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Arthur J. Dyck

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BEYOND THEOLOGICAL CONFLICT IN THE COURTS: THE ISSUE OF ASSISTED SUICIDE

ARTHUR J. DYCK*

Is there a right to die? If "right to die" refers to a right to refuse medical interventions, then such a legal right exists in the United States, as its courts have affirmed.¹ But if "right to die" refers also to a right to be assisted in committing suicide, or a right to have one's life ended, then presently there is no clear agreement as to whether American courts or legislative bodies could or should assert such a right. The initiative passed by voters in Oregon to legislate physician-assisted suicide is receiving review by its courts.² Similar initiatives in Washington and California were both defeated at the ballot box by fifty-four percent of the votes.³ The American public may or may not be poised to support physician-assisted suicide, but the question may be taken out of the hands of voters and decided in the courts. Of course, the courts could leave the matter to the legislative process, but that is not a certainty. It is timely, therefore, to ask what the courts should do. Should courts declare a constitutional right to die that goes beyond a right to refuse life-saving medical intervention and includes physician-assisted suicide and perhaps other interventions intended directly to end someone's life?

* Mary B. Saltonstall Professor of Population Ethics, Harvard School of Public Health and Harvard Divinity School.

1. *Natanson v. Kline*, 350 P.2d 1093, 1104 (Kan. 1960); *Schloendorff v. Society of New York Hosp.*, 105 N.E. 92 (N.Y. 1914).

2. *The Oregon Death With Dignity Act* (1994); *Lee v. State of Oregon*, 869 F. Supp. 1491 (D. Or. 1994).

3. *Initiative for Death With Dignity*, Washington Initiative No. 119 (1991); *The California Death With Dignity Act*, California Proposition No. 161 (1992). These referenda were defeated by the same margin of 54 percent to 46 percent. See generally M.M. Penrose, *Assisted Suicide: A Tough Pill to Swallow*, 30 *PEPP. L. REV.* 689, 708-14 (1993).

Certain legal opinions that have already sought to make a case for such a right show that this question is not premature.⁴ Nor is it misguided to see this question as a moral one as to whether there *ought* to be a constitutional right to assisted suicide.

What this essay contends is that the arguments for assisted suicide as a constitutional right to die are based upon a particular moral and theological outlook.⁵ The courts should seek a non-theological basis for deciding the constitutionality of laws for, and laws against assisted suicide and euthanasia. As will be discussed, there are differing theological traditions implicitly and explicitly represented in conflicting opinions over what to do about refusing life-sustaining medical care, especially in cases involving the administration of artificial nutrition and hydration. Furthermore, these conflicting theological traditions yield differing interpretations of self-determination or liberty interests in such cases. There are, however, some non-theological and plausible reasons for retaining laws against assisted suicide and euthanasia (ie. mercy killing).

I. THEOLOGICAL CONFLICTS IN COURT OPINIONS OVER WITHDRAWAL OF TREATMENT⁶

American courts draw on at least three major moral and theological traditions identifiably present in American courts. In cases that involve the protection of human life and individual liberty in the context of medical treatment, these traditions tend to come into conflict with one another. Opinions of the Massachusetts Supreme Judicial Court in its decision to allow the cessation of nutrition and hydration for Paul Brophy contain explicit assertions of all three traditions.⁷

Paul Brophy, a fire-fighter in his mid-forties, remained in a semi-vegetative state from April 1983 through the time of the decision in September 1986. Doctors had withheld all therapeutic medical interventions in favor of "comfort"-oriented care.

4. For example, Judge Barbara Rothstein, in *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994), and Judge Wright, dissenting from the decision to reverse Judge Rothstein's opinion in *Compassion in Dying v. Washington*, No. 94-35534, 1995 WL 94679 (9th Cir. Mar. 9, 1995).

5. Regarding my use of the term "theological," see *infra* notes 17-18 and accompanying text.

6. For an overview of the various authors discussed in this section, see, e.g., *CLASSICS OF WESTERN PHILOSOPHY*, (S.M. Cahn ed., 1990); A.J. DYCK, *ON HUMAN CARE: AN INTRODUCTION TO ETHICS* (1977); *JUSTICE* (A. Ryan ed., 1993).

7. *Brophy v. New England Sinai Hospital*, 497 N.E.2d 626 (1986).

Brophy breathed on his own taking food and water through a gastrotomy tube, which did not create any adverse side effects. Medical experts testified that Brophy could live for a number of years, perhaps as long as twenty years. Four of the seven justices were convinced that the lower court correctly understood Brophy's comments to others earlier in his life as a wish on his part to be allowed to die under these circumstances.

Writing for the majority, Judge Liacos asserted a state interest in carrying out Brophy's wish to die on behalf of Brophy's right to self-determination. This right, according to Judge Liacos, had deep roots in the history of the United States. To express his conception of self-determination, he borrowed a previous case's quote of John Stuart Mill:

"[T]he only purpose for which power can be rightfully exercised over any member of a civilised [sic] community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a significant warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right."⁸

By relying on the tradition as portrayed by Mill, Judge Liacos invoked a tradition that does not view the right to life as natural and inalienable. Furthermore, the value of one's own life was regarded as something rationally assessable. The individual makes this assessment in a private sphere protected from interference by the state. The right to life, in this tradition, has been characterized as a "right to be let alone."⁹ Also, given that individuals naturally seek pleasure and avoid pain for themselves, it is deemed reasonable, in certain circumstances, to wish to die rather than live.

This view of human nature flows from that found in Thomas Hobbes and John Locke, but not in all important respects. For Hobbes and Locke, human beings naturally seek to preserve their own lives. This natural drive is the basis for the claim of a natural, inalienable individual right to life that cannot be surrendered to the sovereign. Indeed, governments are bound to protect this right.

8. *Id.* at 633 (quoting JOHN STUART MILL, ON LIBERTY, in 43 GREAT BOOKS OF THE WESTERN WORLD 271 (R. Hutchins ed. 1952), quoted in *In re Caulk*, 480 A.2d 93 (1984) (Douglas, J., dissenting)).

9. This development is traced in MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

Justice Lynch, invoking both Hobbes and Locke, dissented from the majority decision because "the State's interest in the preservation of life has not been given appropriate weight."¹⁰ The reference to a Hobbesian perspective is also very explicit when he described the state's interest in the prevention of suicide as that of preventing "irrational destruction." Note that from a Hobbesian perspective suicide becomes irrational because it fails realistically to recognize the natural drive in all of us to preserve our own lives.

Judge Lynch seemed to combine a Hobbesian tradition with that found in Jewish and Christian traditions when he characterized the state's interest in the preservation of life as an interest in preserving not only the particular patient's life but also the sanctity of all human life. Maintaining the sanctity of life, he said, "may well be the reason society invests the State with sovereign authority."¹¹ From this reasoning, Lynch asserted that the majority had, in part, nullified the law against suicide.

Judge Nolan agreed with Judge Lynch in his dissenting opinion that Brophy's life and all of life should be better protected. Like Judge Lynch, Judge Nolan viewed the failure to provide food and water as the proximate cause of death. In his opinion, however, Judge Nolan depicted the court as engaged in a theological quarrel. He considered the decision of the court as striking a balance in favor of death and against life calling the decision "another triumph for the forces of secular humanism (modern paganism)."¹² In referring to the decision as "secular humanism" and "modern paganism," Judge Nolan recalled the struggle of early Christianity and Judaism against those other religions and philosophies of the time that approved of suicide and mercy killing. The Hippocratic Oath, with its prohibitions against giving poisons to cause death or counseling anyone to do so, was embraced by Christian physicians, and even a Christian version, omitting allegiance to Greek deities, also emerged.¹³ Judge Nolan regarded the majority decision as an imposition of what he called "anti-life principles." In short, the court has imposed its theological views on those who regard suicide as "intrinsically evil."

Note briefly the partially dissenting opinion of Justice O'Connor. Among other things, he expressed concern about

10. *Brophy*, 497 N.E.2d at 640.

11. *Id.* at 641.

12. *Id.* at 640.

13. *The Hippocratic Oath and From the Oath According to Hippocrates in So Far as a Christian May Swear It* are reprinted in *ETHICS IN MEDICINE: HISTORICAL PERSPECTIVES AND CONTEMPORARY CONCERNS* 5, 10 (S.J. Reiser et al. eds, 1977).

the court's description of Brophy's condition as "helpless." He feared that the majority made their own assessment of Brophy's "quality of life." He found any court effort to establish an absolute legal right to commit suicide or to measure the quality of life of the individual involved inconsistent "with this nation's traditional and fitting reverence for human life."¹⁴ He characterized this unconditional affirmation of the value of human life as the "cornerstone" of American law:

Even in cases involving severe and enduring illness, disability and "helplessness," society's focus must be on life, not death, with dignity. By its very nature, every human life without reference to its condition, has a value that no one rightfully can deny or measure. Recognition of that truth is the cornerstone on which American law is built.¹⁵

The reader at this point should not think that these seven judges repudiated a patient's right to refuse life-saving and life-sustaining medical interventions. Recall that Brophy was not receiving, and was not slated to receive, any care other than what would keep him comfortable until he died. The judges agreed, as they had in the *Saikewitz* decision, that care going beyond providing comfort that is of little or no benefit relative to the patient's condition, could be rejected as too invasive or burdensome.¹⁶

What, then, divided the court in *Brophy*? Brophy was depicted as someone who could live for years. Hence, failing to feed him could reasonably be viewed as the reason he would die. Furthermore, it was difficult to make a convincing case that the gastrointestinal tube in place was a source of discomfort. Indeed, one could regard it as a necessary source of comfort, preventing any possible ill effects of starvation and/or dehydration. For these reasons it is more difficult to view the majority as affirming what it purports to affirm, namely, a right to refuse medical treatment. Having invoked the tradition of Mill, the majority inserted into its opinion references to privacy, autonomy, a right to die with dignity and a wish for one's death, even in circumstances some would regard as wrong or harmful to the individual. By citing Mill as embodying American tradition, the majority opinion rejects the Hobbesian and Lockean traditions of seeing the

14. *Brophy*, 497 N.E.2d at 646.

15. *Id.*

16. *Superintendent of Belchertown St. Sch. v. Saikewicz*, 370 N.E.2d 417 (1977). It should be noted that in this case it was Saikewicz's inability to comprehend a highly invasive procedure that added weight to the decision to consider the treatment for his leukemia as excessively burdensome.

desire to preserve one's own life as natural and rational. By citing Mill, the majority opinion rejects the traditions in American law that speak of human life as sacred, and whose value defies assessment. These traditions are embodied in the Declaration of Independence, which describes an inalienable right to life as endowed by the Creator. As we shall shortly indicate, this clash of theological traditions occurs in other court decisions whenever a Millian argument, justifying assisted suicide and/or euthanasia, attacks the idea of the sacredness of human life, or the concept of an inalienable right to life.

But why call these clashes theological? One of the enduring questions for any theological system or orientation has to do with the nature of human beings. In the Millian perspective, human beings naturally seek pleasure and avoid pain. The worth of a life and its moral significance depends upon how pleasurable or painful that life is. From this Millian outlook, it is possible to view one's life as no longer worthwhile, and to do so rationally, given the pain and/or loss of pleasure being experienced. Hobbes, as well as Locke, viewed human beings as naturally driven to preserve their own lives. From their perspective, the inclination to kill oneself is regarded as an irrational urge. In Judaism and Christianity, life is precious, inviolable, and with a worth beyond human assessment. Human beings are endowed with the ability and the proclivity to see life as sacred, and to act accordingly. Human beings may act contrary to their proclivities to nurture, protect, and treasure life, but when they do so, laws against such irrational and immoral tendencies are helpful enough to be enforceable for the overall, albeit imperfect, protection of human life sufficient to sustain communities. When the question arises as to whether or not the law should permit assisted suicide, the concern to protect life rationally and sufficiently informs the Hobbesian, Judaic and Christian perspectives alike.¹⁷ The Millian approach is informed by the notions of assessing the worth of a life and to allow each individual to do so, assisting them if necessary. The Millian view is uniquely in theological conflict with the other traditions named. One may call this a metaphysical quarrel but it does involve explicitly theological traditions.

The purpose in analyzing the opinions in the Brophy decision is not to comment on their merits. Rather this essay seeks to show that arguments for the refusal of medical treatment can provoke dissent whenever such arguments are seen as undermining current laws aimed at preventing suicide and protecting human life more generally. The debate can, and does at times,

17. See ARLENE SWIDLER, *HUMAN RIGHTS IN RELIGIOUS TRADITIONS* (1982).

turn into a conflict among traditions deemed to be the basis for American law, even law as such. Insofar as this conflict pits doctrines of human nature against one another, the discussion is endemic to theology and cannot avoid accepting or rejecting some existing theological views of human nature.

The justices in the case of *Susan Rodriguez*, decided in 1993 by the Supreme Court of Canada, expressed this kind of conflict.¹⁸ The case involved a constitutional challenge to the Canadian criminal law provision which made it an offense for a physician to assist in a patient's suicide. Examining this case allows us to identify and analyze the theological assumptions about human nature, especially human motivation, underlying judicial opinions about assisted suicide. This examination will assist in identifying some examples of such reasoning in American courts which includes those that provide a basis for asserting a constitutional right to physician-assisted suicide.

II. THEOLOGICAL CONFLICT OVER PHYSICIAN-ASSISTED SUICIDE: THE *RODRIGUEZ* CASE

The theological assumptions regarding human nature and motivation underlying the various judgments in *Rodriguez* — from the lower British Columbia Supreme Court (B.C.S.C.), to the British Columbia Court of Appeal (B.C.C.A.), to the Supreme Court of Canada (S.C.C.) — unfold in a manner not unlike that of *Brophy*. In both cases the majority and dissenting opinions diverged in their underlying assumptions about human nature and motivation. In *Rodriguez*, moreover, the majority and dissenting opinions diverged on their conception of "justice" — between justice as based on individual claims of well-being versus justice as based on the moral requisites of community, which include the nurture and protection of human life.

An ethical analysis of *Rodriguez* reveals that the judges' theological assumptions and conceptions of justice represent a proxy of their holdings on the criminal prohibition of physician-assisted suicide. On the one hand, the prevailing judicial position, which upheld the latter prohibition of assisted suicide, contained the following features: the assumption that humans are part of a community naturally inclined to nurture and sustain the lives of others; a projecting language of universal obligations; and a conception of justice based on the moral requisites of community. On the other hand, the dissenting position, which

18. *Rodriguez v. British Columbia*, 107 D.L.R.4th 342 (1993). See also *Rodriguez v. British Columbia*, 76 B.C.L.R.2d 145 (B.C. Ct. App. 1993); 18 W.C.B.2d 279 (B.C. Sup. Ct.).

would have struck down the assisted suicide prohibition as unconstitutional, contained the following features: the assumption that humans are pleasure-seeking and pain-avoiding beings; an isolationist language of "rights talk"; and a conception of justice that is based on individualist claims of well being.

Without intending to engage in metaphysical debate, the judgments in *Rodriguez* fell squarely into discernable theological or philosophical traditions that render the outcome of the judgment predictable.

A. *Background*

Susan Rodriguez was suffering from amyotrophic lateral sclerosis (ALS or Lou Gehrig's Disease) and was diagnosed as having one to two years to live in April 1991. The case came before the Supreme Court of Canada in April 1993 and was decided against her in September 1993. Rodriguez lobbied Parliament to change the assisted-suicide laws until her death. Notwithstanding an allegedly healthy appearance and diagnosed lack of physical pain and distress, she committed suicide on February 12, 1994, with the assistance of a doctor and under the observation of a Canadian Member of Parliament. Divorced, Ms. Rodriguez left behind a nine-year-old son.

Since some readers may be unfamiliar with Canadian criminal and constitutional law, a brief explanation of the relevant law is necessary. In 1972 the offense of attempting suicide was deleted from the Canadian Criminal Code. However, the offense of counseling, aiding and abetting suicide was not deleted and, has remained in force in the following terms since 1972:

Every one who

- (a) counsels a person to commit suicide, or
- (b) aides or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.¹⁹

Ms. Rodriguez challenged this legislation by reference to the Canadian Charter of Rights and Freedoms (the Canadian equivalent of the U.S. Bill of Rights) under section 7:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.²⁰

19. Criminal Code, R.S.C., ch. C-46, § 241 (1985) (Can.).

20. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7.

Under the Canadian Constitution, this right (a rough equivalent to the Due Process Clauses under the fifth and fourteenth amendments of the Bill of Rights) cannot be infringed, except where justified as a "reasonable limit," according to a complicated doctrine that will not affect the analysis herein.²¹

The trial court judge held that there was no right to assisted suicide, and thus upheld the statute. The majority of the British Columbia Court of Appeal (B.C.C.A.) upheld that decision, with the Chief Justice of British Columbia dissenting. The majority of the Supreme Court of Canada upheld the B.C.C.A. majority decision 5-4, producing one majority opinion and three dissenting opinions. Accordingly, the prohibition on assisted suicide remains intact today.

B. *Theological Approaches to Human Rights*

The theological views of human nature of particular judges essentially predicted their votes in *Rodriguez*. In contrast to the views of Mill, Bentham, Hobbes, and Locke, one can depict rights as linked with responsibilities in a way that actualizes them. All people have natural inhibitions and proclivities that express themselves in behavior requisite for the existence and sustenance of communal life, human life itself, and individual relations with others. Thus, rights are rendered actual by such behavior, viewed as among the moral responsibilities that make human communities, individual life, and relationships possible. Those natural proclivities include the right and responsibility of procreation, nurture, and refraining from killing and harm.²² In assessing the theological views implicit in the *Rodriguez* judgments, then, one needs to keep an eye out for the absence or prevalence of human connectedness within the particular theological view, and whether humans are viewed as naturally self-preserving, pleasure-seeking/pain-avoiding, or as naturally actualizing the moral requisites of community.

21. Section 1 of the Charter of Rights reads: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." *Id.* § 1. Basically, the Canadian Constitution puts in writing what amounts to a jurisprudential "strict scrutiny" test adopted by the U.S. Supreme Court in its constitutional law. The only point to be taken here is that when a statute infringes upon section 7 of the Charter, it is likely unconstitutional.

22. This view is more thoroughly elaborated in ARTHUR J. DYCK, *RETHINKING RIGHTS AND RESPONSIBILITIES* (1994). See especially Chapter 5.

1. The Preservation of Life as a Natural Responsibility: Majority Judgments

The majority judgments in *Rodriguez* all presupposed that humans naturally wish the life of others. For example, the lower court decision of Justice Melvin (which upheld the statute as constitutional) presumed from the outset that assisted suicide is "diametrically opposed to the underlying hypothesis upon which a Charter of Rights and Freedoms is based, namely the sanctity of human life."²³ This proposition is interesting to us for two reasons.

First, Justice Melvin presumed that the Constitution naturally seeks to preserve life as its most fundamental responsibility. This view supports the notion that the community nurtures its members by protecting the sanctity or inviolability of life, and it does so to protect individuals and the community itself. One could also characterize this presumption as Hobbesian, by which individuals never would surrender their natural self-preservation tendencies to the state. But attributing a Hobbesian stance to Justice Melvin is difficult without hearing more about the judge's view on the rationality of suicide, which he never raised.

Second, the phraseology of Justice Melvin's opinion implicitly suggests that nurturing life is somehow universal: he referred to "the underlying hypothesis upon which a Charter of Rights and Freedoms is based. . . ." ²⁴ Justice Melvin, therefore, did not rely upon a relativist theory based on the peculiar traditions of Canada; rather, he referred to the natural proclivity of *any* community. Since the community manifests itself through laws—and in particular, the supreme law of the Constitution—it should not be surprising that this natural tendency becomes the "underlying hypothesis" of the community.

Justice Melvin was not alone in this view. The majority decision of the B.C.C.A., authored by Associate Justice Hollinrake, also invoked the natural tendency to protect life. The Chief Justice of Canada paraphrased the B.C.C.A. majority position in this way: "The guiding principle, in [Hollinrake's] view, underlying society's approach to this problem had always been, and continued to be, the sanctity of life."²⁵ In a more narrow opinion concurring with the majority, Associate Justice Proudfoot echoed

23. *Rodriguez v. British Columbia*, 107 D.L.R.4th 342, 351 (1993), *citing* *Rodriguez v. British Columbia*, 18 W.C.B.2d 279 (1993).

24. *Id.* (emphasis added).

25. *Rodriguez v. British Columbia*, 107 D.L.R.4th 342, 357 (1993).

this theme: "obviously death is the antithesis of the s.7 guarantee of 'life, liberty and security of the person.'"²⁶

The majority decision of the S.C.C. provided a more comprehensive statement on the natural motivation to cultivate life. Judge Sopinka did not dismiss the claims of Rodriguez as self-evidently violating the right to life, liberty, and security of the person. Instead, he outlined the rationale for opposing suicide, by reference to the inner logic of the constitutional right to security of the person, and to the most basic structure of society and human beings:

I find more merit in the argument that security of the person, by its nature, cannot encompass a right to take action that will end one's life as security of the person is intrinsically concerned with the well-being of the living person. This argument focuses on the generally held and deeply rooted belief in our society that human life is sacred or inviolable. . . . As members of a society based upon respect for the intrinsic value of human life and on the inherent dignity of every human being, can we incorporate within the Constitution, which embodies our most fundamental values, a right to terminate one's own life in any circumstances?²⁷

There is much in this statement for students of ethics to consider. First, Judge Sopinka clearly rejected or avoided reference to individuals as egoists unto their own island. The "belief" and "respect" are rooted in the "society," not the individual alone, which is "based upon respect for the intrinsic value of human life."²⁸

The second element worth highlighting is the use of the term "rights" to characterize the individual seeking death, and the complete avoidance of speaking of rights in reference to society's "sacred or inviolable" view of life. Similarly, Judge Sopinka juxtaposes the language of rights ("right to terminate" life) with the language of morality ("intrinsically concerned . . . with the well-being of the living persons . . . [which is] sacred or inviolable").²⁹

26. *Id.* at 358.

27. *Id.* at 389.

28. *Id.*

29. Judge Sopinka makes the parenthetical comment that his reference to "sacred" is used "in the non-religious sense described by [RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993)] to mean that human life is seen to have a deep intrinsic value of its own." *Id.*

But in taking this view, Judge Sopinka finds himself in tension with a (perhaps short-lived) tradition within Canadian jurisprudence that expressed itself during the first few years after the inception of the Charter of Rights in 1982, whereby liberty and security of the person emphasized "control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress."³⁰ Since the dissenting opinion made this latter tradition the touchstone of its theological or metaphysical view, analysis of this point will be postponed. Judge Sopinka conceded this well-established characterization of "security of the person," finding that such a right had been breached. The case then ultimately turned on whether that breach of liberty and security of the person was in accordance "with the principles of fundamental justice."³¹ Before considering justice, though, we must catch up with the other judges' world views.

2. The Right to Be Left Alone: Dissenting Judgments

The dissenting opinion of Chief Justice McEachern in the court of appeal expressed a view of rights which falls squarely into the tradition of Bentham and Mill. The Chief Justice stated that the right to life, liberty, and security to the person "was enacted for the purpose of ensuring human dignity and individual control, so long as it harms no one else."³² This theological viewpoint contains no notion of responsibility to others—indeed, all that matters is that the individual is left alone, provided the individual leaves alone the rest of the community. Judge McLachlin of the Supreme Court adopted this quotation in her dissent, adding that "[s]ecurity of the person has an element of personal autonomy, protecting the dignity and privacy of individuals with respect to decisions concerning their own body."³³ Along the same lines, Judge Cory's brief dissent emphasized the notion of avoiding pain, through a syllogism that suggested "dying" ought to receive the same constitutional protection as "living"; hence, the right existed "to choose death with dignity."³⁴ Judge Cory made no mention of the individual's community

30. *Regina v. Morgentaler*, 44 D.L.R.4th 385 (1988).

31. Canadian Charter of Rights and Freedoms, *supra* note 20, § 7.

32. *Rodriguez v. British Columbia*, 107 D.L.R.4th 342, 354 (1993).

33. *Id.* at 415.

34. Judge Cory noted:

If, as I believe, dying is an integral part of living, then as part of life it is entitled to the same constitutional protection provided by s.7. It follows that the right to die with dignity should be as well protected as in any other aspect of the right to life. State prohibitions that would

(e.g., Ms. Rodriguez's nine-year-old son, other family and friends), or the general society's desire to sustain and nurture life. This view presumes that human motivation is based upon an individual pleasure/pain quotient: the "pleasure" being associated with "dying with dignity" (which, for Judge Cory, must mean "living with dignity"); and the pain associated with "a dreadful, painful death" (which for him must mean a painful life).³⁵

Before assessing the ethics of this position, the logic ought to be examined. If Judge Cory is correct in saying that death is a part of life, then why would Ms. Rodriguez's life as a victim of ALS be treated any differently than her life prior to ALS, in which case assisted suicide would clearly be outlawed?³⁶ The answer to this question may turn on whether there is a qualitative or quantitative difference between ordinary experience and so-called "near death" experience. Arguing, in effect, that there is only a quantitative difference, the Jesuit theologian Karl Rahner's reasoning is entirely consistent with Judge Cory's, up until the final conclusion: " 'we do not die at the end, but we die throughout the whole of life'—so that the contemporary insistence on either discovering or hastening the 'moment of death' can become as idolatrous as the placement of too great a value on its indefinite postponement."³⁷

A similar conviction was expressed in a less publicized Canadian story involving an ALS sufferer, Florence Perella, who argued that "death with dignity" is an "oxymoron, a self-contradiction Dignity has to do with control and self-control. Death is the loss of all control. That's what dying is."³⁸ Therefore, instead of seeking death, Perella reached out to her com-

force a dreadful, painful death on a rational but incapacitated terminally ill patient are an affront to human dignity.

Id. at 413.

35. *Id.*

36. Judge Cory's reasoning, on the one hand, points to treating "near death" the same as all life, suggesting that life should be sustained just as it was prior to contracting ALS; and on the other hand, the reasoning points to treating pain as a justification for ending life, suggesting that death might be a viable option throughout one's life. *Id.*

37. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 249 (1993).

38. *Id.* H. Shepherd, *Facing Down Death; ALS Victim Welcomes 'Learning Experience' Lost to Those Who Choose Assisted Suicide*, MONTREAL GAZETTE, Mar. 6, 1994, at A23. Ms. Perella expressed great respect for the efforts of Ms. Rodriguez, but wished to offer an "alternative viewpoint": "I consider euthanasia and 'doctor-assisted suicide' to be, in most cases, another triumph of the practical over the spiritual. 'Dying is the ultimate learning experience. As we lose control of our lives, we gain the ability to listen to what life wants to teach us, to receive the love that people want to give us, and, perhaps, to be surprised by God.'" *Id.*

munity in a manner which brought a broad range of pleasant surprises.³⁹ Thus, for Rahner and Perella, there is no fundamental shift in life perspective when one moves from ordinary experience to "near death" experience. The point to be taken here is that the logic of the pleasure/pain quotient forwarded by the dissenting opinions requires an important shift of perspectives, whereby "near death" evaluations of individual pleasure and pain are treated as *qualitatively different* (as opposed to quantitatively different) from everything preceding that "near death" experience.

The viewpoint and language employed by the dissents resemble an individualistic and disconnected approach to human rights. The language is one of "right[s]," "protect[ion]" and autonomy," with an emphasis on the "body," and no reference to society or the community whatsoever. The theological stance is based, to repeat, on the Millian notion that one has the right to be left alone as long as one does not harm others. And if it was not already clear that liberty and security amounted to the "right to be left alone," Judge McLachlin underscored that view by invoking the right to privacy: the right to security of the person "encompasses the notion of dignity and the right to privacy."⁴⁰

The other notable feature of the dissenting judges' theology is the implicit rejection of the Hobbesian notion that individuals are naturally self-preserving. The "right to die" amounts to a concession that life ought not be preserved in certain circumstances. This rejection harkens back to the qualitative shift required to sustain the logic of the pleasure/pain quotient referred to above. That is, the "near death" pleasure/pain considerations are treated as qualitatively different than everything preceding that "near death" experience. It is this qualitative difference in the ALS sufferer's life that rejects the Hobbesian stance, as the qualitative shift leaves behind the desire to preserve oneself. Indeed, it is upon this qualitative shift that the dissent rests their reasons.

To support her position, Judge McLachlin cited the notable *Morgentaler* case,⁴¹ in which the Supreme Court of Canada struck down the existing federal abortion law that arbitrarily denied or

39. The Court stated: "One of the most inspiring things Perella has found in her own illness, she says, is the way her former husband, their four children—aged 25 to 30—and other friends and even strangers have rallied to her aid." *Id.* Thus, as discussed later, Perella's language indicates attachment, in contrast to the dissenting judges' language of alienation.

40. *Rodriguez*, 107 D.L.R.4th at 414.

41. *Regina v. Morgentaler*, 44 D.L.R.4th 385 (1988).

delayed therapeutic abortions to some women. Judge McLachlin viewed the decision as dispositive of the issue in *Rodriguez*. However, she may have neglected an important theme in *Morgentaler* which endeavored to place the individual within the context of community: "The Charter is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives."⁴² Thus, Judge McLachlin may have sold short the fuller conception of rights as forwarded in *Morgentaler*, which attempted to map out the individual within the community rather than isolating that individual in a shroud of privacy rights.

In any event, this position carried the day on the right to "security of the person." The Canadian Supreme Court followed the *Morgentaler* principle that security of the person protects bodily integrity and prevents the state from imposing psychological duress upon individuals making fundamental life decisions. The remaining issue concerned whether the infringement of security of the person was consistent with the "principles of fundamental justice."⁴³

C. *Conceptions of Justice*

1. Justice as Moral Responsibilities: Majority Judgments

The opinions upholding the statute understood justice not solely as self-determination; rather, justice embraced a set of universal goals for moral responsibility in a community. The dissenting opinions conceived of justice as pertaining to individuals and their claims to rights.

The majority opinion of the B.C.C.A. addressed itself to the question of whether the "principles of fundamental justice" permit the prohibition of assisted suicide, and the entailing loss of security to the person. Justice Hollinrake answered the question in the affirmative, arguing that justice necessitates that the community nurture the sanctity of life. Indeed, the majority opinion was at a loss to see how the principles of fundamental justice could immunize an individual from the prohibition against assisted suicide, "when that person is one of those members of society the section is intended to protect in keeping with the concept of the sanctity of life." Justice Hollinrake expressed a view of "justice," first of all, which uses the language of moral cognition: reference is made to society, society's protection of mem-

42. *Id* at 485.

43. *Rodriguez*, 107 D.L.R. at 414.

bers of that society, and the preservation of "the sanctity of life." The society envisioned under Justice Hollinrake's view of justice is not one which leaves the individual alone, on the contrary, it is responsible for its members' lives. Justice Hollinrake expected, almost matter-of-factly, that justice would require a community to take responsibility for an individual whose life was endangered.

More important than the language, though, is the notion that justice requires the community to nurture its members, or in the words of Justice Hollinrake, "preserv[e] the sanctity of life." Thus, not only did Justice Hollinrake assume that human motivation naturally preserves the sanctity of life, but he viewed justice as representing the moral responsibilities (in this case, nurturing life) that are requisites of community.

Judge Sopinka added much content to this general notion of justice representing the moral requisites of community. He cited the American constitutional scholar Laurence Tribe for the proposition that justice does not rest on a narrow view of the individual:

The right of a patient to accelerate death . . . depends on a broader conception of individual rights than any contained in common law principles. A right to determine when and how to die would have to rest on constitutional principles of privacy and personhood or on broad, perhaps paradoxical, conceptions of self-determination.⁴⁴

Thus, Judge Sopinka rejected the notion that justice amounts to individual-based principles of privacy. He reinforced this by commenting that "the court must be careful that [the principles of fundamental justice] do not become principles which are of fundamental justice in the eye of the beholder *only*."⁴⁵ So if justice is not based on the "I" only, then what is its focus?

Sopinka began to answer this question by reference to society: justice was equated with "principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice . . ."⁴⁶ He then criticized the definition of justice forwarded by Judge McLachlin's dissent, arguing that "respect for human dignity and autonomy" (her sole criteria) is but one component of justice "upon which our society is based."⁴⁷ Instead, Judge Sopinka viewed justice as embodying the requisites of the community, ironically citing a former

44. *Rodriguez*, 107 D.L.R.4th at 392 (citing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1370 (2d ed. 1988)).

45. *Rodriguez*, 107 D.L.R.4th at 392.

46. *Id* at 393.

47. *Id* at 394.

(majority) decision of Judge McLachlin to that effect: "The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society."⁴⁸ Thus, determining the content of justice in the context of assisted suicide required reference "to the state's interest in protecting the vulnerable . . . and societal beliefs which are said to be represented by the prohibition."⁴⁹ Judge Sopinka maintained:

[Section 242's] purpose is grounded in the state interest in protecting life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken. This policy finds expression not only in the provisions of our *Criminal Code* which prohibit murder and other violent acts against others, notwithstanding the consent of the victim, but also in the policy against capital punishment This is not only a policy of the state, however, but is part of our fundamental conception of the sanctity of human life "Preservation of human life is acknowledged to be a fundamental value of our society."⁵⁰

Judge Sopinka then underscored this conception of justice, which expresses the moral requisites of community, by outlining the history of suicide provisions, common law views of medical protection for the terminally ill, and legislation in other countries. Finally, Judge Sopinka cut through the controversial distinctions between withdrawal of treatment and assisted suicide with the conclusion that,

[t]o the extent that there is a consensus, it is that human life must be respected and we must be careful not to undermine the institutions that protect it. . . . In upholding the respect for life, [the statute] may discourage those who consider that life is unbearable at a particular moment, or who perceive themselves to be a burden upon others, from committing suicide.⁵¹

In short, the majority opinion characterized justice as an ideal necessarily implying a moral responsibility of the Canadian state and community to preserve, nurture, and sustain the sanctity of human life. Judge Sopinka painted a picture of Canadian justice

48. *Id.* at 395 (citing *Cunningham v. Canada*, 80 C.C.C.3d 492, 499 (1993)).

49. *Rodriguez*, 107 D.L.R.4th at 396.

50. *Id.* The last sentence cites THE LAW REFORM COMMISSION WORKING PAPER, NO. 28, EUTHANASIA, AIDING SUICIDE AND CESSATION OF TREATMENT 36 (1982).

51. *Rodriguez*, 107 D.L.R.4th at 406.

that reaches out to those perceiving themselves as "a burden upon others" and seeks to prove them wrong.

2. Justice in the "I" of the Beholder: Dissenting Judgments

In stark contrast to the majority's conception of justice, the dissenting conception of justice is markedly individualistic. This individualistic conception of justice is clearly asserted in Judge McLachlin's dissenting opinion.

With justice and the individual in mind, Judge McLachlin cited a devastating conception of the principles of fundamental justice penned by Chief Justice Lamer in a previous case where he argued that, "[I]t is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s.7 rights."⁵² It should not be surprising, then, that the dissenting opinion queried whether the "view" of Ms. Rodriguez that "it makes no sense to continue living . . ." sufficiently justified her assisted suicide.⁵³ Judge McLachlin continued rhetorically, "[b]ut what value is there in life without the choice to do what one wants with one's life . . ."⁵⁴ Thus, under this view justice preserves the individual well-being, in the individual's quest for pleasure and avoidance of pain.

To be sure, under this narrow conception of justice, which seems to place all of its faith in the individual, there is no "value" in a life without choice, and without a good reason for continuing to live. The view of Ms. Rodriguez was that continuing to live made no sense and that view represents the critical variable determining justice in this case. Since the view of Ms. Rodriguez becomes the only lens through which justice is determined, the result of permitting an assisted suicide is quite logical. But Judge McLachlin's conception of justice not only excludes a broader vision of justice involving the requisites of society, it suggests that "societal interests" would "thwart the exercise of the accused's right."⁵⁵ Thus, societal interests not only play no role in justice, they may very well deny the individual desire to die. Indeed,

52. *Id.* at 418 (citing *Regina v. Swain*, 63 C.C.C.3d 481, 509 (1991)). It is arguably misleading to leave the quote standing alone, for Chief Justice Lamer went on to say that "societal interests" are to be considered under the "reasonable limits" of the Charter. But the point here is to note that this particular conception of justice, asserted by Justice Lamer (and Judge McLachlin by her adoption of the test) undeniably treats societal interests as irrelevant to the principles of fundamental justice.

53. *Rodriguez*, 107 D.L.R.4th at 419.

54. *Id.* at 420.

55. *Id.* at 418 (citing *Regina v. Swain*, 63 C.C.C.3d 481, 509 (1991)).

Judge Sopinka made this very point when he argued that justice will thwart individual desires to end life because it represents the kaleidoscope of moral responsibilities that all human beings expect from one another.

Perhaps fittingly, little more can be said of this dissenting view of justice because the analysis is as terse as its message. Once society is excluded from the dissenting conception of justice, its substance resembles more a microscope than a kaleidoscope. In the final analysis, this dissenting view of justice leaves the individual to her own devices while the majority view permits the community to reach out in the name of the moral requisite of sustaining life.

In deciding the question of whether a constitutional right to assisted suicide existed, the Canadian Supreme Court exhibited a clash between quite different perspectives. The majority defended a doctrine supporting life's inviolability and the minority countered with a Millian doctrine viewing life's value as subject to a very personal and private assessment of each individual. The minority position in the Canadian court is represented in court opinions in the United States. In other words, positions that could be used to argue for a constitutional right to physician-assisted suicide have already been expressed in American courts, including dissenting opinions in the United States Supreme Court in the case of *Nancy Beth Cruzan*.⁵⁶

III. MILLIAN THEOLOGICAL PERSPECTIVES FAVORABLE TO ASSISTED SUICIDE: AMERICAN COURTS

A. *The Bouvia Case*

To begin with, consider the opinions in the case of *Elizabeth Bouvia*.⁵⁷ *Bouvia* was a 28-year-old woman being cared for in one of Los Angeles County's facilities. She suffered from cerebral palsy, and her disease had progressed to the point where she required care and assistance for all of her physical needs and pain relief for arthritis. She also required supplemental nutrition in the form of a nasogastric tube. She petitioned to remove this tube. Removal of the tube was expected to lead to death by starvation. The patient was considered by all to be mentally competent, and beyond that, of a keen and lively mind. The tube was being well tolerated physically.

In the court's unanimous view, her mental and emotional feelings deserved respect. "To petitioner," wrote the court, "it is

56. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990).

57. *Bouvia v. Superior Court*, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986).

a dismal prospect to live with this hated and unwanted device attached to her She has the right to have it removed immediately."⁵⁸ The court rejected the trial court's concern that Bouvia wished to commit suicide with the State's help rather than exercise her right to refuse treatment. The court found no evidence for this position and interpreted the case as an assertion of the right to refuse medical treatment. This right "[was] recognized as a part of the right of privacy protected by both the state and federal constitutions."⁵⁹ The exercise of it "require[d] no one's approval."⁶⁰ The patient's interests and desires represented the key ingredients to the decision. Furthermore, the decision to refuse treatment was not limited to patients regarded to be " 'terminal' . . . and [the right did] not need the sanction . . . [of] any legislative act, directing how and when it shall be exercised."⁶¹ "It [was] a moral and philosophical decision that, being a competent adult, [was] hers alone."⁶² The court spoke of the possibility that Ms. Bouvia regarded her existence as "meaningless" and emphasized her immobility and dependence on others.⁶³

The court chided the medical practitioners for their invocation of an interest in the preservation of life:

It is incongruous, if not monstrous, for medical practitioners to assert their right to preserve a life that someone else must live, or more accurately, endure for "15 to 20 years." We cannot conceive it to be the policy of this State to inflict such an ordeal on anyone.⁶⁴

This strongly stated opposition to the efforts to preserve life was not intended to sanction suicide but rather the decision to refuse treatment and let nature take its course. Assisted suicide, by comparison, remained banned.⁶⁵ The state in this case maintained an interest "in preserving and recognizing the sanctity of life."⁶⁶

58. *Id.* at 299.

59. *Id.* at 301.

60. *Id.*

61. *Id.* at 302.

62. *Id.* at 305.

63. *Id.* at 304.

64. *Id.* at 305.

65. Any affirmative, direct conduct providing the means by which an individual "could physically and immediately inflict some death producing injury upon himself" remained unlawful. *Id.* at 306 (quoting *In re Joseph G.*, 667 P.2d 1176 (Cal. 1983)).

66. *Bouvia*, 225 Cal. Rptr. at 306.

The reader may rightly ask at this point what the problem is, given that the court appealed to the "sanctity of life" and contended that its decision did not undercut this interest. The concurring opinion of Justice Compton illustrates the problem. For Justice Compton, Bouvia made a "conscious and informed choice that she prefers death to continued existence in her helpless and to her intolerable condition [S]he has an absolute right to effectuate that decision."⁶⁷ Justice Compton found Bouvia's need to accomplish her death by self-starvation inhumane. As such, Justice Compton maintained:

The right to die is an integral part of our right to control our own destinies so long as the rights of others are not affected. That right should, in my opinion, include the ability to enlist assistance from others including the medical profession, in making death as painless and quick as possible.⁶⁸

Justice Compton did not doubt that Bouvia wanted to commit suicide, and described the majority opinion as a "dance" around the issue.⁶⁹ She did not think that the medical profession would have any difficulty accommodating individuals in Bouvia's situation, because it already declined to follow the Hippocratic Oath in the context of abortion.⁷⁰ At the end of her opinion, Justice Compton pleaded for "realistic" approaches toward those for whom death would come as a welcome relief.⁷¹ According to Justice Compton "[i]f there is ever a time when we ought to be able to get the 'government off our backs,' it is when we face death—either by choice or otherwise."⁷²

This last idea, that governments should "get off our backs" at the time individuals "face death," highlights the view of all the justices in this case that Bouvia made a decision that was *hers alone* to make. The court saw what she was deciding as so purely private and personal that the concern of her physicians to preserve her life was described as "incongruous, if not monstrous."⁷³ No allowance whatsoever was made for an abiding, natural desire to preserve one's own life, à la Hobbes and Locke, nor any proclivity to nurture life, a requisite for the existence and maintenance of human communities.

67. *Id.* at 307.

68. *Id.*

69. *Id.*

70. *Id.* at 307–08.

71. *Id.* at 308.

72. *Id.*

73. *Id.* at 305.

It is a small wonder, then, that neither the majority nor Justice Compton predicted Bouvia's decision to continue to live and to receive the necessary nutrition and hydration for that purpose. The majority thought that they were granting Bouvia her wish to be free of the nasogastric tube; Justice Compton thought that Bouvia wished to die, preferably as soon as possible.⁷⁴ Neither the majority nor Justice Compton depicted Bouvia as someone in a relationship with medical caregivers who wished life for Bouvia, an individual described as having an intelligent and lively mind. The court did not consider the continued worth of this relationship and of Bouvia's own life. Evidently that relationship and that life counted for something. Bouvia continued to live out her natural days, not as the court and her lawyers thought, but as Bouvia actually decided.⁷⁵ She did not, as did the court, see the life preserving efforts of her caregivers as "incongruous" or "monstrous", but instead accepted their efforts on her behalf.

It is noteworthy that the court did not actually represent the wishes of Bouvia. Indeed, the court split as to what constitutional rights she could assert: the right to refuse treatment or the right to assistance in dying. The right to refuse treatment gave Bouvia the time to assert her right to life which the right to assistance in dying would not. The presumption that Bouvia wanted to die or refuse to extend her life actually represents a theological/meta-physical construction of the court. It embraces a dim view of a person so utterly dependent upon others, so physically helpless, that the value of living was reduced to zero for Justice Compton, and the value of life-sustaining efforts was reduced to zero for the majority. This is a particular use of the Benthamite and Millian calculus of the ratio of pleasure and pain, deemed applicable to the meaningfulness of one's very continued existence. Indeed, the court made this explicit in its opinion when it argued that: "[Bouvia], as the patient, lying helplessly in bed, unable to care for herself, may consider her existence meaningless. She cannot be faulted for so concluding."⁷⁶ At the same time, they faulted the medical professionals who advocated for her life, and who did not regard it as devoid of all meaning or significance. Furthermore, the court rejected the contention of Bouvia's physi-

74. Did her lawyer know her wishes? Richard S. Scott led an ACLU team representing Elizabeth Bouvia. On August 8, 1992, he killed himself with a gun. He was the first counsel for the Hemlock Society, and said to have been suffering from depression at the time of his death. Ms. Bouvia currently lives in Westwood, California. Gail Diane Cox, *Advocate Takes His Own Life*, NAT'L L. J., Aug. 24, 1992, at 6.

75. *Id.*

76. *Bouvia*, 225 Cal. Rptr. at 304.

cians and the county hospital that forcing them to treat Bouvia for pain, while at the same time allowing her to starve to death, violated the rights of other patients who suffered from chronic illnesses. Indeed, disabled individuals held vigils at the hospital to try to persuade Bouvia to accept the means necessary to sustain her life. Justice Compton, by contrast stated in her opinion, "I can only hope that her [Bouvia's] courage, persistence and example will cause our society to deal realistically with the plight of those unfortunate individuals to whom death beckons as a welcome respite from suffering."⁷⁷ Thus, Justice Compton treated positively the possibility that the example of someone being assisted to end life may serve to encourage others to do the same. At no point did she regard such social contagion as a threat to anyone's right to life or as a threat to the right to have the worth and significance of their lives affirmed rather than doubted or denied. She firmly described Bouvia's right to die as a right that harms no one else, and one that should include a right to enlist the assistance of others, including medical professionals "in making death as painless and quick as possible."⁷⁸ This exemplifies the Millian view of freedom over one's own health and body, without interference by others, provided no one else is harmed:

That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. . . . Over himself, over his own body and mind, the individual is sovereign.⁷⁹

Justice Compton does not include as harm to others the implications of the practice she favored for the perceived worth and future care of the disabled and the chronically ill, though these concerns were being expressed to the public by the disabled and to the court by Bouvia's caregivers. The view of harm to others shared by Justice Compton and the majority of the court does not seem to be tempered by elements in Mill's thought regarding justice as a name for stringent moral rules that are "essentials of human well-being," forbid human beings to hurt one another, make "safe for us the very groundwork of

77. *Id.* at 308.

78. *Id.* at 307.

79. JOHN STUART MILL, *ON LIBERTY*, in *THE PHILOSOPHY OF JOHN STUART MILL* 197 (Marshall Cohen ed., 1961).

our existence," and are "the main element in determining the . . . social feelings of mankind."⁸⁰ The court exhibits what Mary Ann Glendon sees as a "streamlined version of Mill" making up a strong component of American courts' understanding of rights.⁸¹

As we have seen, not only did Justice Compton impute a desire on Bouvia's part to have her life ended, but she expressed the hope that society would be encouraged "to deal realistically," as she put it, with such desires.⁸² She hoped that the law against physician-assisted suicide would be abolished or overturned. Although she did not explicitly regard her advocacy as based on theological premises regarding human nature and the individual's relation to communities, she nevertheless assumed that her view of what rights Bouvia had was somehow theologically neutral or purely secular. Or to put it another way, Justice Compton assumed that the law against physician-assisted suicide imposed itself on individual choice, not its abolition. But that means that Justice Compton does not factor in as "harm to others" what Judge Sopinka in *Rodriguez* calls "undermining the institutions that protect [life]," institutions which, by "upholding the respect for life . . . may discourage those who consider that life is unbearable at a particular moment, or who perceive themselves to be a burden upon others, from committing suicide."⁸³ This is a very different perspective on communal responsibilities by and for its members than the one assumed by Justice Compton.

Whereas Justice Compton did not explicitly address how theology may be involved in her perspective, or those she opposes, Supreme Court Justice Stevens did. In *Cruzan*, Stevens argued that the State of Missouri wrongly took a theological position, as opposed to his secular, theologically neutral view.⁸⁴ If courts adopted the position taken by Stevens, they would view this Millian position as secular, while regarding opposition to it as inappropriately theological or religious. And if Justice Scalia is correct, that would have enormous implications for constitutional law. Justice Scalia argues that Justice Stevens provided a rationale for a constitutional basis for permitting suicide, not just withdrawal of life-sustaining treatment.⁸⁵ Justice Stevens is mistaken about the theological neutrality of his opinion, for it could

80. JOHN STUART MILL, UTILITARIANISM, in THE PHILOSOPHY OF JOHN STUART MILL 391-92, 385 (Marshall Cohen ed., 1961).

81. GLENDON, *supra* note 9, at 72.

82. *Bouvia*, 225 Cal. Rptr. at 308.

83. *Rodriguez v. British Columbia*, 107 D.L.R.4th 342, 390 (1993).

84. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 350 (1990).

85. *Id.* at 299-300.

indeed, unless qualified in ways it is not now, make a case for a constitutional right to assisted suicide and non-interference in decisions to commit suicide.

B. *An Unsuccessful Quest for Theological Neutrality: Justice Stevens in the Cruzan Case*

In 1988, the parents of Nancy Cruzan, who was diagnosed as in a "persistent vegetative state," had been denied by the Supreme Court of Missouri of their request to have nutrition and hydration withdrawn from their daughter.⁸⁶ In 1990, the United States Supreme Court upheld the Missouri law which allows for such refusal of treatment only upon a showing of clear and convincing evidence that the patient wishes to do so. It should be emphasized that neither the Supreme Court of Missouri nor the United States Supreme Court would deny Nancy Cruzan a right to refuse treatment. Indeed, nutrition and hydration was stopped later when more evidence for her wish to cease medical treatment was presented. Justice Stevens' dissenting opinion, however, should briefly be examined because it goes beyond the affirmation of a right to refuse treatment.

Justice Stevens cited what he considered the heart of the Missouri Supreme Court's stated interest in life: an interest in prolonging the lives of individual patients and "an interest in the sanctity of life itself."⁸⁷ Furthermore, the Missouri court's interest in life was unqualified in the sense that it was not conditional on the "quality of life" of any individual patient. As the majority stated, "[t]he state's concern with the sanctity of life rests on the principle that life is precious and worthy of preservation without regard to its quality."⁸⁸ This prompted Justice Stevens to characterize Missouri's policy as one that "treats life as a theoretical abstraction severed from, and indeed opposed to, the person of Nancy Cruzan."⁸⁹ Moreover, Justice Stevens maintained that the Supreme Court's opinion "failed to respect the best interests of the patient."⁹⁰ The Court focused instead on her constitutional right to refuse treatment and whether her wishes to be free of unwanted medical treatment were known.

Justice Stevens laid the foundation for his own view by stressing the highly individual and private nature of any choices

86. *Cruzan v. Harmon*, 760 S.W.2d 408, 411 (Mo. 1988).

87. *Cruzan*, 497 U.S. at 335 (quoting *Cruzan v. Harmon*, 760 S.W.2d 408, 419 (1988)).

88. *Cruzan*, 497 U.S. at 335 n.8.

89. *Id.* at 338.

90. *Id.*

involving one's own death or the possibility of it. He argued that "[t]he sanctity, and individual privacy, of the human body [are] obviously fundamental to liberty."⁹¹ He added that "the constitutional protection for the human body is surely inseparable from concern for the mind and spirit that dwell therein."⁹² In trying to say more about the constitutional significance of death, Justice Stevens asserted that "not much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to individual conscience."⁹³

Justice Scalia cited this last statement in making his case that Justice Stevens explicitly condoned suicide. Justice Scalia described his associate's view as one "that some societies have held, and that our States are free to adopt if they wish," but he also warned that it was "not a view imposed by our constitutional traditions, in which the power of the State to prohibit suicide is unquestionable."⁹⁴ Justice Scalia found humane limits to requiring individuals to preserve their own lives to reside not in the Due Process clause but in the Equal Protection clause, which "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me."⁹⁵ As far as Justice Scalia was concerned, "the federal courts have no business in this field."⁹⁶ He considered the Constitution to be silent on the matter of when treatment is appropriately refused, or whether suicide and assistance in it should be permitted by law.⁹⁷

Justice Stevens had a specific quarrel with the view that Missouri took of life, and wished to rescue Nancy Cruzan from the legal policy of that state as he interpreted it. He accused the Missouri court of trying to define life rather than protect its sanctity. He asserted that the "life" of a person like Cruzan was perhaps not "life" in the sense that the Constitution and Declaration of Independence understood it.⁹⁸ At this point, Justice Stevens also defined life in light of how he understood Nancy Cruzan's situation and he concluded:

In short, there is no reasonable ground for believing that Nancy Beth Cruzan has any *personal* interest in the perpetuation of what the State has decided is her life. As I have

91. *Id.* at 342.

92. *Id.* at 343.

93. *Id.*

94. *Id.* at 300.

95. *Id.*

96. *Id.* at 293.

97. *Id.* at 300.

98. *Id.* at 344-45 (Stevens, J., dissenting).

already suggested it would be possible to hypothesize such an interest on the basis of theological or philosophical conjecture. But even to posit such a basis for the State's action is to condemn it. It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life.⁹⁹

Justice Stevens' contention is quite ironic. He concerned himself with defining and asserting what *personal* interest Cruzan had in her life. That is precisely what the Missouri court wanted to be sure about. That court committed itself not to deciding how the worth of Nancy Cruzan's life, nor what interest others might hypothesize she had, or should have had, in its continuance. They stood ready to affirm her right to refuse treatment in her circumstances, provided that they could determine her own view, not that of others, as to what should be done.

Justice Stevens retorted that the court should have known that she could not possibly have had an interest in her life, given her condition as described in the data before the courts, and that its inability to see this stemmed from its peculiar view of life. This impasse is prompted by Stevens' theological view. Justice Stevens did not presume a continuous drive to preserve one's own life, nor did he see life's worth as continuous, rather its worth as subject to an assessment he saw as a very personal and private matter. In contrast to Justice Stevens, Missouri's Supreme Court assumed a worth to life beyond assessment, which should be undergirded in the State's laws in a manner that encourages the preservation and protection of life and discourages suicide. Refusing treatment was not viewed as compromising such a state interest as long as it was not done in a way that imputed to individuals a view of their condition they did not actually have.

Justice Stevens berated Missouri for pursuing a policy that made an example of Nancy Cruzan and used her life as a symbol of its own purposes.¹⁰⁰ In other words, the Missouri court should have known when someone had no interest in living for "[a] State that seeks to demonstrate its commitment to life may do so by aiding those who are actively struggling for life and health."¹⁰¹ Defenders of Missouri's policy could reply that it aids not only those actively struggling for life and health, but also those who are flagging in that struggle, or may be ready to give up that struggle needlessly and tragically. In response to such a

99. *Id.* at 350.

100. *Id.* at 356.

101. *Id.* at 357.

defense, Justice Stevens argued that "the only apparent *secular* basis for the State's interest in life is the policy's persuasive impact upon people other than Nancy and her family."¹⁰² Since Justice Stevens claimed that Cruzan could not possibly be viewed as having an interest in her life except in an abstract or theological sense, and that Missouri had no interest in the life of those not actively seeking life and health, he had denied, at least in theory, any *secular* basis for a law against assisted suicide. Missouri's law was, after all, prepared to honor an individual patient's right to refuse medical treatment; it was not prepared to assert and honor a right to have one's life ended by an act intended to do so immediately and for that purpose alone. Therefore, a policy such as Missouri's did apply to Cruzan and her family, as well as all others in that state. Whether advertently or inadvertently, Justice Stevens saw no secular basis for such a policy. Additionally, he rejected Missouri's contention that "where issues invoke the concerns of medicine, ethics, morality, philosophy and law," representative assemblies are the appropriate bodies to change the policy of erring on the side of life.¹⁰³ Unless further qualified, Justice Stevens would have had the United States Supreme Court recognize a constitutional right to be free of any state interference in the decisions of those who have lost all interest in continuing to live. When, if ever, the state may or should try to prevent a suicide becomes at the very least a matter of interpreting the interests of the individuals in question. Justice Stevens regarded this view as secular, and Missouri's view as theological, but he was mistaken.

Adopting his view would require that the Court define life, which he believed Missouri should not do. In the view of Justice Stevens, human beings are understood in the Millian way, that is, as having by their nature no abiding interest in preserving their own lives. In defending that theological anthropology, Justice Stevens directly opposed the view of Hobbes and Locke that human beings have a continuous interest in preserving their own lives to the extent where suicide is interpreted as either an irrational act, or that of a mentally distressed individual. He is also opposing the view found in Jewish and Christian traditions that the worth of individual lives is continuous and incalculable, assumptions directly challenged by a deliberately planned act of suicide or assistance in one.

The Millian, Hobbesian, Lockean, Jewish, and Christian traditions are present in American courts as our analysis has illus-

102. *Id.* at 350.

103. *Id.* at 352 n.23.

trated and revealed. If Justice Stevens had explicitly qualified his reasoning in ways that made it clear that he was advocating a constitutional right to the refusal of treatment and nothing more, the consensus among these traditions would remain in place. But Justice Stevens does reason in a way that directly attacks the theological anthropologies of traditions other than his own. He can, therefore, be said to be advocating the imposition of his own sectarian doctrine of human nature on the people and their legislative bodies in the name of an alleged constitutional right that theoretically embraces assistance in suicide. The Millian formulations of Stevens, privatizing decisions about how and when one's life should end, led the Canadian Justice McLaughlin¹⁰⁴ and the American Justices Rothstein¹⁰⁵ and Wright¹⁰⁶ to advocate the unconstitutionality of laws against assisting in a suicide.

The theological conflict evoked by a Millian justification for a right to die that includes assisted suicide expresses a basis for law that evokes or invites theological conflict. But what about laws that forbid assisted suicide? Is it possible to articulate a non-sectarian basis for upholding them as constitutional?

IV. A SECULAR, NON-SECTARIAN BASIS FOR LAWS AGAINST ASSISTED SUICIDE

On what basis, then, can a legislature pass laws to protect human life, and in particular, to try to prevent suicide? Consider what is logically and functionally necessary for individual human beings and their communities to exist and persist. Human beings can only come into being if they have proclivities to procreate and nurture and inhibitions against killing. Human beings and their communities can only continue to exist if these proclivities and inhibitions exist and continue to exist. Procreation, nurture, and the protection of human life are cooperative, communal acts, and can only be sustained over time by cooperative acts. Knowledge, also essential to sustaining human life and well being, is not only dependent on discovering what is true, but on sufficient proclivities to tell the truth, and sufficient inhibitions against lying.

104. *Rodriguez v. British Columbia*, 107 D.L.R.4th 342 (1993) (McLaughlin, J., dissenting).

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

106. *Compassion in Dying v. Washington*, No. 94-35534, 1995 WL94679 (9th Cir. Mar. 9, 1995) (Wright, J., dissenting).

These proclivities and inhibitions are at once requisites of communal and individual existence and the basis of moral rights and rights enforced by law. Fraud and breach of contracts are lies punishable by law. Because of our proclivities and inhibitions we expect to be able to rely in business on veracity and on agreements. Yet these expectations are sometimes not met, and such failures in responsibility can cause us individual losses, as well as undermine the very possibility of peaceful and successful commerce communally. As such, we support by law a right to have our expectations met, or to be compensated when they are not.

A similar approach is evident in our support of the nurture and protection of human life. American and European legal systems recognize and enforce a right to be nurtured,¹⁰⁷ and laws against killing in a wide range of circumstances. Unless these proclivities to nurture and inhibitions against killing are sufficiently strong, such laws would not ultimately be enforceable. And despite all the ways in which people do die, whether by natural disaster, disease, accidents, failures in nurture, warfare, or criminal killings, many communities exist and persist across the globe, and enough people are nurtured and protected that some among us worry that there are too many people on the planet, now or in the future. Procreation, nurture, and the protection of life are strong and real human tendencies, whatever else may be true.¹⁰⁸

But understandably, individuals and communities are concerned about whether their institutions and laws will strengthen or weaken the proclivities and inhibitions requisite to the existence and sustenance of individual and communal life. It is exactly that concern which Judge Sopinka of the Canadian Supreme Court expressed in defense of the constitutionality of the Canadian law against assisted suicide when he asserted that "to the extent that there is a consensus, it is that human life must be respected and we must be careful not to undermine the institutions that protect it. . . ."¹⁰⁹ Our inhibitions against killing include inhibitions against killing ourselves. Judge Sopinka rightly sees the role of the Canadian law against assisted suicide as directly addressing those inhibitions when he asserted that "In

107. For example, laws governing divorce settlements require the non-custodial parent to contribute to the custodial parent's financial support of the children that resulted from their former marriage. See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* (1978).

108. See also DYCK, *supra* note 22, at 123-47.

109. Rodriguez, 107 D.L.R.4th at 70.

upholding the respect for life [the statute] may discourage those who consider that life is unbearable at a particular moment, or who perceive themselves to be a burden upon others, from committing suicide."¹¹⁰ One could add that such a law also encourages those who can and will act to prevent a suicide.

The concern over what happens when a legal system permits individuals to be assisted by physicians deliberately to end their lives cannot be dismissed as based on mere speculation. In the Netherlands, physicians are currently allowed to comply with requests to assist patients in suicides or to immediately end the lives of patients (euthanasia). The results have been carefully documented by a government sponsored study.¹¹¹ Although all deliberate acts to end life are supposed to be based on persistent requests by patients, 1,000 annual instances of active involuntary euthanasia have occurred,¹¹² in addition to 2,300 instances of voluntary euthanasia and 400 instances of physician-assisted suicide.¹¹³ There were also 13,511 annual cases of intentionally inducing death: 4,941 cases of deliberate excessive doses of morphine¹¹⁴ and 8,570 cases of withholding or withdrawing life-prolonging interventions for the sake of causing death.¹¹⁵ These intentional inducements of death were done without the consent of the patients involved.

Why do physicians do this? They speak of the "low quality of life" of their patients, the impossibility of improvement, and of the inability of families to take it anymore. Missouri's insistence that there should be clear evidence as to what patients think about discontinuing treatment, when seen in the context of current practices in the Netherlands, would appear to be an essential effort both to enhance the freedom and to protect the lives of individual patients. Perhaps Missouri's interest in life is not as abstract and impersonal as depicted by Justice Stevens. The inhibitions against killing and deliberately hastening death among physicians may well be weakened by the legal permission to end life. In any event, the inhibitions of Dutch physicians against ending life are presently too weak, not even strong enough to insist that patients be given the opportunity to continue their lives if they so choose. Having life is also a requisite of having freedom. There is a liberty interest in having one's life pro-

110. *Id.*

111. Richard Fenigsen, *The Report of the Dutch Governmental Committee on Euthanasia*, 7 ISS. IN L. & MED. 339, 339-44 (1991).

112. *Id.* at 340.

113. *Id.*

114. *Id.*

115. *Id.*

tected, and to be able to defend it against those who would end it, however well intended any effort to end life may be.¹¹⁶

There is also another liberty interest that is violated when there are no laws against assisted suicide. In the practice of medicine there are and will be false diagnoses and prognoses. It follows that some patients, if legally granted a right to do so, will ask to have their lives ended because they mistakenly believe that their lives will soon end, or will be of a very low quality. For some of these patients there will never be an opportunity to discover that they might have lived and lived well. This is, in part, what it means to err on the side of life, as do laws against assisted suicide. We can predict such unfortunate deaths in the absence of laws against suicide. We can also predict deaths that are less than voluntary because of the pressures to save time and money. In this area, one can also predict that economic and racial discrimination will not be totally absent from the settings in which irreversible decisions about hastening death would be made.¹¹⁷ Suicides are also copied and that undermines liberty interests as well.

In the brief compass of this essay, it would take us too far afield to lay out all the arguments that merit attention in deciding policies related to assisted suicide. Certainly no policy should be devoid of positive measures to reduce pain and suffering. There should be the freedom for patients to choose comfort interventions and reject interventions that interfere with such measures. The right to refuse medical treatment is an essential ingredient of individual freedom, but also of aiding efforts to relieve and/or end possible sources of suffering. How to live while dying should include choices about medical interventions as it does when we are not dying. We do have a broad consensus, encompassing Millian, Hobbesian, Jewish and Christian traditions, that choices that reject life-sustaining treatment do not necessarily compromise the regard for life, nor symbolize, as would actions deliberately ending our lives, that we consider our lives of little or no worth. This consensus breaks down when

116. *Compassion in Dying v. Washington*, No. 94-35534, 1995 WL 94679 (9th Cir. Mar. 9, 1995). Both Justice Noonan in his majority decision and Justice O'Scannlian, in his concurrence in upholding the constitutionality of Washington State's law against assisted suicide, take precisely this view of the liberty interest at stake, and also point to the problems raised by practices in the Netherlands, including the role of physicians as killers.

117. This represents another argument present in the judgment that Washington State's law against assisted suicide is constitutional.

what Glendon called "a streamlined version of Mill"¹¹⁸ is made the basis for deciding the constitutionality of assisted suicide. It is a version of Mill that neglects Mill's assertion of social rules that protect "the very groundwork of our existence" and help determine our "social feelings" as human beings.¹¹⁹

Patients and physicians also need more knowledge of the enormous gains in our ability to control pain. These are all important aspects of policy in the care of those who may think that immediate death is the only or best option for coping with severe illnesses. For a more detailed examination of such issues, I refer the reader elsewhere.¹²⁰

What this essay offers as reasons for maintaining laws against assisted suicide is merely a sketch of a framework. The framework is developed by asking about what human proclivities and inhibitions are logically and functionally identifiable as those without which human life and communities could not come to be, and to be sustained. One can then ask what laws are essential to try to ensure the strength and persistence of these requisites of community and the human rights they function to render actual and attainable. All of this has been more fully discussed and elaborated elsewhere.¹²¹ Hopefully, enough has been said about the requisites of community to make sense of the long-standing traditions that have supported laws against assisted suicide and the shared moral propensities on which they have depended and may yet depend. Hopefully, enough has been said to indicate how these same requisites of community support the constitutionality of laws against suicide.

118. GLENDON, *supra* note 9, at 72. The reader should note that it is this "streamlined version of Mill" that also influences justices who resort to it, to wipe out any moral and legal distinction between refusing treatment and being assisted in a suicide. The failure of the lower court to make this distinction is noted by the Court of Appeals that upheld the constitutionality of Washington State's law against assisted suicide. *See Compassion in Dying v. Washington*, No. 94-355534, 1995 WL 94679 (9th Cir. Mar. 9, 1995).

119. MILL, *supra* note 79, at 197.

120. DYCK, *supra*, note 22, at 286-304.

121. *Id.* *See also* R.M. VEATCH, *DEATH, DYING AND THE BIOLOGICAL REVOLUTION* (1989); MARGARET P. BATTIN, *THE LAST WORST DEATH: ESSAYS IN BIOETHICS ON THE END OF LIFE* (1994).

