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FOREWORD

PHYSICIAN ASSISTED SUICIDE: ITS CHALLENGE TO THE PREVAILING CONSTITUTIONAL PARADIGM

JOHN H. ROBINSON

Why, a reader might ask, has physician assisted suicide emerged as a social problem at this point in history and why has it proven so difficult for modern legal systems to provide a tolerable solution to that problem? The same reader might wonder what is to be done in the face of this difficulty. In this Foreword I answer the first of those putative questions by suggesting that death and dying are both in the throes of a massive revolution these days and that it is that revolution that has given rise to questions about the acceptability of physician-assisted suicide. I intend what I say there to be generalizable to the whole of the technologically advanced area of the globe. My answer to the second of those questions is confined to the difficulty that American legal systems, state and federal, have experienced in their encounters with physician assisted suicide issues. In that answer I suggest that the suicide question reveals a crisis in the current constitutional order, a crisis from which American society will have a difficult time extricating itself. In my answer to the third of those questions, I argue that the current constitutional crisis might offer American religious communities an opportunity to rethink their relation to the secular culture in which they find themselves and perhaps an opportunity to show that culture a way out of the morass in which it finds itself.

I. DYING AS A SOCIAL CONSTRUCT

Nothing is more natural for humans than the social construction of conventions through which we humanize all that is natural for us. So, while we are naturally linguistic, we realize our linguistic capacity only through languages that are themselves shot through with convention, and while we are naturally sexual, we need such highly conventional constructs as courtship, marriage, and the family if we are to realize the human potential

of our sexuality. We could say the same for what meals do for the hunger that our nature makes inevitable for us, and for what clothing does for our natural need to protect ourselves from our physical environment and for our equally natural desire to signal our sex and status to those who come into view. After a while, we could easily become so captivated by the ubiquity of those constructs as to think that they counted against our even having a nature at all, but it is not the correction of that error that interests me here. My interest is in reflecting for a moment on how deeply constructed dying is and has always been. My hope is that this reflection will later help us to figure out how in the next millennium dying ought to be constructed if we are to realize its full human potential—paradoxical (and even ghoulish) as that might sound.

Volumes of history must here be condensed into a few paragraphs.[1] Three observations are in order here. First, until only yesterday in historical time, death and its possibility were everywhere. Women died during or just after childbirth in very high numbers. Their children died within days or months of birth in similarly high numbers. Men and women, boys and girls were all highly susceptible to bacterial and viral conditions that all too often led to death. Social and political instability made war inevitable, and subsistence farming techniques often resulted in widespread famine. Under these conditions, death was much more central to life than it is today, as was the after-life about which religion had so much to say.

The second observation is related to the first: not only was death a central fact of life, but the medical response to the threat of death was primitive and ineffective. Medical science was in its infancy, reducing doctors to alleviators of pain and to peddlers of worthless panaceas. What decent medical care there was was usually allocated to the wealthy and to the well born, leaving the vast peasantry to shift for themselves. Under these conditions people tended to be passive in the face of death, bowing to its inevitability, and focusing on the glory that lay beyond it for those whose lives had merited it.

The third observation relates more to dying than it does to death itself. Dying was, for the most part, a domestic affair. People died at home in the company of their loved ones, attended to more by the priest than by the physician. Under these conditions, dying was not a social or political problem. For that to

1. *See, e.g.*, PHILIPPE ARIÈS, WESTERN ATTITUDES TOWARDS DEATH: FROM THE MIDDLE AGES TO THE PRESENT (1974).

happen, revolutions had to occur both in death and in the process of dying. It is to those revolutions that I now turn.

During the course of this past century, death itself has undergone a massive revolution, at least in the technologically advanced parts of the world. That revolution involved the displacement of the family and the priest by the doctor as the basic minister to the person suffering from some potentially lethal condition. This displacement was achieved by the remarkable success achieved by medical science in understanding and in responding to those conditions that once were thought of as beyond the reach of medicine. Cholera, typhus, diphtheria, polio, tuberculosis, malaria, influenza, and syphilis all fell before the advance of medical science. Even for those conditions for which medical science has no cure, methods of control have been developed, giving diabetics, epileptics, people with heart conditions, and many cancer victims ways to lead normal lives despite their inability to shake their condition entirely.

The revolution in death that I have just described brought with it a revolution in dying that deserves brief attention here. As the doctor replaced the family and the priest as the focal point of the response to potentially lethal conditions, the hospital replaced the home as the *locus* of death and dying. This revolution was surely abetted by other social phenomena—the breakup of extended families and the entry of women into the extradomestic workforce, for example—but at its core was the revolutionary assertion of power over disease by the medical profession. Just as—and just when—house calls gave way to office visits for routine illnesses, the family home gave way to the local hospital for the treatment of potentially lethal conditions.

What all this history means is that one of our least visible and most needed social constructs has, in the space of a single generation, virtually disappeared. In its place another construct is slowly taking shape. But that new construct's emergence is taking much longer to occur than it has taken the old construct to recede. So for the time being we find ourselves between constructs, nostalgically attached to the domestic death of recent memory and understandably hostile to the medicalized death of today. What are we to do during this interregnum and what role should we play in the emergence of the new death construct? For the crudest beginnings of an answer to those questions, let's attend briefly to recent developments in American law regarding death and dying.

II. DYING AND DECISIONAL PRIVACY

For all those centuries during which medicine was almost impotent against illness and accident, the common law quite understandably addressed death primarily in its homicidal and suicidal incarnations. Intentional homicide, if unjustified or unexcused, was for the most part a capital offense,[2] and suicide was punished by ignominious burial and by the forfeiture to the king of all the suicide's earthly possessions.[3] Of late, however, American courts, like their English[4] and Canadian[5] counterparts, have been almost obsessively concerned with the legal questions raised by medicine's new found power over death,[6] and in the short space of twenty years, that obsession has proved to be singularly productive.

Prescinding for the moment from judicial efforts to apply the constitutional doctrine of decisional privacy to those questions, one could argue convincingly that competent individuals can now find in the common law the legal wherewithal to fend off unwanted medical attention, even where that attention is reasonably believed necessary to their continued existence.[7] Similarly, one could argue convincingly that common law principles combine with statutory provisions in most states to give binding legal effect to living wills and health care proxy documents, especially where they specify that death-prolonging medical care not be provided once its futility has become apparent.[8] Even in the absence of a document of that sort, the oral expression of a desire not to be kept alive by mechanical means once one's competence to speak for oneself is irretrievably lost will also be respected provided that certain indicia of seriousness attend that expression.[9] The removal of nutrition and hydration tubes from the persistently vegetative is more problematic, morally at least, than is the removal of respirators,[10] and demands for aggressive

2. 4 WILLIAM BLACKSTONE, COMMENTARIES *177, 202-03.

3. *Id.* at *190.

4. *See* Airedale N.H.S. Trust v. Bland, [1993] 1 All E.R. 821 (Eng.).

5. *See* Rodriguez v. British Columbia, 3 S.C.R. 519 (1993) (Can.).

6. *See, e.g., In re* Estate of Longeway, 549 N.E.2d 292 (Ill. 1989); Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417 (Mass. 1977); *In re* Conroy, 486 A.2d 1209 (N.J. 1985); *In re* Quinlan, 355 A.2d 647 (N.J. 1976); *In re* Storar, 420 N.E.2d 64 (N.Y. 1981).

7. *See, e.g.*, Rodriguez v. Pino, 634 So. 2d 681 (Fla. Dist. Ct. App. 1994); State v. McAfee, 385 S.E.2d 651 (Ga. 1989); McKay v. Bergstedt, 801 P.2d 617 (Nev. 1990).

8. *See, e.g., In re* Guardianship of Browning, 568 So. 2d 4 (Fla. 1990).

9. *See* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990).

10. On the moral problems involved in the removal of nutrition and hydration tubes from persistently vegetative persons, see, for example, Dennis

medical care for the dying are also more problematic than are demands that such care be terminated.[11]

Partially because the common law does not provide answers to these latter questions, and partially because there is a certain inconclusiveness to even those answers that the common law does provide, litigants have for several years now pressed for the constitutional resolution of death and dying questions.[12] Once these questions receive their constitutional answer, it has been thought, then, and only then, will they have been definitively answered. It is at just this point, however, that we must acknowledge that American constitutional law is in the midst of the deepest crisis in its history, and that efforts to constitutionalize issues related to death and dying can only exacerbate that crisis. To make that point clear, however, a few things need to be said about predecessor crises in American constitutional law and about how they were resolved.[13]

The genius of Chief Justice John Marshall, who presided over the Supreme Court from 1801 until 1835, was that he was able to establish both the hegemony of the national government over the commercial life of the new American nation[14] and the supremacy of the federal judiciary in constitutional matters[15] without provoking a crisis either for or within the new constitutional order. Marshall's successors have not been as fortunate or as astute as he was. From the accession of Roger Brooke Taney in 1836 until today, crisis has been the normal condition of American constitutional law. The first great crisis—the struggle over slavery—had been built into the Constitution when the Founders acquiesced in slavery's continued existence in full knowledge of its moral repugnancy.[16] That crisis festered for sev-

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Brodeur, *Is a Decision to Forgo Tube Feeding for Another a Decision to Kill?* 6 ISSUES IN LAW AND MEDICINE 395 (1991).

11. On this issue, see DANIEL CALLAHAN, WHAT KIND OF LIFE: THE LIMITS OF MEDICAL PROGRESS (1990). For an account of recent litigation involving this issue, see Gina Kolata, *Court Ruling Limits Rights of Patients*, N.Y. TIMES, Apr. 20, 1995, at 6. That article discusses the case of Catherine F. Gilgunn, who died on August 10, 1989, after her doctors issued a do-not-resuscitate order over her family's objections. The jury in the Gilgunn case returned a verdict in favor of the defendant health care providers.

12. See Gray v. Romeo, 697 F. Supp. 580 (D.R.I. 1988), for an early instance of this phenomenon.

13. For an earlier effort on my part to think through the crises in American constitutional history, see John Robinson, *Jerry's Jeremiad*, THE WORLD AND I, March 1994, at 388.

14. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

15. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

16. *See* Thurgood Marshall, *The Constitution: A Living Document*, 30 HOW. L.J. 623 (1987); *but cf.* Edward L. White III, Comment, *Another Look at Our*

enty years before it exploded in the disastrous Dred Scott decision of 1857.[17]

No sooner had that crisis been resolved by war, by the brilliance of Lincoln, and by constitutional amendments that repudiated the slave provisions of the original document,[18] than a second great crisis emerged. That crisis involved the role of the state and federal judiciaries in overseeing the legislative regulation of labor-management relations in the emergent industrial centers of the nation. Because the fit between relevant constitutional text and the constitutional crisis at issue here is singularly odd and because that text will play a crucial role in two of the next three crises that I shall be sketching, some attention needs to be given to it.

In repudiating the original Constitution's acquiescence in the evils of slavery, the Reconstruction Congress forbade the states to "deprive any person of life, liberty, or property, without due process of law."[19] For the past 125 years judges and scholars have struggled with what those words might mean. Rejecting the eminently plausible suggestion that they might mean that states must give people a fair trial before they deprive them of life, liberty, or property by execution, imprisonment, or a fine, the Supreme Court of a century ago interpreted those words to mean that the states could not interfere with the liberty of workers and employers to hammer out for themselves the conditions under which the former would enter into or stay in the employ of the latter.[20] Similar language in the Fifth Amendment was held to bar the federal government from interference of that sort as well.[21] In both cases, the Court reached this result by treating the word "liberty" in "life, liberty, or property," as if it imposed some substantive constraints on those human affairs about which a legislature is constitutionally empowered to legislate. For that reason this mode of constitutional thought goes by the awkward, almost contradictory, name of substantive due process thinking.

Substantive due process thinking provoked a constitutional crisis of a very different sort from the slavery crisis that preceded it. As I have already noted, the slavery crisis was so tightly built into the text of the Constitution that it could be resolved only by

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Founding Fathers and Their Product: A Response to Justice Thurgood Marshall, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 72 (1989).

17. Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

18. *See* U.S. CONST. amends. XIII, XIV, XV.

19. U.S. CONST. amend. XIV., § 1.

20. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

21. Adair v. United States, 208 U.S. 161 (1908).

both a national change of heart and a series of constitutional amendments. The substantive due process crisis of a century ago did not originate in the text of the Constitution as then amended. It originated in extra-constitutional theories of property and labor relations, theories that we might loosely describe as social Darwinist. For as long as those theories were widely adhered to in society at large, substantive due process thinking provoked no constitutional crisis, but once they lost popularity among both the educated elite and among the laboring masses, then the constitutional crisis emerged. When those theories collapsed under the weight of social reality and vigorous conceptual criticism, the crisis was resolved without the language of the constitutional text having to be changed at all. From 1937 until today, mainline constitutional theory has simply stopped reading into the word "liberty" in the Due Process clauses of the Fifth and Fourteenth Amendments any significant constraint on the power of government to regulate labor-management relations,[22] and, as a constitutional matter, labor relations no longer produce a crisis for American law at all. Much of the useful work that substantive due process had done with respect to the constitutional regulation of governmental regulation of private conduct is now done under the aegis of the Takings Clause of the Fifth Amendment.[23]

In the same section of the Fourteenth Amendment in which the Reconstruction Congress forbade the states to deprive any person of life, liberty, or property without due process of law, it also forbade the states to deny to any person within their jurisdiction "the equal protection of the laws."[24] In this language too there lurked a crisis, and that crisis is as different from the two that I have just sketched as the second of them was from the first. The first of those crises stemmed from the pact with hell that the founders made back in 1787.[25] It could be resolved only by undoing that pact. The second crisis stemmed from the judiciary's commitment to certain social theories and not from any requirement of the constitutional text. It could be resolved by abandoning those theories and without touching the text. This

22. *See* West Coast Hotel v. Parrish, 300 U.S. 379 (1937); NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1 (1937).

23. *See, e.g.*, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

24. U.S. CONST. amend. XIV, § 1.

25. See William Lloyd Garrison, *The American Union, in* SELECTIONS FROM THE WRITINGS AND SPEECHES OF WILLIAM LLOYD GARRISON 118 (1968), for the most famous American use of this scriptural phrase. For the scriptural phrase itself, see *Isaiah* 28:15.

third crisis had, to be sure, an explicit constitutional focal point, but it was not the text that caused the crisis. The crisis was caused by deep and pervasive popular refusal to acknowledge the profound moral requirement that was implicit in the text. That requirement was that similarly situated persons ought to be treated similarly by the state, and the refusal to acknowledge it took the form of racism. From at least that day in June 1892 when Homer Plessy took a seat in a whites-only car on the East Louisiana Railway[26] until that day in May 1954 when the Supreme Court held that the Board of Education of Topeka, Kansas, could not require Linda Brown to attend a blacks-only public school,[27] the nation was embroiled in its third great constitutional crisis. This crisis, like its immediate predecessor, was resolved without changing a syllable in the constitutional text. What was changed was the national attitude towards race and racism, and we find a monument to that change in the Civil Rights Act of 1964.[28]

At the core of the critique of racism, as racism was embodied in law, was the perception that blacks and whites do not differ in any legally relevant respects, such that for the state to collude in the denial of housing,[29] schooling,[30] jobs,[31] recreational facilities,[32] and the like on the basis of race is for it to violate the equal protection of the laws that is guaranteed by the Fourteenth Amendment. Pure reason conspired at this point with the irony of legislative history[33] to extend the victory won by blacks in *Brown* and its progeny to women, and if women really did not differ from men in any legally relevant respects, perhaps the cur-

26. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

27. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

28. 42 U.S.C. §§ 1971, 1975a, 2000a-2000h-6 (1988 & Supp. V 1993).

29. *See* Shelley v. Kramer, 334 U.S. 1 (1948).

30. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, (1970).

31. *See* 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. V 1993) (Title VII of the Civil Rights Act of 1964). For the most recent development in the way in which Title VII is applied in racially charged employment disputes, see St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993).

32. *See, e.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (per curiam), *aff'g* 252 F.2d 122 (5th Cir. 1958) (public parks); Gayle v. Browder, 352 U.S. 903 (per curiam), *aff'g* 142 F. Supp. 707 (D. Ala. 1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (per curiam), *vacating* 223 F.2d 93 (5th Cir. 1955) (public golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (per curiam), *aff'g* 220 F.2d 386 (4th Cir. 1955) (public beaches).

33. See J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 316 (1978) for an account of how sex was added to "race," "religion," and "national origin" in Title VII of the Civil Rights Act of 1964.

rent constitutional crisis could have been averted.[34] But women do differ from men in ways that the law must address, and in addressing those differences the law inevitably encounters a whole series of hard questions relating to the governmental regulation of human sexuality; so the current crisis became virtually unavoidable. To understand the nature and seriousness of that crisis, we must return to the Due Process Clause of the Fourteenth Amendment and to the mid-twentieth century effort to give it meaning.

Once substantive due process thinking had been swept from the constitutional scene, several efforts were made to fill the void created by its removal. One of the most promising of these efforts was led by Justice Hugo Black. His effort promised to give the federal judiciary substantive power over state legislation without making the Due Process Clause hostage to the socio-political views of the judiciary. Justice Black read that clause of the Fourteenth Amendment as subjecting the states to the substantive restraints on legislation expressed in the first eight amendments to the federal Constitution, thereby requiring the states to honor in their legislation all of the constraints that were built into the Bill of Rights as constraints upon the federal government.[35]

Justice Black's effort was too much for some,[36] too little for others,[37] and troublesomely incoherent to all.[38] In any case, his effort failed, and the effort led first by Justice Harlan and later by Justices Douglas, Brennan, Blackmun, and Stevens succeeded. According to that effort, the liberty protected by the Fourteenth Amendment is not "a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion,"[39] as Justice Black would have it. It is instead "a rational continuum which, broadly speaking, includes a freedom

34. The early women's rights cases were predominately of this equal treatment variety. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). But when this mode of analysis was applied to pregnancy issues, it became problematic. *See, e.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Gedulgig v. Aiello, 417 U.S. 484 (1974).

35. Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

36. *Id.* at 53 (Reed J., writing for the majority).

37. *Id.* at 123 (Murphy, J., dissenting).

38. The incoherence stemmed from Justice Black's attempt to predicate a rigidly textualist approach to constitutional interpretation upon a patently non-textualist interpretation of the Due Process Clause of the Fourteenth Amendment.

39. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

from all substantial arbitrary impositions and purposeless restraints."[40]

Now since one person's "arbitrary imposition" is another person's "rational regulation" some way of giving substance to Justice Harlan's approach had to be found. After a brief flirtation with penumbras, formed by emanations, that create constitutionally protected zones,[41] the Court settled into a significantly more pedestrian way of giving content to Fourteenth Amendment liberty. Nowadays a practice is rebuttably protected from legislative prohibition if it is either "implicit in the concept of ordered liberty"[42] or "deeply rooted in this Nation's history and tradition."[43] From the outset, Justice Black warned that neither of these criteria for the constitutional unacceptability of state or federal legislation could perform the function that the Court had assigned to them; *viz.*, permitting the Constitution and its history—as distinguished from the policy preferences of the current members of the federal judiciary—to determine the conditions under which the will of the majority, as embodied in legislation, would be thwarted by judicial review.[44] Evidence for the appropriateness of Justice Black's warning was provided first by the abortion cases of the 1970s, then by the sexual orientation cases of the 1980s and 1990s.

Whatever one thinks about abortion or about gay rights as matters of substantive social policy, he or she is compelled to acknowledge that the case law in those areas lacks both the textual and the theoretical warrants that give, say, integrationist case law its stability. Such stability as the plurality opinion in *Casey* was able to provide for current constitutional abortion doctrine, for example, was explicitly separated from any attempt to justify that doctrine on textual or theoretical grounds,[45] and no body of case law could be more incoherent than the tangle of recent state and federal cases on gay rights.[46] This incoherence is not due to the

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40. *Id.*

41. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

42. Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

43. *Hardwick*, 478 U.S. at 192 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (opinion of Powell, J.)).

44. *See Griswold*, 381 U.S. at 507-527 (Black, J., dissenting). *See also In re* Winship, 397 U.S. 358, 377-386 (1970) (Black, J., dissenting).

45. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2817 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

46. *Compare* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, Nos. 94-3855/3973/4280, 1995 WL 276248 (6th Cir. May 12, 1995) (upholding constitutionality of a ballot measure that forbade Cincinnati to regard sexual orientation as a predicate for protection under anti-

stupidity or to the wickedness of the judicial figures who have produced these decisions. Far from it—we can safely assume that each of those figures has striven valiantly to do just what the constitutional law on decisional privacy requires him or her to do. The trouble is that no one can do what that body of law requires him or her to do. No one, that is, can determine whether or not a particular practice is so thoroughly implicated in the concept of ordered liberty or so deeply rooted in the nation's history as to be above restrictive regulation without insinuating his or her own policy preferences into that calculation. As a result, the case law in this area breaks down into two irreconcilable parts: one part insists that the entire exercise puts the judicial process itself in jeopardy;[47] the other part naively constitutionalizes the loosely Millian preferences of the current judicial elite.[48] To say the least, this is not a formula for the constitutional resolution of vexing social problems. It is instead a formula for the trivialization of the entire constitutional enterprise. Let the recent effort to find a constitutional solution to the problem of physician assisted suicide serve as an example of what I mean.

In December 1993, Richard C. Kaufman, a trial court judge in Michigan, determined that the constitutional law of decisional privacy includes, in some circumstances at least, a right to commit suicide.[49] Predictably, Judge Kaufman reached his conclu-

discrimination laws) *with* Evans v. Romer, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995) (finding a substantially identical measure unconstitutional). Similarly, *compare* Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (the Navy may use sexual orientation as a predicate for exclusion from the Naval Academy and from service in the Navy) *with* Able v. United States, No. 94 CV 974, 1995 WL 149460 (E.D.N.Y. Mar. 30, 1995) (a federal law and directives issued pursuant to that law are unconstitutional insofar as they permit the military to predicate dismissal from the military upon a person's acknowledgement of his or her sexual orientation).

47. *See id.* at 194 ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."). *See also* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 292-301 (1990) (Scalia, J., concurring).

48. *See Hardwick*, 478 U.S. at 204 (Blackmun, J., dissenting) (" '[T]he concept of privacy embodies the "moral fact that a person belongs to himself and not others nor to society as a whole." ' " (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 777 n.5 (Stevens, J., concurring))).

49. People v. Kevorkian, No. 93-11482, 1993 WL 603212 (Mich. Cir. Ct. Dec. 13, 1993), *rev'd sub nom.* Hobbins v. Attorney General, 518 N.W.2d 487 (Mich. Ct. App. 1994), *aff'd in part and rev'd in part sub nom.* People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 63 U.S.L.W. 3692 (U.S. Apr. 24, 1995) (No. 94-1490).

sion by asking himself if suicide has either the historical or the conceptual warrant required by decisional privacy law.[50] Finding the historical inquiry to produce a "murky" result,[51] he turned to the conceptual issue—viz. "whether the right to commit suicide is ever part of the implicit concept of ordered liberty."[52] In this inquiry, Judge Kaufman was guided by the assertion of the plurality in the then-recent *Casey* decision to the effect that "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" lies at the heart of the liberty that the Fourteenth Amendment protects against intrusive governmental regulation.[53] Using this assertion as his guide, Judge Kaufman was easily able to conclude that suicide decisions deserve to be added to sexual decisions as among the sorts of decisions implicated in this concept of ordered liberty.[54] All that was left for him to do was to decide that, in some cases at least, the state's countervailing interest in proscribing suicide fail to trump a particular person's right to die,[55] and he was free to invalidate Michigan's prohibition on assisted suicide, at least as that prohibition applied to the case before his court.[56]

One year later the Michigan Supreme Court reversed the decision that I have just sketched.[57] Speaking for a majority of his court on this point, Justice Cavanagh found the historical inquiry mandated by the decisional privacy cases to be far from murky. He found instead a long and clear history of societal and legal disapproval of suicide, a history that includes the criminalization of assisted suicide by sixty percent of the states that ratified the Fourteenth Amendment.[58] As for the claim that a right to suicide is implicit in the concept of ordered liberty, Justice Cavanagh argued both that the argument for that claim was internally incoherent and that by proving too much it proved nothing at all.[59] The incoherence, Justice Cavanagh thought, lay in the conflict between the dignitarian presuppositions of all autonomy-based claims and the violation of human dignity implicit in any effort to measure the value of a person's life by

50. *Kevorkian*, 1993 WL 603212 at *8.
51. *Id.* at *13.
52. *Id.* at *13.
53. *Id.* at *13 (quoting Planned Parenthood v. Casey, 112 S. Ct. 2791, 2807 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.)).
54. *Kevorkian*, 1993 WL 603212 at *18.
55. *Id.* at *19.
56. *Id.* at *20.
57. People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 63 U.S.L.W. 3692 (U.S. Apr. 24, 1995) (No. 94-1490).
58. 527 N.W.2d at 730-33.
59. *Id.* at 727 n.41.

reference to the current state of that person's mind or body.[60] The tendency of the argument to prove too much, and therefore to prove nothing, stems from its linkage of a suicide right to autonomy; if the argument works, Justice Cavanagh thought, then every autonomous person would have a rebuttable right to suicide, but this, he thought, is a conclusion that even the advocates of a suicide right are at pains to reject.[61] Justice Cavanagh dismissed as unpersuasive the efforts of the dissenters to employ a balancing test to determine the class of persons whose interest in a painless and prompt death outweighs the countervailing interests that ordinarily militate in favor of a prohibition on one person's giving another assistance in dying.[62]

While this constitutional drama was being played out in Michigan, a parallel phenomenon was occurring on the West Coast. In May 1994, Barbara Rothstein, the Chief Judge of the United States District Court for the Western District of Washington, found in the Due Process Clause, as it has been interpreted by the decisional privacy cases, a constitutional right whereby "adults who are mentally competent, terminally ill, and acting under no undue influence" are entitled "to voluntarily hasten their death by taking a lethal dose of physician-prescribed medicine."[63] As had Judge Kaufman in Michigan five months earlier, Judge Rothstein predicated this finding on the *Casey* plurality's claim that "the right to define one's own concept or existence, or meaning, of the universe, and of the mystery of human life" lies at the heart of the liberty that the Fourteenth Amendment protects from intrusive governmental regulation.[64] By way of this understanding of the scope of the Due Process Clause, Judge Rothstein was able to analogize suicide decisions to abortion decisions inasmuch as each involves "the most intimate and personal choices a person may make in a lifetime."[65] With that much done, all Judge Rothstein had to do was to deny the consti-

60. "In this regard, we observe that a right of personal autonomy cannot exist independent of a recognition of human dignity, and that it would violate the concept of human dignity to measure the value of a person's life by that person's physical and mental condition." *Id.*

61. "Further, because all persons possess a basic right to personal autonomy, regardless of their physical or mental condition, there would be no principled basis for restricting a right to commit suicide to the terminally ill. The inevitability of death adds nothing to the constitutional analysis." *Id.*

62. *Id.* at 727 n.37.

63. Compassion in Dying v. Washington, 850 F. Supp. 1454, 1456 (W.D. Wash. 1994), *rev'd*, No. 94-35534, 1995 WL 94679 (9th Cir. Mar. 9, 1995).

64. *Id.* at 1459 (quoting Planned Parenthood v. Casey, 112 S. Ct. 2791, 2807 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.)).

65. *Id.* at 1462.

tutional significance of the distinction between the termination of life-sustaining medical treatment and the prescription of a lethal dose of medication, and she was free to declare Washington's law against assisted suicide unconstitutional.[66]

By further analogy to the Michigan litigation, when a three judge panel of the Ninth Circuit heard the appeal from Judge Rothstein's decision, that panel reversed her decision.[67] There Judge John Noonan, speaking for the 2-1 majority, rejected Judge Rothstein's attempt to use the "mystery of human life" quote from the *Casey* plurality as a bridge between the constitutional regulation of abortion laws and the constitutional regulation of assisted suicide laws.[68] As had the Michigan Supreme Court, the Ninth Circuit found any effort to base a suicide right in a more general autonomy claim to prove too much, and hence to prove nothing. As Judge Noonan said:

> If at the heart of the liberty protected by the Fourteenth Amendment is this uncurtailable ability to believe and to act on one's deepest beliefs about life, the right to suicide and the right to assistance in suicide are the prerogative of at least every sane adult. The attempt to restrict such rights to the terminally ill is illusory. If such liberty exists in this context, as Casey asserted in the context of reproductive rights, every man and woman in the United States must enjoy it. . . . The conclusion is a reductio ad absurdum.[69]

The Ninth Circuit also rejected out of hand Judge Rothstein's efforts to deny the constitutional significance of the distinction between refusing life support and seeking medical help in dying.[70] Having done this, the Ninth Circuit found it easy to conclude that neither the language of the Constitution nor the history of its interpretation entails a constitutional right of the sort that Judge Rothstein had so confidently asserted ten months earlier.[71]

As I write this summary of these cases, the United States Supreme Court has just denied certiorari in the Michigan case,[72] and the plaintiffs in the Washington case have sought en banc

66. *Id.* at 1467.

67. Compassion in Dying v. Washington, No. 94-35534, 1995 WL 94679 (9th Cir. Mar. 9, 1995).

68. *Id.* at *4.

69. *Id.* at *4.

70. *Id.* at *8.

71. *Id.* at *8.

72. Kevorkian v. Michigan, 63 U.S.L.W. 3692 (U.S. Apr. 24, 1995) (No. 94-1490).

review from the Ninth Circuit.[73] My best guess is that Judge Noonan's decision will not be disturbed on review, but my objective here is not to give reasons for that guess. My objective here is to show that the argumentative process engaged in by Judge Kaufman in the Michigan case and by Judge Rothstein in the Washington case is, to paraphrase Robert Frost, "tennis without the net."[74] More precisely, the whole project of constitutionalizing the resolution of a serious public policy dispute presupposes that the text of the Constitution and the history of its interpretation play a significant, indeed a definitive, role in how that dispute is finally resolved. For the resolution of a dispute to be constitutionalized, it must at least be imaginable that the Constitution will run counter to the zeitgeist, checking momentary enthusiasms and calling the nation back to enduring ideals that have been ignored in the desire to find a quick fix for some systemic problem. But the decisional privacy cases of the past thirty years have not been decided in that way at all. What has happened instead is that the whole process of constitutionalization has been debased in ways that cry out for correction if that process is ever to function effectively and defensibly in the resolution of policy disputes. Let me sketch some of the ingredients of that correction here.

It is, of course, imaginable that the American legal system would simply reject as indefensible any effort to predicate constitutional constraints on legislative constraints on the substantive liberty of the people upon the text and implications of the Due Process Clause. Recent efforts to shift the constitutional warrant for the extant abortion jurisprudence and for the emergent suicide jurisprudence from the Due Process Clause to either the Equal Protection Clause[75] or to the Religion Clauses[76] suggest the attractiveness of such a move even among prototypically liberal theorists. My own suspicion is that neither of these shifts is likely to be entirely successful both because of deep problems inherent in both attempted shifts and because of the inherent attractiveness of the highly selective libertarianism implicit in current substantive due process doctrine. If my suspicion is well-

73. *See Suicide Ban Ruling Appealed*, NAT'L L.J., Apr. 10, 1995, at A8.

74. MACMILLAN DICTIONARY OF QUOTATIONS 227 (John Daintith et al. eds., 1989).

75. *See, e.g.*, Cass R. Sunstein, *Homosexuality and the Constitution*, 70 INDIANA L.J. 1 (1994). *See also* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985).

76. *See, e.g.*, Tom Stacy, *Death, Privacy, and The Freedom of Religion*, 77 CORNELL L. REV. 490 (1992). *See also* RONALD DWORKIN, LIFE'S DOMINION (1994).

grounded, then the central constitutional project of the current era ought to involve a thorough-going reconceptualization of the whole idea of a constitutionally protected sphere of decisional privacy. That reconsideration ought to issue both in a better normative foundation for that doctrine and in better procedures for determining the outer limits of that sphere than current decisional law provides.

As to the first of those outcomes, the courts and their critics will have to call into question the very idea that the touchstone for the proper interpretation of the Due Process Clause, insofar as it imposes substantive limits on the ability of a state to enforce liberty-limiting legislation, is the right of every competent adult to define his or her own "concept of existence, of meaning, of the universe, and of the mystery of human life."[77] While coming to our own terms with the mystery of life may be necessary to intellectual maturity, any suggestion that it somehow suffices to ward off the interventionist state has an odd ring to it. Far from clarifying the law of decisional privacy and showing us a way out of the current crisis, it obfuscates that body of law and deepens that crisis. Because of the crucial relevance of this assertion to the whole question of a constitutional right to assistance in dying, I will devote a paragraph here to its elucidation.

Insofar as a concept of existence functions as a reason for action and as a constraint on state power, the government whose power is thereby constrained should be entitled to at least two desiderata. One is that that concept be to some extent authentic; that is, that it be the product of a particular citizen's personal reflection, and this the *Casey* dictum seems to acknowledge. But a government should also be entitled to desire that a particular citizen's concept be to some extent correct; that is that it bear some positive relationship to existence, and on this *Casey* is tellingly silent. It might appear ludicrous for a state to set itself up as an arbiter of the correctness of concepts such as these, but it is equally ludicrous for the state to feign indifference to those concepts at the same time as it sets them up as the basis for the constitutional doctrine of decisional privacy. In that indifference lurks a specious neutralism that tends to enlist the state on the permissive side of any dispute over the proper role of the state with respect to the regulation of some form of human conduct. If it is to free itself from such question-begging procedures, what American constitutional theory needs to do in both its judicial and its academic incarnations is to mediate the tension between

77. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2807 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

an intolerable state imposition of certain alleged truths about existence and the like and an equally intolerable deference to the basic beliefs of individuals, however bizarre those beliefs happen to be.

This process of mediation will itself have at least two levels to it. One will surely be empirical. Judges and scholars will have to ask themselves what effect assertions of governmental neutrality with respect to certain domains of human conduct have on the way citizens act in those domains. Does governmental neutrality with respect to the sexual lives of its citizens, for example, have any causal relation to the collapse of family ties or to the level of teenage promiscuity, with its incidental toll from AIDS and other sexually transmitted diseases?[78] Is it the case more generally that efforts on the part of government to refrain from imposing one among many contesting understandings of the good life are always read by the general populace as an endorsement of the most permissive of those understandings? Does governmental neutrality with respect to competing conceptions of the good life always become in practice governmental endorsement of moral relativism and of a notion of happiness that substitutes the satisfaction of episodic desire for the fulfillment of human potential? Must respect for individual autonomy always subvert those intermediate institutions that, arguably at least, give rise to an individuality that deserves respect? If the answers to these questions are, as I suspect they will be, of the highly qualified variety that good empirical inquiry routinely produces, they will lead to even more difficult questions about how governmental respect for autonomy will have to be rendered operational so as not to have the dire effects intimated in the series of questions that I have just asked.

As these empirical questions are being answered, other more purely normative issues will have to be addressed if the current constitutional crisis is itself to be resolved. Foremost among these will be the articulation of a conception of the state that connects its moral legitimacy to the respect that it exhibits for the subjectivity of its citizens. H.L.A. Hart,[79] John Rawls,[80] Ronald Dworkin,[81] and Joel Feinberg[82] are among those who have

78. On this question, see Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, Apr. 1993, at 47.

79. *See* H.L.A. HART, LAW, LIBERTY AND MORALITY (1966).

80. *See* JOHN RAWLS, POLITICAL LIBERALISM (1993); JOHN RAWLS, A THEORY OF JUSTICE (1971) (hereinafter RAWLS, JUSTICE).

81. *See* DWORKIN, *supra* note 76.

82. *See* JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW (1984-88).

already made progress in this direction, but it would be foolish to say that any one of them (or that all of them taken together) have succeeded in that task. But even were that task to have been completed, normative work would still have to be done on the distinction between the state, as liberal theory conceives of it, and the society that the liberal state governs. Here the worry is that the requirement of moral neutrality that contemporary liberal theory imposes upon the state will be transferred to those social institutions that the liberal state inevitably relies upon for the development of decent citizens. With this transference come two evils. The first is the inability of those social institutions to function as moral educators, and the second is the substitution of a pernicious rationale for the neutrality of social institutions for the valid rationale that grounds state neutrality.

Social institutions can function as moral educators only when they are possessed of a much more determinate account of the human good than modern liberal theory allows to the state. Tolerance may be a necessary political virtue in heterogeneous states, but it is far from sufficient as a guide to one's personal life. And we can ground state neutrality with respect to at least some range of conceptions of the good in relatively pure political theory, arguing that the state is neither competent to function as a moral arbiter nor licensed to function in that way. Such arguments are ordinarily unavailable, however, when it comes to such social institutions as the family, the school, the church, or one of the professions. If we transfer to them the neutrality requirement that we impose on the state, we are likely to base this illegitimate requirement of social neutrality on wholly contemptible and utterly corrosive relativistic grounds. So the political theory that will be needed to resolve the current constitutional crisis will have to be one that simultaneously justifies a state whose moral agenda is self-consciously thin and a set of social institutions whose moral agendas are unabashedly thick.[83] As unproblematic as this may sound in theory, in practice it may prove to be immensely problematic, as becomes evident as soon as we consider the whipsaw effect it is likely to have in the life of at least some of the citizens of the liberal state. In the next section of this Foreword I will first sketch that whipsaw effect, then I will offer some potential responses to it.

83. The thick/thin imagery can be traced to RAWLS, JUSTICE, *supra* note 80, at 395-99.

III. The Individual as Citizen and as Believer

Imagine a particular individual who is simultaneously a citizen of a liberal state and a congregant in a traditional Christian church. As this individual understands the state in which he lives, it urges him to work out his own concept of existence and meaning for himself and to respect the product of others' efforts along similar lines regardless of the ultimate accuracy of either his efforts or theirs. As he understands his church, however, it urges him to accept a divinely ordained concept of existence and meaning and to shun those who embrace worldly ideals. This individual hears his government tell him that it is a "moral fact" that he "belongs to himself and not others,"[84] but he hears his church tell him that he belongs to God. The autonomy that his state privileges when it speaks to him as a citizen begins to look suspiciously like the pride that his church denounces when it speaks to him as a believer.[85] Worse yet, he understands his state to identify the good with the satisfaction of desire but he understands his church to identify the good with conformity to the will of God. Consequently, he sees that his state expects him to maximize his own utility in any situation in which he might find himself, but he realizes that his church expects him to deny himself in at least some of those situations. This sense that one is receiving contradictory instruction from two recognized authority systems is the whipsaw effect that I referred to earlier.

It may well be true that each of these tensions between what the state tells the individual as citizen and what the church tells that same individual as believer can be reconciled either by correcting one or both of the messages in question or by reminding the individual of the differential capacities in which he hears those messages, but no one should be surprised to learn that believers who are inept at or hostile to such fine distinctions should have come to see the liberal state as their enemy.[86] When, furthermore, the focus shifts to the issue of assisted suicide, the prospects for reconciliation diminish and the schizophrenogenic potential of the liberal state increases. Let me explain what I mean.

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84. Bowers v. Hardwick, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting).

85. *See* David M. Smolin, *Regulating Religious and Cultural Conflict in Post-Modern America: A Response to Professor Perry*, 76 Iowa L. Rev. 1067, 1082 (1991) (discussing St. Augustine's account of pride as the substitution of one's self for God as the source of one's values).

86. On this rift between the liberal state and at least some religious believers, see James D. Hunter, Culture Wars (1991).

The liberal state, the state, that is, that numbers a commitment to decisional privacy among its constitutional priorities, has precious little to say about death and dying, but even that little may sound odd to the believer. The liberal state, insofar as it has anything to say about death and dying, is driven by its other substantive commitments to portray both death and dying in wholly negative terms. For the state, death and dying involve both reduced productive capacity and reduced interest in the satisfaction of desire. For the believer, however, death marks the point of entry into eternal life, and the diminishment that ordinarily precedes death possesses an intelligibility, even a functionality, that baffles secular consciousness. That diminishment invites the dying person to overcome her pride and to open herself to the holy. It witnesses to the deeper values that are obscured in the rush of everyday life, and it rebukes our tendency to value others solely for their accomplishments. It facilitates receptivity to the care of others on the part of the dying person, and it provides an opportunity for reconciliation between the dying person and her family.

The diminishment that is incident to ordinary dying thus functions for the believer and for her faith community as a reminder of deep and easily overlooked Gospel truths—truths about the vanity of the pursuit of money,[87] power,[88] fame,[89] and pleasure,[90] and truths about the fullness of life that awaits those who reject the meretricious allure of that pursuit. Access to these truths is, however, limited by the very nature of the Gospel message.[91] Oversimplifying immensely, we can say of Jesus that he set out simultaneously to affirm human life and to call into question every assumption that we are inclined to make about how to preserve and enhance that life.[92] He often spoke as if those assumptions got in the way of the human flourishing that he so unabashedly endorsed.[93] We act as if we knew what would make us happy, and Jesus spoke as if he knew that we are wrong. There is, therefore, a reversal of values implicit in the Gospels, a reversal with which only the most saintly among us will ever be at ease. Within Christian communities, believers can rely upon their own and their fellow believers' inchoate appropriation of that reversal of conventional values in their efforts to embody the

87. *See, e.g.*, *Matthew* 6:19-21. *Cf. Matthew* 5:3.
88. *See, e.g.*, *Matthew* 20:24-28.
89. *See, e.g.*, *Matthew* 23:5-12. *Cf. Matthew* 5:11-12.
90. *See, e.g.*, *Matthew* 5:27-30.
91. *See, e.g.*, *Matthew* 13:11-16. *Cf. John* 8:12-59.
92. *See, e.g.*, *Matthew* 16:24-27. *Cf. John* 12:24-25.
93. *See, e.g.*, *Luke* 6:20-25.

Gospel message in their lives. But in their dealings with secular society, believers should expect those with whom they deal to be sedulously committed to just those conventional values that the Gospels urge the believer to repudiate.[94] If we locate the believers whom we have been discussing here in contemporary Oregon or in one of the states that is considering the legalization of physician assisted suicide, the implications of the limited accessibility of the Gospel message for that issue should become clear.

In November 1994 the voters of Oregon passed a law that permits doctors to prescribe lethal doses of medication to terminally ill patients once doctor and patient have jumped through the standard bureaucratic hoops.[95] Several other states are considering measures similar to the Oregon measure.[96] In Oregon several Christian confessions played leading roles in the campaign against the assisted suicide ballot measure, as they had, but with more success, in earlier campaigns in California and Washington.[97] In those campaigns, the Church was required by the necessities of modern political life to phrase its hostility to assisted suicide in predominantly secular language. They spoke, therefore, of the slippery slope that leads from assisted suicide to involuntary euthanasia, of the demoralization of the medical profession that might follow from the passage of laws that permit doctors to offer formal cooperation in their patients' suicide, of the need to protect the episodically depressed from a social climate that appears to accept suicide as a permissible way of dealing with life's problems, and so on. In California and in Washington, these arguments prevailed over the countervailing argument for autonomous control over one's own death, but in Oregon they failed.

What should the Church learn from the failure of its efforts to resist Oregon's assisted suicide measure? To make better arguments, to be sure, and to disseminate them more effectively. But perhaps the Church should also learn that it is essential to the Gospel message that it is more effectively conveyed by how its

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94. *See John* 15:18-20.

95. For the text of Oregon's Death With Dignity Act, see OR Legis 3 (1995). For litigation related to this law, see Lee v. Oregon, 869 F. Supp. 1491 (D. Or. 1994).

96. In recent years bills to legalize assisted suicide have been introduced into the state legislature in California, Iowa, Maine, Michigan, Oregon, Texas, Washington, and Wisconsin. *See* Warren Wolfe, *Several States Attempting to Legalize Euthanasia, Assisted Suicide*, [Minneapolis] STAR TRIB., Feb. 27, 1994, at 17A.

97. *See* Bill Broadway, *The Dilemma of Assisted Suicide: Clergy Generally Oppose*, WASH. POST, Dec. 3, 1994, at B6. *See also* J.P. Kenney, *The Suicide State*, FIRST THINGS, Apr. 1995, at 16.

adherents live than by how they talk. While this may be true of all normative messages, it is especially true of the Gospels in light of the deep counter-conventional way of life that they prescribe. When it comes to winning others over to that way of life, argument will get the believer only so far; the rest of the way will have to be covered by the example of a life lived in conformity to the teachings of Jesus. For my own part, I do not see this as a weakness of the Gospel message; I see it instead as a strength. As Christians discover how poorly the Gospel message translates into secular argument, they may recover the power of Christian witness. If this happens, we may find that the Church in Oregon and in states that are considering following Oregon's example affects the formation of public policy in those states more by how well Christians come to terms with their own dying and with the imminent death of the terminally ill in their communities than by how well they use war chests to wage political campaigns. As I see it, both the Church and the state would be the better for this outcome.

In the articles that constitute the body of this symposium each of our authors sounds a note of caution about the practice of physician-assisted suicide. Professor Beschle criticizes the libertarian presuppositions of much of the right-to-die case law, and argues forcefully for a more communitarian approach to the question. John Keown examines the evidence from the Dutch experiment with assisted suicide and concludes that where assisted suicide is tolerated, involuntary euthanasia establishes its foothold as well. Rev. Robert Barry, after surveying the history of religious and secular attitudes towards suicide, argues against assisted suicide both out of concern for the slippery slope that troubles Keown and out of respect for the arguments developed by Aquinas and other Christian philosophers. In his essay Arthur Dyck subjects the reasoning in several recent assisted suicide cases to careful scrutiny, then concludes with the sketch of an argument against suicide. In his student article Arthur Povelones suggests ways in which the initiative process—the principal mechanism by which American voters have had a chance to register their views on this issue—fails at present to function as an effective form of law-making. He also suggests ways in which initiative processes might be improved. We are keenly aware of how much more would need to be said about assisted suicide if our study of it here pretented to completeness. We hope, however, that what our authors have said here contributes to the current national debate on this important topic.