

Winter 1-15-2018

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Michael Milhim  
mmilhim@bgsu.edu

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### Repository Citation

Milhim, Michael, "Justifying a Standard of Death" (2018). *Honors Projects*. 371.  
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Justifying a Standard of Death

Michael Milhim

HONORS PROJECT

Submitted to the Honors College  
at Bowling Green State University in partial fulfillment of the  
requirements for graduation with

UNIVERSITY HONORS MAY 2018

Dr. Christian Coons, Philosophy, Advisor

Dr. James Foust, Journalism, Advisor

**Abstract**

There are three major positions in the legal definition of death debate: the cardio-pulmonary standard, the whole-brain standard, and the higher-brain standard. Prominent arguments for each standard appeal to a theory of human persistence. I'll contend that these arguments fail for two reasons: the metaphysical underpinnings of the arguments are not decisive, and even if they are decisive, they may not be the right policy to enact. The later of these is more practically important than the former.

### Justifying a Legal Standard of Death

Who should we say is dead and who should we say isn't? The answer to this question is extremely important. Dead people are not moral agents or patients, so if someone is declared dead they lose positive moral standing aside from being objects of value to others. Also, importantly, dead people do not have any political standing. When someone dies, their rights cannot be violated because they don't have any. There can be grave wrongdoing if death is determined incorrectly.

There are three major positions in the legal definition of death debate: the cardio-pulmonary standard, the whole-brain standard, and the higher-brain standard. Prominent arguments for each standard appeal to a theory of human persistence. I'll contend that these arguments fail for two reasons: the metaphysical underpinnings of the arguments are not decisive, and even if they are decisive, they may not be the right policy to enact. The latter of these is more practically important than the former.

Let's first examine the cardio-pulmonary standard. The general argument for it is as follows: humans are essentially organisms, and organisms persist only when they function holistically. Thus, so long as any given human functions holistically, that same human persists. To cease to persist is the same as death, so ceasing to function holistically is the death condition for humans. Since loss of cardio-pulmonary function necessarily entails the loss of function of the whole organism, the official standard of death ought to be loss of cardio-pulmonary function.

The immediate response to this standard is what about people who stop breathing and circulating temporarily? Temporary loss of function is not the same as death. This is why irreversibility is added to the standard. The final standard is now irreversible loss of cardio-pulmonary function (Becker).

An initial problem with the cardio-pulmonary standard is that it does not seem to include all the situations where someone is dead. Imagine that tomorrow I steal Jeremy Bentham's preserved body, insert a fresh cardio-pulmonary system, and hook it up to heart-lung machine. On the cardio-pulmonary standard, Bentham isn't dead, and in fact, he was never dead. The loss of his cardio-pulmonary function was reversible when we declared him dead, as evinced by my transplant 186 years later. Maybe this is cheating because I took Bentham's parts and replaced them, and replaced parts don't count as part of the original organism. But we can modify the case so that this isn't included. Imagine instead that I figured out a way to use stem cells to rejuvenate Bentham's own cardio-pulmonary system, is that still cheating? Whatever the contrived case be, cardio-pulmonary functioning does not rule out the possibility of being dead. While it's possible that this intuition is just mistaken, the burden is on cardio-pulmonary defenders to explain this. A possible reply is that we attach too much importance to the psychological aspects of human life, and these aspects aren't pertinent to determining death. Even then though, an argument would need to be given to explain why the mind isn't pertinent to determining death.

Metaphysics aside, consider the ethical implications of this view. Currently, there are many important institutions and processes that rely on the determination of a person's death to proceed. Take for example life insurance. Imagine a family where the main provider is on a heart-lung machine indefinitely; the provider's insurance will not pay out to the family until they're determined to be dead. Combine this with the extremely strong norm of not killing anyone, and what we're left with is a family suffering the consequences of not having a livable income. Similar situations happen with inheritance, transferring of child custody, and excusal from important activities like work and education. If the cardio-pulmonary standard is to remain an ethical option, its advocates would need to either argue for dropping the norm of not killing in

these cases, or argue for a reform of the way death plays a role in economic systems. Either way, cardio-pulmonary defenders are left with a significant argument to make.

The metaphysics of human persistence alone are not sufficient for establishing what ought to be the standard of death. There is an even deeper concern of principle that cardio-pulmonary and whole-brain advocates face which undercuts both positions on metaphysical and ethical fronts: the determining of function.

Before that, let's rehearse the general argument for whole-brain death and its specific problems. Like the cardio-pulmonary standard, the starting point is that humans are essentially organisms, and organisms persist only if they function. From here, the whole-brain standard departs from the cardio-pulmonary standard by invoking the idea of integrated functioning. Instead of holistic functioning, integrated functioning is the necessary condition for persistence. Consequently, the standard of death becomes irreversible loss of integrated function (irreversible inserted for the same reasons as before). While loss of cardio-pulmonary function is sufficient for loss of integrated functioning, it isn't necessary because the brain is the point of integration in humans. Even if there is full cardio-pulmonary function, total loss of brain function is sufficient for death. On this account, the standard takes the form of a conjunction: a person is dead either if there is irreversible loss of cardio-pulmonary function, or if there is irreversible loss of the whole brain's function (DeGrazia).

Just like the cardio-pulmonary standard, the whole-brain standard is very plausible. It recognizes the cardio-pulmonary standard as sufficient for death, but refines the concept by appealing to brain function, which is obviously vital to human life. Does it really accomplish what it sets out though? Consider someone who's in a persistent vegetative state: they still have some brain activity, but not enough for spontaneous breathing, so they're being supported by a

ventilator. This person is not dead according to the whole-brain standard, and will not be until they lose all observable brain function. Someone could go on in such a state for months, even years, but they would not be considered dead. At bottom, the whole-brain standard only includes one more situation of official death than the cardio-pulmonary standard – when a human has no brain function but is on a heart-lung machine. Even more slippery is that the difference between no brain function and very little brain function can at times be difficult to observe, and since this is literally the difference between life and death on the whole-brain account, our confidence in determining marginal cases is low. And still, we have the problem of the family waiting for life insurance payout. Like the cardio-pulmonary standard, the whole-brain standard does very little to explain why death should not be declared in these situations. Concerns exactly like these is why David DeGrazia, the leading whole-brain advocate, argues for a dropping of the norm of not killing in these situations

But back to the deeper concern; function plays a crucial role in both the cardio-pulmonary and whole-brain standards of death. Functioning of the organism is the metaphysical backbone of the specific conditions for both standards. Insofar as we are sure of the function of humans and their brains, we can be sure of who is dead and who is not according to both standards. Conversely, insofar as we're unsure of the function of humans and their brains, we cannot be sure of who is dead and who is not. Unfortunately, there is significant doubt about the determination of human/human brain function on both major accounts of function, and further, there are good reasons to think that functions are not objective at all.

The two prominent accounts of functions are the causal account and the selected effect account. On the causal account, as developed by Robert Cummins, a function of an object is just its causal contribution to a capability of that object. For example, my shoes have the functions of

protecting the skin on my feet, relieving the pressure on the contact points of my feet, and complimenting everything in my closet to make a fashionable outfit. On this account, objects have a lot of functions because any given part can contribute to many different capabilities, and there isn't a specific way to privilege one function over another as more vital to the object. There are ways to privilege one function over another generally, such as figuring out what functions depend on other functions, but there is no correct answer as to which privileging procedure is correct and which isn't. This poses a big problem to function-based standards of death if true, because it would mean that the appropriate function of humans and their brains can't be picked out. To pick one function over another, there would need to be some sort of normative component for the standards to yield determinations at all.

The second prominent account of functions is selected effect. On this account, a function is just a trait that was selected for whatever it was intended for, with the selection mechanism being broadly conceived as oriented toward survival and reproduction of the species (Neander). Functions are naturally selected traits that help fulfill the innate goal of species survival. Again, even though the selected effect account provides a specific goal of organisms, it still isn't clear about what traits were and were not selected for this goal. It might seem obvious that cardio-pulmonary systems and brains were selected for survival of the human species, but this intuition is mistaken. For some trait to be selected for survival, it cannot already be possessed by the species. Trait selection entails that there was a time where the trait wasn't possessed by the species. Cardio-pulmonary systems and brains weren't chosen because humans have always possessed them. It's true that there have been changes to them over the course of time, but these are changes in already existing parts rather than acquiring new parts. The big picture is that since cardio-pulmonary systems and brains were not selected, their function cannot be determined, and

hence death cannot be determined. One fix is to say that the continued possession of a trait counts as selection, but then different problems arise. Many human traits have been retained throughout time, so which one picks out the function of humans as organisms? Which trait picks out the function of the brain? Again, we seem to be in a causal function situation, where we can't objectively privilege one trait over another, yielding death decisions indeterminate. While the selected effect account may cut down on the possibilities, there still remain multiple answers to what human and human brain function is, with no principled way to pick among them.

The last standard – the higher-brain standard – uses a different account of human identity, which makes it markedly different from function-reliant standards. The general higher-brain argument starts off by asserting that humans are essentially persons rather than organisms. Personhood is understood as having consciousness. To lose consciousness entails ceasing to be a person, and ceasing to be a person means ceasing to persist as a human. Because of this, the standard of death is either irreversible loss of consciousness, or irreversible loss of the whole brain's function, or irreversible loss of cardio-pulmonary function (McMahan).

Higher-brain death seems to accomplish what whole-brain death was attempting to accomplish – establishing the high significance of cognitive function in determining death. On this standard, someone could be spontaneously breathing, but also be dead – assuming that the cerebral cortex is the center of consciousness. I have the intuition that this is weird; when someone is breathing on their own, they're alive. Though, it also seems to rightly determine humans with extremely little brain function while being supported by heart-lung machines to be dead. Neither of the standards thus far have categorized such a person as dead.

But, a problem looms: consciousness. Both substance and property dualism pose an epistemic problem to determine death. If substance dualism is true, then the presence or lack

thereof consciousness is outside our epistemic reach; we can't detect a non-physical substance. In the same way, if property dualism is true, then the presence or lack thereof consciousness is also outside our epistemic reach; we can't detect non-physical properties. When death can't be determined on some standard, then that standard isn't permissible because death needs to be determined to act ethically.

For the higher-brain standard to remain epistemically and ethically viable, consciousness needs to be physical. Unfortunately, the truth of physicalism about the mind and consciousness is not uncontroversial. In addition to limited knowledge of the mind by the lights of scientific inquiry, thought experiments such as the p-zombie give grounds to establish the mind as not completely physical (Chalmers). Even if we are confident that some version of physicalism about the mind is true, marginal cases remain hazy. Under what conditions do we know what consciousness has been irreversibly lost? The fact that conscious patients are diagnosed as brain dead while being "locked-in" points to the dicey ethical implications that the epistemology of the higher-brain position entails. Just because the standard includes a group of people we think ought to be considered dead, that does not mean that others who we are unsure of also ought to be considered dead too.

Even more, the practical benefits that some higher-brain advocates purport to deliver are questionable at best. The main benefit is organ donation. The thought is that since higher-brain death is conceptually plausible and has a wider range of death conditions, more organs will be procured for life-saving transplants. To establish this claim, higher-brain advocates would need to find a case where higher-brain brain death would have secured a life-saving organ over the current whole-brain legal standard. Admittedly, I'm not familiar with these important marginal cases, but I have not heard of such a case yet. Generally, humans who are eligible for their

organs to be harvested already meet either whole-brain death or cardio-pulmonary death. And even if there are cases where higher-brain death would have delivered life-saving organs, this needs to be balanced against the increased risk for mis-determination of death as compared to whole-brain death and cardio-pulmonary death. All these considerations but the burden on higher-brain theorists.

Just as a side note, all the standards also face the problem of spelling out what irreversibility is over and above permanency. It might be true that as a matter of fact my grandfather is permanently dead, but this is distinct from his death being irreversible (Bernat). Irreversibility means that whatever efforts we'd make to revive him would be futile. Does this mean that anyone who has a non-futile chance of being revived isn't dead? Admittedly, it's odd to think that Walt Disney isn't dead because someday they'll be able to revive his cryogenically preserved body.

Let's recap: the prominent arguments for the major standards of death make their case by establishing a claim about the essential nature of humans, using that to figure out the persistence conditions for humans, and then, assuming that death is ceasing to persist, adapt the persistence conditions to human anatomy. These standards all face the same problem. As with most metaphysical arguments, the certainty of their conclusions is not high enough to be instituted as a policy. And even if the metaphysical arguments are sound, they fail to establish that their policy is what ought to be done. In each case there are significant moral risks and sure-to-happen wrongdoings.

I'd like to offer a speculative diagnosis of these arguments' deficiencies: they all fail to properly consider the ethical implications of their metaphysics. What policy we ought to adopt in sorting the dead from the live is not solely a matter of human identity. If we had a policy that had

a bonkers theory of human identity and persistence, yet made perfectly ethical judgements in every case, that would be much preferable to a standard that's metaphysically accurate but does not make ethical judgements in every case. What matters first is that the ethically right determination is every case; no live person should be declared dead, and no dead person ought to be declared as live. Even between those two possible mistakes, the former seems much more important to avoid than the latter. But even this is ethically unclear, because it would prescribe going with a conservative death standard to mitigate any moral risk, and, as we saw with cardio-pulmonary death, there are still institutional problems. Maybe death is not even the correct property of beings to look at when considering how to treat them (Singer).

If we are to figure out the standard of death we ought to institute, we need to ask ethical questions before we ask metaphysical questions. We don't know what physical or metaphysical features of persons take precedence in situations of choosing between treating them as like-dead or like-alive. Once the ethical questions about what features matter are answered, then the metaphysics can become of use. For example, if we determine that having conscious experience is the difference in rightly or wrongly treating someone as if they are dead, then the metaphysics can figure out what it means to be conscious, and the epistemology can figure out how we can know if someone is conscious. But, again, the bedrock is the ethical question because, truly, adopting a standard of death is a question of how we ought to treat human beings.

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