress in ethical theory, analysis, or behavior unless one knows how to evaluate ethical theory or human behavior and thus how to know what counts as improvement. It takes ethical theory to tell us if progress in ethical theory has occurred. Although this is not entirely circular, we may not get very far when we deal with seriously contested moral issues: the very criteria for rightness or goodness, and therefore for moral progress are in dispute. So, it is hard to be even adequately superficial here (not an oxymoron).

The idea of progress in ethical theory or analysis is not empty, however, and there is some thin meaning and then truth to the claim that these disciplines have to "catch up" to the speedier progression of science and technology. The non-method method I use in examining the claim is to start with a set of problems—a kind of ostensive explication of the question and of possible answers.

2. A Search.— Consider again *Johnson v. Calvert*,[252] which, as I suggested, is a classic illustration of how technological rearrangements of important life processes generate anomalies that seem to exceed the capacities of our existing frameworks of thought, whether descriptive or normative.

We saw that although the California Supreme Court reached a decision and disposed of the case, full normative "closure" has not occurred and is not likely to. Those dissatisfied with the outcome of the case and/or its reasoning might say that this is the perfect example of law and ethics having to catch up with technology. We need *progress* in our ways of dealing with these "category bastards"—these "unclassifieds"—born of our reconstruction of life.

Let us take the demand for a satisfying answer seriously. The question is: Who is the natural mother and thus entitled to custody? (First problem: is this the right question to start with? What other starting questions are there? Should we have asked: Which groups and interests back which side? But let's push on.)

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252. 851 P.2d 776 (Cal. 1993).

Why does there have to be exactly one natural mother anyway? We can be exhaustive in specifying plausible answers. Here are *all* the outcomes that *reasonably* could vie for being the single, true, right answer. (Perhaps carelessly, I do not list additional candidates for natural motherhood —e.g., the natural father, the Queen Mother, Betelgeuse, etc.) 1) The natural mother is the gestational mother; 2) The natural mother is the genetic mother; 3) The genetic and gestational mothers are both natural mothers, and custody must presumptively be shared equally; 4) Neither one is a natural mother—that's just the way some things turn out when the world changes; and 5) The natural mother is the female who was intended by the parties, at the time the reproductive arrangement was made, to have full, permanent custody, along with her spouse or partner, if any.

What follows from these sharply different premises? The fourth alternative—there is no natural mother—is the most problematic. Although it is an obvious possibility, it seems far less plausible here than in the biologically quite different situation in cloning, where reproduction is of course asexual. But if there were no natural mother and no natural father available, what then? Perhaps the state would take initial custody and try to arrange for the child's adoption or her placement in a Kibbutz, or to award custody to either the genetic or gestational mothers based on which one wins a coin toss or survives mortal combat against the other.

The *Johnson* court, as we saw, chose the fifth possibility—the initial joint decision of the parties that the child would be with the genetic parents. Of course, we cannot *prove* which is the right answer, in the way that Wiles *proved* Fermat's last theorem. Nor can we prove which is the right answer in the sense that we can prove smoking causes cancer. We cannot even prove it, within the boundaries of a specified set of norms, in the sense that we can prove that it is presumptively wrong to kill a non-threatening innocent person knowing that she is innocent. But there's no "proof" of this in the sense that a theorem or a scientific claim is proved. (And it is just a presumption, in any case.) The absence of a calculable, or otherwise ascertainable answer satisfactory to all rational persons *is built into the conceptual structure of the problem.* Ethical theory and much of legal analysis are disciplines that developed (in part) *to deal with certain matters of choice that cannot be answered determinately*—at least not in every case. While one can certainly draw strong parallels between scientific thought and ethical analysis, doing so hardly shows their identity. It shows, if anything, simply that they are both rational enterprises sharing certain features of logical consistency and coherence, though they involve different domains of thought.

So, what is ultimately in dispute in proving what the right answer is in *Johnson v. Calvert* concerns the very criteria for what counts as a "proof." If we cannot settle this, is "progress" meaningless here? "Progress" itself cannot be defined by necessary and sufficient conditions, and in many cases cannot even be linked to a precise set of "factors" or "variables" that effectively narrow the set of possible answers.

For example, think of the ethical/political/legal idea of equality. We of course want to treat the genetic and gestational mothers equally by giving each

an equal opportunity to argue her position; to satisfy standards of equality in finding organ sources and selecting recipients; and to deal with people equally as genetic and nongenetic forms of human enhancement arrive on the scene. How do we do this? Whether we think of "equality" in purely philosophical terms or as a constitutional concept to be interpreted, we cannot, in all cases, clearly determine what even *counts* as (in)equality. If the ratio of personal income to the energy expended in earning that income is equal for all persons, is this equality? What if the equal energy expenditure is by a brain surgeon on the one hand and a squeegee worker on the other? If everyone has equal opportunities (whatever *that* means) but everyone comes up with unequally valued holdings, is that inequality or equality?[253] Must we provide enhancement opportunities to the least gifted and impoverished in order to avoid making existing inequalities worse? To whom should forbiddingly expensive opportunities for extending life to age 120 be distributed?

To call for crisp demonstrations of what the right answers are when doing ethical or legal analysis is, then, to badly misconstrue the nature of conceptual, moral, and legal reality. As long as persons are different, we will have equality problems, and many of them will *never* be "definitively" solved, although some may become less important or even irrelevant over time.[254] If progress entails the perfected ability to find such answers, then only minimal progress, if any, is possible in ethical theory—indeed, in all philosophical analysis—and in law. There is no such thing as "catching up" in this sense. I think *Johnson v. Calvert* was rightly decided and can offer colorable arguments in its defense, but I cannot prove that it is right (in the sense that Wiles proved that Fermat was right), just as you cannot prove that it is wrong. If there is any "progress" here, it is in emphasizing the *rational possibility* of looking to original intentions as a means of resolving disputes. Even critics of the case should reasonably concede that the quality of deliberation about its outcome was superior to the deliberation that would have taken place without the introduction of the parenthood-by-original-intentions idea. That perspective *required* analysis. This notion of progress in deliberation may seem to be a pretty slender advance, but it is the only one available, a point I will return to later.

C. Progress in What?: Behavior, Theory, Insight, and Deliberation

Perhaps the call should not be for progress in moral and legal theory. It should be for improvement in moral behavior in dealing with the stream of innovations we continue to generate. If so, we need to separate progress in moral and law-abiding behavior—human perfectibility—from progress in moral and legal theory, and to distinguish all of these from progress in science and

253. For an extended analysis of the competing versions of (in)equality, see DOUGLAS RAE, EQUALITIES (1981).

254. For example, it is at least conceivable that technology for creating specialized tissue or even organs might be developed from a person's genome, and, over time, become relatively inexpensive to obtain and transplant.

technology. I leave aside all attempts to explain notions of social, political, and economic progress.

1. Progress in Moral Behavior and Law-abidingness.[255]—First, I do not mean to conflate the ideas of moral behavior and law-abidingness—they are very different, though linked—but comparing them would be an unnecessary distraction.

Second, it is hard to see how to "measure" such progress given the empirical and conceptual difficulties already recounted. The conceptual problems are obvious: to the extent that we do not know what moral behavior is, we cannot measure changes in its incidence. For example, the number of abortions and the abortion rate have increased greatly during the course of the Twentieth Century. Is this evidence of moral progress because it reflects the ever-improving status of women and their approach to equality with men? Or is this is moral regress because it kills budding human entities (persons or not) and reflects moral recklessness in risking the creation of human entities bound for destruction before birth. Considering all the available techniques for contraception, how can people be so stupid as to keep on causing undesired pregnancies? This is not progress in human behavior. We are as incompetent as we were tens of thousands of years ago; we simply have more technological options through which to display our incompetence. That isn't progress either.

On the other hand—don't we have fewer wars, massacres and genocides? All right, try something else. We have better public health measures—at least in "developed" countries. (No Calcuttas in the United States.) This reflects a more refined concern for the value of human life, and this is paradigmatic of improved moral attitudes and behaviors. On the other hand, human survival is good for business, other things being equal, so it is in our self-interest to keep more people alive. Public health measures simply reflect rational collective action to promote one's own welfare and do not really demonstrate any "refinement" in moral sensibilities and actions; they reflect just a simple understanding of the individual gains from collective action. After all, that is what the evolution of cooperation is all about. Whether this account is sound or not, it illustrates the difficulty of identifying moral progress in our behavior.

At least there are improvements in civility, tolerance, and the acceptance of human differences—except, perhaps, on the roads and highways, and certainly in the Balkans, Northern Ireland, the Middle East, Afghanistan, the Indian Subcontinent, much of Africa, the Russian Republics, and the corner of Fifth and Main Streets in downtown Los Angeles. Think of the improvement in professional instruction in law schools. No more paper chase, no more "How did *you* get into this law school?" Even better, few places on the planet currently

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255. *See generally* Ternasky, *supra* note 208, at 129 (stating that "it is difficult to refute the claim that the movement [in moral history] has been in the direction of greater moral sophistication and clarity," and suggesting that this claim rests on "the dramatic evidence of change," referring to "the emergence of rights, egalitarian sentiments, widespread call for social and distributive justice" as examples, and concluding that all this "rivals the growth of science during the same period."). The author goes on to cite the growth of anti-slavery sentiment. *See id.* at 130-31.

permit or encourage dueling. If only we had advanced this far much earlier, Alexander Hamilton might still be with us. The ban on dueling has no doubt saved countless persons, instead allowing them to participate or die in ethnic cleansing operations and gang fights. Perhaps serial killers are more polite these days, too.

What would constitute improved moral behavior in the face of new technological powers? Think of human cloning. How does behavior or moral analysis "catch up" here? By swiftly, permanently, and flatly banning human cloning or attempts to accomplish it (taking care, of course, not to snuff important research that could prolong or improve lives). If you don't see this as catching up, consider lesser forms of regulation through legislation and/or judicial application of existing laws combined with common law development. But what is to be the substantive and procedural content of such regulation? How is lineage to be determined? Is the state to monitor the custodial parent(s)' quality of parenting? None of this is catching up? There seem to be few options left: Doing absolutely nothing about it and letting private ordering determine the rate and circumstances of human cloning; destroying all biological laboratories; sending someone back in time to prevent the development of human cloning and then bringing her back to the future in order to minimize temporal paradoxes; and—what else?

We thus need to return to the analysis of progress in moral theory. Without doing so, we cannot make progress in discussing progress in moral behavior.

2. Progress in the Quality of Moral and Legal Theory and Deliberation; Normative Insights and New Conceptual Tools as Progress; Micro and Macro Progress; The Limits of Progress in the Face of Indeterminacy.[256]—

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256. I will not probe the meaning of "indeterminacy" as applied to legal, moral, and philosophical claims generally, except to say that it suggests that there is in principle no unique reasoned answer to certain questions about the nature and confirmability of these claims.

There is some parallel between the discussion in this section and that in Seedhouse. *See generally* Seedhouse, *supra* note 206. The author sets up several examples of difficult problems in health care rationing, and concludes that bioethical reasoning cannot provide predictable answers. *See id.* at 288-90. I assume this is a form of indeterminacy. However, he does not discuss whether the conceptual and normative clarifications represent any form of advancement, nor whether it increases the probability of some consensus decision, whether ultimately defensible on moral grounds or not. However, Seedhouse seems to be saying that bioethicists *as they are* (or were when he wrote in 1995) seem pretty useless, but that they can be doing other things. He says, in reviewing his rationing scenarios, for example, that it is likely that bioethicists "will miss the point: it will be detached from the reality of the family situation." *Id.* at 289. I do not know what this reality is taken to be, nor how coming to grips with it will reveal the (or a) moral solution. I suppose that coming to grips with reality is a form of rationality, but he complains of bioethicists who "suggest ways of health care rationing solely through rational means." *Id.* He later says that "because the world is the way it is [The conceptual world? The world of everyday life and its existing health care systems?], by using standard bioethics methods one will never get to the bottom of the matter, and it will be impossible to decide rationally between rival sets of criteria and principles." *Id.* at 290. "Standard bioethics methods" refers to isolating the problem; getting basic

a. Does moral progress rest on discerning objective truths about moral reality?—The major risk of discussing this is that one will plunge, probably sooner than later, into an extended discussion of "moral reality/truth," which seems to be roughly coextensive with the entire field of ethical theory and moral epistemology. The challenge offered against the idea of moral progress is that if there is no objective moral reality, what could "moral progress" possibly mean? If there is no moral reality, then there is no moral progress. There is nothing we can specify that we are getting closer to or "progressing toward." Even achieving greater consensus—a sort of practical progress—does not unequivocally reflect moral progress. If a consensus avoids clear harms or promotes clear benefits, it might constitute moral progress independently of the content of the consensus—or it might not. It cannot automatically count as moral progress unless the consensus is founded on an intersubjectively confirmable moral truth.

The alternative to some strict form of "provable" moral reality is not moral relativism, but it is difficult to state just what that alternative is. Perhaps we think moral propositions are capable of being true or false, but that the determination of these truth-values is so different from that of truth-value in science that phrases such as "moral reality" or "truth" are misleading. Saying

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information and "key theoretical considerations" down, including consideration of available resources, of needs, and of outcomes; applying criteria of fairness to the situation in question and to alternative situations; and suggesting an "ethical arrangement" to the family beset with the health care distributional problem. *Id.* at 288-89. It may be that he thinks the central difficulty is applying principles of rational thought to "non-rational" (random) or irrational systems. *See id.* at 290.

At this point, one would think the only option is to punt. But Seedhouse has recommendations that bioethicists, in his words, need to "work through." *Id.* One would think that this was perfectly "rational"; perhaps Seedhouse believes "rational" applies only to relatively hamfisted or formalistic applications of various substantive principles, such as autonomy or utility. He complains of several failings of bioethics: Bioethics does not call into question the "dominance" of medicine and "does not challenge the deliberations and strategies of politicians, which partly contribute to the climate of rationing" (this is doubtful); bioethics fails to compare "medical systems" with "other systems in society" (also doubtful); it views inequality in health as mainly about access to means of cure or amelioration of disease (this seems quite appropriate considering the subject matter, as long as one keeps matters of prevention and humane behavior in mind); it does not question the role of technology as the "major weapon against disease"; and it "does not engage in sustained philosophical analysis of the meaning of key words such as health, welling, medicine and disease—that is, bioethics does not properly examine central matters of health care purpose." *Id.* at 290. I do not agree with these claims. After then calling bioethicists to task for "accept[ing] uncritically the context which generates the problems it tries to deal with" (I doubt this also), he identifies two paths—standing "outside" the system, and viewing health care systems "for what they really are"—tribal systems. *Id.* at 291. He prefers the first path; it is a precondition to "talk[ing] constructively about health care rationing." *Id.* As I suggested earlier, it is not clear what it is to be inside or outside bioethics.

What is missing is an account or example of "talk[ing] constructively about health care rationing." *Id.* I have no clear idea of what the preferred program is.

this does not presuppose an objectively confirmable moral reality. I do not think that "progress" is rightly tied to such a rigorous, but unrealistic, showing about moral reality. Beyond this, I am not about to solve the central problems of moral philosophy, and say nothing about moral reality.[257]

b. Examples.—Again, I turn to examples to work out ideas of progress.

In *Brown v. Board of Education*,[258] the Supreme Court ruled that *de jure* separation of students by race in public schools violated the equal protection clause of the Fourteenth Amendment.[259] Did this decision, and its long-term educative effects, represent progress in moral and legal analysis, and in human behavior thereafter?

Leave theories of constitutional interpretation aside for now, and deal with pure normative/conceptual analysis of the idea of equality. (The two are not utterly divorced. "Pure moral analysis" is for some a proper path of constitutional interpretation in which one searches for the best theory of the moral concepts in question.) Compare the prior dominant view—that equality is satisfied when the groups that are separated are nevertheless treated equally in a limited material sense—"separate but equal." One can easily formulate an egalitarian description of this at a high level of abstraction: "Everyone is being treated the same. Whatever your race, you have substantially identical educational (or other) facilities."

How did we come to think otherwise—to move from these thin abstractions tendered in defense of segregation to begin taking account of different conceptions of equality and perhaps of certain real-world effects? Did we discover previously unknown empirical truths? Perhaps we learned for the first time that formal legal separation injures the members of the nondominant group in some ways (insult, offense, diminished self-view, depression, stigmatization, and so on), even without regard to "equality" of material facilities. Or did we already "know" this in some flaccid sense but not *notice* or *attend* to it? Had we previously thought that these effects were not injuries at all—or that if they were, they were deserved, considering racial differences? (Such differences are of course not pure matters of fact.) Did our views of the overall situation change because we changed our view of the nondominant class and came to think that they were persons we should respect in certain ways? Did this respect entail an expanded view of what impermissible injury is, requiring removal of its sources? If so, how did this happen? Was it stimulated by vivid events in the Civil Rights movement that made us rethink our evaluations? If so, how did the movement itself begin and why did it receive increasing support from the dominant group? Did the dominant and nondominant groups change their respective views about

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257. *See generally* Richard N. Boyd, *How to Be a Moral Realist*, *in* ESSAYS ON MORAL REALISM 181 (Geoffrey Sayre-McCord ed., 1988); Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061; Peter Railton, *Moral Realism*, 95 PHIL. REV. 163 (1986). There is a rather intimidating collection of moral terms that regularly accompany discussions of moral realism, such as "moral facts," "moral relativism," and "moral skepticism," but for present purposes, I aim to avoid them.

258. 347 U.S. 483 (1954). *See supra* note 94 (comparing *Brown* with *Plessy*).

259. *See Brown*, 347 U.S. at 495.

themselves? Was it all a matter of sheer chance in which a particular collection of jurists sat on the Supreme Court when a clear opportunity allowed them to implement their personal moral judgments and constitutional theories? And how did these respected members of the establishment come to these radical positions?

Perhaps others know the answers, but I do not. In any case, the idea that there has been progress in re-interpreting the concept of equality is not totally off the wall. The morally superior sentiments of those in both groups trying to undo what we now recognize as evil were eventually put in operation through formal constitutional interpretation and its applications. These constitutional processes in turn seem to have produced important (if not universal) educative effects. In this sense, there has been an improvement in moral behavior and in moral theory: Many of us have *refined* our *understanding* of equality and *acted* on it.[260]

Perhaps, overall, we can say that whatever facts were or were not uncovered, some influential opinion-molders, judges, and lawmakers had a new normative insight concerning equality, fairness, and justice: "This is part of what 'equality' means—no legal barriers, based on race, to human association. Such barriers ratify the unacceptable judgments underlying the segregation laws, and their very existence as well as their implementation work true harms." Simply being *addressed* by the State (and "the People") in certain ways—"You cannot be in each others' company here!"—was seen to constitute and cause moral and constitutional injury. Our conduct thus reflected some elevation in moral sensibilities, at least on the part of some influential groups, and the insight spread to others. In this limited sense, we "caught up" with what should have been viewed as a basic egalitarian ideal. We recognized and acted upon human needs that had been seen only dimly, if at all.

The *Brown* case may give us something to start with, but it carries us only so far. Where in bioethics can we expect new normative insights, whether inspired by salient facts, conceptual analysis, or assorted firings of the brain? Would expanded research on the effects of varying gestational circumstances, or on the so-called nature/nurture tension, help resolve contests between genetic and gestational mothers? What new facts or thoughts will tell us to whom to assign the next liver when we already know the candidates' medical conditions? Or whether it is permissible to take a kidney from a child in order to save his brother? Or whether one is significantly harmed by having the same genome as someone else who has already lived or is currently in full bloom?

These expressions of optimism may seem a bit labored. If we could say what the mysterious new insights would be, we would already have them, although our behavior might lag. If we do not already have them, they might be a long time coming, if they come at all. For example, with segregation, the *issue*—do equal facilities for separated races satisfy equality standards?—had been understood

260. Others argue that *Brown* constituted, if anything, moral regress, because the Court's decision was lawless and unjustified on any proper theory of interpreting the constitutional text. The Court, on this view, thus violated some aspect of the Rule of Law ideal. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

for quite a while before *Brown* was decided. By the time we have our insight, the technological rabbit may be beyond sight.

But, by all means go ahead and get more facts about the impact of gestation on fetal development and maternal-fetal bonding—but also about the feelings and attitudes of genetic parents awaiting the birth of a child they expect to raise. Get facts about the psychological and physical effects of losing a sibling to kidney disease and discovering later in life that the sibling could have been saved if only your parents, or a court, had allowed the transfer of your kidney to her. Get facts about the effects of being born of a genetic plan—cloning, germ-line enhancement engineering, whatever. Of course, we cannot do that too well unless we actually have some cloning, and after we start, it may be hard to stop.

When we get these facts, we may indeed—at least on an individual basis—be aided in reaching closure on some given matter of choice. In particular, the facts may inspire reflection and new perceptions ("Why didn't I see that before?"). But such facts will not dictate a normative result.[261] No set of facts will determine which mode of distribution of lifesaving resources is the true and correct one, except in the company of moral premises.

In 1971, John Rawls published *A Theory of Justice*. He drew on and sharply revised and extended some important constructs within political and moral theory—ideas such as the social contract, the ideal observer, detachment and impartiality, the need to accommodate liberty with equality, and justice as fair treatment of persons. It is hard to say precisely what is "new" in his work and what is not. However, few philosophers, even those in sharp disagreement with him, would deny the impact and worth of Rawls's refinement and synthesis of these preexisting tools—perhaps to the extent of saying he fashioned powerful new tools.

Is this a case of progress in philosophy? Is bioethics improved by the installation of these ideas? Why not? If it is a smaller degree of incremental progress than that worked by Aristotle, Plato, and Kant, it is still progress. Matters that were fuzzy before are clearer now, and we have a more precise idea of what is entailed by particular notions of justice, equality, and liberty. Some may even say that calling his work an incremental advance is misleading because he has moved significantly beyond his illustrious predecessors. In any case, the sort of claim that Rawls or others have made progress is reasonably coherent and far from implausible. Perhaps substituting Nozick for Rawls would make the ascription of progress go down more easily for some auditors.

However, as many have noted, Rawlsian analysis does not give us a bunch of right answers to hard questions at all levels of abstraction, and Rawls did not

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261. *Cf.* Ternasky, *supra* note 208, at 128 (arguing that given a "robust conception of human flourishing" and moral theories that "stand relevantly, approximately, near the truth of that motivation, then we may expect to move nearer the truth as our intuitions are informed by additional social, scientific, and historical evidence."). I am not sure we are aided by the notion of "moving nearer the truth," but the point about intuitions evolving with the presentation of new evidence seems sound.

claim it would, although he did deal with a number of specific issues.[262] Try applying his (or anyone's) tool matrix to the "who-is-the-natural-mother" issue of *Johnson v. Calvert*, or to the questions whether we should ban human cloning, allow the use of various performance-enhancing techniques, or solve scarce-resource distribution by this or that mechanism.[263] The most that can be hoped for, in many cases, is that we narrow the range of permissible options, or that we more fully understand and can justify assorted preferences, attitudes, and behaviors, or that we more adequately justify particular plans or prior actions. In some cases, the Rawlsian analysis not only offers an overarching structure of general application, but indeed yields strong answers to some problems, at least within the framework of Western thought. However, it seems unreasonable to expect any political or ethical theory, whatever its internal philosophical constructs, to tell us, say, whether the entire nation, rather than regions or localities, should be the constituency for organ distribution. Nor will it tell us, after human enhancement techniques become effective, precisely to whom increments in intelligence or other merit or wealth-attracting attributes should go.[264]

If *Brown v. Board of Education* and Rawls's *Theory of Justice* constitute or reflect progress, what is it progress *in*? How do we describe it, especially to skeptics who think of progress as referring to new proofs in mathematics or logic, or theory confirmation in science, or paradigm shifts that pan out empirically, or setting new records in the 100-meter dash? Should we refer to it as "progress in the quality and sophistication and relative completeness of analysis, such that it is likelier to draw assent"? There is a sense, after *Brown* and *Theory of Justice*, in which we know more than we did before about equality, about how to think about constructing political/economic/social systems, and so on. As has been said of metaethics: "Such philosophical progress as has been made in metaethics has come not from simplifying the debate or reducing the number of viable alternatives, but from bringing greater sophistication to the discussion of well-known positions and from exploring heretofore disregarded possibilities and interconnections."[265]

Rawls himself provides an account of what we might rightly call "progress": "If the scheme as a whole seems on reflection to clarify and to order our thoughts, and if it tends to reduce disagreements and to bring divergent convictions more in line, then it has done all that one may reasonably ask."[266]

There is thus a bounded but plausible account of progress in moral and legal

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262. *See* RAWLS, *supra* note 195, at 53 (stating that if his scheme adds clarity and order in our thinking and reduces disagreement, it has served its purpose). *See also* John Rawls, *The Basic Liberties and Their Priority*, *in* POLITICAL LIBERALISM, 289, 340-68 (1993) (discussing political free speech and commenting on several major cases and constitutional standards).

263. *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

264. *See generally* Michael H. Shapiro, *Who Merits Merit? Problems in Distributive Justice and Utility Posed by the New Biology*, 48 S. CAL. L. REV. 318 (1974).

265. Darwall et al., *supra* note 67, at 32.

266. RAWLS, *supra* note 195, at 53.

argumentation and analysis that rests on ideas of normative illumination and increasingly refined analytical tools. That sort of progress may play some role in behavioral progress, and behavioral progress may, in turn, aid insight. This account probably does not meet the expectations of those who call for law and philosophy to catch up with science and technology, but nothing can.

c. "Micro" vs. "macro" progress: Personal moral "closure" and objective moral progress.—Think back to your own difficulties in decision making, whether it was to decide which concert or movie to attend, whether to vote to hire or promote someone, or what advice to give your children on moral issues. Some aspects of these problems, including your personal circumstances, may well have been especially salient to you and more or less settled your mind. This is perfectly consistent with continued reservations or even regret over what you did or "had" to do, and with a realization that the issue was not settled for all time, whether for you or for others generally.[267]

This is obviously not a general summary of human decision making. I am suggesting only that reflection may, for a given person, help decide the matter for her.[268] It is immaterial whether one describes the final resolution of doubts as involving a particular consideration that tipped the scales, or as the result of a rough weighing or balancing. Much the same may hold, with various complexities, for group decision making by ethics committees, Institutional Review Boards, juries, and so on. This notion of (provisional) settlement is a

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267. *Cf.* Railton, *supra* note 257, at 188-90 (discussing a theory of individual rationality, and following this with a discussion of moral norms going beyond individual viewpoints—rationality from what might be called a social point of view). In a footnote, the author observes that "there can be no guarantee that what would be instrumentally rational from any given individual's point of view will coincide with what would be instrumentally rational from a social point of view." *Id.* at 190 n.30. *See generally* Simon, *supra* note 85 (discussing cognition in judicial problem-solving).

268. Once again, this is not an account of or argument for standard moral relativism, although it is plausibly, if nonetheless confusingly, referred to as justificatory relativism. *See* Brock, *supra* note 4, at 236-37. Brock states that his

> account of moral reasoning and justification . . ., which employs a critical screening process together with reflective equilibrium, does allow for the possibility of moral disagreement that is in principle rationally irresolvable, and for the possibility that different individuals may each be justified in holding incompatible moral judgments; we can call this justificatory relativism. . . . Some moral disagreement does, I believe, turn out to be irresolvable in principle, but not as often as many people today suppose. Very often disagreement that initially appears to be moral turns out on closer analysis to be empirical disagreement about matters of fact. [¶] Justificatory relativism implies that moral judgments are correctly understood to be in one sense subjective. . . . What I have in mind here by the claim of subjectivity is this. At the end of the day, . . . after the process of moral reasoning and justification has been completed, a particular individual's moral judgments, principles, or theory will depend on what that person is prepared on reflection to accept, to try to live by, and to judge him-or herself and others by.

Id.

critical aspect of making decisions. Thus, despite rational reservations such as Robert Holmes's—"more should not be expected of it [analytical ethics within bioethics] than it is capable of delivering"[269]—such analytics may be strongly decisive for an individual decision maker, even if the underlying moral issues are not settled within any overall moral theory either from her viewpoint or that of others.

Examples are not hard to imagine, though they are more difficult to confirm empirically. Suppose there is a terminally ill patient who had been unusually energetic but has suffered prolonged, intractable depression during prior illnesses. She now wishes to terminate artificial nutrition and hydration. How do we assess and respond to her preferences? We invoke rough ideas of autonomy-as-opportunities-to-realize-one's preferences, and of relief of suffering. This may occur within a nonconsequentialist or consequentialist moral theory. What strikes you as especially compelling is the ongoing, impenetrable depression of the patient, making every day an utter horror, that is unresponsive to all medications and even to electroconvulsive therapy. So far from this condition being a plausible blockade to aid-in-dying, because of its distorting effect on the perception of one's own preferences, it is now an indication for it. So you think it best to let her, or even help her, go.

This is a conclusion that one might not have reached, or might have reached more reluctantly, if one had not been introduced to ideas of impaired decision making capacity, of clinical depression as a disorder that entails pain unimaginable to those never so afflicted, of the possible transformative effects of biological treatment, and of the bitter fact that these transformative treatments failed completely. Simply learning these ideas and facts may advance individual progress to provisional closure. This view may endure even if the decisionmaker knows of the risks of undue influence or abuse.

Think next of someone who applauds the latest successes in multiple transplants, where several organs are distributed to a single person. Someone else points out that multiple transplants given to just one person do not generally maximize lifesaving. Even if one continues to support multiple transplants, one recognizes the pull of other considerations when one had not done so before. This too is progress.

Problems, of course, are not of equal difficulty or gravity. However, reflection may significantly advance equilibrium for particular persons or groups, even though most of the overarching moral tensions can never be resolved. Perhaps this is a form of reflective equilibrium,[270] and easing the way for it promotes both personal and community progress.[271] For the persons directly on

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269. Holmes, *supra* note 15, at 145.

270. *See* RAWLS, *supra* note 195, at 48-51 (defining reflective equilibrium); *see also* Brody, *supra* note 20, at 172-74, 177-78 (applying the concept to bioethical deliberation); Railton, *supra* note 257, at 190-94 (discussing individual and social rationality in connection with the idea of moral realism).

271. *See generally* Nagel, *supra* note 11, at 202.

[M]ost theorists would recognize, as characteristic of morality, the aim of convergence

the job of decision making, reservations about ultimate moral reality may be of some moment because of anticipated regret concerning the factors outweighed but far from annihilated, and because of fears that future problems may resist all closure.[272] However, this is largely inevitable in many domains of thought.

3. Progress in Bioethics.—

a. Conceptual constraints on the idea of progress.—

(i) Again, the example of principlism.—Recall the references above to principlism, understood as a plan for evaluating actions and situations in light of mid-level moral imperatives. Its central thrust is to advance moral and legal decision making by referring largely or exclusively to a small set of concepts.[273] More specifically, it involves "what has sometimes been called the four-principles approach to biomedical ethics, and also called, somewhat disparagingly, principlism."[274] The four "clusters of principles" are respect for autonomy, which entails respect for a competent person's decisions; nonmaleficence or, a bit loosely, not causing harm; beneficence, or generating benefits, balanced against risks and costs; and justice, understood as fair distribution of benefits, risks and costs. These abstractions are used to illuminate and resolve certain disputes. Beauchamp and Childress contrast "principles"

> by individuals with diverse and conflicting points of view on standards of conduct and choice which all can see as justified. Morality, if there is such a thing, requires us to transcend in the practical domain our individual perspectives, and by means of this collective transcendence to converge on a common standpoint of evaluation. It aims to supply a framework of potential agreement or harmony within which the remaining differences can operate without doing harm.

Id.

Later, Nagel refers to "formulating general hypotheses and testing them by the credibility of their implications," finding reasons for different opinions and the principles they depend upon, and concluding that "progress can often be made on this basis—at least to produce greater understanding of the grounds of disagreement, if not to resolve it finally." *Id.* at 211. *See also* Brock, *supra* note 4, at 217 (discussing ethics commissions' efforts toward "sharpening the issues" and "forging consensus").

Consider the moral evolution of Andrei Sakharov over a period of about two decades, as recounted in Gennady Gorelik, *The Metamorphosis of Andrei Sakharov*, 280 SCI. AM. 98, 101 (1998): "'If I feel myself free,' [Sakharov] once mused, 'it is specifically because I am guided to action by my concrete moral evaluation, and I don't think I am bound by anything else.' He always did exactly what he believed in, led by a clear, unwavering inner morality."

But it is clear from the earlier portions of the article that Sakharov didn't simply intuit moral reality in a moment of time and act as an absolutist. His recognition of conflicting obligations, patriotic and global, developed as he witnessed historical developments and saw the growing risks of nuclear weapons. His development is thus arguably an example of personal moral progress.

272. *See* Williams, *supra* note 122, at 49.

273. Principlism's origins are often associated generally with WILLIAM K. FRANKENA, ETHICS (2d ed. 1973) and, in bioethics, with the first edition (now into the fourth) of TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS (4th ed. 1994).

274. BEAUCHAMP & CHILDRESS, *supra* note 273, at 37 (footnote omitted) (emphasis omitted).

with ethical theory (which is more abstract than principles), rules (less abstract), and particular judgments.[275]

Are the principlists' offerings progress? Even opponents of principlism should think so. Any crystallization of ideas that helps explain how we think (e.g., with heuristics and other shortcuts),[276] and gives people a conceptual map addressing how we should think, may be an advance. Even if it is mistaken and ultimately incoherent, it takes us down cognitive pathways we may have missed, and we can choose which forks to follow on our own. One learns something from principlism even when rejecting it.

The law provides a brief example. The identification of standards of review in constitutional litigation helped define and implement various hierarchies of constitutional rights, powers, duties, etc., and helped organize and clarify both what we were doing and what we should have been doing.[277] It is not a principlist system of the sort dealt with here, but it generally deals with mid-level abstractions in adjudicating constitutional claims. Thinking about the nature of standards of review, why they are in place, and what they do and are supposed to do is instructive, whether or not one thinks the way these standards are used or expressed is mistaken. Instructive on what? On matters of constitutional or moral relevance that we may have over- or underlooked.

There are obvious risks in this largely mid-level evaluation process. In constitutional law, many have stressed the risks of clumsy, possibly question-begging use of standards of review. Critics have also condemned the implicit constitutional hierarchies that they reflect, but their own preferred orderings would still have to be reflected in standards of review.[278] Critics of principlism have tendered parallel objections. As long as we understand some basic limitations of principlism, however, the principlists' schemas may accelerate our personal decision making efforts as well as our agreement with others. This may represent a kind of moral efficiency; one can be efficient or inefficient in moral deliberation, and efficiency here may itself be a moral imperative, depending on the circumstances.[279] As for principlism's limitations, they are readily stated:

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275. *Id.* at 15, 37-38.

276. I am using these terms loosely—for some, perhaps too loosely. One might urge, for example, that a decision procedure in a given case was not a "shortcut" because no material and useful consideration was excluded; there was in fact no longer journey to greater accuracy—high theory would not have advanced deliberation.

277. I do not want to press the comparison between standards of review and principlism too far. It is not clear that they operate at the same level of abstraction. Moreover, standards of review are not articulated by specific reference to principles of any sort, although the standards may presuppose abstractions properly called "principles." The standards of review themselves, however, do not seem to be akin to the structures contemplated by principlism. Perhaps they are more like casuistical rules, maxims, or apothegms, or heuristics generally.

278. The point is that, given interpretive maneuvers that yield an ordering of constitutional values, standards of review that reflect this ordering are a logical inevitability.

279. I note this for the sake of completeness. "Efficiency" is a general term concerning the relationship between ends and means, and it is far from exclusively linked to matters of commerce,

one's heuristics are not the final word. In some cases, appeal must be made to higher-order abstractions to interpret the moral premises and to help resolve conflicts among them. One may even have to de-select principles or reinterpret them. Moreover, the very articulation of principles may fool one into thinking that things are simpler than they are.

So, principlism is not the chopped liver of moral philosophy; its problems are serious.[280] Are its specified criteria sufficiently, but not excessively, comprehensive? One wonders whether equality is rightly assigned to the discussion of justice or to some other combination of the itemized concepts. Where does fairness go—inside justice,[281] or inside equality, wherever that may be? Are the criteria overbroad, underbroad, or void for vagueness, i.e., too sweeping, too narrow or incomplete, or too imprecise to be serviceable? When do they produce reasonably determinate results or at least narrow the range of competing arguments? What are "principles" anyway and where do they come from and how do they relate to each other, to higher abstractions, to lower abstractions, to standards, rules, maxims, apothegms, and bromides? If the principles in principlism were not randomly assembled, then what overarching theory produced them, or are they simply inferred from how people in fact make decisions, with no additional search for foundations? Moreover, the principles within "principlism" are imprecise, overlapping, often pull in different directions, and have internal tensions that put their very coherence at risk. Don't we have to invoke the underlying moral theory to deal with such difficulties, if they can be dealt with at all? If there is no such thing as independent freestanding principles, in short, how did we come by them? Is autonomy a product of a consequentialist or nonconsequentialist theory? If autonomy derives from different theories, does its applications vary, not just with the particular situation,

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as some careless critics think. More generally, it embodies rules of rationality. If someone residing in Los Angeles wishes to visit the Pacific Ocean forthwith, she should, other things remaining the same, move westerly rather than circumnavigating the globe by traveling eastward. In moral analysis, efficient moves are obligatory, where efficiency represents the use of methods that under the circumstances are the best means of satisfying the requirements of the governing moral theory. Of course, this account reduces efficiency to the content of the moral theory and its applications, and there is usually no need to invoke the idea explicitly when doing moral analysis.

280. For a critique of principlism, see Ronald M. Green et al., *The Method of Public Morality Versus the Method of Principlism*, 18 J. MED. & PHIL. 477 (1993). For a response to various criticisms of principlism, see BEAUCHAMP & CHILDRESS, *supra* note 273, at 106-09.

281. *See* BEAUCHAMP & CHILDRESS, *supra* note 273, at 326-34 (identifying "the principle of formal justice" with the "principle of formal equality," and indicating that in deciding particular questions, e.g., admissions to a hospital, "[a]ny answer to this question will presuppose an account of justice that contains material principles in addition to the formal principles").

Note the extensively-discussed issue of the "emptiness" of equality in constitutional law. *Compare* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982), *with* Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983). On the location of fairness on the principlist conceptual map, see BEAUCHAMP & CHILDRESS, *supra* note 273, at 327, 341-43 (discussing fair opportunity).

but with the parent theories? If the applications vary with their foundations, why should we bother with this intermediate stage of governance by principle at all? Because higher theory does not have to be invoked in every case and we can do some coasting? In which cases does it (not) belong? The principles, then, require interpretation, internal reconciliation, and reconciliation with each other, and the only way to do so is to test the authority and meaning of the principles in light of higher-order concepts of ethical theory.

Think again of autonomy to illustrate this point. It is a concept with internal tensions that often confront us, and its various aspects are not accorded the same ranking by everyone. If a patient wants to delegate an important value-laden decision to his physician, should we follow his preferences, vindicating one aspect of autonomy? Or should we instead stress autonomy as rational self-direction in order to discourage the delegation, and implement this goal by adjuring physicians to reject such delegations and insist that the patient make his own decision? If a prospective organ donor expresses assent to the donation of her kidney to a relative but seems conflicted, should the donation be disallowed because of the risk that assent was compromised by familial pressure, undue influence or coercion? Autonomy is threatened either way. We already noted the problem of overriding a competent patient's veto of therapy mental disorder in order to promote her long-run autonomy. More precisely, this compromises her external autonomy (freedom from the interferences) in order to promote her internal autonomy (her capacities, impaired by disorder), which in turn will enhance her external autonomy down the line.[282]

Despite such critiques of principlism, which are well known to the principlists, it is fair to refer to it as reflecting progress. Again, what sort of progress? The sort of progress involved in deciding if a scholar's publications have "advanced the field" and are therefore tenure-worthy? Nonacademics might be excused for questioning this as a standard of progress. Perhaps principlism represents some methodological insights that reveal its principles as crystallizations of concepts derived from one or more higher-level theories that can be used as heuristics or very soft algorithms. Perhaps it is a sort of acceptable moral satisficing, even an obligatory one, given scarce resources of time and effort. If an admittedly soft shortcut helps reach rough consensus, isn't this an advance? Scarce resources may indeed demand satisficing, and principlism may be effective in some cases. Why reinvent the moral wheel at every turn? Of course, if the problems seem simple, we are unlikely to feel a need even to review the relevant principles, never mind the larger abstractions.

However, as critics have repeatedly charged, the principles cannot simply be fitted onto a situation to yield a determinate result. Some say there is no such thing as manageable principles in the sense the principlists require, or they cannot really be applied, as a true algorithm can.[283] (Principlists of course do not

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282. See Shapiro, *supra* note 121 for further discussions of this issue.

283. This is more or less the objection made by Clouser & Gert, *supra* note 212, at 226-27 ("[T]his 'principle' [of beneficence] is simply a chapter heading under which many superficially related topics are discussed; it is primarily a label for a general concern with consequences. But

say they are constructing algorithms, which are quite different from principles.) Such algorithms often provide determinate results in application, such as computer programs for playing tic-tac-toe, or, more impressively, chess. Principles rarely do.

To clarify, organize, and add perspectives and insights hitherto hidden are all forms of progress, and they may indeed advance the time when some answer is settled upon, and we can move on to other matters. Such advances are important, but they should not be overstated. After a time, one grows weary of clarifications that better acquaint us with our confusion but do not provide satisfying answers.[284] However, if clarification[285] helps move us toward even partial or

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by being called a principle, it avoids the kind of fundamental questioning that a theory should undergo."). *See also id.* at 234-36.

> [T]here is neither room nor need for principles between the [adequate, unified moral] theory and the rules or ideals which are applied to particular cases. Rather, one applies the relevant rules and ideals and then, after taking into account all of the morally relevant features, one decides whether or not it is justified to violate a particular moral rule. . . . We believe, in the sense given to 'principle' by Frankena and by Beauchamp and Childress, that for all practical and theoretical purposes there are no moral principles. . . . By invoking several 'principles' they implicitly deny the unity of morality.

Id.

284. Robert Holmes also questions a similar defense of "elucidation." *See* Holmes, *supra* note 15, at 144-45. Note, however, the remarks in the text suggesting that individuals might find personally satisfactory solutions when aided by morally relevant considerations they had not thought of. *See generally* JONSEN & TOULMIN, *supra* note 7, at 305.

> [T]aken by themselves, disputations between 'consequentialists' and 'deontologists,' or between Kantians and Rawlsians, were not of much help in settling vexed practical issues, such as the question, 'How much responsibility should physicians allow gravely ill patients [] in deciding what treatments they shall undergo?' Philosophical *concepts* may be of help in clarifying the manner and terms in which these problems are stated. But in the end the debate will always return to the particular situation of an individual patient with a specific medical condition, and the discernment that is needed to reach any wise decisions in such cases goes beyond the explanatory or clarifying insights of even the best theories—whether scientific insights of molecular biologists or ethical perceptions of moral philosophers.

Id. (footnote omitted).

285. *Cf.* Nagel, *supra* note 11, at 209 (remarking that "[t]he present state of moral controversy reveals a high level of uncertainty about both methods and conclusions, but at the same time there is clearly a lot of value in the three primary standards I have described: common interest, overall utility, and equal rights. On some questions, these standards will give the same answer."). Without pressing the comparison, one can make parallel claims about principlism, though it seems to be at a lower level of specificity.

But cf. Michael Bishop, *The Possibility of Conceptual Clarity in Philosophy*, 29 AM. Phil. Q. 267, 268 (1992) (arguing that "[c]lassical conceptual analysis" in the form of specifying necessary and jointly sufficient conditions "is doomed because most concepts are not structured classically.").

temporary settlements, the effort required may be worth it. In many cases, nothing more than these provisional accommodations are logically possible for philosophical analysis or legal decision making.[286] We will forever be using familiar tools, perhaps with innovative refinements and reconstructions. But no set of tools will bring us to moral or legal closure that matches what can be accomplished in mathematics, logic and science. The kind of provisionality that applies to even the best-confirmed scientific claims does not suggest the contrary; it is quite different, despite the parallels, from moral indeterminacy. No doubt, these defining differences move some to view philosophy and law as fields inferior to science and mathematics, a view not worth stopping on, except to say that using the term "inferior" begs a lot of questions, and, in any case, we have to live with what we have.

(ii) The example of distributing scarce lifesaving resources, especially organs: When paradox blocks "progress"; lotteries and rationality.—Scarcity is a central driving force of life. Distributing scarce lifesaving resources to human beings is not amenable to the relatively simple solutions to, say, dividing a cake at a birthday. Lifesaving are rarely distributed in ways that simultaneously satisfy everyone. The image of triage is a searing one, and although that concept is not directly applicable to all distributional problems, it is easily brought to mind when scarce lifesaving resources are at stake, whether on the battlefield or the civilian hospital ward.[287] Some of the most vivid examples of this come from organ transplantation and use of artificial organs such as dialysis machines and, one anticipates, implantable artificial hearts. Indeed, the problem of selecting patients to receive the first operationally useful dialysis machines was a defining moment in the early development of bioethics.[288]

But few of our powerful moral, philosophical and legal abstractions can be part of classical conceptual analysis in this sense. Most ethical and legal theory is thus nonclassical in the author's sense. Non-classical proceedings, however, can yield incremental clarity for such non-classical concepts.

286. Some authors draw clinical uncertainty into the analysis. *See, e.g.*, Toon, *supra* note 34, at 17.

> It is foolish to believe that a knowledge of moral philosophy or an ethical analysis makes a difficult moral decision easy, any[]more than knowledge of physiology and pathophysiological analysis makes a complex clinical case simple to diagnose or to prognosticate. In both cases[,] *ars longa vita brevis.* What sound training in philosophical analysis can do for moral problems is exactly parallel to what training in clinical sciences can do for the diagnostic problem: i.e.[,] provide a framework in which choices can be organised and evaluated logically, avoiding conclusions not justified by the evidence and decisions made on irrelevant grounds.

Id.

287. The decisions are likely to be sharply different in military and civil contexts. *See generally* GERALD R. WINSLOW, TRIAGE AND JUSTICE (1982).

288. *See* Sanders & Dukeminier, *supra* note 141, at 371, 377-79; *see also* ROTHMAN, *supra* note 6, at 155-57.

Here, as elsewhere, we have made a series of pragmatic accommodations despite our moral uncertainty. Indeed, we are morally obliged to proceed in some way even if moral considerations fail to identify the best options.[289] However, no set of criteria has ever commanded a consensus that identifies the correct premises governing distribution of lifesaving resources. These premises would specify all the required, permitted and forbidden distributions. But the limitations of any known set of criteria for determining distribution have been reviewed many times.[290] Whatever the meta-ethical views; whatever the general ethical theories, whether consequentialist, nonconsequentialist, or *tertium quid*; whatever the particular theory or its sub-branches; and whatever the particular criteria—none can satisfy all moral theories or observers, ideal, reasonable, or otherwise. Social worth, ability to pay, prior good works, degree of medical need, and inherent or acquired merit are all failed criteria as decisive sources of guidance, but remain morally relevant. One might call this impossibility a moral theorem of sorts, but trying to formulate a proof would be bootless, and in any case not to the point. Check any operational set of criteria, e.g., the federal guidelines for heart transplantation, and this claim will quickly be illustrated. These heart transplantation guidelines,[291] which apply to federally funded transplants, specify the need for social support networks, thus making it hard for those who live in relative solitude to receive a transplant; discourage transplants to overage persons; and say nothing about maximizing utility and so on. Decisions are taken and specific complaints are rare. But if complaints and recommendations are made, say, to equalize patients' opportunities, what exactly gets equalized and how? The ratio of medical need to chance of getting the next transplant? On what measure of need? Imminence of death before transplant?

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289. *See generally* David B. Wong, *Coping with Moral Conflict and Ambiguity*, 102 ETHICS 763 (1992) (arguing that "[a] complete ethic should address the question of how people are to act toward one another when they are in serious moral disagreement. . . . [A]ccommodation is a moral value rooted in the fact that serious conflict is a regular feature of our ethical lives.").

290. *See, e.g.*, BARBARA GOODWIN, JUSTICE BY LOTTERY (1992); James F. Childress, *Who Shall Live when Not All Can Live?*, 53 SOUNDINGS 339 (Winter 1970); Albert R. Jonsen, *Ethical Issues in Organ Transplantation*, *in* MEDICAL ETHICS 229, 231 (Robert M. Veatch ed. 1989); Teri Randall, *Criteria for Evaluating Potential Transplant Recipients Vary Among Centers, Physicians*, 269 JAMA 3091 (1993); Nicholas Rescher, *The Allocation of Exotic Lifesaving Therapy*, 79 ETHICS 173 (1969).

291. *See* Health Care Financing Administration of the U.S. Department of Health and Human Services, *Heart Transplant Coverage*, *in* 1 MEDICARE & MEDICAID GUIDE 1 CCH ¶4030.30(D) (Aug. 11, 1994). The criteria for patient selection include critical medical need; maximum likelihood of successful clinical outcome; very poor prognosis without transplant. Adverse factors include advancing age; various concurrent diseases; and a history or behavior pattern or psychiatric illness likely to interfere significantly with medical compliance. ¶4030.30(D)(4) states: "We recognize that some who may not be considered 'good candidates' may also benefit, but the likelihood or extent of benefit is significantly less." The United Network for Organ Sharing (UNOS) guidelines do not seem as rigorous. *See* UNOS Allocation Policy 3, June 26, 1998 <http://www.unos.org>.

Life expectancy after the transplant? Expected quality of life with the transplant? Or are we instead to equalize the ratio of social worth to chance of receiving the next transplant? Are we to work with some ordered set of these variables, or are we now simply replicating the list of failed criteria?

Consider now the very useful example suggested by Annas concerning distribution of a fixed number of fully implantable artificial hearts.[292] His *Minerva* case concerns a lottery as the final selection mechanism, a form of being "unprincipled on principle," to import Bickel's phrase into this context.[293] Obviously, some of the same difficulties we just encountered are built into the prior threshold decision to the number of hearts to be constructed and made available. They are also at work at the stage where persons are included or excluded from the lottery pool. Membership in the lottery constituency is thus itself a scarce resource that must be distributed before the implants are assigned.

A lottery might seem to be the very antithesis of rational moral choice based upon ideals of personhood. Moral rationality adjures us to find a reason to select

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292. *See* George Annas, *Allocation of Artificial Hearts in the Year 2002:* Minerva v. National Health Agency, 3 AM. J. LAW & MED. 59 (1977).

293. Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 76 (1961). For both analytic and entertainment purposes, see Jorge Luis Borges, *The Lottery in Babylon*, *in* LABYRINTHS: SELECTED STORIES AND OTHER WRITINGS, at 30 (Donald A. Yates & James E. Irby eds., story trans., John M. Fein, 1964).

> I come from a dizzy land where the lottery is the basis of life. . . . Their [the older lotteries in which people won silver coins] moral virtue was nil. They were not directed at men's faculties, but only at hope. . . . If the lottery is an intensification of chance, a periodical infusion of chaos in the cosmos, would it not be right for chance to intervene in all stages of the drawing and not in one alone? Is it not ridiculous for chance to dictate someone's death and have the circumstances of that death—secrecy, publicity, and the fixed time of an hour or a century—not subject to chance?

Id. at 30, 31, 34. See also the short story, SHIRLEY JACKSON, THE LOTTERY (Popular Library ed., 1949).

In real life, lotteries for scarce medical resources are used rarely, apparently mostly for new drugs in short supply. Even then, they are viewed as short-lived phenomena. Supplies of therapies proved useful can generally be expected to increase, thus moving distribution into its usual forms. *See* Michael Waldholz, *Unit of Roche Sets Up Lottery for AIDS Drug; Enough for 2,280 Patients Will Be Given Out Free Under Pact with FDA*, WALL ST. J., June 21, 1995. *But see New AIDS Drugs Spawn a Global Pill Chase*, WALL ST. J., July 8, 1996 ("France, where 30,000 people have died of AIDS, is a front-line battleground for getting the drugs approved and distributed. Earlier this year, France's National AIDS Council suggested holding a lottery among patients to determine who would get the scarce protease drugs. The idea triggered outrage and protests."). *See also* Tamar Lewin, *Experimental Drug Is Prize in a Highly Unusual Lottery*, N.Y. TIMES, Jan. 7, 1994, at A1 (quoting one patient's suggestion that "it might have been fairer if people who've had the disease longer, and are in worse shape, got it first." A physician said that "patients were generally very supportive of the idea. Some of the doctors were less so, because they thought they should be able to choose which patients to put before which others."). *See generally* Ralph P. Forsberg, *Rationality and Allocating Scarce Medical Resources*, 20 J. MED. & PHIL. 25 (1995).

one person over another. However, every reason and set of reasons fail as decisive criteria of selection for lifesaving. Even if some reasons succeed from the decisionmakers' viewpoints and the selections are made, the distributional scheme, whatever it is, will be unacceptable to various major segments of the public. What does moral rationality tell us when moral rationality based on finding relevant differences among persons needing lifesaving resources fails at every turn? Quit the project and let them all die? [294] The options seem inconsistent with one of our moral heuristics—a strong presumption for lifesaving.

One would think, given this apparent failure of our system of moral rationality, that metaethical rationality would require us to revise our understanding of moral rationality, which should forbid differentiating among persons needing the resource. Instead, we should use an objective procedure that suppresses differences, perhaps by some randomization device. Because first-come, first-served seems too linked to one's social position and wealth, a lottery seems appropriate, perhaps even morally mandatory, despite the serious moral issues concerning entry into the lottery pool.

To most persons, lotteries of this sort seem morally outrageous. Lotteries are deliberately inattentive to individual variations within the included group. We thus have the maddening situation in which the chief moral deficit of a plan coincides with its chief moral merit—the suppression of interpersonal differences. The personhood of the lottery participants is suppressed, one might say, and they are treated as fungible, though not as objects: we would not be facing a grave distributional difficulty if they were mere objects. Respect for personhood, a critical aspect of moral rationality, demands otherwise. Something as valuable as human life cannot turn on the arbitrariness of pure random chance. It suggests human life is no more valuable than winning at roulette. It appears to make life contingent on essentially nothing at all—that is, the morally irrelevant difference of whose number was drawn—and so devalues it. This perception of illicit contingency is amplified when the lottery is run by the government. Although the government is "ours" in a republic, it may appear still as a voice from above stating that society is unwilling to divert sufficient resources from other areas in order to save lives in the area at hand. This view is irrational when the alternative uses of the resources are other forms of lifesaving, but these other forms may be less salient, and thus barely noticed. Thus, although suppressing differences in assigning voting rights in general elections is required by personhood ideals, suppressing them when distributing lifesaving resources is, on the anti-lottery view, inconsistent with those ideals.

We are thus back to individual differences. A qualified proposition seems plausible: moral rationality requires attention to some interpersonal differences

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294. *See generally* Fred Rosner, *Managed Care: A Contradiction or Fulfillment of Jewish Law* <http://www.ijme.org/Content/Transcripts/Rosner/rmanagedcare.html>, at 8 (the view that this may be a preferred outcome, and citing to the discussion of a "lifeboat ethics" problem in a Talmudic source).

in some contexts, and inattention to other differences in other contexts. Extreme age and debility is a difference that most would accept as a reason for withholding organ transplantation. Being a member of one racial, ethnic, or gender group rather than another is not an acceptable reason, unless there is a link to medical concerns, and if so, it is the idea of medical concerns and not that of group membership that forms the criterion.

In a sense, we are being whipsawed from one "lottery" to another. If we reject lotteries crafted by humans as well as objective schemes that favor those with superior access to health care, we are left with the natural lottery—that complex of genetics, gestation, and post-birth environment that wires in our attributes and substantially affects our opportunities. But relying on attributes derived from the natural lottery is what failed us in the first place. The two regimes of chance represent different sorts of arbitrariness, but under either sort, lifesaving rests on criteria that many believe are not morally relevant. In the artifactual lottery, in particular, life appears to be contingent on morally irrelevant differences among persons—differences having nothing to do with their separate, individuated personhood. Consider, however, what happens when we turn back to differences that define individual personhood—the variations that mark our separate identities as persons and our relative merit and desert. We find that we cannot bear to doom persons to death because of the very same interpersonal trait differences that move us to respect individual personhood: this person is smart, this one is sweet, this one is a wretch, and so on.

The cycle is now complete; we have been thrown from end to the other. Respect for persons, in our lifesaving context, requires us to consider certain interpersonal differences, and also prohibits us from doing so. The only possibility for redemption lies in sorting these differences, identifying which of them must/may/must not be suppressed/addressed. Distinguishing elections (where we generally suppress traits) from choosing mates (where we search for distinguishing traits) raises no contradictions in the ordinary run of cases. Lifesaving, however, is harder to characterize. One might say that lifesaving is so important that it *cannot* be left to chance; or that it is so important that it *must* be left to chance. Moral rationality seems to require two inconsistent paths; therefore, moral rationality is false. The virtue of the contrived lottery is its vice; the vice of the natural lottery is its virtue; and partially objective schemes combine the worst of both systems—although the latter have endured as the least worst of our options. The very logic of personhood fails as a moral guide, or some might think.[295]

What are we supposed to do about this? How do we make progress here? It is no answer to say that these opposing vectors concerning selection for

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295. *See* PAUL A. FREUND, *Introduction to* EXPERIMENTATION WITH HUMAN SUBJECTS at xvii (Paul A. Freund ed., 1970), *quoted in* GERALD R. WINSLOW, TRIAGE AND JUSTICE 103 (1982). "The more nearly total is the estimate to be made of an individual and the more nearly the consequence determines life and death, the more unfit the judgment becomes for human reckoning . . . ." Winslow adds: "On this view, truer testimony to the dignity and worth of each individual's life is borne when human judgment about the relative value of it is kept to a minimum." *Id.* at 103.

lifesaving are in part culturally relative. For one thing, moral relativity does not follow from cultural relativity. For another, however one designates this audience's main culture, we are in it.

Seeing these moral difficulties might count as progress, although, again, this is not very satisfying. We now have a clearer idea of the structure of our difficulty. Knowing that we may be involved in systemic inconsistency is better than not knowing it. Still, there is an abundant literature on the virtues of obfuscation, delusion, and the maintenance of ambiguity.[296] Perhaps it is better for elderly persons, and for the community, to think that they are being excluded from dialysis for medical reasons rather than because of age. Was it progress or regress when the exclusion was exposed?[297]

Perhaps progress of a sort occurs when consensus forms, even if the content of the consensus is no more or less rational than the competing views. In some cases, the consensus may mark agreement on what passes for the foundations of the social and political system in which they live. For whatever reason, whether historical accident or some aspect of human cognition, we might come to agree that lotteries for lifesaving are permissible or even required. Or we might delegate the choice to seers thought to have special access to moral truth, or to judges of a similar bent who can link moral truth to legal truth. It is common in human decision making to remit confusing problems to a "black box" that emits decisions after a hidden or internal process (think of juries or even markets), or simply to leave things to those formally anointed as possessing expertise.

Some decisional problems may "disappear" if society is radically transformed, say, by rejecting republicanism in favor of a single source of power presumed to have privileged access to knowing what is best for us. This is yet another black box procedure. At least one commentator suggests that some bioethical problems stem from our commitment to liberalism. In any event, Ezekiel's remarks are a partial characterization of the distinguishing attributes

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296. *See generally* SECULAR RITUAL 3, 22 (Sally F. Moore & Barbara G. Myerhoff eds. 1977). *See also* GUIDO CALABRESI & PHILIP BOBBIT, TRAGIC CHOICES (1978) (tracing, throughout the book, instances of masking or suppressing moral contradictions and anomalies in distributing scarce benefits and burdens).

297. *See generally* HENRY J. AARON & WILLIAM B. SCHWARTZ, THE PAINFUL PRESCRIPTION: RATIONING HOSPITAL CARE 89-112 (1984).

> [T]he British physician often appears to rationalize, or at least to redefine, medical standards so that he can deal more comfortably with resource constraints. . . . Most patients in Britain appear willing to accept their doctor's word if he says that no further treatment of a particular disease is warranted. This passivity may stem from lack of knowledge about possible treatments or simply from a patient's respect for the physician's authority.

Id. at 100.

On the public exposure of this system, see Norman G. Levinsky, *The Organization of Medical Care: Lessons from the Medicare End Stage Renal Disease Program*, 329 NEW ENG. J. MED. 1395, 1398 (1993) (stating that patient-advocacy groups have exerted sufficient pressure on the British health system "to reduce the barrier to dialysis for older patients").

of bioethics:

> [T]he most striking characteristic of discussions of medical ethical questions is their persistent irresolution. It is not just that [questions raised concerning treatment of AIDS patients—nontreatment, medical costs, and so on] are hard and require tentative and subtle answers. . . . The ethical framework in which these medical ethical discussions and debates occur seems to ensure no agreement. To put it another way: within the last two decades or so, medical ethical *questions* have become irresolvable medical ethical *dilemmas*. [One physician is quoted as asking,] 'What does one do, then?' . . . . Discordant positions, irresolution, and an exhausted uncertainty seem the only conclusive products of three decades of discussion on medical ethics."[298]

Emanuel later refers to "the claim that these problems remain irresolvable because of certain elements of liberal political philosophy . . . ," and argues that "[t]he acute and interminable irresolution surrounding medical ethical questions in the United States arises not from advances in biomedical technology but from the tenets of liberal political philosophy."[299]

It may well be that *some* ethical dilemmas are artifacts of particular politico-philosophic positions, but we are pretty well committed to some form of liberalism. Dilemmas do not necessarily disappear with the abandonment of liberalism. (Would the abandonment of liberalism, in whole or in part, thus be progress?) They may simply take different forms. For example, life also may be viewed as intrinsically valuable in totalitarian regimes, and natural and artificial organs are likely to be scarce there too. Particular conceptions of social worth, desert, and so on may vary from culture to culture, but this variance does not necessarily render them acceptable criteria for saving lives. Even a hierarchical, non-democratic society may place a high intrinsic value on human life, and thus also face a criterial selection problem in saving lives. Does the next artificial heart, assuming its use is legitimate within the group, go to the best Talmudist or to the poor tailor with ten children? To the security chief or the head of the armed forces? To Mother Theresa or the Pope or a small child? Just because a political culture is not liberal does not mean its selection criteria are limited to, say, estimates of future service to the State to the exclusion of everything else.

There are of course limiting cases in which cultural differences diverge immensely from our baseline. If our culture were assimilated into a Borg-like collective, whose members are not considered individual persons, lifesaving choices would seem to rest on whether one's mechanical functioning within the collective is worth preserving given the resource costs. However, to say that a dilemma is the result of accepting personhood as a dominant moral category certainly does not diminish the dilemma's force. *Of course*, many of our dilemmas would cease if we abandoned personhood, or decided human life was worthless, or believed that it was wrong to interfere with Fate or The Force in

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298. EMANUEL, *supra* note 123, at 5-6.

299. *Id.* at 33, 155.

trying to save lives. The problem is, we don't want to be assimilated with the Borg precisely because it does away with individuated personhood; we don't think life is worthless; and most don't think we sin by trying to forestall death with medical technology. Of course, at a high level of abstraction, we too, like the Borg, consider the advantages and disadvantages of any course of action, including lifesaving. For us, however, advantage and disadvantage are not solely matters of mechanical, financial, or resource-use efficiency. All cultures place some value on human life, even if it does not look that way from the outside or because the value is recognized only for members of the culture. Assuming we retain a moral ideal of personhood, think human life is valuable, and have no rigorous belief about the impropriety of human interference with Nature, decisions about whom to save or even whether to save will have to be made, and the learning impacts of these choices on community values will have to be considered.

b. Catching up on "catching up": Is it progress to know that progress is impossible?; remarks on markets and decentralized choice.—Despite its awkwardness, the call for law and ethics to catch up to technology is not meaningless. To the extent that the request is for unique right answers across the board, it reflects a major misunderstanding of ethics and law because it calls for the impossible. Yet the "ethics is falling behind" lament is made so often by so many that one is reluctant to say it just reflects a mass false belief in a Realm of Truth, or is just an expression of frustration over irresolvable dilemmas. Perhaps the frustration is compounded by anger at those who profess expertise but offer no solutions.

Can the catch-up call be reconstructed? How can one reconstruct, without demolishing, a request that presupposes an impossibility? Substantive difficulties of this sort often suggest use of decentralized, atomized procedures such as markets or lotteries. Why worry about how to select genetically influenced traits as a matter of centralized choice on the merits? Let people pursue their preferences (within limits) and an invisible hand will lead to some equilibrium.[300] (This maneuver of course does not instruct the atomized decisionmakers how to choose. If they ask that question from within the market, they still will have no answer.) Evaluation of the equilibrium can be left to moral and political philosophers, who need something to do to be kept from harm's way. Progress$_1$ lies in coming to understand that decisions at some cosmic macro level are not only unnecessary, they are ineffective. As far as substantive regulation is concerned, progress$_1$ consists of backing off from seeking the impossible. It is acquiring "meta-knowledge"—knowledge about whether it is even possible to acquire knowledge needed for answers to troubling questions, and if so how we acquire it. Progress$_2$ is getting the right answer.

There is much to be said for the recommendation to leave some matters to decentralized, atomistic decision making. The reflexive disdain for the marketplace often expressed by critics of using biological technology is not a

300. *See* NOZICK, *supra* note 134, at 315 (referring to the possibility of a genetic "supermarket").

point in their favor and projects an image of ideological cement.[301] Unless there are important reasons pulling us the other way in certain areas, I take the liberal stance that a decentralized system of personal choice on most commercial and many non-commercial and in-between matters is the preferred default method for "solving" many complex social problems, such as who gets what. Some of these systems are markets or embrace market-like mechanisms.

Allergy to markets is understandable here because the most familiar and visible markets concern trade in *things*, tangible or intangible. All-or-nothing views about the taint of commerce are not well taken, however. In particular, category straddling, as with certain forms of what we might call "commerce in persons," is not automatically immoral. Think of a professional sports team purchasing and trading athletes—more precisely, the exclusive rights to their services. More to the point, of course, is the intersection of family formation and commercial transactions, as in surrogacy, gamete sales, and even adoption. True, things that are not clearly one thing or another make us nervous: it is hard to describe, judge, and perhaps even use them. Many thus think that otherwise admirable or at least tolerable practices such as reproduction and sex are polluted by the intrusion of commerce. The response that this is not necessarily so, of course, does not commit one to holding that all category mixing reflects progress. But in some cases it may indeed be progress, or at least is not regress, and seeing this is itself a form of progress$_1$.[302]

Leaving things to market forces and decentralized choice generally is not a political non-decision. As many have said, even if markets were viewed as "natural" (they are in fact no more or less natural than many other systems of exchange and distribution), we know that we can alter natural processes and conditions, and not doing so represents a choice of sorts. Obviously, the consequences of our selection of economic regime and of the choices made by the individuals within them may escalate sharply as technology expands our range of options. The expansion of opportunities may enhance autonomy and general well being in many respects, but it also may be ruinous in others.

Recall that discussion of decentralized choice mechanisms came up because of our encounter with supposedly failed substantive rationality, and our resulting insight that clearly correct answers to hard problems are often impossible. How valuable is it to realize this? If we have more meta-knowledge and a clearer idea of our limitations, so what? This insight is about as fulfilling as "Do the right thing" or "Keep on truckin'." As "progress," is it worth even a nickel?

Whatever its worth, it may be all we can aspire to when confronting values and concepts that conflict both among and within themselves. No amount of research or reflection on our deepest problems is likely to serve up a stunning

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301. *See* George Annas, *Human Cloning: A Choice or an Echo*, 23 DAYTON L. REV. 247, 250 (1998) (criticizing "choice for the sake of choice" and the noisome effects of markets).

302. *See generally* Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 HEALTH POL., POL'Y & L. 57, 76 (1989) (discussing the inflexibility of normative categories, but noting that they may change over time; referring to changes in views about assessments of artificial insemination; and commenting on the possibility of markets for organs).

illumination that inspires the cry, "How come we didn't see that before?" We may, however, by reflection and careful application and refinement of our tools of thought, reduce the time between seeing a problem and responding to *it in some way*; we may increase our sense of having attained a comfortable, if somewhat regret-filled equipoise, even though it does not reflect some timeless right answer; and, in implementing our choice, we may behave in ways that will reinforce valued attitudes and beliefs. This will not magically resolve tensions between liberty and equality, or within contending versions of equality and autonomy, but it can ease the way for the sorts of working compromises and clumsy institutions[303] that we make as we bungle along. I do not see this as an empty call for dialogue or conversation. People can meet and dither, but they still must grapple with what they *ought* to talk about, how to construct their agendas, what substantive principles to apply to the problems at hand, and what procedures to install to further the process and/or keep the peace.

Sometimes the result constitutes a sort of progress$_1$. The volumes produced by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research in (1982) are one example. On the other hand, the 1997 Report and Recommendations of the National Bioethics Advisory Commission on cloning seems to me to be a counterexample.

If we cannot in principle attain definitive answers whenever we like, and we are simply told to discuss and deliberate, how do we proceed? When Professor Roger Dworkin states that "our [legal-institutional] tools for dealing with social problems posed by rapid change in biology and medicine are limited at best,"[304] he is correct. They cannot be improved to the extent that the right answers are identified across the board. However, the substantive content of these legal-institutional tools, along with connected tools of moral/political/policy analysis, are all that we have to work with in finding answers or determining whether we should rely on a decentralized choice mechanism or other form of "black box." To the extent that we do find answers, however, the mechanisms of formal and informal legal processes may be important features of decision making and of reinforcement of preferred norms. Some issues and problems *can* be resolved well enough by substantive principle.

As for gains in our moral behavior ("progress$_3$"), there is no *a priori* reason why it cannot improve with respect to forms of moral conduct that most reasonable persons in most cultures can agree on. Such improvement, at any rate, does not violate any laws of nature, and may significantly alter the bioethics terrain. In another article,[305] for example, I suggest that the chief sources of harm from human cloning—to clones and to everyone else—arise from a self-fulfilling prophecy: we will treat many of the cloned offspring in ways that will help assure that they are harmed, not by their existence as such, but by the avoidable conduct of their custodial parents and various external observers and busybodies among the general public. If we learned not to ill-treat others having different

303. *See* Wong, *supra* note 289. *See generally* Shapiro, *supra* note 205. .

304. DWORKIN, *supra* note 187, at 18.

305. *See* Shapiro, *supra* note 62.

origins, then the prospect of human cloning would be less intimidating. That is progress$_3$: actual improvement in human behavior where we have concluded that we know what proper behavior is.

As for definitely settling acute moral conflicts and anomalies, this is no more possible than it is to identify the limits of infinity. That's the way the world is. We can strive to get straight the core of our confusion—this is clarification as progress—but here we need to be reminded of yet another paradox. The very project of clarification can be called in question, for at least two major reasons. One is the occasional need to keep some things hidden from ourselves; the other is the widespread hostility to reflection noted earlier. The critique of clarification reflects a confused belief that the truth is out there and all we need is common sense to see it.

4. Terminating Technology; Technological Imperatives Again.—One might recommend terminating technological progress along several fronts where the expected harms are thought to exceed the expected benefits. The cessation of technological progress in such circumstances would thus constitute true progress overall. It is hard to see how this can be done, however, without terminating or neutralizing all persons with intact cortexes. We could instead try to delay the onset or implementation of various technologies. (Recall the moratoria on human cloning.)

Such delays are not impossible, despite what some call the "technological imperative." One of the underlying assumptions of the catch-up call is that this imperative is in continuous operation. The idea is that technologies are irresistible to us: we are driven to acquire the knowledge to develop them, and once they are here or within sight, we are impelled to use or develop them. These irresistible urges are strongly reinforced by the escalating need to recover our prior financial and emotional investments in the technologies, by our anticipation of the sheer fun and general utility in using them, and by the general influence of the ideal of progress. No doubt there are other complex emotional factors that account for technology's perceived status as a Great Attractor, inexorably pulling us to embrace it so it can embrace and, as some think, consume us.

Such imperatives, then, are sets of incentives to develop and apply technologies. The pressures installed by these incentives derive from expectations and from preferences arising out of prior investments—pressures that may raise the probability that a technology will in fact be used.[306] This is the only plausible interpretation of the claim that "'can' implies 'ought.'"

Unearthing the true nature of technological imperatives is only a weak form of progress$_2$ because of the high level of generality involved. It is not useless, however, because it argues against an automatic bar on scientific research.

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306. *See* Shapiro, *supra* note 47, at 1100-01 (describing the pressures upon childless couples to use the new reproductive technologies in order to have children).

IV. A REVERSAL: WHEN SCIENCE AND TECHNOLOGY CATCH UP WITH HUMAN THOUGHT—IMPLEMENTING THE IDEA OF PROGRESS

A. In General

This inversion of the symposium theme suggests some instructive points about it. There is one obvious sense in which science and technology may catch up with human thought: the arrival of new capabilities after we have first imagined them. Indeed, one might say that most scientific and engineering progress, pure serendipities aside, involve catching up to one's advance vision. People formulate hypotheses and test them. Science and invention do not thrive solely on the amorphous idea that things aren't so great. They require that we grasp the notion that things can improve. That notion necessarily requires imagination—a perception, however inchoate—of how we and the world might change to our benefit by acquiring knowledge and acting on it.

Catching up with one's vision is thus an intrinsic aspect of an ethic of progress in any domain. One must picture an ideal, however hazily, and think that it is possible to approach or attain it. Sometimes it is perceived need that drives vision, although such needs may themselves be generated by prior scientific developments: one sense of technological imperative is suggested by the reverse aphorism, "invention is the mother of necessity."[307] Deliberate progress presupposes an idea of something not yet accomplished that might and should be.

What would be an example of science and technologically catching with our advance vision? Think of a basic presupposition underlying scientific research and application: the causal principle. I reduce this complex idea by saying that it is a scientific/philosophical postulate that the universe is orderly because its processes and happenings are causally related and these relations can be discovered.

The causal principle, expressed in assorted forms, has long engaged philosophers, scientists, and law-persons in trying to reconcile it with ideas of human freedom and responsibility. It seems endlessly troublesome to be coherent about freedom and responsibility if we believe in the locked-in workings of reality. Until recently, however, we knew little or nothing about the specific pathways of the causal principle in life processes. Despite some cognitive dissonance (at least among scientists, legislators, judges, and of course philosophers), we have all gone about our business, including the business of assigning responsibility, relatively untroubled by these reconciliation problems. We imagined a universe of causation, but had little idea of how it operated. Things are different now.

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307. ARTHUR KORNBERG, THE GOLDEN HELIX: INSIDE BIOTECH VENTURES 8 (1995) ("It was generally agreed that the age-old saying 'necessity is the mother of invention' is usually wrong. Generally, the reverse has proved to be true: *invention is the mother of necessity.* Inventions only later become necessities.").

B. Neuroscience, Genetics, Ethics, and Law[308]

The philosophical project of accommodating free will and determinism is maddening, although in this respect it differs only in degree from other philosophical subjects. There are major disputes about how even to describe the project. On some views, there is nothing to be accommodated because there aren't two things at war: causality is not only compatible with freedom, it is required by it. In any case, we all sense that our decisions are generally our authentic decisions, arrived at freely, and that in most cases we could have altered the course of our lives by deciding differently. Therefore, our wills are perceived to be free.

This self-perceived freedom is the determinism debate's analogue to the well-known naïve refutation of philosophical idealism: one kicks the stone, senses the pressure, feels the pain, and concludes that the world is real and physical because an idea can't mash your toes. A latter-day Samuel Johnson might, in parallel, exercise his will to snap his finger, see that it snaps, and conclude that his will is free.

Notions of compatibilism or of viewing freedom solely as a subjective perception have not resolved the issues, at least not for all who think about them. Many remain skeptical about whether the idea that one could have done otherwise can endure alongside the principle of causality. In reality, some think, we are no freer than machines and mindless or unreflective forms of life. The conscious sense of freedom is just an adaptive delusion.

Such views may have quite an impact on our notions of moral agency and responsibility, desert, merit, character and virtue. The difficulties in making sense of them in a causal world may seem overwhelming, when we bother to think about them. Much of the time, of course, we don't think about it because we don't have to. It is important only to the obsessive workings of some academic minds. When pressed, some will say that we operate the criminal justice system and much of everyday morality on a useful pretense. We proceed *as if* we were free. Others may insist, however, that we need not proceed as if we are free, because we really are free. Being free simply means freedom from certain external and possibly internal constraints, not from the orderly workings of the universe. Unfreedom occurs only when there is a significant departure from this normal causality baseline, and freedom and causality are thus compatible. (Indeed, how could we be free if our actions were *not* full caused?)

We are, of course, reminded of the debate whenever criminal defendants mount an insanity or other defense based on mental disorder. Still, it has been relatively easy to avoid internal reservations about the causal principle and continue to operate moral and penal systems founded on notions of personal responsibility for actions taken freely.

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308. *See* Michael H. Shapiro, *Law, Culpability, and the Neural Sciences*, *in* THE NEUROTRANSMITTER REVOLUTION: SEROTONIN, SOCIAL BEHAVIOR AND THE LAW 179 (R. Masters & M. McGuire eds., 1994) (describing advances in neuroscience and arguing that they do require abandoning ideas of freedom and responsibility).

Within the last few years, however, neuroscientific work has suggested *not* simply that the causal principle holds for thought and behavior, which we already believed but that we can begin to identify some of the specific neurophysiological mechanisms underlying them. Several related discourses now describe these causal networks in great, if very incomplete, detail, some relying on the language of chemistry, others on genetic pathways, and still others uniting both or offering still more discourses.

For example, studies that correlate impulsive misconduct or explosive anger with the neurochemistry of serotonin suggest that the likelihood of misbehavior goes up with the lesser availability of serotonin as a mediator of electrical activity in the brain. Because neurotransmitter chemistry is significantly affected by genetic factors, neuroscience research in combination with accelerating knowledge of the human genome may greatly enhance our ability to assay, predict and control the course of mental/behavioral pathologies. It is still too early to definitively evaluate the serotonin studies, but they have revived talk of neurophysiological screening and treatment of some sort for those with what might come to be called "serotonin deficiency."[309] Indeed, a conference on the biological/genetic roots of violence was partly inspired by these findings, although it was aborted because of the objections of those who thought the project racist.[310]

Of course, this account is still very general. We are nowhere near specifying the Book of Life. However, the increasingly finer-textured accounts of the causes of behavior have invigorated the determinism/free will debate. The causal pathways, or the possibility of learning more and more about them, are now striking. It is harder to ignore them.

From the viewpoint of ethical theory concerning freedom and determination, however, nothing has changed except the details. We have moved from saying, "All this has got to be caused by determinable factors subject to scientific discovery, although we are presently clueless about the nature of these factors," to saying, "It is quite possible that the occurrence of certain kinds of behavior has a lot to do with identifiable and controllable features of brain chemistry and structure, specifically, with . . . ."

Such increased knowledge brings at least the theoretical possibility of

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309. *See generally* J. Philippe Rushton, *The Neurotransmitter Revolution: Serotonin, Social Behavior and the Law*, 14 POLS. & THE LIFE SCI. 117 (1995) (discussing genetic prescreening for low serotonin); Gabrielle Strobel, *Pugnacious Mice Lack Serotonin Receptor*, 144 SCIENCE NEWS 367 (1993). Note, however, that the correlations between conduct and serotonin chemistry are not simple. "As [certain researchers] have shown . . . the combination of alcoholism, low serotonergic function, and a third biochemical condition, low glucose uptake, are highly predictive of impulsive violence or arson." Roger D. Masters, *Environmental Pollution and Crime*, 22 VT. L. REV. 359 (1997).

310. *See* Eliot Marshall, *NIH Told to Reconsider Crime Meeting*, 262 SCI. 23 (1993). A conference on heredity and violence was eventually held, although it was disrupted. *See* Natalie Angier, *At Conference on Links of Violence to Heredity, a Calm After the Storm*, N.Y. TIMES, Sept. 26, 1995, at C8.

sharply increased control over thought and behavior. We can screen large populations for anomalies in their serotonin chemistry, or in the size, shape or structure of this or that part of their brains.[311] We can place this information in huge databases. We can in principle engineer drugs and surgical procedures to avert, encourage and shape thought and conduct. And why shouldn't we? We are merely replacing our insufficiently precise current forms of biological control over behavior with more finely calibrated tools.

So, biological science has caught up with human thought in this sense. The axiom-like causal principle of science and philosophy, when applied to complex life processes, has historically been a broad working formula serving as a vague foundation for science and technology. Now, however, we are filling in the huge blanks, replacing the vagueness of the causal principle with the specificity of neurotransmitter pumps and pathways, and devising medicines to regulate the pumps or to block or open chemical pathways or pave new ones. The causal principle now confronts us with an increasingly detailed blueprint, and it is hard to ignore.

There is no new fundamental abstract insight here, however. That intuitive flash occurred a long time ago. It is the newly discovered particulars that make the fundamental insight vivid and compelling, reviving the freedom/determinism debates. We are not conceptually or morally obliged to abandon any notions of freedom or unfreedom we held before, but our attention has been caught and the problem is before us. It is one thing to say everything is caused. It is quite another to say that your assault on an aggressive entrepreneur demanding to clean your windshield for free was in significant part caused by a relatively low serotonin availability in your brain. The apparent incoherence of our clumsy institutions of moral and legal responsibility are now, if not at the forefront of our minds, far more visible.

In this sense, then, science and technology have gained on an enduring body of moral and legal analysis resting on long-held philosophical and scientific postulates, and are threatening to move past our moral and legal thinking, returning us to our original catch-up problem.

For bioethicists and lawyers, then, serious problems are raised both by the symposium's question whether science is outrunning law and ethics, and its inverse question whether human thought in formulating scientific projections and philosophical/moral problems is outrunning science. But when science makes gains on human imagination and begins to outrun it, we are returned to the symposium theme-in-chief. When technology's advances finally match or exceed our scientific/technological imaginations, our moral and legal systems for determining responsibility are again urged to make progress.

Now we are back to where we were. Assume that some practical technological mastery is attained in predicting individual human conduct far

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311. *Cf.* Richard Stone, *HHS 'Violence Initiative' Caught in a Crossfire*, 258 SCI. 212 (1992) (describing one research proposal: "[T]he researchers will provide 'intervention' for the children in the form of parent training, tutoring, and social skills training. The children will be followed through high school.").

more precisely than ever, and in intervening into specific mental processes so as to forestall misconduct, encourage sound conduct, enhance intellectual abilities, and so on. At this point, the power of ethical and political theory to help us seems to run out. We have never solved to everyone's satisfaction the paradoxes of human freedom. We cannot be free if our conduct is caused, and we cannot be free if it is not, or so the puzzle goes. Some will be strongly inclined to conclude, though they are not conceptually bound to, that only the therapeutic state makes sense. Despite its apparent support in various quarters, however, the therapeutic state is hard to fit into our constitutional system. Apparently, we cannot live as we prefer without a posit of responsibility and desert based on a notion of free decision making. And we cannot live with it because it appears to be false.

Once again, our systems of moral and legal thought cannot fully relieve our misery in facing the possibilities of biological technology, and it makes no sense to expect otherwise. The moral and conceptual reality is that there are conflicts, paradoxes, and indeterminacies that we cannot settle decisively by resort to principle, though we will act pragmatically, if clumsily, to work around our difficulties through political and policy compromises.

Why should we continue our moral and legal deliberations if catching up to technology is impossible? Because not everything is hopelessly indeterminate and progress of a sort is possible. Learning the structure of what ails our present deliberations may aid our future deliberations and assist us in constructing institutions that try to accommodate conflicting attitudes, values and beliefs.

CONCLUSION: BIOETHICS DEFENDED AGAINST THE CHARGE THAT IT IS PRESENTLY INADEQUATE TO THE TASK OF APPRAISING BIOLOGICAL TECHNOLOGY

Bioethics is getting a lot of heat and in most respects does not deserve it, at least insofar as its threshold recognition of moral and legal issues and its use of normative/conceptual tools are concerned. If the discipline of bioethics persistently yields results or recommendations at war with your own views, it does not follow that the foundations of the discipline are infirm, whether as a matter of substance or procedure. Bioethics could of course criticize its critics on such bottom-line grounds, but this is no more appropriate for bioethics than it is for anti-bioethics.

Alternatively, if bottom-line disagreement does not authorize an inference that a discipline is operating without a cortex, what criteria would justify saying that the discipline is infirm? We would so characterize it if its practitioners systematically misstate facts, directly or by suppressing context; rely on invalid or unsound arguments; select immaterial abstractions or overrate their importance; ignore material abstractions or underrate their importance; misapply the abstractions by ignoring or undergrading relevant criteria of interpretation or selecting or overgrading them; or make pronouncements or offer arguments when working under an undisclosed conflict of interest.

These criteria for intellectual infirmity, however, rest on certain critical ideas, such as moral materiality. There is no shortage of disagreement on what

indeed is morally material. Do courts or commentators ignore or understate the interests of gestational mothers when they defer to the parties' original intentions to lodge custody with the genetic parents. There is no easy answer to this, despite some contrary claims.[312] Perhaps the right to custodial motherhood is too important to be left to contract, and should instead rest on status. Which status—that of being the ovum source or of being the gestator? I say that *Johnson v. Calvert*[313] was correct in ruling that where a prior custodial agreement is in evidence, we can leave status aside and address the parties' original expressed understandings.[314] Critics wrongly think that the decision "ignored" the interests of gestational mothers. To say that an interest lost in a given case does not mean it was "ignored" or even downgraded by anyone. Nor does it mean that the decisionmaker failed to recognize the significant effects of gestation on the developing fetus and thus the child ultimately born.[315]

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312. *See* Rothman, *supra* note 37, at 1607 (rejecting "the notion that any woman is the mother of a child that is not her own, regardless of the source of the egg and or the sperm").

313. 851 P.2d 776 (Cal. 1993).

314. *See id.* at 781.

315. There is no reason to suppose that the impact of gestation was unknown. *See generally* R. Brian Oxman, *Maternal-Fetal Relationships and Nongenetic Surrogates*, 33 JURIMETRICS J. 387 (1993). The author recommends that the custody decision in gestational surrogacy rests on the child's best interests, and states that

> [a] child born to a gestational mother who has not contributed genetic material to the zygote has two mothers, a gestational mother and a genetic mother. . . . The gestational mother's endocrine connection and role in the formation, development, and physiological functioning of the fetus are unique in every instance and create a biological mother-child relationship. . . . There is no organ system of the resulting fetus that is not anatomically, physiologically, and genetically affected by the maternal endocrine system to the extent that the resulting fetus is a unique product of the gestational mother that gives rise to a lifelong maternal-child relationship. This relationship must be taken into consideration in any legal proceeding where the physical and legal custody of a surrogate-produced child is at issue. The surrogate mother is a creator of the child sharing an equal role with the genetic mother, and the surrogate's right to a relationship with the child she has created must receive legal recognition. [¶] Because the gestational mother's contribution to the genetically unrelated child is so significant, the appropriate disposition of custody disputes requires the best interests of the child to be assessed . . . ."

Id. at 424 (footnote omitted).

The idea of an "equal role" is clearly normatively ambiguous. It is one thing to describe physiological impacts, but quite another to evaluate them for purposes of determining comparative effects. Before, being a biological mother was a matter of empirical fact—sex, pregnancy, and birth—although impaired observation might create evidentiary difficulties. Artificial insemination and IVF were not thought to compromise biological motherhood, and this was probably not even perceived as a value issue. Gestational surrogacy, however, makes it impossible to rest on empirical observation as decisive. If the gestational mother has X impacts on the child and the genetic mother's genome has Y impacts, nothing follows, without further premises, about who the natural

In *Johnson*, gestation's value was outweighed by another consideration—the intentions of autonomous parties concerning their reproductive interests. Perhaps *Johnson's* critics have misapprehended the nature and value of genetics and of the overarching value of reproductive autonomy—although this too would not follow simply from the fact that they think *Johnson* was wrongly decided. In any event, if the root of the objection to a viewpoint, decision, or discipline is a raw moral disagreement rather than a clear flaw on one or both sides, it may be misleading and time-wasting to complain about the fatal deficiencies in the opposition's thinking.

Sometimes an entire field or some substantial part of it may have taken the wrong path, or at least failed to take the best one. It took a while for the germ theory of disease to be accepted in medicine and science. Here, "path" must be described at a fairly high level of abstraction. Simply reaching conclusions at war with your own does not mean your opponents have taken the wrong fork at some fundamental point. Of course, if there is disagreement, then at *some* stage the partisans have taken different roads. This, hardly establishes that either of their argument structures is deeply flawed.

In any event, it is no failing of ethical theory, law, or bioethics that they do not always give us answers that a group of skilled commentators, courts, legislatures, and an informed citizenry could agree on with near-unanimity as definitive. Here, an admonition of Heidegger is to the point: sometimes we notice things only when they fail.[316] Perhaps bioethics fails when faced with the moral and legal anomalies created by our division and recombination of biologically integrated life processes. But every discipline and approach may fail under such circumstances. In some arenas, answers *are* often provided, at varying levels of generality and specificity. Many agree that we have identified the primary criteria for withdrawal or withholding of medical care where the likely consequence of doing so is the patient's death; that there is nothing inherently wrong with organ transplantation; that the idea of brain death is needed, despite the technical and philosophical disputes still swirling about it; that informed consent by patients or their proxies, or possibly by families as an autonomous unit, is a necessary (though not sufficient) condition for various forms of medical intervention; and, answers or no, that we have identified many of the critical variables necessary to evaluate the technological alteration of living persons or of possible persons via the germ line.

In various situations, however, not only is there no clear consensus, it is impossible to specify what such a consensus could rationally be based on even

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mother is, or about whether there are really two of them. Of course, it is a vast factual oversimplification to put the question this way, but the conceptual point is clear. How would we rate a large effect on kidney development as against liver, heart, or brain development? If we were assessing brain development impacts, would cognitive or emotional impacts count for more, or does it make any sense to calibrate so finely? If it does not, what is the point of the physiological comparison in the first place?

316. *See generally* MARTIN HEIDEGGER, BEING AND TIME 102-03 (John Macquarrie & Edward Robinson trans., 1962).

if we arrived at it. We cannot resolve the paradox of lotteries: on one view, respect for persons requires individuation when distributing important but scarce resources, especially lifesaving procedures; on the rival view, respect for persons forbids such individuation and rationally calls for its opposite—total fungibility within the class of potential recipients. Of course, we will either have lotteries or we will not, but the decision will turn not on the solution to the lottery paradox, but on many other factors, including our sense of the impact of institutionalized lotteries on our preferred attitudes and values. Even if we achieved consensus, we could not infer that we had found the true right answer. (If we did, would the state or society be permitted or obliged to recognize and enforce the right answer?[317])

What *is* possible is knowing more clearly the nature of the blockades to moral closure in some areas, and seeing its possibility in others. Knowing that something is impossible may not sound like much, but we sometimes do pay experts to tell us whether we can or cannot do what we wish to. Furthermore, this knowledge may have spillover effects in helping bring closure for issues capable of it and help us design institutions, perhaps awkward, unwieldy edifices, that effectively allow us to get on with things. In any event, learning the nature of the difficulties preventing progress is itself progress. If we cannot get more than that, then the question becomes whether we should or can delude ourselves otherwise.

I have said that most criticisms of bioethics seem off the mark and too result-oriented. Resting our critiques of moral and legal analysis largely on outcomes does not provide adequate guidance in assessing either the cases at hand or future disputes. This is fatal to a coherent ethics and a coherent legal system, at least as we have come to understand these ideas. The critiques of bioethics are often far more plausibly called "flawed" than bioethics itself because of their fixation on conclusions. As a moral and methodological critique, this is too insubstantial to be of service. Not only is there nothing wrong at the threshold in working with paradigms, principles, and other abstractions, one cannot proceed or even start without them, and the critique of particular paradigms in bioethics is unpersuasive.

In general, the talk about law and ethics being behind science and technology has to be reconstructed to make sense. Law and ethics are categorically different from science and technology and from each other, despite isomorphisms in argument structure and the "fuzziness" of the fact/value distinction. They *concern* science and technology, they are *about* science and technology (and everything else), but they are a different order of existence, and it is thus impossible to apply the same sense of progress to both domains. Their canons of verification differ strongly, despite the structural similarities. There is no race between law and ethics on the one hand, and science and technology on the other.

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317. *See generally* WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 206-07 (1990); Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685 (1992); Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1356 (1991).

In many instances, indecision, paradox, and indeterminacy are not usefully considered flaws in law or in ethics because they are inherent in them. One is not deficient for failing to come up with a certainly correct answer when it is impossible to find one.

Progress in the connected worlds of law and ethics can be assayed by inspecting both the large and the fine structures of our thinking. For one thing, thinking about how we think can help yield answers where answers are possible. Many observers initially had major reservations about the very propriety of, say, withholding artificial nutrition and hydration, or of transplanting organs, or of allowing persons to refuse lifesaving or life-prolonging treatment. Some still do, but the degree of consensus that these procedures may be pursued in many situations is quite high. One encounters opposition within relatively discrete groups defined by certain moral and/or religious views, but not global rejection.

One can expect progress in seeing and addressing some issues that are strongly contested at particular levels of specificity. For example, people who agree on the desirability of organ transplantation may part company on whether queues for organs should be set up for local, regional, or national constituencies. Seeing the issue of constituencies came early, but its perceived importance has grown because of the interaction of technological change and debate. Thus, extension of organ preservation times strengthens (but does not prove) the case for a national constituency and, more generally, makes the constituency issue more vivid. Immunosuppression technology favorably affects the case for transplantation even where tissue matches are nonoptimal. It also alters supply and demand forces, perhaps intensifying distributional issues generally. Such subtechnologies stimulate recognition of new perspectives or the relative importance of old perspectives, and new normative insights become likelier.[318] The facilitator for such insights is continued rational debate, not simply conversation without criteria. Perhaps we did not follow the precedent for kidney disease—government funding for medically indicated treatment—in managing other specific disease categories because we came to understand that such allocations were themselves death decisions.

Even where no satisfactory answers are conceptually possible, we may still develop a rough, perhaps temporary, consensus. Very few persons would opt for

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318. *See* Nagel, *supra* note 11, at 211 (stating that "characteristic of the modern Kantian tradition, moral thought involves the development of more complex, morally influenced motives, as our sense of what is and is not a sufficient reason for action is altered by changing conceptions of equity, fairness, responsibility, cruelty, desert, and so forth.").

But cf. Holmes, *supra* note 15, at 157 (arguing that "philosophical ethics" has "[s]ome . . . but not much" relevance to solving bioethical problems; noting that it promotes "conceptual clarity" and "can provide the categories by which to discuss the problems theoretically," and in some cases it can show that acceptance of a given moral position may allow inferences within "substantive morality"). The author insists, however, that philosophical ethics is neither necessary nor sufficient for resolving the problems at hand. *See id.* I assign more importance to moral and legal clarification, where it assists in achieving personal moral closure, if not without regret, and in allowing parties in disagreement to reach a decision.

a lottery to distribute validated lifesaving resources such as a fully implantable artificial heart, despite their unhappiness with any conceivable set of substantive criteria for differentiating persons. They are unlikely to change their minds even after exposure to the lottery paradox. Perhaps understanding the structure of the paradox may help them see why they are opposed to lotteries, and/or make them more comfortable with their discomfort. Perhaps understanding the paradox will lead them to inquire into empirical questions such as how we are likely to react to shifting from the search for substantive criteria to their rejection in favor of randomness. Perhaps the consensus will change if some moral and religious views change.

Finally, and of considerable practical importance, moral reflection in some cases may highlight aspects of a situation, leading particular decisionmakers to their own informed resolution. Enabling these personal decisions may be a form of moral progress even when it cannot yield definitive answers within normative or metaethical theory. Moreover, even if a wrong decision is taken to engage habitually in good faith moral reflection is a virtue apart from the outcome.[319]

I am not even remotely suggesting that progress is simply a function of process. The temptation to forego substance because of its uncertainties in favor of choosing fair procedures is understandable, and in various situations resort to procedural solutions may be the only available pragmatic strategy for securing an acceptable a bottom-line decision. However, there can be no assurance that the process will culminate in a morally convincing answer or a situation that all would say is the best of the alternatives. Indeed, conscientious decisionmakers who find themselves planted within some procedural scheme, say, a committee to distribute scarce medical resources, will experience precisely the same difficulties encountered by those who, not knowing how to generate a right answer, established the procedure in the first place. What would be clearly amiss, then, is to assert that because we cannot resolve a matter definitively, something is wrong with moral and legal theory generally and bioethics in particular. There are many who cannot abide such uncertainty and the shortage of answers it entails. The only sensible response is: get used to it, because there is no honest alternative.

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319. *Cf.* Holmes, *supra* note 15, at 157 (stating that "[t]he cultivation of a morally sensitive, caring, and compassionate character probably counts for more in the end than analytical skills."). Emphasis on moral virtue and virtuous acts and on moral character generally is an important topic in all branches of ethical theory, but I do not think it can displace to any significant degree the received forms of normative, metaethical and applied ethical theory. The idea of virtue is not independent of basic questions of rightness and goodness. *See generally* BEAUCHAMP & CHILDRESS, *supra* note 273, at 62-69.