Higher-Brain Death

A Critique

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In the minds of many, the debate over the proper criteria for determining death in situations where the traditional understanding of the irreversible cessation of cardiopulmonary function is insufficient was settled by the general consensus of scientists, philosophers, and theologians in the early 1980s. Simply stated, the consensus opinion holds that in situations in which a patient’s heart and lung function is artificially maintained, a determination of death can be made by establishing whether the brain as a whole is no longer functioning. The subsequent passage of laws helped solidify this position as public policy. For Catholics, the whole-brain criterion for determining death was affirmed by Pope John Paul II in 2000. This position stood against the most restrictive view, that only cardiopulmonary criteria should be used, as well as a broader interpretation, that cessation of the higher functions of the brain is sufficient to determine death.

Despite the legal and ecclesial affirmations of the whole-brain death view, defenders of the other positions continued to make their case. Most notable on the side of the partial or higher-brain death criterion is Robert Veatch, who argues

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1 Robert Veatch offers an extensive review of the history of this issue. See his Transplantation Ethics (Washington, D.C.: Georgetown University Press, 2002), 43 to end.

his case in his book *Transplantation Ethics.*³ This essay will offer a critique of the higher-brain death position articulated by Veatch. First, I present a brief summary of Veatch’s argument.

**The Argument of Veatch**

Veatch’s position is best understood in the context of his book’s goal “to provide a moral framework for thinking about transplantation as a matter of public policy—that is, when both consequence (efficiency) and just allocation (equity) are taken into account.”⁴ This goal also serves as the rationale for questioning the current criteria of death enshrined not only in Catholic moral teaching but also in most U.S. state laws. Veatch writes, “What we are interested in is the public policy question: When should we begin treating an individual the way we treat the newly dead?”⁵

In avoiding the traditional theological understanding of death as the irreversible separation of body and soul, Veatch approaches the question from the perspective of those who survive the decedent. Reflecting his interest in religious and moral diversity, Veatch identifies the ways that different cultures recognize death. What is common in this diversity is the fact that once death is recognized, social and cultural behaviors change. The sadness of recognizing an approaching death is replaced by mourning; the body is treated differently and prepared for disposition; a last will and testament is read; different roles are assumed (widowhood); and if necessary succession to office is determined. It is also at this time that organs may be harvested for the purpose of transplantation.⁶

When Veatch writes about human death, he avoids limiting himself to death in the biological sense. Death is much more a social and cultural reality. After death is recognized, behaviors and relationships change. In this sense, the nature of death is open to interpretation, as is seen in Veatch’s formal definition of death: “Death is the irreversible loss of that which is essentially significant of humans.”⁷ It is clear from this definition alone that Veatch is predisposed to accepting a broader interpretation of the brain-death criteria. After all, identifying what is “essentially significant to the nature of humans” could be a difficult and controversial task. The whole-brain death argument assumes that the human brain functions as an integrating organ, the destruction of which would indicate that the individual is no longer alive. Veatch tries to show the inadequacy of this position by using the same argument employed by those who reject the cardiopulmonary criteria. In essence, he notes that just as the cardiopulmonary criteria could produce a “false positive” conclusion that leads one to treat a dead body as if it were alive, so too could the whole-brain death criteria.

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³ It should be noted that Veatch, whose proposal is critiqued in this essay, does not use the term higher brain death. He prefers “whole-brain-oriented” and “higher-brain-oriented” definitions of death. See Veatch, *Transplantation Ethics,* 103.

⁴ Ibid., 37–38.

⁵ Ibid., 54.

⁶ Ibid., 55.

⁷ Ibid., 87.
Because of residual cellular and electrical activity and other life indicators, Veatch argues that it is difficult to satisfy the requirement of the 1981 Uniform Determination of Death Act that “irreversible cessation of all functions of the entire brain, including the brain stem” has occurred.8

Because of these considerations, the question of moral doubt arises. A false-positive conclusion could lead one to treat a living person as dead or a corpse as a living person. Either would be a moral infringement on human dignity. Secondarily, Veatch notes that this doubt might also be harmful to others, inasmuch as medical resources might be wasted and organs that might be life-saving would not be harvested.9

For these reasons, Veatch proposes his formal definition of death as the irreversible loss of the “essentially significant” in human nature. By identifying those characteristics that change the human relationship with a living person to one with a person who has died, Veatch believes that the difficulties and imprecision of the whole-brain death criteria can be avoided.

Before identifying these characteristics, Veatch first rejects rationality as an “essentially significant characteristic,” because of the danger of misidentifying as dead those whose capacity for reason has been impeded by sickness or age. Instead, Veatch posits two characteristics as essentially significant to human nature: experience in the “broadest sense,” and the ability to interact socially. A human being with the capacity to experience and to interact with other humans, even in the most minimal sense, could not be considered dead. As a further clarification, Veatch notes that these capacities for a human being must be embodied. Therefore, what is “essentially significant to the nature of the human” is the “embodied capacity for experience and social interaction.”10

Having established the problems with the whole-brain definition of death in light of his formal definition, Veatch re-articulates a third option, which he first proposed in 1975, commonly called higher- or partial-brain death.11 This third option is, according to Veatch, experiencing a renewal of interest because of the recognition of the inadequacy of the current model. “They ask why it is that one must identify the entire brain with death; is it not possible that we are really interested only in human consciousness . . . This is crucial in rare cases in which the lower brain function might be intact while the cortex, which controls consciousness, is utterly destroyed.”12 Veatch

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8 Ibid., 92–93; 104–105.
9 Ibid., 89.
10 Ibid., 95.
12 Veatch, Transplantation Ethics, 46. Veatch is not alone in his assessment. Winston Chiong also notes that a “growing consensus has developed among bioethicists and philosophers that brain death is actually incoherent.” Chiong himself calls the whole-brain death criterion “roughly correct.” See “Brain Death without Definitions,” The Hastings Center Report 35.6 (November–December 2005): 20–30.
proposes to replace the current model with a less strict assessment of the clinical signs of death, which he calls the “higher-brain-oriented concept of death.” In this view, one is dead when one lacks the capacity for experience and social interaction, which is the result of a loss of higher-brain functions.

Specific Criticisms

There are a number of issues and problems with Veatch’s position.

1. Veatch seems to imply in his work that the traditional signs of death, the irreversible cessation of cardiopulmonary function, have been rejected as a standard and that whole-brain death criteria are the norm. This is certainly not the case for most people who die without technological intervention. For those who are terminally ill or at an advanced age, they are declared dead when their heart stops beating and they stop breathing. Benedict Ashley and collaborators write that brain-death criteria should be used only when the traditional signs cannot be used because of a technological intervention. “If brain death were permitted to become the exclusive criterion for human death, no one would be judged dead without elaborate tests in a hospital.” This implication on the part of Veatch is important, because without it he could not argue that someone who had lost higher-brain function but was still breathing spontaneously could be declared dead.

2. The formal definition of death offered by Veatch is also problematic. Certainly, he is right that when death occurs, human relationships, interactions, and identities change. He is also right in stating that the “essentially significant” of human nature is no longer present at death. This is in conformity with the traditional Christian understanding that death occurs when the body and soul are irreversibly separated. In this view, the criteria for death, whether cardiopulmonary or cerebral, are generally understood as “clinical signs” that death has occurred. Death is understood as a spiritual event which can be determined by recognizing the biological signs that manifest when the individual no longer functions as a unified organism. However, Veatch rejects this understanding and identifies the “essentially significant” as the capacity to experience and engage in social interaction. The signs of death are thus reduced to social and psychological manifestations. This view is inadequate, since experience and social interaction are largely subjective experiences and as such should not function as definitive determinants that death has occurred. Given Veatch’s concern that whole-brain criteria are imprecise, it would seem that his own criteria suffer from that same weakness.

3. Veatch’s approach also seems directed toward an extreme spirit–matter dualism. Although in his work he insists that death must be understood as that of the

13 Veatch, Transplantation Ethics, 100.
14 Ibid., 88, 91, 96–97.
16 Ibid., 169–173.
whole person, his own suggestion that death occurs when the individual irreversibly loses higher-brain function belies this claim.\textsuperscript{17} Veatch downplays the death of the biological reality and argues that it is the social and psychological capacity of the individual that determines death.\textsuperscript{18} To simply ignore the fact that someone without higher-brain capacities who continues to breathe spontaneously and process nutrients might still function as a unified organism would be an inappropriate rejection of the total human person. It is difficult to see how identifying the essentially significant of human nature only with experience and social interaction is not slipping into dualistic thought. It should be noted, however, that those who defend the whole-brain definition of death run a similar risk.

4. Perhaps the most compelling problem of Veatch’s argument is that it runs counter to human intuition. According to Veatch, someone who is spontaneously breathing and unconsciously performing other bodily functions but who has no higher-brain function can be declared dead as a matter of public policy. It is significant, however, to notice how loved ones respond to someone who is permanently unconscious or in the process of dying. In most cases, the family and friends gathered around the sick bed treat the person as if he were living, or at least in the process of dying, and not already dead, no matter what the status of higher-brain function. They are gathered around a living, beloved person—not a corpse. As Veatch rightly notes, this changes once death occurs. It is counterintuitive, however, to accept death while someone is still breathing spontaneously. If the individual shivers spontaneously because of low body temperature, most people will respond by covering the person with a blanket to warm him. That is not a typical response to a corpse. While this problem by itself is not conclusive, it does point to an important reality that Veatch himself affirms—the cultural and social significance of death.

5. Finally, Veatch rightly notes that this discussion is ultimately about the moral status of human beings. “When humans are living, full moral and legal human rights accrue. Saying people are alive is shorthand for saying that they are bearers of such rights. That is why the definition of death debate is so important.”\textsuperscript{19} Truer words could not have been written. Despite the gravity of the debate, Veatch’s solution is to argue for a conscience clause that would allow individuals to make the decision themselves as to which criteria should determine their own deaths. Veatch argues that in a pluralistic society, no one of the three definitions of death and their variants “is likely to gain anything close to a majority any time soon.”\textsuperscript{20}

This seems to ignore the fact that there is a general consensus among physicians, religious leaders, and the general public that the whole-brain death definition is the

\textsuperscript{17}Veatch, \textit{Transplantation Ethics}, 90. Veatch also notes that his particular understanding of the higher-brain position is dependent on an understanding of the human being as an integration of body and mind. Ibid., 111. Nevertheless, his argument has difficulty maintaining this claim.

\textsuperscript{18}Ibid., 87.

\textsuperscript{19}Ibid., 111.

\textsuperscript{20}Ibid.
most appropriate in situations in which the traditional cardiopulmonary definition is unattainable. And even if this consensus did not exist, it would seem irresponsible for public-policy makers to promote a conscience clause, given the admitted seriousness of the debate.

The Subject of Human Rights

The question of rights and society’s responsibility to protect those rights is, of course, related to an understanding of the dignity of the human person, a position clearly articulated in the Catholic tradition. In 1963, Pope John XXIII wrote in his encyclical *Pacem in terris*:

> Any human society, if it is to be well-ordered and productive, must lay down as a foundation this principle, namely, that every human being is a person; that is, his nature is endowed with intelligence and free will. Indeed, precisely because he is a person he has rights and obligations flowing directly and simultaneously from his very nature. And as these rights and obligations are universal and inviolable, they cannot in any way be surrendered.

In the Catholic tradition the dignity of the human person is rooted in a free and rational nature, not in the actual exercise of freedom and rationality or any correlated functions such as the ability to experience or interact socially. Thus, even in cases in which an individual is incapable of acting freely and intelligently because of disease or accident, the nature of the individual, as human, remains intact. Pope John Paul II affirmed this in 2004 when he stated that “the intrinsic value and personal dignity of every human being do not change, no matter what the concrete circumstances of his or her life. A man, even if seriously ill or disabled in the exercise of his highest functions, is and always will be a man.” Therefore, any movement toward a definition of death determined solely by higher-brain function must be rejected. Human beings possess the dignity and rights proper to their nature not because they are able to exercise higher-brain function, but because of the totality of who they are as unique embodied beings, created in God’s image, with a radical capacity for freedom and intelligence.

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21 In 2004, a survey found that only 34 percent of respondents identified someone in a persistent vegetative state as dead. Eighty-six percent agreed that someone who had lost total brain function is dead. More problematic are the 57 percent of respondents who viewed someone in a coma with an unrecoverable brain injury as dead. See Laura A. Siminoff, Christopher Burant, and Stuart J. Younger, “Death and Organ Procurement: Public Beliefs and Attitudes,” *Kennedy Institute of Ethics Journal* 14.3 (September 2004): 217–234.
