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PARTICULARISM IN BIOETHICS: BALANCING SECULAR AND RELIGIOUS CONCERNS

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Creating health care policy, legislation, and case law brings us face to face with the sociological, political, and conceptual dilemmas that moral pluralism poses. Abortion, reproductive technology, the deployment of life-sustaining technologies, assisted suicide, and euthanasia are but a few of the moral controversies in contemporary health care policy and law. These controversies arise, in part, because the development and dissemination of medical technologies has made possible what was once only imaginable. Yet the mere proliferation of such technologies is insufficient to explain the existing contemporary moral controversies in bioethics. These bioethical controversies arise because there are different views concerning how such technologies should be used and how medicine should be practiced. These new medical possibilities illustrate that the Western world no longer shares a common moral narrative.¹

As a discipline, bioethics has tended to underestimate the serious conceptual dilemma that moral pluralism poses.² Although acknowledging that religious views often separate people, as is the case with the different religiously informed views on sexual practices, some scholars suggest hope that secular, content-full³ bioethics could shape health policy and law.⁴ They assume that a general, secular bioethics could be established that would transcend the particular views of reli-

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¹ A variety of writers discuss the collapse of a common moral narrative and the growth of moral pluralism. See, e.g., H. TRISTRAM ENGELHARDT, JR., THE FOUNDATIONS OF BIOETHICS (1986); JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (Geoff Bennington & Brian Massumi trans., 1984); ALASDAIR MACINTYRE, AFTER VIRTUE (1981).

² See, e.g., ENGELHARDT, supra note 1, at 4 (noting that consideration of bioethical philosophy in terms of practical cultural needs occurs against a background of considerable skepticism as to the relevance and coherence of such a philosophy).

³ In this essay I use the term "content-full" to describe any model of moral reflection that has a commitment to a particular set of values and a ranking of those values. Such commitments to defined values are necessary if one hopes to resolve moral controversies such as assisted suicide and artificial prolongation of life.

gious moralities and ideologies that comprise religious bioethics. Those that subscribe to this theory view secular bioethics and religious bioethics in tension with one another at best, or worse, as diametrically opposed. This Article, however, argues that there is no general, content-full secular morality that can serve as a foundation for bioethics. Just as Jews, Roman Catholics, and Orthodox Christians have diverse views of bioethics, neither libertarians, marxists, consequentialists, nor rawlsian secular bioethicists are exempt from diversity of opinion. This conclusion is not grounded in the sociology of knowledge, but rather upon an epistemological argument. The conceptual dilemma is that there are just as many starting points for consideration of secular, content-full bioethics as there are for religious bioethics, and scholars have no way to determine which starting point is correct. Yet without some initial set of premises or moral assumptions moral controversies cannot be resolved. Content-full assumptions therefore must be made if fields of applied ethics, such as bioethics, are to resolve moral controversies. Without any way to know what initial assumptions are correct many different "bioethics"—both secular and religious—will result with no way to know which of them is correct.

If the preceding argument succeeds, it will lead to conclusions about state involvement and the importance of privacy and conscience in health care. It will mean that health policy will have to rely on a general procedural ethic, rather than content-full morality, and that both religious and secular moral views will have to participate in the public policy discussion without reference to discursive reason alone. Thus, the challenge of the future is to understand how individuals from diverse moral and bioethical traditions can recognize some common web of moral authority, however sparse, that may lend guidance and legitimacy to a secular health care policy.

I. THE EMERGENCE OF SECULAR BIOETHICS

Traditionally, the field of medical ethics was limited to discussions of the moral conduct of the physician. The Hippocratic tradition provides one of the clearest expressions of this view in the physicians' oath to "apply . . . measures for the benefit of the sick according to my ability and judgment." The orientation of the Oath is toward the physician's judgment and conduct. But scientific and

5. See generally Carter, supra note 4.
technological advances in medicine—such as life-prolonging technologies, transplantation techniques requiring noncadaveric organ donations, the development of abortion techniques with extremely low mortality, and the ability to determine prenatally the existence of fetal defects—have led to a greater emphasis on the patient’s role in treatment discussions and choices. Thus, contemporary bioethics is shaped, in part, by developments in medicine that provide patients and their doctors with new treatment possibilities, which must be understood and acted upon within the fabric of a moral vision rather than merely a physician’s professional judgment.

The rapid development of medical technology, increases in medical costs, and expansion of biomedical capabilities have prompted established religious and cultural groups to play a role in the discussion on how to meet these new challenges. Much of the moral debate concerning issues in medicine and biomedical sciences in the 1950s, ’60s, and early ’70s took place from within religious perspectives that frankly acknowledged their content as particular, albeit normative. These communities recognized that a new era full of novel medical challenges was dawning; each religious community in its own way tried to fashion a response.

Moreover, the Western Hemisphere, particularly the United States, became ever more secularized, and various individual rights movements gathered strength. The West also was characterized by an officially secular government, by a marked plurality of religious and moral convictions, and by the absence of established religion. These characteristics further underscored the need to determine the extent to which a general bioethics could be articulated, one that applied across denominational lines and that bound persons upon such. If a

8. See, e.g., Joseph Fletcher, Morals and Medicine (1960); Edwin F. Healy, Medical Ethics (1956); Immanuel Jakobovits, Jewish Medical Ethics (1959); Gerald Kelly, Medico-Moral Problems (1958); Paul Ramsey, Fabricated Man (1970); Harmon L. Smith, Ethics and the New Medicine (1970).

A special qualification must be made as to how Roman Catholics regard their bioethical positions or commitments. Since the Middle Ages, Roman Catholicism has assumed that reason alone can establish the content of ethics. The view was that any open-minded person should be able to understand the Roman Catholic proscriptions of abortion or contraception because they were grounded in reason, not divine revelation. Edwin F. Healy writes:

Hence it matters not whether one be a Roman Catholic, a Protestant, a Jew, a pagan, or a person who has no religious affiliation whatsoever; he is nevertheless obliged to become acquainted with and to observe the teachings of the law of nature. In the present volume all the obligations which are mentioned flow from the natural law, unless contrary is evident from the context. Healy, supra, at 7. This faith in reason is one of the intellectual hopes that drives modern philosophy’s search for morality outside the context of religious particularity.
secular bioethics could be fashioned to give content-full guidance, it could help citizens of any religious persuasion to see the moral force of the resulting health care laws and policies.

The search for a secular bioethics can be viewed as a search for a secular or civil religion that might bind the sentiments of citizens who are at least nominally divided by religious, cultural, or other moral differences. These aspirations have a consanguinity with the aspirations of the Stoics and natural law theorists, and with the aspirations that led to the modern philosophical or Enlightenment project. As the West entered the modern age, it was wrought by deep religious controversies and bloody wars. Just as individuals then hoped to discover a reason-based, content-full understanding of proper conduct and to develop a secular moral authority that could be acknowledged across confessional lines, so too, theorists now hope that secular bioethics can provide a content-full morality to guide public policy decisions and to yield a secular moral authority.

Because health care is a cooperative venture that potentially brings together an array of differing moral visions, it highlights the phenomenon of moral pluralism. Health care is delivered in a setting of complex institutions that brings together a diversity of health care professionals, engaged in ventures that are sponsored by both public and private resources and that fulfill a variety of different goals or visions. The men and women involved in the practice of health care often have conflicting understandings of the rights and obligations of professionals, patients, and society. These different interests and moral points of view form the background for the moral controversies of health care and bioethics in our secular pluralistic society. Bioethics has emerged as a discipline seeking to resolve such controversies in this secular, morally pluralistic setting.

II. CLOSURE AND MORAL CONTROVERSIES

Moral controversies emerge when people differ on either the description or the resolution of a moral dilemma. For some, the introduction of the abortifacient drug RU-486 represents a serious moral issue for public debate, while for others the real moral issue is the present ban of RU-486.9 The field of bioethics seeks to resolve such controversies. Moral controversies differ from controversies in other intellectual disciplines, however, in that they seem to have an intermi-

9. This ban may not continue for long. The Population Council, a nonprofit contraceptive research organization, has been awarded the American patent on RU-486 and could make it available in the United States as soon as 1996.
nable quality. In part, this quality is a product of the strong commitments that people often feel toward different sets of moral values or different views of moral justification. Such foundational disagreements often underlie the moral controversies that arise in health care. Without foundational consensus, bioethical debates generally cannot be resolved; conversely, when people share the same understanding of moral justification and moral values, they can debate a moral controversy and arguably reach some resolution. Roman Catholics, for example, share a common moral tradition that enables them to analyze and discuss issues such as the use of life-prolonging technologies: they share a common moral tradition that permits them to conduct meaningful moral arguments using mutually-held beliefs and justifications. Such communities can identify moral issues and reach possible solutions to those issues. When individuals share enough moral premises, they can achieve closure by sound argument.

10. See MacIntyre, supra note 1, at 8.
11. One finds in Western moral philosophy different models of justification. Many of these models appeal to some notion of "reason." Others, such as contemporary feminist ethical reflections, challenge traditional rational models. Indeed, the feminist critique reminds us that Western culture also has appealed to the human emotions or affections as foundations for ethics. In both cases, however, the general assumption has been that some basis, rational or otherwise, serves as a common foundation for moral reflection.

Even among participants with shared moral backgrounds, such debates can seem intractable. For example, Catholics, versed in their tradition, may dispute the bishops' interpretation and deployment of the traditional distinction between ordinary, or obligatory, means and extraordinary, nonobligatory, means. The bishops, for example, say that "[n]o one may ever decide in good conscience to withhold medically assisted nutrition and hydration from persistently unconscious patients because their lives are deemed too burdensome or of too low quality to be maintained." Id. at 19. A Catholic may well respond that the bishops forget that one of the criteria for determining whether a treatment is ordinary or extraordinary is whether or not the treatment provoked a "vehemens horror"—a vehement horror, being a term used to capture a repugnance or fear that a person may have toward a certain medical procedure, therapy, or outcome. One example that theologians discuss to illustrate the difference between ordinary and extraordinary treatments is that of a woman who is unwilling to submit to any medical treatment by a male doctor because it offends her sense of modesty. There is no settled opinion as to whether the woman is obliged to undergo such examination or treatment. Certainly, some moralists have recognized that such distaste can constitute a moral impossibility for the patient and therefore render a means "extraordinary." See, e.g., Alphonsus de Ligorio, Theologia Moralis (1840). Additionally, one could well imagine a good Catholic arguing that they found
A society can also resolve moral controversies when it achieves consensus concerning the ultimate issue. In such a case, it does not matter whether the claims leading to the conclusion are themselves true or false. All that matters is that agreement occurs. This has proven true in the realm of health care as well.

There, however, are several difficulties with this type of closure. First, there is often a failure to distinguish between the consensus decision and the morally appropriate action, which can be disjunctive. For example, the historic existence of social consensus regarding slavery failed to make the practice morally correct. Moreover, as noted above, one's judgment about the moral appropriateness or inappropriateness of an action will depend on the assumptions with which one begins. Thus, social consensus simply indicates that people agree on the conclusion, but it does not indicate whether they all followed the same steps of reasoning to reach the conclusion or whether they agreed on each subsidiary claim leading to the conclusion, much less whether their agreement is objectively or morally correct. Second, although consensus may help resolve a particular problem for which repugnant the prolongation of life by artificial feeding and hydration and that such measures ought to be deemed extraordinary and nonobligatory.

Others may argue that the Maryland Catholic Conference failed to understand the notion of "useless treatment" in the context of the Roman Catholic tradition. The bishops write, "[a] medical means or treatment should not be deemed useless, however, because it fails to achieve some goal beyond what should be expected." Pastoral Letter, supra, at 8. It is clear that the Catholic tradition has assessed the burdens and benefits of treatment within the context of the patient's entire condition, however, and not on a treatment-by-treatment basis. The Roman Catholic tradition does not consider treatment obligatory if there is no hope of the patient's recovery (spes salutis). Cardinal de Lugo argued that the hope of benefit must be more than simply the hope of postponing the inevitable. De Lugo gave the example of a man condemned to death by fire: while surrounded by flames, the man notices that he has sufficient water to extinguish some of the fire, but not all of it. De Lugo then asks if the man is obliged to use the water—and he answers "No." Even though the means is common and would offer some benefit, temporarily prolonging life, it is considered of no value because it would only postpone the inevitable. The benefit derived from the conduct must be worthwhile in both "quality and duration." (De Justitia, Disp. X, Section I, no.30). In fact, the pursuit of such futile or extraordinary treatments may present a grave moral evil. See, e.g., Daniel Cronin, The Moral Law in Regard to the Ordinary and Extraordinary Means of Conserving Life, in Conserving Human Life 3, 77-116 (1989); Thomas J. Bole III, Why Almost Any Cost to Others to Preserve the Life of the Irreversibly Comatose Constitutes an Extraordinary Means, in Birth, Suffering, and Death: Catholic Perspectives at the Edges of Life 171, 184 (Kevin W. Wildes et al. eds., 1992).

As these differences illustrate, a moral community, such as Roman Catholicism, that shares a common set of values and an understanding of moral justification, moral language, and juridical authority, can engender robust discussions on how to understand contemporary issues within the tradition of the community. Given sufficient time and discussion, consensus or closure is even within reach. Absent such shared frameworks, however, as in a morally pluralistic society, such closure will be unattainable.

the principals agree on what action to take, the consensus may be inadequate to extend beyond that particular case or to serve as guidance or precedent for future cases. For example, a consensus decision to terminate treatment in one case cannot necessarily be generalized to other cases, institutional policy, or health care law. Third, it is difficult to understand what role social consensus should play in the resolution of moral controversies in public policy disputes in health care. In particular, consensus in public policy debates often does not mean that all parties involved agree, but rather that a majority or coalition has emerged with the ability to enforce its views. Whether consensus reached in such a manner ought to control or influence public health care policy decisions is itself an issue for consideration.

Another form of closure is the “natural death” of a controversy. A debate may die because public interest in the resolution of the core issues simply fades. Such closure occurs rarely in the moral controversies over bioethics because debate continues to surround most other aspects of each controversy. For example, the moral controversies that initially surrounded the use of advanced medical directives have “died,” yet controversy continues to swirl around the issue of what methods ought to be permitted to accomplish or satisfy such directives, such as artificial feeding and hydration or physician-assisted suicide.

The field of bioethics has sought to resolve controversies through the application of sound argument, or through the development of a set of normative principles or cases, yet appeal to reason inevitably fails to provide satisfactory resolution. To understand why the only closure possible in a morally pluralistic society is procedural closure when inherently moral issues are involved, one must understand why the failure of reason is inevitable. At first glance, appeals to rationality seem promising; that is, if one were able to provide a definitive rational account of a moral issue, then that account ought to resolve all of the questions advanced by rational individuals. In
short, rational individuals could not dispute a definitive rational answer to a rational question—even regarding a moral issue—without declaring their own irrationality. Moreover, even if one imposed a definitive rational solution on those who reject it, this imposition would not be untrue to the real nature of those individuals as rational beings. After all, insofar as humans are rational animals, one would find his or her true nature satisfied by the imposition of definitive rationality.

The fundamental conceptual difficulty inherent in resolving moral controversies on the basis of rational argument is the need to work from a shared set and ranking of moral values that can provide a framework for the argument. Philosophers have sought to establish such standards in several ways, including reasoning: from the very content of ethical claims, that is, from intuition or self-evident truth; from the consequences of actions; from the idea of an unbiased choice made by an ideal rational observer or a group of rational contractors; from the idea of rational moral choice itself; and from the basic nature of reality. None of these strategies can succeed in providing a shared set of moral axioms, however, because there is no uncontroversial way to select or discover the right or true moral content in intuition, consequences, rationality, or in the world itself.

An appeal to intuition fails primarily because, for any intuitive precept advanced, a contrary one can be suggested with equal ease. The same can be said with regard to compositions or systems of intuitions. An idea that for one individual will appear to be a corrupt or

Institute of Justinian 3

The Institute of Justinian 3

1 Institutes of Gaius 3 (Francis de Zulueta trans. 1976); accord The Institutes of Justinian Lib. I, Tit. II, 1 (Thomas C. Sandars trans., 1876). Centuries later, William Blackstone echoed this same theme when he wrote that one of the purposes of the law was to support the moral law common to all. 5 William Blackstone, Commentaries 42-55 (St. George Tucker ed., 1969).

The hope of a common moral culture was realized when the fabric of faith, culture, and state were woven together symbolically in the crowning of Charlemagne as Holy Roman Emperor on Christmas Day in 800 A.D. by Pope Leo III. This union of throne and altar symbolized the marriage of moral law with civil law. The belief that the moral law could be discovered through natural reason and codified in the civil order became embedded in the Christian view of the world. "God" became the keystone of an ordered, rational universe. After the collapse of the Middle Ages' synthesis of faith and reason, the modern age attempted to provide rational justification for Judeo-Christian morality without the element of faith in the Judeo-Christian "God." Indeed, the hope of developing a rational, content-full secular moral theory became the hallmark of the Enlightenment and Western culture. See MacIntyre, supra note 1, at 35-39.
deviant moral intuition can, for another, appear correct, wholesome, and self-evident. For example, some believe assisted suicide is a horrible sin, while others think that it can be a noble act. There is no way to sort and rank the conflicting intuitions behind ethical choices without begging the question of which choice is moral.

The appeal to the consequences of one's decisions brings no more success, because it faces the problem of how to assess and evaluate different consequences. For example, some believe that living somewhat longer as a result of chemotherapy is a better consequence, even with the side-effects, than dying. Yet for others, living a life unimpaired by treatment is a more important outcome than extending the length of life. To make a judgment among consequences one needs an agreed-upon method by which to rank the outcomes. Therefore, a consequentialist must build in some presuppositions about the assessment and ranking of values, both to evaluate possible outcomes of ethical choices and to know which outcomes are more desirable and should be given priority. People might agree, for example, that the proper goals of political life include liberty, equality, prosperity, and security. But this agreement alone is insufficient to provide a basis by which to assess the consequences of moral choices until it is decided how to rank or weigh these goals with respect to each other and to other possible goals or outcomes. Different rankings will result in the selection of decidedly different outcomes. Moreover, each individual in a society may hold commitments to the same values, but may rank these values in different ways. Consequentialist accounts, therefore, are no better than those of intuitionists for purposes of demonstrating which set of outcomes is preferable because such a judgment requires an authoritative means of ranking benefits and harms. We are left in a position in which there is no way to judge between methods of valuing consequences except by appeal to our own moral sense.

Attempting to develop content-full, authoritative moral conclusions by employing some variety of hypothetical-choice theory is no more likely to succeed. Such theories utilize a hypothetical "Ideal Observer," or a set of choosers, who are fully informed of the various possible choices and then asked to act impartially in weighing the community's interests. Yet if the observer is truly impartial, how will any decisions be made? If the observer is indifferent to the potential

21. See JOHN RAWLS, A THEORY OF JUSTICE 183-92 (1971); see also id. at 184 n.34 (citing sources).
22. See id. at 184-85 & n.35 (stating that an ideal observer "assumes a position where his own interests are not at stake and he possesses all the requisite information . . . ").
benefit or harm of its choice, it cannot ever choose between competing values—yet if the observer favors certain values over others, then it is not truly impartial. The observer can never be so impartial or dispassionate as not to favor certain outcomes over others even when the outcomes have objectively equivalent value. Therefore, despite the guise of impartiality, proponents of hypothetical-choice theories must build into the observer some sense of morality or a thin theory of good to dictate the order of choice. Like the intuitionist account or the consequentialist account, the observer needs an externally created method for ranking the choices.

The error in thinking that the observer can be free from this constraint is exemplified in John Rawls's *A Theory of Justice*. By imposing particular constraints on his hypothetical contractors, Rawls built into his contractors a particular moral sense. They must rank liberty more highly than other societal goods;\(^{23}\) be risk averse;\(^{24}\) not be moved by envy;\(^{25}\) be heads of families or at least concerned about the members of the next generation;\(^{26}\) and lastly, prefer greater to smaller shares of wealth and income.\(^{27}\) The problem is that such a description of the contractors presupposes a particular moral point of view, but gives no independent argument for one particular view of the contractors.

Attempts to develop a concrete view of the good in life or justice through analysis of the concepts themselves suffer the same difficulty as hypothetical-choice theories.\(^{28}\) One must know, in advance, which sense of rationality, neutrality, or impartiality to apply in choosing among different accounts of the good life, justice, or morality. No content-full moral vision exists that is not itself already a particular moral vision. One cannot choose among alternative moral senses or thin theories of the good without already appealing to some existing or predefined moral sense or thin theory of the good.

Finally, appeals to the innate structure of reality similarly fail. Such models are known as appeals to the natural law.\(^{29}\) They assume that nature is morally normative and that a moral law exists within the structure of the world.\(^{30}\) The difficulties in such models are twofold. First, in order for the structure of reality to serve as a moral criterion, nature must be shown actually to be morally normative. But in the

\(^{23}\) Id. at 396.
\(^{24}\) Id. at 152-58.
\(^{25}\) Id. at 143, 546.
\(^{26}\) Id. at 128.
\(^{27}\) Id. at 396.
\(^{28}\) See, e.g., id. at 485-90.
\(^{29}\) See, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 23 (1980).
\(^{30}\) See generally id.
absence of some metaphysical account of reality, it will be impossible to conclude whether the structure of reality is accidental or morally significant apart from the contextual concerns of particular people or groups of people. This conceptual problem is especially prevalent with regard to human nature, which appears in scientific terms to be the outcome of spontaneous mutations, selective pressures, genetic drift, constraints set by laws of physics, chemistry, and biology, as well as the effects of catastrophic events. Human nature is a fact of reality; it has no direct normative significance.

The second difficulty with an appeal to natural law is that even if it were possible to find moral significance in human nature, one would have to possess a canonical understanding of nature to realize it. Even if one accepts the normativity of nature, the structure of reality itself is open to many descriptions and interpretations. The natural law appeal, like others, must build in some particular moral sense that determines which interpretation or description of nature is to be normative. But we have no rational way to demonstrate that one description of nature should trump all others.

Thus, in spite of its attractiveness and historical importance, the search to discover a content-full morality that will resolve secular moral disputes has been a failure. Unless people have a common understanding of moral values and moral justification, they will be unable to resolve moral disputes in a content-full way. Moreover, even if a society could agree on a particular theoretical approach, such as an appeal to consequences, or duties, or intuitions, the problem of selecting a particular moral content to guide moral reflection remains. In order to develop a secular bioethics that can give content-full guidance, one must already have in hand that which one is seeking to discover, namely, a content-full moral vision. A view from nowhere will give no guidance. On the other hand, any particular vision presupposes what one needs to secure—some guiding moral conduct. Generality is purchased at the price of content; content is purchased at the price of generality.

The project of justifying a secular bioethics thus appears impossible. Every argument that will lead to a content-full moral conclusion must start with certain particular assumptions; an argument that starts with no assumption will lead nowhere. Disputes over initial assumptions inevitably will exist in a secular moral society because there always will be communities with different moral visions, moral senses, and moral narratives.
The failures of modern secular moral philosophy have not deterred bioethicists from appealing to reason in seeking content-full solutions to the moral controversies in bioethics. A number of commentators have taken such theoretical approaches to bioethics. Each of these approaches suffers from two basic difficulties. First, each builds content into its premises in order to resolve moral dilemmas. Second, each presumes a particular account of the nature of moral justification. For example, Peter Singer defines the most basic element of moral reasoning to be that of a concern for "interests." One might argue, however, that moral reasoning is based on a notion of natural "duties," as Germain Grisez, Joseph Boyle, and John Finnis urge, not based on a notion of interests. Furthermore, Singer builds a basic moral commitment into the definition of the very concept of interests. Robert Veatch experiences similar difficulties in his account of the contractual structure of medicine, patients, and society. His argument that medical practice should be understood in terms of hypothetical contracts contrasts sharply with others, such as Edmund Pellegrino and David Thomasma, who attempt to understand the nature of moral reasoning through the concept of virtue. Even if one accepts Veatch's contract-based position, there is no compelling reason to think that one should accept his account of how those contracts would develop. Contractors, with different interests than Veatch's, assumedly would make very different bargains.

The foundational problem for any theory of morality is that a theory can resolve moral controversies only to the extent that those involved in the controversy share the same set of moral premises. That is, the extent to which those involved share the same concept of moral reason and the same set of moral values or intuitions affects the extent

31. See, e.g., Norman Daniels, Just Health Care (1985) (discussing philosophical approaches to the distribution of health care); John Finnis et al., Nuclear Deterrence, Morality and Realism (1987); Edward Pellegrino & David C. Thomasma, A Philosophical Basis of Medical Practice (1981) (discussing the philosophical implications of medical practice); Peter Singer, Practical Ethics (1979) (applying practical ethics to abortion and ethics issues); Veatch, supra note 7 (setting forth a "contract or comment theory of medical ethics").

33. Finnis et al., supra note 31, at 77-103.
34. Singer, supra note 31, at 12.
35. Veatch, supra note 7, at 7-12.
36. See Pellegrino & Thomasma, supra note 31, at 77 (noting the impact of moral virtue in the practice of medicine).
to which any moral controversy is likely to be resolved. Absent similar moral commitments, the disputes will be interminable.\textsuperscript{37}

There have been two different attempts in bioethics to avoid the foundational difficulties that have confronted theoretical models. The best known proposal is that of Tom Beauchamp and Jim Childress, who suggest the use of middle-level principles to resolve moral controversies.\textsuperscript{38} Beauchamp and Childress argue that moral controversies can be settled without reaching foundational agreement. They argue that there are enough middle-level principles that people share to allow the resolution of moral controversies; that is, there is sufficient overlap among moral theories that controversies can be resolved through appeal to middle-level principles.\textsuperscript{39} These principles are "mid-way" between the general foundations of a moral theory and the hoped-for resolution of a particular moral controversy. Beauchamp and Childress argue that there are four such principles: autonomy,\textsuperscript{40} beneficence,\textsuperscript{41} nonmaleficence,\textsuperscript{42} and justice.\textsuperscript{43}

There are at least three difficulties with this position. First, Beauchamp and Childress provide insufficient justification for accepting this list of principles as the canonical list of middle-level principles. Other principles, such as sanctity of life or some principle of human dignity, might be added to the list. Second, it is not entirely clear what the four proposed principles mean. For example, the word "autonomy" is far from unambiguous. For some, autonomy means the freedom to do whatever one chooses with oneself and consenting others;\textsuperscript{44} for others, it means the freedom to act within certain moral constraints;\textsuperscript{45} and for others, it reflects a value assigned to liberty or to acting in accord with one's own authentic values. Similar ambiguity exists for each of the middle-level principles that Beauchamp and Childress articulate. Ambiguity in these basic principles means that people who may be using the same words actually may be speaking about very different matters.

\textsuperscript{37} As MacIntyre argues, the interminable nature of moral controversies is based upon the lack of a shared conceptual framework and values. MacIntyre, supra note 1, at 8.

\textsuperscript{38} See generally Tom L. Beauchamp & James Childress, Principles of Biomedical Ethics (2d ed. 1983).

\textsuperscript{39} Id. at 261.

\textsuperscript{40} Id. at 59-105.

\textsuperscript{41} Id. at 148-82.

\textsuperscript{42} Id. at 106-47.

\textsuperscript{43} Id. at 183-220.

\textsuperscript{44} See id. at 60-61 (stating the general formulation of autonomy as self-governance).

\textsuperscript{45} See id. at 60 (noting Immanuel Kant's ideal of autonomy, according to which a person is free to govern himself or herself in accordance with universal moral principles).
Moreover, even if the middle-level principles were shared and their meanings were clearly defined, it is not evident how they would address or resolve particular moral controversies. That is, one easily could imagine cases in which different principles would seem to address the same controversy. Because there is no theoretical structure through which to order the principles, there is no definitive method of sorting out the relationship of each principle to the others. For example, in discussing the issue of physician-assisted suicide, one might appeal to the principle of beneficence to argue that the physician should assist. Another may appeal to the principle of nonmaleficence to argue the opposite conclusion. One comes to understand that the difficulties confronting the appeal to middle-level principles can be resolved only by defining the principles in their own terms and in relationship to one another. One then is led back to the initial difficulties that confront ethical theory.

The other attempt to avoid the conceptual dilemmas of ethical theory has been the recent appeal to some form of casuistry. Perhaps the best known example is that of Albert Jonsen and Stephen Toulmin. Jonsen and Toulmin argue that moral controversies are resolved by referring them to particular moral paradigm cases. For example, one might resolve the controversy associated with physician-assisted suicide by referring to the paradigm case of murder. The conceptual problems for secular casuistry are twofold. First, unless people share a common moral view, there is no way to recognize or define a moral controversy or its specific character. Second, without a common moral framework, there is no way to know which set of paradigm cases should be applied. Two or more sets of paradigms often can be applied with equivalent moral force. In the continuing controversy over abortion, for example, some apply the paradigm of killing, while others apply the paradigm of privacy and battery.

In their exposition of casuistry, Jonsen and Toulmin use as their historical example a very highly defined moral community—the casuistry of Roman Catholicism. Yet this casuistry was set within a community that had particular moral understandings and a common juridical structure capable of resolving ambiguities when it was unclear how a case should be interpreted or which paradigm case should

47. Id. chs. 13 & 17.
48. Id. ch. 7.
be applied. The account of Jonsen and Toulmin makes it clear that if casuistry is to work within a secular, morally pluralistic context, there will have to be some common moral framework. The problem is to find the correct one.

The recognition that a content-full moral framework is necessary to the resolution of moral controversies has been expressed in various appeals to the existence of consensus. Consider, for instance, the invocation of the notion of overlapping consensus in John Rawls's recent volume Political Liberalism. Theorists recognize that without a common normative framework an actor in society will not possess the thin theory of the good, the canonical moral intuitions, or the correct moral sensibilities needed to make moral choices and to endorse particular moral judgments. As a result, social institutions often do many things to manufacture the appearance of consensus. For example, when one impanels national commissions or other bioethics committees to frame public policy or to make bioethical recommendations, one is careful both to choose individuals with much in common and to focus the agenda on issues upon which agreement is likely to be attainable. One can only imagine the kinds of principles that the National Commission for the Protection of the Human Subject in Biomedical and Behavioral Research would have endorsed had its members been Robert Nozick, John Rawls, Jesse Jackson, Rush Limbaugh, and William Buckley. Similarly, when people talk about reaching consensus in bioethics, they often fail to recall the great range of moral opinions about health care expressed in political campaigns.

An examination of secular bioethics reveals that the field has mostly reiterated the character of religious bioethics, along with all its difficulties. Secular bioethics merely recapitulates the disagreements that have shaped religious bioethical disputes, but in secular terms. Such an outcome was entirely predictable, given the reasons for the creation of secular bioethics. The development of secular bioethics was a reaction to the diverse ways in which individuals have chosen to approach religion. It was an attempt to create a shared, content-full framework of justification for bioethics on a secular level. This foundation was doomed to fail because it could not succeed without first presupposing particular content-full moral premises—that is, without a prior act of moral faith or common agreement. Thus, agreement on a common framework was silently assumed.

The failure of the secular bioethical project is manifest both sociologically and theoretically. First, there is a continuing multiplicity of bioethics; not simply numerous religious bioethics, but various secular bioethics as well. The controversies go on and on and do not appear open to definitive resolution through sound rational argument. Sociologically, pluralism has persisted and indeed may have intensified. Moreover, the closure of content-full moral controversies by sound rational argument requires that one employ some set of content-full moral premises. The precise character of these premises is what is at issue.

People can bring closure to a moral controversy by negotiation and appeal to procedures.\textsuperscript{51} The appeal to a procedural morality can provide a minimal framework for the resolution of moral controversies among people who hold different moral views. Because individuals speak different moral languages, they will not always have enough in common to recognize a complete, content-full closure of a controversy. Yet they may be able to recognize proper moral authority within the moral controversy. If moral controversies cannot be resolved by a general consensus, participants may decide either to abide by some procedure to reach an answer or to apply external procedures that draw authority from the permission of those involved. Given the intractability of moral controversies absent such external or self-imposed procedural guidance, it is not surprising that the practice of exercising free and informed consent has come to play such a significant role in health care. When people have fundamental disagreement about what is morally proper, they can act together nevertheless by using the moral authority of their limited agreements to create procedures that resolve the controversy.

IV. The Future of Secular and Religious Discourse

When one cannot appeal to a particular understanding of morality in order to ground a system of general, secular bioethics, only one source remains—the authority of moral agents. When individuals meet outside the understandings of their particular moral communities, they can appeal only to each other in order to resolve moral disputes and frame a fabric of interaction.\textsuperscript{52} It is for this reason that

\textsuperscript{51} Beauchamp, supra note 12, at 30-31, 33-35.

\textsuperscript{52} Although this author certainly holds that there are objective moral standards, the difficulty I have been diagnosing herein is epistemological. In a morally pluralistic society, in which many competing standards are put forward, there is no way to know which standards are objectively correct. My own view is that one must begin with a moral faith and then reason within that context. The sources of moral faith vary greatly. For many, con-
practices such as free and informed consent, the free market, and limited democracy are so prominent. The necessary condition for such a framework is that of mutual respect.\textsuperscript{53} Mutual respect is not grounded in a value given to either autonomy, liberty, or persons, but it is integral to resolving moral controversies when a general, content-full moral vision does not exist. Reliance upon permission enables one to establish moral authority in a morally pluralistic world without appealing to a particular, content-full moral vision. There is an underlying legitimacy to informed consent—as in the free market and limited democracy—that presupposes only the permission of those collaborating with concurring others.

There is a \textit{de facto} web of moral authority that can bind individuals of diverse moral understandings. The web of authority may bind individuals in any market, or in any war-torn area of the world, where members of hostile communities can still trade commodities without sharing a moral vision. Theoretically, it is possible to attend to the ways in which permission suffices to ground general moral authority without reaching concurrence on any particular, content-full moral vision or presupposing a communality of content-full moral premises. The theoretical possibility of limited-consensus authority offers a basis for the general moral justification of a range of limited collaborations that can legitimize a \textit{res publica} and health care policy—one that possesses robust rights to privacy along with space for deviant, but peaceable, consensual undertakings.

It follows that the secular state should be morally neutral with respect to content-full understandings of the moral life. The secular state has only the sparsest of balancing mechanisms by which to adjudicate competing claims in bioethics: the agreement of moral agents. In general secular terms, the state has the authority to protect citizens from unconsented-to encroachments, to enforce agreements, and to distribute commonly held resources.

This view of moral authority must not exclude the views of particular moral communities. Particular communities, be they religiously based or ideologically grounded, often provide most of the content of public debate in bioethics. The marginalization of particular views would leave policy and legislative debates in health care to the bureaucrats alone, undoubtedly an undesirable result. The challenge for temporary liberal society shapes such a faith, while for others, faith is shaped by Divine revelation. St. Augustine captured this situation when, borrowing from Isaiah, he wrote, "Unless you believe, you will not understand." \textsc{Saint Augustine}, \textsc{On Free Choice of the Will} Book 2, II (Anna S. Benjamin & C.H. Hockstaff trans., 1964).

\textsuperscript{53} Here, "mutual respect" means the nonuse of others without their consent.
each particular moral community in the future will be to balance two requirements: while being tolerant of other communities and their moral views, each moral community will have to remain true to itself.\textsuperscript{54}