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## **The Moral Foundations of Health Services Reform**

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I write this criticism of H. Tristram Engelhardt's *The Foundations of Bioethics*<sup>1</sup> not from the perspective of a philosopher, but from that of a physician with a long-time interest in health policy issues as they relate to bioethics. I hold Engelhardt in high regard: among philosophers currently active in bioethics, he is one of the few who are deeply committed to freedom as the primary requirement of social life, and to liberty as its primary political manifestation. In this commentary, I will focus on his view of health services reform.<sup>2</sup>

Few would disagree that our health services system is troubled. High costs and their uncontrolled escalation in recent decades are undoubtedly the driving force behind reform of the system. But a variety of other problems, like unequal access and uneven quality of care, have often been a central concern in the design of reform measures. Profound differences in visions of an ideal health services system were highlighted in the intense national debate over health care reform early in the first Clinton administration. The failed attempt to produce a consensus justification on ethical grounds for the American Health Security Act has made it clear that a monolithic, bureaucratic health services system of the sort designed by the Clintons will not come about soon. The differing moral visions of participants in the political debate reflect fundamentally different world views.

In *Foundations*, Engelhardt describes the plurality of moral perspectives competing for control of policy-making, and attempts to construct a morality that can bind together a pluralistic society like ours, in the hope that the Enlightenment effort to find a common morality based on reason and liberty need not be totally abandoned. His project is among the most important in contemporary bioethics, in my view, because liberty, as the central moral feature of American society, has never been more threatened than it is today, and is most imminently endangered by the egalitarian movement in health system reform.

Engelhardt finds the communal ethic he is looking for, not in a thick, content-full moral system, but in a much thinner structure based on the principle of permission. This principle is essentially the same as the principle of respect for autonomy, but is renamed to emphasize that autonomy is not itself a value.

Rather, after Nozick, he sees it as a side constraint. Moral authority is thereby not to be found in one value system or another; rather, it derives from the consent of those who are interacting with one another. The principle of permission leads to prohibition of the use of physical coercion, which serves as the sole standard to guide the creation of laws and policy in large societies. Thus, the morality of large societies is content-less.

Within large polities, however, are found numerous thick moral communities, which people join and leave voluntarily, and which have detailed moral guidelines, a commonly held content-full morality, to guide actions of community members.

The absence of general secular moral authority to prohibit voluntary interactions between persons also limits the scope of the morally permissible shape of health services reform, according to Engelhardt.<sup>3</sup> Because there is no agreed-upon view of justice, beneficence, and fairness, there can be no basic right health care.<sup>4</sup> Moreover, national health care plans, like that proposed by the Clinton administration in 1994, have no broad moral authority because they advance a particular one (of many equally valid) visions of justice and fairness.<sup>5</sup>

Several tiers of health services are inevitable: a public system that may (or may not) be created from the general funds available to a polity, designed to provide a decent minimal level of health services to all in need; multiple community programs in which individuals join together to provide voluntary funds to support a system of agreed-upon health services; and a private tier, in which people are free to buy additional health services for themselves, freely contracting with providers. Because there is, in principle, no objectively discoverable moral ranking of health care goods, such a ranking must be created at the level of political systems. Engelhardt cites the Oregon experiment in public ranking of health services priorities as a good example of how such a lexical ordering can be achieved through public discussion and vote. Inequalities in access to health services are inevitable, Engelhardt claims, because needs and resources are different for everyone, and people are free to act on their own behalf.

He enunciates a principle that underlies the allocation of health care goods: "People are free to purchase the health care they can buy and to provide the health care others wish to give or to sell."<sup>6</sup>

I sympathize and agree with a great deal of Engelhardt's project. Particularly appealing is his emphasis on the principle of permission, what others have called autonomy or self-directedness, as the primary principle for the organization of large societies. But internal inconsistencies and contradictions place his vision of health services reform on very uncertain ground. I would like to cite two difficulties in particular: the prohibition against coercion, which is based on an unproved assumption; and his theory of property, which is inconsistent with his own principle of permission. I will also try to show how the principle of respect for self-directedness can be more solidly grounded in objective fact, and how this same grounding supports a theory of private property that is both different from Engelhardt's view and more consistent with commitment to liberty. Finally, I will indicate how this theoretical substructure leads to a vision of an ideal health services system similar but different from his in a few important ways.

### **The Principle of Permission**

Engelhardt claims that there are no decisive rational arguments to establish one understanding of the good as being morally superior to other competing views, and that moral authority in the secular sphere derives from the consent of willing participants, under the principle of permission. He further claims that all attempts to justify a shared, content-full moral understanding must fail either because they beg the question by presupposing the moral standard that is at stake, or because they generate an infinite regress.

Yet, Engelhardt's theory falls to the same arguments. He asserts that secular morality is not *grounded* in peaceableness; it is instead a *transcendental condition* that makes secular moral life possible.<sup>7</sup> Because no moral viewpoint is superior to any other, he claims, the only possible source of secular moral authority is the authority of consent. This authority requires only a decision to resolve moral disputes in a manner other than by force, that is, by peaceable negotiation. Peaceably negotiating

a moral dispute requires respecting the freedom of the participants in the dispute, that is, requires their voluntary agreement to collaborate. A transcendental argument tries to show that some condition, call it C, cannot be rejected (that is, it has to be accepted as true) because rejecting C depends on something unavoidable, call it A, and A could not exist unless C were true (that is, C is a necessary condition for the existence of A). So, for a transcendental argument to work, two things have to be true: I) that A is unavoidable, and II) that C is in fact necessary for the possibility of A existing; that is, the universal negative proposition, no A is possible unless C is the case, must be true. Anyone who rejects C is caught in a contradiction: the rejection of C is inconsistent with the existence of action A, which is at the same time unavoidable. In Engelhardt's case, action A can be taken to be peaceable negotiation and necessary condition C is voluntary agreement to collaborate. Thus, he has argued I) that peaceable negotiation of moral disputes is an unavoidable condition of secular moral life, and II) that there is no way to negotiate peaceably without voluntary agreement to collaborate.<sup>8</sup>

Engelhardt asks us to accept the first statement (I) as an assumption, but this seems inadequate: he should be able to show why peaceableness is unavoidable. To what does the claim that peaceableness is unavoidable appeal? To the desirability of peace? But what makes peace desirable? It appears that he has begged the question at issue by assuming the unavoidability of peaceableness in order to avoid the dual problems of an infinite regress of appeals to underlying claims, or acceptance of an unarticulated underlying good, that is, peaceableness.

The second part of his transcendental argument also requires a reason, but none is provided; why is agreement to collaborate necessary for the possibility of peaceable negotiation? Peaceable negotiation may take place between jailed and jailer in an American prison or the Soviet gulag, or between a tribal warrior and his chief, but none of these necessarily occurs under a voluntary agreement to collaborate. What makes proposition II a necessity?

Beyond these difficulties, Engelhardt has the additional problem of countering rejection of his

argument, even if both the first and second propositions are true. If they are true, then rejecting peaceable negotiation is contradictory. But in asserting that his argument therefore must be accepted, Engelhardt is claiming that living without contradiction is better than living with contradiction. Isn't this a value judgment? Why is noncontradiction good? By demanding acceptance of his argument, Engelhardt is appealing to something he claims he (and everyone else) does not have: knowledge of the good, namely, that noncontradiction is better than contradiction. In making his case, Engelhardt contradicts himself by claiming both that no understanding of the good is better than any other, and that *his* understanding of the good-- noncontradiction is better than contradiction--is better than the alternative. He cannot have it both ways. If holding contradictory positions is acceptable for him, it must be for us, too, so he cannot object when we reject his argument.

Ultimately, Engelhardt has to answer the question, what makes peaceableness right? Why not use force to settle disagreements? It may be true, as he says, that an aggressor cannot complain if force is used against him, but why should the stronger party be concerned about that possibility? In particular, why should the United States government, controlling the strongest force on earth, care about threats of retaliation?

While I agree that something like Engelhardt's respect for the principle of permission is a primary condition for social life, his use of the Kantian back door of transcendental argumentation is unconvincing. Insofar as his aim is to provide a moral justification for the prohibition of force in human communities, such an argument may not be necessary. He proposes that the Enlightenment project was doomed to fail, because no consensus has been reached on a rational, objective morality on which a liberal society can be grounded, nor can one be discovered. From the fact that no consensus has been reached, though, it does not follow that no such morality exists, or that the search for one must be abandoned. We have seen that the foundation for his own theory is insecure, and now I would like to suggest that his blanket rejection of the possibility of finding an objective morality in which to ground

social life may be in error. A more solid grounding than his for a liberal social order may be found in a theory of natural rights that is by no means uncontroversial, but overcomes some of Engelhardt's objections to appeals to nature as a standard for bioethics. Interestingly, it leads to some conclusions about health services policy that are substantially similar to his.

### **Human nature and rights**

Appealing to human nature to provide a foundation for morality is not something Engelhardt would countenance. It is not clear, however, that ethics or morality is even possible without such an appeal. Moreover, it is not necessarily true that human nature is empty of value or incapable of providing a foundation for morality. Of course, this issue cannot be decided here. Yet, it is not a given that all versions of natural teleology are indefensible or that a respectable scientific account of teleology cannot be provided.<sup>9</sup> It is possible that the best way to begin thinking about morality is by considering a theory of the good. One of the most promising is a virtue ethics that takes human flourishing to be the human *telos*. Such a theory is a long, complicated matter that cannot be completely developed here. I will offer a brief outline, however.<sup>10</sup>

The ultimate moral good, on this account, is self-perfection, or human flourishing. Flourishing is: 1) objective; 2) inclusive; 3) individualized; 4) agent-relative; 5) social; and 6) self-directed. This view has classical origins, but recently has entered contemporary ethical discourse.

1) Objective: Flourishing requires living intelligently. Such a life does not use intelligence to achieve whatever one happens to desire, rather, to achieve right desires, those that will actually lead to fulfillment. Thus, flourishing is an objective value: goods like health, beauty, and pleasure and virtues like integrity, courage, and temperance are determined by human nature. They are manifested differently in different individuals: the good is not seen as generically the same for all people, so the universality sought by utilitarianism and deontology are avoided.

2) Inclusive: Flourishing of individuals is an inclusive end: each of the goods and virtues that

constitute it are valuable in themselves. There is no predetermined worth of each, so individuals must work out for themselves the weighting of these values. Thus, *phronesis*, or practical wisdom, is central to achieving and maintaining flourishing. For practical wisdom to succeed in weighting values appropriately, it must recognize that desires may move people toward benefit and away from harm, but may do the opposite. The creation of rational dispositions is therefore critical to human flourishing.

3) Individualized: No two people flourish in the same way, because their potentialities, talents, and concrete circumstances are different. While there are generic aspects of human nature, the individually distinctive features of flourishing do not permit *a priori* weighing of a good or virtue against other goods and virtues. Such weighting is the task of practical wisdom for each individual, taking into account the facts of his own concrete circumstances. Thus, pluralism is morally appropriate.

4) Agent-relative: An agent-neutral moral theory holds that values and their rankings have no essential relation to the person who makes the ranking or for whom the value exists. There is no moral reason to prefer actions that support one's own projects or family over actions that do not. The view of flourishing presented here rejects agent-neutrality, and claims, rather, that facts specific to individuals, their societies, and their cultures are ethically relevant, and may be more important than other more general facts. The good for a person, in other words, is agent-relative: practical wisdom enables the person to determine the proper course of action under particular and contingent circumstances that cannot be known in advance.

5) Social: People require others to fully mature as human beings. The primary relationships of human are selective, which is characteristic of friendships, groups, and communities. Individual flourishing may require extension beyond families or cultures of origin, however, so openness to other relationships are also important. These permit exploration of new and different people as well as new ways of living and thinking. Open-ended interactions with strangers often form the context within which selective relationships are created.

6) Self-directed: Practical wisdom requires individual effort at several levels: to initiate and sustain thought, to discover the goods and virtues of flourishing, and to achieve and implement them. Thus, the pluralism of human value-seeking must be essentially self-directed. Intelligence and self-directedness are not separable; they are two aspects of the same act. Self-directedness does not necessarily lead to flourishing, but flourishing is not possible without it.

Self-directedness is the unique feature of flourishing that must first be protected for everyone, to make possible their own individualized versions of flourishing. The basic problem of liberalism is how to provide for plurality of human well-being, while at the same time constructing a moral foundation for civil order. The only characteristic of human flourishing that can provide a solution to this problem is self-directedness, for two reasons: it is the only feature of human flourishing in which every person has a necessary stake in every concrete situation, and it is the only feature whose protection is consistent with plurality of forms of flourishing.

There is, therefore, a need for another type of ethical principle, one that takes into account the social nature of human being and also recognizes the plurality of forms of flourishing. The difficulty is that human well-being can take diverse forms, but human action can interfere with self-directedness, a critical component of flourishing. The principle that is needed is one that does not promote a particular form of flourishing, but permits every person the possibility of seeking it. It is not normative, because it says nothing about how to live, but only provides a political context that allows the possibility of self-determination: it is metanormative. The principle is the idea of basic rights.

Rights provide protection for the possibility of self-perfection by protecting self-directedness. They are therefore essentially negative. They cannot assure self-perfection; they can only make it possible by protecting self-directedness. On this account, rights provide no guidance to ethical conduct; they establish a foundation for conduct by protecting a sphere of action in which each person can pursue self-perfection without threat of interference by others. These rights are those of equal liberty, principles

of mutual noninterference. They reconcile our natural sociality with our need to pursue diverse forms of self-perfection.

Just as rights are not normative principles providing guidance toward self-perfection, they also are not normative interpersonal principles. They do not specify how we should interact with others; rather, they provide the context in which such interactions can take place. They are metanormative principles that secure the conditions that permit us to act jointly with others in a social environment.

The basic rights define personal spheres of action, within which one is free to act without interference from others. They include rights to life, liberty, and property. The obligations they impose are negative: to refrain from violating the rights of others. Because they are metanormative and provide no guidance to ethical behavior, they can impose no positive obligations toward others. Positive obligations do exist, but only insofar as they are created by voluntary agreements made within moral territories. In the health care field, this means that there can be no rights to health services other than those attaching to voluntary agreements or contracts. There can be no right to health because health is a personal responsibility and cannot, even in principle, be provided by others.<sup>11</sup> Legal systems that attempt to guarantee health services to some, many, or all at the expense of others, as was true of the Clintons? and most of the other health system reform proposals in 1993-1994, violate basic rights in imposing predetermined hierarchies of values on unconsenting others.

Engelhardt criticizes appeals to nature as a route to resolution of moral controversies on the ground that the character of reality is not morally normative, and individuals may fail to recognize the same objective moral truths.<sup>12</sup> The view presented here escapes this criticism. Thick morality is primarily focused on self-perfection, not, as in most of contemporary moral theory, on relations with others. It is pluralistic and expressed differently among different individuals. Disputes between people are not settled on grounds of presumed universal norms; rather, they are settled within a metanormative framework of basic rights, which are used to create a legal system that respects those rights.

It should be apparent that although this account starts from a radically different philosophical position, it arrives at a view of governance of large societies similar to Engelhardt's. To use his terminology, there are two tiers of morality, one at the level of social cooperation, another at the level of individual persons. Our social levels look similar: a thin secular morality of freedom from coercion that supports a political system which protects territories in which individuals can act freely without interference. At the level of the individual, however, important differences appear. Engelhardt's grounding of secular morality in freedom-as-a-transcendental-condition leads him inescapably to a kind of moral relativism that disallows judgments of right and wrong, of good and evil in the actions of real people living actual lives. It ignores critical features of human nature, thus forfeiting the power to explain, predict and motivate individual and social behavior. For example, if any view of the good is as valid as any other, why, in the late twentieth century, do the most capitalistic and freest nations continue to thrive, after the most socialistic and coercive nations have collapsed or moved vigorously toward capitalism? Why has Lyndon Johnson's vision of a Great Society welfare state failed to reach most of its objectives?

### **Property and taxation**

Engelhardt is correct in saying that the Clintons' health services plan was without moral foundations. His own vision of proper reform, though, is fundamentally flawed because of one of the most egregious internal inconsistencies of his philosophical project--his theory of property and justification for taxation. He sees property as a Lockean mingling of labor with natural material, and envisions untransformed matter as belonging to no one person, rather as belonging to everyone. Taxes are thus either justified as rent on commonly owned matter, or, consequent to the Lockean proviso, justified as "payment due to others for the extent to which an individual claiming a particular property through labor diminishes the opportunities of others to claim similar property through labor."<sup>13</sup> These taxes are the source of general funds which must be distributed as a kind of negative income tax to all members of society. There is

another source of general funds, those that are derived from land that was never ceded to individuals at the time of creation of the society, or state. Those who wish to use the state-owned land or its contents (minerals, oil, and the like) must lease it from the state. The funds collected as rental fees are a source of wealth through which a society or a state may, through a process of negotiation and agreement, fund any of a variety of projects in support of the general welfare, including a system to provide health services to the medically indigent. Thus, Engelhardt has laid the theoretical groundwork to justify Medicare, Medicaid, and state and municipal health services funding.

This theory leads to some surprising conclusions. For example, Engelhardt holds that every person in the universe must participate in ownership of raw materials, and thereby of general funds from taxation of property; as a practical matter, however, only those on this particular planet can partake of its benefits.<sup>14</sup> Therefore, distribution of the funds generated through taxes on original matter or lost opportunities must be international. By this reasoning, one may logically conclude that taxes collected on oil under Texas soil must be given, in part, to every sultan in Kuwait and to every untouchable in India, as well as to everyone else on earth.

The surprising becomes bizarre, however, when Engelhardt concludes that the creation of new individuals reduces the entitlements of others, justifying a tax on reproduction to cover those costs. Furthermore, when individuals are not able to pay such a tax, it would be permissible, in general secular terms, to prevent their engaging in further reproduction.<sup>15</sup> His theories of property and taxation are clearly inconsistent with the principle of permission, peaceableness, and the proscription of coercion. It seems the height of contradiction simultaneously to maintain that persons may not be used for purposes to which they have not consented, and to approve of coercively entering the bodies or bedrooms of unconsenting people, in order to prevent production of new persons. Engelhardt starts with liberty and ends with mandatory tubal ligation or abortion (take your choice) and squads of bedroom police.

This conception of property seems arbitrary, because it is not justified by (in fact, it contradicts) the principle of permission. Conceptualization of property need not be arbitrary, however; it can be grounded in the view of human nature sketched above, avoiding the inconsistencies and contradictions inherent in Engelhardt's account. On that account, ownership of property is found to be a fundamental natural right. In the limited space available, the notion of property as a natural right cannot be defended in detail. Briefly, however, the right to property may be best understood as the right to freedom of action in producing, possessing, and disposing of things that are of value to the lives of human beings.<sup>16</sup> Production of property is a complex process that is highly individualized, requires rational planning, and must be self-directed if it is to serve the end of human flourishing.

What nature offers is not merely a collection of physical resources, as Engelhardt suggests, following Locke, but is endlessly varied opportunities to transform the material world. There is no preexisting wealth--wealth is created by actions on material objects--so the Lockean proviso is irrelevant: every act of transforming material objects is unique, producing something that did not exist before. It would take another act to produce a similar kind of property, and others are free to perform such acts.<sup>17</sup>

Engelhardt justifies taxation as a rental fee or as payment for lost opportunities to use untransformed matter that belongs to no one person, rather, belongs to everyone. But from the observation that untransformed matter can belong to no one in particular, it does not necessarily follow that it must belong to everyone. An alternative is that it belongs to no one at all, and Engelhardt gives no reason to choose the first rather than the second alternative. Proposing universal joint ownership of untransformed material artificially imposes unchosen obligations among persons that inevitably lead to coercive expropriations that are incompatible with morality and freedom.

### **An ideal health services system**

A detailed description of an ideal health services system that might arise from my account of public and private morality is beyond the scope of this presentation.<sup>18</sup> Stated briefly, the problems currently

facing our health care system are primarily financial, and they arise from the presence of an anomalous market in health services--that is, from the absence of a free market--that was the consequence of seriously flawed public policy over the last 60 years.<sup>19</sup> The fundamental cause of the price inflation we have seen in recent years is the fact that *when people buy health services, they do not have the perception that they are spending their own money.*<sup>20</sup> What is needed is a free market in health services: a structure in which the connection between the money people spend and the health services they choose is reestablished, allowing them to regain control and take responsibility for their own health and health care. Many reforms are currently being considered that would move us in that direction: tax reform measures to put everyone--big business employees, small-business employees, the self-employed, and the unemployed--on a level playing field; policy changes to make health services insurance personally owned and portable from one job to another; medical savings accounts, to allow people to appreciate clearly that the money they are spending on health services is their own; and gradual privatization of Medicaid and Medicare. As it does in almost all other areas of economic life, a free market in health services will provide a combination of cost and quality that people actually choose, through a myriad of individual decisions every day.

Engelhardt is not likely to disagree with much of this political project, though he would add to it a component of public financing. His has been a strong but lonely voice in the bioethics community supporting individual freedom and responsibility, and for this, he deserves high praise. His life-long philosophical project is embodied in the new edition of *The Foundations of Bioethics*, an effort that is scholarly and persuasive. His work expresses views contrary to those of much of the contemporary bioethics community, yet is consistent with the particularly American emphasis on liberty as a social and political priority. For this reason, his book should be read and his arguments understood by anyone with a serious interest in bioethics and health policy.

Acknowledgement: I am indebted to Douglas B. Rasmussen for his critique and suggestions for some lines of argument used in this essay, and to George Khushf for his criticism.

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- 2.... I will use the term health services throughout this paper, rather than the more commonly used health care, to emphasize that services can be provided by individual or group providers, while care can only be given by individuals.
- 3.... Engelhardt, *op. cit.*, p. 398-403.
- 4.... *Ibid.*, p. 375-376.
- 5.... *Ibid.*, p. 377-378.
- 6.... *Ibid.*, p. 402-403.
- 7.... *Ibid.*, p. 69.
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- 9.... See Fred D. Miller, Jr. *Nature, Justice, and Rights in Aristotle's Politics* (Oxford: Clarendon Press, 1985), pp. 336-346. Also, Allen Gotthelf and James Lennox, eds., *Philosophical Issues in Aristotle's Biology* (Cambridge: Cambridge University Press, 1987).

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- 12.... Engelhardt, *op. cit.*, p. 56.
- 13.... *Ibid.*, p. 158.
- 14.... *Ibid.*, p. 158-159.
- 15.... *Ibid.*, p. 159.
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18... Goodman and Musgrave have presented a description of a system compatible with this account:

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19... *Ibid*, Chapter 2, pp. 19-36.

20... *Ibid*, Chapter 4, pp. 75-136.