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Donald L. Beschle

*John Marshall Law School*, [dbeschle@uic.edu](mailto:dbeschle@uic.edu)

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THE ROLE OF COURTS IN THE DEBATE ON  
ASSISTED SUICIDE: A COMMUNITARIAN  
APPROACH

DONALD L. BESCHLE\*

INTRODUCTION

A generation ago, the "right to die," the notion that the Constitution protected at least some forms of euthanasia, commanded far less than general acceptance.<sup>1</sup> To a generation with fresh memories of the horrible consequences of declaring some forms of life "unworthy" to continue, even passive forms of euthanasia were suspect.<sup>2</sup> Even the common law right to refuse medical treatment required justification. In reported cases involving patients' refusal of lifesaving procedures, courts commonly framed the issue as one of free exercise of religion.<sup>3</sup> Mere assertions of autonomy unsupported by some additional claim of constitutional protection could be expected to fail.<sup>4</sup>

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\* Associate Professor, The John Marshall Law School; B.A. Fordham University; J.D. New York University School of Law; L.L.M. Temple University School of Law.

1. See Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy Killing" Legislation*, 42 MINN. L. REV. 969 (1958). See also *Tate v. Canonica*, 5 Cal. Rptr. 28 (1960); *People v. Roberts*, 178 N.W. 690 (Mich. 1920); *State v. Ehlers*, 119 A. 15 (N.J. 1922).

2. In 1950, the World Medical Association, at the same meeting where the German medical profession was readmitted, approved a resolution which "condemn[ed] the practice of euthanasia under any circumstances." See OLIVE R. RUSSELL, *FREEDOM TO DIE: MORAL AND LEGAL ASPECTS OF EUTHANASIA* 94 (1977). Dr. Leo Alexander, American medical consultant at the Nuremberg trials, in a widely noted article, wrote that Nazi crimes "started with the acceptance of an attitude, basic to the euthanasia movement, that there is such a thing as life not worthy to be lived . . ." *Id.* at 93.

3. See, e.g., *Holmes v. Silver Cross Hosp.*, 340 F. Supp. 125 (N.D. Ill. 1972); *Montgomery v. Board of Retirement of Kern Co.*, 109 Cal. Rptr. 181 (Ct. App. 1973); *In re Estate of Brooks*, 205 N.E.2d 435 (Ill. 1965).

4. See, e.g., *In re President of Georgetown College, Inc.*, 331 F.2d 1010 (D.C. Cir. 1964); *United States v. George*, 239 F. Supp. 752 (D. Conn. 1965).

In the fourteen years between *In re Quinlan*,<sup>5</sup> the New Jersey case which brought the "right to die" to national prominence, and *Cruzan v. Director, Missouri Department of Health*,<sup>6</sup> the United States Supreme Court's first encounter with the issue, enormous changes took place. In the mid-1970s, *Roe v. Wade*<sup>7</sup> had only recently made clear that the right of privacy established in *Griswold v. Connecticut*<sup>8</sup> was about more than merely keeping government out of people's bedrooms. In medicine, the increased ability to prolong life and the expense of doing so had not yet become prominent national issues. And so the Supreme Court of New Jersey assumed the role of pioneer by upholding a claim that the father of a woman in an irreversible coma had the right to authorize discontinuance of "all extraordinary medical procedures" in furtherance of his daughter's right to forego treatment.<sup>9</sup>

When *Cruzan* came before the United States Supreme Court, the legal landscape was quite different. Reaction to *Quinlan* was generally positive,<sup>10</sup> and courts and legislatures swiftly endorsed its core conclusions. State courts held that competent patients had a right to refuse life-sustaining treatment which needed no bolstering from traditional constitutional rights, such as free exercise, to prevail against countervailing state interests.<sup>11</sup> In addition, courts held that patients no longer able to articulate their wishes have a right to exercise this choice through proxy decisionmakers.<sup>12</sup> Legislatures moved to codify these rights, and

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5. 355 A.2d 647 (N.J.), *cert. denied*, 429 U.S. 922 (1976).

6. 497 U.S. 261 (1990).

7. 410 U.S. 113 (1973) (establishing abortion as part of the privacy right implicit in the Fourteenth Amendment).

8. 381 U.S. 479 (1965) (invalidating state restrictions on the use of contraceptives by married persons).

9. *In re Quinlan*, 355 A.2d at 651. Petitioner Joseph Quinlan initially framed his claim in terms of freedom of religion and freedom from cruel and unusual punishment, both of which were rejected by the court in favor of extending the privacy right to euthanasia. *Id.* at 661-64.

10. See, e.g., Symposium Panel, *Is There a Right to Die?*, 12 COLUM. J.L. & SOC. PROBS. 489 (1976); David P. Falk, Note, *In re Quinlan: One Court's Answer to the Problem of Death With Dignity*, 34 WASH. & LEE L. REV. 285 (1977); Margaret W. Randall, Note, *The Right to Die a Natural Death: A Discussion of In re Quinlan and the California Natural Death Act*, 46 U. CINN. L. REV. 192 (1977).

11. See *Developments in the Law—Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1643-76 (1990).

12. *Id.* The cases on advance directives are summarized in Gregory G. Sarno, Annotation, *Living Wills: Construction, Validity and Effect*, 49 A.L.R.4th 812 (1986).

"living will" statutes proliferated.<sup>13</sup> Commentary was overwhelmingly favorable; one was as likely to find criticism of courts and legislatures for moving too cautiously as one was to find criticism of the fundamental direction in which the law was moving.<sup>14</sup>

Thus, *Cruzan* was more significant for its implicit endorsement of the post-*Quinlan* trend than for its narrow holding which permits a state to require "clear and convincing" evidence of an incompetent patient's desires before permitting a surrogate decision to discontinue treatment. Eight of nine justices appear to have recognized a due process right of a competent patient to refuse treatment,<sup>15</sup> and five appear to have recognized a right to have clearly expressed advance directives respected.<sup>16</sup> Clearly the cutting edge of the "right to die" debate has shifted significantly. The modern debate over the legal status of euthanasia is usually traced to Glanville Williams' book, *The Sanctity of Life and the Criminal Law*, which strongly supported legalization of euthanasia when requested by an adult suffering from an incurable illness that caused severe pain or made the patient incapable of leading a rational existence.<sup>17</sup> The most prominent response to Williams came from Yale Kamisar, who questioned the validity of Williams' conclusion that such a request was voluntary and informed and who also saw even a narrow exception to a general prohibition on some forms of euthanasia as the first step down a

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13. See Marni J. Lerner, Note, *State Natural Death Acts: Illusory Protection of Individuals' Life-Sustaining Treatment Decisions*, 29 HARV. J. ON LEGIS. 175, 184 n.46 (1992).

14. Thus, Ms. Lerner concludes that legislation has not been sufficiently protective of patient autonomy. *Id.* See also Eugenie Anne Gifford, *Artes Moriendi: Active Euthanasia and the Art of Dying*, 40 UCLA L. REV. 1545 (1993).

15. The opinion of the Court cautiously states: "The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278 (1990). The dissenters more forcefully affirm "a fundamental right to be free of unwanted [treatment]." *Id.* at 302 (Brennan, J., dissenting); see also *id.* at 343 (Stevens, J., dissenting). Only Justice Scalia refuses to recognize that the due process clause plays a part in these cases. *Id.* at 292-301 (Scalia, J., concurring).

16. The dissenters, who would have refused to allow Missouri to impose a standard of clear and convincing evidence, obviously extend the right to advance directives. Justice O'Connor, while permitting a high evidentiary standard, strongly suggests that the Constitution compels respect for a clear and explicit advance directive. See *Cruzan*, 497 U.S. at 287-92 (O'Connor, J., concurring).

17. GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* (1957). The book expands on the 1956 lecture series at Columbia University which largely touched off the contemporary debate on euthanasia.

"slippery slope."<sup>18</sup> Post-*Cruzan* developments certainly suggest that the "slippery slope" metaphor has some validity. Types of claims once controversial are now routinely accepted; types of claims once clearly beyond the pale are now merely controversial.<sup>19</sup> But, of course, one commentator's dangerous descent is another's logical and positive development.

The two most common distinctions used by lawyers and ethicists to categorize euthanasia have been the distinctions between "voluntary" and "involuntary" euthanasia and between "active" and "passive" forms. Voluntary euthanasia is chosen by the patient; involuntary euthanasia is chosen by another regardless of the patient's wishes. Active methods of euthanasia intervene to hasten death; passive methods merely refuse to intervene to prolong life.<sup>20</sup> Traditionally, commentators have found voluntary and passive euthanasia far more acceptable than involuntary and active euthanasia. But the usefulness of the categories themselves has been called into question.<sup>21</sup>

The debate over living wills and proxy decisionmaking has turned mostly on questions of the scope of what is "voluntary." Definitions have differed, but for the most part commentators recognize the need to proscribe clearly involuntary euthanasia.<sup>22</sup> In contrast, the active-passive distinction has come under more fundamental attack. A new generation of "right to die" claims has arisen which seek more than merely the right to refuse treatment. Instead, they claim constitutional protection for assistance in actively ending one's life, and immunity from prosecution not only of the patient seeking death, but of the patient's agent. Fundamentally, these claims are assaults on the active-passive dis-

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18. Kamisar, *supra* note 1. See also Yale Kamisar, *When Is There a Constitutional "Right To Die"? When Is There No Constitutional Right To Live?*, 25 GA. L. REV. 1203 (1991).

19. Professor Kamisar notes that Williams devoted much of his argument to defending "passive" euthanasia. *Cruzan* makes clear that at least in certain circumstances, the withdrawal of life sustaining treatment is a right. In his argument in favor of "active" euthanasia, Williams limited himself to cases involving dying patients who asked for death to relieve suffering. Today many advocates of euthanasia do not consider those circumstances to be essential. Kamisar, *supra* note 18, at 1205-14.

20. See GERMAIN GRISEZ & JOSEPH M. BOYLE, *LIFE AND DEATH WITH LIBERTY AND JUSTICE: A CONTRIBUTION TO THE EUTHANASIA DEBATE* 86-97, 139-42 (1979).

21. See, e.g., Kamisar, *supra* note 1, at 1014-30 (on the voluntary-involuntary distinction); Gregory Gelfand, *Euthanasia and the Terminally Ill Patient*, 63 NEB. L. REV. 741, 753-56 (1984) (on the active-passive distinction).

22. Even Glanville Williams advocated euthanasia "where it is performed upon a dying patient with his consent," not when it is involuntary. WILLIAMS, *supra* note 17, at 311.

inction although they also require serious reexamination of the voluntary-involuntary dichotomy.

As a matter of law and social policy, if not of ethics, the existence of a right to at least some forms of voluntary, passive euthanasia seems settled. Is assisted suicide merely a logical extension of this right, or are we on Kamisar's slippery slope? Is the active-passive distinction indefensible, essential, or somewhere in between? If society does not punish one who attempts suicide, is there any reason to punish that person's agent? And how are these decisions to be made: by courts, legislatures, individuals, or some combination?

It has been observed that, while initially we create language, eventually it creates us. In other words, our experience is filtered through preexisting mental concepts, and how we interpret experience, then, depends on the tools we have for expression. The same is true of our legal and ethical categories. Usually, our first instinct is to try to fit experience into preexisting concepts. Both our preferred approach to legal and ethical issues, and the range of alternatives which we regard as available, will profoundly affect the conclusions we reach.

Constitutional rights claims tend to be analyzed not only in popular discourse, but also among lawyers and judges, using one of two approaches: a libertarian approach or a majoritarian approach. While a deontological approach is used by some ethicists and many ordinary people in reaching moral conclusions, such an approach plays at best only a subsidiary role in constitutional analysis; it is not a viable alternative for those dissatisfied with either of the dominant models. There is, however, a more promising, if less well-defined, alternative: a communitarian approach. Before examining that alternative, it will be useful to examine the two most common approaches.

### I. THE LIBERTARIAN APPROACH

Perhaps the most respected approach to rights claims is one which sees individual rights as absolute trumps over community welfare or preferences.<sup>23</sup> Debate may rage over what the rights are or how to determine them, but nearly all participants in American political or legal discourse seem to take strong libertarian positions on some rights issues.<sup>24</sup> Since the inception of the

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23. In contemporary jurisprudential thought, the "rights as trumps" metaphor is most closely associated with Ronald Dworkin. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* xi (1977).

24. "The debate does not include the issue of whether citizens have *some* moral rights against their Government. It seems accepted on all sides that they

modern debate over the "right to die," the libertarian approach has been by far the dominant mode of analysis.<sup>25</sup> This is unsurprising. Most Americans accept the proposition that there is some core of absolute individual liberty, and the logical starting point in deciding what the scope of that liberty is would seem to be the proposition that one has dominion over one's own body.<sup>26</sup> Once a libertarian approach is adopted, therefore, it is difficult to avoid the conclusion that one may act toward one's own body in a way which society sees as destructive.<sup>27</sup> Libertarian deference to individual choice has at least one core limitation. The choice which commands respect must actually be a choice. At some point coercion, deception or incapacity make an articulated "choice" into the product of circumstances outside the individual — often the will of others. While this may not invalidate the individual's "choice," it certainly challenges the easy justification of why that choice should be respected through the language of libertarian individualism.<sup>28</sup>

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do. . . . Some philosophers, of course, reject the idea that citizens have rights apart from what the law happens to give them. . . . But that view has never been part of our orthodox political theory. . . . It is much in dispute, of course, what *particular* rights citizens have." *Id.* at 184. Thus, Justice Scalia, a paragon of deference to the legislature in privacy cases, is the Court's strongest champion of individual property rights. *See, e.g.,* *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *Pennell v. City of San Jose*, 485 U.S. 1, 15 (1988) (Scalia, J., dissenting in part); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

25. *See supra* notes 5-17.

26. Thus, the analytical starting point in *Cruzan*: "Before the turn of the century, this Court observed that '[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of the law.'" 497 U.S. at 269 (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891)).

27. The argument, of course, seems to have already progressed from the right to control one's own body to the right to refuse medical treatment endorsed in *Cruzan* to a general endorsement of negative euthanasia. *See* Joseph Fletcher, *Ethics and Euthanasia*, in *TO LIVE AND TO DIE: WHEN, WHY AND HOW* 113 (Robert H. Williams ed., 1974) ("Arguing pro and con about negative euthanasia is therefore merely flogging a dead horse.") The next step would assert that the "active-passive" distinction makes no sense. *See* James Rachels, *Euthanasia, Killing and Letting Die*, in *ETHICAL ISSUES RELATING TO LIFE AND DEATH* 146 (John Ladd ed., 1979).

Of course, it is possible to avoid that progression. Hobbes was the first to found a system of political philosophy on an individual's right to life, and saw that right as inalienable, thus denying even the individual the right to dispose of his or her life. *See* EIKE-HENNER W. KLUGE, *THE ETHICS OF DELIBERATE DEATH* 103-05 (1981).

28. Thus, early efforts to regulate wages and hours were struck down as violations of the "liberty" of contract. *See* *Lochner v. New York*, 198 U.S. 45

Even strong libertarians must concede that individual choices are not made in a social vacuum; they are at least to some extent influenced by society. This is not enough to refute libertarianism, but it is enough to put us on guard. At some point, influence will become enough to at least warrant serious reflection before assigning "trump" status to individual decisions out of respect for individual liberty. Where this point is has long been a key question in the "right to die" debate. As noted above, most still defend the distinction between voluntary and involuntary euthanasia.<sup>29</sup>

Thus, one might argue that the refusal of lifesaving medical treatment should not be respected because the patient's pain makes the decision to die involuntary.<sup>30</sup> More obviously, one might argue that the decision of a proxy decisionmaker need not be respected, or at the very least must be justified on grounds other than libertarian individualism, since it is not the decision of the individual at all.<sup>31</sup> The response to these objections has been to advocate the use of advance directives, executed well before an individual's need for a surrogate decision maker.<sup>32</sup> As argued elsewhere, this creates its own problems; it is by no means clear that an individual's statement of what should be done at some indefinite point in the future will correspond to the same individual's choice when confronted with the previously unknown experience of imminent death.<sup>33</sup> This is not to say that

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(1905). When a poor laborer accepts work at an extremely low wage and with long hours, is that an exercise of autonomy, or a coerced act? The point is at least debatable.

29. In the introduction to his book advocating euthanasia, Derek Humphry repeats his commitment to voluntary euthanasia, and dismisses the notion that acceptance of this would lead to involuntary euthanasia, "something not even the most rabid enthusiast has advocated." DEREK HUMPHRY, *LET ME DIE BEFORE I WAKE* 4 (1981).

30. See Kamisar, *supra* note 1, at 985-93.

31. Dr. Arnold Relman, for example, stresses that while the informed consent of the patient or family is important, inevitably much of the decision-making process must be delegated to the physician's expertise. Arnold S. Relman, *The Saikewicz Decision: A Medical Viewpoint*, in *LEGAL AND ETHICAL ASPECTS OF TREATING CRITICALLY AND TERMINALLY ILL PATIENTS* 138-47 (A. Edward Doudera & J. Douglas Peters eds., 1982). See also Michael Walzer, *Consenting to One's Own Death: The Case of Brutus*, in *BENEFICENT EUTHANASIA* 100-05 (Marvin Kohl ed., 1975), in which Walzer discusses the legitimacy of automatic deference to a principal's wishes. "Should we simply listen to a man, as if we were his servants, when he asks to die, or should we make an independent judgment, as friends (I think) must do?" *Id.* at 104.

32. See JAMES M. HOEFLER, *DEATHRIGHT: CULTURE, MEDICINE, POLITICS AND THE RIGHT TO DIE* 187-230 (1994).

33. Donald L. Beschle, *Autonomous Decisionmaking and Social Choice: Examining the "Right to Die,"* 77 *Ky. L.J.* 319 (1989).



the decisions of surrogate decisionmakers should not be respected, but it does call into question the justification of that conclusion on purely libertarian grounds.

When we turn to the question of assisted suicide, a new set of questions arises. How does the involvement of an agent change things? If we assume that the voluntary-involuntary distinction must be preserved, what steps must we take to assure that influence flows from the patient to the agent, and not the other way? Does the agent have a duty merely to obey instructions, or is there a duty to determine that the instructions themselves are sufficiently free of undue outside influence? Recent cases illustrate the libertarian approach to these questions and also highlight the flaws of such thought.

There may be no better example of singleminded commitment to libertarianism in "right to die" jurisprudence than the California Court of Appeals decision in *Bouvia v. Superior Court*.<sup>34</sup> Elizabeth Bouvia was at the time a 28-year-old woman, a quadriplegic suffering from severe cerebral palsy.<sup>35</sup> The court found that she was "intelligent, very mentally competent," but "physically helpless" and "totally dependent upon others."<sup>36</sup> She brought an action to compel hospital authorities to disconnect a nasogastric feeding tube so that she might starve to death.<sup>37</sup> This case, like *Quinlan* and other early "right to die" cases, then, sought withdrawal of medical treatment rather than active intervention to hasten death. But the "active-passive" distinction has been under so much fire that there is little reason to believe that the distinction was crucial.<sup>38</sup> Of much more significance

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34. 225 Cal. Rptr. 297 (Ct. App. 1986).

35. *Id.* at 299-300.

36. *Id.* at 300.

37. *Id.*

38. Justice Compton, in her concurring opinion, clearly rejects any distinction between active and passive methods. *Id.* at 307 (Compton, J., concurring). The active-passive distinction depends on how one defines an act. Is the failure to do something an act? In some legal contexts, where a duty to act exists, it is. For example, a parent who fails to call a doctor for a sick child may be guilty of homicide, while a stranger who does the same has done nothing criminal. See WAYNE LAFAYE & AUSTIN SCOTT, CRIMINAL LAW 184 (1972). In light of this, one can understand the argument that the distinction is artificial: "[T]he rightness or wrongness of euthanasia . . . whether direct or indirect, depends on the situation. Neither form is intrinsically or invariably good or evil. Sometimes mercy killing is right; sometimes 'letting patients go' is wrong. It depends." Joseph Fletcher, *The "Right" to Live and the "Right" to Die*, in BENEFICENT EUTHANASIA *supra* note 31, at 50. For a defense of the active-passive distinction, see David Louisell, *Euthanasia and Biathanasia: On Dying and Killing*, 22 CATH. U. L. REV. 723 (1973).

was the undisputed fact that Ms. Bouvia's condition was not terminal.<sup>39</sup>

This fact did not trouble the court. Finding that "a desire to terminate one's life is probably the ultimate exercise of one's right to privacy,"<sup>40</sup> the court then held that "the right to refuse treatment does not need the sanction or approval by any legislative act, directing how and when it shall be exercised."<sup>41</sup> Specifically, the state cannot limit the right to terminal patients, nor, it seems, even to conditions of a specified level of seriousness. Valuation of the quantity and quality of one's life is not a medical decision for her physicians to make. Neither is it a legal question whose soundness is to be resolved by lawyers or judges. It is not a conditional right subject to approval by ethics committees or courts of law. It is a moral and philosophical decision that, being a competent adult, is her's alone.<sup>42</sup>

And, in case this statement is not sufficiently clear, the court goes on to criticize the trial court for questioning Ms. Bouvia's motives: "If a right exists, it matters not what 'motivates' its exercise. We find nothing in the law to suggest the right to refuse medical treatment may be exercised only if the patient's motives meet someone else's approval."<sup>43</sup> In a concurring opinion, Justice Compton makes clear that she regards effectuation of a desire to end a subjectively intolerable condition as "an absolute right," and that this includes the right to enlist active assistance from medical practitioners.<sup>44</sup>

*Bouvia* is strong stuff. Even cases which generally follow its lead often feel the need to soften its libertarian edges. Thus, in *McKay v. Bergstedt*,<sup>45</sup> the Nevada Supreme Court held, with extensive quotations from *Bouvia*, that a quadriplegic had the right to direct the removal of a respirator, whether or not the quadriplegic was terminally ill.<sup>46</sup> Unlike the *Bouvia* court, however, the Nevada court clearly stated that such a right was limited to physical illness and did not include those whose lives were "unbearably miserable because of [their] mental state."<sup>47</sup> The court also limited its holding to those with irreversible condi-

39. *Bouvia*, 225 Cal. Rptr. at 301-02.

40. *Id.* at 306.

41. *Id.* at 302.

42. *Id.* at 305.

43. *Id.* at 306.

44. *Id.* at 307-08 (Compton, J., concurring).

45. 801 P.2d 617 (Nev. 1990).

46. *Id.* at 630-31.

47. *Id.* at 625.

tions<sup>48</sup> and gave the state more leeway to take steps to at least try to convince a patient to choose care alternatives over death.<sup>49</sup>

The *Bergstedt* court, unlike the *Bouvia* court, at least recognized the possibility of over-extension of the premises underlying the strong libertarian approach to the "right to die." The libertarian model, when dealing with a competent adult, assumes that statements of desire are the product of rational calculation, and that they reflect what the individual actually wants, rather than being disguised cries for something else. The spurned lover who says "I want to die" is likely to mean that he really wants his beloved back. This is true even if we accept that as between death and life without her, he genuinely does want to die.

But to recognize the possibility of irrational calculation and ambiguous expression is to suggest a degree of interdependence which is contrary to libertarian thought. To take Ms. Bouvia's "I want to die" at face value is to absolve the rest of us from having to consider whether we are responsible for having brought about the circumstances leading to the request and, prospectively, whether we are duty-bound to change things so that she no longer finds death the only acceptable alternative. The court's picture of an autonomous, rational decision by Elizabeth Bouvia is deeply problematic. The court briefly mentions that prior to deciding that she wanted to die, she suffered a miscarriage, her husband left her, her parents told her that they no longer could care for her, and she unsuccessfully sought a permanent place to live and receive constant care.<sup>50</sup> It hardly takes great insight to suspect that in light of these facts, her wish to die was not an autonomous response to her medical condition, but rather a reaction to a series of perceived rejections or other incidents which made her feel isolated and unwanted.<sup>51</sup>

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48. *Id.* at 630.

49. *Id.* The court does make one significant distinction between terminal and non-terminal cases. Where the patient is terminal, i.e., with a life expectancy of less than six months, the patient's decision to refuse or withdraw treatment must prevail. In addition, any health care provider who provides "any sedative or pain medication to ease the patient's pre-death anxieties or pain," is immune from criminal or civil liability. The possible blurring of the active-passive distinction is evident. Where the patient is not terminal, the court may balance the patient's right against the state's interest in preserving life. Again, the court hesitates to apply the full force of the *Bouvia* rationale. *Id.* at 630-31.

50. 225 Cal. Rptr. at 300.

51. See, e.g., Stanley S. Herr, et al., *No Place To Go: Refusal of Life-Sustaining Treatment by Competent Persons with Physical Disabilities*, 8 ISSUES IN L. & MED. 3 (1992).

A number of activists for the rights of the disabled were appalled by the *Bouvia* decision, not only because of its outcome, but also because of some of the court's specific reasoning.<sup>52</sup> Although it denied that anyone needs the approval of a court to choose death,<sup>53</sup> the court nonetheless went on to, in effect, express its approval of Ms. Bouvia's decision:

Although alert, bright, sensitive, perhaps even brave and feisty, she must lie immobile . . . and must lie physically helpless subject to ignominy, embarrassment, humiliation and dehumanizing aspects created by her helplessness. . . . We cannot conceive it to be the policy of this State to inflict such an ordeal upon anyone.<sup>54</sup>

This characterization of the life of a quadriplegic promotes a social attitude likely to at least indirectly influence the choices of disabled persons in the future. But libertarian theory ignores the connection; those choices will, of course, be seen as "brave and feisty" expressions of autonomy.<sup>55</sup>

The *Bouvia* court is, at least, consistent. Once it determines that the actor is a competent adult, it concludes that any intrusion into the decision to die would be unacceptable paternalism. The *Bergstedt* court refused to go that far. The decision to exclude purely emotional suffering and reversible physical conditions from the universe of acceptable justifications for exercise of the "right to die" surely seems correct, but it is inconsistent with the libertarian tone of the rest of the opinion. If the state may "paternalistically" stop the suicide of one in mental anguish, why may it not do so when the patient's physical condition is perma-

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52. "Some argue that social Darwinism and the eugenics movement are becoming as influential in American thinking currently as when they flourished early in this century. When a culture values human life conditionally, suicide intervention becomes selective." Carol J. Gill, *Suicide Intervention for People with Disabilities: A Lesson in Inequality*, 8 ISSUES IN L. & MED. 37, 37 (1992). See also Paul K. Longmore, *Elizabeth Bouvia, Assisted Suicide and Social Prejudice*, 3 ISSUES IN L. & MED. 141 (1987).

53. 225 Cal. Rptr. at 302.

54. *Id.* at 305.

55. Another example of a court characterizing a decision to withdraw treatment as brave while regarding ambivalence or hesitancy as somehow signs of depression can be found in *Bartling v. Superior Court*, 209 Cal. Rptr. 220, 223 (Ct. App. 1984). The patient's statements and acts which indicated that his decision to die might not be strong or firm were dismissed by the court with the statement that it was not relevant "that Mr. Bartling periodically wavered from this posture because of severe depression or for any other reason." *Id.* at 223. Remarkably, the court did not consider the possibility that the desire to die itself, rather than the desire to continue to live, might have been the real consequence of depression. The court went beyond merely deferring to the decision of the patient to die to the point of endorsing it as correct.

ment but not terminal? Obviously, some degree of social choice is at work; autonomy is not unbounded.

The opinion of the Michigan Circuit Court in *People v. Kevorkian*<sup>56</sup> makes this even more clear. Judge Kaufman, tracing the history of arguments approving suicide back to Greek philosophy, concludes that the state's interest is limited to preventing "irrational" suicide; conversely, a constitutional right exists to commit "rational suicide."<sup>57</sup> The overall tone of the opinion is libertarian, yet by limiting the right to "rational" suicide, Judge Kaufman would allow an enormous amount of social choice. Specifically, to claim the right, a person must have "an objective medical condition" which "significantly impair[s]" the quality of life, the decision to commit suicide must be "without undue influence," and the decision must be "a reasonable response under the circumstances."<sup>58</sup> By retaining the power to declare some choices for suicide unreasonable, by speaking of "rational" and "irrational" suicide, the court, straining to preserve the language and tone of libertarianism, essentially declares a right to end one's life to exist if a court declares that life to be of little value.

If the community may act sometimes to prevent suicide, then the definition of when that is not the case must look to something other than merely the language of libertarianism. To maintain a consistent libertarian commitment, one must essentially follow the lead of the *Bouvia* court's nonjudgmental approach. But are we ready to accept suicide as "an absolute right" at least where a competent adult is involved, regardless of how strongly it appears that the decision is a consequence of depression, fear, a sense of rejection by others or society as much as it is a consequence of intractable physical pain?

In summary, then, the strong libertarian position greatly exaggerates the actual independence and autonomy of the individual. It readily accepts statements of preference at face value, rather than exploring whether the statements are the product of fully informed reflection, or whether they might be expressions of desire for something other than what they initially appear to be. Libertarians do not see that a request for death might primarily be a cry to be relieved of pain, to be provided with care and reassurance, or to have someone respond to loneliness and

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56. No. 93-11482, 1993 WL 603212 (Mich. Cir. Ct. Dec. 13, 1993), *aff'd in part and rev'd in part*, *Hobbins v. Attorney General*, 518 N.W.2d 487 (Mich. Ct. App. 1994), *aff'd in part and rev'd in part*, *People v. Kevorkian*, Nos. 99591, 99674, 99752, 99758, 99759, 1994 WL 700448 (Mich. Dec. 13, 1994).

57. *Id.* at \*9-11, 16, 18.

58. *Id.* at \*15.

depression.<sup>59</sup> This is particularly true in cases such as *Bouvia*, where the individual is not suffering from a terminal illness.<sup>60</sup> But strong libertarian approaches, by enshrining expressions of autonomous preference, provide little if any reason to draw the line of non-intervention at the point of terminal illness.

Once one accepts, as much libertarian thought does, that unassisted suicide is a right,<sup>61</sup> the arguments against assisted suicide do largely become untenable. They primarily are reduced to permitting some minimal state supervision to assure that the request is voluntary, defined as the absence of obvious coercion.<sup>62</sup> As a number of courts and commentators have pointed out, however, the fact that states have decriminalized suicide does not necessarily mean that they have recognized the act as a right.<sup>63</sup> Instead it may, and should, be seen as recognition of the

59. Robert Twycross criticizes the movement toward voluntary euthanasia, contending that "much of the supporting 'evidence' derives from instances in which pain or other symptoms have been inadequately controlled and from the use of inappropriate treatments." Robert G. Twycross, *Voluntary Euthanasia*, in SUICIDE EUTHANASIA 88, 97 (Samuel E. Wallace & Albin Eser eds., 1981).

60. See *supra* text accompanying notes 39-54.

61. See, e.g., Joseph Fletcher, *In Defense of Suicide*, in SUICIDE EUTHANASIA, *supra* note 59, at 38-50. See Chief Justice Lamer's dissenting opinion in *Rodriguez v. British Columbia*, 107 D.L.R. 4th 342, 349-86 (1993) (Can.), which turns on the fact that the practical effect of criminalizing assisted suicide is to prevent only the disabled from suicide, an option open to those who can accomplish the act without assistance.

62. Clearly involuntary euthanasia is opposed even by most advocates of voluntary euthanasia. See HUMPHRY, *supra* note 29. But, of course, coercion may be much more subtle. See the discussion of "acquiescent suicide" in Nancy J. Osgood & Susan A. Eisenhandler, *Gender and Assisted and Acquiescent Suicide: A Suicidologist's Perspective*, 9 ISSUES IN L. & MED. 361 (1994).

63. See *Rodriguez*, 107 D.L.R. 4th at 398. The Canadian court stated: Unlike the situation with the partial decriminalization of abortion, the decriminalization of attempted suicide cannot be said to represent a consensus by Parliament or by Canadians in general that the autonomy interest of those wishing to kill themselves is paramount to the state interest in protecting the life of its citizens. Rather, the matter of suicide was seen to have its roots and its solutions in sciences outside the law, and for that reason not to mandate a legal remedy. *Id.* See also *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1464 n.9 (W.D. Wash. 1994), *rev'd*, No. 94-35534, 1995 WL 94679 (9th Cir. Mar. 9, 1995). In that case, the court maintained the following:

Notably, the statute at issue does not bar suicide, nor does any other Washington statute. . . . Needless to say, this change in the law did not suggest approval of the act of suicide, but rather a determination that the person compelled to attempt it should not be punished if the attempt proved unsuccessful.

*Id.*

fundamental irrationality of responding to an individual's self-destructive act with criminal sanctions.

If an act of suicide is neither a crime nor a courageous expression of autonomy, it most likely is, on some level, a cry for help. Perhaps the most disturbing thing about the libertarian approach to the "right to die" is its tendency to absolve us, as individuals or as a society, from a sense of responsibility to others. Do we provide enough support for the handicapped? Does medicine devote enough attention to the relief of pain?<sup>64</sup> Does the absence of universal health care insurance make people choose an earlier death in order not to financially burden their relatives? Do social attitudes emphasizing the importance of physical perfection send disturbing messages about what type of life is not worth living? If suicide is merely an act of autonomy, we need not address these questions.

Of course, on some level we must (and do) address these questions. As I have argued elsewhere,<sup>65</sup> even in the context of carrying out advance directives for the withdrawal of treatment, a step now generally sanctioned by law, what is presented as mere deference to individual autonomy contains a large element of social choice about the nature and value of life. Similarly, the use of an agent to assist in a decision to terminate life involves some degree of social choice. Almost all would agree that under some circumstances, assisted suicide should be forbidden. But except for cases involving minors and the incompetent, libertarian theory provides us with little guidance in setting limits. Should we condone assistance in the suicide of a physically healthy twenty-five year old in the aftermath of a failed love affair, or a career setback? If not, then we must accept that society has a role to play in these decisions. The mere assertion of autonomy does not end the matter. And if that is so for the physically healthy twenty-five year old, it must also be the case for the permanently disabled person, even the terminally ill patient. This does not mean that our conclusion must or should be the same in each case, but it does mean that society must be involved in the decision of where to draw the line.

This seems to be apparent even to several courts which generally use libertarian language. The circuit court in *Kevorkian* affirms a right to "rational suicide;"<sup>66</sup> but, of course, society will decide the boundaries of the rational. The *Bergstedt* court would support a right to suicide in response to physical, but not emo-

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64. See Twycross, *supra* note 59.

65. See Beschle, *supra* note 33.

66. See *supra* text accompanying notes 56-58.

tional, suffering.<sup>67</sup> Again, social choice is at work. Quite properly, most of us refuse to follow the assertion that a competent adult has absolute power over his or her body to its logical conclusion. Libertarian thought, which unrealistically minimizes interdependence, cannot lead us to acceptable answers here.

## II. THE MAJORITARIAN APPROACH

The most obvious alternative to libertarian constitutional analysis is majoritarianism. While even the most deferential majoritarianism will concede that in some cases the Constitution requires invalidation of legislative choices,<sup>68</sup> the scope of such cases can be minimized. Where the asserted individual right is novel, where there is a long history of legislative involvement, and where strong ethical and policy arguments can be framed on both sides of an issue, the case for deference may well be the strongest. And in the view of some, this is precisely the case with the "right to die." Thus, in his separate opinion in *Cruzan*, Justice Scalia states his preference "that we announce, clearly and promptly, that the federal courts have no business in this field,"<sup>69</sup> that the Justices are in no better position than "nine people picked at random from the Kansas City telephone directory"<sup>70</sup> to resolve these issues; and that legislative decisions, even those which would prohibit voluntary passive euthanasia, should be upheld.<sup>71</sup>

On its surface, deference to majorities is the antithesis of the libertarian approach. Certainly the two approaches envision very different roles for courts. But the two approaches have one significant thing in common. Neither places much of a burden on the individual to justify his or her choices. To the libertarian, the rights-bearing individual acting within a sphere of autonomy may act not only in ways which harm the community, but in ways which seem to others to be foolish or even irrational with respect

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67. See *supra* text accompanying notes 45-49.

68. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 3 (1971):

[O]ne essential premise of the Madisonian model is majoritarianism. The model also has a counter-majoritarian premise, however, for it assumes that there are some areas of life a majority should not control. There are some things a majority should not do . . . no matter how democratically it decides to do them.

*Id.*

69. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

70. *Id.*

71. *Id.* at 293, 300.



to the individual's own welfare.<sup>72</sup> To a majoritarian, the individual likewise has no obligation to justify his or her vote as wise, ethically sound, or even rational, although the individual must obey the laws adopted by the majority. Debate and rational argument might be wise tactics for gaining the votes of others, but they are not required for the system to function and to be legitimate. Thus, Justice Scalia maintains that "[t]his Court need not and has no authority to, inject itself into every field of human activity where irrationality and oppression may theoretically occur."<sup>73</sup> Neither libertarianism nor majoritarianism, then, insist on rational dialogue. Each ultimately is grounded in unfettered individual choice. The only difference being that one defers to each individual, while the other defers to the aggregate of unfettered individual choices.

Even if Scalia is correct in his conclusion that a state's decision to ban all forms of euthanasia violates no constitutional command, can he possibly be right that the Court has no role to police "irrationality and oppression" outside of those areas which the constitutional text marks off as specially protected? Much scholarship suggests that the framers did consider legislatures to be acting legitimately only when they were acting in pursuance of the common good.<sup>74</sup> While this leaves much room for action, since the common good may be defined in so many ways, it does call for the legislature to make at least some effort to justify its choices.<sup>75</sup> Thus, the core requirement of "substantive due process" has always been that the legislature act with at least minimal rationality. Even Holmes and the other dissenters in *Lochner v. New York* would impose such a requirement.<sup>76</sup>

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72. Thus, libertarian thought would criticize arguments against the legalization of drugs based upon harm to the user as "paternalism." See, e.g., DOUGLAS N. HUSAK, *DRUGS AND RIGHT* 130-47 (1992). In the same vein, the tobacco industry has argued that "the efforts to deny the right to pursue the satisfactions of smoking add up to nothing less than tyranny." RONALD J. TROYER & GERALD E. MARKLE, *CIGARETTES: THE BATTLE OVER SMOKING* 104 (1983) (quoting Tobacco Institute statement).

73. 497 U.S. at 300-01 (Scalia, J., concurring).

74. See, e.g., *Symposium on Classical Philosophy and the American Constitutional Order*, 66 CHI.-KENT L. REV. 3 (1990) (essays on the framers' attitudes toward "civic republican" theories).

75. Cass Sunstein contends: "Above all, the American Constitution was designed to create a deliberative democracy. . . . The minimal condition of deliberative democracy is a requirement of reasons for government action." CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 20 (1993).

76. Thus, Holmes would have upheld the statute in *Lochner* because "[a] reasonable man might think it a proper measure on the score of health." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Justices Harlan, White and Day would have upheld the statute since it was not

And if courts must guard against at least blatant irrationality, does this not also apply to cases of "oppression"? Surely government has a wide range of authority to curtail individual liberty in pursuance of the general welfare. However, there must be some limits. Thus, imposing the death penalty upon a random number of those who file fraudulent tax returns might be minimally rational in that a legislature could sincerely believe that it reduces the level of tax fraud. Yet is there any doubt that even justices who do not feel that the death penalty is per se unconstitutional would find the disproportion between the burden this places on a few individuals and the benefit to the community unconstitutional "oppression"?<sup>77</sup>

Neither strong libertarianism nor complete deference to legislative majorities presents a satisfactory framework for analysis of constitutional rights claims. Each oversimplifies complex realities, and neither calls on people, either as rights-bearers or voters, to engage in reflection and dialogue concerning their preferences. And yet, these seem to be the most commonly adopted approaches in "right to die" cases.

Several courts have rejected the libertarian position on the "right to die," most often by denying that the Constitution has anything to say on the subject. Courts taking this position need not address the ultimate issues of ethics or policy involved; they need only declare that the forum in which they must be addressed is legislative rather than judicial. As already noted, this position is most clearly set forth by Justice Scalia in his *Cruzan* concurrence.<sup>78</sup> Thus, even in the context of a refusal of treatment, and certainly in the context of an assisted suicide, "it is up to the citizens of [the state] to decide, through their elected representatives, whether that wish will be honored."<sup>79</sup> In light of a history of government disapproval, if not criminalization, of suicide and assisted suicide plus the absence of a specific textual reference to the claimed right, Scalia finds no basis for regarding

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"unreasonable" or "arbitrary." *Id.* at 66-74 (Harlan, White and Day, JJ., dissenting). The dissenters, of course, were far more deferential to the legislature in their assessment of what actions are rational than the majority, but all agreed that some minimum requirement of legitimate ends and rational means to those ends exists.

77. *See, e.g.,* *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty unconstitutionally disproportionate to guilt of felony murder participant who neither kills nor intends that a killing take place); *Coker v. Georgia*, 433 U.S. 584 (1977) (mandatory death penalty for rape unconstitutional).

78. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 292-301 (1990) (Scalia, J., concurring).

79. *Id.* at 293.

this as an area for the assertion of fundamental rights.<sup>80</sup> He maintains that in practice, it is the equal protection clause which will set "reasonable and humane limits" here; when people impose the same limits on themselves as on others, disproportionate individual burdens are unlikely to arise.<sup>81</sup>

Other courts have been constrained by the majority position in *Cruzan* or by state authority to acknowledge a right to refuse treatment, but have drawn the line at assisted suicide. Thus, the Court of Appeals of Michigan, while affirming on other grounds Judge Kaufman's decision in *People v. Kevorkian*,<sup>82</sup> rejected the notion that there was a constitutional right to commit suicide or to secure assistance in doing so.<sup>83</sup> The court stated that no balancing was required since "[t]he scope of rights encompassed by the concept of ordered liberty does not include the right to commit suicide, much less the right to assisted suicide."<sup>84</sup> The court noted *Cruzan*, but limited the right recognized there to the right "to refuse unwanted medical treatment and passively die a natural death, not to actively intervene so as to hasten one's death."<sup>85</sup>

Similarly, in *Donaldson v. Van de Kamp*,<sup>86</sup> the California appellate court noted the right to refuse treatment recognized in such cases as *Bouvia*, but denied the right to have assistance in hastening one's death, and expressed skepticism over the right of suicide without assistance.<sup>87</sup> Factually, the case is unique. Donaldson, suffering from a malignant brain tumor, wished to be "cryogenically suspended." That is, while still alive, he would be frozen to the point where circulatory, respiratory and brain functions would cease, and he would be clinically dead. The purpose, however, was to "later reanimate[ ] [him] when curative treatment exists for his brain cancer."<sup>88</sup> Ironically, to pursue what most would see as a futile desire for something resembling immortality, Donaldson had to seek to hasten his death.

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80. *Id.* at 293-95, 300.

81. *Id.* at 300.

82. *Hobbins v. Attorney General*, 518 N.W.2d 487 (Mich. Ct. App. 1994), *aff'd in part and rev'd in part*, *People v. Kevorkian*, Nos. 99591, 99674, 99752, 99758, 99759, 1994 WL 700448 (Mich. Dec. 13, 1994).

83. *Id.* at 493. The court affirmed Judge Kaufman's decision on the grounds that the statute violated the provision of the Michigan constitution limiting a bill to a single subject. *Id.* at 489-91.

84. *Id.* at 492.

85. *Id.* at 493.

86. 4 Cal. Rptr. 2d 59 (Ct. App. 1992).

87. *Id.* at 61-64.

88. *Id.* at 61. At the time of the decision, the tumors had "caused . . . weakness, speech impediments and seizures." Doctors projected that Donaldson would die in about eighteen months. *Id.* at 60-61.

While stating that there was no right involved, the court went on to discuss the weight of the state interests to be balanced against the individual's interest in assisted suicide.<sup>89</sup> Most see the central state interest in prohibiting even the most sympathetic cases of assisted suicide as some variation on the "slippery slope" argument: a bright line is necessary to protect those for whom suicide would not be truly voluntary.<sup>90</sup> This is surely an important concern, but the fact that the court felt the need to bring it up is significant. One might think that having made an initial decision that assisted suicide implicates no constitutional rights, a court would not need to go further. Recall Justice Scalia's admonition that courts are not authorized to generally police the possible irrationality and oppression of duly enacted statutes.<sup>91</sup>

But can Scalia's statement be entirely true? Even deferential justices dating back to and including Holmes state that the due process clause guards against arbitrary and irrational legislative acts.<sup>92</sup> The point of contention is always just how heavy the burden of showing rationality is. Scalia's statement may be taken to mean that the enactment of a statute is irrefutable proof of its minimal rationality.<sup>93</sup> Yet that is inconsistent with prior Court decisions; although it is rare, sometimes a court will hold a statute to be irrational.<sup>94</sup>

This leads us to the question of what it means for a statute to be rational. The classic definition of minimum rationality for Fourteenth Amendment purposes is that a statute must have a reasonable relationship to a legitimate state purpose.<sup>95</sup> The test can be seen as entirely utilitarian. Unlike the strict scrutiny test

89. *Id.* at 62-65.

90. *Id.*

91. *See supra* text accompanying notes 32-36.

92. *See supra* note 76.

93. Perhaps the most powerful recent statement of deference under the rational basis test appears in *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101-02 (1993):

In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

The standard, said the Court, does not even require the legislature to clearly articulate its reasons; it is sufficient that the court can find some plausible reason.

94. *See, e.g.*, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

95. *See generally* LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 581-86 (2d ed. 1988).

used where fundamental rights are involved, there need be no proportionality between the social good and the impact of the statute on the individual. Under this analysis, there can be little doubt that the prohibition on assisted suicide, if not a prohibition on suicide itself, qualifies as rational. Although some will be harmed, some will benefit, and courts need strike no balance.

But can that really be correct? Even at the level of "low-level scrutiny," is there no limit on, to use Scalia's word, "oppression?" May rationality be satisfied with absolutely no regard to the extent to which an individual is used as a means to addressing the ends of society? Surely there is no requirement that law never decide how to treat an individual on the basis of that decision's effect on others, but isn't there some limit on the extent to which the individual can be treated as a means to a social end?

Take, for example, the question of punishment. From a purely utilitarian view, is there any reason to insist upon proportionality between the nature of the crime and the punishment imposed? Yet although the death penalty is not per se unconstitutional,<sup>96</sup> the range of crimes for which it can be imposed is quite narrow.<sup>97</sup> The thief may not be executed merely to deter others; there must be some consideration of the rationality of the act as it pertains to him alone. While general utility is undoubtedly a large component of rationality, then, there is reason to believe that at some point the burden on the individual may grow to the point where the imbalance seems irrational.

As a further example, take *Cleburne v. Cleburne Living Center, Inc.*,<sup>98</sup> one of the few recent Supreme Court cases to hold a statute invalid under low-level scrutiny. A local zoning ordinance, it was held, could not exclude group homes for the mentally retarded from a residential district simply in pursuance of the goal of preserving property values.<sup>99</sup> The Court held that property values would fall, if at all, only in response to irrational fears of the handicapped, and thus a seemingly rational economic concern stands unmasked as actually irrational prejudice.<sup>100</sup> But doesn't this case also suggest that there is something simply wrong ("oppressive," if you will) about achieving a social goal with disproportionate disregard for how much of the burden is borne by a small, identifiable group of people, who have done no wrong?

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96. *Gregg v. Georgia*, 428 U.S. 153 (1976).

97. *See supra* note 77.

98. 473 U.S. 432 (1985).

99. *Id.* at 448.

100. *Id.*

In one sense, majoritarianism accepts the same framework for analysis as libertarianism; the initial inquiry of whether an identifiable individual right can be isolated essentially determines the ultimate question. But doesn't the Constitution place limits on government power that are more general, that need not be linked to a specific list of fundamental rights? One of these is the obligation to act with at least some degree of rationality, and the cases involving the due process privacy right in general,<sup>101</sup> and the "right to die" in particular suggest that one component of rationality is some degree of proportionality between individual burdens and social welfare, at least to the point where the treatment of the individual does not show complete indifference to the individual.

The problem with strong majoritarianism, then, is that by setting no limits at all, it may permit instances which impose disproportionate burdens on those who no longer are in a position to share in the social benefits sought by the prohibition. Even if it leads to social benefits to subject an individual to a lengthy period of intense pain, it will strike many of us as simply cruel, and the cruelty, it would seem, challenges the notion that the decision is truly rational.

In light of the shortcomings in the libertarian approach to "right to die" questions, one might take the majoritarian position as the lesser of two evils. Any government response to the question of suicide and assisted suicide, including total prohibition would present no constitutional problem. But that choice should not be made without a search for less troublesome alternatives.

### III. ARE DEONTOLOGICAL ALTERNATIVES APPROPRIATE?

If the fundamental flaw of both strong libertarian and strong majoritarian approaches is their overemphasis on individual preference, the natural response would be to search for an approach

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101. For example, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), which struck down a statute prohibiting the distribution of contraceptives to unmarried persons, the Court stated that if it were to concede that deterrence of extramarital sex was a legitimate state interest, it still would be unreasonable to prescribe "pregnancy and the birth of an unwanted child as punishment for fornication." *Id.* at 448. In other words, even a legitimate social goal may not be sought at the cost of disproportionately burdening an individual. And the "undue burden" analysis of *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), recognizes a legitimate state interest in the protection of life throughout the nine months of pregnancy while at the same time protecting a core right to abortion, seems largely concerned with questions of the proportionality of the state's response to its legitimate interest.

grounded entirely in duty, with that duty imposed by some source independent of the individual or some aggregate of individuals. A deontological approach, whether grounded in religious or secular concepts of duty, might well be a fruitful course for one seeking to derive an ethical position on the question of assisted suicide. An individual, having derived such a position, could then argue for a right to apply it to his or her own actions, under libertarian theory, or vote to impose it throughout the community through majoritarian processes.

An approach based on duty could be particularly attractive to those seeking an alternative to a libertarian approach to the right to die, since it may result in the conclusion that government has a positive duty, not merely an option, to prohibit suicide and assisted suicide. Many will find a majoritarian choice to permit assisted suicide ethically objectionable.

But the focus of this article is on the proper approach to be taken by courts in the debate, and these approaches will be of limited use in that context. Courts, of course, may not justify their decisions on religious grounds, and even when limiting themselves to secular philosophies, courts do not have the option of starkly stating that their constitutional judgments are based upon positive duties imposed upon the state. Courts consistently view the Constitution as a limiting document making certain legislative acts impermissible (marking a line between liberty and majority rule), but not as a document mandating specific legislative acts.<sup>102</sup> As citizens, we use the language of duty to urge legislatures to adopt courses of action,<sup>103</sup> but as constitutional lawyers, we argue about the limitations on legislative actions, not which outcomes are best.

Thus, it will not be possible to derive a position on the constitutionality of prohibitions on assisted suicide entirely from notions of positive duty, whether that is seen as a duty to preserve life or a duty to care for others. That does not, however, mean that notions of duty will have no place in the analysis of the

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102. Thus, the Supreme Court has consistently refused to find that the Constitution requires government to provide social services or benefits beyond what the positive law of the state requires. *See, e.g.,* *DeShaney v. Winnebago County Dep't. of Social Servs.*, 489 U.S. 189 (1989) (Fourteenth Amendment is a limitation on the state, "not . . . a guarantee of certain minimal levels of safety and security"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (no fundamental right to public education); *Dandridge v. Williams*, 397 U.S. 471 (1970) (no fundamental right to welfare payments).

103. The Court has emphasized that arguments that the state should assume a greater duty should be addressed to the legislature. *See DeShaney*, 489 U.S. at 201-03; *San Antonio*, 411 U.S. at 58-59; *Dandridge*, 397 U.S. at 487.

issues. To reject strong libertarian individualism is not to say that liberty and the individual may be ignored; to reject deontological approaches as positing rules regardless of individual or social choice is not to entirely reject the existence of some notion of duty. A viable alternative must take account of each of these considerations.

#### IV. THE COMMUNITARIAN ALTERNATIVE

Recently, a number of theorists from law, social science and ethics, searching for an alternative to libertarianism which at the same time avoids authoritarianism, have gathered under the label of communitarianism.<sup>104</sup> The communitarian movement is defined less by specific answers to social problems than by a commitment to an analysis which insists on a balance between individual and community, between rights and responsibilities.<sup>105</sup> Communitarianism highlights, rather than masks, the connections between decisions of individuals. Since it does not accept mere statements of preference, either by the individual or the majority, as automatically worthy of acceptance, it insists that the decisions be justified. Thus, the individual must, at the very least, be aware of the consequences of his or her actions on the community, and vice versa.

The "platform" endorsed by dozens of social, legal and political figures gathered under the communitarian banner states:

A communitarian perspective does not dictate particular policies. Rather, it mandates attention to what is often ignored in contemporary policy debates: the social side of human nature; the responsibilities that must be borne by citizens, individually and collectively, in a regime of rights . . . the ripple effects and long-term consequences of present decisions. . . .

The basic Communitarian quest for balances between individuals and groups, rights and responsibilities, and among the institutions of state, market, and civil society is a constant, ongoing enterprise.<sup>106</sup>

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104. See generally AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES AND THE COMMUNITARIAN APPROACH* (1993).

105. See *The Responsive Communitarian Platform: Rights and Responsibilities*, reprinted in ETZIONI, *supra* note 104, at 251-67.

106. ETZIONI, *supra* note 104, at 254. The signers of the Platform include such figures as Robert Bellah, Henry Cisneros, Harvey Cox, Amitai Etzioni, William Galston, Mary Ann Glendon, Jane Mansbridge, Newton Minow, William Ruckelshaus, Albert Shanker and Lester Thurow. See 2 *THE RESPONSIVE COMMUNITY*, Winter 1991-92, at 18-20.



Like all "balancing" tests, communitarian approaches are not as determinate as the alternatives which follow one premise to its logical conclusion. They are recognizable not so much by the conclusion reached as the process undertaken to reach it, and perhaps also by those conclusions avoided, that is, those that regard as inconsequential the welfare of either the individual or the community. Yet by squarely facing the complex relationship between individual and community, this approach may lead to far better results than more determinate alternatives.

Communitarians favor the unambiguous promotion of "core values," those which are overwhelmingly endorsed by Americans.<sup>107</sup> Focus on the specific applications of those values which are most sharply contested has obscured the broad range of values which are shared. As sociologist Amitai Etzioni, a leading spokesman for communitarianism, reminds us. "Nobody considers it moral to abuse children, rape, steal (not to mention commit murder), be disrespectful of others, discriminate, and so on."<sup>108</sup> When issues are on the cutting edge, however, communitarians reject "either-or" solutions in favor of attempts to work toward a response which respects both individual and social claims.<sup>109</sup> Such responses will not satisfy maximalists on either side, but they may lead to workable consensus.

All self-described communitarians, then, cannot be expected to agree on all issues.<sup>110</sup> And there is no single communitarian position on the question of assisted suicide.<sup>111</sup> Communitarians can be expected to reject either the strong libertarianism of *Bouvia* or the equally simple retreat to majoritarianism endorsed by Justice Scalia.

When a court is faced with a claim that a statute is unconstitutional, it must, of course, ultimately choose one of two alternatives, to agree or disagree. The way it reaches its decision, the language it uses to express it, and the likely consequences of the decision, though, need not adhere to only one of two polar opposites. Two recent cases reach opposite conclusions on the

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107. *Id.* at 89-107.

108. *Id.* at 99-100.

109. *Id.* at 14-15.

110. Some of those who have publicly endorsed the "Communitarian Platform," for example, have done so while taking exception to particular portions of the document. See 2 THE RESPONSIVE COMMUNITY, *supra* note 106, at 18-20.

111. Etzioni notes that while "[t]here is a broad consensus that we should not terminate [medical treatment to] people who are conscious or able to regain consciousness," and "a strong and widening consensus that we should not continue medical services to people who are brain dead," no consensus exists on other "right to die" questions. ETZIONI, *supra* note 104, at 101.

question of assisted suicide, but avoid sweeping declarations which either absolutize or deny the existence of some autonomy rights. The first of these comes not from the United States, but from the Supreme Court of Canada.

Sue Rodriguez, a 42-year old resident of British Columbia, suffered from ALS,<sup>112</sup> and had a life expectancy of two to fourteen months. The disease is incurable, and causes progressive deterioration of motor functions, depriving its victims of the ability to speak, move, and eventually eat or breathe without artificial assistance. It does not, however, affect mental capacity.<sup>113</sup> Ms. Rodriguez wanted medical assistance in designing a device which she could use "at the time of her choosing" to terminate her life.<sup>114</sup> Section 241(b) of the Canadian Criminal Code criminalizes the act of aiding and abetting suicide;<sup>115</sup> Ms. Rodriguez sought an order that the section was invalid as contrary to the Canadian Charter of Rights and Freedoms.

A brief explanation of the role of courts in the Canadian constitutional structure will be helpful. Prior to the 1982 adoption of the Charter of Rights and Freedoms as part of the Constitution Act,<sup>116</sup> Canada followed the British tradition of parliamentary supremacy with respect to human rights questions.<sup>117</sup> And the Charter itself stakes out a middle position between parliamentary supremacy and the strong judicial review of the United States system. Sections two through twenty-three of the Charter set forth individual rights, generally including those set out in the United States Constitution: freedom of expression and religion,<sup>118</sup> voting rights,<sup>119</sup> rights to specific procedures in criminal prosecutions,<sup>120</sup> equal protection,<sup>121</sup> and

112. *Rodriguez v. British Columbia*, 107 D.L.R.4th 342, 349 (1993) (Can.). ALS, amyotrophic lateral sclerosis, is commonly known as Lou Gehrig's disease.

113. *Id.* at 391.

114. *Id.* at 349.

115. R.S.C., ch. C-46, § 241(b) (1985) (Can.) ("Every one who . . . aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offense and liable to imprisonment for a term not exceeding fourteen years.").

116. Constitution Act, 1982, R.S.C. app. II no. 44, pt. I (1985) (Can.).

117. See PETER HOGG, *CONSTITUTIONAL LAW OF CANADA* 197-203 (1985); Roderick A. Macdonald, *Procedural Due Process in Canadian Constitutional Law: Natural Justice and Fundamental Justice*, 39 U. FLA. L. REV. 217, 220-30 (1987).

118. Constitution Act § 2.

119. *Id.* §§ 3-5.

120. *Id.* §§ 8-14.

121. Specifically forbidden grounds of discrimination are "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." *Id.* § 15.

"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."<sup>122</sup>

But unlike the rights provisions of the United States Constitution, the Charter explicitly warns that rights are not absolutes, but are subject to balancing. As noted above, the right to liberty and security of the person is only violated by deprivations which do not accord with "fundamental justice." In addition, section one of the Charter states that all Charter rights are "subject only to such reasonable limits prescribed by law as can be demonstratively justified in a free and democratic society."<sup>123</sup> Finally, and most inconsistent with the United States model, section thirty-three provides that except in cases involving voting rights, language rights and mobility rights,<sup>124</sup> Parliament or a provincial legislature may expressly declare in a piece of legislation that it will be effective "notwithstanding a provision [of the Charter]."<sup>125</sup> Such a declaration will expire in five years, unless reenacted.<sup>126</sup> Thus, although Canadian courts now are empowered to exercise judicial review to invalidate statutes as inconsistent with constitutional guarantees of individual rights, judicial decisions are not necessarily the last word on the subject.<sup>127</sup> Both the express language of the Charter and Anglo-Canadian traditions of parliamentary supremacy call for courts to adjudicate individual rights claims with considerable deference to concerns for the general welfare.<sup>128</sup>

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122. *Id.* § 7.

123. *Id.* § 1. This "makes clear that [charter rights] are not absolutes," but still places a burden on government "to establish that the ostensible breach is a 'reasonable limit' . . ." Peter W. Hogg, *Canada's New Charter of Rights*, 32 AM. J. COMP. L. 283, 295 (1984).

124. Language rights are dealt with extensively by Constitution Act §§ 16-23. See Joseph E. Magnet, *The Charter's Official Languages Provisions: The Implications of Entrenched Bilingualism*, 4 SUP. CT. L. REV. 163 (1982). "Mobility rights" include the right to enter, remain in and leave Canada and the "right to move to and take up residence in any province." Constitution Act, 1982 § 6.

125. Constitution Act § 33.

126. *Id.* § 33(3)-(4).

127. Professor Hogg states that inclusion of § 33 "was a crucial element" in securing endorsement of the new constitution by the provinces. Hogg, *supra* note 117, at 298.

128. Prior to the Charter of Rights and Freedoms, the Canadian Bill of Rights codified many of the Charter freedoms, but the Bill had the legal status only of an ordinary Act of Parliament. An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, 1960, 8-9 Eliz. II, ch. 44, § 1 (c)-(f) (Can.). For the most part, Canadian courts continued to defer to parliamentary enactments despite any alleged conflict with the Bill of Rights. See Douglas A. Schmeiser, *The Role of the Court in Shaping the Relationship of the*

A five-justice majority of the Court rejected Ms. Rodriguez's claim. Although conceding that the Charter right to liberty and security of the person was impinged, the court held that the restriction was "in accordance with the principles of fundamental justice."<sup>129</sup> The government's objectives in barring assisted suicide were "preserving life and protecting the vulnerable."<sup>130</sup> The issue, then, was whether the balance between the individual's right and the state's interest was appropriate, or more specifically, "whether the blanket prohibition on assisted suicide is arbitrary or unfair in that it is unrelated to the states interest in protecting the vulnerable."<sup>131</sup> While Canada has recognized a right to refuse unwanted medical treatment,<sup>132</sup> the court held that this does not make the blanket prohibition of active euthanasia unreasonable. Alluding to the "slippery slope" argument, the court found that Parliament could rationally find that permitting any exceptions would lead to abuses and "undermine the protection of life."<sup>133</sup> Similar reasoning led the court to reject Ms. Rodriguez's argument that the prohibition violated her right to equal protection of the law, in that the decriminalization of suicide itself meant that only the incapacitated were unable to hasten their death from a terminal illness.<sup>134</sup>

While the court upheld the prohibition, it did not do so by merely denying that an individual right is involved. Instead, it employed an explicit balancing test to weigh the rationality of the statute and the degree of oppression involved.

Similarly, the four dissenting justices, while reaching the opposite conclusion, did not ignore the legitimate social interests involved. One dissenting justice saw the case as presenting a problem of unequal protection of the laws,<sup>135</sup> two as violating the right to liberty and security of the person,<sup>136</sup> and one as violating

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*Individual to the State: The Canadian Supreme Court*, 3 CAN.-U.S. L.J. 67, 71-75 (1980).

129. *Rodriguez v. British Columbia*, 107 D.L.R. 4th 342, 387 (1993) (Can.).

130. *Id.* at 404.

131. *Id.* at 396.

132. "Canadian courts have recognized a common law right of patients to refuse consent to medical treatment, or to demand that treatment, once commenced, be withdrawn or discontinued." *Id.* at 398 (citations omitted).

133. *Id.* at 410. Parliament would be justified in enacting an absolute prohibition because "there is no certainty that abuses can be prevented by anything less. . . ." *Id.* at 401.

134. *Id.* at 409-10.

135. *Id.* at 384 (Lamer, C.J.C., dissenting).

136. *Id.* at 414-16 (McLachlin and L'Heureux-Dube, JJ., dissenting).

both provisions.<sup>137</sup> But in the analysis of each theory, the dissenters followed essentially the same route. Each opinion began with the premise that there is a right of self-determination which gives some autonomy with respect to medical care at the end of one's life.<sup>138</sup> Section 241(b), then, must be justified as sufficiently related to state interests. The state surely has an interest in protecting "vulnerable people,"<sup>139</sup> but the dissenters found the total prohibition disproportionate to the point of failing the test of sufficient rationality. The total prohibition was overbroad in that it "protects" some who are not vulnerable,<sup>140</sup> and at the same time, does not protect those able to terminate their lives without assistance. Justice McLachlin found it objectionable that the "slippery slope" argument asks one person "to bear the burden of the chance that other people in other situations may act criminally to kill others or improperly sway them to suicide."<sup>141</sup> One who establishes true consent should not be held hostage to the interests of those who may not, in the future, consent.

Chief Justice Lamer, who also dissented, stated that even though he would declare section 241(b) to be invalid, he would also suspend the declaration of invalidity for twelve months to permit Parliament to reconsider the issue and produce a provision more carefully tailored to the state's interest. He would allow individuals in Ms. Rodriguez's position to apply for exemptions during this period.<sup>142</sup> Thus, even in urging the invalidity of the statute, the Chief Justice affirmed the limitation of the individual right, and the legitimate role of the legislature.

The communitarian aspect of *Rodriguez* is not its outcome, but rather its approach; both majority and dissenting justices take seriously both the duty of the legislature to justify serious limits on individual liberty and the fact that liberty is subject to justifiable limits. As noted, the Canadian Constitution explicitly calls for such balancing, but the same approach can be found in United States cases as well. A recent example directly addresses the question of assisted suicide.

In *Compassion in Dying v. Washington*,<sup>143</sup> the United States District Court held that Washington's complete prohibition on

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137. *Id.* at 412 (Cory, J., dissenting).

138. *Id.* at 363 (Lamer, C.J.C., dissenting); *id.* at 415-16 (McLachlin and L'Heureux-Dube, JJ., dissenting); *id.* at 413 (Cory, J., dissenting).

139. *Id.* at 372 (Lamer, C.J.C., dissenting).

140. *Id.* at 373.

141. *Id.* at 417-18 (McLachlin, J., dissenting).

142. *Id.* at 379-85 (Lamer, C.J.C., dissenting).

143. 850 F. Supp. 1454 (W.D. Wash. 1994), *rev'd*, No. 94-35534, 1995 WL 94679 (9th Cir. Mar. 9, 1995).

assisted suicide was unconstitutional. Press accounts generally reported this as an unambiguous victory for "right to die" advocates.<sup>144</sup> Surely it furthers the "right to die" cause more than a contrary decision would have, but the decision is much more cautious than it might have been. While invalidating a complete prohibition, the decision leaves substantial room for regulation.

The patient plaintiffs were mentally competent patients suffering from incurable illnesses and were all, significantly, in the terminal phases of their disease.<sup>145</sup> Compassion in Dying, "an organization which provides support, counseling and assistance to mentally competent, terminally ill adult patients considering suicide," was an additional plaintiff.<sup>146</sup> Compassion in Dying operates under written protocols considerably more extensive than those used elsewhere<sup>147</sup> to guard against abuse:

Eligible patients must be considered terminally ill in the judgment of the primary care physician and must be capable of understanding their own decisions. Evaluation by a mental health professional may be obtained to insure that the patient's request is not motivated by depression, emotional distress or mental illness. A request for assisted suicide must not be the result of inadequate comfort care, nor can it be motivated by a lack of adequate health insurance or other economic concerns. The request must come from the patient personally, in writing or on videotape, and must be repeated three times, with an interval of at least 48 hours between the second and third requests. Requests may not be made through advance directives or

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144. See, e.g., Don Colburn & Joan Biskupic, *U.S. Ruling on Washington Law Fuels Legal Battle Over Suicide*, WASH. POST, May 6, 1994, at A2; Timothy Egan, *Federal Judge Says Ban on Suicide Aid Is Unconstitutional*, N.Y. TIMES, May 5, 1994, at A1; Cynthia Hubert, *Helping Patients Die: Court Cases Fuel Fierce Moral Debate*, SACRAMENTO BEE, May 15, 1994, at A1.

145. *Compassion in Dying*, 850 F. Supp. at 1456-57.

146. *Id.* at 1458.

147. The Netherlands has taken the position that while euthanasia remains formally a crime, it will not be prosecuted under certain circumstances. Just what those circumstances are has evolved through court decisions. See CARLOS F. GOMEZ, *REGULATING DEATH* 19-56 (1991). Some of the suggested criteria are more permissive than others, and Gomez finds that physicians operate in ways that go beyond even the most permissive formally stated criteria. *Id.* at 95-125. In the United States, Dr. Jack Kevorkian provides assistance to people who he has known for only a few days, apparently after determining only that, to his satisfaction, they are irreversibly ill and actually wish to die, whether or not they are terminally ill. Paul S. Miller, *The Impact of Assisted Suicide on Persons With Disabilities - Is It a Right Without Freedom?*, 9 ISSUES IN L. & MED. 47 (1993).

by a health-care surrogate, attorney-in-fact or any other person.

According to its guidelines, Compassion in Dying will not assist anyone to commit suicide who expresses any ambivalence or uncertainty. If the patient has immediate family members or other close personal friends, their approval must be obtained. If any members of the immediate family express disapproval, Compassion in Dying will not provide assistance with suicide. As an additional safeguard, Compassion in Dying requires the patient to provide medical records. A consulting physician must review them to verify the patient's terminal prognosis and decision-making capability as well as to rule out inadequate pain management as the reason for requesting assisted suicide.<sup>148</sup>

The court, then, had before it, not only a sympathetic patient plaintiff, but a patient assistance group which had set forth an extensive set of procedures designed to address nearly all of the concerns raised by those with reservations about assisted suicide. Drawing on *Cruzan* and the Supreme Court's recent abortion decision, *Planned Parenthood v. Casey*,<sup>149</sup> the court found that the autonomy principles of these cases led to the conclusion "that a competent, terminally ill adult has a constitutionally guaranteed right under the Fourteenth Amendment to commit physician-assisted suicide."<sup>150</sup> As with *Casey*, however, this privacy right does not protect against all impediments, but only against "undue burdens."<sup>151</sup>

In the context of abortion, an undue burden is one which would "operate as a substantial obstacle" to an informed, deliberate decision to obtain an abortion. It does not include burdens which merely regulate in pursuance of assuring that the decision is informed and deliberate, or in pursuance of some other strong government interest.<sup>152</sup> Here, Judge Rothstein recognized two powerful state interests. She recognized a general state interest in the prevention of suicide by those "with a significant natural life span ahead of them."<sup>153</sup> She maintained, however, as to "people suffering through the final stage of life with no hope of recovery . . . preventing suicide simply means prolonging a dying

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148. *Compassion in Dying*, 850 F. Supp. at 1458.

149. 112 S. Ct. 2791 (1992).

150. *Compassion in Dying*, 850 F. Supp. at 1462.

151. *Id.* at 1462-63.

152. *Casey*, 112 S. Ct. at 2819-21.

153. *Compassion in Dying*, 850 F. Supp. at 1464.

person's suffering, an aim in which the State can have no interest."<sup>154</sup>

The court recognized the state's authority to "define the appropriate boundaries of physician-assisted suicide for terminally ill individuals"<sup>155</sup> and "to enact regulations and restrictions which will ensure that undue influence from third parties plays no part"<sup>156</sup> in the decision. For instance, the state has a clear interest in "protecting people from committing suicide due to undue influence or duress. . . ."<sup>157</sup> The suggestion seems clear that if the state were to enact something resembling the *Compassion in Dying* protocol as limiting the permissible boundaries of assisted suicide, that such a decision would be constitutional. Thus, while the court recognized a right, it also was willing to respect limits to that right. While the court recognized the authority of majorities to pursue the general welfare, likewise, that authority was not without limits.

At first glance, *Rodriguez* and *Compassion in Dying* would seem to have little in common. They reach different conclusions, and come from different constitutional systems which historically take different positions on the relative power of legislatures and courts to assess the constitutionality of government acts. But in the way they approach the problem of assisted suicide, they seem to be more similar to each other than *Compassion in Dying* is to *Bouvia*, or *Rodriguez* is to *Donaldson*. Rather than focusing on the existence or non-existence of a "right to die" or more specifically, a right to commit suicide, and moving from that conclusion to an obvious result, both *Rodriguez* and *Compassion in Dying* recognize the existence of rights and their limits, as well as the authority of legislative bodies to act in furtherance of social goals while at the same time assuming the responsibility to justify their decisions with something more than merely noting that they accurately reflect the sum of constituent preferences. In each case, the government is required to put forward a serious defense of the rationality of its statute, but in each case also, the mere invocation of autonomy will not prevail when a convincing showing of a sufficiently rational statute is made.

## V. APPLYING THE COMMUNITARIAN APPROACH

A communitarian approach would avoid the conclusion that there are no limits on government's power to act in the area of

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154. *Id.*

155. *Id.* at 1466.

156. *Id.*

157. *Id.* at 1465.



suicide and assisted suicide, but at the same time would not begin by postulating a right to suicide, or even a "right to die" in cases of passive euthanasia. Rather, it would acknowledge the legitimacy, indeed the inevitability of social choice in these matters, and encourage public deliberation, primarily in the legislative arena. But courts would retain a role in the process, insisting that legislatures justify their actions with rational argument. Courts should hesitate before attempting to have the last word, but not abdicate their role in the dialogue. Several principles should guide courts in addressing those issues.

A. *There Is No Fundamental "Right" to Suicide, Assisted or Otherwise*

American constitutional law has become closely associated with the concept of defending discrete "fundamental" rights. This has obscured, if not overwhelmed, the notion that there are limits on government action which are more general, which need not be traced to a short list of specified individual rights. This may explain the persistence of libertarian thought and language in "right to die" cases. A strong instinct that there must be some limits on government power leads, in the absence of alternative arguments, to the adoption of libertarian premises as its only refuge. But, as discussed above, to work from the premise that suicide is a fundamental right which calls for the invocation of strict scrutiny, if not absolute protection, is to ignore a host of problems. The model of the autonomous, rational suicide is deeply flawed, and the community has important interests in involving itself in the individual's decision.

States have abandoned the criminalization of suicide itself.<sup>158</sup> To the libertarian, this indicates a recognition of autonomy rights, but it seems more likely that what this really indicates is a recognition that such statutes lack a rational basis.<sup>159</sup> What sense does it make to respond with punishment to one who inflicts or attempts to inflict the ultimate punishment upon himself? If this is so, then criminalization of suicide might violate constitutional norms entirely apart from the existence of a right to suicide. And this leads to a second principle, of equal importance with the rejection of the "fundamental right" to suicide.

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158. No state currently criminalizes attempted suicide itself. *Id.* at 1464. Most states, however, criminalize assistance, either by statute or through common law principles. See HOEFLER, *supra* note 32, at 145.

159. See *supra* note 63.

B. *In Regulating Suicide, Government Must Act Rationally, and Must Display Some Regard for the Individual Involved as well as the Community as a Whole*

Clearly, government must act rationally when it restricts liberty, even in the absence of a fundamental right. This principle applies to the regulation of suicide. The immediate and obvious response to the contention that punishment of a suicide is irrational is that it surely is related to a legitimate government end in that it serves to deter others. This leads us to the following question: may rationality be determined entirely by utilitarian calculations, or must there be some minimal proportionality between the burden placed on the individual and the social good? Some examples readily come to mind. In the area of criminal punishments, although the Supreme Court consistently has held the death penalty itself constitutional, it has also held that the crimes for which it may be imposed are few.<sup>160</sup> This conclusion cannot rest upon purely utilitarian grounds; a rational legislator might well conclude that the *in terrorem* effect of some executions for burglary might benefit society. Obviously, there is some limit on the extent to which the life of even a blameworthy individual may be commandeered for the general welfare. Likewise, heavy and progressive taxation is not unconstitutional, but complete confiscation of property of a selected individual is.<sup>161</sup> There is some limit to the extent to which the individual may be used as a means to a greater end.

The "right to die" cases suggest the following principle. In preventing suicide and assisted suicide, the government must avoid cruelty. Cruelty exists in this context where the individual

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160. See *supra* note 77.

161. See *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622 (1981):

The Court has . . . consistently rejected claims that the Due Process Clause of the Fourteenth Amendment stands as a barrier against taxes that are 'unreasonable' or 'unduly burdensome.' . . . Moreover, there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to that activity.

*Id.* A state may not, however, tax a party who has no minimum contacts with the taxing jurisdiction. See *Quill Corp. v. North Dakota*, 112 S. Ct. 1904 (1992). The individual or entity taxed must, in some minimal way, share in the benefits the state provides. In addition, the Takings Clause of the Fifth and Fourteenth Amendments permit government to regulate the use of property in a way that reduces its value in order to promote the general welfare, but disallows the completely disproportionate act of a complete taking without compensation. See generally *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

is required to suffer serious pain under circumstances which indicate clearly that the pain in no way serves to protect the individual's own interests, but serves exclusively as an object lesson to others. This will allow a great deal of government involvement, and also will not preclude the consideration of utilitarian concerns, but will require some consideration of the individual. For example, cases in which doubt may exist as to the voluntariness of the patient's decision clearly are partially grounded in protection of the individual.<sup>162</sup>

More significantly, it also justifies a large degree of what libertarians would regard as paternalism.<sup>163</sup> Thus, the permanently disabled but not terminally ill person may not have a right to enlist another in the act of suicide because society genuinely sees that such prohibitions are of benefit both to the individual involved and to society.

At some point, however, it will become apparent that the patient is kept alive merely to express to others the value of life. In these cases, presumably involving terminal illness and significant intractable pain, the patient is entirely a means and in no way an end. Here, what we have can be described as cruelty, the infliction of pain for an end which in no way includes the welfare of the individual. A strong majoritarianism contains no limits on this type of social choice. But it by no means goes beyond accepted constitutional thought to insist both that government justify criminal prohibitions as rational, and that rationality, although it may be primarily grounded in community welfare, must avoid the cruelty inherent in requiring a blameless person to suffer greatly where that person's individual welfare is not at all part of the justification for government's acts.

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162. This would suggest that the holding in *Cruzan* was correct; where a state has reasonable uncertainty concerning the patient's wishes, it is justified in protecting the patient's life. A reasonable person could see this as furthering the patient's welfare in addition to protecting the general interest in preserving life.

163. To describe an act as paternalistic in modern discourse is almost always to disparage it. Paternalism takes on a meaning of power and control. Yet if the literal derivation of the word is considered, is "acting as a father would act" clearly a bad thing? A good father, or a good mother, will often refuse to defer to a son or daughter out of genuine concern for the other person, not merely to impose his or her own values. If "paternalism" conjures up images of power and control, might we replace it with "maternalism" to connote care and concern? At any rate, even critics of paternalism will concede that sometimes it is justified. See generally PATERNALISM (Rolf Sartorius ed., 1983).

C. *While Courts Should Participate in the Dialogue Concerning Assisted Suicide, Most Decisions Should be Left to Legislatures*

Recently, legal scholars have recognized that significant constitutional changes have not been solely the consequence of judicial decisions, but have occurred as a result of a dialogue between courts and legislatures.<sup>164</sup> Courts have forced legislatures to reconsider longstanding rules; in some cases the result has been not merely acquiescence<sup>165</sup> but expansion of a newly recognized right.<sup>166</sup> Legislative resistance, on the other hand, has led to judicial reconsideration of at least the scope of the right, if not its existence.<sup>167</sup> Thus, while the history of United States constitutional theory does not explicitly provide for the same level of shared responsibility between court and legislatures in defining constitutional norms as does Canada, the building blocks for a dialogic approach, as opposed to one which elevates one or the other branch to a consistently dominant position are available.

If it is clear that a communitarian approach to "right to die" issues calls for courts to engage in balancing, it is less clear what result that should lead to. After all, *Rodriguez* and *Compassion in Dying* reach different conclusions. *Compassion in Dying* ultimately reaches the better result, but care should be taken to read that result narrowly. As elaborated above, an element of the test of whether a legislature has acted rationally should be some minimal requirement of proportionality; that is, that solutions to social problems which impose extreme suffering on an individual, under circumstances where that individual will not share in

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164. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991), which discusses the relative importance of courts and legislatures in changes in civil rights, women's rights and other areas of the law in recent decades.

165. The refusal of Congress, in the wake of the Supreme Court's unpopular decisions extending First Amendment protection to flag burning, to amend the Constitution largely put an end to the political controversy. See Charles Tiefer, *The Flag-Burning Controversy of 1989-1990: Congress' Valid Role in Constitutional Dialogue*, 29 HARV. J. ON LEG. 357 (1992).

166. The most significant example is the civil rights legislation of 1964-68, which significantly went beyond the holding of *Brown v. Board of Educ.*, 347 U.S. 483 (1954). See ROSENBERG, *supra* note 164, at 94-106.

167. Surely the persistent refusal of state legislatures to accept *Roe v. Wade*, 410 U.S. 113 (1973), was a factor in the Court's subsequent limiting of the abortion right in cases such as *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1990). In contrast, the overwhelming acquiescence in the Court's contraception cases has made the right of access to contraception safe from serious reconsideration.

the benefits gained by that suffering in any way (and of course, where that suffering is not deserved punishment) interfere with liberty in a way which violates due process requirements. At some point, using another's suffering entirely as a means to benefit others and not the sufferer constitutes cruelty. Properly read, *Compassion in Dying* should be seen to stand for this principle. It does not support a "right" to suicide, assisted or otherwise, but rather holds only that an absolute ban goes too far. The decision encourages, indeed insists on, legislative consideration of the question. The danger, of course, is that advocates and other courts will be tempted to see this as merely a first step. If a state enacts a response permitting assisted suicide only in a narrowly defined category of cases involving terminal patients whose pain cannot be adequately managed and who have been carefully screened to assure that their decision is as voluntary as possible,<sup>168</sup> courts should defer. The strength of the libertarian strand of constitutional thought does pose the danger that the narrow reading of *Compassion in Dying* will be seen as only a beginning. But courts should refrain from requiring any more than the avoidance of cruelty. Where a restriction plausibly protects the interests of the patient as well as society, it should be upheld.

If states are compelled to recognize the existence of some cases in which criminal punishment for assisted suicide would be cruel and irrational, but at the same time reassured of the authority to guard against expansion of that narrowly defined category, we can expect states to take various approaches. Indeed, this may occur eventually even in the absence of any constitutionally based mandate.<sup>169</sup> Most people seem to agree that assisted suicide is tolerable when it is a completely voluntary choice by a patient suffering unbearable pain where no alternative methods of relieving the pain are present.<sup>170</sup> But this consensus is likely to fragment on a number of key points. What is a voluntary request? Does it include advance directives? If a

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168. The defeated proposals to legalize assisted suicide in Washington and California were criticized for their lack of safeguards, such as a "cooling off" period between the request for death and the act, a psychological examination, or involvement of the family. HOEFLER, *supra* note 32, at 146-48.

169. While almost all states have adopted some form of "living will" statute dealing with termination of treatment, the statutes are by no means uniform. See Lerner, *supra* note 13.

170. Public opinion polls show that when asked general questions concerning the right of a patient faced with incurable disease to suicide, fairly large majorities endorse it. HOEFLER, *supra* note 32, at 147-48. The majority breaks down, however, when confronted with concrete proposals which are seen to provide inadequate safeguards. *Id.*

request strikes us as irrational, may it be labelled involuntary, perhaps a reaction to depression or some other factor?<sup>171</sup>

Must the patient be terminal? Must the unbearable pain be physical pain, or may it include psychological suffering? Is the patient's subjective assessment of the degree of pain determinative? These and other questions may be answered in different ways by legislators acting in good faith to balance the legitimate concerns present. One approach would be to broadly define the circumstances under which physicians may euthanize, and expect medical ethics to develop specific standards of acceptable practice.<sup>172</sup> Another would be to carefully set forth in the statute itself the procedures to be followed.<sup>173</sup> The *Compassion in Dying* protocols seem reasonably protective of all interests involved, although it is troubling that there is no requirement that the patient not only be terminal, but also be in pain which cannot be adequately managed.<sup>174</sup>

We have little or no reliable evidence of the consequences of permitting assisted suicide. This is not because it does not occur; most agree that it does.<sup>175</sup> But it must exist *sub rosa* in light of its illegality. If we leap from criminalization to the extreme of creating a zone of privacy around the act we may also find ourselves with little information on which to base social policy.<sup>176</sup> On the other hand, as illustrated by the jury verdict in the Kevorkian case, an absolute prohibition in practice may, ironically, give more leeway to "suicide doctors." Juries, uncomfortable with

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171. See Herr, *supra* note 51, at 20-27.

172. The Royal Dutch Society for the Promotion of Medicine has issued a set of guidelines on euthanasia which, while noting that it is a "last resort," sets forth general guidelines of voluntariness and unacceptable suffering which "leaves a good deal open to professional judgment." GOMEZ, *supra* note 147, at 39-44. The American Medical Association recently rejected a proposal to consider ethical guidelines for assisted suicide. *AMA Shuns Assisted Suicide*, ROCKY MT. NEWS, June 15, 1994, at A46.

173. The absence of sufficiently detailed safeguards is seen as the principal reason for the defeat of the Washington and California ballot initiatives. See *supra* text accompanying note 167.

174. The *Compassion in Dying* protocols, while requiring that inadequate pain management be ruled out as the cause of the suicide request, do not seem to explicitly require the presence of pain as a prerequisite. See *supra* text accompanying note 148.

175. See HOEFLER, *supra* note 32, at 148-51; Lawrence K. Altman, *Physicians Broach Forbidden Subject of Euthanasia*, N.Y. TIMES, Mar. 17, 1991, at C3.

176. Carlos Gomez is quite critical of the current practice in the Netherlands and skeptical of any legalized euthanasia, but he concludes his study by emphasizing the need for more research on the feasibility of permitting euthanasia in a narrow range of cases while still preventing abuses. GOMEZ, *supra* note 147, at 127-39.

absolute prohibitions may be apt to acquit in cases in which far less care was exerted to assure that the instance was actually one of the extraordinary cases in which criminal sanctions were inappropriate, than they would if it was shown that the physician failed to comply with standards which were strict but not absolute prohibitions. Doctor Kevorkian's methods for example, fall well short of the published protocols in *Compassion in Dying*.<sup>177</sup>

The notion of a right to suicide, like that of a "right to die," arises out of a valid instinct that some limitations must be placed on government when it regulates how we deal with tragic choices. But the traditional response to this instinct, the assertion that there is a zone in which government may not act creates enormous problems when applied to euthanasia. The decision to die is not made outside of a social context created by others, and the use of notions of autonomy as the foundation of the right fails. But it is possible to avoid concepts of "right to die" or a right to suicide and still place limits on government. Government must act rationally and avoid cruelty. Within those parameters, the Constitution gives government room to balance its commitment to preserving life and the dignity of the individual.

#### CONCLUSION

In America, it has long been noted, all controversial social issues also become legal issues; and so it is with the questions presented by our newfound ability to tinker with the time and manner of death. When social issues become legal issues, our first reflex is to address them using the language of libertarianism or majoritarianism. Thus we use the term "right to die," and the choice of language limits our thinking. Either we defend the right, in which case we tend to underestimate our interdependence, or we deny it, in which case we overlook the limits on the degree to which an individual may be used as a means to a socially beneficial end.

Neither option produces a satisfactory response to the question of euthanasia. A rights-based approach permits us to close our eyes to our responsibility to care for those in physical and psychological pain and defer, in an uncritical way, to their "autonomous" desires to die. A majoritarian approach, however, permits us in genuinely tragic cases to use an individual entirely as a means rather than an end, even to the point of cruelty. The comforting apparent certainties of each approach should be rejected in favor of communitarian balancing. Communitarian

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177. See HOEFLER, *supra* note 32, at 151-59. A number of Kevorkian's patients were not yet in the terminal stages of their disease.

balancing calls upon individuals to recognize that they are not completely autonomous rights bearers, and that in some cases, some degree of paternalism may genuinely be an expression of care not only for the community, but for the individual. It calls upon the community in turn to recognize that there must be proportionality between social ends and the extent to which individuals may be called upon to suffer disadvantage in pursuit of those ends. It calls upon the legislature, as well as the community at large, to produce social policy as a result of dialogue respecting the legitimate concerns of conflicting interests. And it calls upon courts to insist that such a dialogue take place, neither seizing the role of final arbiter nor uncritically deferring to whatever result the legislature produces.

With respect to assisted suicide, it appears that American society has progressed toward a rough consensus which wisely remains skeptical and extremely cautious, but at the same time is unwilling to use the criminal sanction in cases in which that seems pointless and cruel. The legal system has the responsibility of transforming that instinct into public policy and to do so, a communitarian framework is, if not essential, highly advisable.



