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**The Scope of the  
Fourteenth Amendment  
Liberty Interest: Does the  
Constitution Encompass a  
Right to Define Oneself Out  
of Existence? An Exchange  
of Views with john a.  
powell, Legal Director,  
American Civil Liberties  
Union**

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[W]e must start from scratch and think every problem through from its very premises to its last implications.”<sup>1</sup>

**Introduction: The Need to “Unpack”  
the Debate over Euthanasia and Assisted Suicide**

There are few areas in the law so fraught with euphemism and doublespeak as discussion of the so-called right to die. This is not a happy situation for any number of reasons. Perhaps the most important of these is the need for candor when the topic for discussion is the deregulation of euthanasia and assisted suicide. This exchange of views provides a welcome

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<sup>1</sup>Joseph O'Meara, *Forward*, 1 NAT'L. L. FORUM 12 (1956).

opportunity for a candid discussion. Let me begin by noting the points on which John Powell [sic] and I agree.

We share the view that the advancement and protection of individual liberty, human dignity, and the common good require robust and open debate on important issues, careful attention to detail in the drafting of law and public policy, and active oversight of the interpretation and enforcement of the law. Both of us accept the proposition that, subject only to limitations not relevant here,<sup>2</sup> a competent adult is legally free to accept or reject any medical treatment offered, no matter how “beneficial” it may be to that person in the long run. We also agree that, while the provision of “useless” or “excessive” treatment is not required by either law or ethics, reaching agreement on a common definition of the terms *useless*, *excessive*, and *treatment* raises significant legal and ethical questions that are beyond the scope of this particular discussion.<sup>3</sup>

Agreement on ultimate goals, however, is rarely the most important component of a political or legal dispute. In most cases it is the initial premise—the manner in which “the problem” is defined at the outset—that determines the nature of the arguments. When viewed from this perspective, our disagreement on the role of law at the end of life is narrow but significant. We start at opposite ends of the legal spectrum.

Mr. Powell and others who advocate legal recognition of a right to die begin their argument with a presumption that there is an unenumerated civil right to die, and that this right is part of the “liberty” and “privacy” protected by the due process clause of the fourteenth amendment.<sup>4</sup> Given that premise, they argue that individuals not only have the “right” to control the timing and manner of their own deaths, but also that, if the right asserted is to be meaningful for those who are either incapable or unwilling to die by their own hand, they must be free to seek “assistance in dying” from persons who are willing either to supply the means or take whatever action is necessary to cause death.

There are both practical and theoretical problems with this formulation. The practical problem is the easier to explain. Whereas John Powell simply assumes that the right to die is a fundamental right, the

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<sup>2</sup>There is a limited number of instances where individual obligation to the community at large (e.g., public health) may require the subordination of an individual's right to refuse medical treatment. Compare *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) with *Washington v. Harper*, 494 U.S. 210 (1990). Discussion of that point is beyond the scope of this article. So too is a discussion of the moral culpability of actions and omissions attributable to the decisions of competent adults.

<sup>3</sup>See, e.g., Allen J. Bennett, *When Is Medical Treatment “Futile”?* 9 ISSUES IN LAW & MED. 35 (1993).

<sup>4</sup>U.S. CONST. amend. XIV.

United States Supreme Court has yet to accept the proposition that the right to die as elaborated by Mr. Powell is even a constitutionally protected "liberty interest." Writing for the Court in *Cruzan v. Director, Missouri Department of Health*,<sup>5</sup> Chief Justice William Rehnquist limited the scope of the decision to one question: whether a state may require that the wishes of an incompetent patient respecting decisions to withhold or withdraw treatment must be proved by "clear and convincing" evidence. Holding that such a requirement is permissible,<sup>6</sup> the Chief Justice wrote:

This is the first case in which we have been squarely presented with the issue of whether the United States Constitution grants what is in common parlance referred to as a 'right to die.' We follow the judicious counsel of our decision in *Twin City Bank v. Nebeker*, [citation omitted], where we said that in deciding 'a question of such magnitude and importance . . . it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject.'<sup>7</sup>

The language of the opinion is carefully crafted but has been read by advocates on both sides of the right to die issue as supportive of their positions. This is understandable. Though the Court did not reject the notion that an individual *may* have a right to refuse medical treatment, it did not embrace the proposition either:

Many authoritative sources presume that the [*Cruzan*] opinion does recognize a constitutionally protected liberty interest in a competent person to refuse unwanted medical treatment. Indeed, the syllabus prepared for the Court says just that, and the case was hailed by the *New York Times* as the first to recognize a right to die. On the other hand, the Chief Justice's language does not support such a conclusion. While the majority agrees that '[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment *may* be inferred from our prior decisions,' (emphasis added) the Court never makes the inference itself. In fact, the opinion states explicitly that '*for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.*'<sup>8</sup>

Those limitations, read together with the Court's explicit holding that the right to refuse medical treatment is *not* grounded in the concept of privacy but "is more properly analyzed *in terms of* a Fourteenth

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<sup>5</sup>497 U.S. 261 (1990).

<sup>6</sup>*Id.* at 280.

<sup>7</sup>*Id.* at 277-78.

<sup>8</sup>BARRY R. FURROW ET AL., *BIOETHICS: HEALTH CARE LAW AND ETHICS* 230-31 (1991).

Amendment liberty interest,”<sup>9</sup> make it clear that whatever interest an individual has in controlling the nature and timing of medical care must be balanced against other important social concerns. In the words of the Court: “[D]etermining that a person has a ‘liberty interest’ under the Due Process Clause does not end the inquiry; ‘whether respondent’s constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.’”<sup>10</sup> This is not an endorsement of a generalized right to die.

The constitutional argument that lies at the foundation of Mr. Powell’s argument has thus been heard—and avoided by a majority of the Court. Unless a generalized *right to die* (as opposed to the universally accepted notion of the right to refuse medical treatment) can be established in the case law (which is doubtful), it is impossible to sustain the argument that the fourteenth amendment concepts of liberty necessarily include both the right to commit suicide and the right to receive “aid in dying.” And without these “rights,” the government need not bear the burden of proving the precise and “compelling” nature of whatever legitimate interests it might have in punishing or otherwise impeding the actions of those who (like Dr. Jack Kevorkian) would offer such “assistance” to consenting adults.

But I do not rest my argument on the practical ground that the Court has not accepted the generalized right to die. The Court’s views on such issues may change over time. Rather, my argument aims at the heart of the contention that personal autonomy and privacy include a right to either suicide or “assistance in dying.”<sup>11</sup> I assert that the right to die does not exist as a matter of moral logic or constitutional theory. In theory and in practice, such a right would be a contradiction of the “fundamental rights” principles upon which its proponents claim it is grounded. The specific reasons may be summarized as follows:

- First, the right to die is a concept that has no fixed moral or legal meaning.
- Second, while the concept of individual rights necessarily includes the freedom to refuse medical treatment, it does not, and logically cannot, include a right to commit suicide.
- Third, arguments favoring the recognition of a right to assisted suicide:

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<sup>9</sup>497 U.S. at 279 n. 7.

<sup>10</sup>*Id.* at 279 (quoting *Youngberg v. Romero*, 457 U.S. 307, 321 (1982)).

<sup>11</sup>See Leon Kass, *Is There a Right to Die?* HASTINGS CENTER REP., Jan.-Feb. 1993, at 34; Yale Kamisar, *When Is There a Constitutional “Right to Die”? When Is There No Constitutional “Right to Live”?* 25 GA. L. REV. 1203 (1991).

- (a) assume that individual liberty includes an affirmative right to engage in any action that is not illegal and thus begin the argument with the presumption that there is a right to commit suicide;
- (b) fail to address the legal and moral significance of the fact that suicide is, as a matter of law, a form of homicide;<sup>12</sup>
- (c) ignore the important role of intent in both law and ethics;
- (d) presume that consent can serve as a defense to a charge of homicide; and, as a result,
- (e) lay the foundation for recognizing the existence of a right to be killed upon a showing of consent or demonstrating that death is in the best interest of the person who will die.

In sum Mr. Powell's arguments in favor of a right to suicide fail because they assume, largely without regard to the underlying legal, philosophical, metaphysical, and practical foundations upon which they rest, that the right to be a homicide victim—by one's own hand or that of another—is (or should be) one of the liberties protected by the Bill of Rights.

### Lessons from Michigan: The Continuing Saga of Dr. Kevorkian and the ACLU

Michigan law prohibits assisted suicide. Section seven of the statute provides:

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<sup>12</sup>Under English common law, a suicide was a felony and defined the perpetrator as one who "deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death." 4 WILLIAM BLACKSTONE, COMMENTARIES \*189. According to Blackstone, "Felonious homicide is . . . the killing of a human creature . . . without justification or excuse. This may be done either by killing one's self, or another man." *Id.* at \*188. One who killed himself was punished "by a forfeiture of all his goods and chattels to the king." *Id.* at \*190. Suicide "to avoid those ills which [persons] had not the fortitude to endure" was not excused. *Id.* at \*189.

States that have criminalized assisting suicide as a specific offense include CAL. PENAL CODE § 401 (West 1970); CONN. GEN. STAT. § 53a-56 (West 1981); DEL. CODE ANN. tit. 11, § 645 (1979); FLA. STAT. ANN. § 782.08 (West 1976); KAN. STAT. ANN. § 21-3406 (1981); ME. REV. STAT. ANN. tit. 17-A, § 204 (1982); MINN. STAT. ANN. § 609.215 (West 1964); MISS. CODE ANN. § 97-3-49 (1972); MO. ANN. STAT. § 565.021 (Vernon 1979); MONT. CODE ANN. § 45-5-105 (1981); NEB. REV. STAT. § 28-307 (1979); N.J. STAT. ANN. § 2C:11-6 (West 1981); N.M. STAT. ANN. § 30-2-4 (1978); N.Y. PENAL LAW § 120.30 (McKinney 1975); OKLA. STAT. ANN. tit. 21, §§ 813-818 (West 1958 & Supp. 1981-1982); 18 PA. CONS. STAT. ANN. § 2505 (Purdon 1973); P.R. LAWS ANN. tit. 33, § 1385 (1969); S.D. CODIFIED LAWS ANN. § 22-16-37 (1979); TEX. PENAL CODE ANN. § 22.08 (Vernon 1974); WASH. REV. CODE ANN. § 9A.36.060 (1977); WIS. STAT. ANN. § 940.12 (West 1982).

**Criminal assistance to suicide; felony, penalties; exceptions for licensed health care professionals; repealer**

(1) A person who has knowledge that another person intends to commit or attempt to commit suicide and who intentionally does either of the following is guilty of criminal assistance to suicide, a felony punishable by imprisonment for not more than 4 years or by a fine of not more than \$2,000.00, or both:

- (a) Provides the physical means by which the other person attempts or commits suicide.
- (b) Participates in a physical act by which the other person attempts or commits suicide.

(2) Subsection (1) shall neither be applicable to nor be deemed to affect any other laws that may be applicable to withholding or withdrawing medical treatment by a licensed health care professional.

(3) A licensed health care professional who administers, prescribes, or dispenses medications or procedures to relieve a person's pain or discomfort, even if the medication or procedure may hasten or increase the risk of death, is not guilty of assistance to suicide under this section unless the medications or procedures are knowingly and intentionally administered, prescribed, or dispensed to cause death.

(4) This section is repealed effective 6 months after the date the commission makes its recommendations to the legislature pursuant to section 4 [Section 752.1024].<sup>13</sup>

Two things about the Michigan statute are worth noting at the outset. The first is its temporary nature. To its credit, the Michigan legislature recognizes the difficulty of the issues and has referred them to a Commission on Death and Dying for study before making its final decision on whether the practice of assisted suicide should ultimately be permitted in Michigan. The list of issues to be considered is lengthy, and for that reason it has been relegated to the footnotes, but the list includes all the issues raised here and many others as well.<sup>14</sup>

<sup>13</sup>MICH. COMP. LAWS § 752.1027 (1992).

<sup>14</sup>Michigan Comp. Laws, Section 752.1024 (4) assigns the following task to the commission set up under the new assisted suicide statute:

Sec. 4. Within 15 months after the effective date of this act, the commission shall develop and submit to the legislature recommendations as to legislation concerning the voluntary self-termination of life. In developing these recommendations, the commission shall consider each of the following:

- (a) Current data concerning voluntary self-termination, including each of the following:
  - (i) The current self-termination rate in the state, compared with historical levels.

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- (ii) The causes of voluntary self-termination, and in particular each of the following:
    - (A) The role of alcohol and other drugs.
    - (B) The role of age, disease, and disability.
  - (iii) Past and current Michigan law concerning voluntary self-termination, including the status of persons who assist a patient's self-termination, and in particular the effect of any relevant law enacted during the 86th Legislature.
  - (iv) The laws of other states concerning voluntary self-termination, and in particular the effect of those laws on the rate of self-termination.
  - (b) The proper aims of legislation affecting voluntary self-termination, including each of the following:
    - (i) The existence of a societal consensus in the state on the morality of the voluntary self-termination of life, including the morality of other persons assisting a patient's self-termination.
    - (ii) The significance of each of the following:
      - (A) The attitudes of a patient's family regarding his or her voluntary self-termination.
      - (B) The cause of a patient's act of self-termination, including apprehension or existence of physical pain, disease, or disability.
    - (iii) Whether to differentiate among the following causes of voluntary self-termination:
      - (A) Physical conditions, as distinguished from psychological conditions.
      - (B) Physical conditions that will inevitably cause death, as distinguished from physical conditions with which a patient may survive indefinitely.
      - (C) Withdrawing or withholding medical treatment, as distinguished from administering medication, if both are in furtherance of a process of voluntary self-termination.
    - (iv) With respect to how the law should treat a person who assists a patient's voluntary self-termination, whether to differentiate based on the following:
      - (A) The nature of the assistance, including inaction; noncausal facilitation; information transmission; encouragement; providing the physical means of self-termination; active participation without immediate risk to the person assisting; and active participation that incurs immediate risk to the person assisting, such as suicide pacts.
      - (B) The motive of the person assisting, including compassion, fear for his or her own safety, and fear for the safety of the patient.
      - (C) The patient's awareness of his or her true condition, including the possibility of mistake or deception.
    - (v) The relevance of each of the following:
      - (A) The legal status of suicide.
      - (B) The legal status of living wills.



The ACLU argument for the existence of a constitutional right to assisted suicide, by contrast, assumes the existence of a societal consensus that the act of assisting a suicide is a matter of individual, rather than social, morality. A detailed list that charges an official commission with the task of drawing very careful distinctions between and among situations in which seeking assistance in the act of suicide might be contemplated indicates the existence of a very substantial doubt that lifting the ban on assisting at a suicide is compelled by "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" or

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- (C) The right to execute a durable power of attorney for health care, as provided in section 496 of the revised probate code, Act No. 642 of the Public Acts of 1978, being section 700.496 of the Michigan Compiled Laws.
  - (D) The common-law right of a competent adult to refuse medical care or treatment.
  - (E) Constitutional rights of free speech, free exercise of religion, and privacy, and constitutional prohibitions on the establishment of religion.
- (c) The most efficient method of preventing voluntary self-terminations, to the extent prevention is a proper aim of legislation. In particular, the commission shall consider each of the following:
- (i) The costs of various methods of preventing voluntary self-terminations, including the use of any of the following:
    - (A) Public health measures, such as crisis therapy and suicide counseling services.
    - (B) Tort law.
    - (C) Criminal law, including the desirability of criminalizing suicide or attempted suicide.
    - (D) Civil sanctions, including the denial of inheritance and requirements of community service and mandatory counseling.
  - (ii) The likely effect of any of the methods listed in subparagraph (i) on the self-termination rate, and in particular the probability that a particular method might cause the self-termination rate to increase.
  - (iii) The impact of any of the methods listed in subparagraph (i) on the practice of medicine and the availability of health care in the state.
  - (iv) Whether current state law is adequate to address the question of voluntary self-termination in the state.
- (d) Appropriate guidelines and safeguards regarding voluntary self-terminations the law should allow, including the advisability of allowing, in limited cases, the administering of medication in furtherance of a process of voluntary self-termination.
- (e) Any other factors the commission considers necessary in developing recommendations for legislation concerning the voluntary self-termination of life.

compelled by “those canons of decency and fairness which express the notions of justice of English-speaking peoples.”<sup>15</sup>

The second notable characteristic of the statute is the relatively lenient nature of the punishment imposed: up to four years in jail, a fine of up to two thousand dollars, or both. Whatever the Commission on Death and Dying proposes, it is clear that, for the time being at least, assisted suicide is in a legal class all its own. The prison term puts it in the same class of offenses as making false statements on gun license applications and election certificates and keeping a dangerous animal that causes injury to another.<sup>16</sup> The fine puts assisted suicide on a par with tampering with a smoke detector in an airplane.<sup>17</sup>

Read together, however, both the temporary nature of the statute and the lenient nature of the penalty to be assessed can be read as support for the ACLU’s second implicit assumption: that, whatever the lack of support in the language or history of the Constitution for the existence of a right to seek and receive assistance in dying without fear that the assistant will be punished after the fact, judicial recognition of such a right is defensible—if not desirable—on grounds of political morality. Those characteristics also support the opposite conclusion: that society is ambivalent at best, and potentially hostile at worst, to the idea of creating such an immunity by judicial decree.

The profound nature of the issues being studied, the risk to society of precipitous action, and the need for the legislature to consider all these issues before reaching a final conclusion seem not to faze Dr. Jack Kevorkian and his allies at the American Civil Liberties Union in the least. They view themselves as moral leaders,<sup>18</sup> striving to lead an uncertain

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<sup>15</sup>*Griswold v. Connecticut*, 381 U.S. 479, 507, 513 (1965) (Black & Stewart, JJ., dissenting) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), and *Malinski v. New York*, 324 U.S. 401, 417 (1945) (Frankfurter, J., concurring)).

<sup>16</sup>See MICH. COMP. LAWS § 28.422(11) (1992) (false statement on handgun license application); § 168.808 (false statements by election inspectors); § 287.323.3(2) (dangerous animal causing serious injury). Notably, under § 287.323.3(1) the keeper of a dangerous animal that kills a person is subject to prosecution for involuntary manslaughter under the Michigan Penal Code.

<sup>17</sup>See 14 C.F.R. § 135.127(d) (1993).

<sup>18</sup>Dr. Kevorkian has been explicit on this point in his public statements. For example, in a recent book, Kevorkian writes:

My lone voice cannot accomplish much. But in having written this book and taken action through the practice of medicide [Kevorkian’s term for assisted suicide] as the first step in the right direction, I have done all that I can possibly do on behalf of a just cause for our species. I have no delusions about the end result of it all. . . . But who knows—there’s always the chance that some unexpected quirk of human nature will compel a generally misguided society to add a new twist to the lessons of history by doing the right thing

community away from its allegiance to what former Justice William Brennan described in another context as “the anachronistic views of long-gone generations,”<sup>19</sup> and they view the courts as agents of social and moral change. The ACLU has thus thrown down the juridical gauntlet in the name of unfettered individualism and has asked the Michigan courts to declare that:

The liberty protected by the Due Process Clause of the Mich[igan] Const[itution of] 1963, Art. I §17, and by the Due Process Clause of the U[nited] S[tates] Const[itution], Amend[ment] 14, and the generic right to privacy of the Michigan Const[itution of] 1963, all protect the right of a competent adult person to make decisions about the voluntary termination of that person’s life. The right of a competent adult person to make decisions about the voluntary termination of his or her life is a fundamental right for constitutional purposes, and that right is entitled to the strongest degree of constitutional protection, particularly when the competent adult suffers from a terminal illness.<sup>20</sup>

And that:

The provisions of [Michigan’s statute banning assisted suicide], which absolutely prohibit and make criminal any assistance by a physician, licensed health care professional, family member, or friend to a terminally ill person who wishes to hasten the inevitable termination of his or her life in order to avoid extreme and unbearable pain and suffering, impose an undue burden on the exercise of a fundamental right[, and] . . . cannot be justified by any legitimate, or compelling governmental interests. . . .<sup>21</sup>

In the words of one of the attorneys who filed the suit: “Our Constitutions [Michigan and the United States] protect the right of

(for a change) at the right time and instituting obituary [Kevorkian’s term for the medical practice of assisted suicide] without qualms and without delay.

JACK KEVORKIAN, PRESCRIPTION: MEDICIDE: THE GOODNESS OF PLANNED DEATH 244 (1991).

<sup>19</sup>William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L.J. 428, 444 (1986).

<sup>20</sup>Complaint at ¶ 29, *Hobbins v. Attorney Gen. of Mich.* (Mich. Cir. Ct. Wayne County filed Mar. 1, 1993) (No. 93-306178-CZ).

<sup>21</sup>The ACLU also asked the Wayne County Circuit Court to void the statute on the ground that it is a multi-object bill that violates a provision prohibiting such bills found in the Michigan constitution. This is, in fact, the ground on which the court voided the statute. *Hobbins v. Attorney Gen. of Mich.*, No. 93-306178-CZ, slip op. at 10 (Mich. Cir. Ct. Wayne County May 20, 1993), *aff’d*, No. 164963 (Mich. App. May 10, 1994). Except to note that the “single subject” of the bill is the question of how Michigan should deal with assisted suicide in the long and short terms, discussion of this relatively abstruse topic of state constitutional law is beyond the scope of this article.

competent adults to make decisions about the voluntary termination of their lives.”<sup>22</sup>

*Unpacking the Concept: The Role of Platitudes, Generalities, and “Indeterminate Language” in Our Understanding of the Right to Die*

But what is this asserted “right of competent adults to make decisions about the voluntary termination of their lives”? Because there is so much at stake whether the right is recognized by law or not, the only valid place to start is *at the beginning*; that is, with the language of the assertion itself. If a right is to be recognized as a matter of constitutional principle, it should have a name that is descriptive of the legal immunity sought. Unfortunately, stating the question clearly in the right to die context requires a bit of deconstruction.<sup>23</sup>

So I will begin this part of the discussion with the question presented for this exchange—“Does the Constitution Encompass a Right to Define Oneself Out of Existence?”—and compare it with the assertions made in the complaint filed by the Michigan ACLU. Just how does a right to define oneself out of existence compare with a constitutional right of competent adults to make decisions about the voluntary termination of their lives? Is it a claim of right only to make *decisions* about the voluntary termination of their lives, or the more substantial claim that competent adults are entitled to have their lives terminated by someone else whenever the person who is to die has made a good-faith, informed decision that life is no longer worth living?

The following table breaks both formulations of the asserted right into its respective component parts.

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<sup>22</sup>ACLU of Michigan, Press Release, Mar. 1, 1993 (quoting Elizabeth Gleicher, lead counsel).

<sup>23</sup>“Although there are many sophisticated variations of hermeneutic and deconstructive procedures, they share the idea that the meaning of a text (utterance) is at least partly indeterminate and that therefore meaning varies from one reader to another.” Thomas Morawetz, *Understanding Disagreement, The Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 U. PA. L. REV. 371 (1992). I use the term *deconstruction* here notwithstanding the risk that I may be counted by Professor Arthur Austin as one of those law professors who “profess[es] to understand decon[structionism], [and one of] a growing number of law professors [who] mistakenly think that they practice it.” See Arthur Austin, *A Primer on Deconstruction’s “Rhapsody of Word-Plays,”* 71 N.C. L. REV. 201 (1992). I make no such claims, but since the present task is to discern what the terms of the debate over euthanasia mean, the concept of *deconstructionism* seems a useful one to illustrate the difficulty of assigning meaning to terms that are deliberately expressed in the indeterminate language of fundamental rights.

	Right as Stated in ACLU of Michigan Complaint	Right as Described in Conference Brochure
Personal Interest Asserted	"To make decisions about the voluntary termination of that person's life"	"To define one's self out of existence"
Textual Basis in the Constitution	No explicit basis stated	No explicit basis stated
Interpretive Basis	"Substantive due process" under state and federal constitutions: a "liberty" interest  "Right to privacy" under Michigan constitution	"Substantive due process": a "liberty" interest under the fifth and fourteenth amendments
Characterization of the Interest	A "fundamental" federal and state constitutional (due process) "right" and part of the "generic" right to privacy recognized by the Michigan constitution	Fourteenth amendment "liberty" interest
By Whom Possessed?	A competent adult person	All persons
By Whom Exercised?	The individual decisionmaker, in conjunction with "a physician, licensed health care professional, family member, or friend"	Not stated
Permissible Limits	"Compelling governmental interests"	Not stated. If a "fundamental" right, only a "compelling governmental interest" will suffice.

Turning now to the characterization of the rights described in the program brochure and in the ACLU's Michigan complaint, it is immediately apparent that both approach the right to die in much the same manner as former President Jimmy Carter viewed lust: as an act of the mind or spirit complete in and of itself. In the parlance of the ACLU, the right is *to make decisions about* the voluntary termination of one's life. In the parlance of the program design, the right is also confined to the mental and spiritual sphere. In essence it is one of "self-definition" (i.e., "*to define one's self out of existence*").

These are interesting constructs, not only for what they say, but, more importantly, for what they leave out. There is little doubt that all of us have the *ability*—i.e., the "freedom"—to *decide* just about anything concerning our personal future. Like the freedom to *believe*, into which the United States Supreme Court has converted the first amendment right to free exercise of religion,<sup>24</sup> a right to *decide* is most certainly absolute. What is emphatically *not* absolute is the right to *act* in accordance with either our decisions or concept of self-definition.<sup>25</sup> Even under the first amendment,

<sup>24</sup>Davis v. Beason, 133 U.S. 333 (1890); The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1 (1890); Reynolds v. United States, 98 U.S. (8 Otto) 244 (1879).

<sup>25</sup>Cf. Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990).

the Court has held since at least 1879 that “the freedom to act, unlike the freedom to believe, cannot be absolute.”<sup>26</sup>

Logic alone should indicate that there is more involved here than simply a right to “decide” or of “self-definition.” This is borne out by even a cursory review of the state of Michigan law governing death and dying.

### *Michigan Law on Death and Dying*

The courts of Michigan subscribe to the generally accepted view that life-sustaining treatment may be withheld or withdrawn either on the direct request of a competent adult or upon the decision of a competent surrogate. As a result the phrase “to make decisions about the voluntary termination of [their] lives” in the ACLU complaint, as well as the concept of a right “to define one’s self out of existence” must mean something more extensive than the right to die as it has been understood by the courts of Michigan to date.<sup>27</sup> If this were not the case, there would be no need to file a lawsuit challenging the newly enacted Michigan assisted suicide statute.

Prior to the enactment of the new assisted suicide statute, neither suicide, attempted suicide,<sup>28</sup> nor “incitement to suicide” were crimes.<sup>29</sup> The new law is specific: it is aimed at individuals who either provide the physical means or participate in the actual act of suicide or attempted suicide. Notably, “[a] licensed health care professional who administers, prescribes, or dispenses medications or procedures to relieve a person’s pain or discomfort, even if the medication or procedure may hasten or increase the risk of death, is *not* guilty of assistance to suicide under this section. . . .”<sup>30</sup> As a result, there can be no claim that the lawsuit is intended to create a legal immunity against prosecution for a failed suicide attempt by a person acting alone. There can be no claim that it is needed to

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<sup>26</sup>*Id.* at 894 (O’Connor, J., concurring in the judgment, joined in part by Brennan, Blackmun, and Marshall, JJ.) (citing *Cantwell v. Connecticut*, 310 U.S. at 304; *Reynolds v. United States*, 98 U.S. 145, 161-67 (1879)).

<sup>27</sup>See *In re Martin*, 504 N.W.2d 917 (Mich. App. 1993); *In re Rosebush*, 491 N.W.2d 633 (Mich. App.1992).

<sup>28</sup>See 44 Op. Mich. Atty. Gen. 342 (1944) (holding that attempted suicide is not punishable under Michigan law since Michigan law does not punish suicide, relying on 1931 Mich. Pub. Acts 328, § 505, which required punishments to be included in the definitions of crimes and required the same punishments applied to completed crimes to be applied to attempts). The decriminalization of suicide does not mean that anyone has a right to engage in the behavior.

<sup>29</sup>See *People v. Campbell*, 335 N.W.2d 27 (Mich. App.), *appeal denied*, 342 N.W.2d 519 (Mich. 1983) (holding that incitement to suicide is not, under present state criminal statutes, a crime, and defendant, who provided intoxicated and depressed individual with gun and bullets and then left premises, with individual thereafter killing himself, could not be tried for open murder, and information would be quashed and defendant discharged).

<sup>30</sup>MICH. COMP. LAWS § 752.1027(f) (1992) (emphasis added).

immunize the good-faith request for, and administration of, painkilling drugs or other medications that might ease the patient's anxiety or mental state, or that judicial intervention is needed to vindicate the first amendment rights of an individual who, like Dr. Kevorkian, wishes to "counsel" concerning the benefits of what some have called "rational suicide." All of these things are already legal in Michigan.

The allegations in the ACLU complaint demonstrate that this case is neither about the right to die as heretofore understood both in Michigan and elsewhere (i.e., the right to refuse treatment), nor is it about controlling the decisions or individual actions of *patients*, regardless of their physical or mental condition.<sup>31</sup> The asserted right "to make decisions about the voluntary termination of that person's life" with the assistance of conjunction with "a physician, licensed health care professional, family member, or friend" is really not about decisionmaking at all. Its central purpose is to serve as a patient-centered underpinning of a constitutionally based immunity from prosecution *for those who intentionally administer the drugs or lethal force* necessary to "terminate" a consenting patient's life.<sup>32</sup>

If the right asserted in the ACLU complaint means anything at all, it must mean that constitutional law, both state and federal, forbids the enactment or enforcement of any law that prohibits physicians, licensed medical professionals, friends, and family members from "knowingly and intentionally . . . administer[ing], prescrib[ing], or dispens[ing] medications or procedures . . . to cause death."<sup>33</sup> So why don't we just skip the indeterminate language and legal doublespeak?

Stripped to its essentials, the alleged right to assistance in the termination of one's life—and the "right to define one's self out of existence"—means a right to be killed ("terminated") by one's own hand or that of another. Since both formulations are legalese for a claim that access to euthanasia at the hands of physicians, licensed medical professionals,

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<sup>31</sup>Michigan law looks to the intent of the *patient* in determining whether or not decisions that will result in death are to be classified as "voluntary self-termination of life" (i.e., suicide). Section 752.1022 of the Michigan Compiled Laws provides the following definitions:

(f) 'The voluntary self-termination of life,' 'voluntary self-termination,' and 'self-termination' mean conduct by which a person expresses the specific intent to end, and attempts to cause the end of, his or her life, but do not include the administration of medication or medical treatment intended by a person to relieve his or her pain or discomfort, unless that administration is also independently and specifically intended by the person to cause the end of his or her life.

<sup>32</sup>See MICH. COMP. LAWS § 752.1027 (1992).

<sup>33</sup>MICH. COMP. LAWS § 752.1027(3) (1992).

family members, and friends is *a constitutional right*, why not just say so? The answer, I submit, is to be found in John Leo's recent commentary on the words of Derek Humphry, former president of the pro-euthanasia Hemlock Society:

If you doubt that word games are becoming crucial to our social and political struggles, listen to Derek Humphry. A leading figure in the euthanasia movement, Humphry says his side lost at the polls in Washington State last fall largely because it lost the battle over language. The pro-euthanasia campaigners talked broadly about 'aid in dying.' But the media and public, Humphry says, 'used the real words with relish'—suicide and euthanasia—and Initiative 119 went down. In passing, Humphry pointed out the vagueness of 'aid-in-dying.' It can mean, he says, 'anything from a physician's lethal injection all the way to holding hands with a dying patient and saying, "I love you."' Anyone who stretches a phrase to cover both killing and moral support is a serious player in the language games.<sup>34</sup>

### The Privatization of Death and the Limits of Individual Autonomy

The urge to speak in terms of rights when the topic is death and dying is not surprising. The technology of modern medicine has long since surpassed both law and social attitudes concerning death and the treatment of the dying. "Unlike our ancestors," writes Professor Barnette M. Sneiderman of the University of Manitoba, "we generally get older before dying because the diseases that kill us are not contagious but degenerative." In his view, and in the view of many others, it is a "grim fact of life in the age of medical miracles . . . that dying is by inches, and that we cannot in good faith write off the dead until they are dead."<sup>35</sup>

But how then should the law deal with those who are not dying but want to be dead now or at some predetermined time because of their present or anticipated future medical condition? The most direct way to accommodate those who want to die at the time of their choosing would be to legalize active, voluntary euthanasia, but this is not going to happen, either by legislative or initiative action, anytime soon. Even in the Netherlands, where the courts have undertaken to eliminate criminal penalties for active euthanasia, Parliament has balked at legalizing the practice altogether. It is therefore highly unlikely that the state legislatures, Congress, or the American electorate are prepared, either legally or psychologically, to enact such a policy.

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<sup>34</sup>John Leo, *Stop Murdering the Language!* U.S. NEWS & WORLD REP., Apr. 12, 1993, at 23.

<sup>35</sup>Barnette M. Sneiderman, *Why Not a Limited Defence? A Comment on the Proposals of the Law Reform Commission of Canada on Mercy-Killing*, 15 MANITOBA L.J. 85, 91 (1985).



The only fora that appear to be receptive to pro-euthanasia arguments are the courts, particularly in the United States. In the United States<sup>36</sup> and Canada<sup>37</sup> the courts are being asked—incongruously—to declare that the right to be a homicide statistic (but not to be counted as one)<sup>38</sup> is a fundamental human right, subsumed in the more general concepts of privacy and autonomy.<sup>39</sup> In the Netherlands, by contrast, the High Court of the Hague explicitly rejected autonomy and self-determination theories,<sup>40</sup> preferring instead a theory that has come to be known as “conflict of duties” as the basis for the Dutch judiciary’s de facto legalization of medical euthanasia.<sup>41</sup>

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<sup>36</sup>See, e.g., *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994) (order granting in part and denying in part plaintiffs’ motion for summary judgment and denying defendants’ cross-motion for summary judgment) (striking down state ban on assisted suicide); *People v. Kevorkian*, No. 93-11482 (Mich. Cir. Ct. Wayne County Dec. 13, 1993) (striking down state ban on assisted suicide), *aff’d in part and rev’d in part* in *Hobbins v. Attorney General and People v. Kevorkian*,—N.W. 2d—, 1994 WL 273205, 62 USLW 2728 (Mich. App. May 10, 1994) (affirming that state law banning assisted suicide and creating a Commission on Death and Dying violated the Michigan constitution’s “one object” rule, but holding that the right to privacy does not encompass a right to assisted suicide), *review granted* Nos. SC 99591, SC 99674, SC 99752, SC 99758, SC 99759 (Mich. June 6, 1994). Oral argument in the *Kevorkian* and *Hobbins* cases has been scheduled in the Michigan Supreme Court for October 4, 1994. The order of the Michigan Supreme Court provides:

The issues to be briefed are limited as follows: (1) In Docket Nos. 99591 (plaintiff’s application), 99752, and 99759, whether 1992 PA 270, as amended by 1993 PA 3, is unconstitutional under Const 1963, art 4, § 24? [the “one object” rule] (2) In Docket Nos. 99591 (cross-appeal) and 99758, whether MCI 752.1027, MSA 28.547(127) is unconstitutional under the United States Constitution? (3) In Docket No. 99674, whether the circuit judge erred in quashing the information charging the defendant with murder?

<sup>37</sup>*Rodriguez v. Attorney Gen. of Can.*, 107 D.L.R.4th 342 (Can. 1993).

<sup>38</sup>This is precisely what has occurred in the Netherlands. See *infra* text accompanying note 55.

<sup>39</sup>In the United States this takes the form of an argument that the right to commit suicide (auto-homicide) has been a part of the “liberty” and privacy protected by the fourteenth amendment since 1868! This is a strange argument indeed given the experience of chattel slavery.

<sup>40</sup>See Barry A. Bostrom & Walter Lagerwey, Note, *The High Court of the Hague: Case No. 79065, October 21, 1986*, 3 ISSUES IN LAW & MED. 445 (1988).

<sup>41</sup>See generally CARLOS GOMEZ, REGULATING DEATH: EUTHANASIA AND THE CASE OF THE NETHERLANDS 36 (1991). The case of the Netherlands is discussed *infra* in the text accompanying notes 52-59.

I submit that privatizing<sup>42</sup> death by judicial decree is not the answer to the modern dilemma that “dying is by inches.” Centuries of bitter experience have demonstrated that death is too important a subject to be privatized. This is so not only because death is as much a part of an individual’s life as birth, but also because death marks the demise of a *person*—an individual who bears rights and obligations in a community. Death marks not only the end of life for the individual, it signals the end of a community defined by family, friendship, and other important human relationships.

It is for this reason that death has never been perceived as a social good, but rather as an unavoidable evil. And it is for this reason that the preservation of the community itself (which includes the right to self-defense) has been the only legitimate justification for the administration of lethal force. Few people actually *want* to die, to lose relatives or friends to death, or to participate actively in the demise of others.<sup>43</sup> What people *really* want when faced with evidence that their death is reasonably certain to occur within a foreseeable time span is to die without pain and with some semblance of control over the uses, and abuses, of modern medical technology. The right to die has been dubbed “one of the strangest terms to gain acceptance in the legal field”<sup>44</sup> for precisely this reason.

Viewed from this perspective, much of what is understood to be the content of the right to die reflects little more than the expression of legitimate human needs in the face of technology (or, more appropriately, technicians) out of control. In fact, the very debate over the existence of the right to die bespeaks the social nature of the controversy. Only the individual dies; society is left to confront not only the consequences of that death, but also the excruciatingly difficult choices that face individuals and families when they are called upon to make life and death decisions in the context of modern medicine. Such problems are not inherently individual in nature; they are *social* and must be confronted from that perspective. Though we are individuals, “we recognize our mutual humanity in our differences, in our individuality, in our history, [and] in the faithful discharge of our particular culture of obligations.”<sup>45</sup>

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<sup>42</sup>The term is borrowed from Professor Donald L. Beschle. See Donald L. Beschle, *Autonomous Decisionmaking and Social Choice: Examining the “Right to Die,”* 77 KY. L.J. 319, 354 n. 142 (1989).

<sup>43</sup>See Tamara Jones, *Setting a Date for Death*, L.A. TIMES, Mar. 14, 1993, at 1A.

<sup>44</sup>Beschle, *supra* note 42, at 319.

<sup>45</sup>MICHAEL IGNATIEFF, *THE NEEDS OF STRANGERS: AN ESSAY ON PRIVACY, SOLIDARITY, AND THE POLITICS OF BEING HUMAN* 53 (1984).

The term “‘right to die’ strikes a dissonant, if not bizarre, chord”<sup>46</sup> because anyone who has spent time studying the subject knows that it has no fixed meaning. It is used to describe everything from withholding or withdrawing of useless treatments that do little more than torture dying patients incapable of expressing their own views<sup>47</sup> to active euthanasia of those who, because their prognosis for the future is grim, wish (or, in the case of incompetent persons, are *thought* to wish) to control the time and manner of their deaths. Without a set of terms that differentiate between and among the *justifications* for individual or third-party actions which result in death, there can be no meaningful discussion of the nature and limits of the right to individual autonomy in the context of death and dying.<sup>48</sup>

This suits well the approach of the ACLU. Under the direction of John Powell and its local affiliates, it has transformed Professor Laurence Tribe’s theory that individual autonomy is the central criterion of “personhood”<sup>49</sup> into a powerful judicial tool of social change. The phrases *right to die* and *assistance in dying* are used as “trumps in a legal game,”<sup>50</sup> with little or no

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<sup>46</sup>Beschle, *supra* note 42, at 321.

<sup>47</sup>Richard B. Fratianna, M.D. & Christopher P. Brandt, M.D., “Ethical Issues in Resuscitating Patients over Age 75,” Address Before the American Burn Association Convention, Mar. 24, 1993, Cincinnati, Ohio (abstract of paper in author’s files).

<sup>48</sup>Dr. Carlos Gomez’s study on euthanasia in the Netherlands contains an interesting summary of what H. J. J. Leenen, a noted jurist at the University of Amsterdam and an advocate of voluntary euthanasia, has described as “distorted silhouettes of euthanasia.” In summary form they may be stated as follows:

- Termination of pointless treatment;
- Painkilling;
- Refusal of medical treatment;
- *Force majeure* [i.e., a triage situation].

Leenen’s definition of euthanasia is “intentional life-termination by somebody other than the person concerned at the request of the latter.” Assisted suicide occurs “when the life terminating act is performed by the suicidant with repeated requested assistance of another person, for instance, providing the means.” GOMEZ, *supra* note 41, at 24-25 (quoting H. J. J. Leenen, *Euthanasia, Assistance to Suicide, and the Law: Developments in the Netherlands*, 8 HEALTH POLICY 197,198-199 (1987)). United States District Judge Barbara Rothstein’s opinion in *Compassion in Dying v. Washington*, 850 F.Supp. 1454,—(W.D. Wash. 1994), however, rejects such distinctions outright: “From a constitutional perspective, the court does not believe that a distinction can be drawn between refusing life-sustaining medical treatment and physician-assisted suicide by an uncoerced, mentally competent, terminally ill adult.” Judge Rothstein’s reasoning is discussed in greater detail in the “Postscript” to this article, which appears in the text accompanying notes 98 to 137.

<sup>49</sup>See generally LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1302-05 (2d ed. 1988).

<sup>50</sup>The late Professor Robert Cover of Yale University Law School succinctly summarized the difference between the traditional American “rights” approach and the Judaic legal tradition, which is based on obligation, as follows:

acknowledgment that there may be stakes in this particular game far greater than may be immediately apparent.

There is no question that laws condemning homicide limit the freedom of those individuals whose personal circumstances lead them to decide that they or an incompetent relative would, all things considered, prefer to be dead and that, all things considered, assistance is needed to bring it about. But individual decision or need cannot, standing alone, be determinative of social policy. All law limits our ability to effectuate our decisions. The question is whether limits on the *particular* freedom sought are justified.

In my view they are. The privatization of death turns dying at the hands of oneself or another into an abstraction. Worse, it ignores both the reality of human dependency (which goes to the motives for suicidal or homicidal action) and the skepticism concerning human nature and experience that lies at the foundation of the Bill of Rights itself. The vacuum that lurks at the heart of the ACLU's conception of life and liberty makes the guarantees of the Bill of Rights an empty promise.

The framers of the Bill of Rights and fourteenth amendment knew well that, unfettered by a jurisprudence firmly rooted in both personal and social obligation to *specific* persons having *specific* needs, there is nothing, "and man is certain to behave as a wolf to his own kind."<sup>51</sup> Real people facing death, excruciating pain, or long-term disability and dependency "cannot be protected by abstract doctrines" such as individual autonomy, "not merely because these doctrines are words," and the technologies and interventions of modern medicine are things,<sup>52</sup> but because human nature itself has proven to be untrustworthy. The Constitution thus does not provide for direct protection of individual rights, but rather seeks to assure that the power to protect them is divided among the states, the people, and the branches of the federal government.<sup>53</sup> James Madison emphasized this point in *The Federalist*:

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Social movements in the United States organize around rights. When there is some urgently felt need to change the law or keep it in one way or another a 'Rights' movement is started. Civil Rights, the right to life, welfare rights, etc. The premium that is to be put upon an entitlement is so coded. When we 'take rights seriously' we understand them to be trumps in the legal game. In Jewish law, an entitlement without an obligation is a sad almost pathetic thing.

Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, in Symposium, *The Religious Foundations of Civil Rights Law*, 5 J. LAW & RELIGION 65, 67 (1988).

<sup>51</sup>IGNATIEFF, *supra* note 45, at 53.

<sup>52</sup>*Id.* at 52.

<sup>53</sup>See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Steven L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive*,

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.<sup>54</sup>

The proponents of the right to die in this country have unwittingly underscored Madison's point. It may well be that our society's views on death and dying are outmoded and impose an undue burden on those who would otherwise choose euthanasia or assisted suicide as the way to meet their demise (though I doubt it). But the matter is of such obvious importance to all of us that judges in particular should be wary of both the unwillingness (or inability) of euthanasia proponents to call things by their proper names as they argue their case. The catchphrases are soothing words like *choice*, *privacy*, *assistance in dying*, and *individual autonomy*, rather than the harsher words that describe the acts which are to be deregulated by judicial fiat: *euthanasia*, *killing*, and *providing the means to kill yourself*. Such language games should not really be necessary if it is true "that how one should die is so private a matter, so intimately tied to one's right to self-determination, that the state's role is to be circumspect and undisruptive."<sup>55</sup>

This may, in fact, be "the prevailing sentiment in the Netherlands,"<sup>56</sup> but, given the track record of euthanasia proponents at the polls and in state legislatures, it is far from clear that it is the prevailing sentiment in this country. Hence the ACLU desires to constitutionalize its theories about the privatization of death through creative readings of the federal and state constitutions. If John Powell and the ACLU are to be believed, the support for their conception of the right to die is a sentiment so rooted in the history and traditions of the United States as to require that the judiciary recognize it as a fundamental right. It is not. That is what explains both the care with which legislators and voters have approached this subject and the circumspection of the United States Supreme Court in *the Cruzan* case.

Consider briefly the case of the Netherlands.

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*Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); E. Donald Elliot, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506 (1989); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991).

<sup>54</sup>THE FEDERALIST No. 51, at 322 (James Madison) (Mentor Books 1961).

<sup>55</sup>Gomez, *supra* note 41, at 133.

<sup>56</sup>*Id.*

*Euthanasia and Assisted Suicide in the Netherlands:  
Understanding the Dutch Paradox*

The Netherlands is, by any measure, a liberal society. Notwithstanding articles 293 and 294 of the Netherlands Penal Code, which make euthanasia and assisted suicide a crime,<sup>57</sup> a series of Dutch court decisions since 1973 have effectively negated the possibility that physicians who practice them will be punished. It is a contradiction, to be sure, that “euthanasia is still a crime, and on the other hand, under [recently proposed amendments to the Penal Code], [the Dutch] will have rules which say how you can carefully commit that crime.”<sup>58</sup> Nevertheless, the rationale for the contradiction is clear: the Dutch do not consider medical killing to be a private matter, or a morally neutral act.

He who accedes to another’s expressed and serious wish to deprive himself of life deserves considerably less punishment than one who is guilty of ordinary murder. The assent cannot abrogate the criminalization [sic] of taking of a life, but [can] give it a wholly different character. The laws as it were no longer punishes [sic] the attack against the life of a particular person, but the violation of the respect which is due human life in general, regardless of the motive of the perpetrator. Crime against life remains, the attack on the person is abrogated.<sup>59</sup>

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<sup>57</sup>The Netherlands Penal Code, Article 293 (1886) provides: “He who robs another of life at his express and serious wish is punished with a prison sentence of at most twelve years or a fine of the fifth category.”

The Netherlands Penal Code, Article 294 (1886) provides: “He who deliberately incites another to suicide, assists him therein or provides him with the means is punished, if the suicide follows, with a prison sentence of at most three years or a fine of the fourth category.”

The fine of the fifth category reaches a maximum of one hundred thousand guilders, and a fine of the fourth category reaches a maximum of twenty-five thousand guilders. GOMEZ, *supra* note 41, at 19 & nn. 1-2. At 1993 exchange rates, this translates into a maximum sum of approximately \$51,660 for a fine of the fifth category, and a maximum sum of approximately \$12,900 for a fine of the fourth category. By contrast, the maximum fine for assisted suicide under the newly enacted Michigan assisted suicide statute is \$2,000. See *supra* note 11.

<sup>58</sup>*Holland Euthanasia Policy Battle Contentiously Fought* (National Public Radio, “Morning Edition” broadcast, May 6, 1993) (quoting Jeff Havers, Health Law Professor, University of Amsterdam) (transcript on file with author).

<sup>59</sup>GOMEZ, *supra* note 41, at 26 (quoting II H. J. SCHMIDT, *GESCHIEDENIS VAN HET WETBOEK VAN STRAFRECHT* [HISTORY OF THE PENAL CODE OF 1881] 440, as quoted in MARION H. N. DRIESSE ET AL., *OP LEVEN EN DOOD* [OF LIFE AND DEATH] (1986), and *reprinted* in 3 *ISSUES IN LAW & MED.* 385, 387 (1988) (Walter Lagerwey trans.)).

Thus, actual cases must therefore be reported to state authorities and, if necessary, defended in court.<sup>60</sup> The concern of most Dutch defenders of the practice appears to be that “[a] well-regulated and clearly defined practice of euthanasia (irrespective of how often it occurs)”<sup>61</sup> will provide protection against potential abuse, but even they recognize what might be termed the human dimension of the policy. William Roose, foreign secretary of the Netherlands Society for Voluntary Euthanasia,<sup>62</sup> put it this way:

Everybody in Holland is a Calvinist. The Protestants are Calvinists, but so are the Catholics. Even atheists like me are Calvinists. And the communists here, they're the worst Calvinists of all. What does this mean? We like many rules, but we don't like to be told what the rules mean.<sup>63</sup>

Mr. Roose's observation about the nature of Dutch society is relevant to the present discussion in several ways. It points out that the Dutch, while philosophically committed to the medicalization of euthanasia, are also culturally committed to rules and procedures that define and, to some limited extent, confine individual and physician discretion. Their “compromise”—that euthanasia remain a crime under articles 293 and 294 of the Penal Code, but those who practice it under state-approved guidelines cannot be punished—is uniquely Dutch: They have rules, but no one defines what they mean in practice.<sup>64</sup>

### *Contrasting the American Model*

The lesson for Americans in the Dutch experience is (or should be) a profound one. Americans are not cultural Calvinists like the Dutch. They are, if anything, pragmatic, laissez-faire individualists, who are committed

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<sup>60</sup>See Henk Jochemsen, *Will Euthanasia in the Netherlands Be Legalised?* BIOETHICS RES. NOTES, June 1993, at 9, 9-10 (noting that euthanasia will remain illegal but that the law on the disposal of the dead will be amended to require that a standard coroner's report shall be filed in cases of euthanasia and that the coroner will determine whether or not to proceed further with an investigation). According to recent press reports, the Dutch Senate has demanded that the proposal be strengthened to assure that all cases of involuntary euthanasia be prosecuted. See The Reuter Library Report, *Dutch To Amend Controversial Euthanasia Law*, June 11, 1993, BC cycle (available through NEXIS). [Editor's Note: The Dutch Parliament has enacted new legislation formalizing reporting requirements for physicians participating in euthanasia and implementing procedures to be followed by coroners upon receiving reports indicating euthanasia as the cause of death.]

<sup>61</sup>GOMEZ, *supra* note 41, at 57.

<sup>62</sup>*Nederlands Vereniging voor Vrijwillinge Euthanasie* (NVVE).

<sup>63</sup>GOMEZ, *supra* note 41, at 95.

<sup>64</sup>According to Roose, “If we didn't trust our doctors, euthanasia would be intolerable.” *Id.* at 149 n.15.

in the abstract to human rights and the dignity of all, but who chafe at the very idea of legal limits on their autonomy. For Americans rules limiting individual freedom are a necessary evil that must be justified before they are accepted. If the law in question is found to be an unconstitutional violation of one's right to liberty or privacy, the field is deregulated by judicial decree. H. Tristram Engelhardt's views on the matter are more typically American than anything found in the Dutch experience to date:

Against any claims regarding the importance of the sanctity of life, counterclaims can be advanced regarding the sanctity of free choice. Another way of putting this is that killing cannot be shown to be a *malum in se*, at least in terms of general philosophic arguments that do not already presuppose a particular ideological or religious viewpoint. What is wrong with murder is taking another person's life without permission. *Consent cures. The competent suicide consents.*<sup>65</sup>

Though Engelhardt's argument rests on the assumption that "ideological or religious viewpoint[s]" are irrelevant to either the making of public policy or the formulation of rights—a questionable proposition in its own right, but a topic far beyond the scope of this article—his position on the central issue is very clear indeed. "[W]hen stripped of the sensitive moral arguments surrounding the . . . controversy," natural death, homicide, and assisted suicide "are simply [three] alternative medical methods of dealing with" diseases or conditions that kill, or make you wish you were dead.<sup>66</sup>

But once moral arguments are gone, what is left? A respect for the autonomy of others that springs, fully developed, from some abstract conception of humanity? Michael Ignatieff points out the fallacy of such an approach in *The Needs of Strangers*:

Woe betide any man who depends on the abstract humanity of another for his food and protection. Woe betide any man who has no state, no family, no neighbourhood, no community that can stand behind to enforce his claim of need. [King] Lear learns too late that it is power and violence that rule the heath, not obligation.<sup>67</sup>

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<sup>65</sup>GOMEZ, *supra* note 41, at 133-34 (quoting H. Tristram Engelhardt, *Death by Free Choice: Variations on an Antique Theme*, in *SUICIDE AND EUTHANASIA* 251, 264-65 (Baruch Brody ed., 1989) (emphasis added)).

<sup>66</sup>The language is taken from Justice Brennan's dissenting opinion in *Beal v. Doe*, 432 U.S. 438, 449 (Brennan, J., dissenting) (quoting *Roe v. Norton*, 408 F. Supp. 660, 663, n.3 (D. Conn. 1975)). In full, the quoted sentence reads: "[A]bortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy. . . ." *Id.*

<sup>67</sup>IGNATIEFF, *supra* note 45.



John powell's argument is thus not simply about the autonomy of the individual. It is, at bottom, about what *kind* of society we will have, both now and in the future. In the legal world of the ACLU, individual autonomy functions as trump leading to the deregulation of behaviors thought for centuries to be *malum in se*.

Given its basis in a morality which posits that denial of individual choice is the only human act which is *malum in se*, the ACLU argument makes perfect sense. The problem is that such a vision of social morality is not consistent with either the existence of a civil society or the constitutional concept of "ordered liberty."

### Unpacking the Interests

#### *Should Consent Be a Defense to Homicide?*

Given that "the freedom to act, unlike the freedom to believe, cannot be absolute,"<sup>68</sup> what are we to make of the ACLU's assertion that what would otherwise be homicide should be immunized by private words or conduct indicating consent? This, of course, is the ultimate question.<sup>69</sup>

If it is true that the morality and legality of otherwise murderous or suicidal behavior is determined by victim consent, rather than the intent of the person who delivers the lethal agent or force, two conclusions must follow. The first is that autonomous choice is the *sine qua non*, or first principle, of both public morality and the concept of ordered liberty. In theory this would mean that the primacy of autonomous choice over countervailing public interests is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>70</sup> In practice it would mean that such choices may not be inhibited without a showing of great societal need (i.e., a compelling state interest).

The second conclusion is that intentional killing of oneself or another is not *malum in se*, but merely *malum prohibitum*. H. Tristram Engelhardt's position—"consent cures"—is forthright on this point. The law, however, is just as clearly to the contrary.<sup>71</sup>

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<sup>68</sup>Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring in the judgment, and joined on this point by Brennan, Marshall, and Blackmun, JJ.).

<sup>69</sup>Cf. Sneiderman, *supra* note 35.

<sup>70</sup>Snyder v. Massachusetts, 291 U.S. 97, 205 (1934).

<sup>71</sup>See generally WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW (2d ed. 1986):

Consent of the victim is a defense only when it negates an element of the offense or precludes infliction of the harm to be prevented by the law defining the offense. . . . Generally, it may be said that consent by the victim is not a defense in criminal prosecution. The explanation most commonly given is that

Both propositions are difficult to sustain. The phrase *ordered liberty* presupposes a balance between autonomy and social order. More important for present purposes, the *constitutional* provision from which advocates of autonomy derive the proposition that consent cures comes packaged, courtesy of the Civil War amendments, with process and substance limitations intended to preserve life and liberty. Consent cures only when the behavior at issue is not deemed by society to be *malum in se*.<sup>72</sup>

Engelhardt and the ACLU attempt to avoid this conceptual problem by rejecting laws and rules based on religious, moral, and philosophical viewpoints other than their own. They would supplant rules based on traditional social morality with a new morality in which autonomy is the highest virtue and consent is the ultimate defense.<sup>73</sup> It is a nice argument and carries great weight with those who have not thought through its implications. Ultimately, however, it will not do.

The reason why competent individual choice is not absolute, even when there is no case to be made for the rights of innocent third parties, is that the state interest in the preservation of life "consists of at least two related concerns. First, [an] interest in preserving the life of the particular patient [, and] [s]econd, . . . a closely related interest in preserving the sanctity of all human life."<sup>74</sup> These concerns have an independent significance that is both moral *and* practical.

If we begin with the basic proposition that consent (in its fullest sense) negates any legitimate social concern over the use of lethal force, we must also concede that society's right to place a positive value on the life of each person depends upon individual consent. If this is an accurate statement of the argument from autonomy, we are in a very precarious position indeed.

And this is so not merely because of a moral belief in the sanctity of all human life, but because of the interests civil society has in its own

a criminal offense is a wrong affecting the general public, at least indirectly, and consequently cannot be licensed by the individual directly harmed. Thus, it is no defense to a charge of murder that the victim, upon learning of the defendant's homicidal intentions, furnished the defendant with the gun and ammunition.

*Id.* at 511, 687 (footnote distinguishing refusal or withdrawal of medical treatment omitted); see also WARREN ON HOMICIDE 166 at 829 (1914) ("The law does not require that a homicide shall be committed against the will of the person killed. And if a man kills another with his consent or by his desire, he is as guilty as if he had killed against his will").

<sup>72</sup>See, e.g., U.S. CONST. amend. XIII (abolishing slavery).

<sup>73</sup>*Cf.* JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

<sup>74</sup>*Brophy v. New England Sinai Hospital, Inc.*, 497 N.E.2d 626, 640 & n.1 (Mass. 1986) (Lynch, J., dissenting).

preservation. John Locke's *Second Essay Concerning the True Original Extent and End of Civil Government*<sup>75</sup> points out that "the preservation of the society and (as far as will consist with the public good) of every person in it" is "the first and fundamental natural law which is to govern even the Legislative, itself."<sup>76</sup> And thus, when the ability to use lethal means becomes a matter of individual choice, rather than a matter tightly constrained by the threat of official force, society returns to Locke's "State of Nature,"<sup>77</sup> and civil government loses its unique authority. Locke framed the issue by highlighting the pure autonomy of the "State of Nature":

To understand political power aright, and derive it from its original, we must consider what estate all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of Nature, without asking leave or depending upon the will of any other man.

A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another, there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another, without subordination or subjection, unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty.<sup>78</sup>

Viewed from this perspective, the state's monopoly over the use of lethal force is not something it can validly delegate to a private party, no matter what qualifications or personal interest in the outcome such a private party might possess. That monopoly is a part of the social compact, and the due process and equal protection clauses of the fourteenth amendment stand as explicit reminders that it is the *obligation* of the federal government to insure that no one—not even a friend or family member—shall be authorized by law (or judicial decree) to deprive another of life "without due process of law," and that no law (or decree) that seeks to differentiate the value of life itself on the basis of subjective value judgment is consistent with either the thirteenth or the fourteenth amendment.

By negating the traditional bases on which to strike a balance between individual autonomy claims and social concerns, Engelhardt, Powell, and

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<sup>75</sup>JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Mentor Books, Peter Laslett ed., 1960) (1689).

<sup>76</sup>*Id.* at ¶ 134.

<sup>77</sup>*See id.* at ¶¶ 212-220.

<sup>78</sup>*Id.* at ¶ 4.

the ACLU use autonomy and consent as legal trump. They address the “sensitive moral arguments surrounding the . . . controversy” over death and dying by avoiding them.

The moral arguments cannot, and must not, be avoided. Homicide has been viewed as *malum in se* because the demise and death of a person is an unavoidable evil in the best of circumstances. Intentional killing compounds that evil (the death of a person) by adding to it a violation of the most basic element of the social compact (to refrain from intentional killing).

The burden of justification should thus rest with the proponents of euthanasia. The traditional view—the one enshrined in the Constitution—is that homicide is an evil that can be tolerated by society only under carefully controlled circumstances.<sup>79</sup> Legal justifications for killing therefore focus on the *social* nature of the excuse (*e.g.*, self-defense, defense of others, superior orders). Notably, such excuses neither change society’s conception of the act itself nor permit the act to be justified on the basis of a purely individual interest. We need, in the final analysis, to know just what *social* ends are served by relaxing society’s monopoly on the use of lethal force.

### *To Whom Does the Right to Die Belong?*

If there is an asserted right to end one’s life, or to seek lethal assistance in doing so, the law must determine whether these rights belong to *all* persons, regardless of status or condition, or only to those who qualify on the basis of some set of criteria that have yet to be defined.<sup>80</sup> The ACLU’s Michigan complaint frames the issue as one involving only competent adults, but the legal context into which it has been introduced—developed in large part by the efforts of the ACLU—renders that position somewhat misleading. If a right is to be viewed as “fundamental” (*i.e.*, “implicit in the concept of ordered liberty”), the general position of autonomy advocates is that it must also be considered to be an inherent right of *all* persons, without regard to age or condition of dependency.<sup>81</sup>

The case law on the character of the asserted right to die has been both clear and consistent since the New Jersey Supreme Court decided *In re*

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<sup>79</sup>The general view is that the law tolerates the justifiable behavior. *But see* Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking*, 32 U.C.L.A. L. REV. 61, 69-75 (1984) (suggesting that a justified action is right conduct and that the law should be viewed as bestowing a privilege upon the actor).

<sup>80</sup>*See* *People v. Kevorkian*, No. 93-11482 (Mich. Cir. Ct. Wayne County Dec. 13, 1993).

<sup>81</sup>*See, e.g., Jones v. State*, 619 So. 2d 418, 419 (Fla. Dist. Ct. App. 1993) (privacy of minors in cases of statutory rape).

Quinlan.<sup>82</sup> No matter how questionable or ludicrous their reasoning might be,<sup>83</sup> the courts are virtually unanimous in their zeal to extend the right to refuse treatment to individuals incapable of making any choices at all. Through the magic of the doctrine of substituted judgment, infants, incompetent persons, and those mentally retarded also have the right to refuse treatment, and the patently fictional nature of the exercise assures the courts that neither the logic nor the trajectory of their decisions will be scrutinized too closely.<sup>84</sup>

There is a great irony in all of this. The usual rhetoric of autonomy and choice tends to focus on the decisionmaker alone, but the case law on the right to die makes it abundantly clear that the central issue for most of the families and medical professionals has *not* been patient autonomy. Rather, it has been the need for a clear judicial grant of legal immunity for the *assistants* who would refuse treatment on the patient's behalf but who hesitate because their conduct could otherwise subject them to indictment and possible conviction for homicide.

And so it is today in Michigan—but with a significant difference. Patients in Michigan already have legal immunity from prosecution should they attempt to kill themselves and fail, and it goes without saying that they have eternal immunity from legal process should they succeed. The issue in Michigan is unique because the claim is not simply that the attending physician should be able to supply the lethal agent or force, but that *any* licensed medical professional, *any* family member, or *any* friend should be able to administer the coup de grâce, *and* that the Constitution immunizes such conduct.

### *The Rights of Persons Who Are Older, Dependent, or Disabled*

Viewed in light of the interests of the medically dependent, older persons, and persons with disabilities, the concern that the incompetent persons have the same right to die by the hand of a medical professional, family member, or friend raises some very important questions. Chief among them are questions related to the doctrine of substituted judgment itself.

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<sup>82</sup>355 A.2d 647 (N.J.), *cert. denied*, 429 U.S. 922 (1976).

<sup>83</sup>One of the most patently absurd fictions constructed to justify an implicit holding that death was in the best interest of the incompetent patient involved in the case is that of a "reasonable person with a mental age of two years." Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 430 (Mass. 1977).

<sup>84</sup>See Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 2 (1990); see also Philip G. Peters, Jr., *The State's Interest in the Preservation of Life*, 50 OHIO ST. L.J. 891, 960 (1989) (providing an extensive analysis of the strengths and weaknesses of a number of the main analytical approaches).

Writing in the *Yale Law Journal*, Professor Louise Harmon described the substituted judgment doctrine as “a dangerous legal fiction, . . . an essay about word seduction and wordless victims, about the hidden exercise of power and the infirmities of the human mind.”<sup>85</sup> The reasons are clear from its history:

Lord Eldon crafted the legal fiction of ‘doing that which it is probable the lunatic himself would have done,’ permitting equity courts to make gifts of the lunatic’s surplus income to relatives for whom the lunatic owned no duty of support. About twenty years ago the legal fiction was borrowed from the law of lunacy into the law of informed consent. There it has been used by courts to remove organs from the body of the incompetent, to sterilize him, to force medication on him, to let him wither and die, and virtually fall off the vine.<sup>86</sup>

The danger in a rights-based approach lies in its myopic focus on the autonomy of the individual, without regard to the complex web of relationships that give each of our lives shape and meaning. To assert that a patient has the right to make decisions concerning the appropriate course of treatment without regard to either that person’s capacity to make decisions or the impact that his or her decisions have on others is to miss the ethical questions altogether. Whatever the right of individuals to make decisions concerning the course of their treatment, such decisions cannot alter the *independent* ethical duty of the medical professionals to determine whether or not respecting such a decision is medically or ethically appropriate under the circumstances; the *independent* obligation of others to consider the ethics of providing the funding or services required to translate that decision into action; or the *independent* impact that immunizing such decisionmaking will have on society as a whole. In fact, the issues that define the entire debate over the direction of American health care policy at the close of the twentieth century are the limits—and the ethics—of patient autonomy.

### *The Practical and Ethical “Needs of Strangers”*

A society defines itself and its morals, not by high-sounding constitutional rhetoric, but by reference to its actual record. It is the *actual* balance struck between societal and individual interests in the context of life and death that ultimately will determine the measure of our civilization. Autonomy claims fail because they ignore the significance of questions such as these:

- the nature of the person as a bearer of rights and obligations;

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<sup>85</sup>Harmon, *supra* note 84, at 2 (1990).

<sup>86</sup>*Id.* at 1-2.

- the value of individual human lives;
- the place of persons with disabilities within our society and the duties owed to them:
  - the duties owed to the sick and dying;
  - the nature of homicide and justification;
  - the guiding principles of medical ethics;
  - the obligations of families to their most dependent members;
  - the relationship of autonomy claims to social duties; and—most importantly—
  - social attitudes toward death itself, i.e., what some have called the *artes moriendi* (the art of dying).

One need only consider the data on health care costs to appreciate why the coming debate on health care policy, including rationing, will be a critical one for both health care and civil rights law. The trend line is unmistakable.<sup>87</sup>

If Thomas Jefferson is correct and “man has no natural right in opposition to his social duty,”<sup>88</sup> the most important question is not “What are our rights?” but “What are our social duties in the context of death, dying, and health care?” An autonomy model does not even hint at an answer. The government, however, is more than happy to provide one. Hillary Rodham Clinton’s health care task force (i.e., the government) is well aware that the autonomy demands of the individual must be tempered by the ethical duties, perspectives, and health care needs of others, and, at least in the context of health care finance, it has prepared a plan that will inevitably define those rights and duties for us.

None of us are autonomous when the issue is health care financing,<sup>89</sup> and yet the urge to control our own destiny is strong. Daniel Callahan has

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<sup>87</sup>Chart provided by Carlos Gomez, M.D.

<sup>88</sup>Letter to the Danbury Baptists, Jan. 1, 1802, in 8 WRITINGS OF THOMAS JEFFERSON 113 (H. Washington ed., 1864).

<sup>89</sup>Commenting on the repeal of the catastrophic health insurance program signed into law on July 1, 1988, Senator Alan K. Simpson of Wyoming noted: “The whole U.S. has been swung around on their tails by the 5.6 percent who don’t want to pay for these benefits. . . . We [the Congress]’re not confused; we’re terrorized . . . . Yeah, it’s a social experiment; it’s called pay for what you get.” S. Rich, *Health Law Surtax Defeated; Senate Votes to Lower Catastrophic Benefits, But Rejects Repeal*, WASH. POST, Oct. 7, 1989, at A1. The program was repealed in its entirety when Congress adjourned on November 22, 1989. See T. Kenworthy & D. Phillips, *Hill to Face Health, Deficit Issues Anew; In Rush to Adjourn, Bills of Varying Significance Were Passed*, WASH. POST (final ed.), Nov. 23, 1989, at A4. See also R.P. Hey, *Lawmakers Brace for Next Round on Health-Care Issue*, CHRISTIAN SCIENCE MONITOR, Dec. 19, 1989, at 7 (U.S. section).

accurately described American society's propensity to view "medicine . . . as a means of trying to cure or control the problems of life"<sup>90</sup> and assumes that the rationing of health care services is the only way to assure an equitable distribution of scarce health care dollars.<sup>91</sup> If we wish, we can continue to imagine that the primary purpose of constitutional law is to effectuate the self-actualizing decisions of individuals who, like Nancy Cruzan, are incapable of carrying them out. If we are realistic, we will admit that we are not autonomous at all; we are dependent on the good faith (and conduct) of others.

John powell's argument will not come to grips with this fact of life. To do so would be to admit the fallacy of the central premise of his argument. The state of Oregon's highly touted proposal for health care rationing has twice been sent back for reconsideration on the grounds that it discriminates against persons with disabilities.<sup>92</sup> This should come as no surprise. Only the dead make no demands upon our system of health care and those who subsidize it. Small wonder that Michael Ignatieff<sup>93</sup> expressed reservations about the outcome when the balance to be struck is between abstract notions of human rights (e.g., the rights of older persons, persons with disabilities, and medically dependent persons) and more pragmatic considerations, such as skyrocketing costs and the potential for harvesting usable (and potentially salable) organs.<sup>94</sup>

### Conclusion

Neither the language and the history nor the logic of constitutional law supports the proposition that the overarching principle of the Constitution may be summarized by the statement: "Nothing is *malum in se* unless it infringes upon the right of individual choice." John powell's argument, by contrast, rests on it. If the right to die as conceptualized by Messrs. powell, Englehardt, and Tribe is a fundamental right, the courts, not the people, will decide:

- whether death should be considered a social good, as opposed to an inevitable tragedy that is to be avoided in the manner of Dylan Thomas: a "rag[ing] against the dying of the light";

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<sup>90</sup>DANIEL CALLAHAN, *SETTING LIMITS: MEDICAL GOALS IN AN AGING SOCIETY* 19 (1987).

<sup>91</sup>See Robert A. Destro, *Targeting the Elderly: A Non-discrimination Perspective on Daniel Callahan's Setting Limits in SET NO LIMITS: A REBUTTAL TO DANIEL CALLAHAN'S PROPOSAL TO LIMIT HEALTH CARE FOR THE ELDERLY* 45 (1991).

<sup>92</sup>ADA *Analyses of the Oregon Health Care Plan*, 9 *ISSUES IN LAW & MED.* 397 (1994).

<sup>93</sup>See *supra* notes 45, 51, and 67 and accompanying text.

<sup>94</sup>See L. R. Cohen, *A Futures Market in Cadaveric Organs: Would It Work?* 25 *TRANSPLANTATION PROC.* 60, 61 (1993).



- whether the timing and manner of death should be considered a component of the person's concept of the self; and
- whether death might just be part not only of one's self-concept, but also of one's social obligation, that is, the duty to die when it's time.<sup>95</sup>

Needless to say, these are profound issues that touch the heart of what differentiates a civil society organized under a limited constitution from what John Locke described as the "State of Nature." Taken to its logical conclusions, John Powell's autonomy theory of the fourteenth amendment is little more than a romanticized hope that a society of truly autonomous decisionmakers will not recreate that "natural"—and brutally violent—state of affairs. In fact, Locke's description of the "State of Nature"<sup>96</sup> bears an eerie resemblance to the arguments the ACLU utilizes to defend its views on personal autonomy.

To the extent that judges accept John Powell's arguments, they will become our guides on the relatively short journey back into that natural state of perfect, brutish freedom. If we are to avoid that fate, judges would do well to reflect upon Learned Hand's *The Spirit of Liberty*:

And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few; as we have learned to our sorrow.<sup>97</sup>

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<sup>95</sup>In March of 1984 Colorado Governor Richard D. Lamm shocked a group of elderly listeners with the statement that elderly people with terminal illnesses "have a duty to die and get out of the way" because the cost of treating them with the new technologies ruins the nation's economic health and hampers the ability of younger people "to build a reasonable life." *Gov. Lamm Asserts Elderly, If Very Ill, Have "Duty to Die,"* N. Y. TIMES, Mar. 29, 1984, at A16. See also Richard D. Lamm, *Let's Address Our Taboos*, N. Y. TIMES, Oct. 13, 1986, at A1. See also Dana E. Johnson, *Withholding Fluids and Nutrition: Identifying the Populations at Risk*, 2 ISSUES IN LAW & MED. 189, 200 (1986) (noting that the nutritional and hydration needs of those in comas, those in "persistent vegetative states" or affected by dementia, and those without a *confirmed* clinical diagnosis of brain death are also at risk due to questions of "bureaucratic or financial convenience") (quoting Alexander M. Capron, *Ironies and Tensions in Feeding the Dying*, HASTINGS CENTER REP. \_\_\_\_\_, 1984, at 32, 33).

Daniel Callahan has argued explicitly for a paradigm that includes societal limits on an individual's ability to seek even the most rudimentary medical care. See DANIEL CALLAHAN, *WHAT KIND OF LIFE: THE LIMITS OF MEDICAL PROGRESS* (1990); CALLAHAN, *supra* note 90; but see Destro, *supra* note 91.

<sup>96</sup>See *supra* note 77 and accompanying text.

<sup>97</sup>LEARNED HAND, *THE SPIRIT OF LIBERTY* 190 (3d ed. 1960).

### Postscript

Much has transpired since the written versions of this exchange of views were completed in 1993. Though the debate over physician-assisted suicide and euthanasia *literally* involves matters of life and death, the discussion appears to remain polarized between those who view the issue as one of individual liberty and choice and those who view these as profound questions of individual, social, and political morality.

Unfortunately, there is no room for compromise between the two positions. Either the law will create a “consent” exception for physicians and others who take steps intended to end lives that are thought to lack enough meaning to be worth protecting,<sup>98</sup> or they will be subject to the same homicide laws as the rest of us. Though commissions set up to examine the legal, moral, and philosophical issues may disagree over whether the law should create such an exception, there is no disagreement whatever that the central issue is the legitimacy of such *exemptions and who should have them*.<sup>99</sup>

One such committee of “experts,” the Select Committee on Medical Ethics of the British House of Lords, unanimously rejected any changes in the law of homicide because it views the prohibition on intentional killing as “the cornerstone of law and social relationships.”<sup>100</sup>

Unlike the Select Committee, which did reach a unanimous consensus, the Michigan Commission on Death and Dying was badly split on the basic philosophical issue. On one side are those who, in the manner of Ronald Dworkin<sup>101</sup> and H. Tristram Engelhardt,<sup>102</sup> hold that personal liberty is the baseline against which laws must be measured. For them, procedures designed to assure informed consent are—or should be—the

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<sup>98</sup>See *Hobbins v. Attorney General and People v. Kevorkian*, 1994 WL 273205, 62 USLW 2728 (Mich. App. May 10, 1994) (Shelton, J., concurring in part and dissenting in part) (“The State’s interest in the preservation of life relates to meaningful life”).

<sup>99</sup>See Michigan Commission on Death and Dying, Report of the “Pro” Drafting Committee “Draft Statute Supporting Aid-in-Dying” §§ 1.07, 1.14, 1.19, 1.22 (Draft of Apr. 12, 1994) (immunizing “health care professionals and their employees,” but subjecting all others to felony charges carrying a maximum penalty of four (4) years, a fine not to exceed two-thousand dollars, or both). The nature of the penalty, which is identical to that under current Michigan law prohibiting assisted suicide, is discussed in the text at notes 16-17 *supra*.

<sup>100</sup>Report of the House of Lords Select Committee on Medical Ethics, ¶ 237, *quoted in* Bryan Appleyard, Op-ed, *Killing Is Never a Mercy to Society*, INDEPENDENT, Feb. 17, 1994, Edition: 3 Section: Comment at 21. The result is that British physicians remain subject to murder charges and mandatory life sentences if convicted. See Heather Mills, *Euthanasia Pleas Rejected by Lords*, INDEPENDENT, Feb. 17, 1994, Edition: 3 Section: Home News at 2.

<sup>101</sup>RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993).

<sup>102</sup>See text at notes 65-67 *supra*.

only legitimate concern of the state.<sup>103</sup> On the other are those who argue that “[l]egalized killing would dramatically alter the medical decisionmaking process for patients, physicians, and families.”<sup>104</sup>

There is a common thread here, and at its center lies the basic philosophical difference between the views of John Powell and me. On this point there is no room at all for compromise. The British Lords tackled the issue head on and explicitly rejected the autonomy model on which the right to die is based: “the issue of euthanasia is one in which the interest of the individual cannot be separated from the interests of society as a whole.”<sup>105</sup> This philosophy is echoed by the members of the Michigan Commission on Death and Dying, which urges that no exemptions be created. In their view, too much is at stake for society, the individual, the medical profession, and families to view physician-assisted suicide as anything less than a way station “for the [involuntary] euthanasia that will inevitably follow”—just as it has in the Netherlands.<sup>106</sup> Doctors are split along the same philosophical lines.<sup>107</sup>

It is therefore unsurprising that identical differences of opinion show up in the reported decisions. Four cases command particular attention. The Michigan companion cases of *People v. Kevorkian* and *Hobbins v. Attorney General*, striking down the Michigan assisted suicide statute;<sup>108</sup> *Compassion in Dying v. Washington*,<sup>109</sup> striking down the Washington state assisted suicide statute on grounds that it violates the substantive due process right to privacy elaborated by the joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>110</sup> and the judgment of the Supreme Court of Canada in *Rodriguez v. British Columbia (Attorney General)*,<sup>111</sup> upholding the British Columbia assisted

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<sup>103</sup>See Michigan Commission on Death and Dying, Report of the “Pro” Drafting Committee “Draft Statute Supporting Aid-in-Dying,” Draft of Apr. 12, 1994.

<sup>104</sup>Michigan Commission on Death and Dying, Report Opposing Legalized Assisted Suicide, Executive Summary 2 (Draft of Feb. 3, 1994 and Addendum Offered May 9, 1994).

<sup>105</sup>*Id.*

<sup>106</sup>*Id.*

<sup>107</sup>Both the American and British Medical Associations have made it clear that they reject physician participation in the intentional killing (“termination”) of their patients.

<sup>108</sup>No. 93-11482 (Mich. Cir. Ct. Wayne County Dec. 13, 1993) (striking down state ban on assisted suicide), *aff'd in part and rev'd in part* in *Hobbins v. Attorney General* and *People v. Kevorkian*, 1994 WL 273205, 62 USLW 2728 (Mich.App. May 10, 1994) (affirming that state law banning assisted suicide and creating a Commission on Death and Dying violated the Michigan constitution’s “one object” rule, but holding that the right to privacy does not encompass a right to assisted suicide), *review granted* Nos. SC 99591, SC 99674, SC 99752, SC 99758, SC 99759 (Mich. June 6, 1994).

<sup>109</sup>850 F. Supp. 1454 (W.D. Wash. 1994).

<sup>110</sup>112 S. Ct. 2791 (1992).

<sup>111</sup>107 D.L.R.4th 342 (Can. 1993).

suicide statute against a challenge under the Canadian *Charter of Rights and Freedoms*.<sup>112</sup>

The striking thing about these decisions is their all or nothing quality. Just as there is little room for compromise on whether consent “cures” what would otherwise be active participation in a homicide, so too is there little room for compromise when a judge is asked to create such an exemption by judicial decree. Though the change in venue adds nothing of substance to the underlying legal, philosophical, and moral issues, it does raise a troubling issue: the political legitimacy of judicial decisionmaking in such unsettled areas of public policy.

This is so for two basic reasons. The first goes to the essence of any robust theory of judicial review in a democratic society. A decision that the *Constitution* requires the creation of a consent exemption to the law of homicide implies that the issue has *already* been decided by “the People.” The task of the judge or justice is but to enforce an existing prohibition.

The second reason touches the heart of the constitutional concept of liberty. The British Lords are undoubtedly correct in their view that the prohibition of intentional killing is “the cornerstone of law and social relationships.”<sup>113</sup> In Locke’s view, that limitation on individual autonomy is the bulwark that separates civilization from the “State of Nature.” It is for this reason that “the reality at the heart of the euthanasia debate is to be found in [a] confrontation between what is public and what is private—not just in the sense of what belongs in those spheres, but also in what defines them.”<sup>114</sup>

It is (or should be) obvious that the task of *defining* the public and private spheres of human activity is a political judgment of the highest

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<sup>112</sup>The relevant portions of the *Canadian Charter of Rights and Freedoms* are as follows:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Rodriguez v. British Columbia (Attorney General), 107 D.L.R.4th 342, 350 (Can. 1993).

<sup>113</sup>See note 100 *supra*.

<sup>114</sup>Appleyard, *supra* note 100.

order. In some cases, the balance is struck and lines are drawn by the Constitution itself,<sup>115</sup> but in most instances the power to strike a balance, and to draw lines that approximate it, is left to the political process.<sup>116</sup> Only one of the four decisions mentioned above—that of the majority of the Supreme Court of Canada in *Rodriguez*—seems to grasp this basic point.

Since the Canadian Supreme Court's understanding of the *Charter of Rights and Freedoms* is not so different from our own Supreme Court's understanding of the Bill of Rights and the fourteenth amendment, we need to look beyond substantive rules that protect liberty or security of the person. We need also to look beyond the range of potential outcomes. Only two are possible: consent as a defense to homicide can either be accepted or rejected in principle. If it is rejected in principle (i.e., categorically), there can be no exceptions. If it is accepted in principle, the focus shifts to the conditions under which it will operate.

It is the *starting point*—the question—that is key. The United States District Court for the Western District of Washington viewed the “underlying constitutional issue [a]s whether the State of Washington can resolve the profound spiritual and moral questions surrounding the end of life in so conclusive a fashion as to deny categorically any option for a terminally ill, mentally competent person to commit physician-assisted suicide.”<sup>117</sup> Implicit in this question is the presumption that a “categorical” denial of choice in matters over which there are profound spiritual and moral differences of opinion is constitutionally suspect. This, in essence, is Ronald Dworkin's position: when there are profound differences of opinion, autonomous choice becomes the controlling value.

The majority of the Canadian Supreme Court put the question differently. “The issue here, then, can be characterized as being whether the blanket prohibition on assisted suicide is arbitrary or unfair in that it is unrelated to the state's interest in protecting the vulnerable, and that it lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition.”<sup>118</sup> For the Canadian Justices, profound differences of opinion are matters to be taken into account, but “reference must [also] be made to principles which are ‘fundamental’ in the

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<sup>115</sup>See, e.g., U.S. CONST. Amend. III, IV (1791).

<sup>116</sup>*Accord*, Canadian Charter of Rights and Freedoms, Section 1: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

<sup>117</sup>*Compassion in Dying v. Washington*, 850 F. Supp. at 1460.

<sup>118</sup>*Rodriguez v. British Columbia (Attorney General)*, 107 D.L.R.4th at 396 (opinion of Sopinka, J.).

sense that they would have general acceptance among reasonable people.”<sup>119</sup> And thus, unlike their dissenting colleagues and their American counterparts, the majority of the Canadian Court did not limit themselves to a discussion of the appropriate balance to be struck between the specific interests of identifiable parties and the abstract interests of a faceless state. They saw the issue for what it was: a question that goes to the very nature of the society in which we live.

Overall, then, it appears that a blanket prohibition on assisted suicide . . . is the norm among western democracies, and such a prohibition has never been adjudged to be unconstitutional or contrary to fundamental human rights. Recent attempts to alter the status quo in our neighbour to the south have been defeated by the electorate, suggesting that despite a recognition that a blanket prohibition causes suffering in certain cases, the societal concern with preserving life and protecting the vulnerable rendered the blanket prohibition preferable to a law which might not adequately prevent abuse.<sup>120</sup>

The contrast is striking. Chief Judge Rothstein’s opinion striking down Washington state’s law prohibiting assisted suicide characterizes the matter as one of “first impression,”<sup>121</sup> thus paving the way for a *de novo* judicial balancing of the relevant rights and interests. The majority of the Canadian Court took precisely the opposite approach when it undertook to canvass the laws of several Western European countries, the British Commonwealth, the European Commission on Human Rights, and state and federal law in the United States.<sup>122</sup>

The backdrop against which the question is decided is important. In 1908 Oliver Wendell Holmes observed: “All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.”<sup>123</sup>

As applied here, Holmes’s observation cautions against reading principles of liberty and autonomy in a vacuum, bereft of the teachings of history, the lessons of the common law, or the experiences of others. His oft-quoted axioms “A page of history is worth a volume of logic” and “The life of the law has not been logic but experience” caution against the tendency of judges to view newly “constitutionalized” questions as

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<sup>119</sup>*Id.* at 406.

<sup>120</sup>*Id.* at 404.

<sup>121</sup>*Compassion in Dying v. Washington*, 850 F. Supp. at 1455.

<sup>122</sup>*See Rodriguez v. British Columbia (Attorney General)*, 107 D.L.R.4th at 401-04.

<sup>123</sup>*Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

questions of first impression. The legality of assisted suicide and euthanasia are questions that have been debated for centuries.

By what right<sup>124</sup> then does an Article III judge declare the philosophy of Ronald Dworkin to be the “supreme law of the land”?<sup>125</sup> Judge Rothstein’s reliance on the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>126</sup> provides the answer.

The joint opinion in *Casey* adopts the “fundamental rights” jurisprudence argued by the second Justice Harlan in *Poe v. Ullman*.<sup>127</sup> For Harlan,

[t]he best that can be said [about the due process liberty principle] is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard for what history teaches are the traditions from which it broke.<sup>128</sup>

Assuming for purposes of the present analysis that both Justice Harlan and the majority of the current Court are correct and that the due process clause of the fourteenth amendment does empower the Court to strike the balance between “respect for the liberty of the individual . . . and the demands of organized society,” the key to determining whether or not a right to euthanasia or assisted suicide is fundamental depends, in large part, upon ascertaining *the Court’s view* of “the balance struck by this country, having regard for what history teaches are the traditions from which it broke.”

This, of course, is the problem. The legitimacy of any act of judicial review turns upon its consistency with the Constitution. Just as “[t]he principles of fundamental justice cannot be created for the occasion to reflect the court’s dislike or distaste of a particular statute,”<sup>129</sup> neither can the furtherance of an individual’s interests be considered controlling. To characterize an individual’s desire to die as “involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy” is only the beginning of the inquiry, not

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<sup>124</sup>The phrase is borrowed from Louis Lusky. LOUIS LUSKY, BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT’S POWER TO REVISE THE CONSTITUTION (1975).

<sup>125</sup>U.S. CONST. art. VI (1787).

<sup>126</sup>112 S. Ct. 2791, 2806 (1992).

<sup>127</sup>*Poe v. Ullman*, 367 U.S. 497 (1961).

<sup>128</sup>367 U.S. at 542 (Harlan, J., dissenting).

<sup>129</sup>*Rodriguez v. British Columbia (Attorney General)*, 107 D.L.R.4th at 404 (opinion of Sopinka, J.).

its end.<sup>130</sup> The decisions of the Canadian Supreme Court and the House of Lords Select Committee accept as true that the decision to undergo euthanasia or suicide “may originate within the zone of conscience and belief;” for it is at least as personal and (to borrow a phrase from *Casey*) as “fundamentally affecti[ve of] a person as the decision whether to bear or beget a child.” Nevertheless, the decision to elevate it to the rank of fundamental right—and thus to create an exception to a law of general applicability—is “more than a philosophic exercise.”<sup>131</sup> Like abortion, assisted suicide and euthanasia are

act[s] fraught with consequences for others: for the [person] who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life. . . .<sup>132</sup>

But unlike the specific burden pregnancy places only on women, the discomfort, pain, decline, and death that attend disease, trauma, some disabilities, and aging are not in any sense “unique to the human condition and so unique to the law”; they are an integral part of that human condition. And unless words have no meaning at all, killing by force, neglect, or poison cannot validly be described as a means of enhancing the human condition of the person to be killed. The human condition—at least as we know it—ends with death.

This, of course, is why advocates for assisted suicide do not argue that it is unconstitutional to deprive them of “the option of committing suicide as such,” but rather that it is unconstitutional to deprive a person “of the right to *choose* suicide”<sup>133</sup> and the means of carrying that choice to fruition.<sup>134</sup> This is why rationales of the House of Lords Select Committee and the Canadian Supreme Court must be read as nothing less than explicit rejections of the Dworkin and Engelhardt formulations of the maxim “Consent cures.”

The choice is indeed a stark one. Canada’s Chief Justice, Antonio Lamer, admitted as much when he wrote:

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<sup>130</sup>*Accord*, *Casey*, 112 S. Ct. at 2807 (“these considerations begin our analysis of the woman’s interest in terminating her pregnancy but cannot end it. . .”).

<sup>131</sup>*Id.*

<sup>132</sup>*Id.*

<sup>133</sup>*Rodriguez v. British Columbia (Attorney General)*, 107 D.L.R.4th at 365 (Lamer, C.J.C., dissenting)(emphasis in the original).

<sup>134</sup>107 D.L.R.4th at 417-19 (McLachlin and L’Heureux-Dubé, JJ., dissenting).



The truth is that we simply do not and cannot know the range of implications that allowing some form of assisted suicide will have for persons with physical disabilities. . . . Respecting the consent of those [who wish to commit suicide] may necessarily imply running the risk that the consent will have been obtained improperly.<sup>135</sup>

Does the concept of ordered liberty enshrined in the United States Constitution *require* us to run such a risk when experience has shown that “man is certain to behave as a wolf to his own kind”?<sup>136</sup> It doesn't. In fact, it *cannot* without putting at risk the very order upon which our rights to life, liberty, property, and equal protection depend.<sup>137</sup>

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<sup>135</sup>107 D.L.R.4th at 376 (Lamer, C.J.C., dissenting).

<sup>136</sup>Ignatieff, *supra* note 45, at 53.

<sup>137</sup>The Court's death penalty jurisprudence provides a useful comparison. See *Callins v. Collins*, 114 S. Ct. 1127 (1994) (Blackmun, J., dissenting and Scalia, J., concurring).

**IL&M**

***Nota Bene***

