JOURNAL OF HEALTH CARE LAW & POLICY

VOLUME 2 1999 NUMBER 2



# Articles

## SELF-DETERMINATION AND THE WRONGFULNESS OF DEATH

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### INTRODUCTION

Self-determination has become the central ideal governing medical treatment for patients generally and for terminally ill people specifically. Proponents of physician-assisted suicide set this ideal as their core claim.[1] Opponents assert that the practice, if legally recognized, would inevitably slide into involuntary euthanasia for vulnerable people.[2] This article will explore internal tensions within the self-determination ideal as applied to the administration of death that give plausibility to this "slippery slope" concern.

Three different aspects of the self-determination ideal illuminate its vulnerability in approaching death. They are: (1) the modern – rational, secular, self-determining – self as a philosophic proposition (the intellectual history by which the modern conception emerged from a quite different conception of the relation between "self" and "cosmos"),[3] (2) the modern self as a psychological proposition (the

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1. *See* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 179-241 (1993).

2. *See* HERBERT HENDIN, SEDUCED BY DEATH: DOCTORS, PATIENTS, AND THE DUTCH CURE 47-126 (1997).

3. *See infra* Part I. *See generally* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY 139-332 (1989).

developmental pathway by which contemporary individuals grow from infancy into maturity toward a view of themselves through the culturally prized philosophic idea of the self)[4] and (3) the modern self as an American icon (the progressive acknowledgment of self-determination as an ideal in American cultural history from our Revolutionary War through the abolition of slavery to the contemporary claims for patient self-determination).[5]

I have two basic theses. First, by tracing the historic development in Western culture of the idea of the rational, secular, self-determining self, we will see logical contradictions and vulnerabilities that persist in that idea. By tracing contemporary individual psychological development from infancy into the mature adult attainment of the culturally prized conception of the rational, self-determining self, we will see the emotional ambivalence and vulnerabilities that persist in the self-perceptions of "normal adults." And, by tracing the apparently triumphant progression of the self-determination ideal in American cultural history, we will see a "dark side" to this progression, the way in which this ideal both masked and gave impetus to the infliction of terrible oppressions on vulnerable people. Second, these persistent contradictions and vulnerabilities are magnified – for the culture and for individuals – by the imminent approach of death.

## I. THE MODERN SELF AS A PHILOSOPHIC PROPOSITION

The best account of the intellectual history and logical vulnerability of the modern self is Charles Taylor's magisterial book, *Sources of the Self*.[6] In this extended passage, Taylor provides a summary perspective on what he calls the "continuing philosophic discomfort" with the modern conception of self:

> [I]f we follow the theme of self-control through the vicissitudes of our Western tradition, we find a very profound transmutation, all the way from the hegemony of reason as a vision of cosmic order to the notion of a punctual [that is, mechanistically objectifying] disengaged subject exercising instrumental [self-]control. . . . The modern ideal of disengagement requires a reflexive stance. We have to turn inward and become aware of our own activity and of the processes which form us. . . . Disengagement demands that we stop simply living in the body or within our traditions or

4. *See infra* Part II.

5. *See infra* Part III.

6. TAYLOR, *supra* note 3.

habits and, by making them objects for us, subject them to radical scrutiny and remaking.

Of course the great classical moralists also call on us to stop living in unreflecting habit and usage. But their reflection turns us towards an objective order. Modern disengagement by contrast calls us to a separation from ourselves through self-objectification. This is an operation which can only be carried out in the first-person perspective. It doesn't tell us, like Stoicism, to be aware of what is worthwhile for humans as such or, like Plato, to focus on the properties of reason and desire and their relation to what we know about the happy life. . . . This self which emerges from the objectification of and separation from our given nature cannot be identified within anything in this given. It can't be easily conceived as just another piece of the natural world. It is hard for us simply to *list* souls or minds *alongside* whatever else there is. This is the source of a continuing philosophical discomfort in modern times for which there is naturally no analogue among the ancients. Various solutions have been tried — reductionism, 'transcendental' theories, returns to dualism — but the problem continues to nag us as unsolved. . . . [T]his ungrounded 'extra-worldly' status of the objectifying subject accentuates the existing motivation to describe it as a self. . . .

Here we see the origin of one of the great paradoxes of modern philosophy. The philosophy of disengagement and objectification has helped to create a picture of the human being, at its most extreme in certain forms of materialism, from which the last vestiges of subjectivity seem to have been expelled. It is a picture of the human being from a completely third-person perspective. The paradox is that this severe outlook is connected with, indeed, based on, according a central place to the first-person stance. Radical objectivity is only intelligible and accessible through radical subjectivity.[7]

The core intellectual difficulty, the unstable shifts between the first- and the third-person perspectives in the modern conception of the self, is distilled by Taylor in his contrasting accounts of Descartes and Montaigne, two thinkers whose work is the most direct fount of the modern conception:

Descartes is a founder of modern individualism, because his theory throws the individual thinker back on his own respon-

7. *Id.* at 174-76.

> sibility, requires him to build an order of thought for himself, in the first person singular. But he must do so following universal criteria; he reasons as anyone and everyone [and thus in the third person plural]. Montaigne is an originator of the search for each person's originality; and this is not just a different quest but in a sense antithetical to the Cartesian. Each turns us in a sense inward and tries to bring some order in the soul; but this likeness is what makes the conflict between them particularly acute.
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> The Cartesian quest is for an order of science, of clear and distinct knowledge in universal terms, which where possible will be the basis of instrumental control. The Montaignean aspiration is always to loosen the hold of such general categories of 'normal' operation and gradually prise our self-understanding free of the monumental weight of the universal interpretations, so that the shape of our originality can come to view. . . . The search for the self in order to come to terms with oneself, which Montaigne inaugurates, has become one of the fundamental themes of our modern culture . . . . There is a question about ourselves — which we roughly gesture at with the term 'identity' — which cannot be sufficiently answered with any general doctrine of human nature . . . [or] some universal description of human agency as such, as soul, reason, or will. There still remains a question about me, and that is why I think of myself as a self. This word now circumscribes an area of questioning.[8]

To paraphrase Taylor, what exactly *is* this self? When we explore it, when we consult it, what is the source for what it tells us to do or to be? The logical problem, as he identifies it, is that you cannot get to a third-person perspective from within a first-person perspective. You cannot logically be both inside and outside yourself at the same moment.[9]

The approach of death and its imminent disappearance of the self does not create a new intellectual problem for the self's internal coherence but it introduces a new urgency — or perhaps better, an insistent reiteration of the perennial modern urgency — to the unsolved problem of the soul's order. As Daniel Callahan put it, the principle of the self-determined death does not tell us what to choose, it only tells us that we must choose but gives no guidance for that

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8. *Id.* at 182-84.
9. *See id.* at 177-84.

choice.[10] This is the substantive "emptiness" of the self that is supposed to choose how to die. Perhaps the simplest and most vivid depiction I can offer of the unsettling and unsatisfying character of this "emptiness" is from a New Yorker cartoon of several years ago: the drawing showed a group of children in a progressive nursery school, finger-paintings on the walls, with books, blocks, computer screens scattered around the room; and one child is saying to the teacher, "Mrs. Lowry, do we *have* to do whatever we want to do today?"

Taylor addresses this substantive problem in the first part of his book, before he embarks on his historical reconstruction of the intellectual development of the modern self. In this opening part, he observes that "one of the most basic aspirations of human beings [is] the need to be connected to, or in contact with, what they see as good, or of crucial importance, or of fundamental value."[11] This is not simply a sociological observation for Taylor. "How could it be otherwise," he asks, "once we see that this orientation in relation to the good is essential to being a functional human agent?"[12] Taylor does not directly claim — at least in this book, he does not claim — that "the good" is discoverable. He is, however, intensely critical of the dominant conclusion among modern philosophers that this is an erroneous quest:

> The point of view from which we might constate that all orders are equally arbitrary, in particular that all moral views are equally so, is just not available to us humans. It is a form of self-delusion to think that we do not speak from a moral orientation which we take to be right. This is a condition of being a functioning self, not a metaphysical view we can put on or off. So the meta-construal of the neo-Nietzschean philosopher — 'in holding my moral position, I am imposing (or collaborating in the imposition of) a regime of truth on the chaos, and so does everyone' — is just as impossible as the meta-construal of the empiricist — 'in holding my moral position, I am projecting values on a neutral world of facts, and so does everyone'. Both are incompatible with the way we cannot but understand ourselves in the actual practices which constitute holding that position: our deliberations, our serious assessments of ourselves and others. They are not construals you could actually make of your life while liv-

10. *See* DANIEL CALLAHAN, THE TROUBLED DREAM OF LIFE: IN SEARCH OF A PEACEFUL DEATH 35-37 (1993).

11. TAYLOR, *supra* note 3, at 42.

12. *Id.*

> ing it. They clash, in other words, with the best available account of our moral life.[13]

In his historical reconstruction, Taylor demonstrates how the classical conception of "the good" as discoverable by and external to human thought was not discarded wholesale by what he calls the "turn inward" that is characteristic of the modern idea of self.[14] He identifies an intermediate step in Augustine's thought as originating "that strand of Western spirituality which has sought the certainty of God within."[15]

> There is a certain family of 'proofs' of the existence of God whose basic form is typically Augustinian. The démarche which is common to them all is something like this: my experience of my own thinking puts me in contact with a perfection, which at one and the same time shows itself to be an essential condition of that thinking and also to be far beyond my own finite scope and powers to attain. There must then be a higher being on which all this depends, i.e., God.[16]

This Augustinian position, which sees the interior "self" as corresponding to some exterior force, was transformed but not wholly rejected by Descartes.[17] His transformative move, to put it in simplified form, was to portray the inward-looking individual as the external observer of himself who, by this shift in perspective, subjected his "self" to rational self-mastery guided by the individual's "sense of his own dignity as a rational being."[18] As Taylor vividly puts it, "the disengaged subject stands in a place already hollowed out for God; he takes a stance to the world which befits an image of the Deity."[19]

But in Descartes's thought, as well as in the thinking of Locke and Kant in the following century, the theistic perspective within Christian culture persisted as a framework and mediator of their shift between the first- and third-person: "The awesome powers of human reason and will are God-made and part of God's plan; more, they are what constitutes the image of God within us."[20] The Cartesian perspective laid the groundwork for the radical break so visible in our century: "insofar as the sources [of morality] now lie within us, more

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13. *Id.* at 99.
14. *See id.* at 127-39.
15. *Id.* at 140.
16. *Id.*
17. *See id.* at 143.
18. *Id.* at 152.
19. *Id.* at 315.
20. *Id.*

particularly, within certain powers [of rationality] we possess, the basis is there for an independent, i.e., non-theistic morality."[21] This step was not, however, taken by Descartes, Locke or Kant.[22] Their theism receded into the background of their thinking; especially with Kant, man's "dignity as a rational self-controlling agent" is very much in the foreground.[23] But their background theism effectively solved the problem for them of imagining some grounding from which an external observer (a judgmental God or an objectified third-party self) can view the internal (subjective first-person) actor.[24]

Theism is not the only intellectual strategy for solving this problem. The utilitarian apostles of the Enlightenment and scientific rationality in the nineteenth century relied on a secularized premise of "a potential harmony of interests between human beings" — a harmony that each individual can perceive if he shifts from a first-person egoism to a third-person universalism.[25] In this shift, we are "no longer imprisoned in the self [but] are free to pursue the universal good."[26] In this secular version, "the relief of suffering, human but also animal, [moved] to the centre of the social agenda."[27] But in this century, the coherence of this presumed correspondence between first-person and universalized third-person suffering has been exploded.[28]

The logical coherence of this correspondence depended on the existence of some understandable common metric by which one person's suffering could be compared to another's.[29] As the modern critics of utilitarianism have convincingly demonstrated, however, no such common metric is available; one person's subjective experience and preferences are not necessarily commensurable with another's.[30] Accordingly the "common good" — the Holy Grail of the harmony of human interests — cannot be discerned by any straight-forward compiling of the sum of individual preferences. The shift from the first- to a universalized third-person perspective is not logically possible. In this shift, some first-person perspectives must necessarily be favored over others and the logical coherence of this shift requires some ex-

21. *Id.*
22. *See id.*
23. *Id.*
24. *See id.*
25. *Id.* at 329-30.
26. *Id.* at 331.
27. *Id.*
28. *See id.*
29. *See id.* at 332.
30. *See id.* at 375.

ternal standard other than "everyone's first-person perspective." Without God or a God-like resolving authority (a dictator in the literal, as well as authoritarian, sense of the word), there is no satisfactory harmonizing standard available.

However compelling this objection may be as an abstract proposition, it is difficult to ascribe any widespread sense of spiritual malaise to the force of this logical objection. Nonetheless, contrary to Oliver Wendell Holmes' famous dictum that the life of the law has not been logic but experience, logic and experience mutually shape one another in human affairs — as is demonstrated by the historical development of the modern idea of the self. The logical conundrum in nineteenth century utilitarianism — the problem of finding a common metric for inherently incommensurable individual subjective preferences — was not widely seen as an urgent, insoluble problem until the social experience of the twentieth century stripped away comforting assumptions about "inherent human nature" that had tempered the demands for rigorous logical proofs of the potential harmony of human interests.[31] So long as it was plausible to believe that most people most of the time were benignly disposed toward one another, that most people were inclined toward mutual communal support, the strict logical impossibility of comparing incommensurable subjectivities was hardly visible even to systematic social theorists. In the harsh light, however, of the vastly brutal inflictions of human suffering in this century, crowned if not epitomized by the Nazi Holocaust, it has become difficult for anyone to see anything but the logical conundrum of the incommensurability of individual subjectivities.

This is not the popular language. Destruction of community, social isolation and unbridgeable hostility among individuals is the more widely accessible expression of this logical conundrum. But the popular and philosophic languages are precisely equivalent. Alisdair MacIntyre has aptly portrayed this interaction of logic and experience, the way in which social experience interacts with each individual's sense of his own logical coherence:

> [M]oral debates in . . . [our contemporary] culture generally have a highly specific form. Disagreement on some particular issue leads back rather quickly to the assertion of two or more incompatible premises. . . . [W]e have no neutral court of appeal or testing-place where these rival claims may be weighed against one common standard. We have no overriding criterion of an established and defensible kind.

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31. *See* TAYLOR, *supra* note 3, at 375.

> Hence important moral arguments in our culture are systematically unsettleable. They become all too soon exercises in assertion and counter-assertion. But it is not simply the case that we lack the means to convince each other rationally. If two reasonable parties to such a moral debate cannot discover criteria, appeal to which will settle the matter impersonally for both, then neither party can be basing his own conviction on such an appeal. Confronted with the dilemma which creates the debate, each individual can only make explicitly or implicitly an arbitrary choice. Unreason and arbitrariness are internalized.[32]

MacIntyre's observation captures a belief that is wide-spread in contemporary American society — a conviction not only that "unreason and arbitrariness" are the defining qualities of our social life but an underlying suspicion that each individual himself lacks reasoned, non-arbitrary guides for charting his own course. This is the sense in which I understand MacIntyre's statement that "unreason and arbitrariness are internalized"[33] by each individual who participates in the moral debates characteristic of our time.

This substantive emptiness, the sense of uncertainty and drift – accompanied by the wish for some external, third-party direction to fill the emptiness of self-determination – is thus not a new problem generally. But it is emphatically a new problem for decision-making about death. To speak only of an American context, self-determination has been a central pre-occupation and a centrally prized value since at least the founding of the Republic – the break from the grip of the Mother Country, Great Britain – and then the generalization of this principle represented by the abolition of slavery.[34] But medical matters – and especially questions around death and dying – had been exempt from the application of the principle until very recently. Until around 1970, medical paternalism was the generally accepted social rule for interactions between patients and physicians.[35] The extraordinary rise in prestige and social authority of the medical profession occurred just after the Civil War.[36] This was not in response to empirically demonstrated medical success in treating disease or avert-

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32. Alisdair MacIntyre, *Patients as Agents, in* PHILOSOPHICAL MEDICAL ETHICS: ITS NATURE AND SIGNIFICANCE 197, 198-99 (Stuart F. Spicker & H. Tristan Englehardt, Jr. eds., 1977).

33. *Id.* at 199.

34. *See infra* Part III.

35. *See* MacIntyre, *supra* note 32, at 204-07 (discussing physician authority over patients).

36. *See* PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 134 (1982).

ing death; when these demonstrations did appear, relatively late in the nineteenth century, the medical profession was already well on its way toward a specially sanctified social role in taking custody of death and dying.[37]

The application of the self-determination ideal to the administration of death does not create the logical conundrum in the modern sense of self; but the novelty of this application amplifies this incoherence. When the "self" thinks about its imminent death – that is, about its own disappearance as a subject – the very thought vividly depicts the paradoxical incoherence in the idea of a "self" that can simultaneously be both the subject and the object of its examination. Imminent death – the approaching moment when a thinker is losing its grip on its image of itself as a subject – highlights the conundrum that a thinker can think of itself as something different from itself, as an object of its contemplation.

With routinized practice, we may learn to suppress this uneasiness in imagining self-determining decisions about death – just as we have learned in other contexts to ignore the paradoxical incoherence in the modern conception of self. But as Taylor has observed, "philosophic discomfort" cannot be wholly suppressed. Some sense of incompleteness, logical error, lingers on.

## II. THE MODERN SELF AS A PSYCHOLOGICAL PROPOSITION

A sense of uneasiness, of "error" in the idea of the self when confronting death is also highlighted from another perspective – that is, in the pathway for individual psychological development of the modern sense of self. If I ask myself, how did I develop a sense of myself as an independent, autonomous adult from my starting-point as an utterly dependent infant for whom self-determined choice was not "on the agenda," there is an apparent common-sense answer. This answer is that as I grew older, I learned to think of myself in this new way – I learned to set aside my "childish ways," my infantile self-conception, and replace it with a mature adult's self-determining self-conception. But here we encounter a somewhat different version of Taylor's paradox: who is this "I" who was available to learn this new self-conception?[38] Where did "he" come from? If we say that I learned enough to become "him," we are into an infinite regress: and where did *this* "he" come from?

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37. *See id.* at 138-40.

38. *See supra* notes 8-9 and accompanying text.

There is a puzzle here that our common-sense conception of the smooth, learned transition from infantile dependency to adult independence papers over. The imminence of death brings this puzzle crashingly back into view, and requires each of us to go back over the steps that led us from infantile dependency to adult independence. I do believe that retracing our steps is possible. The imminence of death does not necessarily overwhelm our adult capacity for self-determination; but the process is much easier to assert than to experience. In order to identify the difficulties that lie in the way of this process, it is important to explore what is involved in retracing those steps – or, in other words, to identify the psychological steps that were involved in the first place as each of us traveled the path from infantile dependence to adult autonomy.

In setting out the pathway for individual psychological development, I draw on a psychoanalytic understanding and rely specifically on the work of Hans Loewald, one of the most astute and evocative psychoanalytic theorists who built on Freud's foundation.[39] Freud's original conception of the psychoanalytic enterprise was very much an expression of the self-objectifying, rationalist ambition embodied in the modern conception of self.[40] But that scientistic framework has been radically modified by Freud's successors,[41] even as he himself called it into question in the evolution of his own thinking.[42] In his influential essay, *The Waning of the Oedipus Complex*, Loewald observed:

> With reference to the problem of individuation and the status and valuation of the individual, psychoanalysis appears to be in an awkward position. On the one hand, it seems to stand and fall with the proposition that the emergence of a relatively autonomous individual is the culmination of human development. How this may come about and what interferes with such an outcome, resulting in psychopathology, is a most important aspect of psychoanalytic research, reconstruction, and treatment. . . .
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> On the other hand, owing in part to analytic research, there is a growing awareness of the force and validity of another striving, that for unity, symbiosis, fusion, merging, or identification — whatever name we wish to give to this sense of and longing for nonseparateness and undifferentiation. . . . The more we understand about primitive mentality,

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39. *See generally* HANS LOEWALD, *The Waning of the Oedipus Complex*, *in* PAPERS ON PSYCHOANALYSIS 384-405 (1980).

40. *See* HANS LOEWALD, PSYCHOANALYSIS AND THE INDIVIDUAL 15-16, 73 (1978).

41. *See* LOEWALD, *supra* note 39, at 402-03.

42. *See id.* at 399.

> which constitutes a deep layer of advanced mentality, the harder it becomes to escape the idea that its implicit sense of and quest for irrational nondifferentiation of subject and object contains a truth of its own, granted that this other truth fits badly with our rational world view and quest for objectivity. . . . In the course of . . . [psychoanalytic] explorations, unconscious processes became accessible to rational understanding, and at the same time rational thought itself and our rational experience of the world as an "object world" became problematic. . . . [O]bjectivity, rationality, and reality themselves are not what we thought them to be, not absolute states of mind and the world that would be independent of and unaffected by the generative process-structures of mind and world.[43]

This nuanced account of the psychoanalytic understanding of the modern self offers the same perspective on its individual developmental pathway as Taylor's historical excavations: both perspectives demonstrate the powerful grip of the modern conception of the autonomous self on our contemporary communal and self-understanding and, at the same time, the contingency and fragility of this conception. For our purposes, moreover, the psychoanalytic perspective has the same limited use as Taylor's historical account. Taylor, that is, did not purport to give any definitive causal explanation for the development of the modern conception of self; though he alluded at various points to the likely impact of broad economic and social factors, and the likely interaction between these factors and the intellectual developments that he charted, his focus throughout was in reconstructing the historical narrative as such of the idea of self.

Many psychoanalytic theorists, beginning with Freud, have not been so relatively modest in their ambitions. The bedrock strength of the psychoanalytic method of inquiry is not, however, in its capacity to yield causal explanations, either of the progression of individual development or (as Freud himself was constantly led to put forward) of historical and cultural development. The real strength of the methodology is in its capacity to unearth buried and otherwise unacknowledged ideas that individuals carry with them, to discern narrative progressions in these ideas from individuals' early childhood into their maturity, and to identify commonalities among individuals in these narrative progressions. Taylor and other intellectual historians use the accumulated manuscripts of centuries to carry out their exca-

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43. *Id.* at 401-02.

vations while psychoanalysts use the tracings from memories, dreams and free associations of their patients in their explorations.

The one important difference between the two enterprises for our present purposes is that, more than an historian's reconstruction, a psychoanalyst's reconstruction of an individual's narrative progression is likely to demonstrate the continued contemporary force of the excavated ideas for that individual. This is a difference in degree rather than in kind, but it is important for our purposes in light of a central — and to my mind, quite plausible — psychoanalytic premise which is not so clearly avowed in the work of cultural historians: the premise that an individual retains a strong memory of the ideas he held in past times and, notwithstanding the dramatic inconsistency between these ideas and his current conceptualizations, the individual is always prone (and especially likely in times of psychological stress) to fall back into his older ways of thinking.

This is the psychoanalytic premise of the "return of the repressed."[44] This same force may well be at work in the history of cultural groups. Freud, notoriously and excessively, relied on this premise in his works of cultural history; but the existence of powerful mechanisms of preservation, transmission and ready recapitulation of earlier, apparently superceded cultural ideas are much less obvious and compelling than for the existence of these mechanisms in specific individuals viewed as such.[45]

For individuals in our contemporary culture, the proposition illuminated by psychoanalytic inquiry is the narrative progression by which the modern conception of self — self-objectifying, rationalist, individualist — emerges from infancy. The progression, both as it can be reconstructed from work with adults and from psychoanalytically informed investigation with young children, is from the infantile conception, as Loewald put it, of "nonseparateness and undifferentiation" from others (and especially from the most important nurturers in the child's life) to a mature sense of separated individuality at the core of the modern conception of self.[46]

Loewald's account, which draws together the strands of a broad consensus in post-Freudian psychoanalytic thinking, begins with an analytic case illustration:

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44. *See* ROBERT A. PAUL, MOSES AND CIVILIZATION: THE MEANING BEHIND FREUD'S MYTH 1 (1996).

45. *See id.* at 1-4.

46. *See* LOEWALD, *supra* note 39, at 402.

> A student, working for a degree in the same field as his father's, had trouble completing his thesis. He was brilliant; the thesis so far had progressed well. His father had died about a year earlier. The patient began to procrastinate; he felt strongly that he needed support and advice from his thesis advisor. But he knew quite well that he was perfectly capable of finishing the work on his thesis without help. He chided himself for his delaying techniques. In part, these took the form of paralyzing doubts about the originality of his work, regarding which at other times and for good reasons he had no doubts. He also wanted encouragement and support from me, but he kept telling me that it was wholly his responsibility, not the advisor's or mine. Becoming independent, taking responsibility for the conduct of his own life, was one of the themes that had come up repeatedly during the analysis. As he continued, over several hours, to insist that completing the thesis was his and no one else's responsibility, but that he could not bring himself to work on it, it dawned on me that he might be speaking of responsibility also in a sense not consciously intended by him. In addition to or underneath the meaning of responsibility as accountability to himself, as self-autonomy, perhaps he was talking about being responsible for a crime. It would be a crime he wished to delay, avoid, or undo. An interpretation along these lines led to further work on his relationship with his father, his murderous impulses and fantasies regarding him, his ambitions and fears of outdistancing him, and on his guilt about these ambitions (in part already fulfilled) and about his father's death.[47]

From this case example, Loewald draws out this generalized proposition:

> [T]he assumption of responsibility for one's own life and its conduct is in psychic reality tantamount to the murder of the parents, to the crime of parricide, and involves dealing with the guilt incurred thereby. Not only is parental authority destroyed by wresting authority from the parents and taking it over, but the parents, if the process were thoroughly carried out, are being destroyed as libidinal objects as well . . . .[48]

This appellation of parricide is easy to dismiss or to caricature for a reader unaccustomed to psychoanalytic works. I can only ask this skeptical reader to consult the full text of Loewald's article in order to see

47. *Id.* at 388.
48. *Id.* at 389.

the sensitivity and subtlety with which he weaves this appellation into a recognizable account not simply of his patient's dilemma but more generally of "the ambiguity of adult responsibility and autonomy."[49]

For our purposes, I want to emphasize two propositions. The first, which Loewald directly states, is that an imagined act of inflicting death is interwoven into the very developmental progression by which we come to think of ourselves as autonomous, self-determining individuals.[50] The second, which is implicit in Loewald's account, is that this infliction is carried out against an internalized image that each individual holds in his own mind.[51]

As Loewald portrays it, imagined parricide is "a developmental necessity" but not a psychological inevitability.[52] An individual can rigorously repress any parricidal wishes; but this in itself, as Loewald says, "is an unconscious evasion of the emancipatory murder of the parents, and a way of preserving infantile libidinal-dependent ties with them."[53] Thus imagined parricide is the first step in the immature individual's progression away from the infantile conception of "non-separateness and undifferentiation" toward the modern sense of self.

The second forward step in this developmental progression is a sense of guilt.[54] This step too is not universally experienced; it is quite possible for an individual to feel parricidal wishes (or even to act on those wishes) without any consequent sense of guilt. But this is also a developmental failure — a refusal, in Loewald's words, to "bear[ ] and master[ ] the guilt of parricide by internalizing atonement."[55] The eruption of parricidal wishes into action is, from this perspective, an individual's refusal to carry forward his developmental progression wholly in an internalized framework, where the act, the guilt and the atonement can succeed one another. Action is not the only possible interruption of this course; there are many ways for an individual to disown any guilt for the parricidal act, as well as disowning the act itself. The eruption into action is, however, an especially vivid instance of externalization; for many, such actions do not represent an evasion of punishment but an "inexhaustible need for punishment" which is satisfied by the predictably harsh social response to the deed.

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49. *Id.* at 388.

50. *See id.* at 390.

51. *See generally id.* at 388-89.

52. *Id.* at 390.

53. *Id.*

54. *See id.* at 390-91.

55. *Id.* at 389.

There are, of course, many other ways to become derailed in this labyrinthian psychological progression; and no one acts alone in traversing this course. As Charles Taylor noted, each of us is "a self only among other selves";[56] and this is not simply a descriptive or definitional proposition but also a developmental proposition. As Loewald observed, "[p]arents resist as well as promote [this developmental progression] no less ambivalently than children carry it out."[57] But if the progression follows the necessary steps toward the development of the autonomous self, then the internal psychological experience of parricide is succeeded by guilt which in turn is succeeded by "atonement or reconciliation" and "[w]hat will be left if things go well, is tenderness, mutual trust, and respect, the signs of equality."[58] So for Loewald's illustrative patient:

> Bearing the burden of guilt makes it possible to master guilt, not in the hasty form of repression and punishment, but by achieving a reconciliation of conflicting strivings. Completing his thesis was for my patient, to a significant degree, the outcome of reconciling parricide with love for his father, and of reconciling his quest for emancipation and self-responsibility with his desire for identification and becoming one with his father. I understand his eventual ability to complete the thesis in time (as well as other positive developments) as a confluence and integration of conflicting needs rather than mainly as evidence of defense against one or the other of these currents.[59]

This reconciliation — and consequent emergence of the autonomous individual prized as such in our contemporary culture — is not, however, a permanent attainment. "To master all of these currents permanently and without the aid of degrees and waves of repression appears to be beyond human capacity."[60] Successive events in the ordinary cycles of our lives, moreover, prompt the unsettling and retracing of these developmental steps. As our parents age and then die, as we become parents and our children move from dependence toward independence in part through their struggles with us, as we ourselves proceed (and sometimes encounter declining health) on the inevitable path toward death – in all of these experiences, our developmen-

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56. *See* TAYLOR, *supra* note 3, at 35.

57. LOEWALD, *supra* note 39, at 390.

58. *Id.*

59. *Id.* at 391.

60. *Id.* at 392.

tal attainments toward autonomy and self-responsibility are re-opened and re-worked.

Indeed, by Loewald's account, those who have been most successful in attaining the kind of reconciliation of conflicting impulses that is the hallmark of mature autonomy are especially open to this fluctuation.

> [S]elf-responsibility . . . involves appropriating or owning up to one's needs and impulses as one's own, impulses and desires we appear to have been born with or that seem to have taken shape in interaction with parents during infancy. . . . When I speak of appropriating our desires and impulses . . . I do not mean repressing or overpowering them. I mean allowing or granting them actively that existence that they have in any event, with or without permission. Following the lead of the word responsibility, one may say that appropriation consists in being responsive to their urgings, acknowledging that they are ours. A harsh, unyielding superego is unresponsive and in that sense irresponsible. Unless modified it leads to self-destruction or to its having to be bribed and corrupted. Self-inflicted or "arranged" punishment is one form of such corruption; it merely assuages guilt for a while. Responsibility to oneself, in the sense of being responsive to one's urgings in the manner I described, involves facing and bearing the guilt for those acts we consider as criminal.[61]

How, then, does the actual approach of death in an individual's life affect this arduously obtained mature sense of self? The key to understanding the developmental significance of approaching death hinges on the fact that the infliction of parricide is an internalized, imagined event (whether or not it actually takes place). In this internalized representation of the parricidal act, the individual can be understood to emerge from an undifferentiated conception of himself and others, in effect, by "splitting" his own self-representation into two parts and then eradicating one of those parts, the "parental" part, while leaving imaginatively intact the separated individuated part, the "self."

This is of course a metaphorically simplified schematic representation of a complex internal transaction. But it is clear that, whatever its specific steps in its internalized representation, the pathway by which the independent self emerges from a parricidal act remains inscribed within the mature individual's mental apparatus. Thus when-

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61. *Id.* at 392-93.

ever death looms large in a mature individual's mind, some echo arises of the prior parricide and its structurally embedded tracings of a self-inflicted or self-defining killing.

This internalized structural understanding of the developmentally blurred lines between killing another and killing self was evident in Freud's portrayal of suicide in his essay *Mourning and Melancholia*:

> [W]e have come to recognize a self-love of the ego which is so immense, in the fear that rises up at the menace of death . . . that we cannot conceive how this ego can connive at its own destruction. It is true that we have long known that no neurotic [no one?] harbours thoughts of suicide which are not murderous impulses against others re-directed upon himself, but we have never been able to explain what interplay of forces could carry such a purpose through to execution. Now the analysis of melancholia shows that the ego can kill itself only when . . . it can treat itself as an object, when it is able to launch against itself the animosity relating to an object — that primordial reaction on the part of the ego to all objects in the outer world. Thus in the regression from narcissistic object-choice the object is indeed abolished, but in spite of all it proves itself stronger than the ego's self.[62]

The ego thus kills itself by an internal representation of killing a primordial object — by reenacting some version of its earlier imagined parricide. There is, however, no reason to restrict this account to actual suicides. The same psychological representation would occur whenever the ego imagines itself to be dead — whenever, that is, one's own death looms large in an individual's imagination. Even more, this same internalized representation is precipitated whenever an individual imaginatively experiences any emotionally charged death, whether his own or another's. As Freud noted, in impassioned mourning for a loved person, "the shadow of the object fell upon the ego . . . [and] the loss of the object became transformed into a loss in the ego."[63]

If the intense imagination of death prompts a mature individual to re-experience his imagined act of parricide, the ego-loss that was his first developmental step toward an individuated conception of self, then a reiteration of the next developmental step would also follow: the sense of guilt as a reaction to the parricide. Again I underscore: this is not a universally experienced process, but these are the devel-

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62. 4 SIGMUND FREUD, *Mourning and Melancholia, in* COLLECTED PAPERS 162-63 (Joan Riviera, trans., 1956).

63. *Id.* at 159.

opmental steps necessary to lead an individual to our culturally and historically prized sense of the individuated self. Accordingly, as repeated reconstructions of adult psychic life by psychoanalytic observers have demonstrated, an individual who has developmentally attained our recognized modern conception of individuated self-determination will be led to reiterate these developmental steps in confronting his own death or the deaths of intensely engaged others.

I might best convey this central proposition with a rough metaphor: that the modern self is the software that currently programs our conceptualizing capacity and when the question appears "what is death," the programmed response is "death = wrong." We can imagine other answers to this question along the lines that death is "being gathered in to God" or that death is a natural biological phenomenon and thus is morally neutral. But though we can offer these answers to the death question, the programmed software of the modern self overrides them with the persistent message "wrong, wrong, wrong." For Loewald's psychoanalytic account, the "wrong," the error, is a *moral* wrong that inspires guilt. For Charles Taylor's philosophic account, the wrong is a *logical* error that inspires confusion. But the equation is the same from both directions: the death of the "self" is erroneous, is wrong.[64]

To see that we are caught in this reiterative loop — "death = wrong" — makes comprehensible some otherwise puzzling aspects of our contemporary approaches to death. For examples:

- our culture's persistent search for the defining characteristics of the "good death" and the equally persistent elusiveness of this quarry;
- the persistent warfare waged against death by the medical profession, notwithstanding its general commitment to a biologically mechanistic model whose logic should seemingly portray death as a natural, inevitable phenomenon;
- the widespread belief among the general public, and among seriously ill people specifically, that pain should accompany death and their resistence to requesting or ac-

64. Belief in the intrinsic immorality of death was embedded in Western culture much earlier than the appearance of the modern sense of an individuated, self-determining self. This conviction is at least as old as the Old Testament. Death first appears in the Hebrew Bible as punishment for Adam and Eve's disobedience to God's injunction against eating from the tree of knowledge. *Genesis* 2:17 ("in the day that you eat of it you shall die"). The New Testament continues this tradition in the climactic redemptive vision of the Christian Bible. *Revelation* 21:1, 4 (in "a new heaven and a new earth . . . death shall be no more"). The internal vulnerabilities of the modern self give expressive form to this persistent cultural belief in the wrongfulness of death.

cepting available, effective modalities for reducing or eliminating pain;[65]

- the corresponding resistence within the medical profession to prescribe — or even adequately to educate themselves regarding — currently available, effective pain palliation.[66]

This deeply embedded conviction of death's wrongfulness — to pursue my crude metaphor — is not hardwired into human conceptual capacity; we might well be able to reprogram ourselves. If, that is, intense thoughts of death prompt individuals to regress from their mature self-conceptions into earlier developmental stages, then it is also within their grasp to re-travel those pathways back toward their prior mature attainments. But this pathway is never easy to traverse: new obstacles can appear, obstacles successfully overcome at one time can become insurmountable when they reappear at a later time and the ordinary process of growing older inevitably brings new or heightened obstacles. As Loewald observed,

> If we do not shrink from blunt language, in our role as children of our parents, by genuine emancipation we do kill something vital in them — not all in one blow and not in all respects, but contributing to their dying. As parents of our children we undergo the same fate, unless we diminish them. If eventually some sort of balance, equality, or transcending conciliation is achieved, children and parents are fortunate. It is a balance or harmony that in the external no less than in the internal arena remains vulnerable.[67]

It is equally possible to achieve "some sort of balance . . . or transcending conciliation"[68] between the idea of death as inevitable and acceptable and the idea of death as inherently wrong. But this is also, as Loewald put it, "a balance or harmony that in the external no less than in the internal arena remains vulnerable."[69] I am especially skeptical of the capacity of the self-determination ideal as the potential instrument for re-shaping our individual conviction of the wrongfulness of death. One source of my skepticism comes from the historical development of the self-determination ideal in American culture spe-

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65. *See* Jane Ingham & Kathleen Foley, *Pain and the Barriers to Its Relief at the End of Life: A Lesson for Improving End of Life Health Care*, 13 HOSPICE J. 89, 92-93 (1989).

66. *Id.* at 93.

67. LOEWALD, *supra* note 39, at 395.

68. *Id.*

69. *Id.*

cifically. This is the third aspect of the development of the modern sense of "self" and self-determination that I want to explore.

## III. THE MODERN SELF AS AN AMERICAN CULTURAL ICON

We are accustomed to portraying American history as a kind of triumphalist progression – that we applied the self-determination ideal at the moment of the American Revolution only to white men of property but then, inspired by the stirring commitment of the Declaration of Independence to the equality of all mankind, we carried out the unavoidable logic of that ideal to all black men by abolishing slavery and then to all women as well as men by providing female suffrage, and now on to others, such as seriously ill people who want to choose their own deaths.

But this triumphalist account ignores – I would even use the psychoanalytically-tinged word, this account represses – a dark side of the story. The unmistakable historical fact is that each step of this apparent forward-moving progression – each act of liberation carried out in the name of the self-determination ideal – was accompanied by a powerful reaction, a powerful oppression directed against some other, more socially vulnerable group. This attack was, moreover, specifically directed against the imagined capacity, the right, of the members of this group to see themselves and be seen as "self-determining selves." At the very moment, that is, that this capacity, this right, was awarded to some people, it was withheld from – and even diminished from its previous, though tentative, recognition in – other people.

Take, for example, the Revolutionary moment when the white colonists seized their independence from Great Britain on the basis of the self-determination ideal.[70] In this struggle, the colonists repeatedly described themselves as "slaves" of Great Britain; and it was commonplace among the British to accuse the colonists of rank hypocrisy because they themselves held black slaves in subjection.[71] The revolutionary generation itself was quite conscious and articulate about their own hypocrisy. Jefferson – the author, of course, of the *Declaration of Independence* – was explicit about the injustice, the criminality, of this hypocrisy. In his *Notes on the State of Virginia*, he wrote, "The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submission on the other. . . . I tremble for my

70. *See* Robert A. Burt, *Comments on James Oakes, "The Compromising Expedient,"* 17 CARDOZO L. REV. 2057, 2058 (1996).

71. *See id.*

country when I reflect that God is just: [and] that his justice cannot sleep for ever."[72] Notwithstanding this lamentation, Jefferson and his fellow-countrymen did nothing to end the servitude of their slaves, which might appear indictment enough of them.[73] More stunningly, however, various moves had been instituted before the Revolution that looked toward the ultimate abolition of slavery – the enactment of abolition statutes in some Northern states, the easing of conditions for manumission in many Southern states, the prohibition on importation of slaves in many states.[74] But by 1789, when the Constitution was written, these ameliorating, potentially liberating moves were essentially abandoned and in a relatively short time, the newly liberated white male colonists in both the South and the North were united in the new conviction that slavery would be a permanent institution in the United States, although restricted for practical reasons to the plantation economies of the South.[75]

This hardened attitude toward slavery was adopted in the first instance by people who directly acknowledged the injustice, the wrongfulness, of their conduct[76] – and then this new, more draconian policy was carried forward, and its internal logic was extended to increasingly harsh measures, by people who insisted that there was no inconsistency, no hypocrisy, no injustice at all in their conduct: that slaves were inherently inferior, that they were perpetual children who did not deserve and were not capable of self-determination.[77]

Then came the Civil War and the abolition of slavery – presumably a new step forward for the self-determination ideal. But here too, at the same moment that black slaves were freed, other socially vulnerable groups not only failed to gain the same advantages; these groups were actually subjected to increasingly harsh terms of subordination. Two groups in particular exemplify this apparent paradox in post-Civil War America: women and mentally disabled people.[78] Before the

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72. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 162-63 (William Peden ed., 1955).

73. *See* DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1832, at 174-81(1975).

74. *See id.* at 86-89.

75. *See* James Oakes, *"The Compromising Expedient": Justifying a Proslavery Constitution*, 17 CARDOZO L. REV. 2023, 2056 (1996).

76. *See* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 163-72 (1992).

77. *See id.* at 164 n.39.

78. *See* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L. J. 1073, 1147 (1994); DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 130-33 (1971); ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 41-52, 181-86 (1959).

Civil War, significant ameliorative moves had been made to provide some relatively limited but nonetheless clear social liberations for these subordinated groups.[79] Before the War, moreover, there was widespread social acknowledgment of commonalities between these groups – especially regarding the status of women – and the oppressed social status of black slaves.[80] But after the War, the commonalities were not simply ignored; having liberated the slaves, the dominant American culture was not content to be simply inconsistent or passively hypocritical in its conduct toward these other groups. The dominant culture intensified the subordination of these other groups, increased the very injustice that had been acknowledged regarding black slaves.[81]

The most striking instance of this intensified subordination of women was in the legal restrictions on abortion adopted in every state immediately after the Civil War.[82] Before the War, abortion was freely available until the so-called "quickening" of the fetus, that is, until about the end of the first trimester.[83] Under the laws adopted after the War, abortions were legally prohibited except to save the mother's life,[84] and the newly-organized medical profession was given the exclusive role of deciding whether or not the mother's life was sufficiently endangered. (This was, incidentally, the first clear move in American culture giving exclusive custody to the medical profession over any life-and-death decision; one hundred years later, this initial grant of cultural authority to doctors had spread across all such decisions – without, of course, any acknowledged sense of wrongdoing.) Regarding mentally disabled people, their intensified subordination was implemented in the dramatic post-Civil War expansion of state residential institutions[85] and their conversion from the avowed therapeutic and restorative missions that had marked their origins in the 1820s to an exclusively custodial mission carried out with ruthless brutality.[86] This brutal custodial mission was obviously hurtful and unjust

79. *See* JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900, at 22-23 (1978); ROTHMAN, *supra* note 78, at 269-95.

80. *See* Siegel, *supra* note 78, at 1148.

81. For the linkage drawn between slavery and the status of women by the early feminist advocates before the Civil War, *see* FLEXNER, *supra* note 78, at 47; for the efforts of postbellum feminists to characterize women's uncompensated household labor as a form of enslavement and their general failure to secure recognition of women's proprietary claims in this labor, *see* Seigel, *supra* note 78, at 1192-95, 1208-09.

82. *See* MOHR, *supra* note 79, at 205-25.

83. *See id.* at 22-23.

84. *See id.* at 224-26.

85. *See* ROTHMAN, *supra* note 78, at 130.

86. *See id.* at 269-95.

to anyone who chose to look at it – but American culture resolutely looked away from these injustices until more than one hundred years after the Civil War.

The dark side of the abolitionist triumph does not end, however, with the post-Civil War treatment of women and mentally disabled people. This darkness is even more starkly visible in the social treatment of the newly freed slaves, the supposed beneficiaries of the new application of the self-determination ideal. Within a relatively short time after the War, blacks were effectively re-enslaved in the South – with the knowledge and implicit authorization of the white North – but in conditions that were even more harsh, more life-threatening to the former slaves than under their previous condition of servitude. Blacks were now "no one's property" – no white man, that is, had any strong motive to protect blacks from the lynchings and other depredations of white vigilantes;[87] blacks were openly deprived of all voting rights, contrary to the clear commands of the post-Civil War Fifteenth Amendment;[88] and they were subjected to a rigorous regime of racial segregation, a form of subordination and humiliation that had been unknown before the Civil War.[89]

This does not mean that no one benefitted from the new extensions of the self-determination principle embraced by the Civil War. By the time that blacks had been effectively re-enslaved – by the end of the nineteenth century, that is – the clear beneficiary of this new extension had been revealed to be white men engaged in commercial enterprise.[90] This was indeed an extension beyond the original reach of the self-determination principle in the constitutional arrangements that followed the American Revolution – an extension, that is, beyond the aristocratic land-owners who dominated American political life for some fifty years after the Revolution. Post-Civil War developments strongly suggested that the abolitionist struggle on behalf of black slaves had been, to a significant degree, epiphenomenal – that the underlying, and only partially acknowledged struggle, was more fundamentally between white men about "free labor," "wage slavery" and constraints on individual economic enterprise.[91] This struggle had

87. *See* JOEL WILLIAMSON, THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 57-58 (1984).

88. *See id.* at 247-48.

89. *See id.* at 249-58.

90. *See* BURT, *supra* note 76, at 237-51.

91. *See generally* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970).

been fought by white men over the bodies and over the symbolism of the black slaves but the struggle was not at its core about them as such.

I am, of course, painting here with a very broad brush and pulling together a range of materials that might seem quite disparate. But I hope I have made clear why it is important to range so broadly across these various ways of thinking about the self-determination ideal. My goal in all of this is to dig beneath the kind of abstract arguments of principle that are conventionally put forward in the current debate about physician-assisted suicide – the kind of triumphalist story that American culture has at its core embraced the fundamental value of self-determination, and that there is an inner logic, an inner consistency, to this principle that demands its extension from white men of property to blacks to women to dying patients.

I don't deny this inner logic. But this inner logic conceals an internal fragility in the very idea of "self-determination" and the "self" *it*self which Charles Taylor's philosophical account uncovers.[92] This inner logic conceals violence in the psychological formation of the "independent self" and an inescapable sense of guilt, of wrongdoing, that Hans Loewald's psychoanalytic account uncovers.[93] This inner logic conceals a dark accompaniment that is revealed by the American historical experience of the supposed progressive triumph of the self-determination ideal – what I would call the inherent inclination of this ideal toward harmful inflictions on socially vulnerable people, that is, a "slippery slope" toward injustice and oppression.

I use the term "inherent inclination" toward a slippery slope quite advisedly. I do not believe that this is more than an inclination, however strong it might be – I do not believe that it is an inevitable necessity that each step that we see as moral progress toward the unfolding of individual liberty and self-determination must be accompanied by some terrible infliction of injustice. I don't want to believe this, of course; and I resist reading the historical record, dark as it is, as requiring this belief. But I do strongly believe that the inclination is there, and the simplistic drum-beats of praise for the self-determination ideal that are commonplace in public debates today, especially around the issue of physician-assisted suicide, refuse to acknowledge this darker side of the ideal – and this very refusal, this resistance makes it more rather than less likely that the darker side will emerge.

I believe this to be true because I believe that the central impulse toward the inflictions on vulnerable people that have accompanied

92. *See supra* text accompanying notes 6-9.

93. *See supra* text accompanying notes 49-61.

the historic progression of the self-determination ideal arises from the refusal, the resistance, to acknowledging the internal weaknesses of this ideal and the complicated sense of wrong-doing, the guilty feelings, that accompany this ideal. This may appear to be unsupported speculation; the account I have given thus far is highly speculative, though it does have logical and empirical support. But I ask just this: assume, for the purposes of argument, that I have given a correct account of the weaknesses in the very concept of self-determination and, in particular, that the psychoanalytic perspective on the development of the mature sense of self is correct. If we assume the correctness of the developmental progression that Hans Loewald described – that the infant moves toward a differentiated sense of his own "self" by formulating in his own mind an image of the parent and then destroys that image in an imagined act of violence, an act of parricide – then we have a possible, and even a highly plausible, causal explanation of the reason why the assertion of the self-determination ideal carries with it the inclination toward inflictions of oppression and injustice.

This causal explanation was put forward in an essay that Sigmund Freud wrote in 1916 – an essay that he entitled *Criminals from a Sense of Guilt.*[94] In that essay, Freud described patients whom he had treated who told him about various criminal actions that they had engaged in. Freud said:

> Analytic work [with these patients] brought the surprising discovery that such deeds were done principally because they were forbidden, and because their execution was accompanied by mental relief for their doer. [The patient] was suffering from an oppressive feeling of guilt, of which he did not know the origin, and after he had committed a misdeed, this oppression was mitigated. His sense of guilt was at least attached to something. Paradoxical as it may sound, I must maintain that the sense of guilt was present before the misdeed, that it did not arise from it, but conversely – the misdeed arose from the sense of guilt.[95]

This paradoxical idea – that a sense of guilt produces wrongdoing, and the wrongdoing then relieves (at the same time that it reinforces) the sense of guilt – offers an explanation, for example, for the escalating brutality and degradations of the slavery regime in the years following the American Revolution. The underlying but unacknowledged guilt in the revolutionary leaders – among Jefferson and the

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94. 14 SIGMUND FREUD, *Criminals from a Sense of Guilt, in* THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 332, 332 (James Strachey ed., 1957).

95. *Id.*

others – was not simply or even primarily the hypocrisy that accompanied their success in claiming freedom from British "enslavement" while persisting in their enslavement of others. From a psychoanalytic perspective, the underlying guilt that would prompt wrongdoing would have arisen from the violence of the revolutionary leaders' own struggle in obtaining their freedom and right to self-determination against Great Britain – to be very literal about it, from the act of parricide that this war of independence inevitably represented. I know I may be straining credulity for some readers, even those who are trying in the best of faith to assume the correctness of the psychoanalytic account I have set out; but, without insisting on the matter too strenuously, I would urge that before completely rejecting this speculative account of our founding fathers' state of mind, we go back to the history books and see how strenuously revolutionary leaders tried to absolve King George of any responsibility for the oppressions they felt, how hard they worked to blame his policies and his pig-headedness on his evil advisors and on the Parliament, and how hard and long they tried to portray themselves as loyal and submissive to him but opposed only to the exercise of Parliamentary sovereignty.[96]

When we turn to the American Civil War, we find the same intimate connection between violence and the apparent triumph of the self-determination ideal; the abolition of slavery came, after all, only through the most destructive, the bloodiest war that Americans have ever fought, before or since. And, if I may beat this drum a bit more,

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96. *See* EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763-89, at 69-72 (1977); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 165 (1992):

> In the decades leading up to the Revolution scarcely a piece of American writing, whig or tory, did not invoke the parent-child image to describe the imperial relationship. The king was the "father" and Great Britain was the "mother country" and the colonists were their "children." Because the image was so powerful, so suggestive of the personal traditional world in which most colonists still lived, almost the entire imperial debate was inevitably carried on within its confines. At times the polemics between whigs and tories appeared to be little more than a quarrel over the proper method of child-rearing. Whigs argued that Britain was an unnatural parent, cruel and unfeeling in her harsh treatment of her children. . . . In reply the tories accused the colonists of being insolent and ungrateful brats and demanded to know "whether any parent can put up with such disrespectful and abusive treatment from children, as Great Britain has lately received from her colonies." The whole imperial struggle collapsed into a family squabble.
>
> The whigs, of course, invoked the latest, most enlightened thinking about the parent-child relationship: that parents with unruly children had only themselves to blame. But for children and subordinates to disobey their fathers and masters in this still traditional world was so terrifying and unnatural that whigs inevitably resorted to the image of a contract in order to explain the imperial relationship and to justify their sense of equality and their rebelliousness.

there was also a strong implication of parricide in the waging of the Civil War. Abraham Lincoln was more or less explicit about this in his earlier writings anticipating the possibility of war – the implication of parricide was that the country was engaged in destroying the work of the Founding Fathers,[97] the Union that they had carefully crafted in the Constitution.[98] Lincoln and the North, of course, portrayed themselves as the loyal sons of their Founding Fathers;[99] but they knew, they fully understood, that their Fathers' Union had been a voluntary association of the Northern and Southern states and that, in waging war to preserve the Union, they were profoundly transforming it and in this sense displacing their Fathers' work.[100]

To put it in simplest terms (with or without the flavor of parricide), the violence and destructiveness of the Civil War provoked feelings of guilt and these feelings themselves produced wrongdoing, produced acknowledged but nonetheless irresistible acts of injustice inflicted on the most vulnerable targets – on women, on mentally disabled people, and on the freed blacks themselves.[101] In the wake of the Civil War, white Northerners and Southerners became – in Freud's formulations – "criminals from a sense of guilt."[102]

Perhaps this account is right, perhaps it is wrong. But I think its plausibility should serve at least as a warning when we turn to the claims for self-determination of dying people and especially to claims for assistance in committing suicide. In this context – as in the waging of war – the violence and destructiveness of the specific acts involved are unmistakable, no matter how much claims of justice and dignity

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97. *See* GEORGE B. FORGIE, PATRICIDE IN THE HOUSE DIVIDED: A PSYCHOLOGICAL INTERPRETATION OF LINCOLN AND HIS AGE 286 (1979).

98. *See generally* CHARLES B. STROZIER, LINCOLN'S QUEST FOR UNION: PUBLIC AND PRIVATE MEANINGS (1982); EDMUND WILSON, PATRIOTIC GORE (1962).

99. *See* FORGIE, *supra* note 97, at 77-80, 85.

100. *See id.* at 287.

101. *See supra* notes 80-95 and accompanying text.

102. It is also possible to put the matter in an even more straight-forward way, without relying on a psychoanalytically-based causal account. It may be that this cultural-historical conjunction of one group expanding its claim to self-determination while constricting some other group's equivalent claim at the same time can be explained by Orlando Patterson's observation that the idea of "freedom" only emerged in Western culture at the same time that chattel slavery was embraced as such, and that the internal coherence of the idea of "freedom" depended on its direct comparison and juxtaposition with an "un-free" status. *See generally* 1 ORLANDO PATTERSON, FREEDOM (1991). This account is yet another way to depict the internal fragility of the self-determination ideal. From this perspective, at each historical moment that some group saw itself as escalating its claim to freedom and self-determination, that group was impelled to acknowledge the internal weakness of its claim – its incoherence except as a comparative depiction, in Patterson's terms – by depicting some other group as not-free and subordinate to others' determinations regarding them.

might justify these violent acts. The stressfulness of these acts – the incredible stressfulness of the approach of death, however it might come – affects everyone involved, not just the dying person, not just the immediate family, not just the treating physician who may or may not be willing to assist in hastening that person's death. The proponents of physician-assisted suicide claim that we can enact laws to ensure that the death-hastening acts are restricted only to true volunteers who are imminently dying and who have been given full opportunity to avail themselves of other treatment alternatives.[103] We certainly can write these words into statutes. And both the proponents and opponents of assisted suicide certainly agree that it would be immoral, unjust, abusive, to persuade seriously ill people that they should kill themselves because they are costly or bothersome to their families or to society.[104] We all agree it would be immoral, unjust, abusive to forget about voluntariness and hasten the death of retarded people or confused and senile people who are costly and bothersome to others. We all know that this was what the Nazis did and we are not Nazis.

But if the ideal of self-determination is conceptually tenuous, as Taylor's historical-philosophic account suggests; and if the ideal carries with some inescapable sense of wrongdoing and guilt, as Loewald's developmental-psychoanalytic account suggests; and if the progressive realization of the ideal in American historical experience has recurrently been accompanied by terrible oppressions against vulnerable people – if all of this just *might* be true, then we are dangerously fooling ourselves if we quickly and easily assume that implementation of the self-determination ideal in the practice of physician-assisted suicide won't slide into these and other abuses that its opponents fear. The common conviction between proponents and opponents that these abuses would be wrong is not an adequate protection against this "slippery slope." We must reckon with the terrible paradox that Freud identified – that the very fact that we are convinced that these abuses are wrong could be exactly the reason that we will be driven to inflict them.[105] We will become "criminals from a sense of guilt" – and, in order to continuously relieve ourselves of this sense of guilt, we will constantly be tempted into escalating wrongdoings.

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103. For a critique of this claim, *see generally* Daniel Callahan & Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 U. RICH. L. REV. 1 (1996).

104. *See* CARLOS F. GOMEZ, REGULATING DEATH 104 (1991).

105. *See supra* notes 94-95 and accompanying text.

There is, of course, potential wrongdoing on all sides of the assisted suicide issue. It is wrong to stand by and do nothing while desperately ill people cry out for some assistance to hasten their death and thereby relieve their suffering. I don't mean to dismiss these claims; and if we do dismiss them, we can lock ourselves into an escalating pattern of wrongdoing that carries all the risks I have identified for the practice of physician-assisted suicide. Indeed, I believe that the terrible abuses routinely inflicted on dying people by the contemporary overuses of medical technology can be explained by this same dynamic of "criminality from a sense of guilt" as dying people are feared and abandoned by those who are supposed to care for them. But I must reiterate my conviction that we fool ourselves if we think that patient control – that the self-determination ideal – is an adequate corrective to these abuses. We fool ourselves if we imagine that this ideal does not carry its own dark implications. We must approach any solution in the administration of death with caution, with skepticism, with a sober recognition of the complexity and the pitfalls of the enterprise.

Claims for physician-assisted suicide are not, of course, the only context in which the self-determination ideal has been pressed into service regarding the administration of death. Beginning with Karen Quinlan's case in 1976,[106] American courts generally have embraced this ideal as the basis for a right to refuse medical treatment, even if that refusal would lead to death.[107] (The United States Supreme Court effectively endorsed this proposition as a constitutional right in its 1990 *Cruzan* ruling.)[108] There are, of course, rational differences between the claim to refuse life-prolonging medical treatment and the claim for provision of medical treatment that would hasten death;[109] there is a possible distinction between "passive" and "active" embrace of death, there is a difference between the assaultive implications of unconsented medical treatment as compared to the passive resistance involved in a refusal to provide lethal treatments. Nonetheless, the close connection between both of these choice-making claims and the death of the choice-making self equally pushes forward all of the vulnerabilities inherent in the idea of self-determination that I have iden-

106. *See In re* Quinlan, 355 A.2d 647 (N.J. 1976), *cert. denied* 429 U.S. 922 (1976) (stating that the right to privacy is broad enough to include a patient's decision to refuse unwanted medical treatment under certain circumstances).

107. *See id.* at 665.

108. *See* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990) (assuming that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment that encompasses the right to refuse lifesaving hydration and nutrition).

109. *See id.* at 279.

tified. I believe, accordingly, that the claim for the right to refuse life-prolonging treatment must be approached with the same caution, the same skepticism, the same alertness to its inherent potential for a slide toward injustice as the claim for the right to assisted suicide.

The actual implementation of the right to refuse treatment has not, however, generally been subjected to this kind of scrutiny. Proponents for physician-assisted suicide in particular have argued that the refusal right is an unqualified success and have invoked its precedential force for their added claims. This was the position taken by the Court of Appeals for the Second Circuit, in its ruling that New York state could not rationally prohibit assisted suicide because it accepted a right to refuse life-prolonging treatment:

> Physicians do not fulfill the role of "killer" by prescribing drugs to hasten death any more than they do by disconnecting life-support systems. Likewise, "psychological pressure" can be applied just as much upon the elderly and infirm to consent to withdrawal of life-sustaining equipment as to take drugs to hasten death. There is no clear indication that there has been any problem in regard to the former, and there should be none as to the latter.[110]

The court cited no empirical support for its claim that the refusal right has been problem-free;[111] and in any event, the court was mistaken in allocating the burden of proof. The proper question is not whether there is "clear indication [of] any problem" but whether proponents of extending the refusal right can clearly demonstrate its safe application, in light of the logical and psychological vulnerabilities of the self-determination ideal as applied to death and our cultural history of abuse in the implementation of that ideal generally.[112] It does

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110. Quill v. Vacco, 80 F.3d 716, 730 (2nd Cir. 1996), *rev'd sub nom.* Vacco v. Quill, 521 U.S. 793 (1997).

111. *See id.*

112. The actual experience of the refusal right has not been widely studied. *See generally* Sandra H. Johnson, *End of Life Decision Making: What We Don't Know, We Make Up; What We Do Know, We Ignore*, 31 IND. L. REV. 13 (1998). The most extensive recent empirical study found that the right was not in fact being implemented. *See A Controlled Trial to Improve Care for Seriously Ill Hospitalized Patients: The Study to Understand Prognoses and Preferences for Outcomes and Risks of Treatments (SUPPORT)*, 274 JAMA 1591, 1593-95 (1995). The most intriguing finding of this study was that the failure of implementation was not simply derived from physician resistance but that patients and their families themselves appeared reluctant to discuss treatment options or to insist on treatment termination, even when the patients had previously completed advance directives to this effect. *See id.* at 1595. *(See also* Joanne Lynn, *Unexpected Returns: Insights from SUPPORT, in* TO IMPROVE HEALTH AND HEALTH CARE 1997 at 175 (S. Isaacs & J. Knickman eds., 1997): "[T]he problem was much more difficult than that doctors did not hear their patients' requests; it was that no one involved was talking about these subjects."). This reluctance may itself be a response to

seem likely to me that the refusal right carries less risk of sliding toward expansive and oppressive application than the claim for physician-assisted suicide. Unlike physician-prescribed or administered lethal medication, refusal of life-prolonging treatment will lead to death only if there is some independent life-threatening illness. Nonetheless, there is a significant potential that, for specially vulnerable people, the right to refuse will become transformed (subtly or overtly) into a duty to refuse life-prolongation – a prospect that warrants cautious skepticism and intensive empirical investigation, not ideologically driven boosterism on behalf of the self-determination right.

I have painted with broad strokes in this article. My concerns have been abstractly stated, my examples have stayed at a high level of generality. I want to end where I believe the core of the matter must be: in the individual experience of a dying patient. It is of course very difficult to get inside this experience, no matter how close and how empathic we might try to come. The experience itself is so shifting, calls so much into question about our ordinary sense of "self" – of bodily and spiritual intactness and integrity – that even the first-person accounts that dying people leave behind cannot fully communicate "what it is truly like" – even if the experience were not highly variable among individuals and among cultures. Nonetheless I want to end with one imaginative depiction by a gifted novelist, Wallace Stegner, whose artistic sensibility offered an account of one woman's experience that both summarizes the kinds of concerns I have tried to set out here and gives a human face to those concerns.

Near the end of Wallace Stegner's novel, *Crossing to Safety*, Charity Lang is dying of cancer and she says, to her husband and two closest friends,

> There's no decent literature on how to die. There ought to be, but there isn't. Only a lot of religious gobbledygook about being gathered in to God, and a lot of biological talk about returning your elements to the earth. The biological talk is all right, I believe it, but it doesn't say anything about what religion is talking about, the essential *you*, the

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hostility from the medical establishment; or it may be, as I am inclined to believe, that patients and their families implicitly understand the vulnerabilities of self-determination in the face of death. Those who take the former perspective can argue that the SUPPORT study indicates the need for intensified efforts to override physician and patient misgivings. For my part, the SUPPORT study suggestively, though not conclusively, confirms my skepticism about pressing forward on the self-determination pathway in the administration of death. *See generally* Ellen H. Moskowitz & James Lindemann Nelson, *Dying Well in the Hospital: The Lessons of SUPPORT*, 25 HASTINGS CENTER REP. (Special Supplement) at S3 (1995).

> *conscious* part of you, and it doesn't teach you anything about how to make the transition from being to not-being. They say there's a moment, when death is certain and close, when we lose our fear of it. I've read that every death, at the end, is peaceful. Even an antelope that's been caught by a lion or cheetah seems not to *struggle* at the end. I guess there's a big shot of some sedative chemical, the way there's a big shot of Adrenalin to help it leap away when it's scared. Well, a shot will do for quick deaths. The problem is to get that same resignation to last through the weeks or months of a slow one, when everything is just as certain but can't be taken care of with some natural hypo. I've talked to my oncologist about it a lot. He has to deal with death every day, seventy-five percent of his patients die. But he can't tell me how to do it, or give me any references in medical literature that will help. Medical literature is all statistics. So I'm having to find my own way.[113]

This is a richly compressed account of our contemporary ideal of the autonomous self approaching death. Charity skims through the archeology and architecture of this ideal: its origins as a response to the failures of cultural frameworks of meaning offered by religion and by science; the underlying fear that the ideal attempts to address; its impetus toward a quick exit ("a shot," as she says three times); the immediate suspicion she expresses that this way out is not consistent with the goals of "resignation" and "peace" that a supremely confident self-control should attain; and, through it all, both the heroism and the loneliness of the ideal — "I'm having to find my own way."

Charity's soliloquy beautifully illustrates the vulnerability of the modern, rational, self-determining "self" in facing the prospect of death. In a brief compass she states the animating premise for the pursuit of order ("there ought to be [a guiding literature], but there isn't"); she tries what Charles Taylor calls the Cartesian strategy of self-objectification ("the biological talk") and scientific inquiry[114] (talking to her oncologist, but finding that the "medical literature is all statistics"); she makes an attempt at what Taylor calls Montaigne's strategy of finding an utterly original self[115] (there is an "essential *you*," she says, that is not adequately captured by conventional "religious gobbledygook") but she concludes that this supposed essence "doesn't teach you anything about how to make the transition from being to not-being." And she powerfully speaks of the fear now driving her

113. WALLACE STEGNER, CROSSING TO SAFETY 236 (1987).
114. *See supra* text accompanying note 9.
115. *See id.*

inquiry — that, at the edge of death, she feels like "an antelope that's been caught by a lion or cheetah."

But after traversing the conceptual routes offered by the modern conception of self, she is left only — as Taylor puts it — with "an area of questioning"[116] and not an answer for ordering the soul, without the prospect of a "peaceful [end] . . . the sedative . . . the resignation" that she seeks. She has nothing but a question about her "self" without any guidance to help that "self" find its answer — "So I'm having to find my own way."

Acknowledging this loneliness – the sense of isolation and the incompleteness, the insufficiency of the "self" in facing death – is our best guide for thinking about the administration of death in American law, medicine and culture. There is no solution to the "problem of death." There is no "magic bullet," either in assisted suicide to hasten death or in medical technology to stave off death. There is no satisfying way of taking control of death, either through exertions of self-determination or through exertions of medical, technological control. There is at its core the loneliness of death that demands that we look to one another for comfort and companionship, for a loving and persistent presence together in the face of death. This loneliness demands that we promise we will not abandon one another even when, especially when, we are most fearful of being abandoned. This is easy to say, but very hard to do. We make it harder for ourselves if we pretend that some simple formula, some simple idea, can sustain us in approaching death.

116. *Id.*