

THE RIGHT TO ASSISTED SUICIDE AND EUTHANASIA

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I. INTRODUCTION

Whether to permit assisted suicide and euthanasia is among the most contentious legal and public policy questions in America today. The American public consciousness became galvanized on June 4, 1990, with the news that Dr. Jack Kevorkian had helped Janet Adkins, a fifty-four-year-old Alzheimer's patient, take her life.¹ It was later disclosed that Dr. Kevorkian had neither taken the medical history nor made an examination of Ms. Adkins, and that he had never consulted Ms. Adkins's primary care physician.² Dr. Kevorkian had

1. See *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994).

2. See Isabel Wilkerson, *Prosecutors Seek to Ban Doctor's Suicide Device*, N.Y. TIMES, Jan. 5, 1991, at A6. Dr. Murray Raskind, one of the physicians who cared for Ms. Adkins in the early stages of her disease, later stated that she was physically fit and in good spirits at the time of her death. Dr. Raskind added in

simply agreed to meet Ms. Adkins in a Volkswagen van he had outfitted with a "suicide machine" consisting of three chemical solutions fed into an intravenous line needle. It took Dr. Kevorkian several attempts to insert the needle into Ms. Adkins, but he eventually succeeded.³ Ms. Adkins then pressed a lever releasing lethal drugs into her body.

While the media often uses the term "assisted suicide" to describe Dr. Kevorkian's practices, it is a misnomer. Dr. Kevorkian seeks to legalize not only the practice of aiding another in taking his or her life (assisting suicide), but also the practice of intentionally killing another person motivated by feelings of compassion or mercy (euthanasia). Indeed, in 1999 Dr. Kevorkian performed an act of euthanasia for a nationwide television audience on *60 Minutes*, with the express desire of provoking debate over legalizing that practice too. (He was later convicted of second-degree murder after a trial in which he chose to act as his own counsel).⁴

Since Ms. Adkins's death made national headlines, Dr. Kevorkian claims to have assisted more than 130 suicides.⁵ While Dr. Kevorkian is perhaps the most notorious proponent of assisted suicide and euthanasia, he is hardly without allies. Derek Humphry, founder of The Hemlock Society, a group devoted to promoting the legalization of euthanasia, has praised Dr. Kevorkian for "breaking the medical taboo on euthanasia."⁶ The American Civil Liberties Union has taken up his legal defense.⁷

In 1984, the Netherlands became the first country in the world to give legal sanction to some forms of assisting suicide and euthanasia. The Dutch Supreme Court declared that although killing a patient remains a criminally punishable offense under the nation's Penal Code, physicians can claim an "emergency defense" under certain circumstances.⁸

court testimony that Ms. Adkins was probably not mentally competent at the time of her death. *See id.*

3. *See* Pamela Warrick, *Suicide's Partner*, L.A. TIMES, Dec. 6, 1992, at E1.

4. *See* Brian Murphy, *Kevorkian Silent, Starts Prison Term*, DETROIT FREE PRESS, (Apr. 14, 1999) <<http://www.freep.com/news/xtra2/qkevo14.htm>>.

5. *See id.*

6. Derek Humphry, *Law Reform*, 20 OHIO N.U. L. REV. 729, 731 (1993).

7. *See* Charlie Cain, *Key Events in the History of Michigan's Debate Over Abortion and Assisted Suicide*, DETROIT NEWS, Mar. 2, 1997, at A8.

8. As developed by Dutch courts, the emergency defense applies when (a) a patient requests assistance freely and voluntarily; (b) the request is well-

In a 1991 issue of *The New England Journal of Medicine*, Dr. Timothy Quill, a University of Rochester professor, defended his decision to prescribe barbiturates to a cancer patient even though she admitted that she might use them at some indefinite time in the future to kill herself.⁹ A New York grand jury was convened but declined to bring an indictment for assisting suicide. The State's Board for Professional Medical Misconduct considered pressing disciplinary charges but declined, reasoning that Dr. Quill had written a prescription for drugs that had a legitimate medical use for his patient (as a sleeping aid for her insomnia) and that he could not have definitively known she would use the medication to kill herself. Ruling, in essence, that the evidence was too equivocal to conclude that Dr. Quill intended to cause the death of his patient, charges were dropped.¹⁰

In 1992, a gynecology resident submitted an anonymous article to the *Journal of the American Medical Association* that sparked a long-running debate in the most prominent American medical journals. Entitled *It's Over Debbie*, the article described how the author administered a lethal injection to a terminal cancer patient (an act of euthanasia, not assisted suicide) that he had never met before after her demand to "get this over with."¹¹

After its publication in the early 1990s, The Hemlock Society's book, *Final Exit: The Practicalities of Self-Deliverance and Assisted Suicide for the Dying*,¹² rocketed to the New York Times' best-seller list. The book provides step-by-step instructions (in easy to read large print) on various methods of

considered, durable, and persistent; (c) the patient is experiencing intolerable suffering with no prospect of improvement; (d) other alternatives to alleviate the patient's suffering have been considered and found wanting; (e) any act of euthanasia is performed (only) by a physician; and (f) the physician has consulted an independent colleague. See John Keown, *Some Reflections on Euthanasia in the Netherlands*, in EUTHANASIA, CLINICAL PRACTICE AND THE LAW 197 (Luke Gormally, ed. 1994) [hereinafter *Some Reflections*].

9. See Timothy Quill, *A Case of Individualized Decision Making*, 324 NEW ENG. J. MED. 691-94 (1991).

10. See The New York State Task Force on Life and the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* (May 1994) (visited June 4, 2000) <<http://www.health.state.ny.us/nysdoh/provider/death.htm>> [hereinafter *New York Task Force*].

11. Anonymous, *It's Over Debbie*, 259 JAMA 272 (1988).

12. DEREK HUMPHRY, *FINAL EXIT: THE PRACTICALITES OF SELF-DELIVERANCE AND ASSISTED SUICIDE FOR THE DYING* (1991).

"self-deliverance."¹³ On January 18, 2000, its sales on Amazon.com ranked 4,347 among all titles (very high indeed).¹⁴ Chapter titles range from "Self-Deliverance by Plastic Bag" (a recommended method) to "Bizarre Ways to Die" (discussing the relative merits of guns, ropes, and firecrackers) and "Going Together" (ideas for double suicides).¹⁵ A *New England Journal of Medicine* study found that instances of asphyxiation by plastic bag, a method highly touted in *Final Exit*, measurably increased after the book's publication.¹⁶

The growing debate over assisted suicide and euthanasia has produced increasing political and legal activism. In 1988, an early voter referendum campaign in California aimed at toppling the State's law banning assisted suicide failed to secure a spot on the ballot after collecting "only 129,776 valid signatures of the required 372,178."¹⁷ Another effort four years later not only secured a spot on the ballot, but also garnered 48 percent of the vote. A similar 1991 effort in Washington State obtained 46.4 percent of the vote.¹⁸ By 1994, the referendum campaigns bore their first fruit when Oregon voters narrowly approved the legalization of assisted suicide, 51 percent to 49 percent, though subsequent legal challenges delayed implementation for three years.¹⁹

Since 1992, bills have been introduced to legalize assisted suicide or euthanasia in various state legislatures, including

13. See *id.*

14. See Amazon.com (visited Jan. 18, 2000) <<http://www.amazon.com/exec/obidos/ASIN/0440507855/o/qid=948234548/sr=8-1/002-3669652-9325855>>.

15. HUMPHRY, *supra* note 12, at 98-99, 51-57, 100-02.

16. See Peter M. Marzuk et al., *Increase in Suicide by Asphyxiation in New York City After the Publication of Final Exit*, 329 *NEW ENG. J. MED.* 1508, 1508-10 (1993). Though the book was billed as providing "self-deliverance" information for the terminally ill, the study found that of the fifteen suicides who had probably been exposed to the book during the study period, most were not terminally ill and fully six suffered from no illness whatsoever. See *id.* at 1509.

17. Myrna Oliver, *Controlling the End: Right-to-Die Laws Take on New Life*, L.A. *TIMES*, May 10, 1988, at 1, correction appended; see also Allan Parachini, *Bringing Euthanasia to the Ballot Box*, L.A. *TIMES*, Apr. 10, 1987, at 1.

18. See Jan Gross, *The 1991 Election: Euthanasia: Voters Turn Down Mercy Killing Idea*, N.Y. *TIMES*, Nov. 7, 1991, at B16; see also Sandi Dolbee, *Right to Die Measure Rejected by State Voters*, SAN DIEGO *UNION-TRIB.*, Nov. 4, 1992, at A3.

19. See Spencer Heinz, *Assisted Suicide: Advocates Weigh In*, OREGONIAN, Dec. 9, 1994, at A1. Implementation did not occur until October 27, 1997. See Oregon Health Division, *Oregon's Death With Dignity Act: The First Year's Experience* (visited Sept. 15, 1999) <<http://www.ohd.hr.state.or.us/cdpe/chs/pas/ar-intro.htm>>.

Alaska, Arizona, Colorado, Connecticut, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire, New Mexico, Rhode Island, Vermont, and Washington.²⁰ All have failed—so far. Some states have actually strengthened or reaffirmed their laws prohibiting assisted suicide. Dr. Kevorkian's home State of Michigan is an example.²¹ In New York, a blue-ribbon panel was convened to consider revamping or repealing its laws banning assisting suicide, but the panel ultimately rejected any change by a unanimous vote.²² Maryland passed a statute for the first time codifying that state's common law ban on assisted suicide.²³ In the last four years, Iowa, Oklahoma, and Virginia also strengthened their laws against the practice.²⁴ Congress has gotten into the net, too; it is currently considering legislation that would effectively overrule Oregon's referendum permitting assistance in suicide.²⁵

Perhaps frustrated by the results of their early referendum and legislative efforts, in the mid-1990s euthanasia proponents turned to the courts in Washington and New York, seeking to have laws against assisting suicide declared unconstitutional.²⁶ Wildly disparate lower court rulings resulted. One federal district court found a constitutional right to assisted suicide; another found that no such right exists.²⁷ The appellate courts reviewing these decisions produced even more fractured opinions.²⁸ Eventually the cases culminated in argument before

20. See Julia Pugliese, *Don't Ask—Don't Tell: The Secret Practice of Physician-Assisted Suicide*, 44 HASTINGS L.J. 1291, 1319 (1993); AMERICAN MEDICAL NEWS, May 1, 1995, at 5; *Catholic Groups Effectively Kill Bill to Legalize Assisted Euthanasia*, PROVIDENCE J., May 8, 1995, at 1C.

21. See NBC News, *Doctor-Assisted Suicide, State by State* (visited June 4, 2000) <<http://www.msnbc.com/modules/statebystate/state.asp?state=Michigan&ST=MI&2w=no#marker>>.

22. See *New York Task Force*, *supra* note 10.

23. See *Doctor-Assisted Suicide—A Guide to WEB Sites and the Literature* (visited June 4, 1999) <<http://web.lwc.edu/administrative/library/suic.htm>>.

24. See Hemlock Society, *Physician Assistance in Dying: Legislation by State*, (visited June 3, 2000) <http://www.hemlock.org/states_12.html>; see generally Marzuk, *supra* note 16.

25. See Hemlock Society, *supra* note 24.

26. Dr. Kevorkian also filed a losing state court challenge to the Michigan law banning assisted suicide. See *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994).

27. See *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994) (finding constitutional right); *Quill v. Koppell*, 870 F. Supp. 78 (S.D.N.Y. 1994) (rejecting constitutional right).

28. See *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995),

the United States Supreme Court. The Court's 9-0 decisions upheld the Washington and New York laws banning assisted suicide and were hailed as a major victory for assisted suicide opponents.²⁹ Few noticed at the time, however, that critical concurring Justices viewed the cases as raising only *facial* challenges to laws against assisting suicide and reserved the right to consider in later cases whether those laws are unconstitutional *as applied* to terminally ill adults who wish to die.³⁰ Thus, far from definitively resolving the issue, the Court's decisions only assure that the coming decade will witness even more debate over assisted suicide and euthanasia than the last.

Part II of this Article discusses the Washington and New York cases. These cases identify the turf where scholars, courts, and legislatures will fight future battles over assisted suicide and euthanasia. Specifically, they suggest that debate will focus on four issues: history, fairness, autonomy, and utility. The central questions will likely be whether historical precedent supports legalization; whether concerns of equal protection or fairness dictate that, if we permit patients to refuse life-sustaining care like food and water, we must also allow assisted suicide and euthanasia; whether respect for personal autonomy and self-determination compels legalization of these other practices; and whether legalization represents the solution that would provide the greatest good for the greatest number, even if some people might be harmed or offended.

With that background, the Article then discusses in turn each of these questions. Part III reviews the legal history of assisted suicide and euthanasia and concludes that little historical antecedent supports treating them as "rights." Part IV argues that many efforts to distinguish assisted suicide and euthanasia from the refusal of life-sustaining care are unsound but that at least one rational distinction does exist. As a result, principles of fairness and equal treatment do not require legalization of one practice merely because we allow the other. Part V

vacated en banc, 79 F.3d 790 (9th Cir. 1996); *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996).

29. See *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997); see also Joan Biskupic, *Unanimous Decision Points to Tradition of Valuing Life*, WASH. POST, June 27, 1997, at A1.

30. See discussion *infra* Part II.C.

addresses the claim that principles of autonomy compel legalization. As developed by many moral-legal philosophers, faithful adherence to principles of personal autonomy would compel legalization but also would result in an overbroad euthanasia right few would sanction. Part VI confronts utilitarian arguments for assisted suicide and euthanasia and concludes that they are both practically and analytically flawed.

Having addressed the major moral-legal arguments raised in the assisted suicide and euthanasia debate to date, the Article then argues in Part VII that a basic moral and common law principle has been largely overlooked. Whatever the claims of fairness or autonomy or utility may be, this principle holds that the intentional taking of human life by private persons is always wrong. Part VII also examines the roots of the principle and its application. It argues that the principle explains and makes sense of the current legal distinctions between cases where treatment may be withdrawn and where it may not, where potentially lethal care may be given and where it may not, as well as why assisted suicide and euthanasia should not be permitted. It suggests that, whether the venue is judicial or legislative, the appropriate line society should draw—and today largely does draw—is between acts intended to kill and acts where no such intention exists.

II. THE COURTS

A. *The Washington Due Process Litigation*

1. *The Trial Court*

In 1994, a group of Washington State physicians and patients along with a non-profit organization dedicated to the legalization of euthanasia filed suit in federal district court. They sought a declaratory judgment that the state statute forbidding a physician from knowingly assisting a patient's suicide was unconstitutional.³¹

31. See *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994). The statute in question read, "[a] person is guilty of promoting a suicide attempt when he knowingly causes or aides another person to attempt suicide." WASH. REV. CODE § 9A.36.060(1) (1994).

Federal District Judge Barbara Rothstein agreed. Under the Fourteenth Amendment, no state may “deprive any person of life, liberty, or property, without due process of law.”³² Despite the procedural tone of the Fourteenth Amendment’s language, Judge Rothstein observed that, “through a long line of cases,” the Supreme Court has interpreted the Amendment’s “liberty” component to contain certain “substantive” rights that the states may not abridge except for the most compelling reasons, including rights pertaining to “marriage, procreation, contraception, family relationships, childrearing, and education.”³³

For guidance, Judge Rothstein turned to the then-most recent major exposition of substantive due process jurisprudence, *Planned Parenthood v. Casey*,³⁴ in which the Court reaffirmed the right to abortion. Judge Rothstein observed that, while discussing abortion, the three-justice plurality in *Casey* suggested that matters

involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of the liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.³⁵

Judge Rothstein found this reasoning “highly instructive.”³⁶ “Like the abortion decision, the decision of a terminally ill person to end his or her life involves the most intimate and personal choices a person may make in a lifetime and constitutes a choice central to personal dignity and autonomy.”³⁷

Judge Rothstein also found instructive the Supreme Court’s decision in *Cruzan v. Director, Missouri Department of Health*.³⁸ There, the Court assumed without deciding that the liberty component of the Fourteenth Amendment embraces the right of a competent adult to refuse life-sustaining medical

32. *Compassion in Dying*, 850 F. Supp. at 1459 (citing U.S. CONST. amend. XIV).

33. *Id.* at 1459 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 851(1992)).

34. 505 U.S. 833 (1992).

35. *Id.* at 851.

36. *Compassion in Dying*, 850 F. Supp. at 1459.

37. *Id.* at 1459-60 (internal citations omitted).

38. 497 U.S. 261 (1990).

treatment.³⁹ From this apparent right, Judge Rothstein posed the question whether there is “a difference for purposes of finding a Fourteenth Amendment liberty interest between refusal of unwanted treatment which will result in death and committing physician-assisted suicide in the final stages of life.”⁴⁰ Judge Rothstein concluded that there is not, because both are “profoundly personal,” and at “the heart of personal liberty.”⁴¹

2. *The Ninth Circuit Panel Decision*

A divided panel of the Ninth Circuit reversed.⁴² Judge Noonan, a noted Catholic legal thinker before and after ascending to the bench, wrote a stinging decision stressing three points.

First, Judge Noonan argued that *Casey's* discussion of autonomy was a mere “gloss” on substantive due process jurisprudence, one that was later “implicitly controverted by *Cruzan*.”⁴³ Judge Noonan pointed out that *Cruzan* had relied upon an examination of history and tradition—not abstract conceptions of “personal liberty”—to determine whether a constitutional right exists.⁴⁴ Turning to the historical record, Judge Noonan concluded that “in the two hundred and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction. Unless the federal judiciary is to be a floating constitutional convention, a federal court should not invent a constitutional right unknown to the past.”⁴⁵

Second, Judge Noonan suggested that taking *Casey's* personal liberty “gloss” so seriously would lead to absurd results. If “personal dignity and autonomy” is the touchstone of constitutional analysis, he reasoned, every man and woman in the country must enjoy them.⁴⁶ Thus, “[t]he depressed

39. See *id.* at 278 (this right “may be inferred from our prior decisions”); *id.* at 279 (“the logic of the cases . . . would embrace such a liberty interest”).

40. *Compassion in Dying*, 850 F. Supp. at 1461.

41. *Id.*

42. See *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995).

43. *Id.* at 591.

44. *Id.*

45. *Id.*

46. *Id.*

twenty-one year old, the romantically devastated twenty-eight year old, the alcoholic forty year old who choose suicide are also expressing their views of the existence, meaning, the universe, and life."⁴⁷

Third, Judge Noonan rejected any attempt to analogize refusing medical care and affirmatively seeking assistance in suicide on the grounds that one involves an omission of care and the other an affirmative act: "When you assert a claim that another . . . should help you bring about your death, you ask for more than being let alone. . . . You seek the right to have a second person collaborate in your death."⁴⁸

3. *The En Banc Court*

Two and a half years after the suit was filed, an *en banc* panel of the Ninth Circuit vacated Judge Noonan's decision and affirmed the trial court's judgment by a vote of 8 to 3.⁴⁹ The majority opinion was written by Judge Reinhardt, as well known for his expansive view of the Constitution as Judge Noonan is for his conservative views.

The *en banc* court's exhaustive 50-page opinion tracked Judge Rothstein's analysis. It rejected Judge Noonan's assertion that history is "our sole guide" in substantive due process inquiries.⁵⁰ Indeed, the Court argued that if history were the only guide, the Supreme Court never would have declared anti-miscegenation laws unlawful in *Loving v. Virginia*⁵¹ because such laws were commonplace at the time the Fourteenth Amendment was adopted.⁵² Neither would the Supreme Court have recognized a right to an abortion; more than three-quarters of the states restricted abortions when the Fourteenth Amendment was passed.⁵³

Further, the *en banc* panel argued that the historical record concerning suicide itself is "more checkered" than Judge

47. *Id.*

48. *Id.* at 594.

49. *See Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (*en banc*).

50. *Id.* at 805.

51. 388 U.S. 1 (1967).

52. *See Compassion in Dying*, 79 F.3d at 805 (*en banc*).

53. *See id.* at 806.

Noonan had suggested.⁵⁴ Judge Reinhardt pointed to the fact that Socrates and Plato sanctioned suicide under some circumstances, the Stoics glorified it, and Roman law sometimes permitted it.⁵⁵ While conceding that assisted suicide was unlawful under English and American common law, Judge Reinhardt stressed that the majority of states has not treated suicide or attempted suicide as criminal since at least the turn of the century.⁵⁶

Turning to *Casey* and *Cruzan*, Judge Reinhardt argued that Judge Rothstein's analysis had been right all along. Basic life decisions are constitutionally protected, and "[l]ike the decision of whether or not to have an abortion, the decision how and when to die is one" of them.⁵⁷ In responding to Judge Noonan's assertion that, under this logic, a right to assisted suicide would have to be extended to the desperate or depressed, the *en banc* court argued that the state has a legitimate interest "in preventing anyone, no matter what age, from taking his own life in a fit of desperation, depression, or loneliness or as a result of any other problem, physical or psychological, which can be significantly ameliorated."⁵⁸ But, the court stressed, "the state's interest in preserving life, is substantially diminished in the case of terminally ill, competent adults who wish to die."⁵⁹ Likewise, the *en banc* court rejected Judge Noonan's proffered act-omission distinction, stating that "*Cruzan*, by recognizing a liberty interest that includes the refusal of artificial provision of life-sustaining food and water, necessarily recognizes a liberty interest in hastening one's own death."⁶⁰

In one critical respect, the *en banc* court went even further than the trial court. Judge Reinhardt virtually admitted that approving an assisted suicide right would necessarily lead to approving a right to euthanasia, though he strained to point

54. *Id.*

55. *See id.* at 807-08.

56. *See id.* at 808-10.

57. *Id.* at 813.

58. *Id.* at 820.

59. *Id.* In so holding, the court at least tacitly left open whether assisted suicide should be available to persons who are merely depressed or suffering other psychological problems that *cannot* be "significantly ameliorated." *Id.*

60. *Id.* at 816.

out that the formal recognition of the latter right would have to await another day:

We agree that it may be difficult to make a principled distinction between physician-assisted suicide and the provision to terminally ill patients of other forms of life-ending medical assistance, such as the administration of drugs by a physician. . . . The question whether that type of physician conduct may be constitutionally prohibited must be answered directly in future cases, and not in this one. We would be less than candid, however, if we did not acknowledge that for present purposes we view the critical line in right-to-die cases as the one between the voluntary and involuntary termination of an individual's life.⁶¹

While the Washington litigation progressed through the trial and appellate processes, a similar effort was being waged on the other side of the country.

B. *The New York Equal Protection Litigation*

1. *The Trial Court*

The New York litigation, filed June 20, 1994, was led by Dr. Timothy Quill, author of the *New England Journal of Medicine* article defending his decision to prescribe barbiturates to a terminally ill patient.⁶² Like the Washington plaintiffs, Dr. Quill and his fellow physician-plaintiffs challenged New York's law prohibiting the intentional assistance or promotion of suicide.⁶³ Like the Washington plaintiffs, they contended that New York's law violated the substantive component of the Fourteenth Amendment Due Process Clause.⁶⁴

Chief Judge Griesa of the Southern District disagreed. Judge Griesa rejected any attempt to rely on *Casey*, dismissing its discussion of personal autonomy as "too broad" to ordain the outcome of this case: "The Supreme Court has been careful to explain that the abortion cases, and other related decisions on

61. *Id.* at 831-32.

62. *See* Quill v. Koppell, 870 F. Supp. 78 (S.D.N.Y. 1994).

63. *See id.* at 79-80. Section 125.15(3) of the New York penal code provides in pertinent part that "A person is guilty of manslaughter in the second degree when: . . . 3. He intentionally . . . aids another person to commit suicide." Section 120.30 provides that "[a] person is guilty of promoting a suicide attempt when he intentionally . . . aids another person to attempt suicide." *Id.* at 80-81.

64. *See id.* at 82-83.

procreation and child rearing, are not intended to lead automatically to the recognition of other fundamental rights on different subjects."⁶⁵ Like Judge Noonan, Judge Griesa treated the due process claim as depending upon an examination of history.⁶⁶ Again like Judge Noonan, Judge Griesa concluded (with little explanation) that the plaintiffs had failed to prove "that physician assisted suicide, even in the case of terminally ill patients, has any historic recognition as a legal right."⁶⁷

Dr. Quill and his fellow physician-plaintiffs contended that, even if no due process right exists, the Equal Protection Clause of the Fourteenth Amendment renders assisted suicide statutes unlawful.⁶⁸ Specifically, they noted that under New York statutory law a competent person may refuse medical treatment—even if doing so certainly will result in death.⁶⁹ To treat like persons alike, they argued, assisted suicide must also be permitted.⁷⁰ "To certain ways of thinking, there may appear to be little difference between refusing treatment in the case of a terminally ill person and taking a dose of medication which leads to death."⁷¹

In response, Judge Griesa held that New York State needed to present only a "reasonable and rational" basis for the distinction in its law, nothing more.⁷² He found such a distinction exists on the grounds that a patient refusing treatment is merely "allowing nature to take its course" while the act of suicide involves "intentionally using an artificial death-producing device."⁷³

2. *The Second Circuit*

The Second Circuit reversed.⁷⁴ It did not address the due process theory advanced by Dr. Quill below and adopted by the *en banc* Ninth Circuit court. Instead, it adopted the

65. *Id.* at 83.

66. *See id.*

67. *Id.*

68. *See id.* at 84-85.

69. *See id.*; N.Y. PUB. HEALTH LAW §§ 2960-2980, §§ 2980-2994 (McKinney 1994 & Supp. 1997).

70. *See Quill*, 870 F. Supp. at 84.

71. *Id.*

72. *Id.*

73. *Id.*

74. *See Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996).

plaintiffs' Equal Protection theory. Rejecting the trial court's natural-artificial distinction, the court argued that

there is nothing "natural" about causing death by means other than the original illness or its complications. The withdrawal of nutrition brings on death by starvation, the withdrawal of hydration brings on death by dehydration, and the withdrawal of ventilation brings about respiratory failure. . . . It certainly cannot be said that the death that immediately ensues is the natural result of the progression of the disease or the condition from which the patient suffers.⁷⁵

New York responded by proffering another distinction between assisting suicide and refusing treatment, claiming (as Judge Noonan had) that one involves an affirmative act while the other is only an omission. But the Second Circuit rejected this too. "[T]he writing of a prescription to hasten death . . . involves a far less active role for the physician than is required in bringing about death through asphyxiation, starvation, and/or dehydration."⁷⁶ Quoting Justice Scalia's concurrence in *Cruzan*, the court held that the act-omission distinction is "irrelevant" because "the cause of death in both cases is the suicide's conscious decision to pu[t] an end to his own existence."⁷⁷

C. *The Supreme Court*

By mid-1996, the Ninth and Second Circuit cases were ripe for the Supreme Court's review. The Court consolidated the cases and heard argument on January 8, 1997. On June 26, 1997, the Chief Justice delivered two opinions for the Court, overruling both the Ninth and Second Circuits.⁷⁸ He was joined by Justices O'Connor, Scalia, Kennedy, and Thomas.

While widely portrayed in the media as a conservative Rehnquist Court victory for enemies of euthanasia,⁷⁹ the little-reported truth is that any such "victory" may well prove pyrrhic. Largely unnoticed in the Court's fractured opinions is

75. *Quill*, 80 F.3d at 729.

76. *Id.*

77. *Id.* (citing *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 296-97 (1990) (Scalia, J., concurring)).

78. *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997).

79. See Biskupic, *supra* note 29.

the fact that several Justices believed *Glucksberg* and *Quill* presented only the question whether laws against assisting a suicide are *facially* constitutional, *not* whether they are constitutional *as applied* to any particular class of persons.⁸⁰ In their various opinions, moreover, each of these Justices variously hinted, suggested, or at least kept the door open to the possibility that prohibitions against assisting suicide and euthanasia are unconstitutional as applied to competent and terminally ill adults.

1. *The Majority Opinion*

Due Process. The Chief Justice began his opinion for the Court on the substantive due process question by expressing open skepticism about the Ninth's Circuit *en banc* Court's reliance on *Casey* and *Cruzan's* discussions of personal autonomy: "We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices."⁸¹

Unlike Judge Reinhardt's historical analysis, however, Chief Justice Rehnquist did not consult the views of ancient philosophers. He did not look at Roman law or practice. Instead, he began with English common law experience. Even there, the Chief Justice began and ended his analysis in a single paragraph, summarily concluding that suicide and its assistance were never sanctioned in English common law.⁸²

The Chief Justice devoted more attention to American legal history.⁸³ While conceding Judge Reinhardt's point that the sanctions associated with suicide were eventually repealed by all American jurisdictions, the Chief Justice declined the Ninth Circuit's invitation to read much into that: "[T]hrough States moved away from Blackstone's treatment of suicide [as a

80. See, e.g., *Quill*, 521 U.S. at 809 (O'Connor, J., concurring); *id.* at 809-10 (Stevens, J., concurring); *id.* at 750 (Ginsburg, J., concurring). But see *Glucksberg*, 521 U.S. at 735 n.24 (Souter, J., concurring) (arguing that cases pose as-applied, not facial, challenges). A facial challenge to a legislative act is "the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). By contrast, an as-applied challenge requires the challenger to establish only that the Act is unconstitutional with respect to his or her particular set of facts. See *id.* at n.3.

81. *Glucksberg*, 521 U.S. at 708.

82. See *id.* at 710-11.

83. See *id.* at 712-18.

crime], courts continued to condemn it as a grave public wrong."⁸⁴ Of more direct significance, the Chief Justice held, is the fact that American jurisdictions have always treated assisting suicide as a felony.⁸⁵ Having found that "[t]he history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it," the Chief Justice "conclude[d] that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."⁸⁶

Turning directly to *Cruzan* and *Casey*, the Chief Justice rejected the respondents' claim that the Due Process Clause creates a constitutional guarantee of "self-sovereignty" including all "basic and intimate exercises of personal autonomy."⁸⁷ *Cruzan* "was not simply deduced from abstract concepts of personal autonomy."⁸⁸ Rather, the Chief Justice saw its result as dictated by a purely historical analysis: "[G]iven the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions."⁸⁹

The Chief Justice brushed aside, too, reliance on supposedly "highly instructive" or "prescriptive" passages in *Casey*: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* did not suggest otherwise."⁹⁰

Equal Protection. The Chief Justice's equal protection analysis was even more succinct than his due process discussion. New York's distinction between refusing life-sustaining medical treatment and suicide, he wrote, survives rational basis review because it "comports with fundamental legal principles of

84. *Id.* at 714.

85. *See id.* at 713-16.

86. *Id.* at 728.

87. *Id.* at 724.

88. *Id.* at 725.

89. *Id.*

90. *Id.* at 727-28 (internal citations omitted).

causation."⁹¹ When a patient refuses treatment, "he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication."⁹² While essentially adopting Judge Griesa's natural-unnatural distinction, curiously the Chief Justice nowhere addressed the Second Circuit's argument that inducing death by withdrawal of life-sustaining care is no more "natural" than inducing death by active means.

Instead, the Chief Justice proceeded on, holding that the distinction between refusing care and assisting suicide is further justified on grounds of intent. "The law has long used actors' intent or purposes to distinguish between two acts that may have the same result."⁹³ For example, the common law of homicide distinguishes "between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another's life."⁹⁴ And, in this case, a physician who withdraws care pursuant to an express patient demand "purposefully intends, or may so intend, only to respect his patient's wishes."⁹⁵ By contrast, a doctor assisting a suicide "must necessarily and indubitably, intend primarily that the patient be made dead."⁹⁶

2. *The Concurrences*

The Chief Justice's opinions spoke for the Court only by virtue of Justice O'Connor's fifth vote. Justice O'Connor, however, filed a separate statement joined by Justices Ginsberg and Breyer that substantially limits the precedential effect of the Chief Justice's opinions.⁹⁷ Justice O'Connor argued that the only question presented in the cases before the Court was whether the New York and Washington laws that outlaw

91. *Vacco v. Quill*, 521 U.S. 793, 801 (1997).

92. *Id.*

93. *Id.* at 802 (internal citation omitted).

94. *Id.* (citing *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

95. *Id.* at 801.

96. *Id.* at 802 (quoting *Assisted Suicide in the United States: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 104th Cong., 2d Sess., 369 (1996) (testimony of Dr. Leon R. Kass)).

97. Justice Ginsburg cryptically indicated that she "concurr[ed] in the Court's judgment substantially for the reasons stated in" Justice O'Connor's separate opinion, yet nowhere explained where exactly she differed (or agreed) with Justice O'Connor's (or the Court's) reasoning. *Id.* at 789. Justice Breyer joined Justice O'Connor's opinion "except insofar as it joins the majority." *Id.*

assisting suicide are facially unconstitutional—i.e., invalid in *all* possible applications. On this question, Justice O'Connor conceded that laws against assisting suicide have at least *some* constitutional applications. For instance, to Justice O'Connor, the fear "that a dying patient's request for assistance in ending his or her life would not be truly voluntary justifies" at least some governmental restrictions.⁹⁸ But Justice O'Connor expressly left open the possibility that laws against assisting suicide also have some unconstitutional applications and hinted that a dying patient whose request is "truly voluntary" might present just such a case.⁹⁹

Justices Souter and Stevens also filed separate concurrences. Justice Souter focused on attacking the Chief Justice's contention that substantive due process analysis turns on an examination of history or tradition. To him, substantive due process analysis is incapable of "any general formula," except to say perhaps that it should be "like any other instance of judgment dependent on common-law method," with arguments "being more or less persuasive according to the usual canons of critical discourse."¹⁰⁰ In the end, however, Justice Souter concluded that, even using his mode of analysis, states have rational reasons for refusing to permit at least some forms of assisted suicide.¹⁰¹ However, he also stressed that states are in the process of reconsidering their assisted suicide laws.¹⁰² He strongly suggested that such reconsideration is a good idea and that legalization of assisted suicide in some circumstances should be its result.¹⁰³ Indeed, he added that he would not tolerate "legislative foot-dragging" in the area and noted that "[s]ometimes a court may be bound to act regardless of the institutional preferability of the political branches as forums for addressing constitutional claims."¹⁰⁴

Justice Stevens stated openly that he viewed *Glucksberg* and *Quill* as raising only facial challenges. Moreover, he heavily hinted how he would rule in an as-applied challenge limited to

98. *Id.* at 737.

99. *Id.*

100. *Id.* at 769.

101. *See id.* at 782-89.

102. *See id.* at 788.

103. *See id.* at 788-89.

104. *Id.* at 788.

terminally ill adult patients and raised the specter of the Court's decades-long battle over capital punishment through case after case:

[J]ust as our conclusion that capital punishment is not always unconstitutional did not preclude later decisions holding that it is sometimes impermissibly cruel, so is it equally clear that a decision upholding a general statutory prohibition of assisted suicide does not mean that every possible application of the statute would be valid.¹⁰⁵

Justice Stevens went on to argue that, while *Cruzan* and *Casey* are not "prescriptive" of a right to assistance in suicide as Judge Reinhardt had suggested, they "did give recognition, not just to vague, unbridled notions of autonomy, but to the more specific interest in making decisions about how to confront an imminent death."¹⁰⁶ Lest any doubt remain about how he would rule in an as-applied challenge brought by a competent, terminally ill patient, Justice Stevens added that "[t]he liberty interest at stake in a case like this differs from, and is stronger than . . . the common-law right to refuse medical treatment" underlying the *Cruzan* decision.¹⁰⁷

On the equal protection question, Justice Stevens claimed that the Court's distinction between refusing care and assisting suicide based on intent was "illusory."¹⁰⁸ A doctor discontinuing treatment "could be doing so with an intent to harm or kill that patient. Conversely, a doctor who prescribes lethal medication does not necessarily intend the patient's death—rather that doctor may seek simply to ease the patient's suffering and to comply with her wishes."¹⁰⁹ The "illusory" nature of the distinction is further proved, Justice Stevens submitted, by the fact that the American Medical Association ("AMA") endorses administering pain-killing medication to terminally ill patients even when it results in death: "The purpose of terminal sedation is to ease the suffering of the patient and comply with her wishes."¹¹⁰ This same intent,

105. *Id.* at 741.

106. *Id.* at 745.

107. *Id.* (emphasis added).

108. *See id.* at 750-51.

109. *Id.* at 751.

110. *Id.*

Justice Stevens argued, "may exist when a doctor complies with a patient's request for lethal medication."¹¹¹

While rejecting a distinction based on intent, Justice Stevens concurred in the Court's Equal Protection decision overruling the Second Circuit. He accepted, without discussion, the Court's distinction based on causation.¹¹² Unfortunately, like the Court, he declined to address the Second Circuit's provocative criticisms of this distinction.

D. *The Consequences of Glucksberg and Quill*

The most immediate consequence of the Supreme Court's decision was to return the assisted suicide and euthanasia issue to the states and the political process. A less obvious, but perhaps even more important, consequence is the fact that five votes on the Court appear to be leaning *in favor* of recognizing a constitutional right to assistance in suicide for competent, terminally ill persons suffering severe pain.

Whether the assisted suicide and euthanasia issue is resolved in the legislative or judicial arena, *Glucksberg* and *Quill* make clear that only the opening salvo has been fired in what is likely to be a lengthy war analogous to the fight over capital punishment. They also expose the sort of moral-legal arguments we can expect to hear on both sides of the debate in any legislative chamber or judicial proceeding. Four central issues emerge:

First, there is a division between those who see no historical precedent for permitting assisted suicide and euthanasia and those who question whether history so clearly condemns the practices. The Chief Justice (like Judge Noonan) stands on one side of this debate while Judge Reinhardt is firmly on the other.

Second, there is a difference of opinion over whether principles of fairness (equal protection) require us to permit assisting suicide and euthanasia if we allow patients to refuse life-sustaining medical care. The Second Circuit thought principles of fairness so required. Justice Stevens came close to agreeing with the Second Circuit, disputing any distinction based on intent. The New York trial court disagreed, as did a majority of the (present) Supreme Court.

111. *Id.*

112. *See id.* at 750.

Third, there are those, like Judges Rothstein and Reinhardt and Justice Stevens, who are convinced that the themes of self-determination, personal choice and autonomy underlying *Casey* and *Cruzan* provide grounds for a right to assistance in suicide and euthanasia. Meanwhile, others such as Chief Justice Rehnquist, find such principles completely unavailing.

Finally, many are curious whether society would be bettered or worsened by legalization. Justices O'Connor and Souter expressed open interest in what "experimentation" in the states might "prove" about the utility of assisted suicide and euthanasia.

These four issues represent axes around which debate has so far revolved. Although all four issues emerged in the judicial arena, each will surely be hotly debated in the legislative arena. Is euthanasia antithetical to our Nation's tradition? Is it only fair to legalize assisted suicide and euthanasia as we allow patients to refuse life-sustaining care? Are rights to assistance in suicide and euthanasia essential to personal choice and identity? Would the recognition of these rights do more good or harm for most people? All of these are questions that principled legislators will ask, and they are questions that will reemerge in the next case to reach the Supreme Court. The following several Parts of this Article are devoted to developing potential answers to these questions.

III. ARGUMENTS FROM HISTORY

A. *Which History?*

The relevance of history to the constitutional debate over assisting suicide and euthanasia is the subject of much dispute. Some—such as Chief Justice Rehnquist—see history as critical to any substantive due process analysis. Others—such as Justice Souter—think it bears little or no relevance.¹¹³ Even among those agreeing that history is relevant, methodological disputes quickly arise. Joined by Chief Justice Rehnquist, several years ago Justice Scalia included a controversial

113. Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 62 (1981) (questioning reliance on past majorities to give meaning to the Fourteenth Amendment when it was added in the aftermath of the Civil War to protect minority rights).

footnote in his opinion for the Court in *Michael H. v. Gerald D.*,¹¹⁴ asserting that courts conducting substantive due process inquiries should “refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”¹¹⁵ In *Glucksberg*, the Court appeared to follow this dictum, focusing only on the narrow question whether history supports a right to assistance in suicide, and eschewing more general historical discussions about autonomy and “self definition.”¹¹⁶

Justices O’Connor and Kennedy filed a separate statement in *Michael H.* to register their view that the Court had not always examined—and need not always rely on—the most specific level of tradition available.¹¹⁷ Sometimes, they argued, the Court has legitimately examined history at a more “general” level.¹¹⁸ Justice Souter seemed to take this tack in the assisted suicide cases, pointing to the fact that individuals have settled rights to refuse unwanted medical care and procure abortions as evidence of a more general tradition permitting “[e]very human being of adult years and sound mind . . . to determine what shall be done with his own body.”¹¹⁹ Similarly, Judge Reinhardt placed stress on the general legal history of suicide rather on the more specific history of assisting suicide and euthanasia.¹²⁰

It is unclear, however, whether Justices O’Connor and Kennedy meant to suggest in *Michael H.* that a court actually may disregard an on-point “specific” tradition in favor of a contrary “general” one. The primary case they cited for support, *Eisenstadt v. Baird*,¹²¹ certainly does not suggest such license. There, relying on prior cases suggesting a general right to “reproductive privacy” for married couples, the Court declared that laws prohibiting the sale of contraception to

114. 491 U.S. 110 (1989).

115. *Id.* at 127 n.6.

116. *Glucksberg*, 521 U.S. 702, 710-19 (1997).

117. *See* 491 U.S. at 132.

118. *See id.*

119. *Glucksberg*, 521 U.S. at 777 (quoting *Schloendorff v. Society of New York Hosp.*, 105 N.E. 92, 93 (1914)).

120. *See* *Compassion in Dying v. Washington*, 79 F.3d 790, 806-10 (9th Cir. 1996) (en banc).

121. 405 U.S. 438 (1972).

unmarried persons violated the Due Process Clause.¹²² Yet, at the time *Eisenstadt* was decided, a long-standing and more specific tradition existed in many states outlawing the sale of contraceptives to unmarried persons.¹²³ Justices O'Connor and Kennedy neglected to mention that the Court in *Eisenstadt* did not consider or even identify this more specific tradition;¹²⁴ the fact that *Eisenstadt* overlooked a "specific" tradition in favor of a more general one does not offer much of a reasoned basis for sanctioning the practice. Neither did Justices O'Connor and Kennedy in *Michael H.* (or Justice Souter in *Glucksberg*) provide any reason why more general traditions should be permitted to trump more on-point traditions. Besides, *Eisenstadt's* result itself can be defended fully without resort to any contortions concerning historical "levels." Indeed, the case is best understood not as a substantive due process case at all, but as an equal protection case simply requiring equal access to contraceptives for married and unmarried persons alike.

Just as scholars and decisionmakers disagree over the level of historical abstraction to apply, they also disagree on what history is relevant. In due process cases, the Supreme Court has frequently looked not only to this Nation's history, but also to English common law. But why stop there? Why not resort to Roman or Greek precedent? Chief Justice Burger did in his concurrence in *Bowers v. Hardwick*.¹²⁵ So did Justice Blackmun in his opinion for the Court in *Roe v. Wade*.¹²⁶ If Ancient Greece and Rome are relevant, why not survey other, non-Western traditions? Even if agreement can be reached on how far back in history to look and whose history is relevant to the constitutional analysis, the question remains how far forward to go. When interpreting the Fourteenth Amendment, should the analysis include only pre-ratification history, or more recent history as well? In *Glucksberg*, the Court focused primarily on United States history but strayed briefly into the history of English common law,¹²⁷ while Judge Reinhardt

122. *Id.* at 453-55.

123. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989).

124. See *id.*

125. 478 U.S. 186, 196-97 (1986).

126. 410 U.S. 113, 130 (1973).

127. See 521 U.S. 702, 708-15 (1997).

devoted pages of the federal reports to ancient suicide practices.¹²⁸

All of the methodological questions that plague the substantive due process doctrine's reliance on history—whether history should be consulted at all, at what “level” a court must operate, how far back and how far forward to look, and whose history should be examined or eschewed—would also confront any legislator seriously interested in examining history as a potential guide to statutory reform. This Article suggests, however, that only one fair conclusion may be reached on the historical record, no matter what methodology is employed. History provides remarkably little support for the sort of assisted suicide right that Justices O'Connor, Souter, and Stevens suggested they might consider or that our legislatures might sanction.

B. *The Ancients*

Judge Reinhardt claimed that ancient Greek and Roman suicide practices support—or at least are not antithetical to—a right to assistance in suicide. In fact, Athenian law treated suicide as a crime, “punishing” the “guilty” by amputating the corpse's right hand and denying traditional burial rituals.¹²⁹ Plato defended this practice on multiple occasions. In *Phaedo*, Platō (through Socrates) argued that a philosopher should embrace natural death when it comes because it will free him from the shadowy cave of human existence and bring him into contact with truth.¹³⁰ But, he added, to seek out death is wrong, and suicide is akin to “run[ning] away” from one's assigned post and duties.¹³¹ In *Laws*, Plato condemned suicide on the grounds that he who commits the act “from sloth or want of manliness imposes upon himself an unjust penalty [of death].”¹³²

To his general support of Athenian law, Plato did add three exceptions. Suicide might be permissible when compelled by

128. See *Compassion in Dying v. Washington*, 79 F.3d 790, 807-09 (9th Cir. 1996) (en banc).

129. A.W. Mair, *Suicide* (Greek and Roman), in 12 *ENCYCLOPEDIA OF RELIGION AND ETHICS* 26-30 (J. Hastings ed., 1992).

130. See *PLATO, PHAEDO* 73 (Benjamin Jowett trans., 2000).

131. *Id.* at 74.

132. *PLATO, LAWS* 220 (Benjamin Jowett trans., 2000).

(1) judicial order; (2) excruciating misfortune; or (3) moral disgrace.¹³³ The first category, however, is not properly a category of suicide at all. Here, Plato acknowledged merely that the subject of state execution who is ordered to serve as his own executioner is not really a "suicide" (as in the case of Socrates accepting the hemlock as his sentence after trial). Likewise, in the second category, Plato did not endorse (or even appear to contemplate) rationally chosen suicide, but instead expressed compassion for deaths compelled (*anankastheis*) by misfortune—the result perhaps of depression or mental illness. Only in his third category did Plato provide any form of approval for rational, intentional acts of self-killing, but even this was limited to persons killing themselves as the result of intense moral disgrace or embarrassment, not because of a physical ailment. Antony, Brutus, Cornelia, and Cleopatra provide a few examples of the sort of suicide Plato may have had in mind.

In *The Republic*, Plato argued that patients should be permitted to refuse intrusive medical treatments that may lengthen their lives, while making them very unpleasant and useless to the state.¹³⁴ However, this is an argument for a right to refuse unwanted treatment, not one explicitly directed at a right to commit (or assist) suicide. As this Article will discuss later, there is a significant legal and moral distinction between these two practices.¹³⁵ Further, Plato's claim here was less that a person has a right to choose whether to discontinue intrusive medical treatment and more the absolutist, and distinctly illiberal claim, that persons dependent on such care are objectively better off dead than alive.¹³⁶

Aristotle used suicide to raise the larger question whether self-regarding acts that impose no harms on third parties can be considered "unjust."¹³⁷ Acts of injustice, Aristotle contended, require and depend in large measure on the degree of the actor's intent.¹³⁸ Involuntary acts are "neither unjust[]

133. See *id.* at 202, 220.

134. See PLATO, *REPUBLIC* 84-89 (Allan Bloom ed., 1991).

135. See discussion *infra* Part III.G.

136. See PLATO, *REPUBLIC*, *supra* note 134, at 86-87.

137. See ARISTOTLE, *NICHOMACHEAN ETHICS* 142-45 (Martin Ostwald trans., Macmillan 1962).

138. See *id.* at 132-39.

nor just[]."139 Acts "performed in ignorance" or as a result of negligence (e.g., "if (a dueler) did not intend to wound but only to prick") and those done "in full knowledge but without previous deliberation" (e.g., the acts "due to anger or [other passions]") do not mitigate the consequence of the act, but are sometimes "excusable."¹⁴⁰ By contrast, acts done "from choice" are premeditated and conscious and, thus, matters for which humans are always responsible: "[I]f a man harms another by choice, he acts unjustly; and it is this kind of unjust act which makes the agent an unjust man"141

Having focused the question on intentional acts, as opposed to merely negligent or foreseen ones, Aristotle conceded that choosing one's own death may not impose any injustice on third persons: "for he [who commits suicide] suffers voluntarily, but no one voluntarily accepts unjust treatment."¹⁴² Nonetheless, Aristotle saw the act of intentional self-killing as "surely" harmful "towards the state," in that it is contrary "to right reason; and that the law does not permit."¹⁴³ Though the passage is unclear, arguably Aristotle gives vent to the view that the state has a legitimate interest in the preservation of human life, and that its preservation is a basic good and feature of justice—"right reason."¹⁴⁴

Other Greek (and Roman) thinkers were more varied in their thinking. Stoics, self-declared champions of enduring adversity without complaint, ironically considered suicide an acceptable response to physical adversity.¹⁴⁵ Pythagoras, meanwhile, strongly opposed suicide.¹⁴⁶ Epicurus, often cited as an advocate of comfort in life and death, was less concerned with the liberty to commit suicide than he was skeptical that

139. *Id.* at 133.

140. *Id.* at 134.

141. *Id.* at 135.

142. *Id.* at 143.

143. *Id.*

144. *Id.*

145. See, e.g., 3 CICERO, DE FINIBUS 60-61 (Rackham trans., 1914) ("When a man's circumstances contain a preponderance of things in accordance with nature, it is appropriate for him to remain alive; when he possesses or sees in prospect a majority of the contrary things, it is appropriate for him to depart from life.")

146. See CICERO, DE SENECTUTE xx (J.W. Allyn & J.B. Greenough trans. & ed., 1866) (stating Pythagoras's view that people should not "depart from their guard or station in life without the order of their commander, that is, of God").

suicide could ever be the product of rational choice: "He is of very small account who sees many good reasons for ending his life."¹⁴⁷

Under Roman law, criminals committing suicide to avoid punishment (e.g., the death penalty) or their worldly obligations (e.g., deserting soldiers and runaway slaves) were regularly punished.¹⁴⁸ Their corpses were abused and their fortunes forfeited to the state, leaving wives, children, and other heirs penniless.¹⁴⁹ Other forms of suicide, however, were permitted,¹⁵⁰ and Roman law offered no basis for limiting suicide to the terminally ill, or even to the consequence of rational and voluntary decision. The physically healthy and mentally ill were as free to kill themselves as the sick or competent.

Suicide was also treated as a form of entertainment or as a profitable venture. After publicly promising to do so and amid much fanfare, Peregrinus threw himself into a pyre at the Olympic Games to achieve fame.¹⁵¹ After losing a battle, Sardanapalus, King of Nineveh and Assyria, apparently gathered his wife and concubines, set himself on a luxurious couch, and ordered slaves to set them all on fire.¹⁵² During the Punic Wars, "it was easy to recruit individuals . . . who would offer themselves to be executed for rather small amounts of money, which would be given to their heirs. And for a higher price, others could be found to be slowly beaten and mangled to death, which created an even greater spectacle."¹⁵³

147. EPICURUS, LETTERS, PRINCIPAL DOCTRINES, AND VATICAN SAYINGS 68 (Russell Geer trans., 1997).

148. See DIG. 48.21.3 (Marcian, Accusers).

149. *Id.*

150. See *id.* The text states that

where persons who have not yet been accused of crime, lay violent hands on themselves, their property shall not be confiscated by the Treasury; for it is not the wickedness of the deed that renders it punishable, but it is held that the consciousness of guilt entertained by the defendant is considered to take the place of a confession.

Id.

151. See Robert Barry, *The Development of the Roman Catholic Teachings on Suicide*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 449, 464 (1995).

152. See E. COBHAM BREWER, BREWER'S DICTIONARY OF PHRASE AND FABLE 954 (Adrian Room ed., Harper Collins 1995) (1894).

153. Barry, *supra* note 151, at 464.

In the end, Judge Reinhardt correctly noted that suicide sometimes was tolerated by ancient Greeks and Romans.¹⁵⁴ Often, however, it was not. When suicide was tolerated, there is little evidence that toleration was linked in any way to concern for terminally ill persons. Indeed, it is hard to see what contemporary society would wish to emulate in recorded ancient suicide norms and practices.

C. Early Christian Thinkers

Although the Bible nowhere explicitly forbids suicide or its assistance, from almost the earliest moments of Christian society these acts were judged serious sins. Addressing the question in the fifth century, Augustine argued that intentional self-destruction not committed on direct instructions from God constituted a violation of the Sixth Commandment's instruction, "Thou shalt not kill."¹⁵⁵

Augustine, however, emphasized the distinction between intentional and unintentional self-killing. At the time of his writing, powerful schismatic forces threatened the unity of the Catholic Church, including the Donatists, who even attempted to murder Augustine himself.¹⁵⁶ Augustine opposed the Donatists' tactic of deliberately provoking their own arrests and execution to draw attention to their cause.¹⁵⁷ While the Donatists claimed that they were martyrs, Augustine argued that true Christian martyrs would be willing to *accept* execution rather than forsake God, but would never *deliberately volunteer* for death:

[O]bserve carefully and learn in what sense Scripture says that any man may give his body to be burned. Certainly not that any man may throw himself into the fire when he is harassed by a pursuing enemy, but that, when he is compelled to choose between doing wrong and suffering wrong, he should refuse to do wrong rather than to suffer wrong, and so give his body into the power of the

154. See *Compassion in Dying v. Washington*, 79 F.3d 790, 806-07 (9th Cir. 1996).

155. AUGUSTINE, *THE CITY OF GOD* 26 (Marcus Dods trans., Random House 1950).

156. See Possidius, *Vita Augustini*, in 1 SELECT LIBRARY OF NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH ¶ 185.3.12 (Philip Schaff ed., Eerdmans 1977) (131) [*hereinafter* LIBRARY].

157. See *id.*

executioner, as those three men did who are being compelled to worship in the golden image, while he who was compelled threatened them with the burning fiery furnace if they did not obey. They refused to worship the image: they did not cast themselves into the fire, and yet of them it is written that they "yielded their bodies, that they might not serve nor worship any god except their God."¹⁵⁸

Deliberately seeking self-destruction would, Augustine feared, lead down a dangerous and slippery slope. If seeking death to avoid temporal troubles were acceptable, then why not suicide to avoid any risk of future sin or other degradation? "For if there could be any just cause of suicide, this were so."¹⁵⁹ In fact, during the sacking of Rome, Christian virgin women committed suicide in order to avoid rape and, they thought, sin. Early Christians revered these women. But Augustine disagreed: "Why, then, should a [person] who has done no ill do ill to [herself], and, by killing [herself] kill the innocent [person] to escape another's guilty act, and perpetrate upon [herself] a sin of [her] own, that the sin of another might not be perpetrated upon [her]?"¹⁶⁰

Aquinas echoed and built upon foundations laid by Augustine (and Aristotle), submitting that suicide is (1) contrary to the natural inclination of self-preservation and charity whereby everyone should love himself; (2) an injury to the community as well as the individual; and (3) an insult to the Creator's rights over man.¹⁶¹ Aquinas's third argument is an expressly religious appeal, and while he never fully developed his second argument, his first argument forms part of a larger, more developed moral theory.

To Aquinas, certain irreducible, basic human goods are knowable to all persons by practical reasoning; human life is among them.¹⁶² To reject such basic human goods by intentional and deliberate choice is morally wrong—a categorical sin. Thus, to Aquinas all acts of intentional killing are morally wrong, whether performed against another or to oneself.

158. *Id.* ¶ 173.5.

159. AUGUSTINE, *THE CITY OF GOD*, *supra* note 155, at 32.

160. *Id.* at 22.

161. See THOMAS AQUINAS, *SUMMA THEOLOGICA* 70 (Paul E. Sigmund ed. & trans., 1988).

162. See *id.* at 48-50.

Despite this strong reproof, Aquinas, like Aristotle and Augustine, asserted that acts done as the result of deliberate rational choice differ in kind from those unintended or involuntary. Intentional choices are ones we embrace, rationally accept, and control; as such, they necessarily define us and our character. Unintended and involuntary actions, while not devoid of moral character, are not always within our control, and thus speak less to who we are. Accordingly, Aquinas argued, self-defense undertaken with the *intent* not to kill the aggressor but to stop the aggression can be a morally upright action. The victim may *know* that the aggressor will die as the (unintended) result of his gunshot or blow, but he commits no categorical wrong in merely acting with the intent to take steps necessary to stop an aggression.¹⁶³ So, too, Aquinas would contend in the suicide context: The act is adverse to the natural inclination of self-love and harmful to the basic good of human life insofar as it is undertaken rationally and deliberately. Unintended suicides, ones resulting from mental illness, depression, duress, fear, grief, or anger, fall into a different moral category.

Augustine and Aquinas's teachings on suicide influenced all subsequent Christian thinking. By 562, the Council of Braga denied funeral rites to suicides; in 693, the Council of Toledo held that anyone attempting suicide should be excommunicated. In England, the Council of Hertford in 672 adopted a canon denying suicides normal Christian burials; a canon dating from King Edgar's time (c. 1000) reaffirmed this position. Christianity continues to teach against suicide to this day. In 1980, the Vatican issued a Declaration on Euthanasia; the Pope has continually written against suicide, including in his encyclicals, "*Veritatis Splendor*" and "*Evangelium Vitae*."¹⁶⁴

163. *See id.* at 70-71.

164. *See* Pope John Paul II, *Veritatis Splendor*, 23 ORIGINS 297, 321 (1983); Pope John Paul II, *Evangelium Vitae* (visited June 4, 2000) <<http://listserv.american.edu/catholic/church/papal/jp.ii/jp2.evanv.html>> (condemning assisted suicide as "*a grave violation of the law of God, since it is the deliberate and morally unacceptable killing of a human person*"); *see also* National Conference of Catholic Bishops Committee for Pro-Life Activities, *Nutrition and Hydration: Moral and Pastoral Reflections*, 15 J. COMTEMP. HEALTH L. & POL'Y 455 (1999).

The American Lutheran Church and the Episcopal Church also condemn suicide as an ethical wrong.¹⁶⁵

D. *English Common Law*

Early Christian history is of particular relevance because, from its outset, the common law followed Christian teachings on suicide and its assistance. Writing in the mid-thirteenth century, Bracton, one of the common law's earliest lawgivers,¹⁶⁶ endorsed the Roman statute holding that a felon intentionally taking his life to escape punishment by the state was subject to having both his movable goods and real property confiscated.¹⁶⁷ In contrast to Roman statutes, however, Bracton added that one who deliberately kills himself "in weariness of life or because he is unwilling to endure further bodily pain" should also suffer confiscation of his movable goods.¹⁶⁸ Only suicides induced by insanity—undertaken by persons incapable of appreciating the significance of their actions (and, thus, incapable of forming an intent to kill)—escaped punishment.¹⁶⁹

Though Bracton's formulation imposed a lesser penalty for suicides committed due to weariness with life or abhorrence of pain, all acts of intentional self-destruction were condemned from the earliest days of the English common law. This is particularly notable given that Bracton had otherwise permitted Roman statutes to guide his views of English suicide law. Whether Bracton abandoned Roman guidance in this

165. See *New York Task Force*, *supra* note 10, at 91 (reporting views of American Lutheran Church, the Episcopal church, and all branches of Judaism). Respect for human life is also deeply rooted in Eastern thought. See DAMIEN KEOWN, *BUDDHISM AND BROTHERS* 44-45 (1995).

166. See 1 FREDERIC POLLOCK & FREDERIC MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 206 (2d ed., 1952) (calling Bracton "the crown and flower of English medieval jurisprudence").

167. See 2 BRACTON, *ON THE LAWS AND CUSTOMS OF ENGLAND* 424 (Samuel E. Thorne ed., 1968).

168. *Id.* ("He does not lose his [real property] inheritance, only his movable goods.")

169. See *id.* Historians Michael MacDonald and Terence Murphy claim that Bracton included "sheer weariness with life along with the mental defects that excused self-slaying." MICHAEL MACDONALD & TERENCE MURPHY, *SLEEPLESS SOULS: SUICIDE IN EARLY MODERN ENGLAND* 22 (1990). This is, however, simply wrong. "Sheer weariness" reduced the penalty for suicide to the confiscation of movable goods rather than all real and personal property. But, the act was *not* excused along with suicides induced by mental deficits. See 2 BRACTON, *supra* note 167, at 424.

single respect "because forfeiture of goods in such a case ha[d] already become customary in England, or because the Church ha[d] set her seal of disapproval on the practice, or because he judge[d] that the English [would] not subscribe to the frank doctrine of the Roman law that suicide is justifiable in such a case" remains "a matter for speculation."¹⁷⁰

What is not a matter for speculation, however, is that in this one instance in which he forsook Roman guidance, Bracton wrote "what was destined to survive in English law."¹⁷¹ Five centuries later, the penalty associated with suicide had changed slightly (suicides of any kind forfeited only their movable goods), but the principle remained the same: The law treated any intentional suicide as a wrongful act.¹⁷² Likewise, unintentional acts of self-killing, such as by the mentally ill, remained no crime.¹⁷³ Blackstone even went so far as to decry "the pretended heroism, but real cowardice of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure."¹⁷⁴

E. *Colonial American Experience*

Pre-revolutionary American suicide law generally followed contemporary English common law and norms. The American colonies in the seventeenth and eighteenth centuries practiced forfeiture. They also followed the ancient pagan practice, never formally endorsed in English common law, of dishonoring the suicide's corpse, often by burying it at a crossroads:

An obvious explanation of the choice of the crossroads is that they also helped to lay the ghost by making the sign of the cross; but though this may have contributed to the survival of the custom into the Christian era, it has a much earlier ancestry. In early times and among primitive peoples even honorable burial was frequently performed at crossroads, but this spot was specifically chosen for

170. William Meskill, *Is Suicide Murder?*, 3 COLUM. L. REV. 379, 380 (1903).

171. *Id.* at 381.

172. Both Hale and Coke so held. See 1 MATTHEW HALE, PLEAS OF THE CROWN 411 (London, E. & R. Nutt 1736) (1680); 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 54 (London, E. & R. Brooke 1797) (1644).

173. Coke provided an example of such excused unintentional conduct: if a person were to "cut off a limb to prevent the spread of gangrene," but bleed to death as the unintended result, this would not constitute suicide. 3 COKE, *supra* note 172, at 54.

174. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *189.

murderers and suicides. Among the reasons that have been suggested for the practice are that the constant traffic over the grave would help to keep the ghost down; or that the number of roads would confuse it and so prevent it from finding its way home¹⁷⁵

Virginia recorded cases of ignominious burial in 1660 and 1661; in the latter instance, the coroner's jury explicitly held that the suicide was "to be buried at the next cross as the Law Requires with a stake driven through the middle of him in his grave."¹⁷⁶ The colony practiced forfeiture in the colony as late as 1706 and 1707, though it appears that the colony's Governor sometimes interceded to protect the heirs' inheritance.¹⁷⁷

Massachusetts abandoned forfeiture as early as 1641, though maltreating the suicide's body apparently retained its appeal for some time.¹⁷⁸ The 1672 compilation of the "General Laws and Liberties" of the Massachusetts colony intones that

considering how far Satan doth prevail . . . [it is] therefore order[ed], that from henceforth if any person . . . shall at any time be found by any Jury to . . . be willfully guilty of their own Death . . . [he] shall be Buried in some Common Highway where . . . a Cart-load of Stones [shall be] laid upon the Grave as a Brand of Infamy and as a warning to others to beware of the like Damnable practices.¹⁷⁹

In 1647, what was to become Rhode Island also passed a statute condemning all intentional suicide and applying traditional common law penalties:

Self-murder is by all agreed to be the most unnatural . . . wherein he that doth it, kills himself out of a premeditated hatred against his own life or other humor . . . his goods and chattels are the king's custom, but not his debts nor land; but in case he be an infant, a lunatic, mad or distracted man, he forfeits nothing.¹⁸⁰

175. GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 259 (1957) [*hereinafter* SANCTITY OF LIFE].

176. 16 W. AND M. QUART. 181 (Aug. 26, 1661).

177. See ARTHUR P. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 108 n.193 (1930).

178. See *Commonwealth v. Mink*, 123 Mass. 422, 425-26 (1877).

179. *THE COLONIAL LAWS OF MASSACHUSETTS OF 1672*, at 137 (William H. Whitmore ed., 1887).

180. *THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1647-1719*, at 19 (John D. Cushing ed., 1977).

South Carolina appears to have proscribed suicide as early as 1706, instructing coroner juries to return a felony verdict "against the Peace of our Sovereign Lady the Q[ueen, her Crown and Dignity" in cases where the decedent "voluntarily and feloniously . . . of himself did kill and murder himself."¹⁸¹ In 1715, North Carolina adopted English common law and, with it, the traditional suicide proscription.¹⁸²

F. *The Modern Consensus: Suicide*

By the late 1700s and early 1800s, enforcement of the common law's forfeiture penalty began to fade in England, though formal abolition of the forfeiture penalty did not occur until 1870.¹⁸³ The ancient pagan practice of dishonoring the corpse also faded, though it, too, was not formally outlawed until much later.

Like England, eighteenth-century America witnessed a change in attitude regarding the criminal penalties associated with suicide. Pennsylvania led the way in 1701 when it rejected penalties for suicide in its new "Charter of Privileges to the Province and Counties."¹⁸⁴ By the opening of the nineteenth century, New Hampshire, Maryland, Delaware, New Jersey, North Carolina, and Rhode Island had followed suit, passing statutory or constitutional provisions repealing criminal sanctions associated with suicide.¹⁸⁵

British Law Lord Hoffman has suggested that the common law's gradual decriminalization of suicide amounted to recognition of a *right* to commit the act: "[I]ts decriminalisation was a recognition that the principle of self-determination should in that case prevail over the sanctity of life."¹⁸⁶ American ethicist Dan Brock has offered a similar reading of

181. 1 THE EARLIEST PRINTED LAWS OF SOUTH CAROLINA 1692-1734, at 192 (John D. Cushing ed., 1978).

182. See *id.* at 322.

183. See MACDONALD & MURPHY, *supra* note 169, at 233.

184. THE EARLIEST PRINTED LAWS OF PENNSYLVANIA 1681-1713, at 209 (John D. Cushing ed., 1978) ("If any person, through Temptation or melancholly, shall Destroy himself, his Estate, Real & Personal, shall, notwithstanding, Descend to his wife and Children or Relations as if he had Died a natural Death.").

185. See N.H. CONST. pt. 2, art. 89 (1783); MD. CONST., decl. of rts. § 24 (1776); DEL. CONST. art. 1, § 15 (1792); N.J. CONST. art. 17 (1776); N.C. CONST. (1778); R.I. PUB. LAWS § 53, at 604 (1798).

186. Airedale N.H.S. Trust v. Bland (C.A.), 2 W.L.R. 316, 351-52 (1993).

the historical record: "That suicide or attempted suicide is no longer a criminal offense in virtually all states indicates an acceptance of individual self-determination in the taking of one's own life."¹⁸⁷ Judge Reinhardt expressed a similar opinion in *Compassion in Dying*.¹⁸⁸

Hoffman, Brock, and Reinhardt misread the historical record. Dragging the suicide's body around town, driving stakes through it, and leaving grieving families penniless had lost its appeal, but that development hardly signaled a new endorsement or acceptance of suicide. In fact, states that had repealed penalties for suicide continued to describe it in their statute books as a "grave public wrong"¹⁸⁹ or "unlawful and criminal as *malum in se*."¹⁹⁰ Even Glanville Williams, an avid euthanasia proponent, has conceded that "[n]o appreciable volume of opinion against the traditional attitude to suicide appeared . . . until the present century."¹⁹¹

Rather than the result of some new social approval of suicide, the elimination of criminal penalties was the result of an enlightened realization that they hurt the wrong person. With the "wrong-doer" dead and gone, seizure of the suicide's worldly goods hurt only the surviving spouse and orphans. Zephaniah Swift, an early American treatise writer and later Chief Justice of the Connecticut Supreme Court, explained that "[t]here can be no greater cruelty, than the inflicting of a punishment, as the forfeiture of goods, which must fall solely on the innocent offspring of the offender."¹⁹² Thomas Jefferson, drafting a bill to reform Virginia laws, wrote that the law should "not add to the miseries of the party by punishments or forfeiture."¹⁹³ While penalties for suicide had been enforced in

187. Dan Brock, *Voluntary Active Euthanasia*, HASTINGS CTR REP. 22, Mar.-Apr. 1992, at 19.

188. *Compassion in Dying v. Washington*, 79 F.3d 790, 810 (9th Cir. 1996) (en banc).

189. See *New York Task Force*, *supra* note 10, at 55.

190. See *Commonwealth v. Mink*, 123 Mass. 422, 429 (1877); see also WAYNE LAFAYE & AUSTIN SCOTT, *CRIMINAL LAW* § 7.8 (1986) ("When common law crimes have been retained, suicide has been characterized as a 'criminal' or 'unlawful' act, though, not being punishable, not strictly-speaking a crime.").

191. WILLIAMS, *SANCTITY OF LIFE*, *supra* note 175, at 239.

192. 2 ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 304 (Windham, Conn., John Byrne 1796).

193. 2 THOMAS JEFFERSON, *THE PAPERS OF THOMAS JEFFERSON* 275 (Julian P. Boyle ed., 1952) [hereinafter *JEFFERSON PAPERS*].

"barbarous times," with forfeiture the product of a greedy crown acting out of a "spirit of rapine and hostility . . . toward [its] subjects," such penalties were "inconsistent with the principles of moderation and justice which principally endear a republican government to its citizens."¹⁹⁴ The Massachusetts Supreme Judicial Court explained the state legislature's decision to repeal suicide's criminal penalties as one that "may well have had its origin in consideration for the feeling of innocent surviving relatives."¹⁹⁵

The change in attitude toward criminal penalties was also the result of a growing modern consensus that suicide is an essentially medical problem. Jefferson recognized suicide early on "as a disease."¹⁹⁶ Study after study in our own century by physicians and psychiatrists confirms that as many as 90 percent of all suicides are the result of a diagnosable medical disorder.¹⁹⁷ In its commentary to the Model Penal Code, the American Law Institute has summed up the modern view that

[t]here is scant reason to believe the threat of punishment will have deterrent impact upon one who sets out to take his own life. . . . Moreover, it is clear that the intrusion of the criminal law into such tragedies is an abuse. There is a certain moral extravagance in imposing criminal penalties on a person who has sought his own self-destruction, who

194. 6 JEFFERSON PAPERS, *supra* note 193, at 255.

195. *Mink*, 123 Mass. at 429.

196. 6 JEFFERSON PAPERS, *supra* note 193, at 492-507.

197. See Yeates Conwell & Eric Caine, *Rational Suicide and the Right to Die: Reality and Myth*, 325 NEW ENG. J. MED. 1100, 1101 (1991) (noting that 90 to 100 percent of suicides suffer from "diagnosable psychiatric illness"); see also Herbert Hendin & Gerald Klerman, *Physician-Assisted Suicide: The Dangers of Legalization*, 150 AM. J. PSYCHIATRY 143 (1993) (expressing similar opinion); E.S. Schneidman, *Rational Suicide and Psychiatric Disorders*, 326 NEW ENG. J. MED. 889 (1992) (same); ELI ROBINS, *THE FINAL MONTHS* 10, 12 (1981) (94 percent of suicides studied had a mental disorder); E.S. SHNEIDMAN ET AL., *THE SUICIDE PREVENTION CENTER IN THE CRY FOR HELP* 13 (1981) (a "majority" of those committing suicide suffer from a mental disorder); Brian Barraclough et al., *A Hundred Cases of Suicide: Clinical Aspects*, 125 BRIT. J. PSYCHIATRY 355, 356 (1974) (93 percent of suicides studied suffered from a mental disorder); ERWIN STENGEL, *SUICIDE AND ATTEMPTED SUICIDE* 52 (1964) (arguing that one-third of people committing suicide suffer from "a neurosis or psychosis or severe personality disorder"). This includes even elderly patients. See Conwell & Caine, *supra* note 197, at 1101 (finding that two-thirds of suicides committed by persons in their late sixties, seventies, and eighties are not terminally ill, but "in relatively good physical health and that most suffer instead from depression or other psychiatric illness").

has not attempted direct injury to anyone else, and who more properly requires medical or psychiatric attention.¹⁹⁸

Reinforcing the conclusion that the common law had come to recognize suicide as a medical problem, rather than an accepted right, is the fact that an exception to traditional battery doctrine evolved providing both the state and all private individuals with a common law privilege to forcibly detain "a person disordered in his mind who seems disposed to do mischief to himself or to any other person, the restraint being necessary both for the safety of the lunatic and the preservation of the public peace."¹⁹⁹ Most American states now have codified this extraordinary exception to ancient battery doctrine. New York's statute is typical, allowing detention for one "who appears to be mentally ill and is conducting himself in a manner which poses substantial risk of physical harm to himself as manifested by threats or attempts at suicide."²⁰⁰ In California, "any person [who], as a result of a mental disorder, is a danger . . . to himself or herself" can be committed involuntarily to a mental health facility for a period.²⁰¹

G. *The Modern Consensus: Assisting Suicide and Euthanasia*

The Hoffman-Brock-Reinhardt hypothesis that elimination of suicide's criminal penalties signaled some endorsement or acceptance of the practice is further belied by development in the law regarding assisting suicide and euthanasia. Originally, the common law drew a formal distinction between different acts of assisted suicide. Assistants present at the suicide's death could be held guilty of murder or manslaughter, but those clever enough to slip out while the suicide drank the poison they supplied or used the gun they provided were held innocent of any crime. Under ancient common law doctrine, a court could not try assistants before the fact for *any* crime until the principal criminal actor was convicted. Because the suicide

198. MODEL PENAL CODE § 210.5, cmt. 2 (1980).

199. 2 G.C. ADDISON, TORTS § 819, at 708 (3d ed. 1870).

200. N.Y. MENTAL HYG. LAW § 9.41 (McKinney Supp. 1983-84).

201. CAL. WELF. & INST. CODE § 5250 (West 1984); see also Kate E. Bloch, *The Role of Law in Suicide Prevention: Beyond Civil Commitment—A Bystander Duty to Report Suicide Threats*, 39 STAN. L. REV. 929, 934 n.36 (1987) (compiling citations to similar statutes in most states).

was unavailable for prosecution, courts (syllogistically) reasoned that they simply could not try any accessory before the fact.²⁰²

So went the common law in England and in most American jurisdictions until around 1861 when statutes were enacted abolishing the distinction between accessories before and after the fact.²⁰³ Although this change in general criminal law doctrine was made without specific reference to assisted suicide, courts on both sides of the Atlantic soon concluded that accessories before the fact to suicide could now be held liable for murder or manslaughter.²⁰⁴ Thus, almost 100 years after the abolition of penalties for suicide itself, common law courts were in the process of *expanding* criminal liability for its assistance.

Glanville Williams has charged that this new development of liability for accessories before the fact was a "good example[] of the purely mechanical manufacture of criminal law, with no reference to penal policy."²⁰⁵ That historical interpretation is dubious. Applying the same rule to the canny suicide assistant who exited the room at a propitious moment and the

202. *See, e.g.,* *Rex v. Russell*, 1 Moody C.C. 356 (1832) (ruling that a person who gave poison to someone who later committed suicide with the poison is not liable as an accessory if not present for the suicide); *Regina v. Ledington*, 9 Car. & P. 79 (1839) (ruling that a person who incites someone to commit suicide is not liable as an accessory if not present for the suicide); 2 FRANCIS WHARTON, *A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES* 31-32 (7th ed., Philadelphia 1874) (same). Arguably, some tension exists between this rule and the common law's decision to punish suicide. On the one hand, the common law deemed the deceased beyond the reach of legal process for the purposes of inquiring whether he was a principal in his own murder so that his accessory might be tried. On the other hand, the law considered the deceased within legal process for the purposes of investing a coroner's jury to inquire into whether the deceased was competent and an adult when he took his own life (and to determine that he did, in fact, kill himself), as well as for the purposes of "punishing" him by forfeiture.

203. *See* 24 & 25 Vict. c. 23, 94; 2 WHARTON, *supra* note 202, at 33 (noting that by 1874 the "old technical rule" that an accessory before the fact could not be convicted before the principal had been "corrected by statute" in "many of the states").

204. *See, e.g.,* *Rex v. Croft*, K.B. 295 (C.C.A. 1944) (upholding the conviction of the survivor of a suicide pact); *People v. Roberts*, 178 N.W. 690 (Mich. 1920) (the court avoided accessory before the fact questions altogether); *Commonwealth v. Hicks*, 82 S.W. 265, 266 (Ky. 1904) ("In this case, it would be impossible to punish the principal; but it is not believed that under any sound reasoning the accessory [before the fact] would thereby go scot free."); *Burnett v. People*, 68 N.E. 505 (Ind. 1903) ("[I]t becomes immaterial what was the character of the crime committed by the principal or whether there was any crime . . ."); *Regina v. Gaylor*, 169 Eng. Rep. 1011 (C.C.R. 1857) (upholding conviction).

205. WILLIAMS, *SANCTITY OF LIFE*, *supra* note 175, at 265.

unsophisticated assistant who remained brought the common law into harmony—eliminating (rather than creating) a mechanical distinction; indeed, it was hailed at the time as an equitable and enlightened change in penal policy.²⁰⁶ Williams's complaint seems less an attack on the logic of the law's progression than the direction it took.

As statutes supplanted the common law, assisted suicide was codified as a crime in most American jurisdictions. By the time the Fourteenth Amendment was ratified in 1868, nine of the then thirty-seven states had adopted statutes making assisting suicide a crime.²⁰⁷ The Field Code, a reformist codification project that influenced legislative efforts in state after state during the nineteenth century, included a specific prohibition of assisted suicide.²⁰⁸ These laws have remained on the books for more than a century.

The law of euthanasia runs an even straighter course. Euthanasia is a form of intentional homicide motivated by a sense of mercy. At common law and by statute, it is treated as murder.²⁰⁹ Courts have refused to treat the victim's consent or the killer's motive as a defense or a reason to accede to defendants' requests for a jury instruction on assisted suicide as a lesser included offense.²¹⁰ Instead, courts have treated the victim's consent and the killer's motives at most as reasons to mitigate the defendant's punishment.²¹¹

While the proscription against assisting suicide and euthanasia has been virtually absolute in America, one exception to this rule existed for a short time. In 1902, the

206. See Richard Wolfson, *The Criminal Aspect of Suicide*, 39 DICK. L. REV. 47 (1934-35).

207. See *People v. Kevorkian*, 527 N.W.2d 714, 731 (Mich. 1994).

208. See DAVID DUDLEY FIELD, PENAL CODE OF THE STATE OF NEW YORK § 231 (1865) ("Every person, who willfully, in any manner, advises, encourages, abets or assists another person in taking his own life, is guilty of aiding suicide.").

209. See, e.g., *State v. Fuller*, 278 N.W.2d 756, 761 (Neb. 1979) ("Murder is no less murder because the homicide is committed at the desire of the victim.") (internal citation omitted); *Turner v. State*, 108 S.W. 1139, 1141 (Tenn. 1908); *Martin v. Commonwealth*, 37 S.E.2d 43 (Va. 1946); N.Y. PENAL LAW § 125.25 (McKinney 1987) (euthanasia falls under definition of second-degree murder).

210. See, e.g., *State v. Cobb*, 625 P.2d 1133, 1136 (Kan. 1981) (rejecting defendant's claim that the court should have instructed the jury on assisted suicide rather than homicide where the defendant "was a direct participant in the overt act of shooting [the victim], which caused his death").

211. See MODEL PENAL CODE, § 210.5, commentary at 106 (1980); N.Y. PENAL LAW §§ 125.20(2), 125.25(1)(a) (McKinney 1987).

Texas Court of Criminal Appeals in *Grace v. State*²¹² reasoned that because suicide and its attempt were no longer crimes, assisting the act should not be illegal either: "So far as the law is concerned, the suicide is innocent; therefore the party who furnishes the means to the suicide must also be innocent of violating the law."²¹³

Grace is logically unsound. The rationales for decriminalizing suicide—fairness to the suicide's innocent family and recognition of the medical causes of suicide—do not apply to assisting suicide. The penalty for that crime falls on the actor himself, not his family, and there is no reason to presume that the suicide assistant suffers from any form of mental illness. Moreover, if *Grace* were right, euthanasia or "consensual homicide" would have to be decriminalized as well. Even Texas courts, however, did not follow *Grace* to that conclusion; instead, they continued to hold euthanasia illegal.²¹⁴ The Texas state legislature removed any lingering questions by overruling *Grace* and adopting a statute criminalizing the assistance of suicide.²¹⁵

While statutes banning assisted suicide and euthanasia date back a century or more in many states, they are hardly "dead-letters." Many jurisdictions have expressly reconsidered these laws in recent years and reaffirmed them. In 1980, the American Law Institute conducted a thorough review of state laws on assisting suicide in the United States and acknowledged the continuing widespread support for criminalization.²¹⁶ Accordingly, it endorsed two criminal provisions of its own.²¹⁷ In the 1990s, both New York and Michigan convened blue-ribbon commissions to consider the

212. 69 S.W. 529 (Tex. Crim. App. 1902).

213. *Id.* at 530.

214. *See Aven v. State*, 277 S.W. 1080 (Tex. Crim. App. 1925).

215. *See* TEX. PENAL CODE ANN. § 22.08 (1999).

216. *See* MODEL PENAL CODE § 210.5 cmt. 5, n.23 (discussing state statutes).

217. *See id.* § 210.5(1), (2). The language of the provision follows:

(1) *Causing Suicide as Criminal Homicide*. A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by force, duress, or deception. (2) *Aiding or Soliciting Suicide as an Independent Offense*. A person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor.

Id.

possibility of legalizing assisted suicide and euthanasia.²¹⁸ The New York commission issued a thoughtful and detailed report unanimously recommending the retention of existing laws against assisting suicide and euthanasia.²¹⁹ The Michigan panel divided on the issue, but the state legislature subsequently chose to enact a statute strengthening its existing common law ban against assisted suicide.²²⁰ Other states have followed suit.²²¹

In recent years, too, virtually every state in the country has passed statutes establishing living wills or durable powers of attorney in health-care situations, and many of these laws contain language expressly restating the state's disapproval of assisting suicide.²²² Meanwhile, repeated efforts to legalize the

218. See NBC News, *supra* note 21; *New York Task Force*, *supra* note 10.

219. See *New York Task Force*, *supra* note 10.

220. See NBC News, *supra* note 21.

221. See Hemlock Society, *supra* note 24; see also *Doctor-Assisted Suicide*, *supra* note 23 (discussing Iowa, Maryland, Oklahoma, and Virginia).

222. See ALA. CODE § 22-8A-10 (1990); ALASKA STAT. § 18.12.080(a), (f) (1996); ARIZ. REV. STAT. ANN. § 36-3210 (Supp. 1996); ARK. CODE ANN. §§ 20-13-905(a), (f), 20-17-210(a), (g) (1991 & Supp. 1995); CAL. HEALTH & SAFETY CODE ANN. § 7191.5(a), (g) (West Supp. 1997); CAL. PROB. CODE ANN. § 4723 (West Supp. 1997); COLO. REV. STAT. §§ 15-14-504(4), 15-18-112(1), 15-18.5-101(3), 15-18.6-108 (1987 & Supp. 1996); CONN. GEN. STAT. § 19a-575 (Supp. 1996); DEL. CODE ANN., tit. 16, § 2512 (Supp. 1996); D.C. CODE ANN. §§ 6-2430, 21-2212 (1995 & Supp. 1996); FLA. STAT., ch. 765.309(1), (2) (Supp. 1997); GA. CODE ANN. §§ 31-32-11(b), 31-36-2(b) (1996); HAW. REV. STAT. § 327D-13 (1996); IDAHO CODE § 39-152 (Supp. 1996); ILL. REV. STAT., ch. 755, para. 35/9(f), 40/5, 40/50, 45/2-1 (1992); IND. CODE §§ 16-36-1-13, 16-36-4-19, 30-5-5-17 (1994 & Supp. 1996); IOWA CODE §§ 144A.11.1-144A.11.6, 144B.12.2 (1989 and West Supp. 1997); KAN. STAT. ANN. § 65-28, 109 (1985); KY. REV. STAT. ANN. § 311.638 (Baldwin Supp. 1992); LA. REV. STAT. ANN. tit. 40, § 1299.58.10(A), (B) (West 1992); ME. REV. STAT. ANN., tit. 18-A, § 5-813(b), (c) (West Supp. 1996); MD. CODE ANN., HEALTH, § 5-611(c) (1994); MASS. GEN. L., ch. 201D, § 12 (Supp. 1997); MICH. COMP. LAWS ANN. § 700.496(20) (West 1995); MINN. STAT. §§ 145B.14, 145C.14, (Supp. 1997); MISS. CODE ANN. §§ 41-41-117(2), 41-41-119(1) (Supp. 1992); MO. REV. STAT. §§ 459.015.3, 459.055(5) (1992); MONT. CODE ANN. §§ 50-9-205(1), (7), 50-10-104(1), (6) (1995); NEB. REV. STAT. §§ 20-412(1), (7), 30-3401(3) (1995); NEV. REV. STAT. § 449.670(2) (1996); N.H. REV. STAT. ANN. §§ 137-H:10, 137-H:13, 137-J:1 (1996); N.J. STAT. ANN. §§ 26:2H-54(d) (e), 26:2H-77 (West 1996); N.M. STAT. ANN. § 24-7A-13(B)(1), (C) (Supp. 1995); N.Y. PUB. HEALTH LAW § 2989(3) (1993); N.C. GEN. STAT. §§ 90-320(b), 90-321(f) (1993); N.D. CENT. CODE §§ 23-06.4-01, 23-06.5-01 (1991); OHIO REV. CODE ANN. § 2133.12(A), (D) (Supp. 1996); OKLA. STAT. ANN., tit. 63, §§ 3101.2(C), 3101.12(A), (G) (West 1996), 20 PA. CONS. STAT. § 5402(b) (Supp. 1996); R.I. GEN. LAWS §§ 23-4.10-9(a), (f), 23-4.11-10(a), (f) (1996); S.C. CODE ANN. §§ 44-77-130, 44-78-50(A), (C), 62-5-504(O) (Supp. 1996); S.D. CODIFIED LAWS §§ 34-12D-14, 34-12D-20 (1994); TENN. CODE ANN. §§ 32-11-110(a), 39-13-216 (Supp. 1996); TEX. HEALTH & SAFETY CODE ANN. §§ 672.017, 672.020, 672.021 (West 1992); UTAH CODE ANN. §§ 75-2-1116, 75-2-1118 (1993); VT. STAT. ANN., tit. 18, § 5260 (1987); VA. CODE ANN. § 54.1-2990 (1994); V.I. CODE ANN., tit. 19, § 198(a), (g) (1995); WASH. REV. CODE §§ 70.122.070 (1), 70.122.100 (Supp. 1997); W. VA. CODE §§ 16-30-10, 16-30A-16(a), 16-

practice—in state legislatures and by popular referenda—have met with near-total failure.²²³ Nor are American jurisdictions alone in this pattern of open reconsideration and express rejection. In 1993-1994, Britain commissioned a special panel to review its 1961 law against assisting suicide; after lengthy hearings where ethicists, physicians, and philosophers were heard, the panel vigorously argued in favor of retaining current law.²²⁴

Whether one looks to the specific issues of assisting suicide and euthanasia, or to the issue of suicide more generally; whether one examines only American history, or expands the inquiry to embrace English common law history, history does not support a right to assistance in suicide or euthanasia “right.” To the contrary, there is a long-standing modern consensus aimed at preventing suicide and punishing those who assist it. Only when we expand the focus back to ancient Greek and Roman practices do we find any arguable precedent for recognition of a suicide right—and, even then, it is a “precedent” few in modern society would actually endorse.

IV. ARGUMENTS FROM FAIRNESS

While the historical record offers little basis for a right to assistance in suicide or euthanasia, over the last twenty years virtually every American jurisdiction has come to recognize a right to refuse medical treatment based upon common law battery principles that bar nonconsensual touchings.²²⁵

30B-2(b), 16-30B-13, 16-30C-14 (1995); WIS. STAT. §§ 154.11(1)(6), 154.25(7), 155.70(7) (Supp. 1996); WYO. STAT. §§ 3-5-211, 35-22-109, 35-22-208 (1994 & Supp. 1996); see also 42 U.S.C. §§ 14402(b)(1)(2)-(b)(1)(4) (“Assisted Suicide Funding Restriction Act of 1997”).

223. See *supra* notes 17-25 and accompanying text (discussing failed efforts in over fifteen states).

224. See HOUSE OF LORDS, REPORT OF THE SELECT COMMITTEE ON MEDICAL ETHICS, H.L. PAPER NO. 21-I (1993-1994) [*hereinafter* HOUSE OF LORDS REPORT]. In 1961, the British Parliament enacted a statute holding that “[a] person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction to imprisonment for a term not exceeding fourteen years.” Suicide Act, ch. 60 (1961). If anything, this represented another expansion of criminal liability, with Parliament holding not only aiding and abetting suicide criminal, but also that the mere *counseling* of suicide could be punishable, thus throwing into question the legality of distributing books like Derek Humphry’s *Final Exit*, at least in the United Kingdom.

225. See, e.g., *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 279-80 (1990) (holding that competent adult may refuse life-saving medical care); *In re Conroy*, 486 A.2d 1209 (N.J. 1985) (retreating from prior holding that right is

Debate persists, however, over many aspects of this new right, including whether and how to extend this right to *incompetent* persons. Increasingly, "living wills" and "advance directives" are used to instruct family members and physicians on a patient's wishes in the event he or she becomes incompetent. But what of infants or adult persons who have never been competent or persons who have left behind no such instructions? Some states have tried to extend the right to refuse treatment to these persons by "substituting the judgment" of a competent, court-designated, person for the judgment of the incompetent person.²²⁶ Others have developed a "best interest test" whereby courts themselves purport to decide what is in the incompetent's best interests.²²⁷ Both of these doctrines attempt to give meaning to a right to refuse that depends utterly on choice to persons incapable of choosing and to do so through an agent never selected by the patient.

Since the New Jersey State Supreme Court decided the first right-to-refuse case in 1976,²²⁸ virtually every state in the Nation has recognized the right of at least competent adults to refuse even basic, life-sustaining medical care, like tubes supplying food and water. Given the widespread acceptance of such a right, the question follows whether assisted suicide and euthanasia must also be accepted. If patients have a right to tell their doctors to remove respirators or feeding tubes, in fairness should they also have a right to tell their doctors to administer lethal injections?

The Second Circuit answered this question in the affirmative, as did the federal district court in the Washington State litigation. The Supreme Court disagreed, but only over Justice Stevens's vigorous dissent and only in the context of a facial challenge. No majority ruling has decided whether a right to euthanasia and assistance in suicide exists *as applied* to rational, terminally ill patients. Justice O'Connor left ample room for us to speculate that she (and Justices Ginsburg and Breyer) might find equal protection arguments more availing in such a case.

founded on Constitution and arguing instead that it is based on common law); Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417 (Mass. 1977) (right to refuse stems from common law battery doctrine).

226. See *Cruzan*, 497 U.S. at 280-81; ALAN MEISEL, THE RIGHT TO DIE § 9.7 (1989 & Supp. 1992).

227. *Cruzan*, 497 U.S. at 280-81.

228. See *In re Quinlan*, 359 A.2d 862 (N.J. 1976).

Neither have legislatures yet fully considered arguments whether their own laws codifying the right to refuse treatment embrace a larger principle allowing assistance in suicide and euthanasia.

In what follows, the Article considers three potential bases for distinguishing between the established right to refuse, on the one hand, and the proffered right to assistance in suicide or euthanasia, on the other. It concludes that two of these potential distinctions—based on causation and the act/omission distinction—do not work, but that the potential third—the one (wrongly) rejected by Justice Stevens—is rational and significant. Assisting suicide and euthanasia differ in kind from the right to refuse because they necessarily entail both an intent to kill and a moral judgment that the patient's life is no longer worth living. That intent and judgment is not necessarily part of any decision to refuse treatment.

A. *Causation*

The Supreme Court (like the New York trial court before it) concluded that refusing life-sustaining care and suicide are distinguishable because one merely "allow[s] nature to take its course," while the other involves an "unnatural" act. This "natural-unnatural" distinction ultimately boils down to an argument over causation. According to this view, rejecting treatment allows "nature" to cause death, but accepting a lethal injection is "unnatural" because it introduces a new, human causal agent into the picture.

Causation, however, is a notorious chameleon. "There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of opinion," as causation doctrine.²²⁹ To illustrate the problem, suppose that a driver operates a car over miles of highway at an excessive speed and arrives at a street corner just as a child darts from the curb. Do we say that the driver's excessive speed "caused" the death?²³⁰ Suppose we change the hypothetical: The driver knows in advance that the child will dash into the street and nonetheless drives the car at a

229. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 41, at 263 (5th ed. 1984).

230. *See id.* at 264 & n.6.

calculated speed in order to arrive at the precise moment the child enters the street. Does that fact not change or strengthen our view about the "cause" of the child's death?²³¹ Simply put, what we perceive as a responsible or causal force may be determined less by a mechanical review of the physical evidence than by an assessment of someone's mental state, our sense of justice, or common sense.²³²

Consider the case of Shirley Egan. On March 8, 1999, Ms. Egan's forty-two-year-old daughter raised the prospect of putting the sixty-eight-year-old Ms. Egan into a nursing home. Ms. Egan responded by shooting her daughter, paralyzing her from the neck down. When Ms. Egan's daughter declined life support and died, prosecutors were left wondering whether to charge Ms. Egan with murder, as the causal agent of her daughter's death, or with attempted murder, in effect conceding that the daughter's death was "caused" by her refusal of extraordinary life-sustaining measures.²³³

The slipperiness of causation arguments is reflected in *Quill* itself. The Supreme Court argued that "nature" is the "cause" of death when patients refuse or discontinue unwanted treatment. Meanwhile, three judges of the Second Circuit argued just the opposite, viewing the "naturalness" of a death caused by the withdrawal of life-sustaining measures quite skeptically.²³⁴ What qualifies as a "natural" or "unnatural" death may be, at least in some measure, open to the eye of the beholder.

Though never explicitly addressed by the Supreme Court, the Second Circuit's causation analysis is subject to a convincing attack. The opinion does not fully account for the patient who refuses life-sustaining care *before* its introduction: such patients appear to let nature take its course even under the Second Circuit's understanding. With regard to patients who *withdraw* previously accepted life-sustaining care, one could argue that their action allows "nature" to resume its course after a temporary detour.

231. *See id.*

232. *See id.* at 263-64 and citations therein.

233. *See* Deborah Sharp, *Web-Wired Courtroom Lets World Attend Florida Trial*, USA TODAY, Aug. 17, 1999, at 3A.

234. *See Quill v. Vacco*, 80 F.3d 716, 729 (2d Cir. 1996).

Susceptible though its argument might be, the Second Circuit nonetheless has a point. When patients decide to forgo or withdraw basic care such as food and water, the claim that death is "caused" as much by that human choice as any death by lethal injection has some undeniable appeal. Saying "nature" is responsible for deaths in right-to-refuse cases is something like saying that "speed" is responsible for the death of the child crossing the street when the driver set off knowing the child would dart in front of his car and die. It is a causal factor, but certainly not the only one.

B. *Act-Omission*

The New York trial court proffered another distinction between assisting suicide and refusing treatment, arguing that the former involves an affirmative act while the later amounts only to an omission. The Second Circuit rejected this act-omission distinction, reasoning that "[t]he writing of a prescription to hasten death . . . involves a far less active role for the physician than is required to bring about death through asphyxiation, starvation, or dehydration."²³⁵ The Supreme Court never addressed the act-omission distinction, but the Second Circuit had it about right.

The act-omission distinction is entrenched in American doctrinal law. But here, as with causation, the distinction readily is subject to manipulation. Refusing to eat can be cast as "omitting" food or "actively" starving. Removing food and water tubes can be painted as "actively" pulling the plug or merely "omitting" the provision of advanced medical care. Even if the act-omission distinction were not so manipulable, it is unclear whether the distinction holds much moral force worth honoring, at least when it comes to life-taking.²³⁶

Some of the problems with the act-omission distinction in this area are illustrated by *Airedale N.H.S. Trust v. Bland*.²³⁷ Tony Bland, a British teenager, was crushed while standing in the

235. *Id.*

236. For example, why would we "say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing"? *Cruzan*, 497 U.S. at 296 (Scalia, J., concurring).

237. 2 W.L.R. 316 (1993).

spectators' pen at an English soccer match. His injuries left him in a so-called "vegetative" state. That is, he was not dying of his underlying maladies, but required food and water tubes so that he could live in a comatose state. His doctors eventually sought to discontinue the food and water tubes. The case came to the House of Lords, raising the right-to-refuse issue in Britain's highest court for the first time. The Lords assented to the removal of Bland's tubes on the grounds that ceasing treatment would amount only to "omitting care" and not to an "active" taking of life.²³⁸ The Lords, however, nowhere explained why they viewed the *removal* of Bland's many tubes as an "omission," rather than an "active" step.

Even if the Lords had offered some convincing explanation for this classification, they failed to offer any reason why it makes a moral or legal difference. In Anglo-American common law (unlike many other legal systems), no general duty requires a passerby to render a stranger affirmative assistance,²³⁹ but where a special relationship exists—and the patient-physician setting is a paradigmatic example—omissions of ordinary care are as punishable as affirmative misdeeds. Indeed, a physician's "omission" of readily available treatment is the textbook definition of professional malpractice. Thus, merely classifying Bland's case as an "omission" rather than an "act" does nothing to explain its acceptability under traditional Anglo-American legal principles. As one dissenting Lord commented, it leaves the law "morally and intellectually misshapen."²⁴⁰ And so it does: Even medical practitioners in the Netherlands (where

238. *Id.* at 368 (judgment of Lord Goff) ("[T]he law draws a crucial distinction between cases in which a doctor decides to not . . . prolong life, and those in which he decides . . . actively to bring his patient's life to an end.").

239. French officials spent months investigating whether to pursue criminally various paparazzi alleged to have photographed a dying Princess Diana rather than come to her assistance. Despite our contrary legal tradition, many in America and England passionately argued that anyone who failed to render assistance should be prosecuted. Some American states, including Vermont, Minnesota, and Rhode Island, have adopted statutes requiring strangers to provide affirmative assistance to persons in distress when they can do so without harm to themselves. See Ernest S. Weinreb, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980); William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978); F.J.M. Feldbrugge, *Good and Bad Samaritans: A Comparative Study*, 14 AM. J. COMP. LAW 630 (1967).

240. *Airedale N.H.S. Trust*, 2 W.L.R. at 891 (Mustill, J.)

euthanasia is most tolerated) recognize that euthanasia embraces "all activities *or non-activities* with the purpose to terminate a patient's life."²⁴¹

C. *Intention*

The Supreme Court concluded that refusing care and assisted suicide differ not only in their causes, but also in the intentions behind them. A physician who withdraws care pursuant to a patient's request "purposefully intends, or may so intend, only to respect his patient's wishes."²⁴² By contrast, a doctor assisting a suicide "must necessarily and indubitably, intend primarily that the patient be made dead."²⁴³ The Court's distinction, quickly drawn and explained in little detail, was criticized at length by Justice Stevens. In fact, however, profound intent-based moral and legal distinctions *do* exist.

Intention v. Side Effect. An *intentional* action (or omission) is different in character, both morally and legally, from an unintended consequence. Our intentional actions say something about us and our character that no unintended side-effect possibly can. Unlike unintended consequences, our intentional conduct is *always* within our control. An intentional act is one of *choice*. An intended act "*remains, persists, . . . [and]* is synthesized into one's will, one's practical orientation and stance in the world."²⁴⁴ As Charles Fried has put the point:

[I]t is natural that the most stringent moral judgments should relate to intentional acts Morality is about the good and the right way of our being in the world *as human beings*. And the way we relate to the world as human beings is as we pursue our purposes in the world, *i.e.*, as we act intentionally. . . . This primacy of intention explains why in law and morals a sharp line is drawn between the result, which is intended[,]. . . and the certain concomitant, which [is not] intended. . . . To see a paradox in this distinction assumes that because the result in the world is the same in

241. John Keown, *Euthanasia in the Netherlands: Sliding Down the Slippery Slope?*, in *EUTHANASIA EXAMINED: ETHICAL, CLINICAL, AND LEGAL PERSPECTIVES* 261, 290 (John Keown ed., 1995) (emphasis added).

242. *Vacco v. Quill*, 521 U.S. 793, 802 (1997).

243. *Id.* at 802 (quoting *Assisted Suicide in the United States: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 104th Cong., 2d Sess., 367 (1996) (testimony of Leon R. Kass)).

244. John Finnis, *Allocating Risks and Suffering: Some Hidden Traps*, 38 CLEV. ST. L. REV. 193, 202 (1990) [*hereinafter Allocating Risks*].

the two cases the judgment in them must be too. In short, it ignores the element of purpose. . . .²⁴⁵

Though a sometimes utilitarian critic of relying on intent, Oliver Wendell Holmes put the point in its plainest terms: "Even a dog distinguishes between being stumbled over and being kicked."²⁴⁶

Intended acts differ in kind even from merely foreseen consequences. For example, when one person in an office goes on vacation (with the intention of getting some rest) remaining coworkers may have to work overtime and spend less time with their families. The vacationer may even *foresee* that result as absolutely inevitable. Still, foreseeing that consequence differs from *intending* that coworkers will spend less time with their spouses and children.

Commentators often overlook this distinction, collapsing intention with foresight.²⁴⁷ But the law reflects the distinct moral force of intention that we understand through our common experience. A crime committed intentionally receives greater punishment than the same act done unintentionally. We recognize differing "degrees" of homicide (and countless other crimes) depending upon whether the act was done intentionally, knowingly, recklessly, or negligently. Such differentiation continues through sentencing. Thus, the law treats the driver who speeds recklessly but harms the darting child accidentally differently than the depraved killer who deliberately plans to harm the child.

The United States Supreme Court has repeatedly recognized the importance of intent in judging human action. When Congress fails to supply a mens rea requirement in criminal statutes, the Supreme Court habitually implies one rather than hold defendants strictly liable,²⁴⁸ explaining that "[t]he

245. Charles Fried, *Right and Wrong—Preliminary Considerations*, 5 J. LEGAL STUD. 165, 199 (1976); see also Finnis, *supra* note 246, at 195 n.24.

246. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (Dover 1991) (1881).

247. See, e.g., John Finnis, *On the Practical Meaning of Secularism*, 73 Notre Dame L. Rev. 491, 511 (1998) (identifying how Benthamite utilitarian theory tended to collapse the distinction between intended and foreseen action).

248. See, e.g., *Morissette v. United States*, 342 U.S. 246 (1952) (implying element of intent into crime of converting government property); *Staples v. United States*, 511 U.S. 600 (1994) (implying mens rea element into unlawful firearms possession statute); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994) (collecting cases).

contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and duty of the normal individual to choose between good and evil."²⁴⁹

The element of intent is also central to our understanding of suicide, assisting suicide, and euthanasia. Self-destruction *without* an intent to die—even when death is *foreseen*—does not qualify in our minds (or law) as suicide. The soldier who landed on a D-Day beach may have known his “number was up,” but he hardly intended to commit suicide by volunteering for the duty. Augustine’s true Christian martyr may have seen death as a certainty for refusing to renounce his faith, but he did not seek it out. Death is, at most, an accepted side effect of such decisions.

In fact, Augustine and Aquinas (and arguably Aristotle) based their condemnation of suicide in part on the fact that it represents an *intentional* rejection of human life. Augustine endorsed the true Christian martyr’s *acceptance* of death, but not the Donatists’ deliberate *choice* to seek death out. Aquinas endorsed lethal acts where the intent is to stop aggression (self-defense), but not where the intent is to kill. At common law, Edmund Wingate explained in the seventeenth century, to be “*felo de se* [i.e., a felon of himself, a person must] destroy himself out of premeditated hatred against his own life.”²⁵⁰ Blackstone said that, to qualify as suicide, the act has to be “deliberate[]” or part of an “unlawful malicious act.”²⁵¹ Hale held that suicide encompasses only one who “voluntarily kill[s] himself.”²⁵² The Model Penal Code confirms that the crime of

249. *Morissette*, 342 U.S. at 250; see also *id.* at 251 (“Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.”); Roscoe Pound, *Introduction to FRANCIS SAYRE, CASES ON CRIMINAL LAW xxxvi-vii* (1927) (“Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.”).

250. EDMUND WINGATE, *JUSTICE REVIVED: BEING THE WHOLE OFFICE OF A COUNTRY JP BRIEFLY, AND YET MORE METHODICALLY AND FULLY THAN EVER YET EXTANT* 61, 88 (1644).

251. 4 BLACKSTONE, *supra* note 174, at *189.

252. 1 HALE, *supra* note 172, at 411.

suicide "consist[ed] of the intentional self-destruction by person of sound mind and sufficient age."²⁵³

The same holds true for assisting suicide and euthanasia. When General Eisenhower ordered the D-Day invasion,

he *knew* that he was sending many American soldiers to certain death, despite his best efforts to minimize casualties. His purpose, though, was to liberate the beaches, liberate France, and liberate Europe from the Nazis. . . . Knowledge of an undesired consequence does not imply that the actor intends that consequence.²⁵⁴

Unless the assisting party shares the same mental element as the would-be suicide—i.e., an intent to see the patient dead—the common law does not recognize the act as one of aiding or abetting a suicide.²⁵⁵ The same holds true of euthanasia—which is prosecuted at common law as murder. Thus, if a patient knowingly accepts death to avoid the pain and perceived indignity of continued invasive medical care, he does not commit suicide, and the doctor who takes actions to implement the patient's wishes does not commit assisted suicide or euthanasia.²⁵⁶

Intended Means and Ends. It is important to clarify what we mean when we say that an act is "intentional." One may, of course, intend something as an end unto itself—the final object or purpose of one's behavior. But, one may also intend something as a *means* to some further purpose or end.²⁵⁷ I

253. MODEL PENAL CODE § 210.5, cmt. 1 (1980).

254. *Compassion in Dying v. Washington*, 79 F.3d 790, 858 (9th Cir. 1996) (Kleinfeld, J., dissenting) (emphasis added). Chief Justice Rehnquist adopted Judge Kleinfeld's reasoning as his own in *Vacco v. Quill*. See 521 U.S. 793, 802 (1997).

255. MODEL PENAL CODE § 210.5(2) (1980); see also CAL. PENAL CODE § 401 (1999) (assistance must be "deliberate"); N.Y. PENAL CODE § 125.15(3) (act must be "intentional[]"). As the drafters of the Model Penal Code have put it, "a requirement of less than purposeful conduct" for assisted suicide, "would run the serious risk of over inclusiveness, perhaps applying, for example, to the case of one who sells readily available goods to another who states that he intends to kill himself." MODEL PENAL CODE § 210.5, cmt. 2.

256. See DANIEL CALLAHAN, *THE TROUBLED DREAM OF LIFE: LIVING WITH MORTALITY* 77-78 (1993) ("To call these judgments [to refuse treatment] 'intending' death distorts what actually happens. . . . [I]f I stop shoveling my driveway in a heavy snowstorm because I cannot keep up with it, am I thereby intending a driveway full of snow?").

257. See John Finnis, *Allocating Risks*, *supra* note 244, at 195 (discussing intended ends and means); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 117 (1968) (distinguishing between "intentionally doing something" as an ends and "doing something with a further intention" as a means).

intend, as an end, to get some rest. As a means of accomplishing that object, I intend to go on vacation. Not to achieve my intended means would be as much a frustration of my designs and aims as failing to achieve my intended ends.

Thus, suicide and its assistance involve an element of intending death as *either* an end, in and of itself, *or* as a means to some further purpose. Dr. Kevorkian illustrates the significance of intended means in this area. As his final object or end, Dr. Kevorkian claims only to seek to relieve the suffering of his "patients." But to accomplish this goal, he indubitably intends to use the means of killing. For Dr. Kevorkian to fail to achieve his means would represent a frustration of his purposes. Accordingly, in a case where the potassium chloride drip failed to kill his patient, Dr. Kevorkian ran off to find a canister of carbon monoxide.²⁵⁸

Dr. Kevorkian's 1994 acquittal on assisted suicide charges (he was found guilty of murder in a 1999 euthanasia case) further amplifies the significance of intended means. The trial judge correctly held that assisted suicide is a specific-intent crime, but she adopted a novel interpretation of the proof necessary to establish specific intent. The court instructed the jury that it could find Dr. Kevorkian guilty only if it found he "intended *solely* to cause" death.²⁵⁹ Thus, the jury was obligated to acquit Dr. Kevorkian if it found that he intended to kill as a *means* to some other purpose, such as relieving suffering.

This instruction contains patent error. Under the court's rule, an assisted-suicide conviction would never be possible as long as the assistant intends to cause death as means to *any* further end. Thus, the Roman entertainer who assists volunteers in taking their lives in order to amuse his audience would go free, as he intends death merely as a means to some other end. Jim Jones, of Jonestown Massacre fame, would go free on the grounds that he intended to kill his followers only as a *means* of making a political point to protest the conditions of an inhumane world.²⁶⁰ Those who help kill off Grandpa as a

258. See *People v. Kevorkian*, 527 N.W.2d 714, 733-34 (Mich. 1994).

259. Jon Kerr, *Kevorkian Takes Stand in Assisted Suicide Trial*, WEST'S LEGAL NEWS CRIM. JUST., Mar. 4, 1996, available in 3-4-96 WLN 1117.

260. See JIM JONES, THE JONESTOWN MASSACRE: THE TRANSCRIPT OF THE FINAL SPEECH OF REVEREND JIM JONES (Karl Eden ed., 1993) (using this rationale in his

means to the end of cashing in on his life insurance policy would also have a good defense. Obviously, the court's rule does not comport with what we naturally understand to be assisting suicide, an act which embraces the act of intending to help someone else die *either* as an end in itself, or as a means to some further purpose.

Intention and the Right to Refuse. In his separate concurrence in *Glucksberg*, Justice Stevens claimed that any distinction between suicide and refusing life-saving care based on intent is "illusory."²⁶¹ As proof, Justice Stevens suggested that a physician discontinuing care could do so with an intent to kill that patient and a doctor who prescribes lethal medication "may seek simply to ease the patient's suffering and to comply with her wishes."²⁶² Put more simply, Justice Stevens apparently views the right to refuse as a species of suicide and assisted suicide (i.e., intentional killing) that the state already has sanctioned; having endorsed assisted suicide by omission in this fashion, he sees no reason not to permit assisted suicide by commission.

This Article takes issue with the premise of Justice Stevens's syllogism. While an intention to kill—either as an end or as a means—is an element of assisted suicide and euthanasia, it is not a part of the practice of refusing medical care either as a matter of logical necessity or historical development.

Patients decline care for many reasons that in no way implicate an intention to die. They may wish to avoid further pain associated with the invasive treatments and tubes and the poking and prodding of modern medical care. They may wish to avoid the sense of indignity that dependence on medical machinery sometimes can bring. They may wish simply to go home from the hospital, to be with loved ones, and to restore their privacy. None of these decisions—or any of the other countless reasons for refusing care expressed every day by persons confronting an inevitable death—involves an intent to die even when death is foreseen. Likewise, those persons who assist patients in declining unwanted treatment need not necessarily intend death as either a means or as an end. They

final speech to his 900 followers). It is clear that many who died with Jones did not intend to die as either a means or an end, but were coerced—i.e., murdered.

261. *Washington v. Glucksberg*, 521 U.S. 702, 750 (1997).

262. *Id.*

may intend only to discontinue treatment to permit the patient to go home, to live without intrusive assistance, to avoid further pain associated with treatment. They may foresee death as a result of their actions without ever purposefully seeking it out. As the AMA has put the point, the "withdrawing or withholding of life-sustaining treatment is not inherently contrary to the principles of beneficence and nonmaleficence," while assisted suicide is "contrary to the prohibition against [intentionally] using the tools of medicine to cause a patient's death."²⁶³

Consistent with this point, the AMA has concluded that physicians may prescribe death-inducing dosages of palliative medicines where "they can point to a concomitant pain-relieving purpose."²⁶⁴ As Judge Kleinfeld has put it, "[a] physician who administers pain medication with the purpose of relieving pain, doing his best to avert death, is no murderer, despite his knowledge that as the necessary dosage rises, it will produce the undesired consequence of death."²⁶⁵ Where, however, the doctor prescribes such treatment "for the purpose of causing death," the AMA holds that "the physician . . . exceed[s] the bounds of ethical medical practice."²⁶⁶ Moreover, the AMA's view of purposeful killing applies whether the physician intends death as an end or as a means to some further purpose, such as relieving suffering; intentional killing is out-of-bounds "regardless of what other purpose the physician may point to."²⁶⁷

Historically, the judicial decisions creating the common law right to refuse unwanted medical care took great pains in making clear that they did *not* endorse the intentional taking of

263. American Medical Association, Council on Ethical and Judicial Affairs, *Decisions Near the End of Life*, 267 JAMA 2229, 2230-31, 2233 (1992).

264. Motion for Leave to File Brief as *Amicus Curiae* and Brief of the American Medical Association, the California Medical Association, and the Society of Critical Care Medicine as *Amicus Curiae* in Support of Petitioners, on Petition for Writ of Certiorari at 15, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (No. 96-110) (Aug. 19, 1996) (emphasis added).

265. *Compassion in Dying v. Washington*, 79 F.3d 790, 858 (9th Cir. 1996) (en banc) (Kleinfeld, J., dissenting).

266. *Id.* (emphasis added).

267. *Id.* Dr. Quill avoided criminal charges and professional disciplinary action after prescribing barbiturates to an ailing patient and describing his actions in the *New England Journal of Medicine* precisely because of uncertainty over whether he intended to kill his patient or merely sought to provide legitimate treatment for her insomnia. See *supra* notes 10-11 and accompanying text.

life. For instance, in *McKay v. Bergstedt*²⁶⁸ the Nevada Supreme Court recognized the right to refuse treatment but carefully distinguished it from suicide because it does not necessarily involve "the act or an instance of taking one's own life voluntarily and intentionally" ²⁶⁹ In *Satz v. Perlmutter* in the Florida Court of Appeals likewise held that:

As to suicide, the facts here unarguably reveal that Mr. Perlmutter would die, but for the respirator. . . . The testimony of Mr. Perlmutter . . . is that he really wants to live, but do so, God and Mother Nature willing, under his own power. This basic wish to live, plus the fact that he did not self-induce his horrible affliction, precludes his further refusal of treatment being classed as attempted suicide.²⁷⁰

When Georgetown University's hospital sought to compel a Jehovah's Witness to accept a simple life-saving blood transfusion on the grounds that it did not want to be an accomplice to suicide, Judge Skelly Wright distinguished away the hospital's concerns along the same lines:

The Gordian knot of this suicide question may be cut by the simple fact that Mrs. Jones did not want to die. Her voluntary presence in the hospital as a patient seeking medical help testified to this. Death, to Mrs. Jones, was not a religiously-commanded goal, but an unwanted side effect of a religious scruple.²⁷¹

The Washington federal district court in *Compassion in Dying* suggested that in recognizing the right to refuse the State had "carved out" a form of permissible suicide.²⁷² Yet, the Washington state court decision creating the right to refuse expressly held that the State's interest in "the prevention of" suicide was not implicated by the new right because a "death

268. 801 P.2d 617 (Nev. 1990).

269. *Id.* at 625.

270. 362 So.2d 160, 162-63 (Fla. App. 1978). In *Eichner v. Dillon*, 426 N.Y.S.2d 517, 544 (N.Y. App. Div. 1980) the New York Court of Appeals recognized the right to withdraw a life-sustaining respirator, but specifically added that, on the facts before it, the withdrawal of the respirator involved no "intent to die." *Id.*

271. Applications of the President and Directors of Georgetown College, Inc., 331 F.2d 1000, 1009 (D.C. Cir. 1964).

272. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1467 (W.D. Wash. 1994).

which occurs after the removal of life sustaining systems is . . . no[t] intended by the patient."²⁷³

State after state has implicitly recognized this intent-based distinction by continuing to hold assisted suicide and euthanasia unlawful even after recognizing a new right to refuse care.²⁷⁴ Many have also adopted living will and health care power of attorney laws while expressly indicating that none is meant to endorse the practice of assisting suicide.²⁷⁵ Scores have laws that continue to privilege efforts to detain persons attempting suicide.²⁷⁶ And some, like New York, have included language in statutes codifying the right to refuse that expressly instructs that the law is "not intended to permit or

273. *In re Colyer*, 660 P.2d 738, 743 (Wash. 1983). Former Surgeon General C. Everett Koop has labeled *Bouvia v. Superior Court (Glenchur)*, 225 Cal. Rptr. 297 (Cal. App. 2d 1986), as "the most forthright judicial acknowledgment yet of a 'right' to undergo euthanasia by omission." C. Everett Koop & Edward R. Grant, *The "Small Beginnings" of Euthanasia: Examining the Erosion in Legal Prohibitions Against Mercy-Killing*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 585, 629 (1986). In that case, a twenty-eight-year-old woman suffering from cerebral palsy sought a writ of mandamus forbidding her doctors from feeding her through a nasogastric tube. The trial court heard evidence from Ms. Bouvia that suggested serious emotional trouble: She had suffered a recent miscarriage; her husband had left her; her parents had asked her to leave home; and she had repeatedly expressed her intent to commit suicide. See *Bouvia*, 225 Cal. Rptr. at 300; see also Michael R. Flick, *The Due Process of Dying*, 79 CAL. L. REV. 1121, 1128 (1991) (physician arguing that Ms. Bouvia's demand to die was the product of mental illness). After hearing the evidence, the trial court refused the writ on the grounds that Ms. Bouvia had "formed an intent to die," and thus, her refusal of care would constitute an (unlawful) suicide. *Bouvia*, 225 Cal. Rptr. at 305 (quoting trial court).

An intermediate trial court reversed, holding that

we find no substantial evidence to support the trial court's conclusion [that Ms. Bouvia had formed an intent to die]. Even if petitioner had the specific intent to take her life [at one point], she did not carry out the plan. . . . [I]t is clear that she has now merely resigned herself to accept an earlier death, if necessary, rather than live by feedings forced upon her by means of a nasogastric tube.

Id.

What is remarkable about the appellate decision is its narrowness. The court of appeals did *not* hold that Ms. Bouvia's right to refuse encompassed the right to intentional self-killing by omission (i.e., suicide). It did *not* hold that Ms. Bouvia had a right to assistance in suicide or euthanasia. Instead, the court took the unusual step of reversing the trial court's factual findings and simply disputing that Ms. Bouvia had an intention to kill herself. Thus, even in *Bouvia*, the court blinked at the prospect of extending the right to refuse into the terrain of intentional killing. And, in fact, after losing her two-year wrangle in court, Ms. Bouvia changed her mind and opted to continue living. See Nat Hentoff, *Elizabeth Bouvia and the ACLU: I Used to Go to the ACLU for Help, Now They're Killing Us*, VILLAGE VOICE, July 30, 1996, at 10.

274. See *supra* notes 20-25, 216-21, 223-24 and accompanying text.

275. See *supra* note 222 and accompanying text.

276. See *supra*, notes 199-201 and accompanying text.

promote suicide, assisted suicide, or euthanasia."²⁷⁷ Justice Stevens would simply ignore the intent-based line the AMA, case law, and state legislatures have all drawn.²⁷⁸

The line between foreseeing and intending death is a moral Rubicon. Once society moves from accepting death to permitting intentional killings, it crosses into as-yet uncharted territory, forced to determine *which* persons may be intentionally killed. We are forced to consider whether we will permit a new defense to any claim of murder based on the consent of the victim. Such a result would not cohere with our common law heritage that has outlawed consensual duels, sadomasochist killings, and the sale of one's life—like the Roman slave offering his up for circus entertainment, or the peasant in Graham Greene's *Tenth Man* who is willing to stand in a Nazi firing line in the stead of a wealthy lawyer in return for the promise of his family's financial security.²⁷⁹ If society will not create an absolute consent-based defense to murder, *when* will we allow people to kill themselves with assistance? May the healthy, able, and young do so? Should the right be limited to the lives of the old and terminally ill? What criteria will society establish and enforce in determining which lives may be ended and which may not? Almost necessarily, this project in turn depends on raw assessments of "quality of life," leaving different human lives with different moral and legal status and protection based on perceptions of their "quality."²⁸⁰

277. N.Y. PUB. HEALTH LAW § 2989(3) (McKinney 1994).

278. Cf. John Finnis, *On the Practical Meaning of Secularism*, 73 NOTRE DAME L. REV. 491, 511 (1998) (criticizing philosophers filing *amicus* brief in the Supreme Court in *Glucksberg* and *Quill* on the grounds that they ignored the distinction between foreseen and intended killings, resulting in a "very poor fit with reality, law, and professional ethics").

279. See generally GRAHAM GREENE, *THE TENTH MAN* (1985).

280. This Article pursues these issues further in Part VII. Justice Stevens is not the only one to question relying upon intention to distinguish assisted suicide from the right to refuse. A student note in the *Harvard Law Review* claims that such reliance is misplaced for three reasons:

First, many patients who want treatment discontinued know that they will die without it and often clearly express a desire to end their suffering. Second, conditioning a patient's rights on their intentions and motivations undermines their right of self-determination because it enables physicians or judges to override the patient's decision if it does not comport with the physicians' or judges' values. Finally, claims that a patient is not committing suicide because he wants only a natural death, not self-destruction, assume that the discontinuation of life-sustaining treatment does not "cause" a patient's death . . . [t]his argument fails to distinguish objectively the withdrawal of life-sustaining treatment from

Some of the proffered distinctions between the right to refuse and assisted suicide have flaws. The act-omission distinction and the natural/unnatural (causation) distinction cannot differentiate entirely between the right to refuse and the proposed right to assisted suicide. However, intent does provide a rational basis for distinguishing between the right to refuse and assisting suicide. Persons exercising the right to refuse can do so without any *intent* to die—and, indeed, the right is exercised everyday by individuals who have no such intent. By contrast, a right to suicide, assistance in suicide, or euthanasia would necessarily embrace intentional acts of homicide. Opening the door to intentional acts of homicide also brings with it new and profoundly difficult moral questions—questions about whose lives are worth absolute legal protection and whose lives may no longer worth living—that are not present when death is merely foreseen.

V. ARGUMENTS FROM AUTONOMY

If history and fairness cannot sustain an assisted suicide or euthanasia right, some would invite us to look next to principles of “autonomy.” Judges Rothstein and Reinhardt found the argument persuasive that all persons have an inherent (Fourteenth Amendment) right to choose their own “destinies.” Justices Stevens and Souter suggested as much, while Justice O’Connor declined to reveal her cards. These voices (and votes) assure that autonomy arguments will be heard again when the inevitable as-applied legal challenge wends its way to the Court. Likewise, many legislative advocates contend that proper respect for autonomous individual choice compels legalization.

physician-assisted suicide because it is laden with policy judgments, not simply based on objective facts.

Note, *The Right to Die and Physician-Assisted Suicide*, 105 HARV. L. REV. 2030 (citations omitted).

All of these objections fail on inspection. First, patients “who want treatment discontinued” may well “*know* that they will die without it” (emphasis added). *Id.* But this is not the same thing as *intending* death. It is the act of the soldier marching into battle and the martyr refusing to recant—not the act of a suicide. Second, the assertion that conditioning the right to assisted suicide on the patient’s intent interferes with a “right of self-determination” assumes the (significant) premise that a right of self-determination exists, a question we shall confront in the next chapter. Finally, the author asserts that some controversial view of causation is at work. But an intent-based analysis presupposes no particular view of causation or what constitutes a “natural” death.

This Part first addresses the doctrinal question whether *Casey* or *Cruzan* embraces a constitutionally protected "autonomy" interest that might offer grounds for an assisted suicide and euthanasia right. It concludes that the majority in *Glucksberg* and *Quill* got it right—that the law should recognize no such right—and notes further doctrinal grounds supporting and strengthening the majority's conclusion.

Next, it addresses whether autonomy provides a persuasive analytical basis for legalization. This question is not only pertinent for legislators, but it also has relevance for lawyers and jurists who disagree with this Article's position on the reach of *Casey* and *Cruzan* and find that a constitutional "autonomy" interest does exist. This Part explores theories of autonomy offered by three different moral-political theorists and concludes that two of these theories would permit assisted suicide and euthanasia, but in a form that lacks appeal.

A. *Casey and Cruzan*

Chief Justice Rehnquist summarily dismissed the notion that *Casey* and *Cruzan* might form the basis for a constitutional right to assistance in suicide.²⁸¹ While his analysis was sufficient for three other members of the Court who joined the opinion, it apparently was insufficient for the remaining justices. Given that the Supreme Court will likely revisit the issue of assisting suicide, determining the reach of *Casey* and *Cruzan* is critical.

Casey. The argument from *Casey* begins with a single paragraph in a thirty-page plurality opinion discussing the constitutional significance of "intimate and personal choices . . . central to personal dignity and autonomy."²⁸² From this, the Ninth Circuit *en banc* panel (and Justice Stevens) suggest that an "almost prescriptive" mandate exists requiring recognition of a fundamental liberty interest in assisted suicide.²⁸³

The Court never intended such a broad reading of *Casey*. First, though Chief Justice Rehnquist never addressed the point, the *Casey* plurality opinion at heart rests upon *stare decisis* principles, upholding the abortion right because of the

281. *Washington v. Glucksberg*, 521 U.S. 702, 723-27 (1997).

282. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

283. *Compassion in Dying v. Glucksberg*, 79 F.3d 790, 813 (9th Cir. 1996) (*en banc*) (citations omitted).

need to protect and respect prior court decisions in the abortion field extending back twenty years to *Roe v. Wade*.²⁸⁴ Indeed, *Casey's* reliance on *stare decisis* in Section III of its opinion was the narrowest grounds for decision offered by the plurality and was sufficient to decide the controversy before the Court. Consequently, the single-paragraph autonomy discussion upon which the Ninth Circuit so heavily relies is not only the view of a three-justice plurality, but arguably *dicta* even to that plurality's decision.

Second, the Ninth Circuit and Justice Stevens' reading of *Casey's* autonomy discussion proves too much. If the Constitution protects as a fundamental liberty interest every "intimate" or "personal" decision, the Court would have to support future autonomy-based constitutional challenges to laws banning any private consensual act of any significance to the participants in defining their "own concept of existence." As Judge O'Scannlain queried in dissent in the Ninth Circuit's proceedings: "If physician-assisted suicide is a protected 'intimate and personal choice,' why aren't polygamy, consensual duels, prostitution, and, indeed, the use of illicit drugs?"²⁸⁵ Such a result would fly in the face of Justice O'Connor's statement in *Casey* that abortion is "unique" in American constitutional jurisprudence.²⁸⁶

Finally, the Ninth Circuit's argument obscures a basic difference between abortion and assisted suicide. As the Court has conceived it, only *one* person has an autonomy interest at risk in the abortion context: the woman. To the Court in *Roe*, a fetus does not qualify as a human being.²⁸⁷ By contrast, there are "autonomy" interests on *both* sides of the assisted suicide issue—the interest of those persons who wish to control the timing of their deaths *and* the interest of those vulnerable individuals whose lives may be taken without their consent

284. See *Casey*, 505 U.S. at 854-58 (discussing *Roe v. Wade*, 410 U.S. 113 (1973)).

285. *Compassion in Dying v. Glucksberg*, *denial of reh'g en banc*, 85 F.3d 1440, 1444 (1996) (O'Scannlain, J., dissenting).

286. See *Casey*, 505 U.S. at 852.

287. See *Roe v. Wade*, 410 U.S. 113, 158 (1973) (emphasizing that the fetus is not a protected "person" under the Fourteenth Amendment). *But see Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 791-92 (1986) (White, J., dissenting) (arguing that the right to terminate a pregnancy differs from the right to use contraceptives because the former involves the death of a human being while the latter does not).

due to acts of mistake or abuse.²⁸⁸ In *Roe*, the Court expressly held that, had it found the fetus to be a person, it could not have sanctioned a right to abortion because no constitutional basis exists for preferring the mother's liberty interests over the child's life.²⁸⁹ That reasoning applies here: No basis exists for preferring the autonomy interests of those who seek to die over the liberty interests of those who fear inadvertent or wrongful death at the hands of an assisted suicide regime.

Cruzan. In *Cruzan*, the Court recognized that its prior decisions supported "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."²⁹⁰ Under common law battery doctrine, every individual has a right to "bodily integrity" — to be free of any physical intrusion without consent. Out of this common law right has grown a "logical corollary," that a patient "generally possesses the right not to consent, that is, to refuse treatment."²⁹¹ Accordingly, the Court assumed, without deciding, that, "under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person's liberty interest."²⁹² In other words, the Court assumed that the right to refuse treatment includes the right to decline treatment necessary to sustain life.

Buoyed by this assumption, the Ninth Circuit and Justice Stevens asserted that "*Cruzan*, by recognizing a liberty interest that includes the refusal of artificial provision of life-sustaining food and water, necessarily recognizes a liberty interest in hastening one's own death."²⁹³ From there, they found that, if an individual has a right to commit suicide, he must have a right to assistance in committing suicide. Otherwise, "the state's prohibition on assistance [would] unconstitutionally restrict[] the exercise of that liberty interest."²⁹⁴ From a right to assisted suicide, the Ninth Circuit—acknowledging that the

288. See discussion *infra* Parts VI.A-VI.D.

289. See *Roe*, 410 U.S. at 158.

290. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990).

291. *Id.* at 269, 270; see also *supra* note 225.

292. *Cruzan*, 497 U.S. at 279.

293. *Compassion in Dying v. Glucksberg*, 79 F.3d 790, 816 (9th Cir. 1996).

294. *Id.* at 801 (citing *Roe*, 410 U.S. at 151-52).

question was not even before it, but apparently unable to contain its momentum—proceeded to find a right to physician-administered suicide (i.e., voluntary euthanasia).²⁹⁵

By this series of steps, the Court's holding in *Cruzan* is upended. The ultimate basis for the right to decline medical treatment recognized in *Cruzan* lies in the common law of battery.²⁹⁶ Unwanted medical care is an unconsented-to touching, and it may implicate the liberty interest protected by the Due Process Clause,²⁹⁷ but assisted suicide and euthanasia have nothing to do with an unconsented-to touching. Because neither unwanted touching (i.e., the actual administration of medicine) nor a lack of consent is involved, the protection of bodily integrity from unwanted physical invasions simply is not implicated.

B. *Autonomy as a Moral-Political Argument*

Despite the strength of contrary arguments, some jurists may find a constitutional "autonomy" interest. Merely recognizing the existence of an "autonomy" interest, however, does not end the analysis; it only raises the question of what autonomy means in this context. If autonomy is a constitutional value, what kind of assisted suicide or euthanasia right follows? Unconstrained by constitutional doctrine, legislators likewise will have to face moral-political arguments for legalization based on patient "autonomy" and "choice." In the following section, the Article briefly outlines three of the most prominent theories of personal autonomy in contemporary moral-political theory, then turns to consider their potential application to the assisted suicide and euthanasia debate.²⁹⁸

Joseph Raz has identified three preconditions for the exercise of personal autonomy. First, Raz states that autonomy presupposes an individual capable of understanding his options and choosing between them:

295. *See id.* at 831.

296. *See supra* notes 225, 291 and accompanying text.

297. *See supra* note 293.

298. This Article will not capture—and does not seek to capture—every subtlety in the growing debate over autonomy in moral theory. It aims solely to outline this debate in its most general terms in order to assess its application to a discrete legal question, seeking to keep a potentially vast topic within manageable, yet useful bounds.

If a person is to be a maker or author of his own life then he must have the mental abilities to form intentions of a sufficiently complex kind, and plan their execution. These include minimum rationality, the ability to comprehend the means required to realize his goals, the mental faculties to plan actions, etc. For a person to enjoy an autonomous life he must actually use these faculties to choose what life to have.²⁹⁹

Second, Raz argues that one must have a sufficient number of options to choose among for choice to be meaningful. Raz illustrates two aspects of this point. A woman left on a desert island with a carnivorous animal that constantly hunts her may be capable of making autonomous choices, but she has no time to do so. Her thoughts are only concerned with survival. Conversely, a man fallen into a pit with enough food and water to survive for the rest of his natural life may have the means necessary for survival but his available choices leave little room for autonomy. "His choices are confined to whether to eat now or a little later, whether to sleep now or a little later, whether to scratch his left ear or not."³⁰⁰

The third precondition Raz posits is that, for a decision to be autonomous, it must be free from "coercion and manipulation."³⁰¹ For an individual's choice to be his own, it must be *his* choice and not one dictated by another. This assertion of moral theory, like the question of what constitutes a "sufficient" number of options among which to choose, quickly takes us into a question of political theory: When must the state forswear coercion and manipulation in order to assure adequate respect and room for individual choice?

Contemporary autonomy theorists answer this question in different ways. Some hold that the state must remain neutral between competing conceptions of the good life. Others maintain the state need not remain neutral, but may legislate coercively when harm to others is threatened. Still others challenge the necessity of either the neutrality or harm principle to autonomy.

299. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 371 (1988).

300. *Id.* at 374.

301. *Id.* at 373.

C. *The Neutrality Principle*

In simple terms, neutralists argue that respect for individual autonomy means that the state cannot promote any particular moral objective or end, but must leave individuals to choose their own values. The state has no role to play in making men and women moral, no role in “perfecting” persons; to the contrary, the state should aspire to an *anti*-perfectionist ideal.

The familiar brief for state neutrality is John Rawls’s defense of equal liberty in *A Theory of Justice*. Rawls hypothesizes an original position, a moral vacuum where individuals have not yet established any religious or moral identity or commitments.³⁰² Rawls argues that, in the original position, rationally self-interested persons would demand the freedom to define and pursue their own views of what constitutes a good life without state interference.³⁰³ Ignorant of, say, what religion one would profess in society, a rational person would not permit the state authority to prefer one religion over another. People in the original position

cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes. Even granting (what may be questioned) that it is more probable than not that one will turn out to belong to the majority (if a majority exists), to gamble in this way would show that one did not take one’s religious or moral convictions seriously, or highly value the liberty to examine one’s beliefs.³⁰⁴

Accordingly, the state is left free to pursue only those policies and norms that evince equal respect for all competing conceptions of the good.³⁰⁵

An array of contemporary theorists have sought to supplement and strengthen Rawls’s thesis in various ways,³⁰⁶

302. See JOHN RAWLS, *A THEORY OF JUSTICE* 11 (1989).

303. See *id.* at 327-31.

304. RAZ, *supra* note 299, at 207.

305. In the end, even Rawls sanctions at least *one* deviation from strict neutrality. His theory presupposes individuals of equal means and ability pursuing their notions of the good, but not all people start off life on equal terms materially. Rawls would, thus, permit (pursuant to his difference principle) the state to deviate from equal distribution of primary goods to enable the worst-off sufficient means to pursue their own conceptions of the good. See RAWLS, *supra* note 302, at 76.

306. See, e.g., Ronald Dworkin, *Foundations of Liberal Equality*, in THE TANNER LECTURES ON HUMAN VALUES 60-70 (Grethe B. Petersen ed., 1990); Jeremy

but, critical for our purposes, all agree that state neutrality is an essential ingredient to personal autonomy. For example, David Richards argues that neutrality alone ensures "respect [for] the moral sovereignty of the people themselves, the ideal of the sovereign ethical dignity of the person against which the legitimacy of the contractarian state must be judged."³⁰⁷ Should the state pursue non-neutral ends, it would "degrade [individuals'] just equal liberty to define their ultimate philosophical and moral aims."³⁰⁸ Ronald Dworkin similarly submits that government "must impose no sacrifice or constraint on any citizen in virtue of an argument that the citizen could not accept without abandoning this sense of his equal worth" nor should it "enforce private morality."³⁰⁹

Although anti-perfectionists like Rawls, Richards, and Dworkin view state neutrality as the guarantor of individual autonomy, not all liberal moral theorists agree. Raz, for one, agrees that for individual autonomy to mean anything the individual must have a "large number of greatly differing pursuits among which [he is] free to choose."³¹⁰ Autonomous individuals cannot be left with too few options like the hypothetical Man in the Pit or with too little time to make any meaningful decisions like the Hounded Woman. But, to say that a wide range of choices is a precondition to autonomy does not, to Raz, mean that *all* conceivable options must be available to the individual. A non-neutral perfectionist state might rule out certain ways of life as bad, but, Raz argues, no

Waldron, *Autonomy and Perfectionism in Raz's Morality of Freedom*, 62 SO. CAL. L. REV. 1097, 1127-30 (1989); LOREN E. LOMASKY, PERSONS, RIGHTS, AND THE MORAL COMMUNITY 231-54 (1987); BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 386-89 (1980); H.L.A. HART, LAW, LIBERTY, AND MORALITY 30-43 (1963). The neutrality principle advocates, also have, unsurprisingly, sought to claim Kant as one of their own. See, e.g., David A.J. Richards, *Kantian Ethics and the Harm Principle: A Reply to John Finnis*, 87 COLUM. L. REV. 457 (1987); DAVID A.J. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION 8 (1982) [*hereinafter* SEX, DRUGS, DEATH]. But the merits of this claim have come under fire from several quarters. See, e.g., ROBERT GEORGE, MAKING MEN MORAL 147-54 (1993) [*hereinafter* MAKING MEN MORAL]; John Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433 (1987); JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF 94-97 (1989).

307. DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 252 (1989) [*hereinafter* TOLERATION].

308. David A.J. Richards, *Kantian Ethics and the Harm Principle: A Reply to John Finnis*, 87 COLUM. L. REV. 457, 464 (1987).

309. RONALD DWORKIN, A MATTER OF PRINCIPLE 205-06 (1985).

310. RAZ, *supra* note 299, at 381.

reason exists to suppose it would leave individuals with insufficient options. To the contrary, because there are many "forms and styles of life which exemplify different virtues and which are incompatible" with each other, even in a perfectionist state, ample choices will remain for freedom and autonomy to flourish.³¹¹

Not only can a perfectionist state foreclose evil options without seriously infringing on individuals' opportunities for self-creation, Raz argues it *should* do so because autonomy is valuable only when exercised in pursuit of a morally upright way of life. A person may be autonomous even when choosing bad ways of life, but Raz argues that

autonomously choosing the bad makes one's life worse than a comparable non-autonomous life is. Since our concern for autonomy is a concern to enable people to have a good life it furnishes us with reason to secure that autonomy which could be valuable. Providing, preserving or protecting bad options does not enable one to enjoy valuable autonomy.³¹²

As for the Rawlsian claim that rationally self-interested individuals would never choose a state that could rule out some competing conceptions of the good, Raz simply disagrees. Individuals in the original position might well permit a perfectionist state to act non-neutrally and rule out bad choices and lifestyles, provided that it does so in accord with a methodology all can see and accept as fair. Rather than demanding a neutralist state, Raz thinks rationally self-interested persons might just as easily reach "an agreement to establish a constitutional framework most likely to lead to the pursuit of well-founded ideals, given the information available at any given time."³¹³

D. *The Harm Principle*

Just as the neutrality principle divides some moral theorists over autonomy's meaning and prerequisites, a debate over whether the state must respect the harm principle divides others. The harm principle holds that each person must be afforded the right to exercise self-control "[o]ver himself, over

311. *Id.* at 395.

312. *Id.* at 412.

313. *Id.* at 126.

his own body and mind," and that the "only purpose for which power can rightfully be exercised over any member of a civilised community, against his will, is to prevent harm to others."³¹⁴

The harm principle differs from the neutrality principle in one significant respect. Where neutrality bars government from promoting any particular version of morality, the harm principle is concerned with the means used to enforce morality. One may accept that government has a role to play in (non-neutrally) encouraging good choices and discouraging evil ones, but also take the view that it may use coercive means (e.g., criminal sanctions) only to prevent those choices that result in harm to others. Thus, assuming bigamy to be immoral but harmless to others, the non-neutral harm principle adherent would hold that the state could *teach* against bigamy and attempt to *discourage* it (e.g., by refusing to recognize bigamous marriages), but the state could not make bigamy a crime.

Introducing a harm principle necessarily begs the question what constitutes "harm." Must there be a *physical* invasion before the state can intercede? Most adherents to the harm principle recognize the possibility of non-physical harm. Yet they also seek to rule out definitions of harm that expand it so far as to permit the state to "criminalize conduct solely because the mere thought of it gives offense to others."³¹⁵ However, their attempts to a narrower definition are opaque, as Raz's effort illustrates: "[O]ne harms another when one's action makes the other person worse off than he was, or is entitled to be, in a way which affects his future well-being."³¹⁶ Many neutralists, including Rawls, Dworkin, and Richards, also adhere to some form of the harm principle,³¹⁷ but Raz

314. JOHN STUART MILL, ON LIBERTY 9 (E. Rappaport ed., 1978).

315. RICHARDS, TOLERATION, *supra* note 307, at 239.

316. RAZ, *supra* note 299, at 414.

317. See, e.g., GEORGE, MAKING MEN MORAL, *supra* note 306, at 140 n.24 (1993).

Rawls says that "justice as fairness requires us to show that modes of conduct interfere with the basic liberties of others or else violate some obligation or natural duty before they can be restricted." Inasmuch as, for Rawls, "obligations" are obligations of fairness and "natural duties" are owed to others, it seems reasonable to conclude that Rawls himself understands his theory to imply a version of the harm principle that would, at minimum, exclude moral paternalism.

illustrates that one can reject neutralism and still endorse the harm principle. While Raz rejects neutrality as unnecessary to ensure personal autonomy, he argues that to disregard the harm principle would be to violate autonomy in two ways:

First, it [would] violate[] the condition of independence and express[] a relation of domination and an attitude of disrespect for the coerced individual. Second, . . . there is no practical way of ensuring that the coercion will restrict the victims' choice of repugnant options but will not interfere with their other choices.³¹⁸

Simply put, the harm principle allows individuals all the freedom they want to pursue their own views of the good life—up to the point where they could harm an unwilling person. Our freedom ends where the next person's nose begins. Thus, while the state may teach and promote good behavior, allowing it to punish bad conduct that results in no harm to others would trench unduly on individual choice. Worse still, coercive state power is an indiscriminate and unwieldy tool; using it to snuff out bad but purely self-regarding choices may incidentally foreclose other, good choices. Thus, for instance, when the state tries to ban pornography, it almost inevitably infringes upon legitimate artistic expression.³¹⁹

E. "Pure" Perfectionism

Some reject not only the neutrality, but even the harm principle as an essential precondition of individual autonomy. Patrick Devlin argued that the state should be allowed to pursue any moral ends it wishes in the name of social cohesion, regardless of whether the morality pursued is true.³²⁰ More

Id. (quoting RAWLS, *supra* note 302, at 331, 112, 115). Joel Feinberg and Robert Nozick are among the principle's most eloquent and powerful exponents. See, e.g., FEINBERG, HARM TO SELF, *supra* note 306; JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING (1987); JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS (1985); JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS (1984); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA ix (1974) (the state violates individuals' rights if it uses its "coercive apparatus . . . to prohibit activities for their own good or protection"). Whether Nozick is an anti-perfectionist, however, is not altogether evident. See NOZICK, ANARCHY, STATE, AND UTOPIA, at 48-51.

318. RAZ, *supra* note 299, at 418-19.

319. See *id.* at 418.

320. For an interesting discussion of Devlin and his relationship to perfectionist moral theory, see GEORGE, MAKING MEN MORAL, *supra* note 306, at 48-82.

recently, Robert George has taken the position that anyone (like Raz) who rejects state neutrality must also, as a matter of logic, reject the harm principle; George insists that ample room remains for meaningful individual choice without adherence to either principle. Like Raz, George argues that individuals should be free to choose from the many and varied ways of living a morally upright life without state interference.³²¹ However, autonomy is only an instrumental value, not an absolute one. Individual choice deserves respect only to the extent that it is employed toward ends recognized as morally good: "The value of autonomy is . . . conditional upon whether or not one uses one's autonomy for good or ill,"³²² and should be permitted only "in so far as [it is an] important means and condition[] for the realization of human goods . . . and the communities they form."³²³

To Raz's claim that the state's use of coercion in the absence of harm to others expresses disrespect for the coerced individual, George offers two replies:

First, such laws do not, except in the most indirect or implausible senses, deprive the morals offender of any sort of valuable *choice*. . . . [I]t is difficult to perceive violations of autonomy in the legal prohibition of victimless wrongs if we join Raz . . . in a perfectionist understanding of autonomy as valuable only when exercised in the pursuit of what is morally good. And this raises the suspicion that Raz smuggles into this argument a non-perfectionist notion of autonomy.³²⁴

Thus, George asserts that coercing an individual to avoid bad choices does not really deprive him of any meaningful options at all.

This argument, however, glosses over the possibility, latent in the harm principle, that choice itself is a meaningful societal good; that permitting and encouraging people to make—and learn from—bad choices offers some real social benefit. Certainly most parents and teachers would accept this truism.

George advances a more serious argument when he disputes that the use of coercive measures to prevent victimless bad

321. See GEORGE, MAKING MEN MORAL, *supra* note 306, at 173-75.

322. *Id.* at 177.

323. *Id.* at 215.

324. *Id.* at 185.

choices does not display disrespect for the coerced *individual*, but only disrespect for the bad end chosen. The state seeks to condemn the sin, not the sinner. Whatever the intent of such coercive laws, George's point does not address Raz's claim concerning their effects, namely that coercion (however well-intended) is an indiscriminate tool that may not only foreclose the victim's repugnant choice, but may also incidentally interfere with other legitimate choices.

When George eventually comes to grips with this claim, he provides perhaps his strongest argument against the harm principle. Using the pornography example, George notes that harm principle adherents fear that coercive suppression of pornography may result in the accidental suppression of legitimate forms of art. But this, he argues, does not demonstrate that the use of coercion is wrong as a matter of moral or political theory, only that we should use it sparingly and prudently:

The danger of interfering with morally acceptable choices is a consideration that counts against anti-pornography legislation in the practical reasoning of prudent legislators. But it may not be a conclusive reason. In the circumstances, the good to be achieved *may* reasonably be judged as worthy of the risks.³²⁵

Even this argument, however, does not unseat the harm principle as at least a rule of thumb. Indeed, George concedes the imprecision of coercive penalties and the practical dangers of accidental suppression of upright choices in using coercive remedies to suppress immoral choice; thus, he at least implicitly acknowledges the value of the harm principle even in his theory of autonomy and perfectionism.

F. *Autonomy, Assisting Suicide, and Euthanasia?*

In applying the concept of autonomy to assisting suicide and euthanasia, it is immediately evident that George's view hardly commands recognition of any new right. Evaluating whether persons should have the right to receive assistance in suicide or euthanasia devolves into an inquiry into the moral uprightness of the acts themselves. Indeed, George expressly admits that a right to choose a way of life (or death) arises if, but only if, it is

325. *Id.* at 188.

consistent with the realization of human goods and the communities they form.³²⁶ "The saving of souls is the whole reason for the law."³²⁷ George's instrumental view of autonomy, thus, is literally devoid of independent content and cannot be said to require respect for assisted suicide, euthanasia, or any other substantive right.

By contrast, adherents to the neutrality and harm principles claim that their conceptions of autonomy do have independent substantive content, and many argue that they can provide definitive answers to the assisted suicide and euthanasia question.

Neutrality. Relying on the language of neutralism, Ronald Dworkin has testified before the British Parliament that "[p]eople disagree about what kind of a death is meaningful for them," and, precisely because of that disagreement, a neutralist state must permit assisted suicide and euthanasia:

What sort of a death is right for a particular person and gives the best meaning to that person's life, largely depends on how that life has been lived, and that the person who has lived it is in the best position to make that decision. . . . [It] is not that we collectively think [assisted suicide or euthanasia] is the decent thing to do, but that we collectively want people to act out of their own conviction.³²⁸

Richards similarly submits that

it is an open question, consistent with the neutral theory of the good, how persons with freedom and rationality will define the meaning of their lives, and no externally defined teleological script is entitled to any special authority or weight in such personal self-definition. Once we see the issue in this way, we can see that the fact of one's own death frames the meaning one gives one's life in widely differing ways.³²⁹

326. See *id.* at 215.

327. *Id.* at 34.

328. 1 HOUSE OF LORDS REPORT, *supra* note 224, at 23, 28 (statement of Ronald Dworkin).

329. RICHARDS, SEX, DRUGS, DEATH, *supra* note 306, at 248-49; see also DAN BROCK, LIFE AND DEATH: PHILOSOPHICAL ESSAYS IN BIOMEDICAL ETHICS 206 (1993) ("If self-determination is a fundamental value, then the great variability among people on this question [of when consensual homicide might be justified] makes it especially important that individuals control the manner, circumstances, and timing of their dying and death.").

Despite the claims of self-avowed neutralists, neutrality hardly commands (or is even compatible with) the assisted suicide or euthanasia right commonly advocated in public policy and judicial circles. Virtually every proponent of the right would limit its exercise to the terminally ill or those suffering intolerable pain, and would require the participation of a physician in a controlled hospital environment. For example, the referendum passed by Oregon voters in 1994 (like unsuccessful efforts in California and Washington state) permitted physician-assisted suicide only for the terminally ill. The World Federation of Right-to-Die Societies has lobbied for an assisted suicide right available only to the "incurably ill and/or intolerably suffering person who persistently requests that help."³³⁰ Even in the Netherlands, regulations purport to limit aid-in-dying to patients who are "experiencing intolerable suffering with no prospect of improvement" and require that other alternatives to alleviate the patient's suffering "must have been considered and found wanting."³³¹

Putting aside the difficulty of satisfactorily defining terms such as "terminally ill" or "intolerably suffering" — arguably as difficult to grapple with as "harm" — an assisted suicide right available only to such persons fails the neutrality test. Efforts to require a physician's participation in a hospital environment are similarly non-neutral. In a moderate assisted suicide regime, Christian virgins seeking to avoid rapacious invaders, monks seeking the face of God, Romeos despondent over lost loves, Sardanapolises weary with life, Buddhist monks seeking to protest war through self-immolation, prisoners tired of their confined lives, the handicapped overwhelmed by their disabilities — all are barred from taking their own lives in the manner they think most fitting.³³² Individuals seeking death must not only rationally choose it, they must also receive the imprimatur of the state that their lives are of a sort that may be taken; the state is hardly neutral about who qualifies.

Put another way, in the assisted suicide regime typically defended today, the individual's rational choice is a necessary

330. Letter from the World Federation of Right-to-Die Societies, *quoted in* 3 HOUSE OF LORDS REPORT, *supra* note 224, at 182.

331. 1 HOUSE OF LORDS REPORT, *supra* note 224, at 65.

332. Even Ms. Bouvia — whom no court found terminally ill or suffering intolerable pain — would not qualify. See discussion *supra* note 273.

but not sufficient precondition. Instead, the *state* asserts the right and responsibility to make the final moral judgment about which lives are worth protecting even against the rational patient's will. In doing so, the state must necessarily make a comparative moral judgment about the value of human lives, endorsing the premise that some persons (the sick, the terminally ill) may choose death, while others (the virgin, the monk, Romeo) may not. Robert Sedler, an American Civil Liberties Union ("ACLU") assisted-suicide advocate, makes the point plainly when he states that the ACLU would extend a right to assistance in suicide only to the "terminally ill or so . . . physically debilitated that it is *objectively reasonable* for them to find that their life has become unendurable."³³³

The determined neutralist comfortable with making such moral judgments about the comparative worth of human lives might object at this point that he has been misunderstood—that "paternalistic" non-neutral limits on choice *can* sometimes be justified. David Richards, for one, has contended that neutralism can supply

a principle of paternalism and explain its proper scope and limits. From the point of view of the original position, the contractors would know that human beings would be subject to certain kinds of irrationalities with severe consequences, including death and the permanent impairment of health, and they would, accordingly, agree on an insurance principle against certain of these more serious irrationalities in the event they might occur to them.³³⁴

In the end, however, Richards would appear to permit only enough paternalism to ensure a fully rational adult decision. Indeed, to permit more paternalistic interference than that would threaten the core of the neutralist position. If persons in the original position could allow the state to permit the state to foreclose harmful choices altogether (as Raz posits), little would be left of the ideal of state neutrality.

Gerald Dworkin, too, recognizes this potential pitfall. He suggests that persons in the original position could agree to certain paternalistic restrictions on our freedom as "a kind of

333. Robert A. Sedler, *Constitutional Challenges to Bans on "Assisted Suicide": The View from Without and Within*, 21 HASTINGS CONST. L.Q. 777, 794 (1994) (emphasis added).

334. RICHARDS, TOLERATION, *supra* note 307, at 57.

insurance policy we take out against making decisions which are far-reaching, potentially dangerous and irreversible."³³⁵ But, he carefully qualifies his statement by asserting that persons in the original position would agree only to an insurance policy that forces them to think through their decision rationally before acting: "I suggest that we would be most likely to consent to paternalism in those instances in which it preserves and enhances for the individual his ability to rationally consider and carry out his own decisions."³³⁶

The right to assistance in suicide and euthanasia, at least as contemporary proponents usually present it, is far narrower than a neutralist's paternalism principle would allow. No matter how rational the decision, some decisions to die are deemed not worthy of respect and some lives are adjudged too important to end. Richards's criticism of doctors and hospitals that force dying patients to accept unwanted medical treatment is equally applicable to those who advocate an assisted-suicide right limited only to certain classes of adults: "To defend such interference [with an individual's decision to die] on the ground of the universal value of life is the essence of unjust paternalism"³³⁷

At this point neutralist assisted-suicide advocates might attempt a strategic retreat. Conceding that paternalism is justified on neutralist grounds only to the extent that it assures rational individual choice, they might suggest that an assisted-suicide right limited to the terminally ill or intolerably suffering represents a rough approximation of the choice rational individuals in the original position would make. This argument, however, abandons neutralism altogether for raw majoritarianism. It adopts a policy that many of us might accept but one that surely not everyone would freely choose if the state remained truly neutral.

Ronald Dworkin is case in point. Dworkin has written articles and a book, testified before the British House of Lords, and co-authored a brief to the U.S. Supreme Court promoting the legalization of assisted suicide. Yet, in the end, he has

335. Gerald Dworkin, *Paternalism*, reprinted in *MORALITY AND THE LAW* 122-23 (Robert Baird & Stuart Rosenbaum eds., 1971).

336. *Id.* at 125.

337. RICHARDS, *TOLERATION*, *supra* note 307, at 227.

conceded that he would require not only that a person's decision to die be rational, stable, and competent, but also that it be one society agrees is "reasonable."³³⁸ Dworkin is unclear on what showing he would require for a patient's decision to die to qualify not only as "rational" but also as "reasonable," or how this additional requirement comports with neutralist principles. Indeed, his proffered explanation deeply undercuts any claim to pure neutralist reasoning:

We might very well say *as a community*—we *bet* we might be wrong, but we *bet*—that if a teenage lover lives another two years, maybe even two weeks, he will be very glad not to have taken his own life. . . . I believe [the state] does have a sufficient interest in denying help and forbidding others to help someone who announces an intention to end his life, if [the state's judgment] is a reasonable judgment.³³⁹

A community's "bet," of course, is called majoritarian preference and legislation, not the stuff of neutralist principle.³⁴⁰

The Harm Principle. The notion that assisting suicide or euthanasia are purely self-regarding (or "harmless") acts is certainly questionable. In the wake of suicide, spouses are frequently left behind, bereft of their life-long companions. Children are sometimes orphaned. Even the most rational act of suicide, thus, can impose real "harm" on third persons, whatever one's understanding of the term. Thus, even in a purely Razian world, the state would likely be free to use its coercive powers to suppress many acts of suicide, assisting suicide, and euthanasia to protect against the harms befalling unconsenting persons.

Even supposing, however, that suicide imposed no third-party harms, a right to assistance in suicide or euthanasia

338. See Ronald Dworkin, *Euthanasia, Morality and the Law*, 31 LOY. L.A. L. REV. 1147, 1151-52, 1158 (1998).

339. *Id.* at 1152 (emphasis added).

340. Dworkin himself acknowledges criticism that he has strayed from the neutralist reasoning. See *id.* (admitting that other neutralists are "offended" by his concession that the state has a legitimate role in determining the "reasonableness" of suicide decisions). Having shed neutralism, Dworkin must either concede to majoritarian decisions or provide a systematic and substantive moral explanation regarding what does and does not qualify as a "reasonable judgment" by the state to limit the practices of assisting suicide and euthanasia. In at least some writings, Dworkin appears to rely on a utilitarian calculus to do so. See discussion *infra* Part VI.

limited to the terminally ill or intolerably suffering would fail the harm principle test. Such a right would improperly preclude some rational adults from making the (supposedly harmless) choice to die in the manner they choose. To comport with the harm principle, a right to assistance in suicide or euthanasia would require the state to abstain from interfering with *any* rational adult's private decision to die. Unlike neutralists, harm principle adherents would permit the state to *teach* against assisted suicide and euthanasia all it liked. But, while talk would be permitted, action would not. Harm principle adherents would firmly insist that the state refrain from coercively interfering with any freely chosen decision to die.

G. *The Only "Choice" Left for the Neutrality
and Harm Principles*

In the end, neutralists and harm principle adherents who seek to endorse some form of assistance in suicide or euthanasia are left with only one principled choice: endorsing a right permitting all rational adults to kill themselves and to seek any form of assistance they wish. This option goes far beyond what most contemporary proponents claim to seek, requiring effective recognition of a right to consensual homicide. Such a right has no analogy in modern history and goes beyond even Rome's unruly precedent. The prisoner sick of his sentence, the exhibitionist who sets himself on an Olympic pyre, the impecunious seeking a better life for his family by selling himself for amusement, the Buddhist monk wanting to make a political point, and the terminally ill hoping to evade pain are all lumped together. Their different conceptions of the good death all have to be respected — if after a "cooling off" period.

Neutralist and harm principle advocates rarely reveal upfront the practical consequences of their philosophical commitments. Instead of openly advocating a consensual homicide right for all persons, they typically emphasize the dire medical condition of a particular patient, the unpleasantness of the hospital settings, and the compassion of individual physicians like Dr. Quill.

Gerald Dworkin, for instance, writes at length about how he would create a "Suicide Board" composed of psychologists "to

meet and talk with the person proposing to take his life."³⁴¹ But he is ultimately forced to divulge that neutral respect for personal autonomy requires that the Board's approval would be unnecessary and the decision to die (in any fashion) would always rest with the competent adult.³⁴² Richards likewise argues for an assisted-suicide right with a vivid discussion of the plight of cancer patients, but in the end, he too must admit that his argument extends beyond such sympathetic cases to any "voluntarily embraced" decision to die.³⁴³

Joel Feinberg discusses a British television drama, *Whose Life Is It Anyway?* In the program an active young man is paralyzed from the neck down in a car crash. He ultimately decides that he would rather die than live out his life as a quadriplegic. Feinberg describes the young man's physical plight in detail, yet it is all fundamentally irrelevant. To him, if "the choice is voluntary enough by reasonable tests, [one should be] firmly committed to a policy of non-interference . . . for the life at stake is [the patient's] life not ours. The person in sovereign control over it is precisely he."³⁴⁴

In his book *Life's Dominion*, Ronald Dworkin illustrates just how far the neutralist's commitment might be taken in practice. Dworkin (again) asks us to consider the decision of a sick older person, in this case a woman who has become demented due to Alzheimer's. Earlier, while still competent and rational, Dworkin supposes that the woman expressed a firm desire to be killed when full dementia set in. But now, after dementia has set in, the woman seems to enjoy life and says she wishes to live. Dworkin asks which request we should obey: the earlier, rational request, or the woman's present choice affected by dementia? Dworkin's response is telling:

We might consider it morally unforgivable not to try to save the life of someone who plainly enjoys her life, no matter how demented she is, and we might think it beyond imagining that we should actually kill her. We might hate living in a community whose officials might make or license [such a] decision[.]. We might have other good reasons for treating [her] as she now wishes, rather than, as, in my

341. Gerald Dworkin, *supra* note 335, at 124.

342. *See id.*

343. RICHARDS, SEX, DRUGS, DEATH, *supra* note 306, at 226.

344. FEINBERG, HARM TO SELF, *supra* note 306, at 354.

imaginary case, she once asked. *But still, that violates rather than respects her autonomy.*³⁴⁵

To date, no concrete legislative proposal has been offered in America or England that would reach nearly as far as neutralist or harm principles might demand; even the World Federation of Right-to-Die Societies has yet to advocate such a law. Yet, as some academic neutralism and harm principle adherents are beginning to admit openly the consequences of their philosophical views, the practical implications are nearby. Dr. Kevorkian has regularly used a machine in the back of his van to kill "patients" who are neither terminally ill nor suffering intolerable pain; indeed, one was a middle-aged woman in the early stages of Alzheimer's still capable of beating her adult son at tennis—just no longer able to keep score. Moreover, the Dutch Supreme Court has recently relaxed the Netherlands' traditional requirement that a candidate for assistance in suicide show he or she is suffering intolerable pain, suggesting that those suffering merely *psychological* pain can now qualify.³⁴⁶

VI. ARGUMENTS FROM UTILITY

Unlike neutralism and harm principle advocates, utilitarians purport to offer the ability to defend a right to assistance in suicide or euthanasia that does not devolve into a Roman circus, open to all rational adults regardless of motive or physical condition. Eschewing principles of personal liberty, they approach the assisted suicide (and any) issue by asking what the best solution is for most people. Unlike autonomy theorists, they are not hamstrung by adherence to principle into defending a disturbingly overbroad right.

Justices O'Connor and Souter gave hints of utilitarian thinking in *Glucksberg* and *Quill*. Before deciding to write an assisted suicide and euthanasia right into the Constitution, both said they wanted to see the results of state legislative experiments. Implicit in their position is a desire to weigh whether the practice of assisting suicide and euthanasia carries

345. RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 229 (1993) (emphasis added) [hereinafter *LIFE'S DOMINION*].

346. See Keown, *Some Reflections*, *supra* note 8, at 214.

more benefits than harms. The legislative arena commonly entertains utilitarian arguments for proposed laws, with legislators and citizens arguing that enacting a certain provision would (or would not) promote the greatest good for the greatest number.

The classic utilitarian argument for euthanasia is Glanville Williams's book, *The Sanctity of Life and the Criminal Law*.³⁴⁷ In it, Williams argues that physician-assisted suicide should be legalized for terminally ill persons because the benefits it would produce for such persons outweigh any harms it might cause. Williams's utilitarian claim is even echoed by contemporary theorists who claim to eschew utilitarian reasoning. In *Life's Dominion*, Ronald Dworkin attempts to build a purely autonomy-based right to assistance in suicide. In the end, however, Dworkin is forced to admit that allowing assisted suicide would result not only in some persons exercising the right to choose death freely, but in other persons being killed against their will as a result of abuse and mistake.³⁴⁸ In confronting this fact, Dworkin slips into a utilitarian calculus, weighing the pluses and minuses of an assisted suicide regime and arguing that, on the whole, the scale still tips in favor of legalization: "[The fear of abuse and mistake] loses its bite once we understand that legalizing *no* euthanasia is itself harmful to many people There are dangers both in legalizing and refusing to legalize; the rival dangers must be balanced, and neither should be ignored."³⁴⁹

Lurking here is a concession that autonomy interests lie on *both* sides of the assisted-suicide debate—the right to choose on the one hand; the right to be free from non-consensual homicide on the other. Lurking here, too, is a concession that utilitarian reasoning must be employed. Applying that reasoning, Dworkin concludes that, on the whole, permitting legalization is superior. In fact, all that is missing from Dworkin's utilitarian argument are the *reasons* why he thinks the "balance" ultimately tips in favor of permitting assisted suicide rather than outlawing it. He insists the utilitarian

347. WILLIAMS, *SANCTITY OF LIFE*, *supra* note 175.

348. See RONALD DWORKIN, *LIFE'S DOMINION*, *supra* note 345, at 190 ("But some opponents of euthanasia also appeal to autonomy; they worry that if euthanasia were legal, people would be killed who really want to stay alive.").

349. *Id.* at 197-98.

calculus favors one result over the other, but the lack of stated reasons for this result prevents the reader from meaningfully critiquing Dworkin's result.

This Part argues that two problems confront any such utilitarian argument for assisting suicide and euthanasia. First, contrary to Dworkin's assertion, the costs and benefits do not obviously tip in favor of legalization. For example, Dutch experience suggests that, even in a regime purporting carefully to limit assistance in suicide to the very ill, mistaken and abusive killings are a regular occurrence.³⁵⁰ Anecdotal evidence suggests the problems of the Netherlands would recur in this country.³⁵¹ The instances of abuse and mistake may also fall disproportionately on certain vulnerable populations.³⁵² Imposing an assisted suicide regime would further impose a real cost on all society, which is required to make comparative judgments about the value of different human lives.³⁵³ Meanwhile, on the other side of the balance, the benefits of permitting assisted suicide and euthanasia appear limited to a small class of persons.³⁵⁴

Second, and more fundamentally, the project of weighing the costs and benefits of assisting suicide is incoherent. Weighing the liberty interest of the person seeking death against the right of persons to avoid being killed as a result of abuse or mistake is literally impossible due to the incommensurability of the goods being weighed.³⁵⁵

A. *The Dutch Experience*

The Netherlands is the only country in the Western world with a regularly operating euthanasia regime and, as such, offers the only significant empirical evidence about the practice of euthanasia and what its legalization in the United States might entail.³⁵⁶

350. See discussion *infra* Part VI.A.

351. See discussion *infra* Part VI.B.

352. See discussion *infra* Part VI.C.

353. See discussion *infra* Part VI.D.

354. See discussion *infra* Part VI.E.

355. See discussion *infra* Parts VI.F-G.

356. See, e.g., John Keown, *Euthanasia in the Netherlands: Sliding Down the Slippery Slope?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 407 (1995); John Griffiths, *Assisted Suicide in the Netherlands: The Chabot Case*, 58 MOD. L. REV. 232 (1995) [hereinafter *The Chabot Case*]; John Keown, *Further Reflections on Euthanasia in the*

Despite their widespread practice, assisting suicide and euthanasia remain statutorily proscribed crimes in the Netherlands.³⁵⁷ They are tolerated only because Dutch courts have in recent years developed a "necessity" defense. In the view of the Dutch courts, cases of voluntary euthanasia pose the doctor with a situation of necessity if he has to choose between the duty to preserve life and the duty as a doctor to do everything possible to relieve the unbearable suffering, without prospect of improvement, of a patient committed to his care.³⁵⁸ Euthanasia thus is legally tolerated as a necessity when carried out by a physician and applied to terminally ill patients suffering unbearable pain.

Three separate legislative efforts to repeal laws banning assistance of suicide and euthanasia have failed.³⁵⁹ The Dutch government has recently proposed yet another bill that would formally legalize assisted suicide and euthanasia. This effort appears more likely to succeed. It would, however, extend the practice of assisted suicide and euthanasia to *children*. Anyone between the ages of twelve and sixteen could request assisted suicide or euthanasia and, with a doctor's consent, have his or her wishes prevail even over parental objections. Those over sixteen would be treated as adults.³⁶⁰

In 1990, the Dutch government commissioned a study to measure compliance with existing guidelines on assisted suicide and euthanasia. A year later, the Remmelink Commission, so named for the attorney-general chairman, issued a report containing a survey of 406 Dutch physicians conducted by Professor Van der Maas of the Institute of Public

¹ *Netherlands in the Light of the Remmelink Report and the Van Der Maas Survey*, in EUTHANASIA, CLINICAL PRACTICE AND THE LAW 219, 223 (Luke Gormally ed., 1994) [hereinafter *Further Reflections*]; John Griffiths, *Recent Developments in the Netherlands Concerning Euthanasia and Other Medical Behavior that Shortens Life*, 1 MED. L. INT'L. 347 (1994); John Griffiths, *The Regulation of Euthanasia and Related Medical Procedures that Shorten Life in the Netherlands*, 1 MED. L. INT'L. 137 (1994); John Keown, *The Law and Practice of Euthanasia in the Netherlands*, 108 L.Q. REV. 51 (1992).

³⁵⁷. Article 293 of the Dutch criminal code forbids an individual from taking the life of another even after the latter's "express and serious request." Keown, *Further Reflections*, *supra* note 359, at 193. Article 294 forbids "intentionally incit[ing] another to commit suicide, assist[ing] him to do so, or provid[ing] him with the means of doing so." Griffiths, *The Chabot Case*, *supra* note 359, at 233 n.6.

³⁵⁸. Keown, *Some Reflections*, *supra* note 8, at 194-96.

³⁵⁹. See 1 HOUSE OF LORDS REPORT, *supra* note 224, at 64.

³⁶⁰. See Ray Moseley, *Dutch Euthanasia Plan Lets Kids Make Choice*, CHI. TRIB., Aug. 26, 1999, at 1.

Health at Erasmus University, Rotterdam. The Van der Mass Survey identified 2,300 cases of euthanasia in the Netherlands during 1990, accounting for fully 1.8 percent of all deaths in the country that year.³⁶¹ The Survey found that an additional 0.3 percent of all deaths—or some four hundred cases—were due to physician-assisted suicide.³⁶² Accordingly, the survey estimated a total of 2,700 cases in which life was taken with the patient's consent and a physician's aid.³⁶³ The Survey identified one thousand additional cases where physicians intentionally took a patient's life by active means *without* his consent.³⁶⁴ Thus, for every 2.7 acts of physician- or patient-induced death with consent, the Survey found one case in which a physician actively killed a patient without consent in direct violation of the Dutch courts' necessity defense doctrine.

These numbers, moreover, vastly understate the incidence of euthanasia. They embrace only cases of *affirmative* euthanasia and do not include *omissions* of care taken with the *specific intent* of killing the patient (which Dutch medical practice recognizes to be acts of euthanasia).³⁶⁵ Physicians reported that in an additional 8,750 cases they "[w]ithdr[ew] or withh[eld] treatment without explicit request" and did so with the purpose of terminating life.³⁶⁶ All told, John Keown estimates that in 1990, the fifth year of the Dutch euthanasia system, as many as 26,350 deaths were caused by medical intervention intended either in whole or in part to kill, a figure that represents fully 20 percent of all deaths in Holland.³⁶⁷ Over half of these killings (15,258) were without any express patient request.³⁶⁸ Extrapolating to the United States, John Finnis estimates that application of Dutch practices here would mean "over 235,000 unrequested medically accelerated deaths per annum."³⁶⁹

361. See Richard E. Coleson, *The Glucksberg and Quill Amicus Curiae Briefs: Verbatim Arguments Opposing Assisted Suicide*, ISSUES L. & MED., June 22, 1997, at 3.

362. See *id.*

363. See *id.*

364. See *id.*

365. Keown, *supra* note 241, at 270.

366. *Id.* at 270.

367. *Id.* at 271.

368. *Id.* at 270.

369. John Finnis, *Euthanasia, Morality, and Law*, 31 LOY. L.A. L. REV. 1123, 1128 (1998).

One might try to justify the high number of nonconsensual killings in two ways. First, while Dutch regulations require an explicit request from the patient before assistance in suicide can be administered, they do not mandate a written petition. Conditioning the exercise of an assisted suicide right on a written request arguably would allow fewer instances of abuse. Second, of the one thousand nonconsensual killings by action, about six hundred involved *some* discussion between physician and patient about the possibility of euthanasia. But, these discussions ranged substantially in their character:

The[y] ranged from a rather vague earlier expression of a wish for euthanasia [as interpreted by the physician], as in comments like, "If I cannot be saved anymore, you must give me something," or "Doctor, please don't let me suffer for too long," to much more extensive discussions, yet still short of [the] explicit request [Dutch law requires].³⁷⁰

Ultimately, in a single year a minimum of 9,150 persons were killed by omission and four hundred by affirmative action without *any* indicia of consent. These numbers dwarf the four hundred or so cases where patients actually chose physician assistance in dying. Neither do they apparently include an additional ten or so cases in which newborns were actively killed by doctors because the children could not survive without life-sustaining treatment.³⁷¹

Of further concern is the fact that physicians involved in the one thousand nonconsensual affirmative killings volunteered that ending pain and suffering motivated them in only 30 percent of these cases.³⁷² The primary reasons physicians offered for killing without express consent were the absence of prospects for improvement (60 percent), the futility of medical therapy (39 percent), avoidance of "'needless prolongation'" (33 percent), the relatives' inability to cope (32 percent), and "'low quality of life'" (31 percent).³⁷³

That thousands of persons are killed annually without their consent should hardly come as a surprise. Application of the

370. MARGARET PABST BATTIN, *THE LEAST WORST DEATH: ESSAYS IN BIOETHICS ON THE END OF LIFE* 137 (1994).

371. *See id.*

372. *See Keown, Further Reflections, supra* note 319, at 230 (citing the Van Der Maas Survey).

373. *Id.*

necessity doctrine, at least in Anglo-American law, has never turned on the victim's consent. Rather, necessity is usually claimed precisely because the victim has *not* consented. So it was with the sailors who claimed that they needed to eat the cabin boy to survive in *Regina v. Dudley and Stephens*,³⁷⁴ and so it is with nuclear missile protestors and anti-abortion advocates who insist on the "need" to trespass on testing sites or at abortion clinics to save lives.³⁷⁵ Ultimately, the Rummelink Commission itself illustrates just how irrelevant patient consent is to application of Dutch necessity doctrine:

[T]he ultimate justification for the intervention is in both cases [*i.e.*, where there is and is not an explicit request for assistance in dying] the patient's unbearable suffering. . . . The absence of a special request for the termination of life stems partly from the circumstances that the party in question is not (any longer) able to express his will because he is already in the terminal stage, and partly because the demand for an explicit request is not in order when the treatment of pain and symptoms is intensified. The degrading condition the patient is in confronts the doctor with a case of force majeure. According to the Commission, the intervention by the doctor can easily be regarded as an action that is justified by necessity, just like euthanasia.³⁷⁶

To the Dutch Commission, the "ultimate justification" for assisted suicide and euthanasia has nothing whatsoever to do with patient consent, choice or autonomy. Instead, it has everything to do with the "degrading condition" of the patient, who is perceived as better off dead than alive. The Report's eugenics implications were apparently lost on commission members.

B. *American Evidence and Issues*

Because assisted suicide and euthanasia have not yet been widely sanctioned in the United States, we cannot ascertain if they would be carried on here more successfully than in the Netherlands. The only American jurisdiction to experiment with assisted suicide, Oregon, reports that just twenty-three

374. 14 Q.B.D. 273 (1884).

375. See, *e.g.*, Note, Antinuclear Demonstrations and the Necessity Defense, 5 VT. L. REV. 103 (1980).

376. Rummelink Report, translated in Keown, *Further Reflections*, *supra* note 319, at 229.

persons received lethal prescriptions in 1998, the first year of implementation.³⁷⁷

In 1985, however, Mario Cuomo, then-Governor of New York, convened a task force composed of twenty-four members representing a wide variety of ethical, philosophical, and religious views to consider whether to legalize assisted suicide and euthanasia. It unanimously recommended against legalization, partly because it believed abuse and mistake would pose even greater problems in America than in the Netherlands:

If euthanasia were practiced in a comparable percentage of cases in the United States [as in the Netherlands], voluntary euthanasia would account for about 36,000 deaths each year, and euthanasia without the patient's consent would occur in an additional 16,000 cases. The Task Force members regard this risk as unacceptable. They also believe that the risk of such abuse is neither speculative nor distant, but an inevitable byproduct of the transition from policy to practice in the diverse circumstances in which the practices would be employed.³⁷⁸

Recent developments and structural aspects of the American medical and legal system support the New York task force's conclusion.

A 1995 University of Pennsylvania study revealed that 25 percent of 879 polled physicians had withdrawn life-sustaining treatment *without* the consent of either patient or family.³⁷⁹ Twelve percent admitted that they had withdrawn care without even the *knowledge* of the patient or family, and three percent said they had removed life-sustaining care over the express *objections* of patient or family.³⁸⁰ Reacting to these figures, Dr. David Asch, leader of the study, stated that these figures may represent "a good thing, that physicians act like medical professionals, bringing their *own values* to the table, rather than like medical technicians, *doing whatever they are*

377. See Oregon Health Department, *Oregon's Death With Dignity Act: The First Year's Experience* (Mar. 15, 1999) <<http://www.ohd.hr.state.or.us/cdpe/chs/pas/arresult.htm>>.

378. *New York Task Force*, *supra* note 10, at 134.

379. See Richard A. Knox, *Study Finds ICU Doctors Withholding Treatment*, BOSTON GLOBE, Feb. 18, 1995, at 1.

380. See *id.*

told" by the patient and family.³⁸¹ As in the Rummelink Report, the ultimate justification for these killings has nothing to do with patient choice and autonomous decision-making; it is the physician's professional judgment—the values the doctor brings to the table—which prove determinative.

The apparently common practice of physicians disregarding autonomously expressed patient instructions they deem wasteful is already receiving some legal sanction. A Massachusetts trial court ruled in April 1995 that a hospital and its doctors need not provide life-sustaining care they view as futile, even if the patient has expressly requested it.³⁸² The case involved an elderly woman, Catherine Gilgunn, who became comatose after suffering irreversible brain damage. Her daughter instructed the hospital that her mother wished everything medically possible should be done for her should she become incompetent. The hospital, however, ignored the daughter's instructions and refused to place Mrs. Gilgunn on a respirator or to provide cardiopulmonary resuscitation. The lawyer defending the hospital provided this forthright assessment of the ruling: The court's "real point" was that, "in very rare instances, particularly in situations at the end of life, where medicine simply cannot hold off death, . . . physicians can't be required to do things they feel would be inappropriate and harmful to the patient"—regardless of how the patient herself "feels."³⁸³

Structural features of American medical and legal practice further call into question whether assisting suicide could be more safely practiced in the United States than in the Netherlands. Physicians in the Netherlands typically have longstanding relationships with patients; consequently, doctors are in some position to assess the patient's "concerns, values, and pressures that may be prompting the . . . request [for assistance in dying]."³⁸⁴ By contrast, the AMA concedes that American physicians, increasingly employees or agents of large health maintenance organizations, "rarely have the depth of knowledge about their patients that would be necessary for an

381. *Id.* (emphasis added).

382. See Gina Kolata, *Court Ruling Limits Rights of Patients*, N.Y. TIMES, Apr. 22, 1995, sec. 1, at A6.

383. *Id.*

384. American Medical Association, *supra* note 263, at 2232.

appropriate evaluation of the patient's [assisted suicide] request."³⁸⁵

American courts and legislatures likewise have developed "substituted judgment" and "best interests" doctrines that permit third parties to refuse life-sustaining medical treatment for incompetent patients. Introducing these concepts into the assisted suicide and euthanasia arena would be a very small doctrinal step, and it would permit family members and others to kill an incompetent patient by substituting their judgment or deciding death to be in the patient's best interests. Abandoning patient consent for these artificial proxies may introduce additional cases of abuse and mistake not found even in the Netherlands where patient consent is, at least theoretically, required before any killing may occur. Family members concerned with escalating medical costs or diminishing inheritances and states acting as guardians of financially-burdensome incompetent persons are examples of persons that would have troublesome incentives to kill.

Finally, what little evidence can be adduced from Oregon's very limited assisted suicide experience (twenty-three patients) is not altogether comforting. The Oregon Health Department found that "[p]ersons who were divorced and persons who had never married were 6.8 times and 23.7 times, respectively, more likely to choose physician-assisted suicide than persons who were married."³⁸⁶ Moreover, of the twenty-three persons who received a lethal prescription, as many as eight may have changed their mind and ultimately refused assistance in dying.³⁸⁷ Of the remaining fifteen persons who did commit assisted suicide, only four had psychiatric or psychological consultation prior to dying, despite overwhelming evidence about the relationship between mental illness and suicide.³⁸⁸ Furthermore, the Oregon Health Department concedes that it lacks objective information to assess whether physicians are complying with its procedural safeguards, even though this is

385. *Id.*

386. Oregon Health Department, *supra* note 377.

387. *See id.*

388. *See id.*

an affluent state where one would expect euthanasia and assistance in suicide to be regulated most carefully.³⁸⁹

C. *Threatened Minorities*

When entering hospitals, many elderly Dutch patients have begun insisting upon written contracts assuring they will not be killed without their consent.³⁹⁰ Numerous polls suggest that the elderly and minorities in this country are similarly concerned by the prospect of legalized euthanasia. The *Detroit Free Press* has found that while 53 percent of whites it sampled in Michigan could envision choosing assisted suicide themselves, only 22 percent of blacks could.³⁹¹ A poll in Ohio revealed that while roughly one-half of those sampled favored allowing assisted suicide, those most likely to favor the practice were high-income, highly-educated young adults. Those most likely to oppose allowing assisted suicide were blacks, people 65 and older, and those with low levels of income and education.³⁹² A Harvard study found that, while 79 percent of those between eighteen and thirty-four would allow physician-assisted suicide, 54 percent of older Americans would not permit the practice.³⁹³ These surveys demonstrate a concern shared by Dr. Nicholas Parkhurst Carballeira, Director of the Boston-based Latino Health Institute that, "[i]n the abstract, [permitting euthanasia] sounds like a wonderful idea, but in a practical sense it would be a disaster. My concern is for Latinos and other minority groups that might get disproportionately counseled to opt for physician-assisted suicide."³⁹⁴

Empirical evidence concerning the medical treatment provided to minority groups suggests that their relative unease with legalization is entirely rational. The *New England Journal*

389. *See id.* Under Oregon law, the only source of data on assisted suicide cases comes from physicians who report their activities to the State. The Oregon Health Department ("OHD") admits that this raises "the possibility of physician bias." *Id.* Accordingly, the OHD "cannot detect or collect data on issues of noncompliance with any accuracy." *Id.*

390. *See* 1 HOUSE OF LORDS REPORT, *supra* note 224, at 66.

391. *See id.*

392. *See Ohioans Divided on Doctor Assisted Suicide Issue*, UNITED PRESS INT'L, June 28, 1993 (citing poll conducted by the Institute for Policy Research at the University of Cincinnati and co-sponsored by the Cincinnati Post).

393. *See* Joseph P. Shapiro & David Bowermaster, *Death on Trial*, U.S. NEWS & WORLD REP., Apr. 25, 1994, at 31, 39.

394. *New York Task Force*, *supra* note 10, at 90.

of Medicine has reported that female, black, elderly and Hispanic cancer patients are all less likely than similarly situated non-minorities to receive adequate pain-relieving treatment.³⁹⁵ Minority cancer patients are three times less likely than non-minority patients to receive adequate palliative care.³⁹⁶ Minorities have also tended to receive poorer AIDS treatment: Only 48 percent of blacks receive medicines designed to slow the progress of AIDS, compared to 63 percent of whites; while 82 percent of whites receive effective treatments for preventing AIDS-related pneumonia, only 58 percent of blacks receive similar attention.³⁹⁷

In the events leading up to the consideration of the failed California voter referendum on euthanasia in 1992, euthanasia advocates turned to the American Bar Association ("ABA") for support. The ABA, however, ultimately recommended against endorsing a euthanasia right and did so specifically on the ground that

[t]he proposed right to choose aid-in-dying freely and without undue influence is illusory and, indeed, dangerous for the thousands of Americans who have no or inadequate access to health and long-term care services The lack of access to or the financial burdens of health care hardly permit voluntary choice for many. What may be voluntary in Beverly Hills is not likely to be voluntary in Watts. Our national health care problem should be our priority—not endorsement of euthanasia.³⁹⁸

The New York task force likewise recommended against legalization in part because of its likely effects on minority populations. The task force found that legalization would impose severe risks for "the poor, minorities, and those who are least educated and least empowered. . . . Officially sanctioning [euthanasia] might also provide an excuse for those wanting to spend less money and effort to treat severely and terminally ill patients, such as patients with Acquired Immune

395. See Charles S. Cleeland et al., *Pain and its Treatment in Outpatients with Metastatic Cancer*, 330 NEW ENG. J. MED. 592, 594 (1994).

396. See *id.*

397. See Richard D. Moore et al., *Racial Differences in the Use of Drug Therapy for HIV Disease in an Urban Community*, 330 NEW ENG. J. MED. 763 (1994).

398. John H. Pickering, *The Continuing Debate Over Active Euthanasia*, BIOETHICS BULLETIN (ABA), Summer 1994, at 1, 2 (quoting John Pickering, Memorandum to the ABA Commission on Legal Problems of the Elderly, Jan. 17, 1992).

Deficiency Syndrome."³⁹⁹ Even those task force members who deemed euthanasia justified in some instances conceded that continued criminalization would

curtail[] the autonomy of patients in a very small number of cases when assisted suicide is a compelling and justifiable response, [but would] . . . preserve[] the autonomy and well-being of many others. It [would] also prevent[] the widespread abuses that would be likely to occur if assisted suicide were legalized.⁴⁰⁰

The State of Michigan established a commission to study the assisted suicide issue after Dr. Kevorkian brought attention to the subject there. The commission was unable to achieve any majority-endorsed position, but those who concluded that euthanasia should not be legalized stressed the dangers of "social biases."⁴⁰¹ Though "proponents of assisted suicide would . . . point out that the criteria for allowing assisted suicide should be blind to the factors of age or disability," commission members argued that

[t]o suggest that legalizing assisted suicide will not continue to reinforce . . . stereotypes and prejudices against disabling constitutions is to ignore the practicalities of how, and for whom, assisted suicide would be applied. . . . Assisted suicide is truly *accommodated suicide*. It is the provision of accommodations that enable a person with disabilities to commit suicide. Assistance is given in committing suicide, even though assistance is not available to obtain the full range of needed supports. In essence, the state is willing to accommodate people with disabilities in dying, but not in living.⁴⁰²

In 1993, the British Government commissioned a Select Committee of the House of Lords to study assisted suicide; it too, ultimately recommended against legalization partially out of "concern that vulnerable people—the elderly, lonely, sick or distressed—would feel pressure, whether real or imagined, to request early death."⁴⁰³ The state surely possesses a strong

399. *Id.* at 125, 96 (internal citation omitted).

400. *New York Task Force, supra* note 10, at 141.

401. MICHIGAN COMMISSION ON DEATH & DYING, FINAL REPORT (June 8, 1994).

402. MICHIGAN COMMISSION ON DEATH & DYING, REPORT OPPOSING LEGALIZED ASSISTED SUICIDE 6-7 (Apr. 25, 1994).

403. 1 HOUSE OF LORDS REPORT, *supra* note 224, at 491 ("[W]e believe that the message which society sends to vulnerable and disadvantaged people should not,

interest in assuring *all* its citizens that they will never be killed—or counseled to accept death—in whole or in part because of their age, race, or economic status.

D. *Turning Killing Into a Public Process*

Permitting assisted suicide and euthanasia poses another sort of threat to minority populations: Legalization would require society's active participation in making comparative moral judgments about the value of different kinds of human lives. Unless we adopt the neutralist's position that assisted suicide and euthanasia should be open to *all* rational adults, an individual's request to die would not be honored without social ratification. Society would have to regulate which lives are worth living and which are not. Our publicly funded physicians and nurses would become instruments of killing as well as healing, and our publicly funded hospitals would host their activity. Our public medical and nursing schools would teach proper techniques. Killing would be transformed into a public process in which we would all be forced to participate at some level.

Requiring social acquiescence and participation in this process would impose harm on the members of our community who have fundamental moral objections to assisted suicide and euthanasia. Legalization would place many persons in the position abolitionists found themselves in antebellum America, or contemporary abortion and capital punishment opponents find themselves today—in deep distress at even passive participation in a regime which facilitates what they believe to be a severe wrong. The social division and potential unrest such discontent could bring is a “cost” no utilitarian calculus could ignore.

E. *The “Benefits” of Assisting Suicide and Euthanasia*

While ample grounds exist for concern about the costs associated with legalizing assistance in suicide or euthanasia, on the other side of the utilitarian balance it is unclear how frequently assisted suicide or euthanasia would be a “compelling and justifiable” medical response.⁴⁰⁴ The

however obliquely, encourage them to seek death, but should assure them of our care and support in life.”)

404. *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc).

terminally ill, the only group to whom the Ninth Circuit sought to extend right to assistance in suicide, account for just 1.4 percent of the U.S. population.⁴⁰⁵ They are, moreover, hardly overly inclined to self-killing, representing only about two to four percent of suicides in this country.⁴⁰⁶ As to those few terminally ill patients who do seek death, medical evidence suggests that many may act not as a result of (approved) rational deliberation, but rather because of mental illness.⁴⁰⁷ With modern palliative care techniques, it is additionally unclear how frequently pain-avoidance need be a reason for assisting suicide or euthanasia.

A 1988 study reveals that physician incompetence and the unavailability of palliative medicines in the Netherlands created many cases of "necessary" killings: more than 50 percent of Dutch cancer patients surveyed suffered treatable pain unnecessarily, and 56 percent of Dutch physician practitioners were inadequately trained in pain relief techniques.⁴⁰⁸ Another study conducted under the auspices of the U.S. Department of Health and Human Services revealed similar results in this country:

[I]n up to 90 percent of [cancer] patients[,] the pain can be controlled by relatively simple means. Nevertheless, undertreatment of cancer pain is common because of clinicians' inadequate knowledge of effective assessment and management practices, negative attitudes of patients and clinicians toward the use of drugs for the relief of pain, and a variety of problems related to reimbursement for effective pain management.⁴⁰⁹

The AMA likewise opposes euthanasia in part on the medical judgment that the technology of pain management has advanced to the point where most pain is now controllable; the success of the modern hospice movement illustrates the extent

405. See David Clark, "Rational" Suicide and People with Terminal Conditions or Disability, 8 ISSUES L. & MED. 147, 151-53 (1992).

406. See *id.*; see also *New York Task Force*, *supra* note 10, at 147 ("Even the firmest supporters of assisted suicide and euthanasia would acknowledge that only a relatively small percentage of patients in hospitals and nursing homes today would use the practices, if legal.").

407. See generally Clark, *supra* note 405.

408. See 1 HOUSE OF LORDS REPORT, *supra* note 224, at 67.

409. Ada Jacox et al., *New Clinical-Practice Guidelines for the Management of Pain in Patients with Cancer*, 330 NEW ENG. J. MED. 651, 651 (1994).

to which aggressive pain control and close attention to patient comfort and dignity can ease the transition to death.⁴¹⁰

Killing patients may also create perverse incentives. Euthanasia offers a cheaper social option than guaranteeing the care, attention, and pain medication required to afford the opportunity to die in comfort and without pain. Sanctioning killing as a valid medical response to patient pain would, by natural laws of economics, create disincentives to develop and disseminate pain suppressants that could prevent much unnecessary suffering and the "necessity" of killing many persons:

The difficulties in developing caring and creative means of responding to suffering discourage society as well as health care providers from greater efforts. A policy of active euthanasia can become another means of such avoidance. . . . I could not rid my mind of the images of care provided in our hard-pressed public hospitals and in many nursing homes, where compassionate professionals could easily regard a swift and painless death as the best alternative for a large number of patients.⁴¹¹

Contrary to claims by Ronald Dworkin, Glanville Williams, and others, an examination of the "costs" and "benefits" of allowing assisted suicide or euthanasia does not obviously lead to a conclusion that legalization represents the greatest possible solution for the greatest number of persons.

F. *The Utilitarian Miscalculation*

An even more fundamental problem remains in the utilitarian project. Utilitarians do not line up uniformly in favor of legalizing assisted suicide or euthanasia. Soon after Glanville Williams published *The Sanctity of Life* arguing that the costs and benefits associated with euthanasia favored recognizing a right, Yale Kamisar published an article arguing for the opposite conclusion, applying the same utilitarian methodology.⁴¹² Kamisar argued that Williams miscalibrated

410. See American Medical Association, *supra* note 263, at 2232.

411. Alexander M. Capron, *Euthanasia in the Netherlands: American Observations*, in 22 HASTINGS CTR. REP. 30, 32 (1992).

412. See Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 MINN. L. REV. 969 (1958).

his calculus, failing to account accurately for all the costs associated with legalization.

The significance of the Williams-Kamisar debate lies not so much in who performed the most accurate utilitarian calculus, but in the impossibility of their mutual undertaking. Even if one could identify *all* the costs and benefits associated with assisted suicide or euthanasia, on what rational scale could one objectively weigh them? Without reference to any moral conviction, how can one possibly compare, for instance, the interest the rational adult seeking death has in dying with the danger of mistakenly killing persons without their consent?

The problem facing *both* Williams and Kamisar is the absence of any pre-moral scale on which the utilitarian can weigh or compare such competing values.⁴¹³ Endeavoring to weigh the interest the rational adult has in choosing death against the interest the incompetent elderly widow has in avoiding being killed by a greedy nephew willing to "substitute" his judgment for hers is metaphysically impossible without reference to any moral rule or code. It is as senseless as comparing the virtues of apples to those of oranges, senseless

in the way that it is senseless to try to sum up the quantity of the size of this page, the quantity of the number six, and the quantity of the mass of this book.⁴¹⁴

Adopting a moral system or code does, however, furnish a scale on which to weigh whether or not society should continue to criminalize euthanasia and assisted suicide. Accepting the moral premises that one ought never harm basic goods intentionally and that human life is such a good, it follows that euthanasia should not be legalized, whatever the unfortunate side-effects may be for the rational adult who wishes to die.⁴¹⁵ Conversely, adopting the premise that the state may only act with neutral respect for all conceptions of the good life requires recognition of an unfettered right to consensual homicide. Adopting a moral code is thus akin to constructing a scale that calibrates values such that one *can* compare them. It provides a

413. See, e.g., RAZ, *supra* note 299, at 321-66; JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 112-18 (1991); John Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1 (1990).

414. FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 413, at 115.

415. See discussion *infra* Part VII.

methodology for ranking competing values and a framework for resolving conflicts between them.⁴¹⁶

Margaret Battin, a pro-euthanasia medical ethicist, appears to identify the incommensurability problem with utilitarian arguments against assisted suicide and euthanasia when she acknowledges that

the argument sets up a conflict. Either we ignore the welfare and abridge the rights of persons for whom euthanasia would clearly be morally permissible in order to protect those who would be the victims of corrupt euthanasia practices, or we ignore the potential victims in order to extend mercy and respect for autonomy to those who are the current victims of euthanasia prohibitions.⁴¹⁷

Though she seemingly identifies the incommensurability problem (*viz.*, that utilitarian reasoning merely “sets up a conflict” between competing goods), Battin claims she has identified a way out:

To protect those who might wrongly be killed or allowed to die might seem a stronger obligation than to satisfy the wishes of those who desire release from pain, analogous perhaps to the principle in law that “better ten guilty men go free than one be unjustly convicted.” However, the situation is not in fact analogous and does not favor protecting those who might be wrongly killed. To let ten guilty men go free in the interests of protecting one innocent man is not to impose harm on the ten guilty men. But to require the person who chooses to die to stay alive in order to protect those who might unwillingly be killed sometime in the future is to impose an extreme harm—intolerable suffering—on that person, which he or she must bear for the sake of others. Furthermore, since, as I have argued, the question of which is worse, suffering or death, is person-relative, we have no independent, objective basis for protecting the class of persons who might be killed at the expense of those who would suffer intolerable pain; perhaps our protecting ought to be done the other way around.⁴¹⁸

416. See FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 413, at 115. One can *adopt* a system of weights and measures that will *bring* the three kinds of quantity into a relation with each other . . . But the adoption of a set of commitments, by an individual or a society, is *nothing like* carrying out a calculus of commensurable goods.

Id.

417. BATTIN, *supra* note 370, at 119 (emphasis added).

418. *Id.*

In this latter passage, Battin intimates that the conflict between competing autonomy concerns *can* be resolved—and resolved in favor of allowing euthanasia.⁴¹⁹ But Battin's attempt to bypass the incommensurability only demonstrates the impossibility of the task.

Battin suggests that the "ten guilty men" maxim does not apply and, in fact, militates in favor of permitting euthanasia. She suggests that society's traditional willingness to protect the one innocent man even at the expense of letting ten guilty men go free is at least partly based on the fact that doing so imposes no "harm" on the guilty men. But the point of the maxim is not that we protect innocent human life only when it imposes no harm on the guilty, but that society protects the innocent individual life even when it means accepting harms to the guilty men's potential future innocent victims and to the innocent victims of those emboldened by the state's leniency. Indeed, the maxim suggests a categorical moral rule against intentionally harming an innocent human person, even if the side-effects (placing ten guilty men in prison) are desirable. The maxim is thus hardly any pre-moral utilitarian calculator; it apparently affirms a school of moral theory one might associate with Aristotle or Aquinas. Any attempt to apply the maxim in the consensual homicide context would result in the conclusion that it is wrong to risk killing one innocent person even if it means accepting the fact that other innocent persons may be forced to endure unwanted pain and suffering.

Having recognized the incommensurability problem, Battin fails to solve it. She supplies no clear non-moral equation for weighing the costs and benefits of assisted suicide or euthanasia and instead offers a moral rule that would actually seem to foreclose her position on legalization.

G. *A Double-Effect Defense?*

Utilitarians seeking a way around the incommensurability problem sometimes argue that the disadvantages associated with permitting consensual homicide may be discounted because they are not *intentional*. In permitting consensual homicide, the objective is to permit free choice; no one intends

419. *Id.* (suggesting that "perhaps our protecting ought to be done the other way around").

deaths caused by abuse and mistake. At most, one accepts them only as foreseeable but unintended side effects.

For example, Joel Feinberg argues that one should "consider reasonable mistakes in a legalized voluntary euthanasia scheme to be 'the inevitable by-products' of efforts to deliver human beings, at their own requests, from intolerable suffering, or from elaborate and expensive prolongations of a body's functioning in the permanent absence of any person to animate that body[.]"⁴²⁰ Like the supposed neutralist seeking to justify a right to assistance in suicide limited to the terminally ill by resorting to utilitarian arguments,⁴²¹ however, Feinberg here must abandon his principled utilitarian views in an attempt to save a particular result. To suggest that intended effects are more important than unintended ones, Feinberg must endorse a controversial premise of moral reasoning that allows him to *rank* or *score* different kinds of consequences on a common scale. He must abandon the utilitarian promise of purely objective pre-moral calculation leading to the maximization of overall social good and admit the need to adopt a subjective moral code that allows him to compare and draw conclusions about different kinds of consequences.⁴²²

VII. AN ARGUMENT FOR RESPECTING LIFE AS A SACROSANCT GOOD

This Article has considered arguments for assisting suicide and euthanasia based on history, fairness, neutrality, the harm principle, and utilitarianism. None of these arguments provides a principled basis for a right limited to the terminally ill. The failure of these arguments to supply a persuasive basis for an assisted suicide or euthanasia right confined to the terminally ill suggests that a fundamental problem exists in the effort. It also suggests the difficulty of attempting to resolve an inherently moral question on non-moral grounds such as utilitarianism, which seeks to maximize some pre-moral overall

420. JOEL FEINBERG, FREEDOM AND FULFILLMENT 273-74 (1992).

421. See *supra* notes 348-49 and accompanying text (discussing Dworkin).

422. Moreover, if intended consequences are more morally significant than unintended consequences, Feinberg owes us an explanation why a regime that incidentally kills people in order to permit freely chosen deaths is preferable to one that incidentally forbids freely chosen deaths in order to prevent accidental or intentionally abusive killings.

good, or autonomy theory, which seeks to defend the value of choosing often without reference to the value of what is chosen.

This Part argues that a persuasive argument against *any* form of assisted suicide or euthanasia has been largely overlooked in contemporary debate. This moral (and legal) argument does not claim to resolve end-of-life questions objectively, but it concedes that reference to a necessarily subjective conception of right and wrong is required. It is an argument concerning the sanctity of human life.

Under this view, the intentional taking of human life by private persons is always wrong. Publicly authorized forms of killing—in war or in the criminal justice system—fall in a separate category.⁴²³ Some adherents to the sanctity-of-life view argue that war can be waged and capital punishment can be practiced consistently with the norm against private intentional killing; others disagree.⁴²⁴ But, inherent in *any* version of the sanctity-of-life position is an exceptionless norm against the intentional taking of human life by private persons.⁴²⁵ This view seeks to establish both an absolute rule against intentionally taking innocent human life and reasons “why one should not kill an innocent person, even if that killing should violate no norm of fairness or, for that matter, any other relevant moral norm,” like autonomy or utility.⁴²⁶

A. *Life as a Basic Good*

The sanctity-of-life position starts with the supposition that there are certain irreducible and categorical moral goods and evils. The existence of such moral absolutes has been

423. See, e.g., Joseph M. Boyle, Jr., *Sanctity of Life and Suicide: Tensions and Developments Within Common Morality*, in SUICIDE AND EUTHANASIA 221, 221 (Baruch A. Brody ed., 1989); THOMAS AQUINAS, *SUMMA THEOLOGICA* II-II 197-208 (Fathers of the English Dominican Province trans., 1918) arts. 2-6 (arguing that the criminal loses his human dignity by his criminal activity).

424. See Boyle, *supra* note 423, at 221. But see JOHN FINNIS ET AL., *NUCLEAR DETERRENCE, MORALITY AND REALISM* (1987).

425. Abortion is ruled out by such a principle if, but only if, the fetus is considered a form of human life. It is precisely this question over which the Supreme Court in *Roe* divided. See *supra* notes 287-89 and accompanying text. In fact, *Roe* supports the sanctity-of-life position in its candid admission that if the fetus were considered a human life, the Court could not have reached the result it did because no constitutional basis exists for preferring the mother's liberty over the child's life. See *id.*

426. Boyle, *supra* note 423, at 221.

suggested by Aristotle,⁴²⁷ argued by Aquinas,⁴²⁸ and defended by contemporary natural law thinkers.⁴²⁹ A categorical moral good is one understood as intrinsically worthwhile. It is an end that is a *reason*, in and of itself, for action and choice and decision. Reference to some prior premises need not—and cannot—deduce its value; instead, its truth is self-evident (*per se nota*, to Aquinas).⁴³⁰ Society's understanding of basic moral goods comes not from logical constructs, but from practical reasoning and experience. Neither are basic human goods Platonic forms that are unrealizable in daily life. They are reasoned practically from human experience.⁴³¹ Such goods and evils are fundamental aspects of human nature and fulfillment. No logical truth about what "is" can be used to derive these collection of moral "oughts."⁴³²

Likewise, as *basic* reasons for action, basic goods are not instrumental or merely useful for the purpose of achieving some other end. By definition, these ends in and of themselves are fulfilling in their own right. In claiming something as a basic good, one claims that an indefinite number of persons can participate in this inherent good in an indefinite number of

427. See, e.g., ARISTOTLE, NICHOMACHEAN ETHICS, *supra* note 137, at 44.

Not every action or emotion admits of a mean. There are some actions and emotions whose very names connote baseness, e.g., spite, shamelessness, envy; and among actions, adultery, theft, murder. . . . It is, therefore, impossible ever to do right in performing them: to perform them is always to do wrong. In cases of this sort, let us say adultery, rightness and wrongness do not depend on committing it with the right woman at the right time and in the right manner, but the mere fact of committing such action at all is to do wrong.

Id.

428. See *supra* note 163, at 48-50.

429. See, e.g., JOHN FINNIS, MORAL ABSOLUTES: TRADITION, REVISION AND TRUTH 1-30 (1988) [hereinafter MORAL ABSOLUTES]; FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 413, at ch. 5; Robert P. George, *Recent Criticisms of Natural Law Theory*, 55 U. CHI. L. REV. 1371 (1988) [hereinafter *Recent Criticisms*]; Robert P. George, *Self-Evident Practical Principles and Rationally Motivated Action: A Reply to Michael Perry*, 64 TUL. L. REV. 887 (1990).

430. See AQUINAS, *supra* note 161, at 48-50. To say that a good is self-evident is not to say that everyone will recognize it as such. The Declaration of Independence holds it to be self-evident that United States citizens have a right to pursue happiness; not every society shares this position. See George, *Recent Criticisms*, *supra* note 429, at 1410-12.

431. How basic goods are derived from practical reasoning is the subject of much attention by contemporary natural law theorists. See, e.g., FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 413, at ch. 5; George, *Recent Criticisms*, *supra* note 429, at 1371.

432. See FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 413, at 36-42.

valuable ways, many of which may be beyond what is presently imaginable.⁴³³

Human life qualifies as such a basic value. Its status as such is suggested by the fact that people everyday and in countless ways do something to protect human life (one's own or another's) without thinking about any good beyond life itself. The recognitions of this basic good

are as various as the crafty struggle and prayer of a man overboard seeking to stay afloat until his ship turns back for him; the teamwork of surgeons and the whole network of supporting staff, ancillary services, medical schools, etc.; road safety laws and programmes; famine relief expeditions; farming and rearing and fishing; food marketing; the resuscitation of suicides; watching out as one steps off the kerb.⁴³⁴

The fundamental and irreducible value of human life is further evidenced by the fact that it is essential to well-being. To have a good and fulfilled life, one must have life. Human beings are not merely rational beings, but corporeal bodies. Their fulfillment depends on their having physical lives. Life is *intrinsic* to human fulfillment.⁴³⁵

Naturally, these considerations only *indicate* that life qualifies as a basic human good; fundamental premises and principles are not capable of syllogistic demonstration. Still, some objections to life's status as a basic good can be convincingly addressed. One might object that human life is not an intrinsically valuable or categorical good, but merely an *instrumental* one valuable only to the extent that it permits us to enjoy other goods, such as friendship and family. Most of us, for instance, would see little inherent good in a life spent in a coma. What is valuable to people about living is not the chance to exist, but the opportunity existence brings for pursuing other objectives and ends—family, friends, play, and work.

This objection, however, founders on the fact that family, friends, and medical workers often choose to provide years of loving care to persons who exist only physically, comatose or semicomatose, even linked to a respirator and feeding tubes.

433. See George, *Recent Criticisms*, *supra* note 429, at 1412-14.

434. FINNIS, *NATURAL LAW AND NATURAL RIGHTS*, *supra* note 413, at 86.

435. See AQUINAS, *supra* note 161, at 48-50 (arguing that humans have "natural inclination" to live and reproduce shared in common with all living things).

Members of religious orders and hospice organizations choose to devote their entire adult lives caring for such persons precisely because they *are* human persons, not because doing so instrumentally advances some other hidden objective. Even though all persons would not make a similar choice, "the fact that some people have made [such a choice] gives evidence that life is a basic human good—one which offers for choice an intelligible ground which need have no ulterior"⁴³⁶ motive.

Others might object that if human life is a basic good, people would want to remain alive always and under all circumstances. However, to classify something as a basic good does not mean that one always chooses it over other options. Multiple good ways of life compete for human attention, and people must often favor one at the expense of others. Indeed, choice is the inevitable consequence of the fact that people do not live like the Man in the Pit, but in a world where many and varied "good lives" exist. Thus, the soldier who accepts an assignment leading to certain death does not deny the basic goodness of human life; such sacrificial choices only affirm the existence of other worthwhile ends. Indeed, "it is the diversity of *rationaly* appealing human goods which makes free choice both possible and frequently necessary—the choice between rationally appealing and incompatible alternative options, such that nothing but the choosing itself settles which option is chosen and pursued."⁴³⁷

B. *Respecting Human Life as a Basic Good*

This point leads back to the moral distinction between intended and unintended actions, drawn since the time of Aristotle and Aquinas and endorsed even by self-described consequentialists like Feinberg. As discussed earlier, we cannot always control the unintentional side-effects of our actions.⁴³⁸ In choosing to take a family holiday this year, an employee knows it will mean that co-workers at the office will

436. Boyle, *supra* note 423, at 238-39.

437. Finnis, *Natural Law and Legal Reasoning*, *supra* note 413, at 3. This is not to say that such choice is or can be guided by some utilitarian calculus. To assert that reason can aid and guide choice between competing incommensurable goods is not to claim that incommensurable goods can be compared, weighed, and unqualifiedly resolved—*viz.*, that reason can reach some uniquely correct decision.

438. See *supra* Parts III.B-C & IV.C.

have to work overtime. In choosing to invade and liberate Europe, Eisenhower knew it meant certain death for thousands of young men. In both cases, the *intended* action is morally upright (spending time with family; freeing Europe), but both entail negative, if unwanted, side-effects. Living in a world with many diverse and good ways of life, one simply cannot avoid making good choices that exclude or harm other goods.

By contrast, one *can* always refrain from doing intentional harm. Purposeful actions are entirely within a person's ability to control. To intend freely and deliberately to do wrong, moreover, necessarily reveals something about character and commitments that no unintended side effect ever could.⁴³⁹ At an irreducible minimum, therefore, to respect human life means avoiding intentionally doing harm to it, even if we cannot always avoid actions that have the unintended side-effect of harming human life. Applying that rule here eliminates assisted suicide and euthanasia—acts which, by definition, involve an intentional assault against the basic good of life.

The alternative to an absolute rule against private intentional killing, moreover, is troubling territory. Once *some* intentional killings become acceptable, society becomes enmeshed in making moral decisions about which ones it deems permissible. In the assisted suicide and euthanasia context, unless we unleash the full-throttle neutralist and harm principle right open to all adults, society is forced into a debate over the relative value of different kinds of human life. Judging whose lives may and may not be taken in turn depends upon assessments of quality of life—whether one is young and fit or old and sick. Different human lives are thus left with different moral and legal statuses based on their perceived “quality of life.”

Recognizing a rule against the intentional taking of human life, however, does not mean that autonomy and choice count for nothing. Indeed, there remains ample room for refusing or discontinuing medical treatment—even life-sustaining treatment. Patient often reject treatment because they are unwilling to impose further expense on their families, are tired

439. See *id.*; see also THOMAS AQUINAS, *SUMMA THEOLOGICA* II-II 70-72 (Fathers of the English Dominican Republic trans., 1917).

of invasive tubes, or simply wish to leave the hospital and go home. None of these everyday decisions involves an *intent* to die, even when death is foreseen. And medical professionals can respect and give effect to such requests, even when they consider the requests unreasonable or wrong, without *intending* to kill. Indeed, these free and autonomous decisions deserve respect and they are in no way inconsistent with the view that human life is sacrosanct.⁴⁴⁰

C. *The Common Law's Respect for the Sanctity of Life*

The common law reflects and embraces the sanctity-of-life position by proscribing all intentional killings. While unintentional homicides sometimes are excused or punished lightly, intentional killings are treated as always wrong. No defense is accepted. The Court in *Cruzan* professed substantial deference to the common law when deciding whether to respect decisions to terminate life-support.⁴⁴¹ A similar deference to the common law by courts considering assisted suicide and euthanasia would lead to the rejection of those claimed rights.

Although opponents of the sanctity-of-life position might point to the insanity defense as evidence that intentional killings sometimes are permitted, the defense only reinforces the centrality of the element of intent. To prevail on an insanity plea, the defendant must show that he either did not intend the wrongful act or did not appreciate its wrongfulness.⁴⁴²

440. See John Finnis, *A Philosophical Case Against Euthanasia*, in EUTHANASIA EXAMINED: ETHICAL, CLINICAL, AND LEGAL PERSPECTIVES 23, 33 (John Keown ed., 1995) [hereinafter *Philosophical Case*].

Where one does not know that the requests are suicidal in intent, one can rightly, as a health-care professional or someone responsible for the care of people, give full effect to requests to withhold specified treatments or indeed any and all treatments, even when one considers the requests misguided and regrettable. For one is entitled and indeed ought to honour these people's autonomy, and can reasonably accept their death as a *side-effect* of doing so.

Id. (emphasis added).

441. See generally *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (discussing common law right to refuse treatment).

442. See, e.g., MODEL PENAL CODE § 4.01 (Official Draft 1962) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law."); *M'Naughten's Case*, 8 Eng. Rep. 718 (1843):

[I]t must be clearly proved that, at the time of the committing of the act,

Opponents might also attempt to point to necessity doctrine. But necessity has been rejected at common law as an excuse to murder. Indeed, in *Regina v. Dudley and Stephens*, where the two shipwrecked men ate the cabin boy, the court rejected the necessity doctrine in part because of the moral briar patch that would result if we opened the door to some intentional acts of homicide:

Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen.⁴⁴³

Similarly, in *United States v. Holmes*,⁴⁴⁴ the court rejected the claim of necessity by a ship's first mate who had ordered eighteen passengers thrown overboard in a grossly overcrowded lifeboat. The court ruled that if decisions of killing had to be made, they should have been made by lot because "[i]n no other way than this or some like way are those having equal rights put on equal footing, and in no other way is it possible to guard against partiality and oppression, violence and conflict."⁴⁴⁵ While sentencing defendants in cases like *Dudley* and *Holmes* is a difficult task deserving of some leniency, the courts in both of these cases refused to allow sentencing concerns to sway determinations of guilt and innocence.⁴⁴⁶

In *Law and Literature*, Benjamin Cardozo expressly defended *Holmes*: "Where two or more are overtaken by a common disaster, there is no right on the part of one to save the lives of some by the killing of another. There is no rule of human

the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Id.

443. 14 Q.B.D. 273 (1884) (Eng.).

444. 26 F. Cas. 360 (C.C.E.D. Pa. 1842).

445. *Id.* at 370.

446. In *Dudley and Stephens*, the Court imposed a death sentence that the Crown later commuted to six months' imprisonment. *Holmes* initially was sentenced to prison for six months, though the punishment was remitted.

jettison."⁴⁴⁷ Numerous state statutes have codified this teaching.⁴⁴⁸

Despite caselaw and statutes to the contrary, one commentary in the Model Penal Code appears to endorse application of necessity doctrine to acts of intentional homicide.⁴⁴⁹ While "recognizing that the sanctity of life has a supreme place in the hierarchy of values," the Model Penal Code drafters argue for necessity doctrine by citing the example of the person who "makes a breach in a dike, knowing that this will inundate a farm [and kill the inhabitants of the farmhouse], but taking the only course available to save a whole town."⁴⁵⁰

Far from demonstrating that necessity doctrine should be incorporated into our law of homicide, this example does just the opposite. The dike-breaker is no more a murderer than General Eisenhower or those who help persons remove unwanted medical care. The dike-breaker *intends* only to save the town, and in no way wishes to do any harm to (let alone kill) the farmhouse inhabitants. He would be happy to save the town *and* the farmhouse inhabitants. Neither he nor Eisenhower (nor persons removing unwanted life-support) need resort to claims of necessity to defend their morally and legally upright actions.

The Model Penal Code also cites the example of a mountaineer, "roped to a companion who has fallen over a precipice, who holds on as long as possible but eventually cuts the rope."⁴⁵¹ But again, this is hardly an *intentional* act of homicide. The mountaineer does not wish to kill as either an end or as a means, but only to lighten the weight on the rope to save himself. Unlike Dr. Kevorkian, he would be delighted if

447. BENJAMIN N. CARDOZO, LAW AND LITERATURE 113 (1931).

448. See, e.g., WIS. STAT. ANN. § 939.47 (West 1996).

Pressure of natural physical forces which causes the actor reasonably to believe that his or her act is the only means of preventing imminent public disaster, or imminent death or great bodily harm to the actor or another and which causes him or her so to act, is a defense to a prosecution for any crime based on that act, except that if the prosecution is for first-degree intentional homicide the degree of the crime is reduced to second-degree intentional homicide.

Id.; MO. ANN. STAT. § 563.026 (West 1999).

449. See MODEL PENAL CODE, cmt. to § 3.02, at 14-15.

450. *Id.* at 14-15.

451. *Id.* at 15.

his companion managed to fall to safety. His act of self-defense is in no way murder, and resort to necessity doctrine is hardly required to justify it.⁴⁵²

Turning more specifically to the assisted suicide and euthanasia, the common law has repeatedly refused to be drawn into differentiating between persons based upon the quality of their lives, treating all such intentional acts against human life as wrongful. For example, in *Blackburn v. State of Ohio*⁴⁵³ the Ohio Supreme Court faced the remaining survivor of a double-suicide pact. After providing Mary Jane Lovell poisoned port-wine, John Blackburn apparently did not drink his own glass. He was later tried for second-degree murder and attempted to defend himself on the grounds that life had become a burden to Ms. Lovell, who wished to die. The court rejected the defense, expressly holding that

[t]he lives of all are under the protection of the law, and under that protection to their last moment. The life of those to whom life has become a burden—of those who are hopelessly diseased or fatally wounded—nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live.⁴⁵⁴

In *People v. Roberts*,⁴⁵⁵ the Michigan Supreme Court was confronted by a husband who, at his wife's request, had provided her with poison that she used to take her own life. At the time, she was terminally ill with multiple sclerosis. The Court affirmed the husband's conviction for murder and held that the wife's medical condition and suffering in no way suspended the ordinary operation of murder doctrine or otherwise excused the act. Contemporary commentators endorsed this reasoning, positing that "this decision is undoubtedly sound. The law has too high a regard for human life to suffer it be lightly tampered with. It protects the lives of those to whom life is a burden as well as those in the full tide of life's enjoyment."⁴⁵⁶ Likewise, nothing in the Model Penal

452. See *supra* Part III.C (discussing Aquinas's theory of self-defense).

453. 23 Ohio St. 146 (Ohio 1872).

454. *Id.* at 163.

455. 178 N.W. 690 (1920).

456. Recent Decisions, 7 VA. L. REV. 147, 148 (1920); see also Comment, 30 YALE L.J. 408, 412 (1921).

Code or state statutes supplanting the common law offers even the faintest hint that the quality-of-life of the decedent offers any defense to an assisted suicide or euthanasia charge.⁴⁵⁷

D. *Toward a Consistent End-of-Life Ethic*

Respect for the sanctity of life has implications for end-of-life issues beyond assisting suicide and euthanasia, including removal of life support, provision of palliative medical care, and treatment of incompetent patients. In each of these arenas, a consistent rule requiring persons to refrain from intentionally killing others can, and should be applied. Indeed, the evolving law in these areas may be understood as a groping and fitful movement toward a consistent end-of-life ethic centered around respect for the sanctity-of-life.

Right to Refuse. In the life support arena, this Article has shown that courts consistently have permitted patients to discontinue unwanted treatment where their intentions are not to die, but to pursue some other end.⁴⁵⁸ Courts recognizing the right to refuse have taken pains to stress that no intention to die had been formed by the patient and no intention to kill had been formed by the physician. While several states have passed statutes codifying the right to refuse without particular reference to patient or physician intent, it would be inconsistent with the sanctity-of-life principle to interpret these laws as protecting refusals where an intent to die (or kill) is present. As previously discussed, it would also be inconsistent with the common law right to refuse these statutes were intended to codify. Furthermore, it would create incoherence with other state statutes banning the assistance of suicide and privileging efforts to detain persons attempting suicide. At the same time, a right to refuse limited to instances where death is foreseeable but unintended would leave ample room for patients to refuse the often hyper-technological burdensome end-of-life care found in modern hospital environments.

457. "Life itself is a terminal condition A terminal illness can vary from a sickness causing death in days or weeks to cancer [which can be] 'very slow' in its deadly impact, to a heart condition which . . . can be relieved by a transplant, to AIDS, which . . . is fatal once contracted." *Compassion in Dying v. Washington*, 49 F.3d 586, 593 (1995).

458. *See supra* Part IV.C-D.

Palliative Care. Justice Stevens suggested that it is an ethically acceptable medical practice to kill an ailing patient intentionally by prescribing an overdose of pain suppressants.⁴⁵⁹ If true, such a position would be antithetical to the sanctity-of-life perspective. As it turns out, Justice Stevens is simply wrong. The AMA has endorsed the provision of palliative care when intended to relieve pain, even when high dosages necessary to relieve pain might foreseeably result in death.⁴⁶⁰ But it has also expressly rejected the use of palliative care with the intent to kill, holding that “[w]here a physician prescribes treatment for the purpose of causing death, the physician has exceeded the bounds of ethical medical practice, regardless of what other purpose the physician may ‘point to.’”⁴⁶¹

The AMA’s view of palliative care, thus, precisely tracks the sanctity-of-life position’s concern with human intention. Indeed, the AMA applies the same sanctity-of-life distinction between intended and unintended acts against human life in all medical care:

Analytically and medically, acceptance of palliative treatment that may result in death is no different from the knowing acceptance of the risk of death that accompanies many medical treatments, such as the risk of death attendant on a quadruple bypass. If the patient’s death results from the surgery, the surgeon is not responsible for the death, nor does he intend it, even though it technically occurred at his hands. The indicated treatment—intended for the patient’s well-being and undertaken with the patient’s informed consent—simply was not successful.⁴⁶²

Incompetent Persons. Where incompetent patients have left no instructions regarding their end-of-life care and designated no family member to serve as their surrogate, or where patients were never capable of doing deciding for themselves (e.g., infants), courts have strained to give meaning to their right to refuse by appointing guardians to “substitute their judgment” for the patient’s, or by themselves openly weighing the patient’s “best interests.”

459. See *Washington v. Glucksberg*, 521 U.S. 702, 750 (1997).

460. See *American Medical Association*, *supra* note 263, at 2232.

461. Motion for Leave to File Brief, *supra* note 264, at 15.

462. Brief of the Attorney General at n.9, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (No. 96-110), reprinted in 12 *ISSUES L. & MED.* 275, 281 (1996).

Whether performed by a guardian or a court, the exercise of the right to refuse in such circumstances can and should be judged by the same standards as competent patient refusals and the provision of palliative care. Those who have a duty to care for someone else should not be permitted to exercise that duty in a way *intended* to bring about death. This does not mean that all conceivable medical treatment must be provided. The ordinary purpose of medical treatment is to restore a patient to health. That goal is simply unattainable for the permanently "vegetative" patient. Thus, one can easily reject elaborate medical procedures on the grounds that the cost and burdens associated with the treatment is too much for too little restorative gain. Nothing in a decision to reject a lung transplant or open-heart surgery need involve an intent to kill or a wish to see the incompetent patient die.

The question of intent does, however, come more sharply into focus when inexpensive, non-burdensome care is at issue. Rejection of such care certainly need not always involve an intent to kill. For instance, taking an elderly loved-one home from the hospital to be cared for by family rather than to be attached to intravenous drips in an isolating ward often emanates from concerns for family and loved ones. But, denying incompetent persons basic care can also stem from more nefarious intentions and callous disregard:

[T]o desist from providing at least food and basic hygiene to invalids whose deaths are not imminent and to whom the process involved are no significant burden, seems to be either (1) to intend and bring about their death as a means, e.g., to save the other costs involved in their continued existence, or (2) to make a choice (however hidden by benign sentiments and palliative accompaniments) to cease providing care for them. And in an affluent society—unlike in a society, e.g., after a nuclear attack, where attending to the needs of the able-bodied might reasonably be preferred [without embracing an intent to kill]—the latter is willy nilly a choice to deny the personhood of these invalids by breaking off human solidarity with them at its root.⁴⁶³

Accordingly, guardians for incompetent persons choosing to reject basic care like food, water, and nursing care should have

463. John Finnis, *Bland: Crossing the Rubicon?*, 109 L. QUART. REV. 329 (1993); see also Finnis, *Philosophical Case*, *supra* note 440, at 33.

some demonstrable form of authority and some real accountability to ensure against acts of intentional homicide—be it via a living-will or a court-appointed commission. This is, however, an underdeveloped area of law that deserves attention. The law should authorize no one to have the power of death over another person without some safeguard that the power is exercised within the limits of any assigned authority and within the limit of law outlawing intentional killing. Nor does this matter simply involve fiduciaries acting *ultra vires*, but rather, it concerns life and death.

VIII. CONCLUSION

Far from resolving the constitutional status of suicide and euthanasia, the Supreme Court's decisions in *Glucksberg* and *Quill* essentially deferred the question of assisted suicide and euthanasia for another day. The Court upheld laws banning assisted suicide as facially valid, but several justices reserved judgment on the constitutionality of such laws as applied to terminally ill adults who choose death. The Court's decisions, as well as its language encouraging state legislatures to experiment in this area, raise a number of questions for future courts and lawmakers.

First, they raise the question whether historical precedent exists to support either a constitutional right to, or legalization of, assisting suicide and euthanasia. Although ancient Rome offers some precedent for assisted suicide, few today would seriously wish to emulate the practices it sometimes tolerated. Looking to English and American common law history, no meaningful historical antecedent supports an assisted suicide or euthanasia right, despite contrary arguments by Judge Reinhardt and others stemming from the "decriminalization" of suicide in the nineteenth century.

Second, the Court's decision and Justice Stevens's strenuous contrary opinion raise the question whether principles of equal treatment and fairness require toleration of assisted suicide and euthanasia since we recognize a right to refuse life-sustaining medical treatment. Attempts to distinguish between the practices on causation and act-omission grounds prove unsuccessful, but a meaningful moral-legal distinction exists based on intent: the right to refuse need not involve any

intention to die or kill, whereas the supposed right to assisted suicide and euthanasia always does.

Third, the Article explored whether *Casey* and *Cruzan's* language about the importance of choice and autonomy command legalization. As a matter of constitutional doctrine, it found that neither mandates a right to assisted suicide or euthanasia. As a matter of logic, it found that any autonomy right grounded in neutralist or harm principle theory would result in a vastly overbroad and unappealing right.

Fourth, the Article considered whether utilitarianism provides a basis for legalization or future court action. Justice O'Connor expressed open curiosity whether experimentation would reveal that legalization "benefits" more persons than it harmed. The Article found, however, that given the existing evidence, the utilitarian calculus does not clearly weigh in favor of legalization and the project of attempting to compare incommensurate goods (the liberty to kill oneself versus the lives of persons who would be killed as a result of abuse and mistake) is analytically unsound.

Finally, the Article argued that courts and legislators should consider a new perspective grounded in the recognition of the sanctity of human life. Under this perspective, private intentional acts of homicide are always wrong. Persuasive moral reasoning and common law experience support this rule. According to such a rule, assisted suicide and euthanasia plainly would not be permitted. The sanctity-of-life view also has implications for the removal of life-sustaining treatment, the use of palliative care, and the treatment of incompetent persons. All these end-of-life decisions should be treated consistently, and the developing common law in these areas is largely coming to reflect and embrace the sanctity-of-life position endorsed here.