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## Constitutional Privacy, the Right to Die and the Meaning of Life: A Moral Analysis

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## CONSTITUTIONAL PRIVACY, THE RIGHT TO DIE AND THE MEANING OF LIFE: A MORAL ANALYSIS\*

BY

DAVID A.J. RICHARDS\*\*

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It is a striking fact that arguments which often eloquently call for the decriminalization of "victimless crimes"<sup>1</sup> rely on utilitarian calculations aimed at ending either the pointless or positively counterproductive waste of valuable and scarce police resources expended in the enforcement of these laws. The pattern of argument and litany of evils are familiar. H.L.A. Hart, for example, in his defense of the *Wolfenden Report*,<sup>2</sup> makes the tactical concession that some victimless crimes are immoral and then discusses in detail the countervailing and excessive costs of enforcing the ends of legal moralism in this area.<sup>3</sup> In the United States, commentators stress implicitly utilitarian pragmatist arguments identifying tangi-

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1. Examples of illegal conduct sometimes described as "victimless crimes" are drug and alcohol abuse, gambling, prostitution, and homosexuality. See N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 2-6 (1970); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 266-67 (1968); Kadish, *The Crisis of Overcriminalization*, 374 *ANNALS* 157 (1967). See also MODEL PENAL CODE §§ 207.1-.6, Comments (Tent. Draft No. 4, 1955); COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, *REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION* (1957) [hereinafter cited as *WOLFENDEN REPORT*].

2. *WOLFENDEN REPORT*, *supra* note 1.

3. See H. HART, *LAW, LIBERTY, AND MORALITY* 45, 52, 67-68 (1963).

ble evils that intangible moralism appears quixotically to incur.<sup>4</sup> The core of these enforcement evils is that these crimes typically are consensual and private. In consequence, the absence of either a complaining victim or witness requires costly forms of enforcement, including police work that is colorably unconstitutional, often unethical, and eventually corruptive of police morals, for example, entrapment.<sup>5</sup> Such high enforcement costs also include the opportunity costs foregone in terms of the more "serious" crimes on which police resources could have been expended.<sup>6</sup> When these costs are assessed in light of the special difficulties in this area of securing sufficient evidence for conviction and of deterring the strong and ineradicable motives that often explain these acts, the utilitarian balance sheet condemns the criminalization of such acts as simply too costly.

Such arguments proselytize the already converted and do not seriously engage the kind of justification to which proponents of criminalization traditionally appeal. Such proponents may reply that the mere consensual and private character of certain acts, even coupled with the consequent higher enforcement costs, is not sufficient to justify decriminalization, for many consensual acts clearly are properly criminal, for example, dueling. Many nonconsensual acts are also correctly criminal despite comparably high enforcement costs, for example, intrafamilial homicide which imposes high enforcement costs in terms of intrusion into privacy and intimate relations.<sup>7</sup> If there is a good moral reason for criminalizing certain conduct, extraordinary enforcement costs will justly be borne. Accordingly, efficiency-based arguments for decriminalization appear to be deeply question-begging. The arguments have weight only if the acts in question are not independently shown to be immoral; but, the decriminalization literature concedes the im-

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4. See N. MORRIS & G. HAWKINS, *supra* note 1; H. PACKER, *supra* note 1; Kadish, *supra* note 1.

5. See generally J. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* (1966).

6. See N. MORRIS & G. HAWKINS, *supra* note 1, at 2-6; H. PACKER, *supra* note 1, at 266-67; Kadish, *supra* note 1, at 157.

7. For one statement in this form of criticism, see Junker, *Criminalization and Criminogenesis*, 19 U.C.L.A. L. REV. 697 (1972). Cf. Kadish, *More on Overcriminalization: A Reply to Professor Junker*, 19 U.C.L.A. L. REV. 719 (1972) (supporting excess cost rationale).

morality of such acts and then elaborates efficiency costs that have little decisive weight<sup>8</sup> absent an evaluation of the morality of the acts themselves.

The absence of critical discussion of the focal issue that divides proponents and opponents of criminalization has made decriminalization arguments much less powerful than they can and should be. Indeed, such efficiency-based arguments have not been decisive in the retreat of the scope of victimless crimes, whether by legislative revision or by judicial invocation of the constitutional right to privacy. In those areas in which there has been wholesale or gradual decriminalization, such as contraception,<sup>9</sup> abortion,<sup>10</sup> and consensual, noncommercial sexual relations between or among adults,<sup>11</sup> the most important basis of change has been a shift in moral judgments to the effect that these acts, traditionally believed to be morally wrong per se, are not morally wrong.<sup>12</sup> In order to give decriminalization arguments the full force that they should have, we must supply the missing moral analysis. The absence of such analysis has prevented us from seeing the kinds of moral needs and interests that decriminalization in fact serves. To this extent, legal theory has not responsibly brought to critical self-consciousness that nature of an important and humane legal development.

This glaring lacuna in legal theory derives from deeper philo-

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8. H.L.A. Hart does distinguish between conventional and critical morality but does not explicate the latter concept. See H. HART, *supra* note 3, at 17-24. For purposes of his argument, he assumes the immorality of the acts in question, and then makes various points about the costs that strict enforcement of these moral judgments would inflict.

9. See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

10. See *Roe v. Wade*, 410 U.S. 113 (1973).

11. The Supreme Court recently upheld the refusal to extend the constitutional right to privacy to consensual adult homosexuality. *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *aff'g mem.*, 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court). There has been, however, a gradual movement toward decriminalization of consensual sodomy by legislative repeal. As of 1976, at least 18 states had decriminalized sodomy. See Rizzo, *The Constitutionality of Sodomy Statutes*, 45 *FORDHAM L. REV.* 553, 570 n.93 (1976). A more recent overview indicates that 21 states have decriminalized. See Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 *HASTINGS L.J.* 799, 950-51 (1979).

12. I have tried to explain the nature of these changes in moral judgments in Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 *HASTINGS L.J.* 957 (1979) [hereinafter cited as Richards, *Sexual Autonomy*].

sophical presuppositions which the decriminalization literature appears often to assume: those of the utilitarian pragmatism associated with America's indigenous jurisprudence, legal realism.<sup>13</sup> American legal theory has been schizoid about the proper analysis of moral values in the law since the publication of Holmes' *The Common Law*<sup>14</sup> in 1881. On the one hand, traditional moral values underlying existing legal institutions have been "washed in cynical acid"<sup>15</sup> so that the legal institution may be analyzed without begging any questions about its moral propriety; on the other hand, the enlightened moral criticism of legal institutions has been conducted in terms of implicitly utilitarian calculations and has sought to maximize the greatest happiness of the greatest number.<sup>16</sup> In discussions propounding the virtues of decriminalization, this pattern of schizoid moral analysis is shown, first, by the dismissive concession of the traditional immorality of the acts in question and, second, by the discussion of moral reform exclusively in terms of efficiency-based considerations that lend themselves to implicit calculations of utility maximization. These discussions suppose that there cannot be any serious nonutilitarian critical analysis of the moral values thought to underlie victimless crimes simply because utilitarianism is presumed to be the only enlightened critical morality.<sup>17</sup>

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13. See, e.g., G. JACOBSON, PRAGMATISM, STATESMANSHIP, AND THE SUPREME COURT (1977). It would be a mistake to regard legal realists as doctrinaire utilitarians when, in fact, they were antagonistic to Bentham's ahistorical approach to jurisprudence. See, e.g., M. WHITE, *The Revolt Against Formalism in American Social Thought of the Twentieth Century*, in PRAGMATISM AND THE AMERICAN MIND: ESSAYS AND REVIEWS IN PHILOSOPHY AND INTELLECTUAL HISTORY 41-67 (1973). See generally W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973). But the appeal to social considerations was, for them, implicitly utilitarian. See Richards, Book Review, 24 N.Y.L. SCH. L. REV. 310 (1978).

14. O. HOLMES, *THE COMMON LAW* (2d ed. 1963).

15. The famous appeal to wash the law in cynical acid derives from Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

16. See generally O. HOLMES, *supra* note 14.

17. H.L.A. Hart appears to acknowledge the existence of a critical morality that is not necessarily utilitarian, although he does not explore the content of this morality in his discussion of decriminalization. See H. HART, *supra* note 3, at 45, 52, 67-68. But see H. HART, PUNISHMENT AND RESPONSIBILITY (1968), where he repeatedly insists that principles of fairness and equal liberty, independent of utilitarian considerations, are needed to account for the principles of punishment, *id.* at 72-73, and the form of excuses in the criminal law, *id.* at 17-24. For a striking attempt by Hart to construct a nonutilitarian theory of natural rights from Kantian premises, see Hart, *Are There Any Natural Rights?*, in SOCIETY, LAW, AND

Today the pervasive utilitarian presuppositions of American legal theory are under attack both from within jurisprudence<sup>18</sup> and from external developments in normative and moral theory.<sup>19</sup> In moral theory, powerful philosophical objections have been made to the adequacy of utilitarianism as a normative theory, and plausible alternative theories have been proposed that better account for the moral point of view.<sup>20</sup> In American legal theory, these general developments in moral theory are currently being harnessed to the examination of the central place of moral ideas in American law so that American legal institutions, like the countermajoritarian design of American constitutional law, inexplicable on utilitarian grounds, are shown to rest on sound, nonutilitarian moral foundations.<sup>21</sup> This new and aggressive use of moral theory in the understanding of the normative structure of legal institutions is of general significance in many areas of the law.<sup>22</sup> In this Article, I shall try to show the significance that such moral theory may have for understanding one part of the substantive criminal law where decriminalization has been urged and for converging constitutional law doctrines invoking the constitutional right to privacy.<sup>23</sup>

Anglo-American criminal law theory has generally focused on

MORALITY 173 (F. Olafson ed. 1961).

18. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); D. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977); Richards, *Taking TAKING RIGHTS SERIOUSLY Seriously: Reflections on Dworkin and the American Revival of Natural Law*, 52 N.Y.U. L. REV. 1265, 1331-38 (1977).

19. See A. GEWIRTH, *REASON AND MORALITY* (1978); J. RAWLS, *A THEORY OF JUSTICE* (1971); D. RICHARDS, *A THEORY OF REASONS FOR ACTION* (1971) [hereinafter cited as D. RICHARDS, *REASONS FOR ACTION*].

20. The critique of utilitarianism was a prominent focus of English intuitionism, which powerfully and persuasively showed that utilitarian concerns could not account for the constraints of equality and fair distribution or for the moral force of promising or gratitude. See H. PRICHARD, *MORAL OBLIGATION ESSAYS AND LECTURES* 169-79 (1949); W. ROSS, *FOUNDATIONS OF ETHICS* 87-113 (1939); W. ROSS, *THE RIGHT AND THE GOOD* 37-47 (1930). See also J. SMART & B. WILLIAMS, *UTILITARIANISM FOR AND AGAINST* 77-150 (1973); authorities cited note 19 *supra*.

21. See, e.g., D. RICHARDS, *THE MORAL CRITICISM OF LAW*, *supra* note 18, at 39-191.

22. See authorities cited note 18 *supra*. See also G. FLETCHER, *RETHINKING CRIMINAL LAW* (1978); C. FRIED, *RIGHT AND WRONG* (1978).

23. See also Richards, *Sexual Autonomy*, *supra* note 12; Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979) [hereinafter cited as Richards, *Commercial Sex*]; Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 GA. L. REV. 1395 (1979) [hereinafter cited as Richards, *Human Rights*].

certain pervasive structural features of the substantive criminal law<sup>24</sup> but has not considered in any depth the question that is at the heart of much European criminal law theory<sup>25</sup>—that of the role of moral wrongdoing in the definition of criminal offenses. Although general concessions are made that criminal sanctions properly apply to morally wrong acts,<sup>26</sup> little critical attention is given to how moral wrongdoing is to be interpreted as the necessary limiting predicate for the proper scope of the criminal penalty. In particular, advocates of decriminalization bizarrely tend to concede to opponents a conventionalistic definition of moral wrongdoing<sup>27</sup> and then to present utilitarian arguments about special enforcement costs. To make such a concession, however, is unconditionally to surrender the war. That legal theorists accept a definition of morality that, for a moral theorist, is quite transparently inadequate is a mark of the unhappy separation of legal and moral theory.<sup>28</sup> The recent reintegration of anti-utilitarian moral concepts into legal theory enables us to reconsider these questions in a new and inspiring way. We now may critically investigate what should be the central issue in a sound theory of the criminal law: the concept of moral wrongdoing and its role in the just imposition of the criminal sanction.

At the same time that such moral theory may clarify the real moral basis and proper force of such decriminalization arguments, it also may elucidate the Supreme Court's gradual, and not altogether consistent, elaboration of a constitutional right to privacy,

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24. Primary emphasis is usually given to such questions as the nature and role of the requirements of *mens rea* and *actus reus*, the proper form of excusing conditions and justification defenses, and the appropriate relation between inchoate and consummated offenses. The classic text is G. WILLIAMS, *CRIMINAL LAW* (2d ed. 1961). See also J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (2d ed. 1960); W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* (1972).

25. For a comparison of continental and Anglo-American approaches to criminal law theory, with a focus on the role of Kantian moral theory in the former and utilitarianism in the latter, see G. FLETCHER, *supra* note 22, at 406-08, 467, 530-04, 512, 577, 695-97, 768-69, 780-81, 790.

26. See, e.g., J. HALL, *supra* note 24, at 385. "It is pertinent to recall here that the criminal law represents an objective ethics which must sometimes oppose individual convictions of right." *Id.*

27. See generally P. DEVLIN, *THE ENFORCEMENT OF MORALS* 9-13 (1965); see also G. FLETCHER, *supra* note 22, at 568.

28. See Richards, *Commercial Sex*, *supra* note 23, at 1231-36.



which the Court has used to achieve, by constitutional mandate, at least some of the just aims of the decriminalization reformers. The Supreme Court's deployment of the constitutional right to privacy to invalidate the application of criminal sanctions to the use and sale of contraceptives<sup>29</sup> and abortion services<sup>30</sup> and the use of pornography in the home<sup>31</sup> is at one with the aims of decriminalization reformers. On the other hand, the failure to extend the right to consensual adult sexual conduct, both commercial<sup>32</sup> and non-commercial,<sup>33</sup> has led reformers to continue decriminalization efforts, with some success,<sup>34</sup> in the legislative arena. If moral theory can clarify the general basis for such decriminalization arguments, it should, *pari passu*, delineate the specific application of such arguments to the constitutional right to privacy. If so, we may defend the Court against the conventional criticism that the right to privacy is constitutionally unprincipled and ad hoc<sup>35</sup> and yet also critically assess the Court's past performance in the application of the right and suggest the sound elaboration of its future development.<sup>36</sup> We also may address and perhaps unravel a critical puzzle in this area: why *should* decriminalization sometimes be sponsored by a countermajoritarian constitutional right and sometimes be left to majoritarian legislative reform? Perhaps the answer is one of a policy calculation of convenience in the Court's concern with preserving its institutional capital.<sup>37</sup> But before we impute such an unprincipled motive to the Court, we must first assess whether some line of principle can be articulated between cases properly sponsored by the constitutional right to privacy and others left to legislative reform. Even if the Court's practice does not conform to this principle, it may be important to know that its practice is not merely shabbily political but aspires, however inchoately and inco-

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29. See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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

31. See *Stanley v. Georgia*, 394 U.S. 557 (1969).

32. See Richards, *Commercial Sex*, *supra* note 23, at 1201-03.

33. See note 11 *supra*.

34. See note 11 *supra*.

35. See, e.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

36. See authorities cited note 23 *supra*.

37. See J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 129-170 (1980).

herently, toward a defensible principle.

I propose to address these more general questions of both criminal and constitutional law through an examination of the moral basis for the decriminalization of certain decisions to die. In terms of the general legal literature on decriminalization, such arguments were classically stated by Glanville Williams in *The Sanctity of Life and the Criminal Law*,<sup>38</sup> using the terms characteristic of decriminalization advocates, namely, utilitarianism. For Williams, the only available moral contrast is between utilitarian humanism, which would dictate the decriminalization of certain acts of euthanasia and suicide, and a religious ethics, which requires such criminalization.<sup>39</sup> Correspondingly, legal critics of Williams' arguments, like Yale Kamisar,<sup>40</sup> do not question his utilitarian arguments of principle but raise practical problems of abuse which should caution us against institutionalizing such arguments. It is doubtful whether this sterile contrast between utilitarianism and religious ethics exhausted the alternatives of ethical analysis even when Williams first wrote; certainly, the Protestant theologian, Joseph Fletcher,<sup>41</sup> supported his arguments for the legitimacy of euthanasia not on solely utilitarian grounds, but in terms of arguments grounded in dignity and personhood. There is good reason to believe that the utilitarian form of Williams' classic arguments for decriminalization in this area rendered such arguments less ethically powerful than they were and could be; for, if the gravamen of the utilitarian's argument for a right to die is the simple presence of a balance of pain over pleasure in a person and surrounding persons, the inference is natural and was logically drawn<sup>42</sup> that the argument applied in full force not only to consenting and terminally ill adults (voluntary euthanasia), but to all cases of persons suffering from a balance of pain over pleasure, including those who do not and would not consent to die (involun-

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38. G. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 248-350 (1957).

39. This way of drawing the distinction implicit in Williams' book was emphasized and applauded by Bertrand Russell in a review of it. See Russell, Book Review, 10 *STAN. L. REV.* 382 (1958).

40. Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 *MINN. L. REV.* 969 (1958).

41. See J. FLETCHER, *MORALS AND MEDICINE*, 3-34, 172-225 (1954).

42. Kamisar, *supra* note 40, at 1014-41.

tary euthanasia).<sup>43</sup> In light of recent anti-utilitarian moral theory, we fundamentally may reconceive the arguments for the decriminalization of certain decisions to die in terms of the rights of the person which expressly disavow the manipulative utilitarianism which Williams' account assumes.

Such an account concurrently should enable us to address the issue of whether or to what extent the constitutional right to privacy should encompass certain decisions to die. In three striking recent cases, *In re Quinlan*,<sup>44</sup> *Superintendent of Belchertown State School v. Saikewicz*,<sup>45</sup> and *In re Eichner*,<sup>46</sup> state courts in New Jersey, Massachusetts, and New York, respectively, have invoked the constitutional right to privacy as the basis for vindicating the right to refuse certain kinds of medical treatment in extreme cases of terminal life or illness when death was the likely consequence. While the Supreme Court has carefully avoided the task of clarifying the degree to which, if at all, its conception of constitutional privacy encompasses a right to die in these or other contexts,<sup>47</sup> it must eventually—consistent with its constitutional duty reasonably to elaborate constitutional values—articulate a principled conception of the relationship of constitutional privacy and the right to die.<sup>48</sup> To the extent that recent anti-utilitarian

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43. For recent forms of utilitarian arguments which appear to justify forms of infanticide on such grounds, see J. GLOVER, CAUSING DEATH AND SAVING LIVES 150-69 (1977) and P. SINGER, PRACTICAL ETHICS 122-26, 130-39 (1979). Both theorists sharply distinguish euthanasia of a person who could consent and does not, which is not permissible, from the case of a person who cannot or is not capable of consent, which sometimes is permissible. J. GLOVER, *supra*, at 190-202; P. SINGER, *supra*, at 146-47. In the case of Glover, this idea rests on a principle of respect for autonomy, which he employs as an important constraint on just killing, J. GLOVER, *supra*, at 74-85, but never fully explains in terms of his general utilitarian approach. Importantly, the principle does not apply to those incapable of consent, for example, young infants.

44. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 922 (1976).

45. *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977).

46. *In re Eichner*, 102 Misc. 2d 184, 423 N.Y.S.2d 580 (1979), modified and aff'd sub nom. *Eichner v. Dillon*, 73 A.D.2d 431, 426 N.Y.S.2d 517 (1980).

47. Certiorari has been denied in *Quinlan* and in a number of other cases where the Court might have clarified the constitutional status of the right to die. See *Anderson v. Raleigh Fitkin-Paul Morgan Memorial Hosp.*, 377 U.S. 985 (1964); *Jones v. President & Directors of Georgetown College, Inc.*, 377 U.S. 978 (1964); *Perricone v. New Jersey*, 371 U.S. 890 (1962); *Labrenz III. ex rel. Wallace*, 344 U.S. 824 (1952).

48. For an argument that constitutional privacy does embrace a right to die, see Delgado,

moral theory starts from the premise of the basic rights of the person on whose protection American constitutionalism importantly builds, it should enable us to grapple with these issues.

In order to deal with these matters sensibly, this Article will have the following structure: first, a philosophical explication of the proper scope of the public morals as a basis for criminal sanctions, including an account of the role that human and moral rights necessarily play in this conception; second, an application of this analysis to the explication of the moral principles which define the structure of the right to life; third, a critical examination of the moral and paternalistic arguments for the criminalization of all decisions to die; fourth, a statement of the case for the right to die, its limits, and its proper effectuation as a form of the constitutional right to privacy; and fifth, a discussion of possible limits on the degree to which the full scope of the right to die may be enforced by constitutional privacy.

## I. HUMAN RIGHTS AND THE MORAL FOUNDATIONS OF THE CRIMINAL LAW UNDER CONSTITUTIONAL DEMOCRACY

In order to evaluate the kind of moral analysis necessary to assess arguments for the criminalization of acts in a constitutional democracy foundationally committed to ideas of human rights, I shall first introduce an explication of the idea of human rights and how recent deontological moral theory expresses this idea in a sharply anti-utilitarian fashion. I then will suggest an analysis of the "public morality" required by these values.

### A. *The Concept of Human Rights*

Any coherent account of the ethical foundation of the substantive criminal law and its connections in the United States to constitutional principles must take seriously the radical vision of

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*Euthanasia Reconsidered—The Choice of Death as an Aspect of the Right of Privacy*, 17 ARIZ. L. REV. 474 (1975). See also Orbon, *The "Living Will"—An Individual's Exercise of His Rights of Privacy and Self-Determination*, 7 LOYOLA U.L.J. 714 (1976); Scher, *Legal Aspects of Euthanasia*, 36 ALB. L. REV. 674 (1972); Strand, *The "Living Will": The Right to Death with Dignity?*, 26 CASE W. RES. L. REV. 485 (1976); Survey, *Euthanasia: Criminal, Tort, Constitutional and Legislative Considerations*, 48 NOTRE DAME LAW. 1202 (1973); Comment, *The Right To Die*, 10 CAL. W.L. REV. 613 (1974); Comment, *Proposed State Euthanasia Statutes: A Philosophical and Legal Analysis*, 3 HOFSTRA L. REV. 115 (1975).

rights of the person that underlies the Constitution and its view of the criminal law. The initial perception must be that the idea of human rights is a major departure in civilized moral thought. When Locke,<sup>49</sup> Rousseau,<sup>50</sup> and Kant<sup>51</sup> progressively gave the idea of human rights its most articulate and profound theoretical statement, they defined a way of thinking about the moral implications of human personality that was radically new.<sup>52</sup> The practical political implications of this way of thinking are a matter of history as well as of continuing vitality today. The idea of human rights was one among the central moral concepts in terms of which a number of great political revolutions conceived and justified their demands,<sup>53</sup> and the idea retains its revolutionary vitality today as the basic moral vocabulary in terms of which, in the international sphere, colonial independence and postcolonial interdependence have been conceived and discussed.<sup>54</sup> One central application of the revolutionary implications of the concept of human rights was clearly the criminal law; a number of provisions of the United States Constitution and Bill of Rights are preoccupied by it,<sup>55</sup> and several provisions of the French Declaration of the Rights of Man and of Citizens<sup>56</sup> go beyond the United States Constitution in ex-

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49. LOCKE, *Second Treatise*, in TWO TREATISES OF GOVERNMENT (P. Laslett ed. 1960).

50. Rousseau, *The Social Contract*, in THE SOCIAL CONTRACT AND DISCOURSES (G. Cole trans. 1950).

51. I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (1959) [hereinafter cited as I. KANT, FOUNDATIONS]; I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (1965); Kant, *Concerning the Common Saying: This May Be True in Theory, But Does Not Apply in Practice*, in SOCIETY, LAW, AND MORALITY 159-72 (F. Olafson ed. 1961).

52. See Richards, *Sexual Autonomy*, *supra* note 12, at 964-72.

53. The political revolutions of the seventeenth and eighteenth centuries witnessed such landmarks as the English Petition of Rights (1627), the Habeas Corpus Act (1679), the American Declaration of Independence (1776), The United States Constitution (1787), the American Bill of Rights (1791), and the French Declaration of the Rights of Man and of Citizens (1789).

54. For a useful discussion of the force and currency of the idea of national self-determination in international law, see Franck & Hoffman, *The Right of Self-Determination in Very Small Places*, 8 INT'L L. & POL. 331 (1976). See also Franck, *The Stealing of the Sahara*, 70 AM. J. INT. L. 694 (1976).

55. See U.S. CONST. art. I, § 9 (clauses prohibiting suspension of habeas corpus, bills of attainder, and ex post facto laws by Congress); U.S. CONST. art. I, § 10 (prohibitions of bills of attainder and ex post facto laws by the states); U.S. CONST. art. III, § 3. See also U.S. CONST. amends. I, IV, V, VI, VIII, (general provisions relevant to the criminal law).

56. See FRENCH DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS, especially at IV, V, VI, VII, VIII, IX, X, XI.

pressly stipulating substantive constraints on the scope of the substantive criminal law, namely that people are to have liberty from the criminal law "in the power of doing whatever does not injure another."<sup>57</sup> Arguments of this latter kind became a prominent feature of Anglo-American conceptions of human rights with the publication of John Stuart Mill's *On Liberty*.<sup>58</sup>

If the concept of human rights appears to have such pervasive moral force, the philosophical analysis of human rights is of central importance. Recent deontological moral theory, in particular that of Rawls<sup>59</sup> and Gewirth,<sup>60</sup> has enabled us to understand and defend the force of human rights against the familiar Benthamite criticisms.<sup>61</sup> To be specific, these neo-Kantian moral theories focus on the explication of the concept of human rights in terms of two features: the capacities of personhood, sometimes called rational autonomy, and equality.

### 1. *Autonomy*

Autonomy, in the sense fundamental to the idea of human rights, is an assumption about the capacities, developed or undeveloped, of persons *as such*—namely that persons *as such* have a range of capacities that enables them to develop, want to act on, and, in fact, act on higher order plans of action that take as their object one's life and the way it is lived, and evaluate one's life in terms of principles of conduct and canons of evidence to which one has given one's rational assent.<sup>62</sup> Harry Frankfurt made this point when he argued that the "essential difference between persons and other creatures is to be found in the structure of a person's will."<sup>63</sup>

57. FRENCH DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS IV. For the text of the Declaration, see T. PAINE, *RIGHTS OF MAN* 133 (1976) (1st ed. London 1792).

58. See J. MILL, *ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1947) (1st ed. London 1859).

59. J. RAWLS, *supra* note 19.

60. A. GEWIRTH, *supra* note 19.

61. See BENTHAM, *Anarchical Fallacies: Being an Examination of the Declaration of Rights Issued During the French Revolution*, in 2 *THE WORKS OF JEREMY BENTHAM* 491 (J. Bowring ed. 1962) (1st ed. Edinburgh 1843).

62. See D. RICHARDS, *REASONS FOR ACTION*, *supra* note 19, at 65-68.

63. See Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 *J. PHIL.* 5, 6 (1971). For related accounts, see Dworkin, *Acting Freely*, 4 *NOUS* 367 (1970); Dworkin, *Autonomy and Behavior Control*, 6 *HASTINGS CENTER REP.* 23-28 (1976). See also Benn,

Frankfurt argues that the difference between humans and animals lies neither in having desires or motives, nor engaging in deliberation and making decisions based on prior thought, because certain lower animals may have these properties. Rather, the essential difference between humans and animals is that, besides wanting and choosing and being moved to do this or that, persons may want to have or not to have certain desires. As Frankfurt put it, persons

are capable of wanting to be different, in their preferences and purposes, from what they are. Many animals appear to have the capacity for . . . "first-order desires" or "desires of the first order," which are simply desires to do or not to do one thing or another. No animal other than man, however, appears to have the capacity for reflective self-evaluation that is manifested in the formation of second-order desires.<sup>64</sup>

The cluster of capacities constitutive of autonomy include human capacities for language and self-consciousness, memory, logical relations, empirical reasoning about beliefs and their validity (human intelligence), and the capacity to use normative principles, including, *inter alia*, principles of rational choice in terms of which ends may be more effectively and coherently realized. These capacities make possible for persons independent decisions regarding what their life shall be, self-critically reflecting, in terms of arguments and evidence to which one gives one's own rational assent, which of one's first-order desires will be developed and which disowned, which capacities cultivated and which left barren, with what or with whom in one's life history one will or will not identify, or what one will define and pursue as basic goals or what to strive toward as an aspiration. Persons, for example, establish various kinds of priorities and schedules for the satisfaction of first-order desires. The satisfaction of certain wants, for example, hunger, is regularized; the satisfaction of others is sometimes postponed, for example, delays in marriage in order first to secure other objectives. Indeed, persons sometimes gradually eliminate certain self-criticized desires, such as smoking or gluttonous appetite, or over time encourage the development of others, such as cul-

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*Freedom, Autonomy and the Concept of a Person*, 77 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 109-30 (1976).

64. Frankfurt, *supra* note 63, at 7.

tivating one's sensibility to love and tender mutual response.<sup>65</sup> The mark of personhood is precisely our capacity to assess evaluatively our lives in such ways: to come to see certain aspects of our lives as irrational or a failure of competence or morally wrong, while in other respects it is rational or competent or morally desirable, and to take corresponding critical attitudes expressed in the uniquely *personal* emotions—regret, shame, and guilt or self-respect, pride, and sense of integrity.<sup>66</sup>

The idea of human rights crucially takes a normative attitude expressing respect for this capacity of persons, *as such*, for rational autonomy—to be, in Kant's memorable phrase, free and rational sovereigns in the kingdom of ends,<sup>67</sup> viz., to take ultimate, self-critical responsibility for one's ends and the way they cohere in a life, including the capacity to evaluate and revise one's system of ends in terms of arguments and evidence which express one's rational nature.<sup>68</sup> Kant characterized this ultimate normative respect for the revisable choice of ends as the dignity of autonomy,<sup>69</sup> in contrast to the heteronomous, lower-order ends—pleasure and talent—among which the person may choose. Kant thus expressed the fundamental liberal imperative of moral neutrality among many disparate visions of the good life: the concern is not with maximizing the agent's pursuit of any particular lower-order end, but rather with respecting the higher-order capacity of the agent to exercise rational autonomy in choosing and revising one's ends. The basic Kantian intuition is that the central focus of ethics is respect not for what people currently are or for particular ends, but for an idealized capacity which people, if appropriately treated consistently with the requirements of human rights, can realize—namely, the capacity to take responsibility as a free and rational agent for one's system of ends, in short, personhood.

65. On the relation of the person to rational choice, including choices of these kinds, see D. RICHARDS, *REASONS FOR ACTION*, *supra* note 19, at ch. 3.

66. For an account of the bases for these personal emotions, see *id.* at 250-67.

67. See I. KANT, *FOUNDATIONS*, *supra* note 51, at 51-52.

68. Rawls, *A Kantian Conception of Equality*, *CAMBRIDGE REV.*, February 1975, at 94.

69. See I. KANT, *FOUNDATIONS*, *supra* note 51, at 53.



## 2. *Treating People as Equals*

As regards equality, the idea of human rights expresses a normative point of view that puts an equal weight on each person's capacity for autonomy. Recent neo-Kantian moral theory alternatively has articulated the idea of equality in one of three ways: (1) in terms of equal concern and respect,<sup>70</sup> (2) in terms of universalizability,<sup>71</sup> and (3) in terms of the political right that all parties to the social contract be treated equally.<sup>72</sup>

The notion of treating persons as equals is, of course, ambiguous. A fundamental way to distinguish among moral theories is to focus on how they differently resolve this ambiguity. For example, John Stuart Mill, following Bentham, argued that utilitarianism treated people as equals in the sense that everyone's pleasures and pains were impartially registered by the utilitarian calculus; thus, utilitarianism satisfies<sup>73</sup> the fundamental moral imperative of treating persons as equals, where the criterion of equality is pleasure or pain. To humane liberal reformers like Mill the great attraction of utilitarianism was precisely its capacity to interpret sensibly the basic moral imperative of treating people as equals in a way that enabled reformers concretely to assess institutions in the world in terms of human interests.<sup>74</sup> Any alternative to utilitarianism must provide a coherent interpretation of treating people as equals which also enables critical moral intelligence concretely to assess institutions in terms of relevant consequences. The great challenge to anti-utilitarian moral theory is to explain why it better explicates the moral imperative of treating persons as equals in a way that also supplies coherent substantive principles of humane moral criticism of existing institutions.

From the perspective of neo-Kantian deontological moral theory, utilitarianism fails to treat persons as equals in the morally fundamental sense. To treat persons in the way utilitarianism requires is to focus obsessively on pleasure alone as the *only* ethically significant fact and to aggregate it as such. Pleasure is treated as a kind

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70. See R. DWORKIN, *supra* note 18, at 150.

71. See A. GEWIRTH, *supra* note 19.

72. See J. RAWLS, *supra* note 19.

73. See J. MILL, *UTILITARIANISM* 76-79 (1957) (1st ed. London 1863).

74. See *id.* at 73.

of impersonal fact, and no weight is given to the separateness of the creatures who experience it. But, this treatment flatly ignores that the only *ethically* crucial fact can be that *persons* experience pleasure and that pleasure has significance and weight only in the context of the life that a person chooses to lead.<sup>75</sup> Utilitarianism thus fails to treat persons as equals in that it literally dissolves moral personality into utilitarian aggregates. In contrast, neo-Kantian deontological moral theory interprets treating *persons* as equals not in terms of lower-order ends persons may pursue, pleasure or pain, but in terms of personhood, the capacity of each person self-critically to evaluate and give order and personal integrity to one's system of ends in the form of one's life. The fundamental and ethically prior fact is not pleasure and the maximum impersonal aggregations thereof, but so expressing equal concern and respect for the capacities of personhood that people may equally develop the capacities to take ultimate responsibility for how they live their lives and revise them accordingly. It is no accident that from Kant<sup>76</sup> to Rawls<sup>77</sup> and Gewirth<sup>78</sup> this perspective has been supposed to justify human rights that are not merely non-utilitarian, but anti-utilitarian. Thus to express equal respect for personal autonomy is to guarantee the minimum conditions requisite for autonomy; ethical principles of obligation and duty rest upon and insure that this is so and correlatively define human rights. Without such rights, human beings would lack, *inter alia*, the basic opportunity to develop a secure sense of an independent self. Instead they simply would be the locus of impersonal pleasures which could be manipulated and rearranged in *whatever* ways would aggregate maximum utility overall, for all individual projects must, in principle, give way before utilitarian aggregates. Rights insure that this not be so, a point Dworkin has made by defining rights as trumps over countervailing utilitarian calculations.<sup>79</sup>

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75. See Williams, *A Critique of Utilitarianism*, in J. SMART & B. WILLIAMS, *UTILITARIANISM FOR AND AGAINST* 77 (1973).

76. I. KANT, *FOUNDATIONS*, *supra* note 51, at 59-64.

77. J. RAWLS, *supra* note 19, at 22-27.

78. A. GEWIRTH, *supra* note 19, at 200-01.

79. R. DWORKIN, *supra* note 18, at 90-94, 188-92.

## B. *Recent Neo-Kantian Theory and Human Rights*

The task of interpreting human rights in terms of the autonomy-based interpretation of treating persons as equals has been substantially furthered by the recent revival of contractarian theory in the work of John Rawls and the similar neo-Kantian construction of Alan Gewirth.

### 1. *John Rawls*

Rawls' contractarian theory explicates human rights and their institutionalization in American constitutional law in a way that the existing moral theories of constitutional theorists—utilitarianism<sup>80</sup> and value skepticism<sup>81</sup>—cannot imitate. The great early theorists of human rights—Locke, Rousseau, and Kant—whose ideas clearly influenced American constitutionalism, all invoked, explicitly or implicitly,<sup>82</sup> contractarian metaphors in explaining the concrete implications of autonomy and equal concern and respect. The basic moral vision of these theorists was that human institutions and relationships should be based on equal concern and respect for personal autonomy or, as I have put it above, on an autonomy-based interpretation of treating persons as

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80. The majoritarian appeal in Thayer, *The Origin and Scope of The American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), is implicitly utilitarian, as are Bickel's later works, A. BICKEL, *THE MORALITY OF CONSENT* (1975); A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

81. See generally L. HAND, *THE BILL OF RIGHTS* (1958). Compare A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS*, *supra* note 80, in which a value skepticism similar to Hand's leads to a critique of moral reform through constitutional adjudication. Moral reflection and reform in the light of principles are to be replaced by unconscious moral historicism. *Id.* at 174-75. These ideas represent a significant retreat from Bickel's earlier work. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). Value skepticism and utilitarianism are often inextricably intertwined in the work of these theorists. The idea, invoked seminally by Holmes, appears to be that one is skeptical of any nonutilitarian ideas but that utilitarian ideas are to be invoked in any proper analysis of the law. For the latter, see O. HOLMES, *supra* note 14. For a good statement of Holmes' value skepticism as a theory of the first amendment, see his dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). See also his famous dissenting observation, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

82. Kant did not expressly invoke a contractarian model in the way Locke and Rousseau did, but he clearly suggested it. See Kant, *supra* note 51. For Locke, see Locke, *supra* note 49. For Rousseau, see Rousseau, *supra* note 50.

equals. The requirements of this moral point of view were expressed by the idea that a just society was one governed by an agreement or social contract arrived at by the consent of all persons starting from a position of basic equality. Rawls' contractarian model has the great virtue of showing the continuing intellectual and moral vitality of this kind of metaphor.

The basic analytic model is this:<sup>83</sup> moral principles are those that perfectly rational persons, in a hypothetical "original position" of equal liberty, would agree to as the ultimate standards of conduct applicable at large.<sup>84</sup> Persons in the original position are thought of as ignorant of any knowledge of their specific situations, values, or identities, but as possessing all knowledge of general empirical facts, capable of interpersonal validation, and holding all reasonable beliefs. Because Rawls' concern is to apply this definition of moral principles to develop a theory of justice, he introduces into the original position the existence of conflicting claims to a limited supply of general goods and considers a specific set of principles to regulate these claims.<sup>85</sup>

The original position presents a problem of rational choice under uncertainty. Rational people in the original position have no way of predicting the probability that they will end up in any given situation of life. If a person agrees to principles of justice that permit deprivations of liberty and property rights and later discovers that he occupies a disadvantaged position, he will, by definition, have no just claim against deprivations that may render his life prospects meager and servile. To avoid such consequences, the rational strategy in choosing the basic principles of justice would be the conservative "maximin" strategy:<sup>86</sup> one would seek to maximize the minimum condition, so that if a person were born into the worst possible situation of life allowed by the adopted moral prin-

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83. J. RAWLS, *supra* note 19, at 11-22. See also D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 75-91.

84. J. RAWLS, *supra* note 19, at 11-22.

85. If there were goods in abundant superfluity or if people were more willing to sacrifice their interests for the good of others, the need for a moral system might be significantly different or even nonexistent. For David Hume's remarkable discussion of the conditions of moderate scarcity, see D. HUME, A TREATISE OF HUMAN NATURE bk. III, pt. 2, § 11 (London 1739), reprinted in SOCIETY, LAW AND MORALITY 307-19 (F. Olafson ed. 1961). See also J. RAWLS, *supra* note 19, at 128.

86. See J. RAWLS, *supra* note 19, at 150-61.

ciples, he would still be better off than he would be in the worst situation allowed by other principles.

The choice of which fundamental principles of justice to adopt requires consideration of the weight assigned to general goods by those in the original position. "General goods"<sup>87</sup> are those things or conditions that all people desire as the generalized means to fulfillment of their individual life plans.<sup>88</sup> Liberty, understood as the absence of constraint, is usually considered to be one of these general goods. Similarly classifiable are powers, opportunities, and wealth.<sup>89</sup>

Among these general goods, self-respect or self-esteem, a concept intimately related to the idea of autonomy, occupies a place of special prominence.<sup>90</sup> Autonomy, seen now in the light of contractarian theory, is the capacity of persons to plan, shape, and revise their lives in accordance with changing desires and aspirations assessed in terms of arguments and evidence to which the person gives rational assent. As such, autonomy involves such essentially human capacities as thought and deliberation, speech, and craftsmanship. The competent exercise of such abilities in the pursuit of one's life plan forms the basis of self-respect,<sup>91</sup> without which one is liable to suffer from despair, apathy, and cynicism. Thus persons in the original position, each concerned to create favorable conditions for the successful pursuit of his life plan, but ignorant of the particulars of his position in the resulting social order, would agree to regulate access to general goods so as to maximize the possibility that every member of society will be able to achieve self-respect. Accordingly, self-respect may be thought of as

87. Rawls describes these general goods as "things which it is supposed a rational man wants whatever else he wants." *Id.* at 92. The notion of rationality considered here is developed in D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 27-48, and J. RAWLS, *supra* note 19, at 407-16. The general view of the good is discussed in J. RAWLS, *supra* note 19, at 395-452, and in D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 286-91.

88. For the notion of a life plan, see C. FRIED, AN ANATOMY OF VALUES 97-101, 155-82 (1970); J. RAWLS, *supra* note 19, at 407-16; D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 27-48, 63-74.

89. J. RAWLS, *supra* note 19, at 92. See also Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32, 41-49 (1973).

90. J. RAWLS, *supra* note 19, at 433, 440-46.

91. See D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 257, 265-68; R. WHITE, EGO AND REALITY IN PSYCHOANALYTIC THEORY (1963).

the primary human good.<sup>92</sup>

Thus Rawls' contractarian reconstruction provides an interpretation of the moral weight of autonomy—autonomy as a feature of the primary human good—and equality—the original position of equal liberty—and affords a decisionmaking procedure, the maximin strategy, which provides a determinate substantive account for the content of human rights as minimum conditions of human decency. An important feature of the contractarian interpretation of autonomy is the assumption of ignorance of specific identity and the consequent requirement that a decision be reached on the basis of empirical facts capable of interpersonal validation. This assumption assures that the principles decided on in the original position will be neutral as between divergent visions of the good life, for the ignorance of specific identity deprives people of any basis for illegitimately distorting their decisions in favor of their own vision. Such neutrality, a fundamental feature of the idea of political right,<sup>93</sup> insures to people the right to choose their own lives autonomously.<sup>94</sup>

## 2. *Alan Gewirth*

Both Rawls and Gewirth give expression to the autonomy-based interpretation of treating persons as equals in terms of variant interpretations of Kantian universalizability. Rawls does so in terms of the veil of ignorance which enables the agent to abstract from her or his particular ends, so that one captures the idea that in thinking ethically one respects higher-order capacities of personhood, not lower-order ends which happen to be pursued, and in terms of the idealized contractual hypothesis whereby what persons would agree to therein comes to the same thing as what each

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92. In Rawls' terminology, self-respect is "the most important primary good." J. RAWLS, *supra* note 19, at 440. *See also id.* at 178-80.

93. Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113-43 (S. Hampshire ed. 1978).

94. In later elaborations of his theory, Rawls has laid great stress on the primacy of the argument for religious toleration as the paradigm for his argument. *See Rawls, Fairness to Goodness*, 84 *PHIL. REV.* 536, 539-40, 542-43 (1975); *Rawls, Reply to Alexander and Musgrave*, 88 *Q.J. ECON.* 633, 636-37 (1974). The self-conscious primacy of religious toleration in Rawls' theory is a striking correlate to the place of the free exercise and anti-establishment clauses of the first amendment.

person, thus idealized, would universalize for all persons alike. Gewirth follows Kant more literally: he argues that ethical reasoning, as such, is marked by a certain phenomenology—namely, in reasoning ethically, an agent abstracts from her or his particular ends—thinking in terms of human action *in general* versus any particular ends of human action, which turns out to be what we previously called rational autonomy—and considers what general requirements for rational autonomy the agent would demand for the self, so idealized, on the condition that the requirements be consistently extended to all other agents alike.<sup>95</sup> Clearly Rawls' argument is more abstract but to similar effect: we start not from the particular agent, but from the concept of rational persons who must unanimously agree upon, while under a veil of ignorance as to who they are, the general critical standards in terms of which their personal relations will be governed.

Both the theories of Rawls and Gewirth are deontological: the idea of moral right is not defined teleologically in terms of maximizing the good, however defined, but in terms of certain principles which express the autonomy-based interpretation of treating persons as equals.<sup>96</sup> It is important to see that this kind of deontological moral perspective, while it rejects as an ultimate moral principle the utilitarian maximization of the aggregate of pleasure over pain, is not incompatible with the relevant assessment of consequences in thinking ethically. Both these theories appeal to consequences in arguing that certain substantive principles would be universalized (Gewirth) or agreed to (Rawls). Thus Gewirth has argued that the universalizing agent would assess the necessary substantive or material conditions for rational autonomy and would universalize these conditions; the consequences of universalization thus determine what would be universalized. Correspondingly, Rawls' contractors consider the consequences of agreeing to certain standards of conduct as part of their deliberations.

The main substantive difference between these two theories is in Rawls' argument that the contractors of the original position, in the conditions of uncertainty—not knowing who they are and thus how they will be specifically affected by agreeing to certain princi-

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95. A. GEWIRTH, *supra* note 19, at 48-198.

96. J. RAWLS, *supra* note 19, at 30, 40.

ples—would find it rational to maximin, viz., agree to that set of principles which would make the worst off best off. Gewirth has resisted the thoroughgoing application of this strategy on the ground that, through the veil of ignorance, it too radically treats as morally arbitrary differences between people not all of which can easily be regarded as ethically fortuitous<sup>97</sup> and thus properly regulated by a principle like maximin which, in making the worst off best off, tends to be equalizing, because, in many cases, the way rationally to make the worst off best off is to abolish the worst off classes altogether by mandating equality. We do not have to pursue this disagreement here as its substantive upshot is in terms of narrow issues of economic distributive justice which are not our present concern. For present purposes it is important to keep in mind the broad common ground shared by Rawls and Gewirth. Even in the area of distributive justice, both agree about the justice of maintaining a social and economic minimum. Even as regards their differences over maximin, it seems clear that Gewirth's insistence, over a wide range of cases, that each person, idealized in terms of rational autonomy, should demand for himself or herself whatever can be universalized to other persons converges with maximin, viz., insuring that each person equally has access to certain conditions of well-being and self-respect.<sup>98</sup> With respect to human rights, the consequence of both approaches would be a set of general principles of critical morality, some of which would involve such fundamental interests that coercion would be justified in enforcing them.<sup>99</sup> These principles, which we can denominate the principles of obligation and duty, would define correlative rights.<sup>100</sup> Let us consider the relevance of this general account of human rights to the analysis of the moral foundation of the criminal law and related constitutional principles.

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97. A. GEWIRTH, *supra* note 19, at 108-09. See also *id.* at 331.

98. See *id.* at 199-365; Gewirth, *The Basis and Content of Human Rights*, 13 GA. L. REV. 1143 (1979).

99. For a contractarian derivation of such rights, see D. RICHARDS, *REASONS FOR ACTION*, *supra* note 19, at 92-195.

100. See *id.* at 95-106.



### C. *The Moral Foundations of the Substantive Criminal Law*

It is an uncontroversial truth that the criminal law rests on the enforcement of public morality, viz., that criminal penalties, *inter alia*, identify and stigmatize certain moral wrongs which society at large justifiably condemns as violations of the moral decency whose observance defines the minimum boundary conditions of civilized social life.<sup>101</sup> Little critical attention yet has been given in Anglo-American law to the proper explication of the public morality in light of considerations of human rights to which constitutional democracy in general is committed; rather, legal theory and practice have tended to acquiesce in a questionable identification of the public morality with social convention.<sup>102</sup> We are now in a position to articulate an alternative account of the moral foundations of the substantive criminal law, which can illuminate various criminal law and related constitutional law doctrines and the proper direction of criminal law reform.

The substantive criminal law and cognate principles of constitutional law rest on the same ethical foundations: the fundamental ethical imperative that each person should extend to others the same respect and concern that one demands for oneself as a free and rational being with the higher-order capacities to take responsibility for and revise the form of one's life. Whether one uses Rawls' maximin contractarian hypothesis or Gewirth's universalization of rationally autonomous people, the consequence is the same for purposes of the criminal law. Certain basic principles are agreed to or universalized, as basic principles of critical morality, because they secure, at little comparable cost to agents acting on them, forms of action or forbearance from action that rational persons would want guaranteed as minimal conditions of advancing the responsible pursuit of their ends; furthermore, these principles

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101. See, e.g., BUTLER, *Upon Resentment*, in FIFTEEN SERMONS AT THE ROLLS CHAPEL 102 (1913); J. FEINBERG, *The Expressive Function of Punishment*, in DOING AND DESERVING 95-118 (1970); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958); F. STEPHEN, *Punishment and Public Morality*, in 2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 30-37, 90-93 (1883).

102. See Richards, *Commercial Sex*, *supra* note 23, at 1231-36; Richards, *Sexual Autonomy*, *supra* note 12, 975-99; Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281, 1333-46 (1977).

will be so fundamental in securing either a higher lowest (Rawls)<sup>103</sup> or the conditions of rational autonomy (Gewirth)<sup>104</sup> that, in general, coercion will be viewed as justified, as a last resort, in getting people to conform their conduct to these principles. Accordingly, these principles are commonly referred to as the ethical principles of obligation and duty which define correlative rights.<sup>105</sup>

One fundamental distinction between these principles of obligation and duty is that some apply in a state of nature whether or not people are in institutional relations to one another, whereas others arise because of the special benefits that life in institutions and communities makes possible; I shall refer to the former as natural duties<sup>106</sup> and to the latter as institutional duties and obligations.<sup>107</sup> With respect to natural duties, the principles include, at a minimum, a principle of nonmaleficence<sup>108</sup> (not inflicting harm or gratuitous cruelty), mutual aid<sup>109</sup> (securing a great good, like saving life, at little cost to the agent), consideration<sup>110</sup> (not annoying or gratuitously violating the privacy of others), and paternalism<sup>111</sup> (saving a person with impaired or undeveloped rationality likely to result in severe and irreparable harm). With respect to institutional duties and obligations, the principles include basic principles of justice<sup>112</sup> which regulate such institutions—legal and economic systems, conventions of promise-keeping and truth-telling, family and educational structure—and, in appropriate circumstances, require compliance with the requirements of such institutions,<sup>113</sup> for example, respecting certain property rights. All these principles of obligation and duty—natural and institutional—are formulated in complex terms, and priority relations are established among them to determine, in general, how conflicting obligations should be resolved and what the relative moral seriousness of of-

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103. See D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 92-195.

104. See note 98 & accompanying text *supra*.

105. See note 100 & accompanying text *supra*.

106. See D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 92-95, 176-95.

107. *Id.* at 27-175. See also *id.* at 92-95.

108. *Id.* at 176.

109. *Id.* at 185.

110. *Id.* at 189.

111. *Id.* at 192.

112. *Id.* at 107-47. See also J. RAWLS, *supra* note 19, at 195-394.

113. D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 148-75.

fenses would be; the infliction of death, for example, is a more grave violation of integrity than a minor battery.<sup>114</sup> The general nature of such principles and their derivation from the moral imperative of treating persons as equals, however, seems clear. Such principles secure to all persons on fair terms basic forms of action and forbearance from action which rational persons would want enforceably guaranteed as conditions and ingredients of living a life of self-critical integrity and self-respect; correlatively, such principles define human or moral rights, the weight of which as grounds for enforceable demands rests on the underlying moral principles of obligation and duty which justify such enforceable demands. Other moral principles are also agreed to or universalized, but they fall in an area, supererogation,<sup>115</sup> which is not our present concern.

In understanding the moral foundations of the criminal law, two classes of these moral principles are relevant at different points: (1) the moral principles which define the forms of action and forbearance from action which the criminal law enforces, for example, nonmaleficence, and (2) the principles of justice which regulate the ways in which these moral principles may be enforced.

With respect to (1), the principles in question require forms of action and forbearance from action which express basic respect for the capacity of persons responsibly to pursue their ends. Such principles impose stringent constraints on the kinds of action and forbearance from action which permissibly may be made subjects of criminal penalty; only those forms of action and forbearance may properly be criminalized which violate rights of the person to forms of respect defined by the underlying principles of obligation and duty. Such constraints on the propriety of criminalization are a salient feature of the perspective of human rights on criminal justice, a thought expressed in the French Declaration of the Rights of Man and of Citizens that people are to have liberty from the criminal law "in the power of doing whatever does not injure another"<sup>116</sup> and by John Stuart Mill in terms of his harm princi-

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114. For attempts to formulate such complex principles which appear broadly convergent in substantive requirements, see *id.* at 8-10; A. GEWIRTH, *supra* note 19, at 199-365.

115. D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 196-211.

116. FRENCH DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS IV.

ple.<sup>117</sup> It is easier to state this thought negatively, in terms of what it rejects, than to formulate positively what it requires as substantive conditions of the just use of the criminal penalty. Negatively, this thought rules out, as the measure of proper criminalization, the mere thought, no matter how conventional or historically common or sincerely held, that certain conduct is disapproved or rejected.<sup>118</sup> Positively, the thought appears to require, as a condition of just criminalization, a certain kind of moral reasoning rooted in respect for the rights of the person. Later I shall argue that the constitutional right to privacy, correctly interpreted, expresses a form of this requirement and is thus rooted in the most basic ideas of human rights on which constitutionalism justly builds.<sup>119</sup>

With respect to (2), the principles of justice, since the moral principles of (1) are the proper objects of enforcement by forms of force or coercion, ethical principles of justice that govern the proper distribution of such force or coercion are agreed to or universalized.<sup>120</sup> Such principles include the general requirement that sanctions be applied only to persons who broke a reasonably specific law, who had the full capacity and opportunity to obey the law, and who reasonably could have been expected to know that such a law existed. In this way, each person is guaranteed the greatest liberty, capacity, and opportunity of controlling and predicting the consequences of her or his actions, compatible with a like liberty, capacity, and opportunity for all. Such a principle can be agreed to or universalized because it is a reasonable way to secure general respect for and compliance with the moral principles of (1) at a tolerable cost; for, these conditions provide the fullest possible opportunity for people to avoid these sanctions if they so choose or, at least, the fullest possible opportunity within the constraint that some system of coercive enforcement is justified to insure compliance with the moral principles of (1).<sup>121</sup> In addition, the

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117. See J. MILL, *supra* note 58.

118. See authorities cited note 102 *supra*.

119. See text accompanying notes 343-59 *infra*. Compare Richards, *Sexual Autonomy*, *supra* note 12, at 957-1018, with Richards, *Human Rights*, *supra* note 23, at 1421-28.

120. I discuss these principles at greater length in Richards, *Human Rights*, *supra* note 23, at 1416-20.

121. See *id.* at 1428-34.

principles of (2) would include principles of proportionality<sup>122</sup> and effectiveness<sup>123</sup> which would place constraints on degrees and kinds of sanction that may be used as just criminal sanctions.

## II. THE MORALITY OF DECISIONS TO DIE AND THE RIGHTS OF THE PERSON

In order to assess critically the arguments for the criminalization of all decisions to die, we must examine carefully the moral structure of the idea of the right to life which underlies such criminalization. The concept of the right to life, like any complex moral and legal concept, such as the right to property, appears to consist of several distinguishable elements,<sup>124</sup> each having different implications and requiring separate analysis. First, let us examine the cluster of moral principles of obligation and duty, sketched in general terms above, which are constitutive of the right to life; then, we may critically examine the proper force of various common arguments for the criminalization of all decisions to die.

### A. *Moral Principles Constitutive of the Right to Life*

For purposes of the present analysis of the moral right to life, let us stipulate a common denominator of the idea of rights as such, whether moral rights or legal rights—those enforceable by the civil or criminal law. Having a right implies at least the justifiability of coercion, in some form, in protecting certain kinds of choice from incursion by others, whether the individual has the additional liberty of choosing whether these rights shall be enforced, for example, contracts in the civil law, or whether she or he does not have that choice, for example, rights to personal safety in the criminal law.<sup>125</sup> In the moral sphere, such justifiability of coercion would be crucially defined by moral principles of obligation and duty which, by definition, justify coercion in their enforcement. Accordingly, the delineation of the moral structure of the right to life requires analysis of the pertinent moral principles of obligation and duty

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122. *See id.* at 1418, 1442-45.

123. *See id.* at 1418-19, 1442-45.

124. Hart, *Bentham on Legal Rights*, in OXFORD ESSAYS IN JURISPRUDENCE, 2D SER. 170-201 (A. Simpson ed. 1973).

125. *See* D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 99-106.

which justify coercion in the protection of life. We shall focus here on the relevant aspects of three such principles: nonmaleficence, mutual aid, and paternalism.

In general, these principles define natural duties which apply to personal relationships whether within or outside common institutions.<sup>126</sup> These principles thus do not exhaust the moral principles of obligation and duty relevant to the full assessment of the morality of acts in general and killing in particular. To be specific, personal relationships within institutions and between institutions are governed by principles of justice and fairness which regulate the distribution of benefits and burdens of such institutions.<sup>127</sup> In particular, certain of these principles of justice will bear on questions of the morality of inflicting harms. Principles of just punishment, for example, will justify certain kinds of infliction of evil in order to uphold the just aims of the criminal law,<sup>128</sup> including the enforcement of the natural duties,<sup>129</sup> and the principles of just war may, in appropriate circumstances and within defined limits, justify the infliction of harms consistent with measured aims of justice.<sup>130</sup> In some cases such principles may justify forms of killing. For present purposes, let us assume that some reasonable set of such principles of justice have been formulated and that we have confidence that some forms of the infliction of harms justified by such principles are circumscribed within sharp limits of proportionality and effectiveness. With such principles in the background and assuming the justifiability of forms of harm infliction justified by such principles, we may turn to the principles of natural duty which establish and define a general moral right to life.

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126. See *id.* at 92-95, 176-95.

127. See *id.* at 107-75.

128. See, e.g., Richards, *Human Rights*, *supra* note 23, at 1416-20.

129. The natural duties, by definition, apply to personal relationships, whether or not persons are in an institutional relationship to one another. Persons, for example, would be bound in their relationships in some state of nature to observe the principle of nonmaleficence and the like. However, since the principles of natural duty are the justifiable object of coercive enforcement when a just form of coercive enforcement exists—for example, a nation-state with a just legal system—the natural duties are the subject of coercive enforcement, for example, through the criminal law. See generally Richards, *Human Rights*, *supra* note 23, at 1414-20.

130. See D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 137-41. See also C. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979); M. WALZER, JUST AND UNJUST WARS (1977).

### 1. *The Principle of Nonmaleficence*

The principles of natural duty are those principles, justifying coercion in their enforcement, which would be agreed to or universalized, consistent with the autonomy-based interpretation of treating persons as equals, as an effective public morality governing the relations of persons *simpliciter*, whatever their institutional relations to one another. Foremost among these principles is the principle of nonmaleficence,<sup>131</sup> which, for our present purposes, we may construe in terms of the requirement not intentionally, knowingly, or negligently to inflict harms on other persons except in cases of necessary and proportional self-defense<sup>132</sup> or in certain extreme cases of just necessity<sup>133</sup> or extreme duress.<sup>134</sup> Since our present concern is with the broad implications of this principle for the right to life, which it in part defines, let us focus here on the moral basis of the prohibition of harm.

Let us begin with the very idea of personhood, or rational autonomy, in terms of which treatment as equals, from the human rights perspective, is defined.<sup>135</sup> As we have seen, personhood is defined in terms of certain higher-order capacities, developed or undeveloped, which enable persons critically to reflect on and revise the form of their lives in terms of arguments and evidence to which they freely and rationally assent. The exercise of these capacities is shown when people adopt, examine self-critically, and revise plans of living in terms of various forms of evaluative criteria—sometimes principles of rational choice whereby they define and pursue their system of ends in a way better designed to satisfy all or a greater number of them now or in a more harmonious and complementary way over their life cycle,<sup>136</sup> sometimes personal

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131. For a general discussion of this principle, see D. RICHARDS, *REASONS FOR ACTION*, *supra* note 19, at 176-85. See also T. BEAUCHAMP & J. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 97-134 (1979).

132. On self-defense, see D. RICHARDS, *REASONS FOR ACTION*, *supra* note 19, at 181; Richards, *Human Rights*, *supra* note 23, at 1435-36. See also C. FRIED, *RIGHT AND WRONG* 42-53 (1978).

133. See Richards, *Human Rights*, *supra* note 23, at 1437-39.

134. See *id.* at 1431-32.

135. C. FRIED, *supra* note 132, at 7-53.

136. For an account of rational choice and its principles in such contexts, see D. RICHARDS, *REASONS FOR ACTION*, *supra* note 19, at 27-48.

ideals of excellence in which they invest their rational self-esteem,<sup>137</sup> sometimes in terms of ethical principles either of minimal decency<sup>138</sup> or supererogatory heroism or beneficence.<sup>139</sup> From the perspective of an autonomy-based ethics, divergent and quite disparate plans of life may be reasonably affirmed and pursued on such terms;<sup>140</sup> the notion of rationality, in terms of which persons often evaluate and revise their lives, yields a neutral theory of the good which is compatible with enormous diversity and idiosyncrasy of life design. Consistent with this diversity and idiosyncrasy, however, there are certain things which not unreasonably we may assume all rational persons want as typical conditions of whatever else they want. For purposes of his theory of distributive justice, Rawls calls these "general goods"<sup>141</sup> and focuses on wealth, status, property, etc., as examples. For purposes of our present focus on the natural duties, we may identify as such goods the typical rational interest of persons,<sup>142</sup> as conditions of pursuing whatever else they want, in basic integrity and control of their bodies, persons, and lives and thus in security from forms of interference with this integrity, including injury, pointless cruelty, and most forms of killing.<sup>143</sup>

The principle of nonmaleficence would be agreed to or universalized, consistent with the autonomy-based interpretation of treating persons as equals, because it secures the fundamental interest of personal integrity in terms of a prohibition which does not typically require persons to sacrifice substantial interests. Substantial interests are not sacrificed because the pursuit of persons' substantial interests does not indispensably require acts forbidden by the principle<sup>144</sup> or, at least, does not typically do so. Forms of self-

137. See *id.* at 264-67.

138. See *id.* at 107-95.

139. See *id.* at 205-11.

140. See Dworkin, *supra* note 93, at 113-43.

141. See notes 87-88 & accompanying text *supra*.

142. I omit here any discussion of the possible interest of persons in constraining forms of cruelty to animals. For some discussion, see D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 182-83.

143. For a similar formulation, see Brandt, *A Moral Principle About Killing*, in BENEFICENT EUTHANASIA 106-14 (M. Kohl ed. 1975).

144. The requirement that actions required by a principle do not call for substantial sacrifices of personal interests—for example, death, ill health, penury—is a central reason why



defense and the like are expressly exempt from the principle because they do not clearly observe this or similar conditions.<sup>145</sup>

The principle of nonmaleficence, consistent with its moral basis in protecting personal integrity on fair terms to all persons who both benefit from the principle and bear the burden of observing it, is defined in terms of the prohibition of harms, which is in turn defined in terms of the frustration of the rational interests of persons as conditions of whatever else they want. It is important to see and give weight to the place that *harm*, so understood, plays in properly interpreting its requirements. Not all forms of pain are forbidden by the principle, for some kinds of pain infliction do not violate the rational interests of persons and thus are not harms. Consider, for example, the pain of self-knowledge that good education or therapy may indispensably involve. The infliction of such pain, guided by wise experience, is no harm, indeed it is often among the most good one person can do for another.<sup>146</sup>

Correspondingly, the principle, properly understood, does not forbid killing as such, but forbids those killings which are harms.<sup>147</sup> Clearly, most killings of persons are harms in the sense to which we can give a sensible interpretation,<sup>148</sup> namely that persons typically have a rational interest in living which killing frustrates. Epicurus, in a famous conundrum, challenged the intuition that one's death could be an evil:

So death, the most terrifying of ills, is nothing to us, since so

the principle is one which defines duties or obligations which may be coercively enforced; otherwise, justifiable coercion would never be agreed to. D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 277.

145. In self-defense contexts, the agent would be harmed unless harm were used in defense. See authorities cited note 132 *supra*. In cases of just necessity, harm is inflicted only as a way of fairly avoiding greater harm. See Richards, *Human Rights*, *supra* note 23, at 1437-39. In duress, the agent is threatened with harm which a reasonable person cannot resist. See *id.* at 1431-32.

146. Even masochistic pleasure in some cases may be regarded as a good not forbidden by nonmaleficence. See D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 178.

147. Brandt, *supra* note 143, at 106-14. See also Brandt, *The Morality and Rationality of Suicide*, in *ETHICAL ISSUES IN DEATH AND DYING* 123-33 (T. Beauchamp & S. Perlin eds. 1978).

148. Joel Feinberg has noted the oddity of asking whether a murderer has harmed his victim. See Feinberg, *Harm and Self-Interest*, in *LAW, MORALITY AND SOCIETY* 299 (P. Hacker & J. Raz eds. 1977). Nonetheless, on reflection, he can give a sense to the idea. *Id.* at 299-308.

long as we exist, death is not with us; but when death comes, then we do not exist. It does not then concern either the living or the dead, since for the former it is not, and the latter are no more.<sup>149</sup>

Surely this paradox falsely supposes that the evil of death must, to be sensible, be cotemporal with life as such, which would render the concept senseless and incoherent,<sup>150</sup> but it is a mistake to identify the evil of death with some absence of good in living.<sup>151</sup> The rational self-interest of persons in life is not in just life as such, but in the kinds of plans and aspirations of the person which life makes possible. Such plans and aspirations are independent of our actually living, for their success or failure may be known only long after our deaths.<sup>152</sup> And during our lives, such plans and aspirations are our reasons for living; indeed, death is an evil, where it is an evil, because it cuts off those still vital plans in which we have centered our selves.<sup>153</sup>

It must follow that there are some cases in which killing or ending one's life will not be a harm, namely, where a person has a rational interest in dying.<sup>154</sup> Surely we can give a coherent sense to this idea not merely in terms of specific examples, such as the terminally ill cancer patient, in terrible pain, demanding death, but in terms of a general characterization of cases, namely, those in which the person's plans, assessed and subject to revision in terms of

149. Epicurus, *Letter to Monoceus*, in *THE STOIC AND EPICUREAN PHILOSOPHERS* 31 (W. Oates ed. 1940). For the comparable passages in Lucretius, see *III DE RERUM NATURA* 11.830-1091. For commentary, see Silverstein, *The Evil of Death*, 77 *J. PHIL.* 401-24 (1980).

150. See generally Silverstein, *supra* note 149.

151. See *id.* at 405-10.

152. See Feinberg, *supra* note 148, at 299-308, where the point is made in terms of posthumous harms to one's interests, for example, the frustration of altruistic aims in which one centered one's life or defamation to one's reputation. In Nagel, *Death*, in *MORAL PROBLEMS* 361-70 (J. Rachels ed. 1971), Nagel notes the existence of harms of which a person is not and cannot be aware, for example, "the misfortunes of being deceived, despised, or betrayed." *Id.* at 366. Nagel includes in this idea that breaking a deathbed promise is "an injury to the dead man." *Id.*

153. See Nagel, *supra* note 152, at 361-70. See also B. WILLIAMS, *The Makropulos Case: Reflections of the Tedium of Immortality*, in *PROBLEMS OF THE SELF* 82-100 (1973). Williams' argument rests on the thought that the boredom that immortality would introduce into our appetite for plans and aspirations would be so extreme that life might become an evil.

154. See authorities cited note 147 *supra*. See also D. RICHARDS, *REASONS FOR ACTION*, *supra* note 19, at 177-79, 193-95.

standards and arguments to which he or she gives free and rational assent, are better satisfied by death than by continued life.<sup>155</sup> From the point of view of the neutral theory of the good, fundamental to the autonomy-based interpretation of treating persons as equals, these matters must be assessed in terms of the individual person's coherent system of rational ends, plans, and projects. From this perspective, there are cases of both altruistic and egoistic motivation in which certain persons more reasonably secure their rational ends by death than by continued life. Surely we have no difficulty in understanding the reasonableness of such actions in cases of heroism or saintly beneficence, when death is embraced as the necessary means to do great goods for others and death thus realizes a personal vision of fulfillment whose ideals cannot be met better. Comparable cases exist in which, for persons with certain coherent and rationally affirmed plans of life in certain circumstances, death may be reasonably justified in terms of better realizing the ends of their life plan. For example, a person for whom the pain of terminal illness has no redemptive meaning, for whom the illness frustrates all the projects of life in which the person centers life's meaning, for whom death is, in any event, highly probable, and for whom such pointless pain and physical decline affirmatively violates ideals of personal integrity and control, may find in present death more rationality and meaning than prolonged life.<sup>156</sup> Even outside such contexts as terminal illness, present death may be a reasonable course for persons who find in continued life the frustration of all the significant aims and projects in which, as persons with freedom and full rationality, they define their selves and in which the choice of death may, as an expression of dignified self-determination, better realize their ideals of living than a senseless life of self-contempt. In Ibsen's *Ghosts*, when Mrs. Alving is asked by her son Oswald to kill him when his incurable idiocy comes on him again, Oswald's voluntary choice appears rational in terms of his preference for death rather than a life spent in dependent idi-

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155. See Brandt, *The Morality and Rationality of Suicide*, *supra* note 147, at 123-33.

156. D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 177-79, 193-95. See also M. KOHL, THE MORALITY OF KILLING 71-110 (1974); Barrington, *Apologia for Suicide*, in EUTHANASIA AND THE RIGHT TO DEATH (A. Downing ed. 1969); Flew, *The Principle of Euthanasia*, in EUTHANASIA AND THE RIGHT TO DEATH 30-48 (A. Downing ed. 1969).

ocy and childishness.<sup>157</sup> The sense in which Oswald rationally wishes death must be interpreted in terms of his individual desire for personal competence and autonomy which is, for him, the *sine qua non* of satisfying all other desires he may have. His rational ends here are better secured by being killed intentionally by another, and thus ending all desire, rather than by continuing life with the frustration of his basic personal ideals of competence.<sup>158</sup> Perhaps, as Seneca argued,<sup>159</sup> for some persons such a course would be similarly reasonable when facing the prospect of senility.<sup>160</sup>

If death in such cases cannot be regarded as harmful, such forms of killing cannot be properly regarded as within the scope of the principle of nonmaleficence. But, consistent with our discussion of these cases, we must underline the limited nature of the exemption of these cases from the principle that the infliction of death is not a case of harm when the individual person voluntarily requests such death, or can reasonably be shown would request it, *and* the request appears rational in terms of the system of rational ends that the person would, with full freedom and rationality, affirm.<sup>161</sup> Fundamental to the autonomy-based interpretation of treating persons as equals is the idea that the rational self-determination of the person is ethically fundamental and cannot be parsed in terms

157. The example is taken from D. RICHARDS, *REASONS FOR ACTION*, *supra* note 19, at 178-79.

158. *Id.*

159. Seneca observes:

I will not relinquish old age if it leaves my better part intact. But if it begins to shake my mind, if it destroys its faculties one by one, if it leaves me not life but breath, I will depart from the putrid or tottering edifice. I will not escape by death from disease so long as it may be healed, and leaves my mind unimpaired. I will not raise my hand against myself on account of pain, for so to die is to be conquered. But if I know that I must suffer without hope of relief, I will depart, not through fear of pain itself, but because it prevents all for which I would live.

H. FEDDEN, *SUICIDE: A SOCIAL AND HISTORICAL STUDY* 178 (1938) (quoting Seneca). The same passage is excerpted in Gillon, *Suicide and Voluntary Euthanasia: Historical Perspective*, in *EUTHANASIA AND THE RIGHT TO DEATH* 174-75 (A. Downing ed. 1969). For an extended general treatment by Seneca of suicide, see *THE STOIC PHILOSOPHY OF SENECA* 202-07 (M. Hadas trans. 1965). See also *SENECA LETTERS FROM A STOIC* 124-30 (R. Campbell trans. 1969).

160. D. PORTWOOD, *COMMON-SENSE SUICIDE: THE FINAL RIGHT* (1978).

161. D. RICHARDS, *REASONS FOR ACTION*, *supra* note 19, at 178-79.

of some more basic moral element like pleasure or pain. A main objection of this perspective to utilitarianism is that utilitarianism, in its obsessive focus on pleasure as such, dissolves moral personality into utilitarian aggregates ignoring the *ethically* crucial fact that *persons* experience pleasure and that pleasure has significance and weight only in the context of the life that a person chooses to lead.<sup>162</sup> Accordingly, the human rights perspective, which focuses on treating *persons* as equals, gives no fundamental weight to pleasure or pain as such; rather, it secures to persons, on fair terms to all, respect for higher-order capacities of personal dignity, whereby persons may define for themselves the weight that pleasure will play in their design of life. In the context of the present discussion of nonmaleficence, we see the dramatic implications of this perspective in concrete terms: forms of killing are not exempt from nonmaleficence on any basis of a net of pain over pleasure or evil over good, however measured, in the life of the person, let alone the surrounding persons. Many people whose lives contain more misery and pain than pleasure find in such lives robust and sustaining meaning<sup>163</sup> and find death wholly irrational, certainly not anything they would voluntarily request. From the perspective of human rights, killing them is as violative of nonmaleficence as killing the most flourishing hedonist. Properly exempt from nonmaleficence are only those cases of killing which express the underlying values of human rights—voluntary choice *and* rational self-definition.<sup>164</sup>

It is important to see the significant constraints that this account imposes on exempt forms of killing: if a person is capable of voluntary consent, such consent must always be secured; if such consent is impossible, it must be determined reasonably that it would be given in such circumstances. Even voluntary consent, however, does not suffice. In addition, it must be clear that the

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162. See notes 75-79 & accompanying text *supra*.

163. For a starkly dramatic statement of this position, derived from the experience of Jews in Nazi camps, see V. FRANKL, *MAN'S SEARCH FOR MEANING* (1959). For a good statement of this point by a philosopher, see Foot, *Euthanasia*, in *ETHICAL ISSUES RELATING TO LIFE AND DEATH* 14-40 (J. Ladd ed. 1979).

164. The infliction of pain, as opposed to killing, may be justified in certain cases without a voluntary consent requirement. See D. RICHARDS, *REASONS FOR ACTION*, *supra* note 19, at 180.

form of death is one which appears rational in terms of the system of ends that the person would, with full freedom and rationality, affirm. We shall return to this point when we examine the principle of paternalism.

Again in contrast to utilitarianism,<sup>165</sup> this account puts sharp constraints on killing in cases where persons have been capable of consent, for example, young children and the defective.<sup>166</sup> We begin with the thought that all creatures are persons who have the capacities, developed or undeveloped, to be persons with some capacity for self-critical reflection on their lives.<sup>167</sup> Aside from certain extreme cases,<sup>168</sup> most young children and defectives are persons in this sense: they have these capacities in some form.<sup>169</sup> It is very

165. For recent forms of utilitarian argument to this effect, see note 43 *supra*.

166. In this, I disagree with Marvin Kohl, who extends his notion of voluntary euthanasia, with which the account here given is sympathetic, to encompass the consent of parents on behalf of infants. See Kohl, *Voluntary Beneficent Euthanasia*, in *BENEFICENT EUTHANASIA* 134 (M. Kohl ed. 1975). Kohl's insensitivity to this problem arises, I believe, from the emphasis of his account on the quasi-utilitarian concept of "kindness," rather than the rights of the person. See generally M. KOHL, *THE MORALITY OF KILLING* 77-91, 96, 106 (1974). For a similar query about this move in Kohl's argument, see P. DEVINE, *THE ETHICS OF HOMICIDE* 174-75 (1978).

167. See D. RICHARDS, *REASONS FOR ACTION*, *supra* note 19, at 81, 182-83. See also E. KLUGE, *THE PRACTICE OF DEATH* 88-95 (1975).

168. An example of such extremes is human creatures born without brains, a condition characterized medically as anencephaly. See J. WARKANY, *CONGENITAL MALFORMATIONS* 189-99 (1971).

169. There are two distinct positions in the recent philosophical literature on what makes a creature a person and thus gives rise to moral claims of rights. First, there is the position that personhood rests not on capacities for self-critical rationality, but on actual exercise of such capacities in forms of actual self-consciousness. This position appears to have been adopted because it makes sharply clear that unborn fetuses are not persons in any sense, but it also has the consequence that young infants are not persons either since infants lack the requisite exercise of higher-order self-consciousness. See Tooley, *A Defense of Abortion and Infanticide*, in *THE PROBLEM OF ABORTION* 91 (J. Feinberg ed. 1973). Recent utilitarian theories appear to deploy something like this argument, introducing nonutilitarian considerations of autonomy or personhood as strong, indeed conclusive, reasons against killing when a person has developed self-consciousness, but, when developed self-consciousness does not yet exist, supposing the moral issue to depend on utilitarian consequences. With this view, infanticide of young infants and involuntary euthanasia of defectives may be justified. See J. GLOVER, *supra* note 43, at 150-69, 190-202; P. SINGER, *supra* note 43, at 122-26, 130-39. Nonutilitarian theorists, who adopt Tooley's conception of the person, concur with the utilitarian theorists about the justifiability of involuntary euthanasia of newborn infants. See, e.g., Engelhardt, *Ethical Issues in Aiding the Death of Young Children*, in *KILLING AND LETTING DIE* 81-91 (B. Steinbock ed. 1980) (even voluntary euthanasia of defective infants may be morally justified, but, on grounds of prudence, passive euthanasia is to be

difficult to see how killing them could be justified as an exemption from nonmaleficence. In the case of those who have been mature adults, but who are now incapable of consent, for example, the comatose, we may reasonably infer the nature of their consent from those who have known them intimately.<sup>170</sup> But, in the case of those who have to date been incapable of consent, it appears difficult to give a defensible sense to either imputed consent on their behalf or to the idea that they would rationally consent to die. The point is not merely the obvious one of just suspicion of the independent judgment of those who consent on their behalf, who may have strong interests to free themselves from such dependents; but, at a deeper level, how can a person who has lived as a mature adult justly enter into the personal world of a child or defective who has never been a mature adult?<sup>171</sup> There is no injustice in asking the intimate of a mature adult now incapable of consent what that person, if still capable of consent, would wish to be done if he knew he would be in his present situation; we regard the reasonably ascertained wishes of a mature adult as authoritative in such cases. But there is no moral symmetry between this case and that of a person who has never been capable of rational consent; a person, while capable of rational consent, certainly has authority to determine what shall happen to her or him when lacking such capacity, but there is no comparable moral authority—at least over decisions to die—of mature adults for those who have never been capable of

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preferred).

Second, there is the position, here adopted, that personhood turns not on actual self-consciousness, but on the capacity, whether developed or undeveloped, for self-consciousness. On this view, personhood turns on the presence in a creature of the capacity, in some form, for the functions of personhood, even though these capacities are not and cannot be now fully exercised. For humans, the mark of this, empirically, is the presence of the brain and higher-brain function in some form. There are two views of when this capacity exists: (1) that it exists in any organism which will develop this capacity, though it does not now have it; (2) that it exists only in a creature which has the capacity. For a defense of (1), see P. DEVINE, *supra* note 166, at 74-105, a view which has the consequence that abortion at virtually all stages of pregnancy is equivalent to or is the killing of an innocent person. The view here adopted is (2), which has the consequence that abortion only in the latter stages of pregnancy raises issues of killing persons. See, e.g., E. KLUGE, *supra* note 167, at 1-100. On this view, the thesis of (1) confuses capacities with potentialities. See *id.* at 15-18, 180.

170. For the contrary view, see Bandman & Bandman, *Rights, Justice, and Euthanasia*, in *BENEFICENT EUTHANASIA* 81-99 (M. Kohl 1975).

171. For an eloquent statement of this view, see Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 *STAN. L. REV.* 213 (1975).

consent. Surely to permit this inference allows persons to decide this issue on irrelevant grounds, supposing the choice to be what they—with the ideals of personal independence of a mature adult—would want if they knew they would become a child or defective, like Ibsen's Oswald. But, of course, the child or defective lacks these ideals, and justly may center her or his life in other sensible ways which the adult cannot conceive.<sup>172</sup> Without reasonable access to the consent of these persons and with little realistic insight into their systems of ends,<sup>173</sup> there is little reason to infer an exemption from nonmaleficence.<sup>174</sup>

## 2. *The Principle of Mutual Aid*

Another set of facts, relevant to the formulation of another principle of natural duty which bears on the right to life, relates to forms of assistance and aid which, at only slight cost to oneself, one person may render to another in saving the other from grave

172. The supposition appears to be that the child or defective is a former mature adult now in the child's or defective's body and tortured by the perception of present degradation of previous talents and competence. But, of course, in this case, unlike the case of Oswald and the like, there is no such previous person against whom the perception may be ethically checked.

173. For a moving and illuminating account of the world of a handicapped person from within, see Metzler, *Human and Handicapped*, in *MORAL PROBLEMS IN MEDICINE* 358-63 (S. Gorovitz et al., eds. 1976). If this account surprises one in ways one could not have anticipated, the discontinuities between the worlds of even more handicapped persons and our own may be, *a fortiori*, even more severe.

174. For similar skepticism about medical practices of passive euthanasia of defective newborns, see Gustafson, *Mongolism, Parental Desires, and the Right to Life* in *ETHICAL ISSUES IN DEATH AND DYING* 145-72 (R. Weir ed. 1977). See also McCormick, *To Save or Let Die: The Dilemma of Modern Medicine*, in *ETHICAL ISSUES IN DEATH AND DYING* 173-84 (R. Weir ed. 1977). Consider, in this connection, that adequate care could alleviate much of the suffering of spina bifida children. See Zachary, *Ethical and Social Aspects of Treatment of Spina Bifida*, in *MORAL PROBLEMS IN MEDICINE* 342-48 (S. Gorovitz et al., eds. 1976). For recent philosophical argument in support of the position here taken, see E. KLUGE, *supra* note 167, at 131-209. See also P. DEVINE, *supra* note 166, at 167-80. One caveat: one should distinguish, in the discussion of these matters, the moral issue of involuntary euthanasia or infanticide, namely that either violates nonmaleficence, from the issue of who bears the just burden of rearing such children. Certainly, it seems unfair for parents to be regarded as the just persons to bear such a burden, when they bear no special responsibility for it and did not fairly anticipate it. Certainly, a just society would give a high priority to relieving parents of this unfair burden, seeking alternative forms of care—including other parental figures with substantial state input—consistent with the rights of the children.



forms of harm.<sup>175</sup> Consistent with the autonomy-based interpretation of treating persons as equals, persons would agree to or universalize this principle, enforceable by coercion if necessary, because in this way, they will guard against the possibility that they themselves may end up in such a position of requiring assistance from other persons, where they would wish such assistance to be given.

It is important to see that the agreement on the principle of mutual aid arises from the consideration of a certain circumscribed set of circumstances and not all possible circumstances of aid. In other words, the principle is concerned only with aid, given at slight personal cost, which secures a great good to the person aided. The distinction of mutual aid from different sorts of circumstances in which persons may do good to other persons must be contrasted usefully with the traditional and contemporary failure of philosophers to draw this distinction. Consider Kant's argument in the *Foundations of the Metaphysics of Morals* as to why it is a moral duty to give aid to others in great distress—the argument involving basically the sort of reasoning just sketched.<sup>176</sup> When Kant, however, in the *Metaphysical Principles of Virtue* explicitly discusses duties of this sort, we learn that they are part of the general category of duties of beneficence, which include taking the morally permissible ends of others as one's own. Thus Kant, on the one hand, wishes to indicate that they are forms of imperfect duty which, unlike the imperfect duties of respect, are meritorious, not owed to other persons.<sup>177</sup> In similar fashion, Price discusses the duty of beneficence, which covers both a person's doing "all the good he can to his fellow-creatures" generally and doing good to "distressed persons he ought to relieve."<sup>178</sup> And Sidgwick clearly

175. See D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 185-89.

176. Specifically, the argument asserts that a requirement of mutual aid is a minimum requirement that one would be willing to agree to obey oneself, since it would secure a great good to oneself, if one were distressed and others obeyed, and that others would also agree to obey, from an original position of equal liberty. I. KANT, FOUNDATIONS, *supra* note 51, at 41; see, e.g., I. KANT, CRITIQUE OF PRACTICAL REASON 34-35 (L. Beck trans. 1956); I. KANT, METAPHYSICAL PRINCIPLES OF VIRTUE 52, 115, 117 (J. Ellington trans. 1964). For comments on Kant's argument, see Eisenberg, *From the Forbidden to the Supererogatory: the Basic Ethical Categories in Kant's Tugendlehre*, 3 AM. PHIL. Q. 255-69 (1966).

177. I. KANT, METAPHYSICAL PRINCIPLES OF VIRTUE, *supra* note 176, at 112.

178. R. PRICE, A REVIEW OF THE PRINCIPAL QUESTIONS IN MORALS 120-21 (D. Raphael ed.

describes both nonmaleficence and mutual aid as a "somewhat indefinite limit of Duty" beyond which "extends the Virtue of Benevolence without limit," but he sees these as only relative distinctions within the wider principle of beneficence in reference to which he grants that the "distinction between Excellence and Strict Duty does not seem properly admissible in Utilitarianism."<sup>179</sup> What is common to these traditional philosophers is the assimilation of the circumstances of mutual aid to those of general beneficence and the consequent failure to distinguish and explain the different sorts of moral principles which are relevant to those different sorts of circumstances.<sup>180</sup>

Mutual aid, in contrast to beneficence, requires aid only where rendering the aid is of little cost to the person who aids: a person may save another from drowning by merely putting out her hand or throwing out a lifebelt. This feature explains how the principle could be agreed to as one of duty, justifying coercion and defining correlative rights: persons would only agree to or universalize such a principle, as one of duty, if they knew it did not require a person to sacrifice life and limb to save another. Of course, acts of heroism, saving persons at such risks, are morally admirable on the ground of the principle of beneficence.<sup>181</sup> But we are here concerned not with the moral ideals of saints and heroes, but with the human rights that are properly enforceable by law. The principle of mutual aid defines a natural duty which, properly understood

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179. H. SIDGWICK, *THE METHODS OF ETHICS* 253, 492 (7th ed. 1963).

180. This unfortunate confusion continues in philosophical work today. Philippa Foot, for example, who aptly describes the relevance of different kinds of moral principles to the justifiability of euthanasia, insists on characterizing what is here called nonmaleficence as a stringent duty of justice; whereas, mutual aid is said to involve charity. The result is that the contrast between nonmaleficence and mutual aid, which, properly understood, are two natural duties, is made into a contrast between duty and supererogation. Foot, *supra* note 163, at 25-32. Beauchamp and Childress present an even more systematic account of the range of moral principles relevant to these issues. T. BEAUCHAMP & J. CHILDRESS, *supra* note 131, at 56-96 (autonomy and paternalism); *id.* at 97-134 (nonmaleficence); *id.* at 135-167 (beneficence and paternalism); *id.* at 168-200 (justice). Yet again, Beauchamp and Childress, by describing mutual aid as the principle of beneficence, obscure the fundamental moral distinction between mutual aid as a natural duty and beneficence as a principle of supererogation.

181. See D. RICHARDS, *REASONS FOR ACTION*, *supra* note 19, at 205-11.

and limited, imposes such enforceable rights.<sup>182</sup>

For purposes of our present analysis, we should note that the operative concept in the principle of mutual aid, as in that of nonmaleficence, is harm—here, relieving likely harms. Again consistent with the underlying values of equal concern and respect for autonomy, harm must be interpreted in terms of the rational interests of the person. Thus, in line with our previous discussion of death as harm, in the absence of reason to believe that a person both wants death and such death is reasonable in terms of a rational life plan, the opportunity to save from death would be governed by the principle of mutual aid.

In order to assess the concrete implications of this principle, consider that mutual aid appears to be a fundamental ethical principle underlying medical care.<sup>183</sup> Medical professionals, by training and self-conception, are in a position to render forms of life-saving aid. In addition, because they are well paid and define their lives in terms of rendering such aid, often it will be of little cost for them to render aid. Indeed, there may be some gain. In consequence, the requirements of mutual aid apply to such professionals more extensively than they do to ordinary people.<sup>184</sup> If this is so, it appears that different moral principles relevant to the right to life have different scopes of application. Whereas the principle of nonmaleficence appears broadly to apply to all persons equally, the principle of mutual aid appears to have more extensive applications to some persons than to others.<sup>185</sup> Most cases of mutual aid involve saving from harms which no one, including the person aided, would dispute were harms calling for relief; but some cases are disputed.

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182. See Richards, *Human Rights*, *supra* note 23, at 1429-30, and D. RICHARDS, *THE MORAL CRITICISM OF LAW*, *supra* note 18, at 209-16, for moral criticism of the failure of Anglo-American law to recognize such enforceable legal duties commensurate with mutual aid.

183. Foot, *supra* note 163, at 25-32; See also T. BEAUCHAMP & J. CHILDRESS, *supra* note 131, at 135-67.

184. See Foot, *supra* note 163, at 25-34.

185. See *id.* See also T. BEAUCHAMP & J. CHILDRESS, *supra* note 131, at 96-134 (nonmaleficence); *id.* at 135-67 (beneficence).

### 3. *The Principle of Just Paternalism*

Let us begin with a consideration of the proper scope of paternalistic considerations in general and then turn to the special problems raised by the application of these considerations to choices like the decision to die. The autonomy-based interpretation of treating persons as equals would clearly justify a natural duty defined by the principle of paternalism and explain its proper scope and limits.<sup>186</sup> From the point of view of agreement to or universalization of basic principles of natural duty consistent with this perspective, persons would be concerned with the fact that human beings are subject to certain kinds of irrationalities with severe consequences, including irreparable harms. They accordingly would agree to an insurance principle requiring interference, if at little cost to the agent, to preserve persons from certain serious irrationalities in the event they might occur to them.<sup>187</sup> There are two critical constraints on the scope of such a principle.

First, the relevant idea of irrationality itself cannot violate basic constraints of the autonomy-based interpretations of treating persons as equals: the neutral theory of the good, expressed by Rawls as ignorance of specific identity, and reliance only on facts capable of empirical validation. In particular, possibly idiosyncratic personal values cannot be smuggled into the content of "irrationality" that defines the scope of the principle; rather, the notion of irrationality must be defined in terms of a neutral theory that can accommodate the many visions of the good life compatible with moral constraints. For this purpose, the idea of rationality must be defined relative to the person's system of ends which, in turn, are determined by the person's appetites, desires, capacities, and aspirations. Principles of rational choice require the most coherent and satisfying plan for accommodating the person's projects over time.<sup>188</sup> Accordingly, only those acts are irrational that frustrate the person's own system of ends. Paternalistic considerations only come into play when irrationalities of this kind exist; for example,

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186. See T. BEAUCHAMP & J. CHILDRESS, *supra* note 131, at 153-64; D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 192-95; Dworkin, *Paternalism*, in MORALITY AND THE LAW 107-26 (R. Wasserstrom ed. 1971).

187. See authorities cited note 186 *supra*.

188. See D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 27-48.

the agent's jumping out the window will cause his death, which the agent does not want but which he falsely believes will not occur.

Second, within the class of irrationalities so defined, paternalistic considerations would properly come into play only when the irrationality was severe and systematic, that is, due to undeveloped or impaired capacities or lack of opportunity to exercise such capacities, *and* a serious, permanent impairment of interests was in prospect. Interference in irrationalities outside the scope of this second constraint would be forbidden in large part because allowing people to make and learn from their own mistakes is a crucial part of the development of mature autonomy.<sup>189</sup>

When we consider the application of these paternalistic considerations to decisions to die, we immediately see that the second constraint is satisfied: death is, typically, an irreparable harm, indeed the most irreparable of harms. Accordingly decisions to die are a natural object of paternalistic concern. Indeed, in the absence of any specific knowledge of the situation or life history of a person about to inflict death on himself, the general presumption that death is a harm would appear to warrant paternalistic interference. In such contexts, at most, one's possibly mistaken interference may only lead to postponement, which is certainly hardly as bad a result as not interfering and discovering that the death in question was clearly irrational.<sup>190</sup>

On the other hand, as we earlier observed, there are surely some deaths which are not harms which are both voluntarily embraced and consonant with a rational plan of life which is, with freedom and rationality, affirmed.<sup>191</sup> In such cases, the first constraint of just paternalism is not satisfied, and assuming a potential interferer has knowledge that a person's prospective death is of such a kind, one would lack any moral title to interfere.

If medical care often is governed by mutual aid, in some cases paternalism as well comes into play. Consider a case where the medical professional's conception of the good of the patient is inconsistent with the patient's conception so that we do not have a clear case of proper mutual aid. In such controversies, arguments

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189. *Id.* at 193.

190. J. GLOVER, *supra* note 43, at 176-79.

191. See notes 154-174 & accompanying text *supra*.

of paternalism naturally come into play: may the professional interfere for the patient's own good?<sup>192</sup> Surely the conditions of just paternalism are, at least arguably, present: the interference is often at little cost to the professional, and the patient appears irrationally to decline medical services which may alone save his life. If the state of the law is that patients in all such cases have an absolute right to decline medical treatment,<sup>193</sup> the law cannot be justified by the principles here articulated, for such rejection may be clearly irrational in terms of the patient's own rational life plan and thus the proper object of paternalistic interference.<sup>194</sup>

On the other hand, it would be grotesquely wrong for the state to compel any person, other things being equal, to have medical treatment, even if necessary to save life, when the person conscientiously rejects such treatment as inconsistent with a life plan which he rationally and freely affirms. To defend such interference on the ground of the universal value of life is the essence of unjust paternalism, smuggling into the content of irrationality, which defines the scope of just paternalism, majoritarian ideologies which are no more neutral than the religious ideologies they despise—for example, that of a Jehovah's Witness.<sup>195</sup> Complications are introduced when dependent children and the like are introduced into the picture, either in the form of dependents of the person who prefers

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192. See T. BEAUCHAMP & J. CHILDRESS, *supra* note 131, at 82-94, 153-64.

193. For a sense of the complexity of the case law, see Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 *FORDHAM L. REV.* 1 (1975). For a broad defense of such a right, see R. VEATCH, *DEATH, DYING AND THE BIOLOGICAL REVOLUTION* 116-63 (1976); Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 *RUT. L. REV.* 228 (1973). For criticism of such a right, see Comment, *Unauthorized Rendition of Lifesaving Medical Treatment*, 53 *CALIF. L. REV.* 860 (1965).

194. It may be, however, the intention of defenders of such a right that the idea of "informed consent," on which it turns, requires the kind of rational deliberation and capacity which would exempt the case from just paternalism. See Cantor, *supra* note 193, at 236-54.

195. For a case that may be attacked on such grounds, though the issue of competency is not in fact clear, see *John F. Kennedy Memorial Hosp. v. Heston*, 58 *N.J.* 576, 279 *A.2d* 670 (1970) (blood transfusion ordered for severely injured 22-year old, unmarried woman who had been a Jehovah's Witness for some time even though her mother refused to authorize the transfusion). Other courts have upheld the right to refuse a transfusion on religious free exercise grounds. *In re Brooks' Estate*, 32 *Ill.* 2d 361, 205 *N.E.2d* 435 (1965) (adult Jehovah's Witness, with spouse and adult children who did not oppose her express refusal); *Erickson v. Dilgard*, 44 *Misc.* 2d 27, 252 *N.Y.S.2d* 705 (Sup. Ct. 1962) (on general grounds of self-determination).

death<sup>196</sup> or as the person who allegedly prefers death.<sup>197</sup> These are cases in which other factors are relevant. Absent such factors, however, paternalism is clearly unjust.

#### 4. *The Structure of the Right to Life*

The interlocking requirements of these three principles of natural duty—nonmaleficence, mutual aid, and paternalism—establish the moral structure of the right to life. On this account, that right is to be understood in terms of the choices protected by the requirements (justifying coercion) of these principles: namely, that harm not be inflicted (nonmaleficence), that persons be saved from harms if at little cost (mutual aid), and that persons be saved from the irreparable harms likely to be worked on themselves by their own irrational folly (paternalism). The moral complexity of this right is seen in the fact that its constitutive principles seem to have different scopes of application;<sup>198</sup> nonmaleficence applies to everyone, whereas mutual aid and paternalism<sup>199</sup> may have special application to service professionals. This difference may have important consequences in later defining the morality of various kinds of decisions leading to death. In general, it cannot be supposed plausibly that these principles forbid the infliction of death in all circumstances. What then are the arguments supposed to justify such an absolute prohibition?

#### B. *Moral Arguments for the Prohibition of All Acts Inflicting Death*

The criminal law in the United States appears to express the moral judgment that, with certain narrow exceptions—the defenses—all forms of killing are wrong. While suicide itself is no

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196. See, e.g., *Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir.) (mother of seven-month old child), *cert. denied*, 377 U.S. 978 (1964).

197. See, e.g., *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (parental religious objection to blood transfusion for baby with congenital malformation overruled), *cert. denied*, 371 U.S. 890 (1962). For a general discussion of the complexities of the case law, see R. VEATCH, *supra* note 193, at 124-36.

198. See text accompanying note 185 *supra*.

199. Paternalism and mutual aid have special application to service professionals for the same reasons, special training and aspirations.

longer criminal in many states,<sup>200</sup> aiding and abetting suicide is, in general, criminal.<sup>201</sup> In the United States forms of euthanasia, which in European countries are often grounds for mitigation and even exculpation,<sup>202</sup> are officially regarded as equally criminal as pure murder.<sup>203</sup> The underlying moral condemnation of all acts inflicting death appears to rest on a number of disparate grounds including: (1) life as God's property, (2) life as the property of the state, (3) the immorality of despair, (4) life as the inalienable basis of moral personality, (5) harms to determinate third parties, (6) paternalistic arguments about the irrationality of all decisions to die, and (7) wedge arguments.

### 1. *Life as God's Property*

The most ancient philosophical argument for the immorality of self-willed death, which echoes through the history of all later reflection in Western thought on this question, is Socrates' brief argument in Plato's *Phaedo* to the effect that release from life must take place only at God's will, for "the gods are our keepers, and we men are one of their possessions."<sup>204</sup> Plato appears to use this argument metaphorically as a way of expressing moral conclusions arrived at on other grounds. Clearly, in the *Phaedo*, Socrates' death, which is regarded as self-willed, is supposed to be one in which "God sends some compulsion,"<sup>205</sup> in the sense that death

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200. W. LAFAVE & A. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 568-70 (1972).

201. *Id.* at 570-71.

202. See generally Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U. PA. L. REV. 350 (1954). In Switzerland, for example, physician assistance in a patient's suicide, for reasons of mercy, is not punishable at all. *Id.* at 376-77. In Uruguay, homicide motivated by compassion and performed at request is totally exculpated. *Id.* at 368-69. In Germany and Switzerland, euthanasia for mercy mitigates. *Id.* at 360-68.

203. In the criminal law, the maxim that consent is no defense justifies this stance. See W. LAFAVE & A. SCOTT, JR., *supra* note 200, at 408-13. However, the actual history of litigation relating to cases of euthanasia reveals strikingly erratic patterns of either no prosecution, acquittals, convictions for lesser crimes, and the like. See, e.g., Sanders, *Euthanasia: None Dare Call It Murder*, 60 J. CRIM. L.C. & P.S. 351 (1969); Survey: *Euthanasia: Criminal, Tort, Constitutional and Legislative Considerations*, 48 NOTRE DAME LAW. 1201, 1213-15 (1973); Comment, *The Right to Die*, 10 CAL. W.L. REV. 613 (1974); 34 NOTRE DAME LAW. 460 (1959).

204. PLATO, *Phaedo* 62b, in *THE COLLECTED DIALOGUES OF PLATO* 45 (E. Hamilton & H. Cairns eds. 1961).

205. *Id.* at 45.



here is "my country's orders";<sup>206</sup> and elsewhere, Plato extends this category to include forms of stress, calamity, and disgrace which compel self-willed death.<sup>207</sup> To this extent, Plato's metaphor of divine compulsion is not inconsistent with, and indeed may be a way of giving expression to, the idea of appropriate death in extreme circumstances of disease or degradation; certainly, the Roman Stoics and other ancients interpreted Plato in this sense.<sup>208</sup>

The idea of life as God's property, originating as a metaphor in Plato, is rigidified into an absolute prohibition on all forms of self-willed death only by St. Augustine,<sup>209</sup> whose complex argument St. Thomas rather summarily adopts;<sup>210</sup> thus summary prohibition, in turn, appears to be the basis, clearly present in Blackstone,<sup>211</sup> of the English heritage of grisly punishment of self-willed death, in particular, for suicide.<sup>212</sup> Augustine's argument is complex with

206. *Id.* at 44.

207. In *Laws*, Plato discusses the punishment for "self-slaughter though no sentence of the state has required this of him, no stress of cruel and inevitable calamity driven him to the act, and he has been involved in no desperate and intolerable disgrace, the man who thus gives unrighteous sentence against himself from mere poltroonery and unmanly cowardice." PLATO, Book IX *Laws*, 873c-d, at 1432, in *THE COLLECTED DIALOGUES OF PLATO* (E. Hamilton & H. Cairns eds. 1961).

208. The most notable example of this in the ancient world was the widely admired suicide of Cato, which took place after reading the *Phaedo*. See H. FEDDEN, *supra* note 159, at 95-101. For a general description of attitudes to suicide in the ancient Greek and Roman world, see *id.* at 49-106. See also, J. CHORON, SUICIDE 15-24 (1972). For examples of the sentiments of Roman Stoics, see the Seneca excerpts in note 159 *supra*. On the pervasive influence of the Socratic model, see J. RIST, *STOIC PHILOSOPHY* 233-55 (1969).

209. See AUGUSTINE, *CONCERNING THE CITY OF GOD-AGAINST THE PAGANS* 26-39 (1972).

210. T. AQUINAS, *SUMMA THEOLOGICA*, Part. II-II, q. 64, art. 5.

211. Blackstone's justification for the grisly penalties for suicide is clearly theological and statist. "[T]he suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects." 4 W. BLACKSTONE, *COMMENTARIES* \*189. The strong theological base for the English prohibition was expressly acknowledged by English judges. Suicide was criminal as

an offence against nature, against God, and against the King. Against nature, because it is contrary to the rules of self-preservation . . . to destroy one's self is contrary to nature, and a thing most horrible. Against God, in that it is a breach of His commandment, *thou shalt not kill* . . . . Against the King in that hereby he . . . has lost one of his mystical members.

*Hales v. Petit*, 1 Plowden 253, 262, 75 Eng. Rep. 387, 400 (1562).

212. This heritage included dishonoring the corpse of the suicide—inherited from Christian practices—and forfeiture of estate of the suicide. See G. WILLIAMS, *supra* note 38, at 257-64.

many strands, some of which we shall later examine; its conclusion is an absolute prohibition, except in those mysterious cases—here, a faint echo of Plato<sup>213</sup>—where “the Spirit . . . secretly ordered” self-willed death.<sup>214</sup> For present purposes, we may focus on Augustine’s argument that in all cases our life is the property of God that *we* may not surrender.

The heart of Augustine’s argument appears to be a theological interpretation, in fact highly controversial,<sup>215</sup> of “You shall not kill” in the Decalogue.<sup>216</sup> On the basis of this interpretation, Augustine seems prepared to question even the justifiability of self-defense,<sup>217</sup> let alone forms of self-willed death. Such a theological argument may compel the assent of those who share Augustine’s perceptions and interpretations; certainly, they have the right to govern their lives in accord with its mandates. But, of course, it is not a moral argument of the form that may be an acceptable basis for the public morality of persons of differing religious and philosophical perceptions, for—on the model of constitutional morality here deployed—a theological argument of this form would be given no decisive weight in determining public morality by persons lacking knowledge of specific identity whose agreements depend on facts capable of interpersonal validation.<sup>218</sup> Indeed, from the perspective of the autonomy-based interpretation of treating persons as equals, the idea that our lives are the property of anyone but ourselves appears to compromise the basic dignity of moral

213. See note 205 & accompanying text *supra*.

214. AUGUSTINE, *supra* note 209, at 32. Augustine uses this explanation to account for Samson’s suicide. *Id.* at 37.

215. There is little evidence that the Old Testament was concerned with suicide as such; the suicides mentioned there go without comment. Even the New Testament nowhere condemns suicide; the Church only develops concern with it in the third century. See J. CHORON, *supra* note 208, at 13-15, 24; H. FEDDEN, *supra* note 159, at 30-31. One scholar has observed linguistic evidence of Old Testament unconcern with suicide as such. Daube, *The Linguistics of Suicide*, 1 PHIL. & PUB. AFF. 387, 394-99 (1972). Daube also notes the lack of any authoritative evidence in Jewish doctrine of the appropriate period for the Augustinian subsumption of suicide under the Sixth Commandment’s prohibition of “murder,” the Hebrew word never being used for self-willed death. *Id.* at 414-15 n. 166. For an argument by a Christian theologian that the Augustinian interpretation is clearly wrong, see J. FLETCHER, *supra* note 41, at 195-96. For current Jewish views, see Sherwin, *Jewish Views of Euthanasia in BENEFICENT EUTHANASIA* 3-11 (M. Kohl ed. 1975).

216. AUGUSTINE, *supra* note 209, at 31-32.

217. *Id.* at 36.

218. See notes 90-94 & accompanying text *supra*.

personality.

Perhaps Augustine's argument may be given an appealing moral interpretation as a way of saying that the basic equality of all persons means that no person may judge the worth of other persons and that forms of killing, if permitted at all, would compromise this basic value.<sup>219</sup> Certainly, this kind of argument has appeal when directed against certain kinds of utilitarian defenses of killing which suppose that the net of pain over pleasure talismanically identifies those who may live and those, including young infants and the defective, who must die.<sup>220</sup> But then, it is a general objection to utilitarianism that it fails to take seriously treating *persons* as equals. Defects in its account of permissible killing evince this larger mistake. It is not true, however, as this interpretation of Augustine supposes, that all justifications of killing must commit this error, for there is one person who may, within limits, justly assess the rational meaning of life or death to a person, namely, the person herself or himself. Indeed, to deprive the person of this right, in the cases to which it properly applies, is to deprive the person of the dignity of constituting the meaning of one's life.

## 2. *Life as the Property of the State*

That self-willed death immorally violates our duties to the state is a prominent feature of Aristotle's condemnation,<sup>221</sup> which St. Thomas repeats with approval,<sup>222</sup> and Blackstone reads into the Anglo-American legal heritage.<sup>223</sup> Aristotle's argument is certainly consistent with his general perfectionist ethics of heroic and creative display and performance: the highest exemplars of ethical conduct are persons of heroic capacity and intellectual and creative talent who devote their lives to public service through the achieve-

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219. See e.g., Sullivan, *The Immorality of Euthanasia* in *BENEFICENT EUTHANASIA*, 12-33 (M. Kohl ed. 1975). Specifically, Sullivan argues that man does not have full dominion over his life, that he has even less dominion over the lives of others, and that God has dominion over the lives of all. *Id.* at 14. This is the typical Christian argument that man has no absolute control over his life: he has the use of it but may not destroy it. See N. ST. JOHN-STEVAS, *LAW AND MORALS* 51 (1964). See also P. DEVINE, *supra* note 166, 167-80.

220. See notes 165-174 & accompanying text *supra*.

221. ARISTOTLE, *NICOMACHEAN ETHICS* 1138a4-1138b14, at 143-44 (1962).

222. T. AQUINAS, *SUMMA THEOLOGICA*, Part. II-II, q. 64, art. 5.

223. See note 211 *supra*.

ment of works of excellence, whether in war, politics, the arts, or the life of theory.<sup>224</sup> Since the self-willed death of such a person, except in some heroic exploit, deprives society of a perfectionist asset, it is paradigmatically immoral or, as Aristotle prefers to put it, unjust.<sup>225</sup>

Aristotle's ethics, like Plato's, is remote from the autonomy-based interpretation of treating persons as equals which introduces concepts of human and natural rights unknown in the thought of ancient Greece.<sup>226</sup> Certainly the Aristotelian assumption that one's life is a collective asset which the state may exploit on whatever terms redound to its perfectionist glory is at war with the contractarian metaphors of human rights, which require, as conditions of just obedience, reciprocal respect of individual well-being and dignity. From this perspective, the absolute prohibition on self-willed death in circumstances reasonably perceived by the person as perpetuating pointless and degraded life must appear to be, as Montesquieu put it, "the unjust sharing of their utility and my despair."<sup>227</sup>

The state certainly has a just interest, defined in terms of background principles of justice incumbent on it, not only to protect the right to life of its citizens and persons subject to its protection, but to guarantee fair conditions of life that enable persons to live well with self-respect.<sup>228</sup> When the state reasonably meets its duties of justice in such respects, persons who benefit therefrom may

224. The whole of ARISTOTLE, *NICOMACHEAN ETHICS* (1962), is an attempt to describe the human excellence which morality requires us to maximize. See Book 10 for a characterization of the special weight Aristotle gave to the human excellence of theoretical wisdom.

225. See ARISTOTLE, *supra* note 221.

226. See Richards, *Sexual Autonomy*, *supra* note 12, at 964-70.

227. C. MONTESQUIEU, *THE PERSIAN LETTERS* 157 (1961). David Hume similarly remarks:

All our obligations to do good to society seem to imply something reciprocal. I receive the benefits of society, and therefore ought to promote its interests; but when I withdraw myself altogether from society, can I be bound any longer? But allowing that our obligations to do good were perpetual, they have certainly some bounds: I am not obliged to do a small good to society at the expense of a great harm to myself: why then should I prolong a miserable existence, because of some frivolous advantage which the public may perhaps receive from me?

D. HUME, *On Suicide*, in *ESSAYS MORAL POLITICAL AND LITERARY* 593-94 (1963) (1st ed. Edinburgh 1741).

228. See D. RICHARDS, *REASONS FOR ACTION*, *supra* note 19, at 107-47; J. RAWLS, *supra* note 19.

be under moral obligations of fairness and natural duties of justice to obey the law.<sup>229</sup> Sometimes, for example, in a just war regulated by principles of proportionality and effectiveness,<sup>230</sup> citizens may even be under moral duties to risk their lives in defense of the just institutions from which they have benefited; sometimes, where such obligations have been fairly and freely undertaken and have yielded the person countervailing and reciprocal benefits in the past, persons may have obligations to put aside private despair in order to afford some great social good to society that cannot otherwise be supplied.<sup>231</sup> But such reciprocities of benefit and obligation apply only in certain circumstances and to limited extents; they do not yield any general duty of the kind that Aristotle and his tradition suppose. Indeed, such a general duty appears clearly unjust: it ignores the basic contractarian implications of human rights, giving no weight to the intrinsic limits on state power that the rights of the person require. The state may not require anything and everything of persons, as Aristotle's idea of life as the property of the state mistakenly supposes. If the autonomy-based interpretation of treating persons as equals means anything, it means that the whole idea of property rights in our lives—whether title lies in God, other persons, or the state—is radically misplaced, denying, as it does, the basic dignity of the person in shaping a life, as a free and rational agent, and demanding, as a condition of any just demand on one for contribution or obedience, respect for this dignity. Aristotle's idea of unconditional demand indulges the kind of fantasy of total control and subordination which the ideal of a free person, expressed in the human rights perspective, repudiates and should repudiate. It is a kind of demand which a just state or a just God<sup>232</sup> would not make, at least in the form of an enforceable legal duty.

### 3. *The Immorality of Despair*

Both Plato<sup>233</sup> and Aristotle<sup>234</sup> evince concern with forms of self-

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229. D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 148-75.

230. See note 130 & accompanying text *supra*.

231. See D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 150-51.

232. See Brandt, *The Morality and Rationality of Suicide*, *supra* note 147, at 123-33.

233. See note 207 *supra*.

234. See ARISTOTLE, *supra* note 221. See also *id.* 1116a10-1116a15, at 71-72.

willed death which involve moral defects of character, in particular, in the courage that a person of reasonable firmness would display in the face of certain kinds of fear and disappointment and consequent temptations to end it all. Neither philosopher appears to be thinking of all forms of self-willed death; Aristotle appears clearly to regard certain forms of altruistic self-willed death as both moral and admirable,<sup>235</sup> and Plato regards self-willed death as justified in certain extreme circumstances.<sup>236</sup> In Augustine,<sup>237</sup> followed by St. Thomas,<sup>238</sup> this form of argument has evolved into a general moral objection to all forms of self-willed killing, including even acts of heroism or martyrdom—except for the mysterious cases which “the Spirit . . . secretly ordered”<sup>239</sup>—on the ground that they involve the immorality of despair. The immorality of such deaths for Augustine is illustrated by Judas’ suicide, for “he despaired of God’s mercy and in a fit of self-destructive remorse left himself no chance of a saving repentance.”<sup>240</sup>

One specific application of Augustine’s argument suggests what may have been the primary intention of his thesis. In discussing hard cases where reasonable people may suppose self-willed death to be justified, Augustine clearly considers the hardest case to be where a Christian in order to protect herself from violent sexual violation might kill herself rather than submit.<sup>241</sup> Augustine, often suggestively Freudian, argues that this moral calculation is defective, resting on the indefensible—we would say sexist—assumption that the woman attacked bears some moral responsibility or taint for having been raped.<sup>242</sup> But this assumption, Augustine insists, is deeply wrong; the woman has done no wrong, but would do wrong in acquiescing in the false and sexist condemnation by killing herself.<sup>243</sup> In an era of rampant Christian martyrdom,<sup>244</sup> Augustine ap-

235. See *id.* 1115a23-1115b6, at 69-70.

236. See note 207 *supra*.

237. See AUGUSTINE, *supra* note 209, at 26-39.

238. See T. AQUINAS, *supra* note 210.

239. AUGUSTINE, *supra* note 209, at 32.

240. *Id.* at 27.

241. *Id.* at 26-31, 36, 38-40.

242. *Id.* at 26-28.

243. *Id.* at 26-31.

244. For historical background of the rampant martyrdom, notably the Donatists, against which Augustine was writing, see H. FEDDEN, *supra* note 159, at 118-33.

pears concerned to expose the irrationalities and sometimes immoral assumptions which underlie certain forms of self-willed death. The point of the argument appears to be to purify Christian ideals of self-sacrifice from a false romanticism of martyrdom.

This form of Augustine's argument is interesting, forceful, and valid: the romantic idealization<sup>245</sup> of self-willed death, which in fact is irrationally inconsistent with the very ideals which the person claims to express in this death, should be exposed for the false and pathetic thing it is. But Augustine's total prohibition goes well beyond these cases; clearly, he appeals here to the independent theological argument earlier sketched:<sup>246</sup> it is because our lives are God's property that *we* may not will our deaths and that the despair that motivates such will is wrong.

But how, from the perspective of the autonomy-based interpretation of treating persons as equals, can all cases of self-willed death be regarded as despairing, and why—in those cases that are despairing—is such despair always ruled out? Certainly altruistic forms of self-willed death not only may be free from despair, but affirmative of our most admirable values and aspirations;<sup>247</sup> and even egoistic forms of such death, if undertaken with certain styles and within certain constraints, may be in some circumstances more expressive of ideals of dignified invention and unrepining self-mastery than would be continued life.<sup>248</sup> In any event, there is no reason to believe that the neutral theory of the good, fundamental to ideas of human rights, rules out despair as one possibly appropriate response of persons to certain prospects of pain and degradation. Augustine invokes, in this connection, a certain ideal, highly controversial and disputable, of the redemptive value of suffering;<sup>249</sup> he assumes, "under the kind of eternity" *sub specie aeternitatis*, that any suffering or degradation now, like the suffer-

245. On suicide as an expression of romantic idealization in literature, see A. ALVAREZ, *THE SAVAGE GOD* 139-213 (1972).

246. See notes 209-220 & accompanying text *supra*.

247. See ARISTOTLE, *NICOMACHEAN ETHICS* 1115a3-1115b6, at 69-70.

248. This is a prominent feature of Stoic reflection on suicide. See note 159 *supra*. See generally J. RIST, *STOIC PHILOSOPHY* 233-55 (1969).

249. This endurance of suffering is, for Augustine, a mark of true greatness of soul. See AUGUSTINE, *supra* note 209, at 32-34. For frank acknowledgement that suffering "for the Christian is not an absolute evil but has redeeming features," see N. ST. JOHN-STEVAS, *supra* note 219, at 51.

ing of Jesus, will be redeemed, indeed that our patient endurance of such suffering may be the test of our Christian mettle. Nonetheless, there is no reason to believe that this ideal is any more entitled to moral enforcement as the only legitimate attitude to suffering than any other conception. To say that Christian patience is the only attitude to suffering consistent with rational personhood is dogmatic.<sup>250</sup> Many other courses may reasonably accommodate the diverse individuality of human competences, aspirations, and ends. What for one is a reasonable, self-imposed ideal of the sanctity of holy and redemptive suffering is,<sup>251</sup> for another, pointless degradation, a waste of dignity in obsequious decline.<sup>252</sup>

The Augustinian picture here is like the utilitarian's idea of the simple meanings of pleasure and pain, by which we may analyze all hard and controversial questions; only here, the elements are not pleasure and pain as such, but a particular form of pain, despair, that we are told can have only *one* tolerable moral interpretation, namely, being wrong and forbidden. But just as utilitarians are wrong about the unambiguous meanings of pleasure and pain, Augustine is wrong about despair. For some persons, with visions of life that they rationally and freely affirm and revise, certain kinds of suffering and degradation are the natural objects of despair, and they have a right to respond to this interpretation, in appropriate circumstances, by ending their lives. It would be outrageous from the perspective of the autonomy-based interpretation of treating persons as equals to stay their hand *solely* on the basis of an Augustinian interpretation of despair which they do not reasonably

250. The attempt to articulate intuition as an argument inevitably falters and ends up resting on the question-begging affirmation of the preeminent value of life. See, e.g., P. DEVINE, *supra* note 219, at 201-02. Devine first argues that the Stoic attitude to suicide is inconsistent because it fails to follow its own principle of altering attitudes to the world rather than the world itself, that is, learning better to endure suffering, rather than committing suicide. *Id.* In fact, the description fails to take seriously the Stoic idea of dignity, trivializing it into a kind of passive adjustment without inner ideals rationally affirmed. Devine does not pursue that point and begs the question by merely affirming the value of life.

251. For at least one model of Christian spirituality, St. Ignatius, overcoming suicidal despair on the ground that it was forbidden by God was part of his journey to sanctity. See *ST. IGNATIUS' OWN STORY* 17-20 (W. Young trans. 1956). A similar journey is expressed by the poet Gerard Manley Hopkins in his "(Carrion Comfort)". See *POEMS AND PROSE OF GERARD MANLEY HOPKINS* 60-63 (W. Gardner ed. 1953). For Hopkins, the resistance to "Despair" is expressed in "I can; . . . not choose not to be." *Id.* at 60.

252. See notes 154-174 & accompanying text *supra*.



share and which has, in any event, no superior moral claim to enforcement by law. Surely, in such matters, the range of reasonable personal ideals is wide, various, and acutely sensitive to personal context and individual idiosyncrasy. The law has no proper role in prejudging the method of choosing in general and the proper attitude to suffering in particular.

#### 4. *Life as the Inalienable Basis of Moral Personality*

Perhaps the most interesting of the arguments regarding the wrongness of self-willed death are those which center on moral personality. St. Thomas puts this argument in terms of the natural law of self-preservation, which self-willed killing unnaturally violates.<sup>253</sup> Immanuel Kant, the father of modern deontological moral theory, adapts this argument in the form of the claim that ending one's life is, in some way, inconsistent with the foundations of one's moral duty to his own personality, and thus is morally wrong. Kant thus appears to suppose that to "destroy the subject of morality in his own person is tantamount to obliterating . . . the very existence of morality itself"<sup>254</sup> and appears to think of self-mutilation as wrong, that is, as a kind of "partial self-murder," for the same reason.<sup>255</sup> Kant's sense of the horror of suicide is striking:

We are . . . horrified at the very thought of suicide; by it man sinks lower than the beasts; we look upon a suicide as carrion

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Humanity in one's own person is something inviolable; it is a holy trust; man is master of all else, but he must not lay hands upon himself . . . . Man can only dispose over things; beasts are things in this sense; but man is not a thing, not a beast. If he disposes over himself, he treats his value as that of a beast. He who so behaves, who has no respect for human nature and makes a thing of himself, becomes for everyone an Object of freewill.<sup>256</sup>

Initially, it is important to be puzzled by the imputation to persons of the natural end of self preservation, which self-willed kill-

253. See T. AQUINAS, *supra* note 210.

254. I. KANT, *THE METAPHYSICAL PRINCIPLES OF VIRTUE* 83-84 (1964).

255. *Id.* at 84.

256. I. KANT, *LECTURES ON ETHICS* 151 (1963).

ing unnaturally violates, when it is conceded that the capacity for self-willed killing appears to be a distinctive mark of persons. Accordingly, why does Kant regard this as a sign of our sinking lower than the beasts, when, in fact, it may be a feature of the critical self-consciousness that sets persons apart from other creatures?<sup>257</sup> Donne surely is correct when he argues against the Thomist argument that what is fundamental to persons is not the preservation of life but the pursuit of their rational good, as they define it, which may or may not mean continued life.<sup>258</sup> If anything, a purely naturalistic description of animals and persons might indicate that self-preservation is a fair description of the animal world, but not of the world of persons for whom continued life is only one value among others and not always the dominant one.<sup>259</sup> Kant appears to concede this description when he grants the morality of forms of altruistic self-willed death,<sup>260</sup> but he appears to draw the line at egoistic self-willed deaths, supposing them inconsistent with the constraints of morality.

At one point, Kant puts this latter argument in terms of universalization: persons could not consistently universalize a principle of egoistic self-willed killing, for humankind would come to an end, which is inconsistent with the aims of self-love.<sup>261</sup> Kant's argument

257. H. FEDDEN, *supra* note 159, at 312.

258. J. DONNE, *BIATHANATOS* 49 (1930). In Donne's view then, the principle of self-preservation ceases to be of force when life either ceases or, in the individual's determination, appears to cease to be a good. David Hume's argument, in response to the Thomistic natural law conception, is more speculative in scope, but to similar effect: all nature, Hume argues, is subject to causal laws according to which God rules, and man's nature is also so governed. But, since man has reason to achieve his purposes, man uses these laws to achieve his purposes; it is no more contrary to nature for a man to achieve his rational purposes of ending pain and shame by death than it is for man to alter the natural order in order better to achieve other rational ends, for example, using medicine to fight disease. See D. HUME, *supra* note 227, at 587-93. For the English debates on these matters, see S. SPROTT, *THE ENGLISH DEBATE ON SUICIDE FROM DONNE TO HUME* (1961).

259. To say that person is by definition a self-maintaining system, as in P. DEVINE, *supra* note 219, at 20, either reintroduces the unacceptable Thomistic assumption or uninformatively fails to characterize the nature of the self in which persons have rational interests.

260. See I. KANT, *supra* note 254, at 84-85; I. KANT, *supra* note 256, at 150. Kant refuses to characterize altruistic self-sacrifice as "suicide" in any sense. *Id.* On the vagaries of characterizing certain behavior as "suicide," see J. MARGOLIS, *NEGATIVITIES* 23-35 (1975). See also Beauchamp, *What Is Suicide?*, in *ETHICAL ISSUES IN DEATH AND DYING* 97-102 (T. Beauchamp & S. Perlin eds. 1978).

261. See I. KANT, *FOUNDATIONS*, *supra* note 51, at 39-40.

is question-begging: it assumes what must be shown, that persons' rational good always involves continued life. The argument also grossly travesties the kind of limited exemption from nonmaleficence, mutual aid, and paternalism that is consistent with the autonomy-based interpretation of treating persons as equals. Instead of the quite circumscribed exemption which we have described, Kant supposes a kind of moody and open-ended weariness with life which, like Shakespeare's Hamlet, any loosening of the "canon 'gainst self-slaughter"<sup>262</sup> would unleash in a rash of mass suicides. Kant underestimates the degree to which persons' rational good flourishes only in continued life, making the remarkable and quite indefensible assumption that only an absolute moral prohibition on egoistic self-willed death could bind us, in general, to life—a rather striking failure of imagination which the pre-Christian era does not support.<sup>263</sup> In any event, if life were so desperate and impoverished as to make this assumption reasonable, why *should* a Kantian morality of decent respect for dignity bind us to a life which our conscience finds empty of rational meaning?

We are now at the heart of Kant's argument: the assumption that ending one's life on egoistic grounds is to repudiate moral personality, like the sale of one's body or alienation of body parts. Kant's argument here, as elsewhere in his discussion of traditional Augustinian offenses against morality,<sup>264</sup> rests on an indefensible interpretation of the relation of moral personality to the body.<sup>265</sup> Kant identifies the person with the living body, and then argues roughly as follows: (1) It is always wrong to alienate moral personality; (2) The living body and the person are the same; (3) Egoistic self-willed death is a kind of alienation of the living body; (4) It is always wrong to engage in egoistic self-willed death. The crucial assumption is the second, on the basis of which Kant associates self-willed death with the surrender or alienation of moral personality and thus labels it a forbidden alienation of the morally

262. See W. SHAKESPEARE, *HAMLET*, act I, scene ii, ll. 131-32.

263. See J. CHORON, *supra* note 208, at 15-24; H. FEDDEN, *supra* note 159, at 95-101; J. RIST, *supra* note 208, at 233-55.

264. For a discussion of Kant's sexual views, see Richards, *Commercial Sex*, *supra* note 23, at 1255-62.

265. See, e.g., I. KANT, *supra* note 256, at 148-54.

inalienable.

Kant's identification of moral personality with the body in this discussion is inconsistent with what he says elsewhere about autonomy as the basis of moral personality. In his central statement of ethical theory, moral personality is described in terms of autonomous independence—the capacity to order and choose one's ends as a free and rational being.<sup>266</sup> By comparison, in his discussion of self-willed death, this autonomous freedom is absolutely and inexplicably walled off from any sovereignty over the living body. These views are impossible to square. Indeed Kant himself appears to sense the strain that his absolute condemnation of egoistic suicide works on his deeper ideals. He characterizes proponents of such a right of self-willed death in ways that betray respect: “[I]f man is capable of removing himself from the world at his own will, he need not submit to any one; he can retain his independence and tell the rudest truths to the cruellest of tyrants.”<sup>267</sup> And suddenly, Kant draws back from such admiration with a non sequitur:

Let us imagine a state in which men held as a general opinion that they were entitled to commit suicide, and that there was even merit and honor in so doing. How dreadful everyone would find them. For he who does not respect his life even in principle cannot be restrained from the most dreadful vices; he reck neither king nor torments.<sup>268</sup>

But the defense of such a right, properly interpreted, is not only not inconsistent with an autonomy-based interpretation of treating persons as equals; it appears to be justified on such a basis. Clearly the deeper theory of autonomy, Kant's central contribution to ethical theory,<sup>269</sup> requires the rejection of the parochial and unimaginative views of moral personality applied in his discussion of self-willed death. Autonomy, in the fullest sense,<sup>270</sup> rests on persons' self-critical capacities to assess their present wants and lives, to form and act on wants and projects, and to revise and change them. Autonomy occurs in a certain body, occasioning a person

266. See I. KANT, *supra* note 51, at 51-52.

267. I. KANT, *supra* note 256, at 153.

268. *Id.*

269. See notes 62-69 & accompanying text *supra*.

270. See notes 62-69 & accompanying text *supra*.

self-critically to take into account that body and its situation in deciding on the form of her or his life. But the embodiment of autonomy does not isolate the exercise of autonomy in the way Kant supposes. Kant means to be making the quite valid point about autonomy-based ethics that it is immoral to abdicate or alienate one's autonomy or one's capacity for self-critical choice about the form of one's life. All forms of slavery thus are forbidden because they involve such a surrender of basic autonomy and of the human rights that express and facilitate such autonomy. Kant fuses this valid moral idea with the quite unrelated idea that self-willed death is a similar kind of alienation. For an autonomy-based theory, this fusion is conceptual nonsense, darkly obscuring what Kant dimly senses but cannot acknowledge: that what is ethically ultimate is the capacity of persons independently to interpret and to evaluate the rational meaning of the projects and aims that constitute their lives, and that this dignity, properly understood, may embrace a decision to die. There is no slavery here, but only the deeper realization of autonomous independence, which must extend, if it extends to any profound level at all, to evaluations of the meaning of the boundaries of one's life with death.

It is not difficult to understand how Kant, so powerful in his statement of abstract universalistic ethics, could be so time-bound in his casuistry of decisions to die; he assumes, as the foundation of his discussion, the Augustinian assumptions regarding death that he also unquestioningly accepts regarding sex.<sup>271</sup> Thus when Kant argues that we have no right to control our dying, he is not only making the confused and indefensible argument about alienating moral personality just discussed, but he is echoing, as the texts make clear,<sup>272</sup> Augustine's quasi-theological argument about our lives as the property of God, which *we* may not alienate. Kant accordingly isolates death from autonomy in the way conventional for his period. There is no reason to continue this mistake today. Indeed, we may note the ultimate intellectual and moral paradox

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271. See Richards, *Commercial Sex*, *supra* note 23, at 1255-62.

272. While Kant insists that suicide is immoral on ethical grounds independent of putative condemnation by God's will, he concludes his discussion of its immorality with the telling Augustinian remark, echoing Plato: "[A] suicide opposes the purpose of his Creator; he arrives in the other world as one who has deserted his post; he must be looked upon as a rebel against God." I. KANT, *supra* note 256, at 153-54.

of Kant's argument: that the submerged reason for denying *our* right to control decisions about death is to place such authority in another, God. An argument thus couched in the rhetoric of repudiating moral slavery in fact disfigures and denies our moral freedom in the name of a hidden master.

##### 5. *Harms to Determinate Third Parties*

Earlier arguments for the immorality of all self-willed deaths premised on the idea of our life as property of the state<sup>273</sup> suggested that absolute prohibitions resting on this conception could not be sustained, but that more circumscribed moral arguments might be available forestalling such deaths in specific circumstances of fairly undertaken moral obligations of fairness—for example, military service in a just war or completing some project which affords an indispensable good to society before one takes one's leave. We regarded such arguments as resting on the background of institutional principles of justice and fairness which qualify the scope of application of the principles of natural duty directly relevant to the moral structure of the right to life—nonmaleficence, mutual aid, and paternalism. Such moral obligations to society are the most that can be critically sustained of the absolute prohibitions resting on the idea of life as the property of the state. But, of course, they are not absolute, applying only in limited contexts and circumstances. If, for example, a person has completed any services or projects which society on grounds of reciprocal fairness may demand of him, there is no just claim that society may make demanding that she or he remain.<sup>274</sup>

A similar analysis applies to moral obligations to determinate third parties which a person's decision to die may call into question. Decisions to die do not occur in a vacuum: persons who express such wishes reasonably may be embedded in personal relationships which may relevantly alter our moral evaluation of the situation. Certainly the central class of such relevant relationships are those of parent to still young and vulnerable children. Parenthood is a role embedded in social institutions of family and

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273. See notes 221-232 & accompanying text *supra*.

274. Compare the remarks of Montesquieu at text accompanying note 227 *supra* with the remarks of Hume at note 227 *supra*.

education, clearly regulated by principles of justice which assess rights and duties as well as benefits and burdens in terms of fairness and equity to parents, children, and society in general.<sup>275</sup> Clearly, voluntarily undertaking parenthood gives rise, *inter alia*, to moral obligations of fairness to perform one's just role as the kind of nurturing and sustaining parent which the well-being of children requires; in addition, natural duties of parenthood appear, in such circumstances, convergently to require appropriate forms of care and commitment.<sup>276</sup> A *prima facie* violation of such moral obligations and duties is abandonment, which may involve two independent wrongs: first, breaking the bond of psychological parenthood, in early childhood, which may harm the child developmentally;<sup>277</sup> and second, failing to insure that the child receives alternative care of the ethically required kind—individualized attention, stable affection, stimulation, and concern.<sup>278</sup> Now such wrongs are *prima facie*; countervailing considerations may outweigh such wrongs. For example, military service and the like may require prolonged parental absence, may even lead to death, but in some circumstances may be the conduct which may be ethically justified. Self-willed death of a young parent, however, appears deeply problematic: in most cases, such abandonment appears clearly wrong. Perhaps we should distinguish the case of the terminally ill parent from the case of the parent who could continue living quite ably but who, in terms of her or his good, rationally and freely affirmed, prefers death—for example, the Jehovah's Witness who on religious grounds declines medical treatment, but who could survive quite well with treatment. The prolongation of

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275. See Richards, *The Individual, the Family and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1 (1980).

276. The moral idea here is that, quite apart from background institutional roles, merely giving birth to a vulnerable child, other things being equal, gives rise to duties of care and nurturance. See Locke, *The Second Treatise*, in J. LOCKE'S TWO TREATISES OF GOVERNMENT 323-25 (P. Laslett ed. 1960).

277. See generally J. BOWLBY, ATTACHMENT AND LOSS, (3 vols.: ATTACHMENT (1971); SEPARATION: ANXIETY AND ANGER (1975); LOSS: SADNESS AND DEPRESSION (1980)); J. BOWLBY, CHILD CARE AND THE GROWTH OF LOVE (1953); J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973); M. RUTTER, MATERNAL DEPRIVATION REASSESSED (1972).

278. See authorities cited note 277 *supra*. See also A. CLARKE-STEWART: CHILD CARE IN THE FAMILY: A REVIEW OF RESEARCH AND SOME PROPOSITIONS FOR POLICY (1977).

life of the terminally ill parent may do little good for the child and, indeed, may do ill in some cases; perhaps here the ethical requirement would be that the parent must insure that some alternative parental care will be afforded the child before the parent takes her or his leave. The parent, who could easily survive, may do wrong, difficult ever to justify, in abandoning the child in such circumstances.<sup>279</sup> But perhaps some justification may be present in those cases where the parent can demonstrate that the child already identifies with a network of stable and loving persons, that the network will continue after her or his death, and that the care has been so generalized that the parent's absence will not be felt appreciably by the child.<sup>280</sup>

Clearly such moral obligations to determinate third parties do not justify any absolute prohibition of self-willed death in all cases. Not all persons who reasonably contemplate self-willed death are parents. Even with respect to those who are parents, it would be unacceptably onerous to generalize the arguments sketched above to restrict the liberty of parents in all stages of their life cycle.<sup>281</sup> Children grow up, develop lives and relationships of their own, become autonomous. It is as wrong, as violative of the rights of the person, to suppose that parents' lives are forever the property of their children as to suppose that lives are property of God or of the state. Parents have lives of their own, shaped by aspirations, ends, and projects of which being a parent is only one part, and not nec-

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279. Even if there is no moral justification for such conduct, there may be mitigating circumstances and even forms of excuse—mental disturbance, for example—which would qualify and sometimes exculpate from moral blame.

280. See *In re Osborne*, 294 A.2d 372 (D.C. 1972), in which the decision of a Jehovah's Witness to refuse blood transfusions on religious grounds was upheld though the man had two young children. The man's wife had testified about continuing care for the children:

"My husband has a business and it will be turned over to me. And his brothers work for him, so it will be carried on. That is no problem. In fact, they are working on it right now. Business goes on.

"As far as money-wise, everybody is all right. We have money saved up. Everything will be all right. If anything ever happens, I have a big enough family and the family is prepared to care for the children."

*Id.* at 374 (quoting testimony). The record also indicated a close family relationship extending beyond the parents. *Id.* For commentary, see R. VEATCH, *supra* note 193, at 158-59.

281. For the idea of a parental life cycle, see R. RAPOPORT, R. RAPOPORT & Z. STRELITZ, *FATHERS, MOTHERS AND SOCIETY: TOWARDS NEW ALLIANCES* (1977). See also R. RAPOPORT & R. RAPOPORT, *LEISURE AND THE FAMILY LIFE CYCLE* (1975).



essarily the most important part. If, in terms of the meaning of life which a person reasonably and freely affirms, death is the preferred and projected course, the existence of adult children cannot morally qualify their right to act so.<sup>282</sup> If a parent faces the realistic prospect of terminal illness and reasonably decides that self-willed death is the better course, how can the grief of those who do not share the pain or the vision of degradation stay their hand? Why, ethically, is the grief over this form of death any worse than the grief over the possibly prolonged and terrible death that would otherwise take place?<sup>283</sup> The death of parents is, in any circumstances, difficult for children who are prone to experience therein unconscious fears, guilt, and remorse.<sup>284</sup> If the self-willed death of parents holds special terrors for their adult children, that may be because of the long tradition of moralistic condemnation of it which, since Augustine, has dominated the West. But this tradition appears to be wrong and indefensible, indeed to violate the rights of the person. When we disencumber ourselves of these false demons, we may enable parents to explain such choices with lucid rationality to their children, to dissolve their unjust fears or guilt, and to explain the meaning of this act as an expression of the person they are.<sup>285</sup> Unlike the Stoics and others,<sup>286</sup> we do not have

282. D. PORTWOOD, *supra* note 160, at 93-106.

283. Certainly, in the circumstances where death is morally permissible, for example, terminal illness, it is uncertain that one who considered effects of his dying on those he loves would prefer prolonged death and deterioration over available suicidal alternatives, if one assumes appropriate explanation. For one form of such explanation, see Johnston, *Artist's Death: A Last Statement In A Thesis on 'Self-Termination,'* N.Y. Times, June 17, 1979, at 1, col. 1.

284. For a classic study of the pathology of grieving, see S. FREUD, *Mourning and Melancholia*, in 14 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 243-58 (J. Strachey trans. 1957) [hereinafter cited as STANDARD EDITION]. See generally J. BOWLBY, ATTACHMENT AND LOSS, *supra* note 277. For the larger social implications of unresolved grief, see A. MITSCHERLICH & M. MITSCHERLICH, THE INABILITY TO MOURN (1975).

285. See note 283 *supra*.

286. For descriptions of these moving ceremonies of self-willed death, see the description of the suicide of Cato, H. FEDDEN, *supra* note 159, at 95-101. For Tacitus' account of Seneca's similar death, see THE STOIC PHILOSOPHY OF SENECA, *supra* note 159, at 243-44. For the suggestion by Enlightenment thinkers of the need for the revival of such rituals, see T. MORE, UTOPIA 108-09 (E. Surtz ed. 1964); M. MONTAIGNE, *A Custom of the Island of Cea*, in THE COMPLETE WORKS OF MONTAIGNE 251-62 (1948); F. NIETZSCHE, HUMAN ALL-TOO-HUMAN 85-86, 88, 286-87 (1964). See also MONTESQUIEU, *The Grandeur and Declension of the Roman Empire*, in III COMPLETE WORKS 86-87 (London 1777); F. NIETZSCHE, THE TWILIGHT OF

such rituals of self-willed dying: a way of speaking one's own death, of sharing the moment with those one loves and respects, of mutual solace and support, which may better affirm the meaning of one's life than a more isolated and pain-wracked death.<sup>287</sup> But that lack of ritual is our problem, our impoverishment, our failure of social imagination;<sup>288</sup> it is no justification for our failure to respect the possible dignity of self-willed death and to establish rituals adequate to our moral needs.

### 6. *Paternalistic Arguments*

Even if no other moral argument on behalf of condemnation can be sustained, it may still be argued that undertaking particular conduct is sufficiently irrational for an agent so that there is moral title to interfere on paternalistic grounds. We have already examined the proper scope of paternalistic considerations, consistent with the autonomy-based interpretation of treating persons as equals, and their application to self-willed death.<sup>289</sup> Our conclusion was that self-willed death was a natural object of just paternalistic concern, death being, typically, irreparable harm, but that such concern, on balance, was unjustified in cases where the person voluntarily and rationally embraced death. There is one case—children—where these considerations clearly dictate just intervention. On the other hand, these considerations, sometimes mistakenly, are supposed to render suspect all forms of self-willed killing. Let us first examine the issue of children and then turn to the abuses of paternalism in this area.

THE IDOLS 88-90 (1964); F. NIETZSCHE, *Thus Spoke Zarathustra*, in THE PORTABLE NIETZSCHE 183-86 (W. Kaufman trans. 1954); A. SCHOPENHAUER, *ESSAYS AND APHORISMS* 77-79 (1970); Voltaire, *Of Suicide*, in 17 WORKS 165 (4th ed. 1772).

287. Recent social historians have brought home the dramatic point that the impersonal isolation of contemporary dying in hospitals has occasioned the loss of the comforting rituals of public dying at home which characterized previous eras, where the dying person would bid farewell to family and friends in a ceremony of mutual comfort. See generally P. ARIES, *WESTERN ATTITUDES TOWARD DEATH: FROM THE MIDDLE AGES TO THE PRESENT* (P. Ranum trans. 1974); E. KUBLER-ROSS, *ON DEATH AND DYING* 1-33 (1969); D. STANDARD, *THE PURITAN WAY OF DEATH* 188-94 (1977). The humane need for such rituals would apply to both ordinary dying and self-willed death. Of course, it is possible that with more humane concern for the dying some would not request death. See *id.* at 122-38. Others, however, might avail themselves of such rituals reasonably to will an earlier death.

288. See note 287 *supra*.

289. See notes 186-197 & accompanying text *supra*.

If there is one category of persons whose capacity to undertake death voluntarily, as part of a life plan freely and rationally defined by them, appears justly suspect, it is young children. The issue arises dramatically when parents, who on religious grounds would will death for themselves, extend such treatment to their young children.<sup>290</sup> While children in such cases typically ratify the parental view, we justly question the rational independence of mind underlying the ratification. Since the child's view is not the expression of the freedom and rationality which exempts from paternalism and since the conduct does involve irreparable harm to the child, state interference is justified, on the grounds of just paternalism, in the cases to which the above considerations apply. Also justified is state insistence on the medical treatment which, in the case of a mature adult, it could not, consistently with human rights, order.<sup>291</sup>

Sometimes, however, paternalistic considerations are supposed to justify intervention well beyond this limited case. In this connection we must observe the temptation to employ certain radically inappropriate forms of paternalistic arguments, and query the force of this temptation in the condemnation of decisions to die.

When we consider the application of paternalistic considerations to choices of self-willed death, we face the question how to assess the rationality of this kind of choice. The idea of rationality employed here takes as its fundamental datum the agent's ends and aspirations, which the agent organizes, evaluates, and revises dispassionately in terms of standards and arguments to which she or he assents as a free and rational being. In this context, principles of rational choice are those standards which call for the assessment of choices in terms of the degree to which alternative choices better satisfy the person's ends and aspirations over time.<sup>292</sup> Since the agent's ends and aspirations over time are often complex and difficult to anticipate with exactitude, a number of such choices in a particular case may be equally rational. Nonetheless, there is a coherent sense to the application of rationality criteria to these choices. Some such choices are clearly irrational if they frustrate

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290. See note 197 *supra*.

291. See the discussion of this problem in Richards, *supra* note 275, at 50-52.

292. C. FRIED, *supra* note 88, at 155-82.

every significant end which the agent has, and available alternatives do not.<sup>293</sup> Such irrational choices, if they also are likely to lead to irreparable harms, may be the proper object of paternalistic interference.

One radically inappropriate form of paternalistic interference is that which is grounded in the substitution of the interferer's own personal ends for the ends of the agent. This substitution fails to take seriously the fundamental datum of paternalism, that the agent's ends are defined in terms of her or his rational and independent self-definition and that the agent acts irrationally only when the action frustrates such ends. This error is a frequent problem in the paternalistic assessment of basic life choices like intimate relations, occupation and vocation, and the boundaries of life and death in one's values, for in such cases people find it all too natural facilely to substitute their own personal solutions for the kinds of imaginative understanding of the perspectives of others required properly to examine these matters. The temptation to such paternalistic distortions is particularly strong in cases in which conventional moral judgments mistakenly condemn certain conduct absolutely.<sup>294</sup>

The assertion of paternalistic arguments sometimes marks a period of transvaluation of values in matters of certain kinds of life choice. Certain conduct traditionally believed to be morally wrong no longer justifiably may be regarded so.<sup>295</sup> In such a context, the last stand of traditional moralists, after they are compelled to concede the lack of moral foundations for their views, is to retreat to paternalistic arguments that covertly mask the discredited traditional morality. Because people attach deep significance to traditionally sanctioned life choices in the choice of intimate relations, occupation and vocation, life and death, this position is natural. For many, such decisions are of metaphysical import and invoke the person's deepest ideology—the kind of choice associated with

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293. In terms of rational choice theory, one plan would dominate another. See D. RICHARDS, *REASONS FOR ACTION*, *supra* note 19, at 28, 40-43.

294. For a characterization of the distortions of such judgments in the perception of the availability of commercial sex services, see Richards, *Commercial Sex*, *supra* note 23, at 1264-71.

295. See, e.g., Richards, *Sexual Autonomy*, *supra* note 12, at 975-99.

what we shall later discuss as the "meaning of life."<sup>296</sup> Given the personal significance that they may have found in such traditional moral judgments, their imaginations systematically fail them when they seriously try to consider whether it could be a rational life choice to adopt a traditionally condemned life choice. Nevertheless, such views cannot be sustained in terms of acceptably neutral rationality criteria and indeed can be seen to rest on deep moral confusions which contradict the ultimate values of human rights.

No good argument can be made that paternalistic considerations would justify the kind of intervention that is involved in the traditional condemnation of all decisions to die. In some cases, such choices seem quite rational, indeed all *too* rational. For example, a person has a coherent vision of the good of his life, rationally and freely affirmed and revised, and faces the prospect of painful death or deterioration in which all significant projects of his life will be frustrated, a frustration which for him has no redemptive meaning, and indeed in which continued life would betray the central ideals around which he centers his conception of a meaningful life; for him, self-willed death better meets all his significant ends than the alternative. Indeed, the alternative—continued life—which frustrates all his significant ends in a way death would not, may be, by comparison, irrational.<sup>297</sup> If he voluntarily embraces such death, affirming therein the considered and reasonably reflective values of his integrity as a person, there is no ground of paternalism which could justly stay him.

Indeed, in such cases, we may suspect the views of the persons who would make paternalistic claims for intervention. Some of the arguments for the irrationality of all such decisions may be based on mistaken distortions of the facts. It is as if the extant moralistic condemnation of decisions to die inexorably shaped the reading of the facts so as to confirm that the putatively immoral conduct was personally irrational as well. Accounts of suicides, for example, claim that they are mentally disturbed<sup>298</sup> or socially maladaptive.<sup>299</sup> Psychiatrists sometimes supply a psychiatric makeweight to

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296. Elsewhere I have characterized the influence of certain of these judgments in terms of "metaphysical familism." See Richards, *supra* note 275, at 37 & n.172.

297. See notes 154-174 & accompanying text *supra*.

298. See, e.g., K. MENNINGER, *MAN AGAINST HIMSELF* (1938).

299. The classic statement of this position is E. DURKHEIM, *SUICIDE: A STUDY IN SOCIO-*

the moral condemnations by claims that suicides are mentally ill or at least neurotic.<sup>300</sup> None of these claims has been sustained by careful empirical research observing sound scientific methods.<sup>301</sup> Typically, such claims rest on the limited sample of people whom the researcher mistakenly believes to be typical of the research population at large.<sup>302</sup>

The empirical literature on suicide, for example, makes clear that the phenomenon is quite complex and divides it into different kinds of phenomena which should not be confused.<sup>303</sup> One class appears to be that of the suicide attempt, who tend to be young, disproportionately female, not undertaking suicide in a way clearly calculated to succeed, and ambivalently hoping for help.<sup>304</sup> The other class, of more typically successful suicides, is older, more likely to be male, designing suicide in a way reasonably designed to succeed, often in contexts of realistic deprivation.<sup>305</sup> Nothing is to be gained in confusing the differing moral realities of these two kinds of persons. The former are persons who, if not mentally ill in any clinical sense, are subject to moods of depression which disable them from assessing alternatives in a reasonably flexible and free

ogy (1951). Durkheim appears to assume the Kantian moral view, see notes 253-272 & accompanying text *supra*, to the effect that suicide, as such, immorally violates the foundations of moral personality. See E. DURKHEIM, *supra*, at 333-38. For an alternative attempt by a sociologist to account for the moral and social complexities of suicide, see J. DOUGLAS, *THE SOCIAL MEANINGS OF SUICIDE* (1967). See also J. BAECHLER, *SUICIDES* (1979).

300. See K. MENNINGER, *supra* note 298.

301. See, e.g., J. CHORON, *supra* note 208, at 74-78; E. STENGEL, *SUICIDE AND ATTEMPTED SUICIDE* 58-59 (1975).

302. More judicious commentators, like Stengel, who see the fallacy of this inference, nonetheless remain skeptical about the commonness of rational suicide, largely on the basis of their work with suicide prevention which benefits often largely confused and desperate people who do not rationally contemplate suicide. See E. STENGEL, *supra* note 301, at 125, 132-34. Here, Stengel appears himself fallaciously to reason from an admittedly skewed sample. His argument that persons who face the same misfortune, for example, terminal cancer, have different responses—some contemplating suicide, others never doing so—does not show, as he mistakenly infers, that some uniform response must be rational. It only shows that persons have very different conceptions of their ends, which may justify different judgments of rationality on similar facts. See *id.* at 133. The implicit judgments here of normality, *id.* at 58, thus appear to suppress the kinds of fundamental moral distinctions regarding human individuality which an ethical medical practice should here observe.

303. See *id.* On successful suicides, see *id.* at 19-73. On attempted suicides, see *id.* at 77-117.

304. See *id.* at 77-117.

305. *Id.* at 19-73.

way; the project of suicide is not, for them, the expression of a critically evaluated rational life plan, as is shown by the ambivalent nature of their planning.<sup>306</sup> Such persons are the just subjects of continuing social concern on the ground of just paternalism, for their conduct, the product of mood and depression, perhaps of youth, and not of a critically reflective life plan realistically assessed, is the kind of irrationality which, in the presence of irreparable harm, should trigger intervention. Just concern for such persons has given rise in England to the Samaritans<sup>307</sup> and in the United States to suicide prevention centers,<sup>308</sup> which seek to provide institutional facilities where such persons are enabled to discuss their problems, to develop needed perspective on them, to seek the help which they appear ambivalently to want. Such facilities are part of the kind of intervention that just paternalism appears to support, for such intervention is not an absolute prohibition but, at the most, voluntary postponement to encourage processes of reasonable reflection and dialogue which may better secure society's ethical interest in ensuring that such conduct is undertaken rationally.<sup>309</sup> Thus there is no inconsistency; rather there is mutually complementary support between the ethical grounds for such programs, in the cases to which they properly apply, and respect for the right of rational self-willed death, in the cases to which this right properly applies.<sup>310</sup> Both conceptions rest on support and encouragement and respect for capacities of rational dignity; in the one case, we insure their existence; in the other, we respect their exercise.

In general, since the ground for programs of suicide intervention is concern for forms of irrationality, it would be perverse to enforce such aims through the use of the criminal sanction, which generally requires, as a condition of just punishment, the presence of

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306. For the importance of ambivalence in the psychiatric assessment of the rationality of suicide behavior, see Motto, *The Right to Suicide: A Psychiatrist's View*, 3 LIFE-THREATENING BEHAVIOR 183-88 (1972).

307. See E. STENGEL, *supra* note 301, at 137-49.

308. For the kinds of evaluations and procedures typical of such centers, see generally E. SCHNEIDMAN, N. FARBEROW & R. LITMAN, *THE PSYCHOLOGY OF SUICIDE* (1970).

309. See note 190 & accompanying text *supra*.

310. J. CHORON, *supra* note 208, at 79-82, 96-106, 152-56.

capacities of rational choice and deliberation.<sup>311</sup> Even if intervention, including stopping the act if possible, may be justified in *some* cases of self-willed death,<sup>312</sup> criminalization appears wholly inappropriate to accomplish even such limited aims.

Finally we should remind ourselves that, outside this circumscribed area of just paternalistic concern in decisions to die, there is no ground whatsoever for interference. Paternalistic interest in such cases represents the kind of unjust influence of moralistic judgments condemning all such cases which cannot be critically defended consistent with respect for human rights. Special reason to be suspicious of the motives for such distortions in the case of self-willed death exists, for it is all too easy to substitute, in the place of genuine concern for the rational perspective of others on their own lives and deaths, one's fears of one's own death<sup>313</sup> or one's egoistic desires to hold those we love in the world as long as we can.<sup>314</sup> Dialogue with those who purpose death, urging our point of view, our needs, as factors in their deliberations, is one of several ways to deal with such impulses. But there is no ground on which we can justly express these impulses through absolute prohibitions on all forms of self-willed death. We must recognize these impulses, however understandable and natural, for what they are: the desire to control those we love, to remain the omnipotent and loved child,<sup>315</sup> to not be left alone. We should acknowledge these impulses as needs and try to deal with them honestly; but we, consistent with human rights, cannot dignify them in terms of a moral imperative forbidding self-willed death. The justice of our desires to control even those we love has limits.<sup>316</sup> Those limits are established by respect for human rights in terms of which we express our respect

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311. See Richards, *Human Rights*, *supra* note 23, at 1417, 1428-34.

312. See notes 186-197 & accompanying text *supra*.

313. One study, for example, indicates that physicians are significantly more afraid of death than either the healthy or sick lay people. This was the case even though 63% of the physicians said they were less afraid of death now than they had been heretofore. See Feifel et al., *Physicians Consider Death*, PROC. AM. PSYCH. ASSOC. 201-02 (1967).

314. On forms of love bond that disable the lover from realistically perceiving the needs of the beloved, see M. BALINT, PRIMARY LOVE AND PSYCHOANALYTIC TECHNIQUE 90-140 (1965).

315. *Id.*

316. These limits importantly govern and regulate the justice of relations of parents to children, and the converse. See Richards, *supra* note 275.



for personal dignity, including the possible dignity of self-willed death.

### 7. *Wedge Arguments*

The nature of wedge arguments for the absolute prohibition of all decisions to die is to concede, *arguendo*, the moral force of the critical arguments above discussed and grant that *some* cases of self-willed death may be morally right, but then to argue that there is no way to express in law or conventional morality this judgment, for the validation or legitimation of *any* such conduct inexorably will be the entering wedge of arguments for killing that are clearly unethical.<sup>317</sup> This argument takes two common forms: first, that any legitimation of voluntary euthanasia will also validate the horrors of Nazi genocide; and second, that even if voluntary euthanasia could be validated without this implication, forms of voluntary euthanasia would be abused in terms of putting pressure on people to die. Neither argument can be sustained.

The former argument is classically stated by Yale Kamisar<sup>318</sup> in response to Glanville Williams<sup>319</sup> in a way which brings out the fallacy in the objection. Kamisar claims to agree with Williams that the scope of the criminal law should be critically assessed and reformed in the light of utilitarian objectives.<sup>320</sup> He then claims, however, that such utilitarian assessment—which would legalize voluntary euthanasia of the consenting terminally ill on the ground that, because such persons experience more pain than pleasure in themselves and cause more pain than pleasure in others, voluntary euthanasia would maximize pleasure over all—inevitably must ignore the voluntary consent requirement and thus would validate massive forms of involuntary euthanasia of the defective, whose elimination might maximize utility over all, which is the rationale for the racial genocide of Naziism.<sup>321</sup> Kamisar's argument contains two distinct objections: first, that the voluntary consent require-

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317. For a classic statement of this form of argument, see Kamisar, *supra* note 40.

318. *See id.*

319. *See* notes 38-39 & accompanying text *supra*.

320. *See* Kamisar, *supra* note 40, at 974.

321. *Id.* at 1014-41.

ment cannot be made effective;<sup>322</sup> and second, that utilitarianism justifies euthanasia in other cases besides those of voluntary consent.<sup>323</sup> Kamisar's objection to an effective institutional embodiment for voluntary consent is technical: how, he argues, can one be certain that what a terminally ill patient in pain now requests is what he or she would want if his or her mind were not clouded by pain, and how can one be sure that what a person says she or he would want prior to being in such pain is decisive of what they want when now in pain and unable voluntarily to consent? The answer, sensibly made by Williams,<sup>324</sup> is that optimally we should seek both: voluntary consent prior to illness and consent, if possible, when ill. But clearly, if consent when ill is not possible, for example, when the person is comatose and unlikely to regain consciousness, the voluntary consent of a person of the requisite form in certain circumstances, given prior to the nonconsenting state, might be ethically determinative. As we have seen, other things being equal, the two conditions of a self-willed death that is not violative of the natural duties are voluntary consent *and* reasonableness in terms of the person's own life plan, rationally and freely adopted and assessed by the person. Surely some kind of formal consent given under precisely defined legal conditions prior to illness, like the "living wills" which have already been adopted in several states,<sup>325</sup> would be highly probative on both these questions; in addition, there must be assurance that there is no over-

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322. *Id.* at 978-1013.

323. *Id.* at 1014-41.

324. See G. WILLIAMS, *supra* note 38, at 339-46. See also Williams, *Euthanasia Legislation: A Rejoinder to the Non-Religious Objections*, in *EUTHANASIA AND THE RIGHT TO DEATH* 134-47 (A. Downing ed. 1969).

325. At least eight states have adopted a "Natural Death Act" whereby an individual executes a so-called "living will." Comment, *North Carolina's Natural Death Act: Confronting Death with Dignity*, 14 *WAKE FOREST L. REV.* 771, 774-77 (1978). The seminal statement in support of the "living will" was Kutner, *Due Process of Euthanasia: The Living Will, a Proposal*, 44 *IND. L.J.* 539 (1969). See generally Kutner, *The Living Will: Coping with the Historical Event of Death*, 27 *BAYLOR L. REV.* 39 (1975). For commentary, see the articles on the "living will" cited at note 48 *supra*. See also Kaplan, *Euthanasia Legislation: A Survey and a Model Act*, 2 *AM. J. LAW & MED.* 41-99 (1976); Raible, *The Right to Refuse Treatment and Natural Death Legislation*, 5 *MEDICOLEGAL NEWS* 6 (1977); Note, *The Legal Aspects of the Right to Die Before and After the Quinlan Decision*, 65 *KY. L.J.* 823 (1976-77); Note, *The Tragic Choice: Termination of Care for Patients in a Permanent Vegetative State*, 51 *N.Y.U. L. REV.* 285 (1976); Comment, *The Living Will: Already a Practical Alternative*, 55 *TEX. L. REV.* 665 (1977).

reaching in securing the consent and—independent of consent—that the illness in question is one which the person reasonably might escape by death, that is, a painful terminal illness which the person has little probability of surviving in any event.<sup>326</sup>

Kamisar appears to sense the weakness of this technical objection and moves quickly to a more profound problem in Williams' argument: the general thrust of Williams' utilitarian argument extends beyond voluntary euthanasia, narrowly defined in terms of consent and reasonableness in the circumstances, to involuntary euthanasia of the defective or the eugenically unfit, and such euthanasia leads to the horrors of Nazi genocide.<sup>327</sup> It hardly seems fair to impute to a utilitarian like Williams, who writes in the tradition of liberal utilitarian reform of John Stuart Mill<sup>328</sup> and H.L.A. Hart,<sup>329</sup> the false and vicious racial theories which were the actual moral basis for the Nazi programs.<sup>330</sup> If utilitarian arguments would legitimate forms of involuntary euthanasia at all, this legitimization would apply in sharply circumscribed circumstances which bear not the slightest resemblance to either the Nazi theory or practice.<sup>331</sup> Thus, to the extent that Kamisar uses utilitarianism as his operative critical morality, he cannot give expression to the kind of objection he intends.

The objection is true and important; but once we see its moral basis for what it is, we cannot draw the implications that Kamisar confusedly does. The objection is that utilitarianism is a manipulative moral theory which does not take seriously treating *persons* as

326. In this connection, Yale Kamisar argues that medical judgments about terminal illness and incurability are fallible and that the death of patients should not be a hazard of medical fallibility. Kamisar, *supra* note 40, at 993-1013. But surely, the issue is one of reasonable assessment of prognosis on all the available facts. If the person perceives that a highly probable evil should and will be escaped by death, then there can be no moral objection to the person's decision to die. Part of such reasonable assessment is, of course, the possibility of medical fallibility. But once the person is thus apprised and the assessment is not unreasonable, the relative weight of the probabilities must be left to the person. Williams, *supra* note 324, at 134-47. Kamisar's use of the objective mode would here deprive the person of a right of reasonable judgment which is her or his right.

327. See Kamisar, *supra* note 40, at 1014-41.

328. See J. MILL, *supra* note 58.

329. See H. HART, *supra* note 58.

330. M. KOHL, *supra* note 156, at 96-100.

331. See discussion of J. Glover and P. Singer at notes 43, 169 *supra*.

equals; one mark of this failure is the theory's tendency to legitimate involuntary euthanasia of persons if they appear to be suffering more pain than pleasure and occasioning more pain than pleasure in the others who must care for them.<sup>332</sup> Indeed, from the viewpoint of pure utilitarian ethics, the elimination of a person has no ethical negative significance if pleasure overall is thus advanced,<sup>333</sup> as it might be not only by ending the net pain produced by a defective but replacing him or her by a nondefective person who produces a net pleasure.<sup>334</sup> The proper answer to this objection is not to retain one's utilitarianism and disavow one's beliefs about the propriety of voluntary euthanasia and impropriety of involuntary euthanasia, but to question one's intuitive commitment to utilitarianism and seek a moral theory more adequate to one's considered moral judgments.<sup>335</sup> We have already suggested one form of such a theory which expresses an autonomy-based interpretation of treating persons as equals, the substantive moral conclusions of which are clearly anti-utilitarian. The consequence of this theory is<sup>336</sup> that voluntary self-willed death in certain circumstances is not morally wrong, but involuntary forms of killing of persons cannot be ethically justified. Thus we may disavow Williams' and Kamisar's utilitarianism, disavow entirely any legitimation of involuntary euthanasia of persons, and place voluntary forms of self-willed death on solid anti-utilitarian ethical foundations with no malign tendency *at all*.

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332. See discussion of J. Glover and P. Singer at notes 43, 169 *supra*.

333. This intuitively harsh consequence of pure utilitarianism is avoided by both Jonathan Glover and Peter Singer by somewhat ad hoc and anti-utilitarian devices. For Glover, this takes the form of his principle of autonomy, whereby creatures with developed self-consciousness who can and do express wishes to live are given enormous weight, which, for him, outweighs countervailing utilitarian consequences which might, absent the enormous normative weight given autonomy, require death. J. GLOVER, *supra* note 43, at 74-85. In similar fashion, Peter Singer claims that "persons" with self-consciousness have a kind of overwhelming normative weight which gives them, should they want continued life, a kind of right to it. P. SINGER, *supra* note 43, at 72-92. For both theorists, since young infants, for example, lack such self-consciousness, they have no such weight, for their lives are thus subject to utilitarian calculations of the normal kinds. For commentary, see notes 43, 169 *supra*.

334. For the idea of replacement, see J. GLOVER, *supra* note 43, at 72-73, 159-60, 163. See also P. SINGER, *supra* note 43, at 122-26, 130-39.

335. See text accompanying notes 1-342 *supra* and *infra*.

336. See notes 154-174 & accompanying text *supra*.

There remains one form of the wedge argument which we should consider briefly: that even if we limit permissible killing to circumscribed forms of voluntary euthanasia and the like, the legitimation of voluntary euthanasia by law or social convention will lead to abusive manipulation of persons to encourage them, when old and dependent, to avail themselves of this option<sup>337</sup>—freeing their children, for example, of the burdens of care and passing on the estate that the children regard as their due. Now, of course, it is a mark of rights that they can be abused;<sup>338</sup> but before we permit the possibility of abuse to compromise our definition of rights, we must make sure that the forms of such abuse are not unfairly likely and cannot be minimized by ways of conditioning the exercise of such rights. Certainly, manipulative enticement of such kinds, in contemporary circumstances of affluence and longevity, would be abusively wrong.<sup>339</sup> But in contemporary life, forms of social security, pension benefits, and the like make the life of older people, in contrast to previous historical periods,<sup>340</sup> sufficiently independent that they cannot be regarded, in general, as unfairly manipulable by the young. If we are concerned about abuse of the old here, surely we should be concerned not to compromise their rights, but as a just society, further to guarantee the independent well-being of older citizens<sup>341</sup> so that they retain in old age an autonomous dignity which does not make them easy prey to the callousness of the young. In addition, we may minimize the incidence of this kind of abuse by conditioning the exercise of the right in certain ways, re-

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337. See Kamisar, *supra* note 40, at 990-93. See also Foot, *supra* note 163, at 38-39.

338. See Richards, *Human Rights and Moral Ideals: An Essay on the Moral Theory of Liberalism*, 5 *SOCIAL THEORY & PRAC.* 461-88 (1980).

339. Philippa Foot suggests that such forms of enticement might have a quite different moral status in "an extremely poverty stricken community where the children genuinely suffered from lack of food." Foot, *supra* note 163, at 39.

340. In preindustrial society, parental dependence on children in old age was extreme, for the child provided parents with "a form of social security, unemployment insurance, and yearly support." J. KETT, *rites of passage: adolescence in America 1790 to the present* 23 (1977).

341. One aspect of such concern would be to relieve impersonality in the process of dying, a contemporary inhumanity of some magnitude. See note 287 *supra*. Perhaps such concern would lend some reasonableness to put aside willing their own death. Perhaps others would, with appropriate understanding, more reasonably embrace self-willed death. In any event, on grounds of justice, persons should have such support in their moments of dying, no matter what influence it has on the exercise of their rights.

quiring, for example, a showing that no form of overreaching has occurred before the requirement of voluntariness can be met or imposing a stringent requirement that the action be reasonable in terms of the independently assessed life plan of the person, as, for example, with a painful terminal illness. If such conditions are met, we must respect the dignity of choice of older persons, whatever the ingredients, altruistic or egoistic, of their deliberations.<sup>342</sup>

### III. CONSTITUTIONAL PRIVACY AND THE RIGHT TO DIE

So far the argument has been pointedly negative: we have explicated the moral right to life in terms of the intersecting requirements of three principles of natural duty—nonmaleficence, mutual aid, and paternalism—and shown that the moral right to life does *not* include all cases of self-willed death; and we have analyzed the critical moves in various traditional and contemporary arguments claimed to justify absolute prohibitions of all decisions to die and shown that they do *not* work. We must now put these analyses to a constructive use in defining an affirmative right, the right to die, and show why this right is embraced by the constitutional right to privacy.

Let us begin by focusing our earlier arguments on the explication of the constitutional right to privacy. As I have argued elsewhere,<sup>343</sup> the constitutional right to privacy is best interpreted, consistent with the human rights perspective embodied in the Constitution, as a way of subjecting the scope of the criminal law to constitutional assessment and criticism in terms of the autonomy-based interpretation of treating persons as equals. In a constitutional democracy committed to the conception of human rights as the unwritten constitution,<sup>344</sup> in terms of which the meaning of

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342. Williams observes in this connection:

If a patient, suffering pain in a terminal illness, wishes for euthanasia partly because of his pain and partly because he sees his beloved ones breaking under the strain of caring for him, I do not see how this decision on his part, agonizing though it may be, is necessarily a matter of discredit either to the patient himself or to his relatives.

Williams, *supra* note 324, at 138.

343. See Richards, *Sexual Autonomy*, *supra* note 12, at 964-72.

344. See *id.* at 958-64.

constitutional guarantee is to be construed, it is wholly natural and historically consistent with constitutional commitments to regard the autonomy-based interpretation of treating persons as equals as the regulative ideal in terms of which the "public morality," which the criminal law expresses, is to be interpreted. Sometimes this thought has been expressed, as a rough first approximation, in terms of the harm principle, namely that the state may only impose criminal sanctions on conduct which harms others, a point made by the French Declaration of the Rights of Man and of Citizens<sup>345</sup> and by John Stuart Mill's *On Liberty*.<sup>346</sup> This article has tried to reformulate the thought in terms of the autonomy-based interpretation of treating persons as equals and has tried to show how such a conception imposes specific constraints on the kinds of principles which permissibly may be enforced by the "public morality," for example, the moral principles of obligation and duty, of which the principles of natural duty relevant to the moral structure of the right to life are one subset. The traditional idea of "harm" appears to support the right to life—for example, nonmaleficence requires that one not inflict certain harms on other persons—but the idea of harm clearly is interpreted, in contrast to Mill's utilitarian formulation,<sup>347</sup> in terms of the rights of the person.

Now a natural consequence of this way of thinking is that, when the scope of the criminal law exceeds such moral constraints on the proper interpretation of the "public morality," the criminal law violates human rights; it limits the scope of liberty and dignified life choice in ways that fail to respect the neutral theory of the good and the capacity of persons to define their own lives. Introduced into the criminal law are idiosyncratic and parochial ideologies which do not rise to the level of the moral reasoning which alone may be enforced by the criminal law.<sup>348</sup> The constitutional right to privacy expresses a form of this moral criticism of unjust over-criminalization and may be explicated in terms of the intersection

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345. See notes 56-57 & accompanying text *supra*.

346. See J. MILL, *supra* note 58.

347. For a fuller examination of the contrast between this view and Mill's argument, see Richards, *supra* note 338, at 465-80. See also Richards, *Human Rights*, *supra* note 23, at 1421-28.

348. See authorities cited note 102 *supra*.

of three variables:<sup>349</sup> (1) the antimoralistic strain that the forms of traditional moral argument, supposed to justify a certain form of criminalization, are critically deficient and demonstrably fail to take the proper form which respect for human rights requires; (2) the antipaternalistic feature that the extant force of the valid traditional moral arguments, in popular or conventional morality, distorts persons' capacity to see that certain traditionally condemned life choices may be rationally undertaken and encourages them to justify paternalistic interference therein; and (3) a strong autonomy-based interest in protecting human dignity from (1) and (2), since the liberty in question relates to a basic life choice around which people may organize their personhood.

The previously stated negative arguments—both regarding the moral structure of the right to life not extending to all forms of self-willed death and the criticisms of the traditional moral arguments supposed to condemn all such acts—make clear that both the antimoralistic and antipaternalistic strains of the constitutional right to privacy apply to certain decisions to die. While our legal system no longer tends to criminalize suicide as such,<sup>350</sup> it does forbid aiding and abetting suicide<sup>351</sup> and all forms of euthanasia,<sup>352</sup> whether voluntary or involuntary. Now, as we have seen, no good moral argument to sustain such absolute prohibitions exists. Because of the force of the traditional moral condemnation in the conventional morality which the law supports, persons abusively are tempted to suppose that persons cannot rationally wish and undertake their deaths and that, therefore, paternalistic interference is always justified.

It is natural that the application of the constitutional right to privacy has surfaced in cases like *In re Quinlan*,<sup>353</sup> *Superintendent of Belchertown State School v. Saikewicz*,<sup>354</sup> and *In re Eichner*.<sup>355</sup>

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349. For amplification of these variables, see Richards, *Sexual Autonomy*, *supra* note 12, at 964-1014.

350. W. LAFAVE & A. SCOTT, JR., *supra* note 200, at 568-70.

351. *Id.* at 570-71.

352. *See* note 203 *supra*.

353. 137 N.J. Super. 227, 348 A.2d 801 (Ch. Div.), *rev'd*, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

354. 373 Mass. 728, 370 N.E.2d 417 (1977).

355. 102 Misc. 2d 184, 423 N.Y.S.2d 580 (1979), *modified and aff'd sub nom.* *Eichner v. Dillon*, 73 A.D.2d 431, 426 N.Y.S.2d 517 (1980).



In two of these cases, *Quinlan* and *Eichner*, we have irreversibly comatose and essentially vegetative patients and reason to believe that each, in such circumstances, would want to be allowed to die; in the third, *Saikewicz*, we have the prospect of painful treatments of a terminally ill person who, being mentally incompetent, lacks rational capacity to consent. Let us focus here on *Quinlan* and *Eichner*, in which the underlying moral argument, interpreted in terms of the theory here proposed, appears strongest.<sup>356</sup> In these cases, we may pose the issue in terms of the natural duty of mutual aid: does the principle of relieving harm, when accomplished at little cost to oneself, bind the medical professional to continue these persons on life-sustaining equipment? There is clearly no background duty or obligation which here might require continued life, for there is no general obligation of social service, fairly and reciprocally incurred, and no special moral obligation to determinate third parties—neither of them were parents, let alone parents of still young children—which either person had still to render or, for that matter, the comatose state being irreversible,<sup>357</sup> could render.

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356. *Saikewicz* involves a 67-year-old profoundly retarded ward of the State of Massachusetts, who was terminally ill with leukemia. Chemotherapy, which statistically caused remission in 30-50% of the cases for periods ranging from 2 to 13 months, was medically indicated, though it would cause Saikewicz adverse side effects and discomfort. Based upon the patient's inability to provide informed consent for the chemotherapy treatment and his inability to understand the treatment, a guardian was appointed who recommended his not being treated on the grounds that it was in his best interests. 373 Mass. at —, 370 N.E.2d at 419. The court in *Saikewicz* upheld the guardian's recommendations on the ground of the constitutional right to privacy if the declining of the life-prolonging treatment was in his actual interests. *Id.* at —, 370 N.E.2d at 435. On the view here proposed, this result is morally problematic since there is not actual consent nor was anyone reasonably apprised of what a reasonable person's consent would here have been since Saikewicz never had the capacity for informed consent. Saikewicz' lack of understanding of the effects and discomfort does not, in these circumstances, wholly rebut one's moral doubts about here not giving treatment which would, absent the retardation, have been medically indicated. On what ground, ethically, are we, the nonretarded, entitled to impute consent to Saikewicz when, in the case of a comparable nonretarded person, chemotherapy would normally be indicated?

357. Neither Quinlan nor Brother Joseph Fox were dead by the brain death criterion of the Ad Hoc Committee of the Harvard Medical School, which requires no discernible central nervous system activity. Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, *A Definition of Irreversible Coma*, in *ETHICAL ISSUES IN DEATH AND DYING* 11-18 (T. Beauchamp & S. Perlin eds. 1978). The criterion arose from advances in medical technology, which could sustain respiratory and heart function—the traditional indicia of life—even in the absence of capacity for brain function. Previously, the cessation of breathing and heart function had been correlated with lack of brain function.

While the voluntary consent of Ms. Quinlan appears not to have been as considered and rationally given as that of Brother Joseph Fox in *Eichner*,<sup>358</sup> a good case for such consent can be made, and in both cases, continued life appears to be something neither would reasonably want. Thus both the stipulated conditions of proper forms of self-willed death are here satisfied: voluntary consent *and* reasonableness in terms of the person's life plan.<sup>359</sup> Accordingly, to save either of their lives would here not be relieving harm, as contemplated by the principle of mutual aid, and there would be no breach of mutual aid by not prolonging life. Indeed to insist in such cases that life be prolonged would appear to rest on the kind of paternalistic distortion which we have earlier noted.

Since in such cases both antimoralistic and antipaternalistic features of the constitutional right to privacy are in play, we have a putative candidate for the application of the right. But, how can death be regarded as a basic *life* choice?

*See Black, Definitions of Brain Death, in ETHICAL ISSUES IN DEATH AND DYING 5-10 (T. Beauchamp & S. Perlin eds. 1978). The Harvard criterion has been criticized both for not being permissive enough and for being too permissive. The former criticism focuses on the fact that the Harvard criterion allows total brain death to mark "death" when there has been irreversible loss of the cerebral neocortex's function on which the capacities of critical self-consciousness turn. Thus, the proper criterion should be the narrower one of loss of neocortex function. See Veatch, Defining Death Anew: Technical and Ethical Problems, in ETHICAL ISSUES IN DEATH AND DYING 19-38. (T. Beachcamp & S. Perlin eds. 1978). The latter criticism argues that loss of brain function should not cavalierly be assumed to be the mark of "death" because this disengages concepts of the "person" too sharply from the living body and may allow the taking of body organs for transplants. Jonas, Against the Stream: Comments on the Definition and Redefinition of Death, in ETHICAL ISSUES IN DEATH AND DYING 51-60 (T. Beauchamp & S. Perlin eds. 1978). See Schwager, Life, Death, and the Irreversibly Comatose, in ETHICAL ISSUES IN DEATH AND DYING 38-50 (T. Beachamp & S. Perlin eds. 1978). For a balanced proposal for incorporating brain death into revised legal conceptions of death, see Capron & Kass, A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal, in ETHICAL ISSUES IN DEATH AND DYING 60-75 (T. Beauchamp & S. Perlin eds. 1978).*

358. Brother Joseph Fox had expressed to close friends both at the time of the Karen Quinlan situation and shortly before being hospitalized his considered view that his life not be sustained if he were in the Quinlan situation. *In re Eichner*, 102 Misc. 2d 184, \_\_\_, 423 N.Y.S.2d 580, 586 (1979), *modified and aff'd sub nom. Eichner v. Dillon*, 73 A.D.2d 431, 426 N.Y.S.2d 517 (1980). In this Brother Joseph expressly affirmed a Catholic view to which he was, as a religious man, conscientiously committed. In *Quinlan*, Karen Quinlan had not affirmed such a view in so focused and considered a way, but the court found her father's judgment sufficiently based in understanding of his daughter's wishes to warrant his enforcing the privacy right on her behalf. *See* 70 N.J. at \_\_\_, 355 A.2d at 664.

359. *See* notes 154-174 & accompanying text *supra*.

## IV. THE RIGHT TO DIE AND THE MEANING OF LIFE

In order to understand why certain decisions to die must be embraced within the constitutional right to privacy, we should draw together disparate observations made earlier regarding the idea of human rights, the values of dignity and moral personality that it protects, and the necessary implications of this idea and these values for the protection of certain decisions to die. Even if such decisions to die in fact were never exercised or exercised only rarely, the right to so decide is, for reasons now to be explained, fundamental.

A common feature of serious critical reflection on one's life, indeed the kind of critical reflection fundamental to our being persons with what I have called autonomy, is that ordinary people of good will pose the issues in terms of the query: what is the meaning of life? The weightiness of this question for persons is posed, I believe, by our capacity as persons for self-consciousness and by the consequent and inexorable thought that we will die. If personhood gives us the capacity of higher-order reflection on and evaluation of our system of ends and how they cohere in a life, the terms of that reflection and evaluation are posed by the thought of our death, the formal constraint which circumscribes the design of our life, and by the need to make sense of death.

When traditional methods of rationalizing death no longer appear true or valid, people naturally express this loss of faith in terms of the meaninglessness of life or the associated thought that, without such meaning, suicide is called for. Dostoevsky's Kirillov argues that if God is dead, man is God, and he, the first man-God, shows his Godhead by suicide.<sup>360</sup> Camus, finding life absurd because empty of providential redemptive meaning, poses, as the first question of philosophy, why—in the face of meaninglessness—not commit suicide?<sup>361</sup>

Why should this be so: why should the fact that one's death is final without personal immortality, as Kirillov and Camus and many other moderns assume, imply or be taken to imply that one's *life* is meaningless in some haunted and harrowing way? The natu-

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360. See F. DOSTOEVSKY, *THE POSSESSED* 93-98, 524-39 (A. Yarmolinsky trans. 1936).

361. A. CAMUS, *THE MYTH OF SISYPHUS* 3-13, 39-44, 76-83 (J. O'Brien trans. 1955).

ralness of the inference is based, I believe, on this: that because we, as persons, are critically self-conscious of our lives as a whole over time, which includes death which defeats and frustrates the projects on which we center our lives,<sup>362</sup> making sense of death appears to be an inexorable part of making sense of life; if death is senseless, life may be senseless too.

Of course there is a stark non sequitur in this inference: it is the fallacy of supposing that because one system of beliefs, which places death in the framework of personal immortality and interprets one's life in terms of this framework, is no longer accepted as true or valid, that all alternative systems of belief and value must be similarly hollow and incoherent. This supposition is flatly false: it expresses a failure of imagining and constructing new systems of belief and value in terms of a self-fulfilling romantic desperation about the task of giving meaning to life *at all*.<sup>363</sup>

The idea, the meaning of life, is ambiguous, and this romantic desperation plays on the ambiguity.<sup>364</sup> On the one hand, the idea of life's meaning may be interpreted in terms of teleological purpose externally defined and specified, like books which have the purpose of being read or buildings of affording shelter, and the like; this interpretation is externally defined in terms of the purposes of the creator or user of the artifact in question, which may be God or Nature.<sup>365</sup> On the other hand, life's meaning may be interpreted in terms of the structure of evaluations which the person imposes on and expresses through the structure of her or his living; in this sense, the meaning of life is not interpreted in terms of teleological purpose externally defined, but in terms of the purposes of the

362. See notes 147-153 & accompanying text *supra*.

363. The perception of absurdity arises from and expresses, as an ultimate metaphysical fact, a common fact of self-critical evaluation of one's life, namely that a certain range of assumptions of personal significance in which one invests one's energies and aspirations passionately appears, on examination, to lack any justification that one can reasonably affirm. T. NAGEL, *MORAL QUESTIONS* 11-16 (1979). In this case, however, the fact that certain assumptions are shown to be invalid, rather than expressing a perception limited to those assumptions mistakenly is taken to render invalid, without examination or argument, all alternative assumptions which one might construct or avow.

364. See, e.g., K. BAIER, *THE MEANING OF LIFE* (1957). See also Edwards, *Life, Meaning and Value of*, 4 *ENCY. OF PHIL.* 467-77 (P. Edwards ed. 1967).

365. See K. BAIER, *supra* note 364, at 3-24.

person<sup>366</sup>—the idea, certainly close to the core of linguistic or language meaning, that an expression is meaningful in virtue of the intentions which it is known and purposed to communicate.<sup>367</sup> The romantic desperation of Kirillov and Camus and others<sup>368</sup> uses the defeat of teleological purpose as a way of defining life's meaning (because of disbelief in a personal God or in personal immortality) in an argument that, therefore, the meaning of life, in the form of personal evaluation, is empty. But the argument is a non sequitur. Indeed it may be precisely because life *is* meaningless in the teleological sense that there is such weight to be placed on personal meaning, as the proper task of a human life.<sup>369</sup>

This personal sense of the meaning of life is at one with the ideas of personal autonomy and rational personhood which, I have argued, are the central values in terms of which human rights are to be interpreted. On this view, it is an open question, consistent with the neutral theory of the good, how persons, with freedom and rationality, will define the meaning of their lives, and no externally defined teleological script is entitled to any special authority or weight in such personal self-definition. Once we see the issue in this way, we can see that the fact of one's own death frames the meaning one gives one's life in widely differing ways.

Sometimes psychologists<sup>370</sup> and philosophers<sup>371</sup> claim that the thought of one's death is in some way impossible for us, a claim that may rest on the startling confusion between the content of the

366. *See id.* at 24-29.

367. *See generally* S. SCHIFFER, *MEANING* (1972).

368. *See also* Tolstoy, *Death and the Meaning of Life*, in *ETHICAL ISSUES IN DEATH AND DYING* 317-24 (T. Beauchamp & S. Perlin eds. 1978).

369. *See* K. BAIER, *supra* note 364, at 24-29. *See also* K. BRITTON, *PHILOSOPHY AND THE MEANING OF LIFE* 51-215 (1969).

370. Sigmund Freud articulated this view:

It is indeed impossible to imagine our own death; and whenever we attempt to do so we can perceive that we are in fact still present as spectators. Hence the psycho-analytic school could venture on the assertion that at bottom no one believes in his own death, or, to put the same thing in another way, that in the unconscious every one of us is convinced of his own immortality.

Freud, *Thoughts for the Times on War and Death*, in 14 *STANDARD EDITION*, *supra* note 284, at 289.

371. Compare the discussion in Edwards, *My Death*, in 5 *ENCY. OF PHIL.* 416-19 (P. Edwards ed. 1967). For a recent example of such a philosopher, see P. DEVINE, *supra* note 166, at 24-31.

thought of one's death, which has nothing to do with one's continued life, and one's having this thought, which requires one to be alive.<sup>372</sup> Surely the claim is not true; indeed, the mark of personhood is that one frames the issue of how to live one's life by death and one plans accordingly, as any estate lawyer will attest. The meaning of one's life is defined by one's projects, by the evaluative organization of one's ends and aspirations in a plan of life which express one's sense of self-respect in the competences, contributions, and relationships in which one centers one's person, one's sense of a life well and humanely lived. One's death plays innumerable roles in this process: it provides, for example, the sense of a mortal life plan so that hard choices must be made about the use of time, about the life cycle and tasks appropriate thereto, about the developmental subordination and complementarity of tasks;<sup>373</sup> it suggests the need to reflect about projects that one wishes to survive one, and how this need may best fulfill one's sense of values that should endure—for example, the belief in education, charity, or artistic cultivation; it raises the whole question of dying and the issue of dying in a way one finds meaningful.<sup>374</sup>

Since persons, as such, have broad latitude to define the dignified meaning of their lives, they must have, consistent therewith, the corollary right to define the meaning of their deaths, including, other things being equal, forms of self-willed death which are consistent with treating persons as equals. Indeed, I believe, a natural feature of the striking normative attitude that human rights take to the person is that reflection on one's death may, ethically, appropriately cultivate the kind of evaluative scrutiny of and responsibility for the living of one's life that personhood calls for,<sup>375</sup> in the way that Tolstoy's Ivan Ilych comes critically to see the emptiness of his successful and complaisant conventionalism only in the

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372. See Edwards, *supra* note 371. See also M. DE UNAMUNO, TRAGIC SENSE OF LIFE 38-57 (1954).

373. See D. RICHARDS, REASONS FOR ACTION, *supra* note 19, at 27-48. See also C. FRIED, *supra* note 88, at 155-82.

374. The role of one's death in living an authentic personal life is the central perception of Martin Heidegger's philosophical system. See M. HEIDEGGER, BEING AND TIME (J. Macquarrie & E. Robinson trans. 1962). For forceful criticism, see P. EDWARDS, HEIDEGGER ON DEATH: A CRITICAL EVALUATION (Monist Monograph No. 1 1979).

375. H. FEDDEN, *supra* note 159, at 285, 287-88, 312.

prospect of his death.<sup>376</sup> Indeed consistent with such considerations, the concern for personal responsibility, fundamental to human rights, appears to support an *affirmative* moral interest in encouraging persons to reflect on the kinds of considerations, if any, that would lead them reasonably to depart life. Certainly when the cultivation of critical self-consciousness as an end in itself enters human thought with the rise of philosophy in ancient Athens, one finds concomitantly an elaboration of the vocabulary and concepts of self-willed death<sup>377</sup> as one natural subject of critical reflection. How could it be otherwise? Through such critical reflection, even if most people would not have occasion to depart in fact or would rarely find such departure reasonable, they would affirm and express, as reflective persons with responsibility for ordering the projects of their life, the meaning, the uncompromisable values, on which they center their integrity.

Certainly, consistent with the neutral theory of the good,<sup>378</sup> persons will meet this task in widely disparate ways. Some persons who, as free and rational beings, adopt the Augustinian script would thus affirm the values of the sanctity of suffering, on which they center their lives,<sup>379</sup> for they would see the right to die as one they could not, consistent with their integrity, exercise. Others, however, would better understand and articulate the values of their rational dignity by seeing that, their dignity being more reasonably achieved by death than continued life in certain circumstances, holding to life in such cases would be the shallowest fetishism.

Through acknowledging the right to die, in cases to which it properly applies, we secure to persons the fundamental human right upon which they may call their life their own, guaranteeing to them the kind of independent responsibility in ordering and revising their ends, as free and rational beings, that enables them to affirm both in life and death the meanings of their integrity. Perhaps because our law does not acknowledge this right, we have lost

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376. L. TOLSTOY, *THE DEATH OF IVAN ILYCH AND OTHER STORIES* 95-156 (A. Maude trans. 1960).

377. See Daube, *supra* note 215, at 390-94, 399-405.

378. For the range of possible attitudes in the western tradition, see J. CHORON, *DEATH AND WESTERN THOUGHT* (1963).

379. See note 251 *supra*.

the capacity for serene lucidity before death, the kind of moving affirmation of the integrity of one's values that one often finds in those who accept this right, for example, the Stoics<sup>380</sup> and David Hume.<sup>381</sup> Instead we isolate death from life, rendering unspeakable and unspoken the personal meaning that a person has a right to bring to death<sup>382</sup> as she or he does to life.<sup>383</sup>

Kant, the greatest philosopher of human rights, senses this point, from which he inexplicably draws back when he notes the remarkable independence of mind which the Stoic doctrine of self-willed death reflects: "he reckes neither king nor torments";<sup>384</sup> and Rousseau, consistent in the face of a conventional wisdom which even Kant could not resist, senses that if there is not this right "there is no human action which might not be made a crime."<sup>385</sup> The right is, within the limits described earlier, the right to decide to die when this decision more rationally fulfills one's projects, reasonably and freely affirmed in a coherent and considered plan of life.

In contrast to the Thomist and Kantian claim that self-willed death places man beneath the animals,<sup>386</sup> I would argue that it is the mark of our dignity as persons, our capacity to build a meaningful life, and to depart it when it cannot realistically meet our reasonable demands.<sup>387</sup> In this, we show ourselves neither the property of God or the state or our children, but as persons who may best express, as ends in themselves, as an expression of ra-

380. See notes 159-160, 208, 286 *supra*.

381. See note 227 *supra*. For an illustration of Hume's remarkable contentment in his last months, see D. HUME, *My Own Life*, in HUME'S DIALOGUES CONCERNING NATURAL RELIGION 239 (N. Smith ed. 1935). The letter from Adam Smith to William Strahan describing Hume's last months is reprinted in 2 THE LETTERS OF DAVID HUME 450-52 (J. Greig ed. 1932). The last-mentioned book contains the remarkable letter from Hume to Edward Gibbon upon reading the first volume of *The Decline and Fall of the Roman Empire*, which appeared while Hume was dying. *Id.* at 309-11.

382. See J. HILLMAN, *SUICIDE AND THE SOUL* (1964).

383. See note 287 *supra* on the impersonality of contemporary modes of dying. See also G. GORER, *DEATH, GRIEF, AND MOURNING IN CONTEMPORARY BRITAIN* (1965); GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *THE RIGHT TO DIE: DECISION AND DECISION MAKERS* (1974).

384. I. KANT, *supra* note 256, at 153.

385. J. ROUSSEAU, *LA NOUVELLE HELOISE* 264 (1968).

386. See text accompanying note 256 *supra*.

387. H. FEDDEN, *supra* note 159, at 285, 287-88, 312. This concept of self-willed death, built on rights of the person, has nothing to do with forms of institutional suicide which deny such rights. See *id.* at 16-26.



tional self-mastery and dignity, the meaning we give our lives by ending them.

#### V. THE LIMITS OF CONSTITUTIONAL PRIVACY IN EFFECTUATING THE RIGHT TO DIE

We have now completed our argument both for the existence of a moral and human right to die and the proper place of the constitutional right to privacy in effectuating it. Constitutional privacy rests on the three variables: (1) antimoralistic critique of existing laws as not resting on moral judgments that can be sustained reasonably in terms of the constitutionally authoritative mandate of the autonomy-based interpretation of treating persons as equals; (2) antipaternalistic distortions, which tend—because of the conventional moral judgments still widely held and enforced by law<sup>388</sup>—to make people interfere in conduct because it is assumed to be irrational; and (3) an area of life choice in which the protection of autonomy from the incursions of (1) and (2) defends centrally important forms of dignity. Constitutional privacy is the right deployed as a prophylaxis against the injustices of (1) and (2) in the protection of (3). Since both (1) and (2) apply in the case of certain decisions to die, and since such decisions appear to effectuate a central dignity in life choice (3), constitutional privacy, correctly understood, embraces the right to die.

But, to what extent may the full scope of this right to die properly be enforced by the constitutional right to privacy? Certainly, as we have observed, the right was properly invoked in *In re Quinlan*<sup>389</sup> and *In re Eichner*.<sup>390</sup> While both cases may be justified forms of voluntary euthanasia, they involve forms of so-called “passive” euthanasia—letting die through withdrawal of life-support systems of “extraordinary” kinds—which have the approval of even religions which claim to rest on Augustinian doctrine.<sup>391</sup> What

388. One perceptive commentator identifies the “suburban spirit” as a form of wide-spread and unreasoned social prejudice against forms of self-willed death. *Id.* at 230, 248-49.

389. 137 N.J. Super. 227, 348 A.2d 801 (Ch. Div.), *rev'd*, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

390. 102 Misc. 2d 184, 423 N.Y.S.2d 580 (1979), *modified and aff'd sub nom.* *Eichner v. Dillon*, 73 A.D.2d 431, 426 N.Y.S.2d 517 (1980).

391. See the address of Pope Pius XII, “The Prolongation of Life, Address of Pope Pius XII to an International Congress of Anesthesiologists,” November 24, 1957, AAS XXXXIX

is the proper procedure in these "passive" euthanasia cases, and to what extent should constitutional privacy embrace more controversial cases of voluntary active euthanasia, that is, killing, and exemption in some cases from criminal liability for aiding and abetting suicide? Even if we grant the existence of the moral right to die in certain cases beyond voluntary passive euthanasia, is the constitutional right to privacy the way to effectuate this right?

On the view here proposed, these issues would be assessed in terms of the relevant moral principles of natural duty—nonmaleficence, mutual aid, and paternalism—and background moral obligations which qualify the scope of these principles. Cases like *Quinlan* and *Eichner* are appropriate because voluntary consent *and* reasonableness for the person, as grounds for exemption from mutual aid, are reasonably established, and in those cases there are no relevant background moral obligations, for example, parenthood of a young child. It is important to see that the ethical justification for such cases here turns on mutual aid, a moral principle with special relevance to determining the moral duties of health care professionals and hospitals.<sup>392</sup> Since such persons and institutions are in the business of mutual aid, it appears important that institutional schemes be designed so that they may meet their duties and understand clearly when voluntary passive euthanasia is called for. Accordingly, the *Quinlan* scheme seems appropriate if we interpret it in this way: both consent *and* reasonableness may be inferred from written consent of intimates who know the patient, and the hospital committee is to make clear that the patient is irretrievably comatose (on the issue of reasonableness). The presence of a court order, as in *Eichner*,<sup>393</sup> appears cumbersome and pointless. Of course, if the *Quinlan* conditions are not met, criminal liability would lie.

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(1957) (translation from the original French, "The Pope Speaks," Spring 1958, vol. 4, no. 4, pp. 393-98).

392. See notes 183-185 & accompanying text *supra*. See also notes 198-199 & accompanying text *supra*.

393. 73 A.D.2d at —, 426 N.Y.S.2d at 550. The court in *Eichner* adopts the procedure from *Saikewicz*. On the morally problematic facts of *Saikewicz*, see note 356 *supra*, some such more extraordinary procedure might be required if we assume (which is problematic) that any such procedure at all is justified. The moral status of *Saikewicz* and *Eichner*, however, are completely different, and there is no ground for importing the moral ambiguities of the former into the latter.

One must understand that voluntary passive euthanasia cases of this kind importantly rest ethically on mutual aid and on the exemption conditions from mutual aid. Ethically, mutual aid happens to be of direct relevance to cases of letting die, though the idea of letting die is stretched, in a Pickwickian way, to denominate taking off a respirator as a form of letting die.<sup>394</sup> Whether we interpret taking off the respirator as an act or omission, it is ethically right in such circumstances because there is an exemption from the requirements of mutual aid.

Voluntary active euthanasia poses a different moral issue not because it calls for an act versus an omission but because, in contrast to passive euthanasia, it rests on the prohibitions of the natural duty of nonmaleficence, which has a broader application than mutual aid to all persons rather than, as with mutual aid, mainly to health professionals. For this reason, it seems to me morally mistaken to regard cases of voluntary active euthanasia as, in any sense, the special responsibility of health care professionals. Voluntary active euthanasia is an ethical issue which any legal reformation would wisely remove from medical execution, as opposed to pertinent medical advice.

Sometimes, the distinction between voluntary active and voluntary passive euthanasia is expressed in terms of the supposedly operative moral distinction between killing, which is always wrong, and letting die, which sometimes is right.<sup>395</sup> There are in some cases moral distinctions between killing and letting die;<sup>396</sup> but the proper moral force of the distinction is expressed not in terms of an absolute moral prohibition in the one case and a sometime permission in the other,<sup>397</sup> but in terms of the different requirements

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394. See, e.g., Fletcher, *Prolonging Life*, in *ETHICAL ISSUES IN DEATH AND DYING* 226-40 (R. Weir ed. 1977).

395. G. KELLY, *MEDICO-MORAL PROBLEMS* 20 (1955). See C. McFADDEN, *MEDICAL ETHICS* 27-33 (1962); T. O'DONNELL, *MORALS IN MEDICINE* 39-44 (1959); N. ST. JOHN-STEVAS, *THE RIGHT TO LIFE* 71 (1963).

396. See, e.g., Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, in *KILLING AND LETTING DIE* 156-65 (B. Steinbock ed. 1980).

397. One criticism of the doctrine expounded in the works cited in note 395 *supra*, has been that there is no morally relevant distinction *at all* between killing and letting die. See, e.g., Bennett, *Whatever the Consequences*, in *KILLING AND LETTING DIE* 109-27 (B. Steinbock ed. 1980). However, there appear to be *some* cases in which there is a morally and legally important distinction. See Dinello, *On Killing and Letting Die*, in *KILLING AND LET-*

and applications of the principles of nonmaleficence and mutual aid.<sup>398</sup> Sometimes it does make a moral difference that one has killed, rather than let die,<sup>399</sup> but, sometimes there is no moral difference at all.<sup>400</sup> In particular, on the issue of voluntary euthanasia, there are cases in which, given the requisite conditions of voluntary consent *and* reasonableness to the person and no pertinent background moral obligations, it would be no more wrong to kill the person than to let the person die, for, in both cases, there would be an exemption from the pertinent scope of the relevant principles of natural duty—nonmaleficence, mutual aid, and paternalism.<sup>401</sup>

Sometimes it is argued that though there is no controlling ethical distinction in certain cases of voluntary active and passive euthanasia, passive euthanasia is consistent with the proper medical ethic of care and concern for the dying in a way in which active euthanasia is not.<sup>402</sup> While, as an abstractly conceived ethical matter, it may be no more caring for the person to let them die rather than acquiesce in their request to end their lives—and in some cases it may be much less caring if the criterion is, as it should be, the reasonably expressed wishes of the person<sup>403</sup>—there is no good ethical reason why the exemption from nonmaleficence should be enforced by medical professionals, whose whole ethical orientation

TING DIE 128-31 (B. Steinbock ed. 1980). See also Fitzgerald, *Acting and Refraining*, in *MORAL PROBLEMS IN MEDICINE* 284-89 (S. Gorovitz et al., eds. 1976).

398. Philippa Foot has made this point in terms of more stringent duties of not harming and less stringent duties of rendering aid. See Foot, *supra* note 396, at 156-65. See also Foot, *supra* note 163, at 25-32. Foot's way of making the distinction may not be fully accurate. See note 180 *supra*. See also Davis, *The Priority of Avoiding Harm*, in *KILLING AND LETTING DIE* 172-214 (B. Steinbock ed. 1980); Russell, *On the Relative Strictness of Negative and Positive Duties*, in *KILLING AND LETTING DIE* 215-231 (B. Steinbock ed. 1980).

399. See note 398 *supra*. For example, whereas it might clearly violate nonmaleficence to kill a person, there might be no violation of mutual aid in letting him die if the cost of aid was very high.

400. See, e.g., Rachels, *Euthanasia, Killing and Letting Die*, in *ETHICAL ISSUES RELATING TO LIFE AND DEATH* 146-63 (J. Ladd ed. 1979).

401. See notes 154-174 & accompanying text *supra*.

402. See P. RAMSEY, *THE PATIENT AS PERSON* 113-64 (1970). Ramsey appears to acknowledge that the force of the prohibition on killing is, for him, a religious ideal about proper dying. *Id.* at 153, 160.

403. Even Ramsey appears to acknowledge some exceptions to the justness of his prohibition on killing. *Id.* at 161-64.

is defined by mutual aid and its requirements.<sup>404</sup> Certainly in cases of terminally ill persons who request death, medical advice would be appropriate on the issue of the reasonable probability of death and the unlikelihood of cure, which is relevant to exemption from nonmaleficence (on the issue of the reasonableness of the request). But once such advice is given and painless ways of ending life suggested, it would be more consistent with the ethics of medicine if the infliction of death were left to others.<sup>405</sup>

But if this is so, if indeed persons in such cases have a clear moral and human right to die, should the constitutional right to privacy protect both the active and passive forms of voluntary euthanasia? There is reason to doubt whether the constitutional right to privacy would be the appropriate way to enforce the right to die in all the cases to which it applies. Constitutional privacy is, after all, the creature of judicial reasoning and enforcement, and it is doubtful whether judicial enforcement would be a reasonable way to effectuate the right to die in all cases.

If, as I have suggested, voluntary active euthanasia is not an appropriate demand to make of medical professionals, there is obviously a need for some alternative procedure to effectuate the right in a suitably circumscribed way: some system of "living wills" which extends to active euthanasia,<sup>406</sup> consultation with intimates to make sure that death is what the person reasonably wants, some facility or training for how to administer death painlessly, perhaps some showing that, in the patient's context, there is no way for her or him to inflict death on her or his own,<sup>407</sup> and the like. Many such alternative schemes could be imagined, but they all seem more appropriately the objects of a legislative scheme than some judicial innovation. In the absence of such schemes, courts would have to rest content with enunciating, in some clear cases of volun-

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404. Compare the similar argument in T. BEAUCHAMP & J. CHILDRESS, *supra* note 131, at 112-17.

405. Both Montaigne and St. Thomas More, discuss the role of public officials in monitoring decisions to die. *See* note 286 *supra*.

406. Such "living wills" currently apply to forms of passive euthanasia. *See* authorities cited note 325 *supra*.

407. This might be a way of insuring the voluntariness of the person and absence of overreaching by interested third parties. *See* Kamisar, *supra* note 40, at 1011; P. DEVINE, *supra* note 166, at 183-84.

tary active euthanasia consistent with ethical principles, a constitutional defense to criminal liability predicated on a very clear showing that all the requisite moral constraints are satisfied.<sup>408</sup>

The constitutional right to privacy rests, I have argued, on certain ethical principles of respect for personhood, and the court has the appropriate role of elaborating the underlying moral right consistent with its judicial capacities. But the court should not strain its resources beyond its reasonable capacities, looking instead to legislative reforms which better effectuate certain aspects of the underlying right.<sup>409</sup> I do not suggest that the court should remain supine in the area of voluntary active euthanasia or certain cases of aiding and abetting suicide.<sup>410</sup> The state of American law on these questions is deeply wrong, remitting ultimate moral questions to the discretion of prosecutors, judges, and juries and producing a pattern of erratic and unjust results inconsistent with any defensible moral principle.<sup>411</sup> The court should intervene in egregiously clear cases and make it clear that deep constitutional principles are flouted by the state of our law; but once it has done so, it should make clear that legislatures bear responsibility as well to effectuate the underlying rights.

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408. Such a defense might apply only in the clearest cases of Glanville Williams' proposed legislative defense. See G. WILLIAMS, *supra* note 38, at 339-46.

409. Compare the role that legislative reform is playing in the area of voluntary passive euthanasia. See note 325 *supra*.

410. Compare the Switzerland exemption from aiding and abetting suicide for physicians in cases of patient request and terminal illness. See note 202 *supra*.

411. See note 203 *supra*. Compare the European practice. See note 202 *supra*.