ON THE RIGHT TO BE SHELTERED FROM THE "RIGHT TO DIE"

HADLEY ARKES*

They say that colleges are the nursing grounds for the jurists of the future, and the measure of the colleges can be found in that entertainment Professor Richard Lederer has been willing to offer to the public by giving us the history of the Western world as culled from the papers of his undergraduates.[1] To give you the flavor of these offerings, they contain passages of this kind: that Socrates was a Greek teacher who died from an overdose of wedlock . . . that David was a Hebrew king who did battle with the Philatelists . . . that the Revolution took place in America when the British put tacks in our tea . . . . And after the Revolution, we no longer had to pay for taxis.

There was also some material in this collection on technology, birth, and death: for example, that with the invention of the steamboat a whole network of rivers sprung up in the land. (These were the original "supply-siders," I think.) Lincoln's mother died in infancy. Lincoln himself was born into a log cabin he had built with his own hands. Louis Pasteur discovered a cure for rabbis. And of course, long before that, Sir Francis Drake had circumcised the world with a 100-foot clipper.[2]

A population constituted with sensibilities of this type can be a persistent source of what the philosophers call self-refuting propositions, as with the primate who runs up after class insisting that "There is no truth." When that mind turns to moral philosophy or jural matters, it produces a rich variety of incoherent rights-claims: for example, "I have a right to believe that I don't exist." Who is the bearer of that right? The one who does not exist? Imagine the character who tried to claim a "right to die" and do himself in on the strength of his convic-

* Edward Ney Professor of Jurisprudence, Amherst College. The argument condensed in this paper will be published in a fuller form in the collection of papers, edited by Gerard Bradley and Charles Barry, drawn from the conference on euthanasia at the College of Law of the University of Illinois in October 1989. Also, see the article by the author, *"Autonomy" and the "Quality of Life": The Dismantling of Moral Terms*, 2 ISSUES L. & MED. 421 (1987).

1. *See* R. LEDERER, ANGUISHED ENGLISH (1987).

2. *See id.* at 8, 10, 11, 13, 15.

tion that he does not exist. There are judges who are ready to honor his claim under the banner of his "autonomy" or privacy. And yet, the ground of his action, the basis of his rights-claim, remains incoherent. He may be *free* to kill himself, but that is quite separate from establishing the *rightness* or the *justification* for the act. His conviction that he "does not exist" simply cannot supply a coherent reason for anything; therefore, it cannot supply a "justification" and the ground of a "right."

In trying to explain this matter to my students, I imagined the case of a judge who said, "Smith, you've been acquitted; therefore, I sentence you to twenty years." The judge has violated the law of contradiction, and on the basis of that mistake he has inflicted a harm on Smith. Now, imagine that the judge says, "Smith, you've just been acquitted; therefore, I sentence *myself* to twenty years!" The basis of the wrong remains precisely the same. The judge has violated the law of contradiction and inflicted a harm. The nature of the wrong has not been effaced in any degree by virtue of the fact that he visits the punishment solely on himself. The point is that the ground of his judgment simply cannot supply a coherent reason for his act, regardless of whether he inflicts the punishment on others, or on himself.

If we had the time here, I think that I could show you that those propositions that really have standing as moral propositions find their anchor, in the same way, in the law of contradiction. And we could eventually explain, on that ground, just why we cannot draw moral conclusions about people on the basis of such attributes as the color of their hair, their height, or their infirmities. To know someone is deaf, for example, is not to know anything of moral consequence about him. From his deafness we cannot infer that he is destined to a life of criminality, that he has no prospects of leading a decent life, or that he *deserves* to be punished. We could understand, then, why it would be wrong to kill anyone because of his deafness; but then, for the same reason, we would understand why it would be wrong for any person to kill *himself* for that same, unjustified reason. Once we understand, in other words, that deafness cannot provide a reason or a justification for a homicide, it is a matter of moral indifference that the killing is visited on oneself rather than others.

I recall these rudimentary points in logic, or in the history of

moral reflection, in order to set them against the remarkable trends in which the courts have advanced some radical claims about the "right to die"—and then extrapolated from that so-called right, the right of people to end the lives of their relatives when they become burdensome. In just a few years, the courts have moved from the indefensible to the unthinkable: They have moved from a willingness to cut off food and water for comatose patients who were supposedly wanting in a "cognitive and sapient" state, and they have shown a willingness recently to cut off treatment for patients who are very much conscious—who are able to respond to directions, lift their arms, and follow people around the room with their eyes.[3] The courts think that they are honoring a claim of autonomy or privacy, a claim that had its sharpest expression in *Roe v. Wade*.[4] But what we have seen in these cases is a dramatic example of claims of autonomy *detached* from the moral ground that would give them any sense.

We don't respect rights of autonomy on the part of animals; we don't seek their informed consent before we govern them or practice surgery on them. Claims of autonomy arise only for *moral agents*, for those beings who have the capacity to deliberate about the grounds of their choice, or the uses of their autonomy, and they are drawn to reflect on the choices that would be good or bad, right or wrong. But then the paradox: The right to autonomy is a right that arises only for moral beings; but it is the nature of a moral being that he is capable of reflecting about the choices that are right or wrong, and *therefore he can understand the things he is not free to choose in the name of his own autonomy*. He can understand, for example, that he would have no "right" to kill himself because he has an ancestor of the wrong race, or because he has lost his hearing.

But then I'd invite you to follow me in filling in the rest of the implication: If we do not have a right of privacy that permits us to destroy ourselves when we are deaf, then it follows that we cannot delegate to other people a right of "substitute judg-

3. *See In re* Jobes, 108 N.J. 394, 529 A.2d 434 (1987). One physician who attended Nancy Jobes reported that "on four or five occasions he had said, 'Nancy, pick up your head,' and that, with only one exception . . . she obeyed." *Jobes*, 108 N.J. at 405, 529 A.2d at 439. But in response, Judge Garibaldi "explained" that these reports on the responsiveness of Mrs. Jobes were simply "inconsistent with the trial court's conclusion that Mrs. Jobes [was] in a persistent vegetative state." *Jobes*, 108 N.J. at 408, 529 A.2d at 441.

4. 410 U.S. 113 (1973).

ment," and permit them to order, in the name of *our autonomy*, a withdrawal of treatment that we would not be warranted in ordering, even for ourselves, even in the name of our own autonomy.

I spoke on this problem at the College of Law at the University of Illinois in October 1989, and a nurse from Seattle came up saying that she now understood the problem she was trying to explain to some patients with AIDS. They were claiming, in the name of their privacy, a right to refuse treatment because of their AIDS. What they didn't understand was this: To establish the rightness of removing treatment from them on that basis would be to establish the ground on which *anyone* may remove it, in their place, if they were not able to express their own preferences. And that same understanding, about the rightness of ending treatment, may establish the ground on which other people may then conclude, in a choice among patients, that the patients with AIDS are patients that may justly be allowed to die, in preference to other patients, with other kinds of maladies.

I've remarked to colleagues that it really isn't necessary to overrule *Roe v. Wade* in order to scale back abortions to the volume at which they were performed before 1973. The so-called right to an abortion can be placed on the same plane as those other rights from which it was supposedly derived, like the "right to marry"[5] or the "right to procreation."[6] Either of these freedoms may be subject to a host of restrictions, when the restrictions can be justified.[7] If *Roe v. Wade* were placed on the same plane, it would mean that people have a right to abortions in those situations in which these operations may be justified, but the state may impose restrictions in the cases in which there would be no compelling reason for the taking of a human life. Justice White has already suggested this point, with the effect of startling Justice Stevens,[8] but Justice Stevens has a mind immanently open to surprise. *Roe v. Wade* could remain a shell in our law, even after most of its substance is removed. But so

5. *See* Loving v. Virginia, 388 U.S. 1 (1967).

6. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

7. For an extended analysis of this point in *Loving*, *Skinner*, and the cases that were later summed up to create a "right to privacy," see H. ARKES, FIRST THINGS 341-57 (1986).

8. *See* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 790-95 (1986) (White, J., dissenting); *id.* at 776 (Stevens, J., concurring).

long as the decision stands there, marking an unanchored right of privacy and autonomy, then it stands as the foundation of another branch of our law, in which it offers the most extravagant license for euthanasia, for the withdrawal of medical treatment from newborn, retarded infants, and the withdrawal of food and water from aged, infirm patients. *Roe v. Wade* will not have to be struck down in any case involving the restriction of abortion; the need to strike it down will probably arise in one of these other cases, where *Roe* supplies the necessary ground for euthanasia.

But when anything touches these days on the foundations of *Roe v. Wade*, we find judges who are willing to overturn the teachings of a lifetime on the bench for the sake of protecting this right of taking life—which now seems to be, for them, in Matthew Arnold's phrase, the one thing needful.

I happened to be in the courtroom on that memorable day when Justice Thurgood Marshall announced his sudden conversion to the cause of States' rights. The Reagan administration had been seeking access to the records of a hospital in order to protect newborn, retarded infants from the withdrawal of medical treatment.[9] Justice Marshall had committed his career as a lawyer to breaking down the barriers of federalism and privacy, which prevented the federal government from protecting civil rights. He had helped the law reach private hospitals in forbidding the racial segregation of patients. But now, when it came to vindicating the civil rights of the handicapped, Marshall asked, with an exquisite surprise and indignation, What happened to the rights of States? Charles Cooper was arguing the case for the government that day, and he had turned upon him now Marshall's newly summoned passion for the cause of States. When the case for the government was stripped of its shadings and complications, Marshall thought the plain "truth is that the Federal Government is just taking over the state's function. . . . The only thing that's involved here is the right of the Federal Government to move into what for centuries has been a state matter, namely how to operate a hospital."[10] Late in his seasons of experience, he had apparently

9. *See* Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986).

10. Complete Oral Arguments of the Supreme Court of the United States, 1985 Term, Bowen v. American Hosp. Ass'n, No. 84-1529, at 16, 23. For a fuller treatment of the oral argument and the issues raised in this case, see H. ARKES, BEYOND THE CONSTITUTION 232-45 (1990).

come to revere a federal government limited by the rights of States.

And in this, I suppose, there may be a lesson for us all. When some of these questions are put to us, in a demanding, jolting way, we may discover—as Justice Marshall discovered—that we have principles we haven't even used yet.