EUTHANASIA RECONSIDERED — THE CHOICE OF DEATH AS AN ASPECT OF THE RIGHT OF PRIVACY

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In recent years, successive holdings by the Supreme Court of the United States have drawn a protective mantle of privacy about certain decisions that fundamentally affect the human life cycle.[1] This cycle may be viewed as a kind of trajectory, whose peak between birth and death represents the capacity for productivity and independent action. The Court has included many of the choices that determine the shape of that trajectory within the right of privacy. Thus, it has been held that decisions regarding marriage,[2] contraception,[3] procreation,[4] and the raising and educating of children[5] are protected. One critical choice that has, so far, escaped inclusion in the list of protected decisions is the choice of the terminus of that trajectory—the moment and manner of one's death.[6] Today, suicide is treated as a crime in only a small minority of American jurisdictions.[7] Still, aiding and abetting suicide is

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1. *See* Roe v. Wade, 410 U.S. 113, 211-13 (1973) (Douglas, J., concurring); Wheeler & Kovar, *Roe v. Wade: The Right of Privacy Revisited*, 21 KAN. L. REV. 527, 545 (1973); Note, *Roe and Paris: Does Privacy Have a Principle?* 26 STAN. L. REV. 1161, 1174 (1974); *cf.* Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 32-43 (1973).

2. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

3. *See* Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

4. *See* Roe v. Wade, 410 U.S. 113 (1973); Skinner v. Oklahoma, 316 U.S. 535 (1942).

5. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

6. Commonwealth v. Noxon, 319 Mass. 495, 66 N.E.2d 814 (1946); State v. Zygmaniak, No. 1197-72 (Super. Ct., Monmouth County, N.J., Oct. 15, 1973), *noted in* Comment, *The Right to Die*, 10 CALIF. WEST. L. REV. 613 (1974); Sanders, *Euthanasia: None Dare Call It Murder*, 60 J. CRIM. L.C. & P.S. 351, 351-55 (1969); Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U. PA. L. REV. 350 (1950).

7. R. PERKINS, CRIMINAL LAW 82-85 (2d ed. 1969); *see* Commonwealth v. Mink, 123 Mass. 422, 429 (1877); State v. Carney, 69 N.J.L. 478, 480, 55 A. 44, 45 (1903).

often punished as a felony,[8] and affirmative acts, even the acts of a physician in response to the requests of a competent, terminally ill patient, designed to hasten the arrival of death, constitute the crime of first-degree murder.[9] The Supreme Court has yet to review a case involving euthanasia or mercy killing.

Observers have attributed this judicial and legislative neglect of euthanasia, at least in part, to the manner in which thoughts of death raise deeply internalized psychological resistances. Unlike marriage, sex, and childbirth, death is an intensely anxiety-producing subject.[10] Its contemplation would be easier if there were more opportunities in our society to observe death. We would then appreciate, in more than a merely abstract way, that those who want to die often want to do so with a fervor approaching desperation,[11] may have every reason for wanting to do so,[12] yet may lack the means to accomplish their purpose unaided.[13] The pain of the terminal patient, like the plight of the would-be suicide whose life has become an intolerable burden, is foreign to the

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8. R. PERKINS, *supra* note 7, at 84-85; *see* Burnett v. People, 204 Ill. 208, 68 N.E. 505 (1903); Blackburn v. State, 23 Ohio St. 146, 163 (1872); Aven v. State, 102 Tex. Crim. 478, 277 S.W. 1080 (1925).

9. W. CURRAN & E. SHAPIRO, LAW, MEDICINE, AND FORENSIC SCIENCE 130 (1970). It has been suggested that informal devices, such as "jury nullification" and a conspiracy of silence within the medical profession, operate to protect the patient and physician who decide to resort to euthanasia. Kutner, *Due Process of Euthanasia: The Living Will, A Proposal*, 44 IND. L.J. 539, 541 (1968). Still, there have been numerous prosecutions and some convictions, of physicians and others responsible for mercy killings. *See* cases collected in Comment, *supra* note 6, at 614-16. There seem to have been somewhat more prosecutions and convictions in England than the United States, Parry-Jones, *Criminal Law and Complicity in Suicide and Attempted Suicide*, 13 MED. SCI. & L. 110 (1973), possibly as a result of the intense publicity engendered by the very active English Euthanasia Society.

Although empirical data is lacking, it seems likely that the threat of penal and professional sanctions operates as a deterrent to the physician, particularly in cases where the family and the physician have not developed a long term relationship of trust and respect. *See* Comment, *supra* note 6, at 615-16.

If a constitutionally-based right to die is recognized, that right would immunize a physician who, acting at the direction of an individual entitled to exercise the right, administered death-dealing drugs. Williams v. Preiser, 479 F.2d 337 (2d Cir. 1974); Vuitch v. Hardy, 473 F.2d 1370 (4th Cir. 1973).

10. *See, e.g.*, D. MAGUIRE, DEATH BY CHOICE 1-2 (1974); Morris, *Voluntary Euthanasia*, 45 WASH. L. REV. 239, 239-40 (1970); Williams, *Euthanasia and Abortion*, 38 U. COLO. L. REV. 178 (1966). Maguire, *supra*, suggests that traditional attitudes about death as a fearsome subject, to be avoided in polite discourse, may be changing. Sanders' discussion, *supra* note 6, like that of many other commentators on euthanasia, is directed primarily to the case of the terminally ill patient. The scope of most commentaries appears to be so limited because they are directed to legislatures as a policy matter. Although this Article focuses on the aged and terminally ill, the constitutional principles developed contemplate no such limitation, in principle, and should be equally applicable to the healthy and the ill.

11. D. MAGUIRE, *supra* note 10, at 43, observes that the elderly often fear the prolongation of dying more than they fear death itself.

12. For a description of the despair and hopelessness experienced by terminally ill patients denied humane assistance in hastening the arrival of death, see *id.* at 7-48.

13. Morris, *supra* note 10, at 244. Healthy persons can, of course, commit suicide by ingesting an overdose of drugs or leaping off a bridge. For the seriously incapacitated, however, this escape may be physically impossible. *See* cases cited in D. MAGUIRE, *supra* note 10, at 13-14, 23-24.

experience of most persons, however.[14] While most legislators and judges have experienced marriage, the birth of children, and the raising of offspring, few have personally witnessed the despair and helplessness of an aged, sick loved one whose greatest desire is to end his misery.[15] This may explain, but cannot justify, the lack of attention devoted to the civil liberties of persons who wish to die. Logical consistency, not to mention simple compassion, demand that this oversight be reconsidered.

This Article begins with an evaluation of the thesis that decisions relating to death, like those relating to birth, sex, and marriage, are deserving of constitutional protection by virtue of the right of privacy.[16] Concluding that they are, the Article ventures an analysis of the parameters of such a right. Since privacy, like other individual rights protected by the Constitution, is a limited rather than an absolute right, and is thus capable of being overridden by state interests,[17] a number of interests which have been asserted against a right to die are evaluated.[18] Although it is concluded that many of these are insufficient to meet the

14. Moore, *The Case of Voluntary Euthanasia*, 42 U.M.K.C.L. REV. 327, 330 (1974). For a description of the manner in which advancing medical technology has outstripped our ability to deal with death, see Stevens, *Do Patients Have Rights in the Timing of Their Own Deaths?*, 8 NEW ENGLAND L. REV. 181, 181-82 (1974). Today, life can be maintained almost indefinitely if the patient is willing to endure the discomfort and expense of an existence dependent on mechanical devices.

15. *See* E. KUHBLER-ROSS, ON DEATH AND DYING 5-7 (1969); Moore, *supra* note 14, at 330.

16. Although some commentators have hinted that the decision to die may be protected by the right of privacy, Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228, 239-41 (1973); Comment, *supra* note 6, at 620-22, at this writing none have offered a satisfactory analytical rationale for extending the right to euthanasia nor suggested the logical contours of such a right.

There are numerous ways in which the question of voluntary euthanasia could arise in court. It could be raised as a defense in a prosecution of a physician for the homicide of his patient, *see* Roe v. Wade, 410 U.S. 113, 120, 127 (1973), as a direct challenge to the constitutionality of denying euthanasia in a declaratory judgment action brought by a patient, *see* Roe v. Wade, *supra* at 120, in a wrongful death action by the survivors against the physician, or even obliquely in a products liability action for wrongful death. *Cf.* Zygmaniak v. Kawasaki Motors Corp., 131 N.J. Super. 403, 408-11, 330 A.2d. 56, 59-61 (1974) (refusal to rule as a matter of law that requested shotgun killing of severely injured motorcycle accident victim was so unforseeable as to relieve defendant of liability). For a recent opinion that bases the right to refuse medical treatment, even though the refusal is likely to result in death, on the right of privacy enunciated in *Roe*, see *In re* Yetter, 62 Pa. D. & C.2d 619 (C.P. Northampton County, Pa. 1973).

17. Roe v. Wade, 410 U.S. 113, 154 (1973).

18. A few recent commentaries have suggested that a purely utilitarian analysis of the impacts or interests involved in technological or bio-ethical decisionmaking may prove inadequate to take account of all relevant considerations. *See* Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205 (1974); Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617 (1972). A sequel to this Article, now in preparation, explores a number of arguments, which could be raised in connection with euthanasia statutes, that are both nonreligious and nonutilitarian. The present analysis confines itself to consideration of those interests broadly categorized as utilitarian, which courts have traditionally considered to be implicated in due process or equal protection analysis. *See* Roe v. Wade, 410 U.S. 113, 147-64 (1973); *In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

compelling interest standard applied in recent privacy decisions, others appear more substantial. These latter interests may, in certain circumstances, circumscribe the interest of the person who elects death.

DYING AND PRIVACY: THE THRESHOLD ARGUMENT

In assessing the nature of the privacy interest underlying the choice to die, the most illuminating judicial treatment of an analogous interest is found in the abortion cases, *Roe v. Wade*[19] and *Doe v. Bolton.*[20] Although these decisions dealt with the interest of a pregnant woman in putting an end to the development of her fetus, rather than the interest of an individual in ending his own life, the generality of the language employed and the many parallels between the two situations suggest that their rationale can be extended to the latter case as well.

Roe reaffirms privacy's protection of individual autonomy in intimate and momentous matters.[21] The Court prepared for its conclusion that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"[22] by citing a series of cases which found a constitutionally protected interest in decisions relating to procreation, marriage, and family life.[23] The emphasis in these cases on the intimacy and importance of such matters[24] suggests that the right to privacy extends to other important and intimate matters. *Eisenstadt v. Baird,*[25] in particular, indicates that marriage, procreation, and family life are merely illustrative of the constitutionally protected zones of privacy. "If the right of privacy means anything," the Court declared, "it is the right . . . to be free from unwarranted governmental intrusion into matters *so fundamentally affecting a person* as the decision whether to bear or beget a child."[26]

The analysis used in *Roe* to show that a woman is so fundamentally affected by the decision to terminate her pregnancy that the right of privacy protects her autonomy in making that decision applies with

19. 410 U.S. 113 (1973).
20. 410 U.S. 179 (1973).
21. *See* Note, *supra* note 1, at 1166. In light of the justly criticized opacity of the Court's reasoning in *Roe, see* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 YALE L.J. 920 (1973), the principles underlying the decision must be elicited by eliminating the hypotheses which explain the earlier contraception cases but are inconsistent with *Roe.* Performing this examination, one writer convincingly eliminates all but the view that the right of privacy protects individual autonomy in important matters. *See* Note, *supra* note 1, at 1166.
22. 410 U.S. at 153.
23. Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).
24. *See, e.g.,* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965).
25. 405 U.S. 438 (1972).
26. *Id.* at 453 (emphasis added).

equal force to the decision to die. Like the decision to abort, the decision to obtain a merciful injection of lethal drugs is a highly personal decision involving the individual and his physician.[27] The significance, in both cases, of the involvement of the physician is not the traditional privacy of the doctor-patient relationship, for other professional relationships are traditionally but not constitutionally private.[28] Rather, it is the physician's special competence to advise the patient of the state of his closest physical, mental, and social associate[29]—his own body. Indeed, the decision to die is even more intimate than the decision to abort since no potentially independent entity is destroyed.[30]

Moreover, as with abortion prior to *Roe,* the present prohibition of euthanasia is in substantial part predicated upon judgments that are explicitly recognized as private by the Constitution.[31] The first amendment commits religious choices to individual discretion,[32] yet the proscription of euthanasia and abortion is based on ethical and religious beliefs concerning the sanctity of life.[33] That the dispute over the propriety of mercy killing is waged with reference to such doctrine is further evidence of the intimacy of the choices involved.[34]

The decision to terminate a pregnancy and the decision to terminate one's own life share more than intimacy. The consequences which make the abortion decision a crucial choice for the individual precisely parallel those which make euthanasia momentous. Like the mother compelled to bear an unwanted child, the individual forced to continue a pain-racked existence suffers severe physical and psychological detriments[35] and faces the prospect of a "distressful life and future."[36] Like the mother forced to raise a child whose care she does not choose to assume, the individual who is compelled to continue living may be required to exhaust his personal fortune in an undertaking not of his own choosing.[37] Indeed, requiring a person to remain alive who finds

27. *See generally* Roe v. Wade, 410 U.S. 113, 164 (1973); *In re* Yetter, 62 Pa. D. & C.2d 619, 623 (C.P. Northampton County, Pa. 1973).

28. *Cf.* Note, *supra* note 14, at 1178-79.

29. "Intimate: . . . 2: marked by a very close physical, mental, or social association. . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1184 (1963).

30. *Cf.* Roe v. Wade, 410 U.S. 113, 154 (1973).

31. The close connection between first amendment guarantees and the right of privacy is apparent from the prominence of that amendment in the privacy line of cases. *See, e.g.,* Roe v. Wade, 410 U.S. 113, 152 (1973); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965).

32. Epperson v. Arkansas, 393 U.S. 97 (1968); McGowan v. Maryland, 366 U.S. 420 (1961).

33. *See, e.g.,* Hassett, *Freedom and Order Before God: A Catholic View,* 31 N.Y.U.L. REV. 1170, 1184-88 (1956); Williams, *supra* note 10, at 180; Comment, *Legal Aspects of Euthanasia,* 36 ALBANY L. REV. 674, 675 (1972).

34. *See* United States v. Vuitch, 402 U.S. 62, 78 (1971) (Douglas, J., dissenting in part).

35. *See* text & notes 11-14 *supra.*

36. Roe v. Wade, 410 U.S. 113, 153 (1973).

37. *See generally Euthanasia Questions Stir New Debate,* MEDICAL WORLD NEWS,

life distasteful and a burden, even more than a prohibition of abortion, subordinates that person's wishes to societal notions of life's purpose and comes very close to offending the values sought to be protected by the 13th amendment.[38]

The intimacy and importance of the decision to select the timing of one's death thus provide a doctrinal basis for concluding that the right of privacy protects this decision.[39] The parallel between abortion and euthanasia, however, extends beyond constitutional doctrine to the social ramifications of present mercy-killing law. Like the prohibition of abortion, current law barring euthanasia subordinates tangible social needs to the moral convictions of some. The overtones of "population growth, pollution, [and] poverty"[40] which were present in the abortion controversy have companions in the euthanasia issue. In light of the shortage and attendant high cost of medical facilities, the use of these facilities to compel the unwilling to live misallocates scarce resources.[41] Moreover, the prohibition of mercy killing forces individuals to deplete personal financial resources which they might reasonably prefer to distribute to loved ones rather than to the medical profession.[42] Like the abortion and birth control cases, therefore, the question whether the right of privacy confers a right to die implicates moral values given the force of law at a high social cost.

Sept. 14, 1973, at 78 (suggesting the possibility that health care facilities may incur liability for postponing death unreasonably by extensive, extraordinary measures, over the objections of the patient and his family).

38. *See* Tribe, *supra* note 1, at 39-40; *cf.* Note, *Asexual Reproduction and Genetic Engineering: A Constitutional Assessment of the Technology of Cloning*, 47 S. CAL. L. REV. 476, 516-28 (1974). Support for this argument may be found in the anti-slavery clause of the 13th amendment. The argument is strengthened by reports that physicians have succeeded in maintaining the body functions of individuals for up to 2½ years, even though the patients had sunk into an irreversible coma. Capron & Kass, *A Statutory Definition of the Standard for Determining Human Death: An Appraisal and a Proposal*, 121 U. PA. L. REV. 87, 92 (1972).

39. Even apart from a showing of momentousness and intimacy, some courts have founded a right to refuse life-preserving medical treatment, and thereby invite death, on a broader principle—the right to do with one's body what one pleases. Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914), *overruled on other grounds*, Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957); *see* Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, *rehearing denied*, 187 Kan. 186, 354 P.2d 670 (1960). In his concurring opinion in *Roe v. Wade*, Justice Douglas urged that the right of privacy involves a right to make basic life decisions and to care for one's own health and person free from restraint, 410 U.S. at 211-14, but the majority was not ready to go so far. *Id.* at 154. Commentators have urged that such a right would be consistent with classic libertarian writing. Note, *Informed Consent and the Dying Patient*, 83 YALE L.J. 1632, 1643 (1974). *See also* Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974).

40. Roe v. Wade, 410 U.S. 113, 116 (1973).

41. *See generally* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 275-76 (1974) (Douglas, J., separate opinion).

42. For a vivid example of heroic medical measures applied in a losing cause, see Morris, *supra* note 10, at 248 n.23.

Apart from the interest in not depleting their estates in a losing cause, patients may prefer that their deaths not be prolonged unduly because of their altruistic desire to donate healthy organs to persons in need of transplants.

If, as urged above, the rationale of *Roe* suggests a prima facie right to select the moment of one's death,[43] a number of issues remain open. Can the right be limited by countervailing state interest? If so, under what circumstances can the right be exercised? Answers to these questions require a closer examination of the reasoning employed by the Court in the abortion decisions.[44]

In *Roe*, the Court, after taking notice of the intimate quality and momentous effect of a woman's decision to bear or not to bear a child,[45] considered a number of state interests that had been urged as weighing against her free exercise of the right to an abortion. Some interests, such as deterring sexual immorality, were rejected immediately as constitutionally improper state purposes.[46] Others, such as the interests in regulating medical procedures[47] and in protecting the potential life of the fetus,[48] were held to be more substantial and were accommodated in the final balance struck by the opinion.[49] In each case, the Court closely examined the cognizable interest in light of its impact on both the organic pattern of the growing fetus and the pregnant woman.[50] Since abortion prior to the end of the first trimester is safer than natural childbirth, the Court concluded that the state's interest in regulating surgical procedures was insufficient to forbid abortion prior to that time.[51] By the end of the first trimester, however, the balance tips; natural childbirth becomes safer than surgical intervention.[52] Thus, the Court held that from this point on, the state may legitimately regulate the place and manner in which abortions are performed.[53] As to the state's interest in protecting the fetus, the Court concluded that this interest becomes compelling and therefore limits free choice only upon the end of the second trimester of pregnancy, when the fetus becomes viable.[54]

As with abortion, a number of interests have been advanced to

43. *Cf.* Ely, *supra* note 21, at 935-36, on the analogous conclusion reached by the Court in *Roe* with respect to a woman's choice to have an abortion.

44. For an excellent analysis of the step-by-step procedure involved in judicially assessing the merit of a privacy-based claim, see Comment, *The Right to Abortion: Expansion of the Right to Privacy Through the Fourteenth Amendment*, 19 CATHOLIC LAW. 36 (1974). *See also* Note, *supra* note 1.

45. 410 U.S. at 153.

46. *Id.* at 148; *see* Eisenstadt v. Baird, 405 U.S. 438, 448 (1972).

47. 410 U.S. at 163; *see* Buck v. Bell, 274 U.S. 200 (1927); Jacobson v. Massachusetts, 197 U.S. 11 (1905). *See also* Doe v. Bolton, 410 U.S. 179 (1973).

48. 410 U.S. at 163-64.

49. *Id.* at 162-64.

50. *Id.* at 149-50, 155, 164.

51. *Id.* at 163-64.

52. *Id.*

53. The regulation, however, must be such as "reasonably relates to the preservation and protection of maternal health." *Id.* at 163.

54. From this point on, abortions may be prohibited "except when . . . necessary to preserve the life or health of the mother." *Id.* at 164.

justify society's refusal to permit its members to select the timing of their own deaths. Some of the more common of these will be considered in the next section. At this point, the lesson to be drawn from the abortion cases is that important personal decisions, once subsumed under the right of privacy, are not automatically defeated by a showing of any colorable state interest. The state interest must be substantial[55] and must be closely tailored to the furtherance of that interest.[56] Blanket prohibitions, like the abortion statute invalidated in *Roe*,[57] are initially suspect. Nevertheless, an emerging right is unlikely to be absolute when the state retains important interests in limiting its exercise. In light of the close parallel between abortion and euthanasia,[58] it should be expected that the instances calling for limitation of the right to choose death will bear a close relationship to the stage of human life at which the interests justifying governmental intervention appear.

THE QUALIFIED RIGHT TO DIE

Among the interests that could be asserted in opposition to the right to die are: (1) that the state has a duty to protect the lives of persons;[59] (2) that since death is an irreversible process, the risks to both the patient[60] and his physician[61] of a hasty or ill-informed decision are unacceptable; (3) that permitting individuals to die who are under

55. Roe v. Wade, 410 U.S. 113, 154-55 (1973); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

56. "Where certain fundamental rights are involved . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake . . . ." Roe v. Wade, 410 U.S. at 155. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307-08 (1940).

57. The statute in question had excepted from criminality "only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved . . ." 410 U.S. at 164.

58. See text & notes 19-42 *supra* and 127-30 *infra*.

59. *See* Roe v. Wade, 410 U.S. 113, 156-57 (1973); J. GOULD & LORD CRAIGMYLE, YOUR DEATH WARRANT?: THE IMPLICATIONS OF EUTHANASIA 1-2 (1971). *See also In re* Quinlan, No. C-201-75 (Sup. Ct., Ch. Div., Morris County, N.J., Nov. 10, 1975), in which the trial court refused to grant the request of the father of an irreversibly comatose 21-year-old woman to be permitted to discontinue certain medical treatment when such discontinuation would have resulted in her death. The father had argued that the right of privacy, among others, protected his decision to terminate his daughter's treatment. The court refused to grant his request. *In re* Yetter, 62 Pa. D. & C.2d 619 (C.P. Northhampton County, Pa. 1973) (see discussion note 16 *supra* and text & note 81 *infra*) was distinguished on the ground that the Quinlan woman was comatose, hence incapable of making her own decisions, and the court's traditional role of acting in the interest of an incompetent precluded giving effect to the father's choice. *In re* Quinlan, *supra* at 36-38.

60. Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 MINN. L. REV. 969, 983 (1958), *citing* Lazslo, Colmer, Silver & Standard, *Errors in Diagnosis and Management of Cancer*, 33 ANNALS OF INTERNAL MEDICINE 670 (1950).

61. *See In re* President & Director of Georgetown College, Inc., 331 F.2d 1000, 1009 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

medical treatment violates the physician's ethical code, his right to practice his profession, and the Hippocratic oath:[62] (4) that permitting individuals to choose the moment of their deaths will undermine respect for the sanctity of life[63] by usurping a decision only God should make;[64] (5) that recognition of such a right will serve as an "entering wedge" for compulsory elimination of the aged, the unproductive, and the genetically defective;[65] (6) that society depends on the productivity and hence the continued existence of its members;[66] and (7) that the death of some will leave dependents destitute and unable to care for themselves.[67]

Duty to Protect Life

The argument for a duty to protect life derives initial plausibility from the significance attached to personhood in *Roe*. The Court was required to consider whether a fetus is a person within the meaning of the 14th amendment because the state's interest in protecting the life of a 14th amendment person would overshadow the mother's privacy interest.[68] Although the Court's reasoning was not made explicit, it apparently assumed that if fetal life is protected from state action by the due process clause of the 14th amendment, then a compelling state interest in protecting it from private action would thereby be established. Since one whose election of death is encompassed within the right of privacy would be a constitutional person,[69] a similarly compelling state interest in preserving his life would appear.

This argument gains its appeal by focusing on one important distinction between euthanasia and abortion while ignoring another. To

62. *See* Cantor, *supra* note 16, at 250; Morrison, *Dying*, SCIENTIFIC AM., Sept. 1973, at 55. *See generally* Roe v. Wade, 410 U.S. 113, 130-32, 141-46 (1973); *id.* at 219-20 (Douglas, J., concurring); *In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1009 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); United States v. George, 239 F. Supp. 752, 754 (D. Conn. 1965).

63. Devlin, *Morals and Contemporary Social Reality*, in P. DEVLIN, THE ENFORCEMENT OF MORALS 124 (1965); Hassett, *supra* note 33, at 1186; *see* Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring).

64. *See* Fletcher, *Ethics and Euthanasia*, 73 AM. J. NURSING 670, 673-75 (1973).

65. J. GOULD & LORD CRAIGMYLE, *supra* note 59, at 129; Kamisar, *supra* note 60, at 1026, 1030-41. *See generally* D. MAGUIRE, *supra* note 10, at 88, 132-36; Louisell, *Abortion, the Practice of Medicine, and the Due Process of Law*, 16 U.C.L.A.L. REV. 233, 249 (1969).

66. Note, *Unauthorized Rendition of Lifesaving Medical Treatment*, 53 CALIF. L. REV. 860, 862 (1965); *cf.* Note, *supra* note 39, at 1660. *See also* Bisenius v. Karns, 42 Wis. 2d 42, 52, 165 N.W.2d 377, 382, *appeal dismissed*, 395 U.S. 709 (1969). The interest in productivity underlies many statutory enactments, such as compulsory education laws. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Brown v. Board of Educ., 347 U.S. 483, 493 (1953).

67. Cantor, *supra* note 16, at 251-54; Comment, *Compulsory Medical Treatment: The State's Interest Re-evaluated*, 51 MINN. L. REV. 293, 298-301 (1966).

68. 410 U.S. at 156-57.

69. The 14th amendment protects only *persons* from deprivation of liberty without due process of law. Accordingly, the assertion of a 14th amendment liberty interest, such as privacy, presupposes personhood. U.S. CONST. amend. XIV, § 1.

be sure, the person whose life would be terminated by euthanasia differs from the fetus whose life ends in abortion in that the latter lacks personhood for constitutional purposes.[70] But the euthanasia decision also differs from the abortion decision in that no third entity, whether a person or not, is involved; the right to death is exercised by the same individual whose right to life the state seeks to protect. When, by electing euthanasia, the individual has expressly renounced his right to life, the state cannot reasonably assert an interest in protecting that right as a basis for overriding the individual's private decision to die. To hold otherwise makes little more sense than urging a prohibition against destroying or giving away one's private property simply because the Constitution protects property as well as life. Although the Constitution recognizes that human life is, to most persons, of inestimable value and protects against its taking without due process of law, nothing in that document compels a person to continue living who does not desire to do so. Such an interpretation effectively converts a right into an obligation, a result the constitutional framers manifestly did not intend.

The Risk of Error

Although the state's interest in preserving life loses force when the individual whose life is at stake voluntarily chooses to renounce it, determing when such a free election has occurred may not always be easy. The dying patient may be drugged, in pain, or unaware of the totality of his medical condition.[71] Error is also possible because of possible collusion by individuals who stand to gain by his death.[72] Moreover, the decision to die, once acted upon, may well prove irreversible.[73] Life is too precious, it has been urged, to permit its termination when there is the slightest possibility that the decision to die will prove erroneous or based on false premises.[74] Unlike other irreversible surgical interventions such as amputations, sterilizations, and organ transplants, the possibility that the patient will have any future at all is at stake.[75] Consequently, individuals must be protected from the consequences of

70. Although constitutional personhood appears to be a quality which one either has or lacks, the parallel between some of the likely candidates for euthanasia and fetuses before the end of the second trimester of pregnancy is worthy of mention. Persons who depend on life-sustaining machinery are, like fetuses before viability, "incapable of meaningful life" apart from that machinery. *See* Roe v. Wade, 410 U.S. at 163. The Court in *Roe* determined when a compelling state interest in protecting the fetus arose on the basis of this and other considerations. *Id.*

71. Kamisar, *supra* note 60, at 986-88.

72. *See id.* at 990-91; Moore, *supra* note 14, at 335.

73. Kamisar, *supra* note 60, at 975-76.

74. *E.g., id.* at 1026, 1030-41.

75. Thus, drawing by analogy on the principle of criminal law that it is better to let 100 guilty persons go free than to convict one innocent man, one writer concludes that the suffering caused by prohibiting euthanasia is acceptable if necessary to prevent the wrongful taking of human life. Kamisar, *supra* note 60, at 1005-13.

their own fallibility, and physicians must continue to be prohibited from rendering life-taking assistance in response to patients' voluntary requests.

In the absence of procedural safeguards—such as requirements that the patient's request be repeated on separate occasions,[76] that the patient be lucid and alert,[77] and that he be questioned by a panel of laymen and psychiatrists[78]—this argument might have some appeal, particularly in close cases where the possibility of error is greatest. A prohibition against all voluntary election, however, cuts too broadly; the argument derives its persuasiveness from the possibility of hard cases when in reality most cases will be easy ones. Certainly, a prohibition of all elective euthanasia cannot be sustained because of the risk of error in a few cases; even if protection of the possible victims of error is a compelling interest, the statute must be drawn so as to vindicate that interest by the least drastic means.[79]

More importantly, such objections seem to rest on a confusion about the role of error. Error, for some commentators, occurs when a patient selects death in circumstances where others would consider such a decision mistaken or unreasonable.[80] The issue, however, is not whether the patient's decision comports with the sensibility of others but whether or not he made the decision. If a competent and informed decision has been made, traditional legal notions of autonomy and self-determination favor the protection of individual choice, even if that choice seems to others foolish or tragic.[81] Determining whether a given decision has been made is, of course, a much simpler task than determining whether or not it has been wisely made.

Even if it is granted that the state has a legitimate interest in

76. *E.g.*, ST. JOHNS-STEVAS, LIFE, DEATH, AND THE LAW 267 (1961); Cantor, *supra* note 16, at 260-61; Sanders, *supra* note 6, at 352 (describing a proposal by the English Euthanasia Society).

77. *See* Comment, *Euthanasia: Tort, Constitutional, and Legal Considerations*, 48 NOTRE DAME LAW. 1203, 1256 (1973). *See also* Kutner, *supra* note 9 (proposing a "living will"). Decisions of individuals who are incompetent, of course, need not be given effect. Natanson v. Kline, 186 Kan. 393, 407, 350 P.2d 1093, 1104 (1960). And, patients who are deranged from extreme pain are manifestly not competent to make these decisions. Still, not all physically ill persons are deranged; nor are all such persons incompetent to make choices about their futures.

78. See authorities cited note 76 *supra*.

79. *E.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973); Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Cantwell v. Connecticut, 310 U.S. 296, 307-08 (1940).

80. *See* Kamisar, *supra* note 60, at 1007-13.

81. *In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1009 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *In re* Yetter, 62 Pa. D. & C.2d 619 (C.P. Northampton County, Pa. 1973); J. MILL, ON LIBERTY 6-8 (People's ed. 1873); *see In re* Osborne, 294 A.2d 372, 374-75 (D.C. Ct. App. 1972); *In re* Brooke, 32 Ill. 2d 361, 372-73, 205 N.E.2d 435, 442 (1965).

For a discussion of determinations of competency, see Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39, 75-80 (1975).

protecting individuals from foolish or ill-considered self-destruction, that interest appears to be seriously undermined by the inconsistency with which it pursues that goal.[82] In other contexts, society has declined to intervene when individuals competently choose to engage in behavior dangerous only to themselves, such as climbing mountain peaks or eating rich food.[83] In these and other instances, the individual is neither required to demonstrate his competency nor the soundness of his decision. Admittedly, there is a difference between engaging in activity the outcome of which is uncertain and initiating medical procedures certain to cause death. At the same time, however, the latter decision is one entitled to great respect since it falls within a constitutionally protected area of privacy.[84] On balance, the possibility of error or mistake could be sufficiently limited through procedural safeguards so as to render this an insufficient basis to preclude absolutely the individual's election of death as a final means of escape from his condition.

In addition to assuring that the patient has in fact decided to elect euthanasia, it must be established that he is competent to make this election. Two objections may be raised. First, it may be urged that a decision to die runs counter to strong survival instincts and therefore—unlike a decision to elect life-saving surgery—constitutes evidence of incompetency. Second, and more serious, is the problem of coercion. It has been suggested that the judgment of terminal patients may be so influenced by drugs, pain, pressure from family members, or financial difficulties[85] as to make free decisions unlikely.

The suggestion that a decision to die is always evidence of mental incapacity is untenable, both constitutionally and as medical fact. First, if the decision to die is, as was previously argued, protected by the constitutional right of privacy, it cannot be made evidence, in itself, of a defective mental state.[86] Second, the belief that only a person whose

82. The state's failure to assert an interest as compelling in one context casts doubt on the compelling nature of that interest when its application is attempted in other areas, especially since the danger from which the individual is sought to be protected—being killed—is similar in each case. To be sure, in opinions involving purely economic regulation, courts have been willing to permit the state to pursue its objectives inconsistently or in piecemeal manner, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911), but when fundamental interests are involved, the standard is higher and inconsistency of application may prove fatal. *See* Dandridge v. Williams, 397 U.S. 471, 484-85 (1970).

83. Statutes designed primarily, or exclusively, to protect the individual from his own acts, however, have been upheld in certain contexts. *See* cases cited in Cantor, *supra* note 16, at 247-48. These have generally involved activities such as motorcycling without a crash helmet or consuming contaminated food. These prohibitions, however, do not result in denial of a right of constitutional proportions such as that involved in the decision to die.

84. See text & notes 19-42 *supra.*

85. Note, *supra* note 39, at 1657.

86. Analogously, the fifth amendment right against self-incrimination protects against penalizing the exercise of that right by drawing an inference of guilt from the

faculties are impaired would choose death simply is not true. Many dying patients welcome death as a friend and view its approach calmly and with equanimity.[87] Perhaps society's preoccupation with death as a tragedy to be avoided at all costs prevents us from realizing this.[88] But, regardless of the source of this attitude, it should not be imposed upon unwilling patients so as to deny them access to the relief they desire.

The possibility of decisions coerced by pain and the stress of illness is one which must be taken seriously but which cannot be permitted to preclude all choice. It would surely be paradoxical if, to avoid the possibility of coercion in certain instances, the state enacted a blanket prohibition that had the effect of removing all free choice. Neither the law of succession[89] nor that of informed consent to medical procedures[90] has found it necessary to resort to such a drastic approach, and it would seem that such a presumption of incompetence is even less appropriate when applied to preclude exercise of a right of the proportions of that involved here. Rather, the effort should center around a search for ways to ensure that only those patients who are uncoerced[91] are permitted to elect death and that the decision is made with the patient's full understanding of his condition. This approach admits the legitimacy of the need to protect against the coerced decision of the momentarily pain-crazed patient but does not do so at the price of stifling the free choice of all patients, including those who genuinely want to die.

The Physician's Professional Responsibility

It has been urged that recognizing a right on the part of patients to elect death would place an intolerable strain on the physician, whose

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defendant's silence. Griffin v. California, 380 U.S. 609 (1965). Allowing an inference of incompetence to arise from exercise of the right to die would impose a similar penalty. The analogy to *Griffin* is somewhat inexact, however, since imposition of such a penalty does not "chill" a dying patient's exercise of his right in precisely the same way an inference of guilt chills a criminal defendant's exercise of his fifth amendment right to remain silent. In the *Griffin* case, chilling occurs as a result of imposition of a criminal sanction; in the case of the dying patient, as a result of erecting a legal bar to making a competent choice. The net result, however, is the same: inhibition of a constitutional right because of a state-sanctioned practice.

87. Note, *supra* note 39, at 1647-48. *See generally* O. KNOPF, SUCCESSFUL AGING: THE FACTS AND FALLACIES OF GROWING OLD 182-84 (1975).

88. Note, *supra* note 39, at 1647.

89. T. ATKINSON, LAW OF WILLS 232-39 (2d ed. 1953).

90. Grannum v. Berard, 70 Wash. 2d 304, 422 P.2d 812 (1967); *see In re* Yetter, 62 Pa. D. & C.2d 619 (C.P. Northampton County, Pa. 1973); Peterson v. Ertsland, 69 Wash. 2d 588, 594, 419 P.2d 332, 336 (1966). *See generally* Note, *supra* note 39, at 1651-53.

91. Arguably, a pain-racked, terminally ill patient will never be uncoerced. The issue of voluntary choices in stressful situations has been addressed in other contexts, however, and few authorities have found it necessary to adopt the extreme view that consent in such situations is per se impossible. *Cf.* Friedman, *supra* note 81, at 80-87.

professional loyalties are to the preservation of life.[92] Alternatively, it may be argued that the public will lose confidence in the medical profession if it learns that physicians may, in certain circumstances, euthanatize their patients.[93] These objections are unpersuasive.[94] Even if well founded, it is improbable that these reservations, to the extent they are based on the pecuniary or professional interests of physicians as a class, would rise to the level of a compelling interest.[95] To the extent the physician's objections are based on his personal, moral, or religious feelings, the first amendment simply requires that the law take no account of them.[96] To the extent they are based on the desire to protect liberty—the physician's freedom to practice his profession without constraints—they are easily met by observing that the physician is not compelled to euthanatize anyone, but is merely protected from criminal sanctions if he does so.[97]

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92. *See* authorities cited note 62 *supra*.

93. J. GOULD & LORD CRAIGMYLE, *supra* note 59, at 104.

94. For example, a majority of the American public approves of euthanasia for death-bound, seriously ill patients. MEDICAL WORLD NEWS, Sept. 14, 1973, at 74. Thus, the objection that public confidence in the medical profession would be weakened seems groundless.

95. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969). *See also* Note, *supra* note 39, at 1646.

Several courts have warned that recognition of a right to die might subject hospitals and medical personnel to unreasonable liability from the threat of malpractice and wrongful death suits. *In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1009 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); United States v. George, 239 F. Supp. 752, 754 (D. Conn. 1965); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 580, 279 A.2d 670, 673 (1971). Such liability could arise in a number of ways. Following the patient's death, relatives might sue for wrongful death, claiming that the patient's consent was invalid since he was incompetent. Or a patient's choice to die, though competent, may have been based on erroneous information given him by the hospital or physician. The former danger—that an apparently lucid but incompetent patient will succeed in convincing the physician to euthanatize him—can be reduced by the institution of some of the simple precautionary procedures discussed above. In questionable cases, physicians and hospitals could seek a judicial hearing and court order, thereby insulating themselves from liability. *See In re* President & Directors of Georgetown College, *supra*; *In re* Yetter, 62 Pa. D. & C.2d 619 (C.P. Northampton County, Pa. 1973). Such precautions would not protect the physician or hospital from the consequences of negligent misinformation or misdiagnosis which resulted in the patient's decision to end his life. Consequently, medical personnel might be confronted by conflicting and seemingly irreconcilable risks. Once having advised the patient, to the best of their knowledge, and having been requested by him to perform euthanasia, the hospital must either accede to his desires and run the risk of a lawsuit if their medical judgment proves incorrect, or else deny the patient assistance in asserting his constitutional right to die. In response to this argument, it should be observed that the restraining effect of potential liability would have the salutary result of making physicians extremely careful about the information they give terminal patients who are contemplating euthanasia. Yet, this need for great care need not "chill" medical practice; the doctor need only be sure that his information is the best available in light of the importance of the decision.

96. Epperson v. Arkansas, 393 U.S. 97 (1968); McGowan v. Maryland, 366 U.S. 420 (1961).

97. In reality, surveys have demonstrated that a substantial majority of physicians tacitly approve of euthanasia, Comment, *supra* note 33, at 674; Comment, *supra* note 6, at 615, at least by passive means, whereby death is hastened by the discontinuation of artificial life support measures. *See id.* at 613-16. Thus, moral-professional objections from the medical community would seem to pose little practical or theoretical obstacle to relaxing the present prohibition against mercy killing. *Id.*

The Sanctity of Life

Another interest allegedly served by denying individuals the right to choose the moment of their deaths is that of preserving respect for "the sanctity of life." At times this suggestion is couched in terms of a religious imperative:[98] only God may decide when a human life is to end.[99] The interest sought to be preserved is not that of preventing the overreaching of one individual by another, as was at issue in *Roe*, but rather avoidance of the cheapening and deprecation of the value of life that could result from permitting individuals to take their own lives. Because the lives at issue are those of mature human beings, the shock value of such decisions could be greater than in the case of fetuses, and the potential effect on public attitudes more severe.

Nevertheless, the assertion—at least to the extent that it expresses something other than an ultimate, and hence unchallengeable, religious concern—is false on its face and incapable of being advanced by the state consistently with its actions in other contexts. It is false because most life that would be terminated simply is not sacred in any meaningful secular sense. There is little that is sacred or ennobling about a modern hospital room or nursing home[100] or the array of instruments and tubes used to prolong life a few more days or hours. The extreme reluctance of our society to confront squarely the reality of death blinds us to the fact that, for the dying patient, the alternatives are not living or dying.[101] They are, rather, a protracted death or one that comes more quickly. When dying is protracted, it is often accompanied by fear, indignity, loss of control of bodily functions, and incessant pain that is uncontrollable by drugs.[102] In such situations, permitting death with dignity is perceived by those most intimately involved as the most humane solution and more consistent with a concern for the spiritual side of man's nature than a focus on life purely in vegetative or quantitative terms.[103] The recent statutory trend to redefine the moment of death in terms of capacity for meaningful life is consistent with this suggestion.[104]

98. The sanctity of life argument may well surface in a different, and conceivably more compelling, form when expressed in meta-utilitarian or transcendental terms. The "entering wedge" argument, *see* text accompanying notes 109-18 *infra*, likewise appears susceptible of being recast in meta-utilitarian, but nonreligious terms. *See generally* discussion note 18 *supra*.

99. Hassett, *supra* note 33, at 1184-88.

100. *See* Brown, *An Appraisal of the Nursing Home Enforcement Process*, 17 ARIZ. L. REV. 304, 311-12 (1975).

101. *See* Cantor, *supra* note 16, at 259; Williams, *supra* note 10, at 179; Note, *supra* note 39, at 1650.

102. See authorities cited notes 11-12, 14-15 *supra*.

103. *E.g.*, D. MAGUIRE, *supra* note 10, at 7-8, 10-13; Cantor, *supra* note 16, at 243; Moore, *supra* note 14, at 332.

104. *See generally* Comment, *supra* note 6, at 627.

In no other context does our system of values require uncompromising observance of life as the highest value.[105] We require our youth to render military service in frequent wars and police actions, and when they lose their lives in combat, we celebrate them as heroes. Scenes of the Vietnam conflict were shown in color in every living room, and even children's television is replete with violence and killing. Our most popular films and television programs glorify violence, and when the death penalty was recently held unconstitutional, the states responded hastily with statutes reinstating it on the maximum possible basis.[106] The erosion of public respect for the sanctity of life caused by permitting euthanasia under closely controlled circumstances would appear miniscule when compared to that resulting from other sources.[107] Thus, the state's failure to respect life consistently in other areas suggests that its interest in life per se is less than compelling.[108]

Selective Elimination

The "entering wedge" argument was also advanced in the abortion cases. It was urged that permitting unrestricted access to abortions in the first trimester would eventually lead to infanticide and the elimination of mature individuals considered socially undesirable.[109] The Court evidently did not find this pessimistic view so much as plausible, for the argument was rejected as insufficient to warrant discussion, let alone to overcome the mother's privacy interest.

The refusal to reply to the entering wedge argument was appropriate since the argument does not respond to the issue at hand. Absent a showing that euthanasia or abortion would necessarily lead to the horribles paraded in opposition to them, the argument at most shows that these horribles are to be avoided but says nothing about abortion or euthanasia.[110] If, on the other hand, the argument is given a charitable construction—as urging that no principled distinction can be drawn

105. *See generally* Note, *supra* note 39, at 1647.

106. *E.g.*, FLA. STAT. ANN. § 921.141 (Supp. 1975-76); GA. CODE ANN. § 27-2534.1 (Supp. 1974); UTAH CODE ANN. § 76-5-202 (Supp. 1973); *see* Comment, *Resurrection of the Death Penalty: The Validity of Arizona's Response to Furman v. Georgia*, 1974 ARIZ. ST. L.J. 257; Note, *The New Illinois Death Penalty: Double Constitutional Trouble*, 5 LOYOLA U.L.J. 351 (1974).

107. The euthanatizing of able-bodied young persons, particularly parents, is likely to be barred by considerations to be developed more fully later. *See* text & notes 119-30 *infra*. The interest in denying individuals an opportunity to engage in acts deliberately designed to denigrate the value of human life might, however, have the effect of denying individuals the opportunity to exercise the right of voluntary euthanasia as part of a publicity-seeking venture or self-immolation.

108. *See* discussion note 82 *supra*.

109. Brief for Appellant in Opposition to Motion to Dismiss at 41-45, Byrn v. New York City Health & Hosps. Corp., 410 U.S. 949 (1973). *Byrn* was one of a group of abortion cases that reached the Supreme Court about the same time as *Roe v. Wade*. *See also* Louisell, *supra* note 65, at 249.

110. *See* Morris, *supra* note 10, at 265.

between elective euthanasia and admitted horribles like compulsory elimination of undesirables—it is simply mistaken.[111] The distinction is the obvious difference between recognition of individual autonomy and invasion of that autonomy. Indeed, even if it is assumed that no distinction may be drawn, rejection of the entering wedge argument in the abortion cases a fortiori requires its rejection in the case of elective euthanasia, since the difference in principle between killing a second trimester fetus and killing an infant is obviously not so great as the difference between honoring an individual's wish to die and killing him against his wishes.[112]

In reality, those considerations that warrant extending the right of privacy to cover voluntary election of the moment of death operate to constrain state efforts toward compulsory elimination of undesirables. Surely, no one would argue that the Court's recognition of a right to buy and sell contraceptives[113] amounted to an invitation to governmental control of the distribution of contraceptives. Nor did recognition of a realm of family autonomy in decisions relating to childrearing result in state incursions in this area.[114] To so argue is surely inverse logic, since in each case, the limitations on state authority were specifically designed to increase the autonomy of the individual vis-à-vis the state, not diminish it.

A variant of the argument that permitting the individual to choose the moment of his death invites the state to make the decision for him centers around the government's role in supervising medical procedure. Many of the procedural safeguards necessary to ensure that the right is exercised in conformity with agreed limitations[115] will presumably be entrusted to the state's courts and administrative agencies. Arguably, the power to make such decisions invites abuse. For example, a government that harbored a bias against citizens of a certain class might arrange that they be denied the benefit of euthanasia if by so doing the estates of

111. *See generally* Roe v. Wade, 410 U.S. 113, 160-61 (1973); Winston, *On Treating Like Cases Alike*, 62 CALIF. L. REV. 1 (1974). This conviction was a major factor in the formation of the right-to-life opposition to abortion, including substantial support from the Roman Catholic Church. *See* Roe v. Wade, *supra* at 160-61.

112. *See* Note, *supra* note 39, at 1663. Theologians might challenge this contention, urging that consensual killing is indistinguishable from other killing, since both violate the principle that only God may decide when a person is to die. Thus all termination of life is an affront to God and must be avoided even at the cost of a great increase in human suffering. Unless a secular basis for this contention can be found, however, the establishment clause of the Constitution forbids imposing it on society through force of law. Epperson v. Arkansas, 393 U.S. 97 (1968); McGowan v. Maryland, 366 U.S. 420 (1961).

113. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

114. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

115. For suggestion of some such safeguards, see text & notes 76-78 *supra*.

unpopular or politically dissident families or groups could be depleted.[116] Alternatively, the government could collude with physicians to give medical misinformation to undesirables in the hope that they would then choose to die. The latter result seems farfetched since a government capable of such machinations would undoubtedly have more efficacious and direct means of accomplishing its purposes.[117] The former result would seem likely only if the decisionmaking machinery were completely insulated from review by the courts, the public, and the press, a result easily avoided by proper drafting of any statute or order recognizing a right to die.[118]

Productivity and Dependency

Two final, closely related objections to permissive euthanasia are more substantial. They are the state's interest in the productive capacity of citizens[119] and its interest in avoiding the destitution of surviving dependents.[120] The former interest supplies, in part, the justification for compulsory education statutes;[121] the latter has been advanced in blood transfusion cases as sufficient to override patients' first amendment objections to receiving emergency medical treatment necessary to preserve their lives.[122]

In individual cases, these interests might well be compelling. Imagine, for instance, a wage earner and father of several children who is suffering from cancer. The course of the disease, presently incurable and one for which no cure is likely in the near future,[123] can nevertheless be

116. For an excellent discussion of some of the problems of distributive justice involved in allocating biomedical benefits, see Shapiro, *Who Merits Merit? Problems in Distributive Justice and Utility Posed by the New Biology*, 48 S. CALIF. L. REV. 318 (1974).

117. *See* D. MAGUIRE, *supra* note 10, at 88, 132 (describing the shocking events that took place in Nazi Germany prior to and during World War II). *See also* Alexander, *Medical Science Under Dictatorship*, 241 NEW ENGLAND J. MEDICINE 39, 40, 44 (1949). Such events are cited by proponents of the view that society can ill afford to relax its vigilance against the possible revival of such barbarities. These arguments, however, ignore the gross disparities between the cultural and political settings of Nazi Germany and present-day United States and thus lack historical plausibility.

118. Statutes or judicial orders could, for example, require that some form of limited access to the press be made available. They could also require that membership on committees of inquiry include representation from lay, religious, and medical communities. For a discussion of review committees to ensure proper use of behavior modification techniques, see Friedman, *supra* note 81, at 95-100.

119. *See* Note, *Unauthorized Rendition of Lifesaving Medical Treatment*, 53 CAL. L. REV. 860, 862 (1965); *cf.* Note, *supra* note 39, at 1660.

120. Cantor, *supra* note 16, at 251-54; Comment, *supra* note 67, at 298-301. *See In re* Yetter, 62 Pa. D. & C.2d 619, 623 (C.P. Northampton County, Pa. 1973).

121. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Brown v. Board of Educ., 347 U.S. 483, 493 (1953).

122. *Compare In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964), *with In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

123. The possibility of a miraculous 11th-hour medical breakthrough has been urged as a justification for denying gravely ill individuals assistance in hastening the moment of

controlled to some extent by radiation treatment and chemotherapy, so that the individual has a life expectancy of perhaps 2 years. Without treatment, the father will die within 6 months. Both measures, however, are expensive and have deleterious side effects. The father, after careful consideration, concludes that life under his present conditions is not worth living. Lacking the courage to commit suicide, or perhaps reluctant to incur the notoriety that such an act might bring for his survivors,[124] he requests that his physician administer a lethal dose of a pain-killing drug. The physician refuses on the sole ground that he will face criminal prosecution, and the father seeks a declaratory judgment.

In these circumstances, it seems plausible that the state's interests in forbidding the father to choose death outweigh his interest in seeking an early and painless end.[125] The father has not passed the point of productivity and should not be permitted to avoid his obligation to support his dependents. On the other hand, once the father's disease has run its course and left him bedridden and unable to engage in work or family activities, the state's interests diminish, and his request to die should be honored.[126]

Roe suggested that the state's interests in preserving the human organism vary—as a matter of constitutional doctrine—with the condition of the organism at the different stages of its life.[127] Although the analogy is far from perfect—indeed the interest equations are precisely reversed—the case of the father illustrates some similarities between the developmental process affecting fetuses and that involving persons who wish to die. The state's interest in the fetus vis-à-vis the mother grows as the fetus matures and eventually becomes compelling at viability.[128] The state's interest in the person who requests medical assistance in dying, on the other hand, may at first be compelling, but becomes less than

death. Kamisar, *supra* note 60, at 999-1005. But such medical miracles, even if announced during the critical period of decision, are rarely available in time to help the afflicted patient. Morris, *supra* note 10, at 262.

124. The early common law "punished" the successful suicide by burial on the public highway, with a stake through the chest. Comment, *The Punishment of Suicide—A Need for Change*, 14 VILL. L. REV. 463, 465 (1969). Although this barbaric practice has ceased, society often attaches ignominy to the suicide. This sense of shame often has adverse psychological effects on the survivors. *Cf.* Cantor, *supra* note 16, at 245-46. *See also* D. MAGUIRE, *supra* note 10, at 220.

125. *Compare In re* President & Directors of Georgetown College, Inc. 331 F.2d 1000, (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964), *with In re* Brooks' Estate, 32 Ill. 2d 361, 205 N.E.2d 435 (1965) (declining to override adult patient's refusal of medical aid, in absence of minor dependents).

126. If state interests can become compelling as an organism advances along its developmental path, *see* Roe v. Wade, 410 U.S. 113 (1973), it follows that they may also cease to be compelling when the organism has moved past the stage of optimum development. *In re* Brooks' Estate, 32 Ill. 2d 361, 205 N.E.2d 435 (1965); *cf.* Erickson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1962); *In re* Raasch, No. 455-996 (P. Div., Milwaukee County Ct., Wis., Jan. 21, 1972).

127. *See* discussion note 126 *supra*.

128. Roe v. Wade, 410 U.S. 113, 163-66 (1973).

compelling as the individual advances in age or his physical condition deteriorates. The point at which this happens, as was suggested earlier, will depend on the existence, in the particular case, of factors which limit the individual's privacy interest. Such factors might include the number of dependents, their ages and needs, the age of the individual making the request, and his ability to be productive.

A court charged with adjudicating the constitutionality of a prohibition against voluntary euthanasia might well develop a tripartite calculus similar to that created by the Supreme Court in *Roe*,[129] but employing the factors enumerated above. This scheme might provide that the state's interest in preserving the life of a younger individual with minor dependents presumptively outweighs his interest in dying, unless he is so incapacitated as to be unable to perform his wage-earning or parental duties and is unlikely to regain his capabilities. In the case of a somewhat older individual, the state's interest weakens, and the individual should be able to elect death unless there are pressing reasons for refusing him this option, such as the need for his presence as a witness at a criminal trial or fulfilment of some other critical social duty. An individual in his final years should have unlimited access to medical aid in bringing about his death, and the state should not be permitted to prevent that choice except when intervention is the only means of securing the continued productivity of an individual who owes the state an important duty or who supports numerous dependents.[130] Other interests that could be asserted against the right to die, such as the possibility of error—that is, that one might be "throwing away" precious life—even if compelling initially, would also be expected to decrease in gravity as the individual approaches the natural terminus of his life.[131]

CONCLUSION

The interest of an individual in selecting the moment of his death is similar to that involved in a number of other highly personal choices that are protected by the right of privacy. The decision to die is a fundamental decision affecting the life cycle of human beings. Its effect is felt primarily by the individual involved; it determines the shape and duration of his life. It is a choice deserving of respect because, like refusal to permit access to abortion, its prohibition consigns the individ-

129. *Id.* at 164-65.

130. The guidelines resulting from such an approach would necessarily involve two variables, rather than the single variable (time) laid down in *Roe*. This would make their utilization by physicians only slightly more complex, however, as it is just as feasible, and equally intelligible biologically, to assign yes/no values to designated pairs of variables as to single variables.

131. *See* text & note 57 *supra*.

ual to a life that he does not choose to lead and may find hateful. The case for euthanasia is even stronger than that for abortion in that there is no third being involved whose interest must be protected. On the other hand, the individual seeking to exercise the choice is a "person" under the fourteenth amendment. This difference cuts both ways. Lives, arguably, are deserving of greater protection than proto-lives; yet, paternalistic intervention in the personal decisions of competent adults who have waived protection is more difficult to justify than that exercised in favor of fetuses, who presumptively want to live.

As with the abortion of healthy fetuses, voluntary euthanasia is subject to limitations reflecting ascertainable state interests. Of the many interests that have been asserted against permissive euthanasia, only two survive *Roe* and *Doe*—the state's interest in the productivity of citizens and its interest in seeing that surviving dependents not be left destitute. In any given case, the significance of each interest must be evaluated, taking into account the needs of individuals at varying stages in their lives. Nevertheless, some general principles emerge. Each of the state's interests tends to diminish over time. Each is at its maximum in connection with young wage earners who support dependents. Finally, the general interest in preserving the life of an unwilling individual reaches its most attenuated form in the case of persons who are of advanced age, whose medical condition is hopeless, and for whom continued medical treatment poses an unacceptable burden.

Those for whom life continues to hold the promises of family, friends, and self-worth cherish existence as an ultimate value. For others, terminal disease may guarantee only an agonizing wait for death. Most of us fall into the former category, never, until our own final moments, appreciating death's haven. Our insensitivity to the needs of the dying, our bias toward the maintenance of life at all costs, permits legislatures to turn a deaf ear to the pleas of the dying for final relief. So long as this is so, courts will need to exercise their traditional function of interceding on behalf of politically impotent minorities.[132] In carrying out this function, the right of privacy enunciated in recent Supreme Court opinions offers itself as a ready instrument for safeguarding the integrity of individual choice.

132. *See* Ely, *supra* note 21, at 933-35.