

Notes



Introduction

1. Peter G. Filene, *In The Arms of Others: A Cultural History of the Right to Die in America* 53 (Ivan R. Dee 1999); *Physician Assisted Suicide* 34 (Robert F. Weir, ed., Indiana Univ. Press 1997); Daniel Callahan, *The Troubled Dream of Life: Living with Mortality* 141 (Simon and Schuster 1993); Win J. Deikers, “Images of Death and Dying” (paper presented at Nijimegan Conference on “Death without Suffering”) (April 5–7, 2000) [hereinafter “Nijimegan Conference”].

2. Daniel Callahan, *supra* n. 1, at 88; “Extracts from the Report of the House of Lords Select Committee on Medical Ethics,” in *Euthanasia Examined: Ethical, Clinical, and Legal Perspectives* 96 (John Keown, ed., Cambridge Univ. Press 1998) [hereinafter “Euthanasia Examined”]; Sheryl A. Russ, “Care of Older Persons: The Ethical Challenge of American Medicine,” 4 *Issues in Law & Med.* 87, 88 (1988).

3. Daniel Callahan, *supra* n. 1, at 32–33, 47; Mary Clement and Derek Humphrey, *The Unspoken Argument: Euthanasia and the High Cost of Dying* 15 (ERGO 2002) [hereinafter “High Cost of Dying”]; Joyce Ann Schofield, “Care of the Older Person: The Ethical Challenge to American Medicine,” 4 *Issues in Law & Med.* 53, 53 (1989); Sheryl A. Russ, *supra* n. 2, at 88; *Cruzan v. Director Missouri Dept. of Health*, 497 U.S. 261, 328–29 (1990); David Field, “Palliative Medicine and the Medicalization of Death,” 3 *European J. Cancer Care* 59 (1994); “Legal Euthanasia: Ethical Issues in an Era of Legalized Dying,” 18 *J. Med. & Phil.* 270–71 (1994).

4. Derek Humphrey and Mary Clement, *Freedom to Die: People, Politics, and*

the Right to Die Movement 19 (St. Martin's Griffin 2000). The same demographics of the dying also appear in Britain. See David Field, *supra* n. 3, at 60.

5. John M. Cooper, "Greek Philosophies on Euthanasia and Suicide," in *Suicide and Euthanasia: Historical and Contemporary Themes* 9 (Baruch M. Brody, ed., Kluwer Academic 1989) [hereinafter "Historical and Contemporary Themes"]. See also Steve Zanskas and Wendy Conduci, "Eugenics, Euthanasia, and Physician Assisted Suicide: An Overview for Rehabilitation Professionals," 72 *J. Rehab.* 27, 28 (2006) (*eu* = "good," *thanatos* = "death"); Robert I. Mishbin, *Euthanasia: The Good of the Patient, the Good of Society* 47 (University Publishing Group 1992). For Stoics and Epicureans, it was a matter of personal choice. Fr. Robert Barry, O.P., "The Development of the Roman Catholic Teaching on Suicide," 9 *Notre Dame J.L. Ethics Publ. Pol.* 449, 464 (1995); John M. Cooper, "Greek Philosophers on Euthanasia and Suicide," in "Historical and Contemporary Themes," *supra*, at 29 (though they still encouraged people to try to avoid suicide); Lynn Tracy Nerland, "A Cry for Help: A Comparison of Voluntary, Active Euthanasia Law," 13 *Hastings Int'l & Compar. L. Rev.* 115, 119–21 (1989). See also Michael Manning, *Euthanasia and Physician-Assisted Suicide: Killing or Caring?* 7 (Paulist Press 1998) (in making a decision, one must also consider responsibilities to others). Socrates also approved (Fr. Robert Barry, O.P., *supra*, at 461), though Plato expressed some reservations (John M. Cooper, "Greek Philosophers on Euthanasia and Suicide," in "Historical and Contemporary Themes," *supra*, at 19). Those opposed to suicide included the Pythagoreans, see Fr. Robert Barry, O.P., *supra*, at 461 (God values each soul), and on Aristotle, see Fr. Robert Barry, O.P., *supra*, at 462; and John M. Cooper, "Greek Philosophers on Euthanasia and Suicide," in "Historical and Contemporary Themes," *supra*, at 208 (suicide is cowardice and violates our duty to serve the state). They also included the followers of Hippocrates. See Michael Manning, *supra*, at 8. But also see *id.*, at 8–9 (a minority of Hippocratic physicians in the fourth or fifth century believed they had the discretion to terminate the patient's life).

6. Stacy L. Mojica and Dan S. Murrell, "The Right to Choose: When Should Death Be in the Individual's Hands?" 12 *Whittier L. Rev.* 471, 471 (1991). Fr. Robert Barry, O.P., *supra* n. 5, at 463. Suicide was common among aristocrats as a response to loss of honor and shame or even something done as a whim. *Id.* Fr. Robert Barry, O.P., *supra* n. 5, at 463; Kay Redfield Jamison, *Night Falls Fast: Understanding Suicide*, 13 (Knopf 1999).

7. See Stacy L. Mojica and Dan S. Surrrell, *supra* n. 6, at 474–75.

8. Patricia S. Mann, "Meanings of Death," in *Physician Assisted Suicide: Expanding the Debate* 25 (Margaret P. Battin, Rosamond Rhodes, and Anita Silvers, eds., Routledge 1998) [hereinafter "Expanding the Debate"]; *The Reference Shelf: Suicide* (Robert E. Long, ed., H.W. Wilson 1995); Daniel C. Maguire, *Death by Choice* 86 (Schocken Books, 1975).

9. Daniel C. Maguire, *supra* n. 8, at 84; Tracy Nerland, *supra* n. 5, at 122.

10. Wesley J. Smith, *Forced Exit: The Slippery Slope from Assisted Suicide to*

Legalized Murder 75, 81 (Times Books 1997); Ian Dowbiggen, *A Merciful End: The Euthanasia Movement in Modern America* 4, 63-65 (Oxford Univ. Press 2003); Lynn Tracy Nerland, *supra* n. 5, at 124-25; N.D.A. Kemp, "Merciful Release": *The History of British Euthanasia Movement* 208 (Manchester Univ. Press 2002); Shai J. Lavi, *The Modern Act of Dying: A History of Euthanasia in the United States* (Princeton Univ. Press 2005).

11. Robert I. Mishbin, *supra* n. 5, at 151; Harold Y. Vanderpool, "Doctors and the Dying of Patients in American History," in *Physician-Assisted Suicide* 33 (Robert Weir, ed., Indiana Univ. Press 1997) [hereinafter "Physician-Assisted Suicide"]; Ian Dowbiggen, *supra* n. 10, at 36, 47; N.D.A. Kemp, *supra* n. 10, at 205 ("... social Darwinism and eugenics were strong themes of the euthanasia debate"). In fact, between 1907 and 1945, 40,000 U.S. citizens were subjected to eugenic sterilizations. See Steve Zanskas and Wendy Coduit, *supra* n. 5, at 27.

12. Barry Rosenfeld, *Assisted Suicide and the Right to Die: The Interface of Social Science, Public Policy, and Medical Ethics* 17-18 (American Psych. Assn. 2004) (doctors developed diagnostic methods from which one could predict the outcome of a disease, and anesthesia and pain medicines).

13. Ian Dowbiggen, *supra* n. 10, at 64, 70; Wesley J. Smith, *supra* n. 10, at 83; N.D.A. Kemp, *supra* n. 10, at 211 ("... the British euthanasia movement could not avoid being tarred with the Nazi brush").

14. Malcolm Parker, "End Games: Euthanasia under Interminable Scrutiny," 19 *Bio Ethics* 523, 534 (2005) ("Very gradually, but inexorably, physician-assisted suicide and euthanasia are being legalized across the world"). See also *id.*, at 534 ("Germany allows physician-assisted suicide, but not active euthanasia"); C. Gastmans, F. Van Neste, and P. Schotsmans, "Facing Requests for Euthanasia," 30 *J. Med. Ethics* 212 (2004) (Belgium law legalizing euthanasia took effect on September 23, 2002); Katy Heslop, "Euthanasia around the World," *Observer* (Sept. 19, 2004) (self-administered assisted suicide legal in Switzerland). It has been noted that in Europe, in addition to religious beliefs, moral values, and sociodemographics, perceptions on euthanasia are "probably also influenced by national traditions and history." Joachen Cohen, Isabelle Marcoux, John Bilsen, Patrick DeBroosere, Gerrit Van Der Wel, and Luc Deliens, "European Public Acceptance of Euthanasia: Socio-demographics and Cultural Factors Associated with the Acceptance of Euthanasia in 33 European Countries," 63 *Soc. Sci. & Med.* 743 (2006).

15. Annette E. Clark, "Autonomy and Death," 71 *Tulane L. Rev.* 45, 54-55 (1996); Lynn Tracy Nerland, *supra* n. 5, at 127 (58 percent favor euthanasia in 1988); Robert T. Hall, "Final Acts: Sorting out Ethics of Physician Assisted Suicide," 54 *Humanist* 10 (1994) (1993 Harris Poll: 73 percent favor same form of Oregon-like physician-assisted suicide); Sarah Horsfell, Christian Alcocar, C. Temple Duncan, and Jonathan Polk, "Views of Euthanasia from an East Texas University," 38 *Soc. Sci. J.* 617 (2001) (72 percent support PAS); "Knowledge, Attitudes, and Behavior: Survey Finds Majority Support Right to Euthanasia and Physician-Assisted Suicide," *AIDS Weekly* 13 (Jan. 28, 2002) (61 percent support law permit-

ting PAS). See also Linda Ganzini, Wendy S. Johnson, Bentson M. McFarland, Susan M. Tolle, and Melinda A. Lee, "Attitudes of Patients with Amyotrophic Lateral Sclerosis and Their Caregivers toward Assisted Suicide," 339 *New Engl. J. Med.* 967 (1998) (majority of patients in Washington and Oregon with amyotrophic lateral sclerosis (ALS) would consider assisted suicide); Lauren Neergaard, "How People Meet Death: A Major Study," *Seattle Post Intelligencer* (Nov. 15, 2000) (60 to 80 percent of Americans believe terminally ill people in pain should be able to end their lives); Jennifer Silverman, "Views on Physician-Assisted Suicide," 38 *Int'l Med News* (Apr. 10, 2005) (57 percent of physicians say PAS is ethical, and 41 percent would endorse legalization in a wide variety of cases); "Survey Shows Most Physicians and General Public Support Physician-Assisted Suicide," *Life Science Weekly* (Nov. 8, 2005) (62 percent of physicians and 64 percent of public believe physicians should be permitted to dispense life-ending medication); O.D. Duncan and L.F. Parmelee, "Trends in Public Approval of Euthanasia and Suicide in the U.S., 1947–2003," 32 *J. Med. Ethics* 266, 268 (2006) ("... one might say, tentatively, [that] approval of euthanasia has leveled off at approximately two-thirds of the population"). Cf. Paul J. Zwier, "Looking for a Non-legal Process: Physician-Assisted Suicide and the Care Perspective," 30 *U. Richmond L. Rev.* 199, 204 n. 23 (in a 1981 survey, 61 percent of Christian laity surveyed approved of suicide in cases of "incurable disease").

16. Sarah Horsfall et al., *supra* n. 15. In contrast, the position of mental health doctors for or against PAS is strongly correlated with their individual belief systems, particularly their religious beliefs. Tony D. Pasquale and John P. Gluck, "Psychologists, Psychiatrists, and Physician-Assisted Suicide: The Relationship between Underlying Beliefs and Professional Behavior," 32 *Profess. Psych. Research & Behavior* 50 (2001).

17. See the discussion of Oregon law in chapter 4. For an analysis of why a seemingly popular PAS referendum failed, see Steven J. Ziegler, Ph.D., J.D., and Robert A. Jackson, J.D., "Who's Not Afraid of Proposal B? An Analysis of Exit-Poll Data from Michigan's Vote on Physician-Assisted Suicide," 23 *Pol. & Life Sci.* 42 (2005).

18. Felicia Cohn and Joanne Lynn, "Vulnerable People: Practical Rejoinders to Claims in Favor of Assisted Suicide," in *The Case against Assisted Suicide: For the Right to End-of-Life Care* 240 (Kathleen Foley, M.D., and Herbert Hendin, M.D., eds., Johns Hopkins Univ. Press 2002) [hereinafter "The Case against Assisted Suicide"]; Liezl Van Zyl, *Death and Compassion: A Virtue-Based Approach to Euthanasia*, 124–25 (Ashgate 2000). See also Ian Dowbiggin, *supra* n. 10, at 175. (Consistently in the polls one-third support PAS, one-third support PAS in isolated cases but oppose it in general, and one-third oppose PAS under all circumstances. While there is a general endorsement of the abstract right to PAS, people balk when considering the right in specific situations.)

19. J. Hegelin, T. Hilstun, J. Hau, and H.E. Carlsson, "Surveys on Attitudes towards Legalization of Euthanasia: Importance of Question Phrasing," 30 *J.*

Med. Ethics 521 (2002); Donald P. Haides-Markel and Mark R. Joslyn, “Just How Important Is the Messenger versus the Message? The Case of Framing Physician-Assisted Suicide,” 28 *Death Studies* 243, 257 (2004) (“Respondents exposed to a depiction that emphasized individual rights were significantly more supportive of PAS . . .”); David W. Moore, “Three in Four Americans Support Euthanasia: Significantly Less Support for Doctor Assisted Suicide,” *Gallup News Service* (May 17, 2005) (the fact that the word *suicide* is contained in the phrase “physician-assisted suicide” dramatically affected the outcome of the poll).

20. See C. Leget, “Boundaries, Borders, and Limits. A Phenomenological Reflection on Ethics and Euthanasia,” 32 *J. Med Ethics* 256, 256, 259 (2006) (arguments from both sides of the debate are interrelated and logically connected).

Issue 1

1. See Malcolm Parker, *supra* intro. n. 14, at 530:

- i. For most people, our ultimate preferences and principles, which satisfy our conceptions of the good life, can certainly conflict with others’ preferences and principles, so morality involves both the realization of our individual conceptions and attempts to harmonize them with those of others.
- ii. This kind of theory is naturalistic in that it bases morality in human needs, concerns, attitudes and preferences, but also retains deontological language in its traditional place, to refer to those widely agreed principles of which we approve and which we can commend, setting them apart from just any possibility, and reserving to them a critical edge, as well as their generality and claim to universality.

2. Guido Calabresi and Phillip Bobbitt, *Tragic Choices* 198 (Norton 1978).

3. Ronald Dworkin, *Life’s Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* 11, 25 (Vintage 1994); “Submission to the Select Committee of the House of Lords on Medical Ethics by the Linacre Centre for Health Care Ethics,” in *Euthanasia, Clinical Practice, and the Law* Book Two, “Euthanasia and the Law: The Case against Legalism” 118 (Luke Gormally, ed., Linacre Centre for Health Care Ethics 1994) [the volume is divided into two parts referred to as Book One and Book Two; the volume as a whole is hereinafter cited as “Clinical Practice”]; James M. Gustafson, “Mongolism, Parental Desires, and the Right to Life,” in *Death, Dying, and Euthanasia* 275 (Dennis I. Moran and David Mall, eds., Univ. Publications of America 1997) [hereinafter “Death-Dying”]; Luke Gormally, “Walton, Davies, Boyd, and the Legalization of Euthanasia,” in “Euthanasia Examined,” *supra* intro. n. 2, at 128; Liezl van Zyl, *supra* intro. n. 18, at xix, 9 (life and death are part of the “secular sacred”). Interestingly, the notion of the sanctity of life, which seems so fundamental to us, is really of relatively

recent origin in human history. M.T. Meulders-Klein, “The Right over One’s Own Body: Its Scope and Limits under Comparative Law,” 6 *Bost. Col. Int. & Compar. L.R.* 29, 32, 33 (1983).

4. John Keown, *Euthanasia, Ethics, and Public Policy: An Argument against Legalization* 224 (Cambridge Univ. Press 2004); Bryan Bennett, “Letting Vegetative Patients Die,” in “Euthanasia Examined,” supra intro. n. 2, at 179; Robert I. Mishbin, supra intro. n. 5, at 74I; Larry Goshin, J.D., “The Right to Choose Death: The Judicial Trilogy of Brophy, Bovia, and Conroy,” 14 *Law, Med., & Health Care* 198, 199 (1922); John F. Kavanagh, S.J., “Ethics Notebook: Killing and Letting Die,” 183 *America* 23 (Sept. 23, 2000).

5. Dennis Sullivan, M.D., “Euthanasia versus Letting Die: Christian Decision-Making in Terminal Patients,” 21 *Ethics & Med* 109, 111 (2005) (“The intuitive nature of the injunction against taking [innocent] life goes beyond the Decalogue to a shared consensus of the secular community as well . . .”).

6. Karen Lebacqz, Ph.D., and H. Tristram Engelhardt Jr., Ph.D., M.D., “Suicide,” in “Death-Dying,” supra n. 3, at 688.

7. Peter Singer, *Rethinking Life and Death: The Collapse of Our Traditional Ethics* 70, 74 (St. Martin’s Griffin 1994). See also “Submission to the Select Committee of the House of Lords on Medical Ethics by the Linacre Centre for Health Care Ethics,” in “Clinical Practice,” supra n. 3, at 39; and Margaret P. Battin, “Is a Physician Ever Obligated to Help a Patient Die?” in *Regulating How We Die: The Ethical, Medical, and Legal Issues Surrounding Assisted-Suicide* 32 (Linda L. Emanuel, ed., Harvard Univ. Press 1998) [hereinafter “Regulating How We Die”].

8. Germain Grisez, “Suicide and Euthanasia,” in “Death-Dying,” supra n. 3, at 786–87; Kay Redfield Jamison, supra intro. n. 6, at 65, 88.

9. Kay Redfield Jamison, supra intro. n. 6, at 72–73; Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* 67 (Oxford Univ. Press 1985).

10. “War, Morality Of,” in the *New Catholic Encyclopedia*, vol. 14, at 635 et seq. (2d ed., Gates 2002); Margaret Somerville, *Death Talk: The Case against Euthanasia and Physician Assisted Suicide* 300 (McGill-Queen’s Univ. Press 2001).

11. *The New Catholic Encyclopedia*, supra n. 10, at 659.

12. Germain Grisez, “Suicide and Euthanasia,” in “Death-Dying,” supra n. 3, at 804; Daniel C. Maguire, supra intro. n. 8, at 83, 121.

13. A. J. Ashworth, “Self-Defense and the Right to Life,” 34 *Camb. L.J.* 282, 283 (1975); Sanford H. Kadish, “Respect for Life and Regard for Rights in the Criminal Law,” 64 *Cal. L. Rev.* 871, 883 (1976).

14. Joshua Dressler, *Understanding Criminal Law*, §18.07B, at 228 (Matthew Bender 1995).

15. Daniel C. Maguire, supra intro. n. 8, at 111. See also German Grisez, supra n. 12, at 786–87.

16. See Jim Dwyer, Peter Neufeld, and Barry Scheck, *Actual Innocence* (2000); Edward F. Connors, Thomas Lundregan, Neal Miller, and Tom

McEwen, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial* (U.S. Department of Justice 1996). See also Innocence Project, <http://www.innocenceproject.org>; and “Sister Helen Prejean on Death Row: Nun Author and Anti-death Penalty Movement,” 127 *Commonwealth* 11 (Oct. 6, 2000).

17. *Ibid.*

18. Stuart Banner, *The Death Penalty: An American History* 5–23, 88–111 (Harvard University Press 2002).

19. James Boyd White, “Telling Stories in the Law and in Ordinary Life: The *Oresteia* and ‘Noon Wine,’” chapter 8 of *Heracles’ Bow: Essays on the Rhetoric and Poetics of Law* 176 (University of Wisconsin Press 1985).

20. Erich H. Loewy, “Harming, Healing, and Euthanasia,” in “Regulating How We Die,” *supra* n. 7, at 54; Arthur Dyck, “Beneficent Euthanasia and Benemortasia: Alternative Views of Mercy,” in “Death-Dying,” *supra* n. 3, at 352.

21. “Submission to the Select Committee of the House of Lords on Medical Ethics by the Linacre Centre for Health Care Ethics,” in “Clinical Practice,” *supra*, n. 3, at 126 (such a belief in equality is necessary if we will have “Justice” in our society); Arthur Dyck, “Beneficent Euthanasia and Benemortasia: Alternative Views of Mercy,” in “Death-Dying,” *supra* n. 3, at 359 (no person or community can say who deserves to live or die); Luke Gormally, “Walton, Davies, Boyd, and the Legalization of Euthanasia,” in “Euthanasia Examined,” *supra* intro. n. 2, at 115 (we protect all by making all equally entitled to justice); Peter Singer, *supra* n. 7, at 65; Marc Stauch, “Causal Authorship and the Equality Principle: A Defense of the Acts-Omission Distinction in Euthanasia,” 26 *J. Med. Ethics* 237, 240 (2000). As was the case with the sanctity of life, the notion that all lives have equal value is a recent one in human history. M.T. Meulders-Klein, *supra* n. 3, at 35.

22. “Introduction: A Medical, Legal, Psychosocial Perspective,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 13; Diane Coleman, “Not Dead Yet,” in “The Case against Assisted Suicide,” *supra* intro. n. 3, at 213; John Finniss, “Misunderstanding the Case against Euthanasia: Response to Harris’s First Reply,” in “Euthanasia Examined,” *supra* intro. n. 2, at 64; Peter Singer, *supra* n. 7, at 36, 49, 199. This concern is said to be particularly acute for the disabled given how society tends to undervalue them and limit their lifestyle choices. Jerome E. Bickenbach, “Disability and Life-Ending Decisions,” in “Expanding the Debate,” *supra* intro. n. 8, at 123; Darrel W. Amundsen, “The Significance of Inaccurate History in Legal Considerations of Physician-Assisted Suicide,” in “Physician-Assisted Suicide,” *supra* intro. n. 11, at 16; Peter Singer, *supra* n. 7, at 181.

23. Thomas H. Lellie and James I. Werth Jr., “End-of-Life Issues and Persons with Disabilities: Introduction to Special Edition,” 16 *J. Disability Pol’y Studies* 2, 2, 3 (2005); James L. Werth Jr., “Concerns about Decisions Related to Withholding/Withdrawing Life-Sustaining Treatment and Futility for Persons with Disabilities,” 16 *J. Disability Pol’y Studies* 21, 32 (2005). (“The primary concerns expressed by advocates related to assisted suicide revolve around the social deval-

uation of persons with disabilities that is present in the United States and the possibility that persons with disabilities will internalize these negative attitudes.”); Merope Pavlides, “Whose Choice Is It, Anyway? Disability and Suicide in Four Contemporary Films,” *J. Disability Pol’y Studies* 46 (2005) (“This review confirms the hypothesis that such films underscore our cultural tendency to view disability and illness as an experience that demands release rather than support”); Darrell W. Amundsen and Gail Taira, “Our Lives and Ideologies: The Effect of Life Experience on the Perceived Morality of the Policy of Physician-Assisted Suicide,” 16 *J. Disability Pol’y Studies* 53, 55 (2005) (“The very people whose job it was to care for me believed that I would be better off dead”); id., at 56 (“The ableist’s ideology. . . : The unhappiness of ‘those people’ is caused by their impairments, not by the ableist’s own lack of social conscience. This is the social harm caused by ableism and abetted by the assisted suicide movement.”). But see Karen Hwang, “Attitudes of Persons with Physical Disabilities toward Physician-Assisted Suicide: An Exploratory Assessment of the Vulnerability Argument,” 16 *J. Disability Pol’y Studies* 16, 20 (2005) (the disabled community is not monolithic in its view; some don’t think of themselves as vulnerable and resent the label). But the disabled may be more prone to consider ending their lives because of discriminatory services that make life difficult to live, Paul K. Langmore, “Policy, Prejudice, and Reality: Two Case Studies of Physician-Assisted Suicide,” 16 *J. Disability Pol’y Studies* 38, 44 (2005); and an unsupportive cultural environment that keeps the disabled from seeing the potential quality and value their lives might have, Richard Radtke, “A Case against Physician-Assisted Suicide,” *J. Disability Pol’y Studies* 58 (2005).

24. Bill Moyers, “Living with Dying,” segment 1 of *On Our Own Terms: Films for the Humanities and Science* (2000); Darrel W. Amundsen, “The Significance of Inaccurate History in Legal Considerations of Assisted Suicide,” in “The Case against Assisted Suicide,” *supra* intro. n. 3, at 13; Darrel W. Amundsen, “The Significance of Inaccurate History in Legal Consideration of Physician Assisted Suicide,” in “Expanding the Debate,” *supra* intro. n. 8, at 91; Stacie L. Mojica and Dan S. Murel, *supra* intro. n. 6, at 471, 485. This opposition on the part of African Americans, however, may be as much a function of religious belief as concerns about racial bias. Peter G. Filene, *supra* intro. n. 1, at 213. Dona J. Reese, Robin E. Ahern, Shankar Nair, Joleen D. O’Faire, and Claudia Warren, “Hospice Access and Use by African Americans: Addressing Cultural and Institutional Barriers through Participatory Action Research,” 44 *Social Work* 549, 553–54 (1999) (barriers to use of hospice include knowledge of service economic restraints, religious views that to not pray for a miracle and fight on demonstrates a lack of faith in God, cultural views about fighting for life and a cure versus accepting palliative care and inevitable death, distrust of nondiverse health care system when a recommendation for palliative care is made).

25. “Social worth” was a central criterion for decisions about who would be given access to kidney dialysis in some programs. Twenty-nine percent of the cen-

ters definitely excluded patients with a “poor family environment, 21 percent indigency, 20 percent poor employment record.” See Renee C. Fox and Judith P. Swazey, *The Courage to Fail: A Social View of Organ Transplants and Dialysis* 230 table 5 (2d ed., University of Chicago Press 1978). Further, “‘marital status,’ ‘net worth,’ ‘occupation,’ and ‘past performance and future potential’ were the types of social worth criteria that the committee member avowedly considered.” *Id.*, at 232.

An even more vivid sense of the role of social worth criteria in these life and death decisions comes from the recollections of one board member who made such decisions.

“The choices were hard,” Mr. N, a lay member of the committee, told us, “and I wasn’t happy about some of the decisions I made. For example, I remember voting against a young woman who was a known prostitute. I found I couldn’t vote for her, rather than another candidate, a young wife and mother who had proved her responsibility and worth. I also voted against a young man who had been a ne’er-do-well, a real playboy, until he learned he had renal failure. He promised he would reform his character go back to school, and so on, if only he were selected for treatment. But I felt I’d lived long enough to know that a person like that won’t really do what he was promising at the time.”

Id.; see also Paul E. Kalb and David H. Miller, “Utilitarian Strategies for Intensive Care Units,” 261 *JAMA* 2389 (1989) (“such social considerations as quality of life, family preferences, and potential contribution to family and society were all important factors in physician treatment decisions”). Thus, in making decisions about who would be given dialysis the committee tended to choose people like them, the upper middle class. See Renee C. Fox and Judith P. Swazey, *supra* n. 25, at 230–31.

[T]hose making microallocation decisions have a strong tendency to prefer patients with whom they identify; if the decision-makers are well-educated and well-to-do professionals, an allocation system in which the patient’s social worth were a factor would be likely to prefer patients with high socio-economic status. Minority groups and the underprivileged might be underrepresented.

The preceding quotation is from Maxwell J. Mehlman, “Rationing Expensive Lifesaving Medical Treatment,” 1985 *Wisc. L. Rev.* 239, 258 (n. omitted). See also Kelli D. Back, “Rationing Health Care: Naturally Unjust?” 12 *Hamline J. Pub. L. & Pol.* 245, 249 (1991) (noting that those making rationing decisions “tend to favor patients with whom they can identify”). Cf. President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Allocation of Resources for Medical Intensive Care, Securing Access to Health Care: The Ethical Implications of Differences in the Availability of Health Services* 306

(1983) (doctors consciously or unconsciously are influenced by their affinity, or lack thereof, with a patient, including whether the doctor and patient are of the same socioeconomic class).

26. Daniel C. Maguire, *supra* intro. n. 8, at 88, 132. For a fuller discussion of the Nazi horror, see chapter 4.

27. Helga Kuhse and Peter Singer, “For Sometimes Letting—and Helping—Die,” 19 *Law, Med. & Health Care* 149, 150 (1987).

28. See *Cruzon v. Director, Missouri Dept. of Health*, 497 U.S. 261, 302 (1990). This is less surprising when one realizes that on average 80 days of the last year of one’s life are spent in a hospital or nursing home. Peter G. Filene, *supra* intro. n. 1, at 55. See also Paul J. Zweir, *supra* intro. n. 5, at 224 (70 percent of these decisions will involve withdrawing treatment); George P. Smith, “Restructuring the Principles of Medical Futility,” 11 *J. Palliative Care* 9.9 (1995); and Marcia Angell, “Helping Desperately Ill People to Die,” in “Regulating How We Die,” *supra* n. 7, at 12. A somewhat different estimate (though limited to hospitals) estimates that 50 percent of deaths in hospitals from nonemergency cases result from withdrawing lifesaving treatment. Robert T. Hall, *supra* intro. n. 15, at 10.

29. Daniel Callahan, “Self-Extinction: The Morality of the Helping Hand,” in “Physician Assisted Suicide” *supra* intro. n. 11, at 95. If a nonphysician pulled the plug, it would be homicide. Leslie Pickeries Francis, “Assisted Suicide: Are the Elderly a Special Case?” in “Expanding the Debate,” *supra* intro. n. 8, at 241; Peter Singer, *supra* n. 7, at 77. See also J.P. Bishop, “Euthanasia, Efficiency, and the Historical Distinction between Killing a Patient and Allowing a Patient to Die,” *J. Med. Ethics* 220, 220 (2006) (we can’t distinguish between killing and letting die because the modern view of causality wrongly focuses on effect not motives and intent like the older formulation).

30. David J. Roy and Charles-Henri Rapine, “Regarding Euthanasia,” 1 *European J. Palliative Care* 57, 58 (1994).

31. George P. Smith, *supra* n. 28, at 10. Smith includes four concepts within the notion of futility: (1) the treatment won’t cure, (2) the treatment is not beneficial, (3) the treatment is unlikely to produce benefits, and (4) the treatment is plausible but not yet validated. See also Robert I. Mishbin, *supra* intro. n. 5, at 144–45 (no right to use resources if “futile”). Cf. Robert I. Mishbin, *supra* intro. n. 5, at 127 (on “go slow” codes in hospitals). For the Catholic view on futility, see Kevin D. O’Rourke, O.P., “Pain Relief: Ethical Issues and Catholic Teaching,” in *Birth, Suffering, and Death* 157, 163 (K.W. Wilder, ed., Kluwer Academic 1992); and “Nutrition and Hydration: Moral and Pastoral Reflections,” 15 *J. Contemp. Health Law & Policy* 455, 466 (1999) (National Conference of Catholic Bishops Committee for Pro-life Activities) (discusses when providing water is considered futile).

32. James L. Werth, “Concerns about Decisions Relating to Withholding/Withdrawing Life Sustaining Treatment and Futility for Persons with Disabilities,” 16 *J. Disability Pol’y Studies* 31, 34 (2005) (“If Futility is to be a useful concept in practice, it must have an understandable and acceptable definition and be

applied consistently by physicians. Research indicates that this is not the case,”); David Rieff, “Illness as More Than Metaphor,” *New York Times Magazine* (Dec. 4, 2005) (in writing about the death of his mother, Susan Sontag, her son notes, “I have found no consensus [regarding the meaning of medical futility] among the oncologists I have spoken with in the aftermath of my mother’s death, and I don’t believe there is one”).

33. Peter Asili, “Right to Die Cases and Theology,” 100–101 *Law & Justice* 58, 66 (1998) (discusses the concept of disproportionality in the Catholic moral tradition in medicine).

34. John Keown, *supra* n. 4, at 44; Law Reform Commission of Canada, *Protection of Life: Euthanasia, Aiding Suicide, and Cessation of Treatment* (working paper 2) 35 (1982) [hereinafter: “Canada”]. For the Catholic perspective on the ordinary versus extraordinary distinction, see, Peter Asili, *supra* n. 33, at 66.

35. Gillian M. Craig, “On Withholding Nutrition and Hydration in the Terminally Ill: Has Palliative Medicine Gone Too Far?” 20 *J. Med. Ethics* 139, 144 (1994).

36. Daniel C. Maguire, *supra* intro. n. 8, at 124–25. In fact, the Catholic application of the doctrine includes a consideration of costs and burdens on the remaining family members. Asili, *supra* n. 33, at 66; Joseph Boyle, “A Case for Sometimes Feeding Patients in a Persistent Vegetative State,” in “Euthanasia Examined,” *supra* intro. n. 2, at 199.

37. Peter Singer, *supra* n. 7, at 112; Leizl van Zyl, *supra* intro. n. 18, at 52; John Harris, “The Philosophical Case against the Philosophical Case against Euthanasia,” in “Euthanasia Examined,” *supra* intro. n. 2, at 33, 39; “Submission to the Select Committee of the House of Lords on Medical Ethics by the Linacre Centre of Health Care Ethics,” in “Clinical Practice,” *supra* n. 3, at 139; Robert T. Hall, *supra* intro. n. 15, at 12; George P. Smith, *supra* n. 28, at 10.

38. Margaret P. Battin, “Is a Physician Ever Obligated to Help a Patient Die?” in “Regulating How We Die,” *supra* n. 7, at 41; Lawrence O. Gostin, *supra* n. 4, at 94. On the other hand, there are authors who say that one cannot easily tell whether or not morphine was the cause of a particular death. Wesley J. Smith, *supra* intro. n. 10, at 222. There are even some who claim that, properly administered, morphine carries no greater risk of death than aspirin. “Submission to the Select Committee of House of Lords on Medical Ethics by the Linacre Centre for Health Care Ethics,” in “Clinical Practice,” *supra* n. 3, at 79.

39. Alan Donagan, *The Theory of Morality* 57 (1997); John Keown, *supra* n. 4, at 20; Joseph M. Boyle Jr., “Toward Understanding the Principle of Double Effect,” 90 *Ethics* 527 (1980); Kevin D. O’Rourke, G.P., *supra* n. 31, at 165.

40. Liezl van Zyl, *supra* intro. n. 18, at 127. See also Alan Donagan, *supra* n. 39, at 159; Joseph M. Boyle Jr., *supra* n. 39, at 531–32.

41. Glanville Williams, *The Sanctity of Life and the Criminal Law* 322 (Knopf 1972); Liezl van Zyl, *supra* intro. n. 18, at 129; Joseph M. Boyle Jr., *supra* n. 39.

42. Yale Kamisar, “The Reasons So Many People Support Physician Assisted

Suicide and Why Those Reasons Are Not Convincing," 12 *Issues in Law & Med.* 113, 125 (1996).

43. "Submission to Select Committee of House of Lords on Medical Ethics by the Linacre Centre for Health Care Ethics," in "Clinical Practice," supra n. 3, at 63. Cf. Robert I. Mishbin, supra intro. n. 5, at 141.

44. Craig Paterson, "On Clarifying Terms in Applied Ethics Discourse: Suicide, Assisted Suicide, and Euthanasia," 43 *Int'l Phil. Q.* 351, 351-55 (2003). ("Suicide is to be taken to mean: an act or omission whose proximate effect results in the person's own bodily death, voluntarily and knowingly undertaken, with the intended objective [whether as an end in itself or as a means to some further end] that one's bodily life be so terminated.")

45. Bernard Gert, Charles M. Culver, and K. Danner Clooser, "An Alternative to Physician-Assisted Suicide," in "Expanding the Debate," supra intro. n. 8, at 182; John D. Arras, "Tragic View," in "Expanding the Debate," supra intro. n. 8, at 294; Balfour M. Mount and Pat Hamilton, "When Palliative Care Fails to Control Suffering," 10 *J. Palliative Care* 24 (1994); Marion D. Cooper, "When Palliative Care Fails to Control Suffering," 10 *J. Palliative Care* 27 (1994); Gillian M. Craig, supra n. 35, at 139; Gillian M. Craig, "On Withholding Artificial Hydration and Nutrition from the Terminally Ill: The Debate Continues," 22 *J. Med. Ethics* 147 (1996); Stacy Diloreto, "The Complexities of Assisted-Suicide," 34 *Patient Care* 65, 65 (2000).

46. Raanan Gillon, "Palliative Care Ethics: Non-provision of Artificial Nutrition and Hydration to Terminally Ill Sedated Patients," 20 *J. Med. Ethics* 131 (1994); Judith A.C. Rietjens, Ph.D., Johannes J.M. van Delden, M.D., Ph.D., Agnes van der Deide, M.D., Ph.D., Astrid M. Vrakking, M.S., Breggie D. Onwuteaka-Philipsen, Ph.D., Paul J. van der Maas, M.D., Ph.D., and Gerrit van der Wal, M.D., Ph.D., "Terminal Sedation and Euthanasia: A Comparison of Clinical Practices," 166 *Arch. Internal Med* 749, 749 (2006).

47. David Orentlicher, "The Supreme Court and Terminal Sedation: Rejecting Assisted Suicide, Embracing Euthanasia," 24 *Hast. Const. Q.* 947, 953-58 (1997); Id., at 959 (sedation prevents saving a patient who has been misdiagnosed because he or she will die anyway from starvation); John D. Arras, "Tragic View," in "Expanding the Debate," supra intro. n. 8, at 300 (author believes that terminal sedation is even worse than PAS); David Orentlicher, "The Supreme Court and Terminal Sedation: An Ethically Inferior Alternative to Physician-Assisted Suicide," in "Expanding the Debate," supra intro. n. 8, at 301.

48. Judith A.C. Rietjens et al., supra n. 46, at 752.

Issue 2

1. H. Tristram Englehardt Jr., "Death by Free Choice: A Modern Variation on an Antique Theme," in "Historical and Contemporary Themes," supra intro. n. 5, at 260; Paul I. Mishbin, supra intro. n. 5, at 175.

2. “Limits to Moral Pluralism,” in “Clinical Practice,” Book One, “Euthanasia and Clinical Practice: Trends, Principles, and Alternatives (Working Party Report, 1982),” supra ch. 1 n. 3, at 45; Glanville Williams, supra ch. 1 n. 41, at 19.

3. See, for example, Melinda A. Lee, Heidi D. Nelson, Virginia P. Tilden, Linda Ganzini, Terri A. Schmidt, and Susan W. Tolle, “Legalizing Assisted Suicide: Views of Physicians in Oregon,” 334 *New Engl. J. Med.* 310, 314 (1996); David W. Moore, supra intro. n. 19 (religious beliefs are most strongly correlated with opposition to PAS if the person is a weekly churchgoer and/or an evangelical Christian).

4. On one side are those who attribute the ban to a pragmatic need to prevent wholesale martyrdom. Fr. Robert Barry, O.P., supra intro. n. 5, at 471. On the other are those who find the ban an existing moral principle throughout the history of the church. Id.; Darrel W. Amundsen, “Suicide and Early Christian Values,” in “Historical and Contemporary Themes,” supra intro. n. 5, at 79, 130–32, 140 (Augustine condemned the Donatists).

5. Darrel W. Amundsen, “Suicide and Early Christian Values,” in “Historical and Contemporary Themes,” supra intro. n. 5, at 77.

6. Fr. Robert Barry, O.P., supra intro. n. 5, at 472; Darrel W. Amundsen, “The Significance of Inaccurate History in Legal Considerations of Physician-Assisted Suicide,” in “Physician-Assisted Suicide,” supra intro. n. 11, at 3.

7. Darrel W. Amundsen, “Suicide and Early Christian Values,” in “Historical and Contemporary Themes,” supra intro. n. 5, at 79, 104. See also id., at 62 (Jewish martyrs).

8. Fr. Robert Barry, O.P., supra intro. n. 5, at 470 (rape by a pagan); Darrel W. Amundsen, “Suicide and Early Christian Values,” in “Historical and Contemporary Themes,” supra intro. n. 5, at 79, 121; Darrel W. Amundsen, “The Significance of Inaccurate History in Legal Considerations of Physician-Assisted Suicide,” in “Physician-Assisted Suicide,” supra intro. n. 11, at 13, 20. But see Darrel W. Amundsen, “Suicide and Early Christian Values,” in “Historical and Contemporary Themes,” supra intro. n. 5, at 140 (Augustine condemned suicide by rape victims), Darrel W. Amundsen, “The Significance of Inaccurate History in Legal Considerations of Physician-Assisted Suicide,” in “Physician-Assisted Suicide,” supra intro. n. 11, at 12 (arrest by pagans); and Darrel W. Amundsen, “Suicide and Early Christian Values,” in “Historical and Contemporary Themes,” supra intro. n. 5, at 80 (torture by pagans).

9. Paul I. Mishbin, supra intro. n. 5, at 143.

10. Tom L. Beauchamp, “Suicide in the Age of Reason,” in “Historical and Contemporary Themes,” supra intro. n. 5, at 197; Gerald A. Larue, *Euthanasia and Religion: A Survey of the Attitudes of World Religions to the Right to Die* 3 (Hemlock Society 1985); *Basic Questions on Suicide and Euthanasia: Are They Ever Right?* Bio Basics Series, 35–36 (Gary P. Steward, ed., Kregel 1998).

11. Fr. Robert Barry, O.P., supra intro. n. 5, at 253 (Samson, Razis), 456 (Saul, Zimri, Ahithophel, Judas).

12. Id., at 45; Darrel W. Amundsen, “Suicide and Early Christian Values,” in

“Historical and Contemporary Themes,” supra intro. n. 5, at 127; Daniel C. Maguire, supra intro. n. 8, at 143 (Samson); Darrel W. Amundsen, “The Significance of Inaccurate History in Legal Considerations of Physician-Assisted Suicide,” in “Physician-Assisted Suicide,” supra intro. n. 11, at 24.

13. Fr. Robert Barry, O.P., supra intro. n. 5, at 451, 452, 456.

14. Gerald A. Larue, supra n. 10, at 24; Anthony Fisher, “Theological Aspects of Euthanasia,” in “Euthanasia Examined,” supra intro. n. 2, at 316; Joni Eareckson Tada, *When Is It Right to Die?* 112 (HarperCollins 1992).

15. Fr. Robert Barry, O.P., supra intro. n. 5, at 454–55 (the prophets Elijah, Jonah, Job, Moses, and Tabil wished to die), 458.

16. James F. Childress, “Religious Viewpoints,” in “Regulating How We Die,” supra ch. 1 n. 5, at 125; Beth Spring and Ed Laron, *Euthanasia: Spiritual, Medical, and Legal Lessons in Health Care* 109 (Multnomah 1988) (Saint Augustine’s position); Joseph Boyle, “Sanctity of Life and Suicide: Tensions and Developments within Common Morality,” in “Historical and Contemporary Themes,” supra intro. n. 5, at 226 (author notes that the phrase “your neighbors” is not added to modify “Thou shall not kill”).

17. Cf. Alan Donagan, supra ch. 1 n. 39, at 6.

18. Daniel B. Sinclair, “The Interaction between Law and Morality in Jewish Law in the Area of Feticide and Killing of a Terminally Ill Individual,” 11 *Criminal Justice Ethics* 76, 80 (summer–fall 1992); H. Tristram Engelhardt Jr., “Death by Free Choice: Modern Variations on an Antique Theme,” in “Historical and Contemporary Themes,” supra intro. n. 5, at 257; Peter Singer, supra ch. 1 n. 7, at 218 (the threat of murder causes fear because humans can see themselves existing over time and the risk of death at the hands of another “threatens the peaceful existence on which our society depends”). See also Carl Wellman, “A Moral Right to Physician-Assisted Suicide,” 38 *Am. Phil. Q.* 271, 273 (2001) (murder also harms the family and friends of the victim).

19. Daniel C. Maguire, supra intro. n. 8, at 6; Glanville Williams, supra ch. 1 n. 41, at 313–14; Karen Labacqz and H. Tristram Engelhardt Jr., M.D., “Suicide,” in “Death-Dying,” supra ch. 1 n. 8, at 695.

20. Glanville Williams, supra ch. 1 n. 41, at 256. Cf. also Karen Lebacqz, Ph.D., and H. Tristram Engelhardt, supra ch. 1 n. 6, at 686. (“Murder . . . is the violation of a person’s ‘right to life.’ In suicide, there is no violation of someone’s right to life, because the act is not against the victim’s will.”)

21. James F. Childress, “Religious Viewpoints,” in “Regulating How We Die,” supra ch. 1 n. 7, at 26 (author goes through Aquinas’s “metaphors,” i.e., gifts, loans, and such); Fr. Robert Barry, O.P., supra intro. n. 5, at 476; Beth Spring and Ed Laron, supra n. 16, at 122.

22. Noam J. Zohar, “Jewish Deliberations on Suicide,” in “Expanding the Debate,” supra intro. n. 8, at 364.

23. Paul I. Mishbin, supra intro. n. 5, at 169; Baruch A. Brody, “A Historical Introduction to Jewish Casuistry on Suicide and Euthanasia,” in “Historical and

Contemporary Themes,” supra intro. n. 5, at 39; James F. Childress, “Religious Viewpoints,” in “Regulating How We Die,” supra ch. 1 n. 7, at 138; Rabbi Immanuel Jacobvit, “Some Recent Jewish Views on Euthanasia,” in “Death-Dying,” supra ch. 1 n. 3, at 343.

24. Fr. Robert Barry, O.P., supra intro. n. 5, at 476; Darrel W. Amundsen, “Suicide and Early Christian Values,” in “Historical and Contemporary Themes,” supra intro. n. 5; Thomas L. Beauchamp, “Suicide in the Age of Reason,” in “Historical and Contemporary Themes,” supra intro. n. 5, at 142, 190–92; Michael Manning, M.D., supra intro. n. 5, at 17; Glanville Williams, supra ch. 1 n. 4, at 264.

25. Karen Labacqz and H. Tristram Engelhardt Jr., M.D., “Suicide,” in “Death-Dying,” supra ch. 1 n. 3, at 695; Beth Spring and Ed Laron, supra n. 16, at 97; “The Gift of Life,” in “Clinical Practice,” Book One, “Euthanasia and Clinical Practice: Trends, Principles, and Alternatives (Working Party Report, 1982),” supra ch. 1 n. 3, at 51.

26. Paulo Coelho, *Veronica Decides to Die* 8 (Margaret Jull Costas, trans., HarperCollins 1998).

27. Germain Griez, “Suicide and Euthanasia,” in “Death-Dying,” supra ch. 1 n. 3, at 763; John Finnis, “A Philosophical Case against Euthanasia,” in “Euthanasia Examined,” supra intro. n. 2, at 32.

28. Paul I. Mishbin, supra intro. n. 5, at 173; “The Conditions of Our Stewardship,” in “Clinical Practice,” Book One, “Euthanasia and Clinical Practice: Trends, Principles, and Alternatives (Working Party Report, 1982),” supra ch. 1 n. 3, at 53; Peter Asili, supra ch. 1 n. 33, at 65. But see Glanville Williams, supra ch. 1 n. 41, at 250 (author considers a conundrum: How can you return your soul if it is destroyed at death? Yet, if it’s not destroyed, God gets it back.).

29. Gerald A. Larue, supra n. 10, at 16; Tom L. Beauchamp, “Suicide in the Age of Reason,” in “Historical and Contemporary Themes,” supra intro. n. 5, at 203.

30. Daniel C. Maguire, supra intro. n. 8, at 61, 142.

31. Tom L. Beauchamp, “Suicide in the Age of Reason,” in “Historical and Contemporary Themes,” supra intro. n. 5, at 204; Kenneth Boyd, “Euthanasia: Back to the Future,” in “Euthanasia Examined,” supra intro. n. 2, at 73.

32. Fr. Robert Barry, O.P., supra intro. n. 5, at 150; *Basic Questions on Suicide and Euthanasia: Are They Ever Right?* Bio Series 28 (Gary P. Stewart, ed., Kregel 1998); Paul Ramsey, “The Indignity of Death with Dignity,” in “Death-Dying,” supra ch. 1 n. 3, at 322.

33. Darrel W. Amundsen, “Suicide and Early Christian Values,” in “Historical and Contemporary Themes,” supra intro. n. 5, at 712.

Issue 3

1. John Stuart Mill, “Utilitarianism,” 4 (George Sher, ed., Hackett 1988) (1861).

2. *The Encyclopedia of Philosophy*, vol. 7, 207 (Paul Edward, ed. in chief, Collier Macmillan 1962) [hereinafter “Philosophy”]; interview with John Harris, Professor of Philosophy and Bioethics, Manchester University, Manchester, England, April 2001 [hereinafter “Interview”]; Standley Haverwas, “Selecting Children to Live or Die: An Ethical Analysis of the Debate between Dr. Lorber and Dr. Freeman on the Treatment of Meningomyelocle,” in “Death-Dying,” supra ch. 1 n. 3, at 243; Alan Donagan, supra intro. n. 39, at 192; John Stuart Mill, “Utilitarianism,” supra n. 1, at vii, 16.

3. John Stuart Mill, “Utilitarianism,” supra n. 1, at 21.

4. “Philosophy,” supra n. 2, at 206; “Clinical Practice,” Book One, “Euthanasia and Clinical Practice: Trends, Principles, and Alternatives (Working Party Report, 1982),” supra ch. 1 n. 3, at 28 (generally people seek happiness; variously defined). See also John Stuart Mill, “Utilitarianism,” supra n. 1, at 8–13, 34.

5. John Stuart Mill, “Utilitarianism,” supra n. 1, at 35.

6. “Philosophy,” supra n. 2, at 208.

7. Id.

8. Id., at 209. See, generally, David Lyons, *Forms and Limits of Utilitarianism* (Clarendon 1965).

9. Derek Humphrey, *Final Exit: The Practicalities of Self-Deliverance and Assisted Suicide for the Dying* xv (published by Hemlock Society; distributed by Carol Pub. 1991); Katy Redfield Jamison, supra intro. n. 6, at 24; John Wesley Smith, supra intro. n. 6, at xvi.

10. Kay Redfield Jamison, supra intro. n. 6, at 24.

11. David Lyons, supra n. 8, at 69–72.

12. Karen Lebacqz and H. Tristram Engelhardt Jr., M.D., “Suicide,” in “Death-Dying,” supra ch. 1 n. 3, at 676–79. Cf. Glanville Williams, supra ch. 1 n. 41, at 272 (laws against suicide may deter some at the margins).

13. David Lester, “Suicide among the Elderly in the World: Covariation with Psychological and Socio-economic Factors,” in *Suicide and Euthanasia in Older Adults: A Trans-cultural Journey* 7, 12 (Daniel DeLeo, ed., Horgrefe and Huber 2001) [hereinafter “Older Adults”].

14. Kay Redfield Jamison, supra intro. n. 6, at 24; Karen Lebacqz and H. Tristram Engelhardt Jr., M.D., “Suicide,” in “Death-Dying,” supra ch. 1 n. 3, at 675; Margaret A. Dickerson, Melinda A. Lee, and Linda Ganzini, “Practical Issues in Physician Assisted Suicide,” 126 *Annals of Internal Med.* 146, 149 (1997). But cf. “Grief Eased for Euthanasia Families,” *Times* (London) (July 25, 2003) (“Families whose loved ones die as a result of euthanasia suffer less harrowing grief and fewer symptoms of stress than do those whose relations die of natural causes according to Dutch study”).

15. Harvey Max Chochinov, M.D., and Keith G. Wilson, Ph.D., “The Euthanasia Debate: Attitudes, Practices, and Psychiatric Considerations,” 40 *Can. J. Psych.* 593, 598–99 (25 percent of cancer patients show depressive symptoms, with 6 to 10 percent exhibiting “major” depression, which is significant because of

the correlation between depression and the desire for death); Linda Ganzini and Melinda A. Lee, “Psychiatry and Assisted Suicide in the United States,” 36 *New Engl. J. Med.* 1824, 1825 (1997) (80 percent of cancer patients who killed themselves had “depressive syndrome”); Harvey M. Chochinov, M.D., Ph.D., and Leonard Schwartz, LL.B, LL.M, M.D., “Depression and the Will to Live in the Psychological Landscape of Terminally Ill Patients,” in “The Case against Assisted Suicide,” supra intro. n. 18, at 261, 264; Robert G. Twycross, “Where There Is Hope, There Is Life: A View from Hospice,” in “Euthanasia Examined,” supra intro. n. 2, at 145; Leslie Pickering Frances, “Assisted Suicide: Are Elderly a Special Case?” in “Expanding the Debate,” supra intro. n. 8, at 82–83 (depression can affect choices); Michael Teitelman, “Not in the House: Arguments for a Policy of Excluding Physician-Assisted Suicide from the Practice of Hospital Medicine,” in “Expanding the Debate,” supra intro. n. 8, at 208–9 (it is difficult to evaluate depression in the terminally ill). Cf. also Kay Redfield Jamison, supra intro. n. 6, at 81 (the overwhelming majority of suicides are linked to psychological illness [the book focuses on those under 40]).

However, “interest” in suicide and the “desire for hastened death” were better correlated with hopelessness than depression. Zeehan A. Butt, James C. Overholser, and Carla Kmett-Danielson, “Predictors of Attitudes towards Physician-Assisted Suicide,” 47 *Omega* 107, 114 (2003); Malcolm Parker, supra intro. note 14, at 524; Barry Rosenfeld, supra intro. n. 12, at 86.

16. Jean Amery, *On Suicide: A Discourses on Voluntary Death* 114 (John D. Barlow, trans., Indiana Univ. Press 1995).

17. Linda Ganzini and Melinda A. Lee, supra n. 15, at 1825 (no effect on mild to moderate depression); Linda Ganzini, Melinda A. Lee, Robert T. Hintz, Joseph D. Bloom, and Darien S. Fenn, “The Effect of Depression Treatment on Elderly Patients’ Preferences for Life-Sustaining Medical Treatment,” 151 *Am. J. Psych.* 1631 (1994).

18. Harry M. Chochinov, M.D., Ph.D., and Leonard Schwartz, LL.B, LL.M, M.D., “Depression and the Will to Live in the Psychological Landscape of Terminally Ill Patients,” in “The Case against Assisted Suicide,” supra intro. n. 18, at 268 (the correlation between suicidal ideation and hopelessness was greater than that between suicidal ideation and depression). But see N. Gregory Hamilton, M.D., and Catherine A. Hamilton, M.A., “Competing Paradigms of Response to Assisted Suicide Requests in Oregon,” 162 *Am. J. Psych.* 1060, 1060 (2005) (“Although physical illness may be a precipitation cause of despair, these patients usually suffer from treatable depression and are always ambivalent about their desire for death”).

19. Mark Sullivan, Linda Ganzini, and Stuart J. Young, “Should Psychiatrists Serve as Gatekeepers for Physician-Assisted Suicide?” 28 *Hastings Center Report* 24, 28 (1998).

20. Yale Kamisar, “Some Non-religious Views against Proposed ‘Mercy Killing’ Legislation,” in “Death-Dying,” supra ch. 1 n. 3, at 432–33; John Keown,

supra ch. 1 n. 4, at 73; Wesley J. Smith, supra intro. n. 10, at 166; “Canada,” ch. 1 n. 34, at 461; Gerald A. Larue, supra ch. 2 n. 10, at 16; Kathy Doyle and Alex Carroll, “The Slippery Slope,” 146 *New Law J.* 759 (May 1996) (story of a patient who recovered after being diagnosed as PVS).

21. “Canada,” supra n. 20, at 46; Yale Kamisar, “The Reasons So Many People Support Physician-Assisted Suicide and Why Those Reasons Are Not Convincing,” 12 *Issues in Law and Med.* 115, 132, 143 (1996); Gerald A. Larue, supra ch. 2 n. 10, at 16; Yale Kamisar, “Some Non-religious Views against Proposed ‘Mercy Killing’ Legislation,” in “Death-Dying,” supra ch. 1 n. 3, at 435-42.

22. See, generally, Robert Finn, *Cancer Clinical Trials: Experimental Treatments and How They Can Help You* (O’Reilly 1999); *The Reference Shelf: Suicide* 127 (Robert Emmett Long, ed., H.W. Wilson 1995).

23. Peter J. Filenes, supra intro. n. 1, at 75; Wesley J. Smith, “The Right to Die, the Power to Kill,” 46 *Nat’l Rev.* 38 (1994); John F. Kavanagh, S.J., “Ethics Notebook: Killing and Letting Die,” 183 *America* 23 (Sept. 23, 2000).

24. Peter G. Filenes, supra intro. n. 1, at 39 (would it have been worth it to keep Karen Ann Quinlan alive if the chances for her recovery were “one in a million?”).

25. Ronald Dworkin, supra ch. 1 n. 3, at 197-98; Gerald Dworkin, R.G. Frey, and Sissela Bok, *Euthanasia and Physician Assisted Suicide: For and Against* 77-88 (Cambridge Univ. Press 1998); Helga Kuhse, “Killing a Poor Philosophical Argument against Euthanasia,” *Aust. Fin Rev.* 16 (March 28, 1995).

26. Leon R. Kass, M.D., Ph.D., “I Will Give No Deadly Drug,” in “The Case against Assisted Suicide,” supra intro. n. 18, at 25-26; Yale Kamisar, supra ch. 1 n. 42, at 116.

27. Leon R. Kass, M.D., Ph.D., “I Will Give No Deadly Drug,” in “The Case against Assisted Suicide,” supra intro. n. 18, at 25-26.

28. Paul J. Zwier, supra intro. n. 15, at 242.

29. Linda Ganzini and Steven K. Dobscha, “Clarifying Distinctions between Contemplating and Completing Physician Assisted Suicide,” 15 *J. Clinical Ethics* 119 (2004) (“Physicians [in Oregon] reported that 46 percent of the patients who requested PAS changed their minds following a substantive intervention by a physician”); Zeesham A. Butt, James C. Overholser, and Carla Kmetz Danielson, “Predictors of Attitudes towards Physician-Assisted Suicide,” 47 *Omega* 107, 115 (2003) (instability of PAS request was prevalent in elderly patients who were both terminally and nonterminally ill); Ronald Dworkin, supra intro. n. 3, at 46; Robert G. Turycross, “Where There Is Hope There Is Life: A View from the Hospice,” in “Euthanasia Examined,” supra intro. n. 2, at 141, 155; “Assisted Suicide and the Fluctuating Will to Live,” 17 *Med. Health Letters* (Oct. 1, 2000). Cf. also Margaret Somerville, supra ch. 1 n. 10, at 123 (significant difference between a person “asking to die,” and “asking to be killed”).

30. Margaret Somerville, supra ch. 1 n. 10, at 262; Jos M.V. Welie, *In the Face*

of Suffering: *The Philosophical-Anthropological Foundations of Clinical Ethics* 163 (Creighton Univ. Press 1998); Liezl van Zyl, supra intro. n. 18, at 181 (the paradigm 1850s American masculine view was that you must be tough in the face of pain and indifferent to suffering).

31. Yale Kamisar, “Some Non-religious Views against Proposed Mercy Killing Legislation,” in “Death-Dying,” supra ch. 1 n. 3, at 427; Liezl van Zyl, supra intro. n. 18, at 164; Richard A. McCormick, “Bioethic: A Moral Vacuum?” 180 *America* 8, 10 (May 1, 1999); Sara R.S. Bryce, “Appropriate Care of the Incompetent Older Person,” 4 *Issues in Law & Med.* 69, 81 (1988).

32. Yale Kamisar, “Some Non-religious Views against Proposed Mercy Killing Legislation,” in “Death-Dying,” supra ch. 1 n. 3, at 427; Liezl van Zyl, supra intro. n. 18, at 164. See also Thomas R. Cole, “The Enlightened View of Aging: Victorian Morality in a New Key,” 13 *Hastings Center Report* 34 (1983); Sara R.S. Bryce, “Appropriate Care of the Incompetent Older Person,” 4 *Issues in Law & Med.* 69, 81 (1988) (sequestering of the elderly away from the mainstream of life results from our society’s inability to reconcile the reality of their dependence with its wish to believe in autonomy).

33. John Keown, supra ch. 1 n. 4, at 276; Helga Kuhse, supra n. 25, at 166. Cf. also the concern that the “right to die” may become perceived as a “duty to die” on the part of the patient. Liezl van Zyl, supra intro. n. 18, at 43; David J. Mayo and Martin Gunderson, “Physician Assisted Suicide and Hard Choices,” in “Legal Euthanasia: Ethical Issues in an Era of Legalized Dying,” 18 *J. Med. & Phil.* 329, 335 (1993) (Margaret P. Battin and Thomas J. Bole III, issue eds.).

34. Allen Verhey, “A Protestant Perspective on Ending Life: Faithfulness in the Fact of Death,” in “Expanding the Debate,” supra intro. n. 8, at 350; Robert I. Mishbin, supra intro. n. 5, at 199.

35. Gerald Dworkin, R.G. Frey, and Sissela Bok, supra ch. 3, n. 25, at 67–69.

Issue 4

1. See Amicus Brief of Surviving Family Members in Support of Oregon’s Death with Dignity Act, filed in *Oregon v. Ashcroft* (No. CV01-1647-JO); Liezl van Zyl, supra intro. n. 18, at 57; Timothy E. Quill, M.D., *Death and Dignity: Making Choices and Taking Charge* (Norton 1994); Phil Such, “Why I’m Starving Myself to Death,” *Daily Mail* (Feb. 21, 2002). Cf. also Derek Humphrey (with Ann Wickets), *Jean’s Way* (Hemlock Society 1978); and Juliet Cassuto Rothman, *Saying Goodbye to Daniel: When Death Is the Best Choice* (Continuum 1995) (withdrawal of life support).

2. Liezl van Zyl, supra intro. n. 18, at 47.

3. Robert I. Mishbin, supra intro. n. 5, at 17. Gerald Dworkin, R.G. Frey, and Sissela Bok, supra ch. 3 n. 25, at 44–45; Thomas St. Martin, “Euthanasia: The Three-in-One Issue,” in “Death-Dying,” supra ch. 1 n. 3, at 600.

4. Gerald Dworkin, R.G. Frey, and Sissela Bok, *supra* ch. 3 n. 25, at 58–59.
5. David W. Louiselle, “Euthanasia and Biathanesia: On Dying and Killing,” in “Death-Dying,” *supra* ch. 1 n. 3, at 389.
6. Debra M. Bryan, “It’s My Body and I’ll Die if I Want to: A Plan for Keeping Personal Autonomy from Spinning out of Control,” 8 *J. Med. & Law* 45, 53 (2004); Mary A. Fisher, “To Live or to Die,” *Reader’s Digest* 107, 112 (May 2003). See also “Assisted Suicide and Euthanasia, Part I,” Testimony to Senate Judiciary Committee on Civil Rights, Constitutional and Property Rights, Congressional Testimony of Wesley J. Smith, Senior Fellow, Discovery Institute, at 6 (May 26, 2006, congressional testimony) (Smith “extrapolates” from the Dutch experience that if PAS were legalized in the United States there would be 170,000 instances of it each year, with 85,000 being involuntary).
7. Daniel C. Maguire, *supra* intro. n. 8, at 140–41.
8. Margaret F. Battin, “Is a Physician Ever Obligated to Help a Patient Die?” in “Regulating How We Die,” *supra* ch. 1 n. 7, at 19–34. Cf. Joel Feinberg, vol. 3: *The Moral Limits of the Criminal Law: Harm to Self* 34 (Oxford Univ. Press 1984–88).
9. Gerald Dworkin, R.G. Frey, and Sissela Bok, *supra* ch. 3 n. 25, at 45.
10. Daniel C. Maguire, *supra* intro. n. 8, at 88, 132; Leo Alexander, M.D., “Medical Science under Dictatorship,” in “Death-Dying,” *supra* ch. 1 n. 3, at 571; Wesley J. Smith, *supra* intro. n. 10, at 70; Ian Dowbiggin, *supra* intro. n. 10, at 62–66.
11. Wesley J. Smith, *supra* intro. n. 10, at 75 (350,000 people).
12. Wesley J. Smith, *supra* intro. n. 10, at *Id.* 78–79 (this eventually resulted in 275,000 deaths). See also Leo Alexander, M.D., “Medical Science under Dictatorship,” in “Death-Dying,” *supra* ch. 1 n. 3, at 574.
13. David C. Thomasama, “When Physicians Choose to Participate in the Death of Their Patients: Ethics and Physician Assisted Suicide,” 24 *Law, Med. & Ethics* 183, 191 (1996).
14. Wesley J. Smith, *supra* intro. n. 10, at 74.
15. *Id.*, at 7; Leo Alexander, M.D., “Medical Science under Dictatorship,” in “Death-Dying,” *supra* ch. 1 n. 3, at 571.
16. Fredric Wertham, M.D., “The Geranium in the Window: The ‘Euthanasia’ Murder,” in “Death-Dying,” *supra* ch. 1 n. 3, at 602. See also Wesley J. Smith, *supra* intro. n. 10, at 79.
17. Wesley J. Smith, *supra* intro. n. 10, at 78.
18. *Id.*, at 79.
19. Daniel C. Maguire, *supra* intro. n. 8, at 133; Robert I. Mishbin, *supra* intro. n. 5, at 18–19.
20. Karl Binding and Alfred Hoche, M.D., “Permitting Destruction of Life Not Worth of Life: Its Extent and Form” (Liepzig 1920), reprinted in 8 *Law & Med.* 23 (1992); Ian Dowbiggin, *A Concise History of Euthanasia* 77–80 (Rowman and Littlefield 2005) (author places Binding and Hoche in their historical con-

text); David C. Thomasama, *supra* n. 13, at 191; Wesley J. Smith, *supra* intro. n. 10, at 73.

21. *Buck v. Bell*, 274 U.S. 200 (1927); Wesley J. Smith, *supra* intro. n. 10, at 81.

22. Robert I. Mishbin, *supra* intro. n. 5, at 49.

23. Derek Humphrey and Mary Clement, *supra* intro. n. 4, at 21; Robert I. Mishbin, *supra* intro. n. 5, at 33. See also *The Reference Shelf: Suicide* 129 (Robert Emmett Long, ed., H.W. Wilson 1995) (doctors are revolted by death and leave it to nurses). In fact, it has only been since the beginning of the twentieth century that doctors could really heal. See Peter G. Filenes, *supra* intro. n. 1, at 20.

24. Derek Humphrey and Mary Clement, *supra* intro. n. 4, at 22; Robert I. Mishbin, *supra* intro. n. 5, at 92; Annette E. Clark, *supra* intro. n. 15, at 126; Herbert Hendin, “Selling Death and Dignity,” 25 *Hastings Center Report* 19, 23 (1995).

25. John Keown, *supra* ch. 1 n. 4, at 165.

26. Daniel Callahan, *supra* intro. n. 1, at 58, 72.

27. Linda L. Emanuel, “A Question of Balance,” in “Expanding the Debate,” *supra* intro. n. 8, at 256, 257; Peter E. Filenes, *supra* intro. n. 1, at 4; Ira R. Byock, “Physician-Assisted Suicide Is Not an Acceptable Practice for Physicians,” in “Physician Assisted Suicide,” *supra* intro. n. 11, at 109.

28. Susan M. Wolf, “Facing Assisted Suicide and Euthanasia in Children and Adolescents,” in “Expanding the Debate,” *supra* intro. n. 8, at 106–7; Annette E. Clark, *supra* intro. n. 15, at 88.

29. Annette E. Clark, *supra* intro. n. 15, at 88.

30. Nelson Lund, “Two Precipices, One Chasm: The Economics of Physician-Assisted Suicide and Euthanasia,” 24 *Hastings Const. Q.* 903, 909 (1997). See also Annette E. Clark, *supra* intro. n. 18, at 88.

31. Rein Janssen and Zbigniew Zylicz, “Articulating the Concept of Palliative Care: Philosophical and Theological Perspectives,” 15 *J. Palliative Care* 38, 38 (1999); Nelson Lund, *supra* n. 30, at 908.

32. Nelson Lund, *supra* n. 30, at 908.

33. Rein Janssen and Zbigniew Zylicz, *supra* n. 31, at 39; Michael J. Hyde, *The Call of Conscience: Heidegger and Levinas and the Euthanasia Debate* 128 (Univ. South Carolina Press 2001).

34. Robert I. Mishbin, *supra* intro. n. 5, at 33–34; David C. Thomasama, *supra* n. 13, at 193. But see Robert T. Hall, *supra* intro. n. 15, at 16 (patients are more likely to trust a doctor if they know that the doctor will stay to the end, help them die); “Euthanasia Wouldn’t Kill Patients’ Trust, Survey Says,” *Akron Beacon Journal* (Ohio) (Dec. 6, 2005) (in a survey by Wake Forest University researchers interviewees were asked if they agreed or disagreed with the statement “If doctors were allowed to help patients die, you would trust your doctor less.” Fifty-eight percent of the adults questioned disagreed with the statement.). The outcome of a patient survey may be different, however, in the managed care/HMO environment, where a patient may wonder whether a doctor’s suggestion of PAS is motivated by concern for the patient or for his or her employer’s bottom line. See Steve

P. Calandrillo, “Corralling Kevorkian: Regulating Physician-Assisted Suicide in America,” *Virg. J. Soc. Pol’y & L.* 41, 82 (1999).

35. Gary P. Stewart, ed., *Basic Questions on Suicide and Euthanasia: Are They Ever Right?* Bio Basics Series 61 (Kregel 1998) (patients indicated that they would lose trust if a doctor brought up PAS). But see Margaret P. Battin, “Is a Physician Ever Obligated to Help a Patient Die?” in “Regulating How We Die,” supra ch. 1 n. 7, at 40 (patients who believe that doctors will help them die tend to hold on to the end); and Paul Van Der Maas and Linda L. Emanuel, “Factual Findings,” in “Regulating How We Die,” supra ch. 1 n. 7, at 168 (most patients would not lose trust if they knew their doctor was involved in PAS or euthanasia).

36. “The possibility that persons may get comfort from having the medication (and never using it) should not be minimized. . . . In fact, this may be one of the most important findings from the Oregon experience and is consistent with the data showing that control is one of the key factors in why people want to use the Act.” Howard Weinberg and James L. Werth Jr., “Physician-Assisted Suicide in Oregon: What Are the Key Factors?” 27 *Death Studies* 501, 512–13 (2002). Cf. Linda Ganzini and Steven K. Dobscha, supra ch. 3 n. 29, at 120 (only one out of 100 patients who consider PAS die after ingesting a lethal prescription); Noelle Knox, “An Agonizing Debate over Euthanasia,” *USA Today* (Nov. 23, 2005) (“In Europe, Physicians and others have found that many people ask about euthanasia or assisted suicide but don’t pursue the option. The reason may be more effective pain medications and peace of mind that comes from knowing euthanasia is an option.”).

37. Nelson Lund, supra n. 30, at 530–31.

38. Yale Kamisar, supra ch. 1 n. 42, at 114.

39. Cicely Saunders, “A Hospice Perspective,” in “The Case against Assisted Suicide,” supra intro. n. 18, at 283; Richard Lamerton, M.D., “How Hospices Cope,” in “Death-Dying,” supra ch. 1 n. 3, at 550; Liezl van Zyl, supra intro. n. 18, at 198; Cicely Saunders, “The Philosophy of Terminal Care,” in *The Management of Terminal Malignant Disease* 232 (Cicely Saunders, ed., Edward Arnold 1978); Cicely Saunders, “Forward,” in *Oxford Textbook of Palliative Medicine* (C.D. Doyle, G.F.W. Hanks, and N. MacDonald, eds., Oxford Univ. Press 1998); “Palliative Medicine: A Time for Definition?” (editorial), 7 *Palliative Med.* 253 (1993).

40. Sanford Levinson, “Assisted Suicide Should Be Legalized,” in *Euthanasia: Contemporary Issues Companion* 69 (Linda Yount, ed., Greenhaven 2002); Harvey M. Chochinov and Leonard Schwartz, “Depression and the Will to Live in the Psychological Landscape of Terminally Ill Patients,” in “The Case against Assisted Suicide,” supra intro. n. 18, at 272, 275, 298–302; Daniel Callahan, supra intro. n. 1, at 100–101; Nathan I. Cherny and Russell K. Portenoy, “Sedation in the Management of Refractory Symptoms: Guidelines for Evaluation and Treatment,” 10 *J. Palliative Care* 31 (1994); Stacy Diloreto, “The Complexities of Assisted Suicide,” 34 *Patient Care* 65 (2000); Zbiginew Zylicz, “Ethical Considerations in the Treatment of Pain in a Hospice Setting,” 41 *Patient Educ. & Counseling* 47

(2000); Herbert Hendin, "Suicide, Assisted Suicide, and Mental Illness," 16 *Harv. Mental Health Letter* (Jan. 1, 2000).

41. David Orentlicher, *supra* ch. 1 n. 47, at 453–54.

42. "Introduction," in "Expanding the Debate," *supra* intro. n. 8, at 4; Margaret P. Battin, "Is a Physician Ever Obligated to Help a Patient Die?" in "Regulating How We Die," *supra* ch. 1 n. 7, at 24; Paul Van Der Maas, "Factual Findings," in "Regulating How We Die," *supra* ch. 1 n. 7, at 157 (10 percent of cancer patients are in "untreatable pain"); Derek Humphrey and Mary Clement, *supra* intro. n. 4, at 57 (10 percent of cancer patients in untreatable pain). But see Ira R. Byock, "Physician-Assisted Suicide Is Not an Acceptable Practice for Physicians," in "Physician-Assisted Suicide," *supra* intro. n. 11, at 115 (author cites authorities that some pain cannot be controlled but disagrees with these authorities, though recognizes that in the current reality pain is not controlled).

43. Presentation by Zbigniew Zylicz, "Ethical Issues in Pain Management in Hospice Care," in "Nijmegen Conference," *supra* intro. n. 1.

44. Forty-two percent of U.S. hospitals offer a formal pain management program, and 23 percent offer formal hospice programs. Debra M. Bryan, "It's My Body and I'll Die if I Want to: A Plan for Keeping Personal Autonomy from Spinning out of Control," 8 *J. Law & Med.* 45, 62; Margaret P. Battin, "Safe, Legal, Rare? Physician-Assisted Suicide and Cultural Change in the Future," in "Older Adults," *supra* ch. 3, n. 13 ". . . about 50% of dying hospitalized patients were reported to have experienced moderate to severe pain at least 50% of the time in their last three days of life"); *id.*, at 203, 204 n. 1. Most studies have failed to find a significant relationship between pain and requests for PAS. See Barry Rosenfeld, *supra* intro. n. 12, at 96, 98. However, this may be misleading:

Although a superficial reading of this literature might lead one to conclude that pain is not a significant predictor of interest in assisted suicide (because the two were significantly associated in only one of five published studies), several alternative explanations also exist. First, as noted earlier in this volume (chap. 4), there is ample reason to believe that pain would be more relevant as a predictor of interest in assisted suicide in some medically ill populations than in others. Pain may be a less salient factor in patients with HIV/AIDS, MS, or ALS, compared to patients with cancer. Thus, the failure to observe a relationship between pain and interest in assisted suicide might reflect the populations studied, not the importance of pain as a trigger. Only one of the studies described above focused squarely on cancer-related pain (M. Sullivan et al., 1997), although most of the patients studied by E.J. Emanuel et al. (2000) also had a primary diagnosis of cancer. Thus, in both studies of cancer patients, some relationship between pain (either expectancies or severity) has been noted, and the strongest relationship by far was observed in Emanuel et al.'s much larger, and far more methodologically sound study. (*Id.*, at 98–99)

45. Kathleen Foley, M.D., "Compassionate Care, Not Assisted Suicide," in "The Case against Assisted Suicide," supra intro. n. 18, at 298-99; Kristi L. Kirschner, Carrol J. Gill, and Christine K. Cassel, "Physician-Assisted Death in the Context of Disability," in "Physician-Assisted Suicide," supra intro. n. 11, at 154; Peter G. Filenes, supra intro. n. 1, at 216; Annette E. Clark, supra intro. n. 15, at 105, 131, 134; Stuart Coates, "Spiritual Components in Palliative Care," 2 *European J. Palliative Care* 37 (spring 1995).

46. Derek Humphrey and Mary Clement, supra intro. n. 4, at 63; Liezl van Zyl, supra intro. n. 18, at 33; Annette E. Clark, supra intro. n. 15, at 105. But see lawsuits in civil cases for not relieving pain. Liezl van Zyl, supra intro. n. 18, at 184; Anne Helm, "Voluntary Euthanasia: An International Perspective," 17 *Law/Tech-nology* 300, 302 (1984).

47. Derek Humphrey and Mary Clement, supra intro. n. 4, at 63 (fear of prosecution); Kathleen Foley, M.D., "Compassionate Care, Not Assisted Suicide," in "The Case against Assisted Suicide," supra intro. n. 18, at 304 (fear of a Drug Enforcement Administration investigation and license revocation). See, also Professor Sandra Johnson, Saint Louis School of Law, "End of Life Decisions," speech delivered at the Seattle University School of Law, Seattle, Washington (Oct. 7, 2002).

48. Gerald Dworkin, R.G. Frey, and Sissela Bok, supra ch. 3 n. 25, at 118-20 (discusses a 1994 study that concluded that palliative care in American hospitals was deplorable). Cf. also, regarding similar problems in Canada, Harvey Max Chochinov, M.D., and Keith G. Wilson, Ph.D., "The Euthanasia Debate: Attitudes, Practices, and Psychiatric Considerations," 40 *Can. J. Psychiatry* 593, 597 (1995) (a significant percentage of patients die in unnecessary pain).

49. Derek Humphrey and Mary Clement, supra intro. n. 3, at 63-65; Anne Helm, supra n. 46, at 302.

50. Derek Humphrey and Mary Clement, supra intro. n. 4, at 65.

51. Kathleen Foley and Herbert Hendin, "Conclusion: Changing the Culture," in "The Case against Assisted Suicide," supra intro. n. 18, at 328-32; C.D. Doyle, G.F.W. Hanks, and N. MacDonald, "Introduction," in *The Oxford Textbook of Palliative Medicine* (C.D. Doyle, G.F.W. Hanks, and N. MacDonald, eds., Oxford Univ. Press 1998). But cf. Annette E. Clark, supra intro. n. 15, at 120-22 (even after intensive training, only one-third of hospital staff accessed advance directives in patient's files).

52. Robert G. Twycross, "Where There Is Hope, There Is Life: A View from Hospice," in "Euthanasia Examined," supra intro. n. 2, at 141, 165; Howard Brody, "Assisting in Patient Suicides Is an Acceptable Practice for Physicians," in "Physician-Assisted Suicide," supra intro. n. 11, at 138; Paul Van Deer Mass and Linda L. Emanuel, in "Regulating How We Die," supra ch. 1 n. 7, at 156; Liezl van Zyl, supra intro. n. 18, at 146.

53. Michael M. Burgess, "The Medicalization of Dying," in "Legal Euthanasia: Ethical Issues in an Era of Legalized Dying," 18 *J. Med. & Phil.* 269 (1993)

(Margaret P. Battin and Thomas J. Boyle III, issue eds.); Kathleen Foley and Herbert Hendin, “Conclusion: Changing the Culture,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 311.

54. Ezekiel J. Emanuel, Diane Fairclough, Brian C. Claridge, Diane Blum, Eduardo Bruera, W. Charles Penley, Lowell E. Schnipper, and Robert J. Mayer, “Attitudes and Practices of U.S. Oncologists regarding Euthanasia and Physician-Assisted Suicide,” 133 *Annals of Internal Med.* 527 (October 2000); Harvey Max Chochinov, M.D., and Keith G. Wilson, Ph.D., *supra* ch. 3 n. 15, at 595.

55. Noelle Knox, *supra* note 36 (“Kimsa, the family doctor in the Netherlands who has helped people end their lives, said he found the experience ‘shattering’”); Steven K. Dobscha, M.D., Ronald T. Heinz, M.D., Nancy Press, Ph.D., and Linda Ganzini, M.D., M.P.H., “Oregon Physicians’ Responses to Requests for Assisted Suicide: A Qualitative Study,” 7 *J. Palliative Med.* 451, 453–54 (2004) (“Requests for assisted suicide carried both apprehension and discomfort”). Yet, “[d]espite discomfort at many levels, physicians reported that going through the assisted suicide decision making process had a positive impact on them personally, and on their ability to speak with patients about the end of life” (id., at 459).

56. Paul Starr, *The Social Transformation of American Medicine: The Rise of a Sovereign Profession and the Making of a Vast Industry* 420, 420 (Basic Books 1982); Gerald Dworkin, R.G. Frey, and Sissela Bok, *supra* ch. 3 n. 25, at 126–27; Richard A. McCormick, *supra* ch. 3 n. 31, at 11; Nelson Lund, *supra* ch. 4 n. 30; Mary Clement and Derek Humphrey, “High Cost of Dying,” *supra* intro. n. 3, at 27.

57. Mary Clement and Derek Humphrey, *supra* n. 56, “High Cost of Dying,” *supra* intro. n. 3, at 38; Margaret Somerville, *supra* ch. 1 n. 10, at 233.

58. Mary Clement and Derek Humphrey, “High Cost of Dying,” *supra* intro. n. 3, at 9–10.

59. Noelle Knox, *supra* n. 36 (“As members of the baby boom generation age, their increasing frailty will strain health care and welfare systems, not to mention their families”).

60. Beth Spring and Ed Laron, *Euthanasia: Spiritual, Medical, and Legal Lessons in Terminal Health Care* 23 (Multnomah 1988). We spend three and a half times more on their health care than the remainder of the population. See *The Reference Shelf: Suicide* 95 (Robert Emmet Long, ed., H.W. Wilson 1995).

61. Merrill Matthews Jr., “Would Physician-Assisted Suicide Save the Healthcare System Money (or Is Jack Kevoorkian Doing All of Us a Favor)?” in “Expanding the Debate,” *supra* intro. n. 8, at 315; Mary Clement and Derek Humphrey, “High Cost of Dying,” *supra* intro. n. 3, at 7.

62. “Thus, when one couples America’s aging population with the fact that Medicare enrollment in managed care organizations is rapidly rising, a conflict is brewing that will directly determine the amount of (and whether) care will be given to chronically ill, elderly patients in the future. This problem is particularly acute given that 40 percent of total Medicare expenditures come in the last few months of life, making it fertile area in which HMO’s will try desperately to slash

costs, perhaps even encouraging P.A.S. to inappropriate candidates.” Steve P. Calandrillo, *supra* n. 34, at 74 [nn. omitted]).

63. Wesley J. Smith, *supra* intro. n. 8, at 141, 147-48; John Keown, *supra* ch. 1 n. 4, at 275-76; Paul Starr, *supra* n. 56, at 447-48 (doctors are losing their “professional autonomy” and becoming tied to “profit centers”). Cf. *id.*, at 448 (77 percent of nursing homes are proprietary). But see those contending that, in fact, the cost savings from PAS for hospitals and nursing homes would be far less than people believe. “Notes,” in “Regulating How We Die,” *supra* ch. 1 n. 7, at 266, note 9; Paul Starr, *supra* n. 56, at 171 (less aggressive life sustaining would only save 3.3 percent of the health care budget); Felicia Cohn and Joanne Lynn, “Vulnerable People: Practical Rejoinders to Claims in Favor of Assisted Suicide,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 240; Merrill Matthews Jr., “Would Physician-Assisted Suicide Save the Healthcare System Money? (or, is Jack Kevoorkian doing us all a favor),” in “Expanding the Debate,” *supra* intro. n. 8, at 320-21.

64. Steve P. Calandrillo, *supra* n. 34, at 44 (“HMOs know all too well that elderly and terminally ill patients run up huge medical bills in their last months of life [40 percent of Medicare expenditures are made in the last year of life], and it is not unimaginable that PAS—in the absence of regulation—will be introduced as one very haunting method to control those costs”); *id.*, at 73-74, 75 (“Put simply, managed care organizations have a direct financial incentive to limit care and control costs because every dollar patients pay into the plan that is not spent on care [or on administrative costs] remains in the plan’s coffers”). See also Steve Zanskas and Wendy Coduti, *supra* intro. n. 5, at 31-32 (authors discuss PAS and the economics of managed care). One gets little solace from the revelation that an organization that supports Kaiser Permanente and lobbies for “groups practicing in the managed care model” have strongly advocated to the California legislature in support of passing an assisted suicide bill. See “Flashback 2002; Kaiser Shops for Doctors Willing to Prescribe Assisted Suicide Drugs in Oregon,” *Obesity, Fitness and Wellness Week* (April 14, 2007).

65. See Herbert Hendin, *supra* n. 24, at 19; Dr. Timothy E. Quill, M.D., *supra* ch. 4 n. 1, at 122-24; David Rieff, “Illness as More than Metaphor,” *New York Times*, *supra* ch. 1, n. 32 (“... the doctor’s power to influence those [terminal] patients, one way or the other, is virtually complete.”); Steve P. Calandrillo, *supra* n. 34, at 83 (“There is abundant empirical evidence indicating that physicians exert a great deal of control over the ‘independent’ choices of their patients merely by presenting them with information and suggestions”).

66. Dieter Giesen, “Dilemmas at Life’s End: A Comparative Legal Perspective,” in “Euthanasia Examined,” *supra* intro. n. 2, at 212; Paul Starr, *supra* n. 56, at 378; Margaret Somerville, *supra* ch. 1 n. 10, at 13; Nelson Lund, *supra* n. 30, at 939-40; Sheryl A. Russ, “Care of the Older Person: The Ethical Challenge of American Medicine,” 4 *Issues in Law & Med.* 87, 88 (1988).

67. See *supra* intro. n. 28. See also Yale Kamisar, *supra* ch. 1 n. 42, at 125.

68. Gerald Dworkin, R.G. Frey, and Sissela Bok, *supra* ch. 3, n. 25, at 57. Cf. Robert S. Magnusson and Peter H. Ballis, *Angels of Death: Exploring the Euthanasia Underground* (Yale Univ. Press 2002).

69. The *Leeowarden* (1973) case. For a very detailed, case by case discussion of the series of Dutch court cases involving euthanasia, see Raphael Cohen-Almager, *Euthanasia in the Netherlands: The Policy and Practice of Mercy Killing* 39–49 (Kluwer Academic 2004). See also Wesley J. Smith, *supra* intro. n. 10, at 95; and Julia Belian, “Deference to Doctors in Dutch Euthanasia Law,” 10 *Emory Int’l L.J.* 255, 262 (1996). For a novel that portrays the Dutch system gone mad, see Ian McEwan, *Amsterdam* (Anchor 1999).

70. Julia Belian, *supra* n. 69, at 259.

71. Wesley J. Smith, *supra* intro. n. 10, at 95; John Keown, “Some Reflections on Euthanasia in the Netherlands,” in “Clinical Practice,” *supra* ch. 1 n. 3, at 211 (author questions leaving legal decision to the standards of practice of the medical profession); Julia Belian, *supra* n. 69, at 262.

72. Wesley J. Smith, *supra* intro. n. 10, at 95.

73. Carlos F. Gomez, M.D., *Regulating Death: Euthanasia and the Case of the Netherlands* 37–38 (Free Press 1991); B. Sluyters, “Euthanasia in the Netherlands,” 57 *Medico-Legal J.* 34 (1988).

74. Bert Gordian, “New Developments in Dutch Legislation concerning Euthanasia and Physician Assisted Suicide,” 26 *J. Med. & Phil.* 299, 300 (2000) [hereinafter “New Developments”]; Julia Belian, *supra* n. 69, at 265–69.

75. Lisl van Zyl, *supra* intro. n. 18, at 51–52; John A. Robertson, “Involuntary Euthanasia of Defective Newborns: A Legal Analysis,” in “Death-Dying,” *supra* ch. 1 n. 3, at 165; Joshua Dressler, *supra* ch. 1 n. 14, at § 22.01, p. 261.

76. Julia Belian, *supra* n. 69, at 265–69.

77. Wesley J. Smith, *supra* intro. n. 10, at 96.

78. Julia Belian, *supra* n. 69, at 255.

79. *Id.*

80. See Raphael Cohen-Almager, *supra* n. 69, at 58.

81. Bert Gordijn, “Regulating Moral Dissent in an Open Society: The Dutch Experience with Pragmatic Tolerance,” 26 *J. Med. & Phil.* 225, 230 (2001) [hereinafter “Pragmatic Tolerance”]. See also Herbert Hendin, “The Dutch Experience,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 98; and Robert I. Mishbin, *supra* intro. n. 5, at 183, 187.

82. Bert Gordijn, “Pragmatic Tolerance,” *supra* n. 81, at 229.

83. *Id.*, at 232 (concept arose in the sixteenth century); Herbert Hendin, M.D., *Seduced by Death: Doctors, Patients, and Assisted Suicide* 163 (Norton 1998) [hereinafter “Seduced by Death”].

84. Bert Gordijn, “Pragmatic Tolerance,” *supra* n. 81, at 232; Herbert Hendin, “The Dutch Experience,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 97.

85. Kenneth Culp Davis, *Police Discretion* (West 1975).

86. John Keown, “Further Reflections on Euthanasia in the Netherlands in Light of the Rummelink Report and the Van Der Maas Survey,” in “Clinical Practice,” *supra* ch. 1 n. 3, at 219, 236.

87. Carlos F. Gomez, M.D., *supra* n. 73, at 122; John Keown, *supra* ch. 1 n. 4, at 132.

88. David C. Thomasama, Thomasine Kimborough-Kushner, Gerrit K. Kimsma, and Chris Ciesielski-Carlucci “Part II: Living with Euthanasia: Physicians and Families Speak for Themselves,” in *Asking to Die: Inside the Dutch Debate about Euthanasia*, 275 (Kluwer Academic 1998) [hereinafter “Asking to Die”]; John Keown, *supra* ch. 1 n. 4, at 132. Half of Dutch doctors do not report because it is “too much trouble.” See Keith B. Richburg, “Netherlands Struggling with Right to Die Law: In the First Nation to Legalize Euthanasia Some Applaud Death with Dignity, Others Are Dubious,” *Chicago Tribune* (Jan. 18, 2004); Tony Sheldon, “Only Half of Dutch Doctors Report Euthanasia, Study Says,” <http://bmjournals.com/cgi/content/full/326/7400/1164?etoc> (May 31, 2003). On the other hand, there is a noted increase in the percentage of general practitioners [GPs] reporting. See *id.* (level of GPs reporting increased from 44 to 60 percent).

89. See David C. Thomasama et al., “Asking to Die,” *supra* n. 88, at 275, 290. Cf. also *id.*, at 317 (author discusses those working in a hospital that does not approve of VAE); John Keown, *supra* ch. 1 n. 4, at 132. Cf. Jurgen Woretschafer and Matthias Borgers, “The Dutch Procedure for Mercy Killing and Assisted Suicide by Physicians in a National and International Perspective,” 2 *Maastricht J. European and Compar. Law* 4, 17 (1995) (authors discuss the international law analogue to our Fifth Amendment, *nemo tenetur*).

90. Julia Belian, *supra* n. 69, at 278–79 (e.g., five-month suspended sentence and such).

91. John Keown, *supra* ch. 1 n. 4, at 133.

92. *Id.*, at 85.

93. *Id.*, at 85–86; Bert Gordijn, “New Developments,” *supra* n. 74, at 302, 303.

94. Carlos F. Gomez, M.D., *supra* n. 73, at 117 (2 percent, 2 to 4 percent, 6 percent).

95. *Id.*, at 130.

96. John Keown, *supra* ch. 1 n. 4, at 144.

97. Bert Gordijn, “New Developments,” *supra* n. 74, at 306–7.

98. *Id.*, at 303.

99. *Id.*, at 305.

100. Carlos F. Gomez, M.D., *supra* n. 73, at 96.

101. *Id.*, at 130; Herbert Hendin, M.D., “Seduced by Death,” *supra* n. 83, at 136; John Keown, *supra* ch. 1 n. 4, at 83; Wesley J. Smith, *supra* intro. n. 10, at 83.

102. John Keown, *supra* ch. 1 n. 4, at 83.

103. Herbert Hendin, M.D., “Seduced by Death,” *supra* n. 83, at 214.

104. John Keown, *supra* ch. 1 n. 4, at 109; Robert I. Mishbin, *supra* intro. n. 5, at 72–73; Julia Belian, *supra* n. 69, at 297 (discusses Dr. Chabot). But see Stephanie van den Berg, “Dutch Supreme Court Rules against Widening Euthanasia Guidelines,” *Agence-France Presse* (Dec. 4, 2003) (Dutch Supreme Court upheld the conviction of a doctor who euthanized a healthy 86-year-old

patient solely because patient was “sick of living”); Raphael Cohen-Almager, *supra* n. 69, at 167.

105. John Keown, *supra* ch. 1 n. 4, at 85, 88–89.

106. *Id.*

107. Herbert Hendin, M.D., “Seduced by Death,” *supra* n. 83, at 162. But cf. Johanna H. Groenewould et al., “Physician Assisted Death in Psychiatric Practice in the Netherlands,” 336 *New Engl. J. Med.* 1795 (1997) (psychiatrists get many requests for AVE, but “very few” are granted).

108. John Keown, *supra* ch. 1 n. 4, at 91, 125.

109. Herbert Hendin, “The Dutch Experience,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 103; Wesley J. Smith, *supra* intro. n. 10, at 101.

110. Herbert Hendin, “The Dutch Experience,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 103. When physicians report VAE, 99 percent of the doctors reporting say that they have engaged in consultation; among those not reporting, only 18 percent consult with another doctor. John Keown, *supra* ch. 1 n. 4, at 132. Moreover, when death is the result of nonvoluntary active euthanasia (NVAE), 97 percent do not consult with another doctor. Herbert Hendin, “The Dutch Experience,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 103; John Keown, *supra* ch. 1 n. 4, at 132.

111. Herbert Hendin, “The Dutch Experience,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 111.

112. John Keown, *supra* ch. 1 n. 4, at 87.

113. Bregje D. Onwutteaka-Philipsen and Gerrit Van der Wal, “A Protocol for Consultation of Another Physician in Cases of Euthanasia and Assisted Suicide,” 275 *Med. Ethics* 331 (2001).

114. See Raphael Cohen-Almager, *supra* n. 69, at 170.

115. Herbert Hendin “The Dutch Experience,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 102; Rein J.P.A. Janssen, Henk A.M.J. Tenhave, and Zbigniew Zylicz, “Hospice and Euthanasia in the Netherlands: An Ethical Point of View,” 25 *J. Med. Ethics* 408, 408 (1999) (in the mid-1990s palliative care in the Netherlands was “in its infancy”).

116. Herbert Hendin, “The Dutch Experience” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 121 (“... the Dutch experience suggests that engaging physicians in palliative care is much harder when the easier option of euthanasia is available. . .”).

117. Bert Gordijn and Rein Janssen, “The Prevention of Euthanasia through Palliative Care: New Developments in the Netherlands,” 41 *Patient Educ. & Counseling* 35, 38 (2000); Bert Gordijn and Adraan Visser, “Issues in Dutch Palliative Care: Readjusting a Distorted Image,” 41 *Patient Educ. & Counseling* 3 (2000).

118. Bert Gordijn and Rein Janssen, *supra* n. 117, at 38.

119. Herbert Hendin, “The Dutch Experience,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 120–21. Cf., for example, E.P. Tross, “Too Big for Their Wooden Shoes,” 27 *Human Life Rev.* 53 (2002) (formerly pro-euthanasia physicians said in an interview that if they had been familiar with palliative care they would not have killed some of the patients they euthanized).

120. Herbert Hendin, “The Dutch Experience,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 120–21. Still, the critics do not believe the care is good at this point of time. See *id.*, at 123, 143; and John Keown, *supra* ch. 1 n. 4, at 112, 141.

121. Robert I. Mishbin, *supra* intro. n. 5, at 62; John Keown, *supra* ch. 1 n. 5, at 112 (the commission characterized this large-scale NVAE as “care for the dying”).

122. Robert I. Mishbin, *supra* ch. 1 n. 5, at 62. Yet it is common for the seriously ill to ask for VAE one day and wish to live the next. Herbert Hendin, M.D., “Seduced by Death,” *supra* n. 83, at 34–36, 159. See also Margaret Sommerville, *supra* ch. 1 n. 10, at 123 (even if patients say they want to die, that does not mean they are asking to be killed).

123. Robert I. Mishbin, *supra* intro. n. 5, at 62.

124. David C. Thomasama et al., “Asking to Die,” *supra* n. 88, at 13.

125. John Keown, *supra* ch. 1 n. 4, at 105.

126. Herbert Hendin, M.D., “Seduced by Death,” *supra* n. 83, at 95.

127. David C. Thomasama et al., “Asking to Die,” *supra* n. 88, at 13.

128. *Id.* (87 percent); Robert I. Mishbin, *supra* intro. n. 5, at 62 (70 percent).

129. Robert I. Mishbin, *supra* intro. n. 5, at 62; John Keown, *supra* ch. 1 n. 4, at 105.

130. John Keown, *supra* ch. 1 n. 4, at 105.

131. *Id.*, at 126. See, generally, Liezl van Zyl, *supra* intro. n. 18, at 60 (the practice of NVAE may be more widespread than believed since the society as a whole is valued over the individual).

132. John Keown, *supra* ch. 1 n. 4, at 96.

133. *Id.*, at 96, 97–98, 106. A total of 6,250 were given drugs with the partial intent of causing death, 5,000 without a specific patient request. *Id.*, at 96, 97–98.

134. *Id.*, at 126.

135. David C. Thomasama, *supra* ch. 4, n. 13, at 185. Note that in the United States, in cases in which life-sustaining treatment was withdrawn, 35 percent was without the patient’s consent. Annette E. Clarke, *supra* intro. n. 15, at 119.

136. Helga Kubse, “Killing a Poor Philosophical Argument against Euthanasia,” *Aust. Finan. Rev.* 16 (Mar. 28, 1995). See also Peter Singer, *supra* ch. 1 n. 7, at 153; and David C. Thomasama et al., “Asking to Die,” *supra* n. 88, at 58 (no evidence that NVAE is on the rise). But see John Keown, “Euthanasia in the Netherlands: Sliding down the Slippery Slope?” in “Euthanasia Examined,” *supra* intro. n. 2, at 287 (even without pre-1990 data, the Dutch experience supports the slippery slope argument). In fact, according to a more recent article, the number of

those euthanized has decreased. “Number of Declared Euthanasia Cases in Netherlands Declining,” *Agence-France Presse* (Apr. 29, 2003).

137. “Nearly two years after the Netherlands became the first country to legalize euthanasia and doctor-assisted suicide, an estimated 2,000–3,000 lives end that way there each year. . . . There is some dispute about the number of mercy killings performed in the Netherlands, but both sides agree there has been no surge in reported cases since the law took effect in April 2002.” Keith B. Richburg, *supra* n. 88.

138. John Keown, *supra* ch. 1 n. 4, at 79 (author discusses the expansion of the concept of “unbearable suffering”).

139. See Raphael Cohen-Almager, *supra* n. 69, at xii, 103 et seq.

140. Sixty-six percent of those living independently were opposed to legalizing euthanasia. Cynthia M. Bumgardener, “Euthanasia and Physician-Assisted Suicide in the United States and the Netherlands: Paradigms Compared,” 10 *Ind. Int’l & Comparative L. Rev.* 387, 415 (2000). Ninety-five percent of those living in nursing homes were opposed. *Id.* Fifty to 60 percent of seniors in another survey indicated that they feared involuntary euthanasia. Julie A. Di Camillo, “A Comprehensive Analysis of the Right to Die in the Netherlands and the United States after Cruzan: Reassessing the Right of Self-Determination,” 7 *Am. U.J. Int’l Law & Policy* 807, 819–20 (1992). In a general medical survey, 10 percent gratuitously added that they feared being involuntarily killed. “Euthanasia in the Netherlands,” *International Anti-Euthanasia Task Force* 4 (2000).

141. Robert I. Mishbin, *supra* intro. n. 5, at 102.

142. Wesley J. Smith, *supra* intro. n. 10, at 94; Peter Singer, *supra* ch. 1 n. 7, at 158; Robert I. Mishbin, *supra* intro. n. 5, at 97; Ute Angelique Joas, “Physician-Assisted Lethal Injection versus the Plastic Bag: Will Euthanasia Ever Come? A Comparison of Standards in the Netherlands and the United States,” 6 *Temple Int’l & Comparative L. J.* 365, 387 (1992). But see David C. Thomasama et al., “Asking to Die,” *supra* n. 88, at 502 (the tradition that everyone has a family doctor is changing as the Dutch population becomes increasingly transient).

143. Liezl van Zyl, *supra* intro. n. 18, at 107.

144. Wesley J. Smith, *supra* intro. n. 10, at 93; Peter Singer, *supra* ch. 1 n. 7, at 158; Robert I. Mishbin, *supra* intro. n. 5, at 99; David C. Thomasama et al., “Asking to Die,” *supra* n. 88, at 319, 503.

145. Wesley J. Smith, *supra* intro. n. 10, at 109.

146. David C. Thomasama et al., “Asking to Die,” *supra* n. 88, at 319, 503.

147. Carlos F. Gomez, M.D., *supra* n. 73, at 21.

148. Herbert Hendin, M.D., “Why the Netherlands? Why the United States,” in “Seduced by Death,” *supra* ch. 4 n. 83, at 163, 171 (“The common [Dutch] attitude was that the doctor may have been mistaken, but that he was entitled to his judgment on the matter. . . . [This is] consistent with . . . the Dutch lack of moral passion and unwillingness to assign individual responsibility.”).

149. John Keown, *supra* ch. 1 n. 4, at 167.

150. *Id.*; Wesley J. Smith, *supra* intro. n. 10, at 117.
151. *Lee v. Oregon*, 107 F.3d 1382 (9 Cir., 1997); Annette E. Clark, *supra* intro. n. 15, at 61; Wesley J. Smith, *supra* intro. n. 10, at 126.
152. Derek Humphrey and Mary Clement, *supra* intro. n. 4, at 274.
153. *Id.*, at 294. With this perspective, the attempt of U.S. Attorney General Ashcroft to undermine the act by taking away the ability of Oregon doctors to use any federally controlled drug to conduct euthanasia is ironic. See Nelson Lund, “Why Ashcroft Is Wrong on Assisted Suicide,” 113 *Commentary* 50 (2002).
154. John Keown, *supra* ch. 1 n. 4, at 176, 172, 179.
155. *Id.*, at 176 (for 1998), 177 (for 1999), 179 (for 2000).
156. *New York Times* (Mar. 6, 2003).
157. The number of suicides was 46 in 2006 (Steve Geissinger, “To the North, Euthanasia Up,” *Oakland Tribune*, local section [March 9, 2007]), 42 in 2003, 30 in 2002, 21 in 2001, 27 in 2000, 27 in 1999, and 16 in 1998. “Assisted-Suicide Numbers Increase,” *Statesman Journal* (Mar. 10, 2004). Interestingly, while it is estimated that nationally 1 in 250 deaths is really disguised PAS, in Oregon all evidence indicates that the death by PAS rate is far lower—1 in 1,000. Linda Ganzini and Steven K. Dobscha, *supra* ch. 3 n. 29, at 121. In fact, “a very small percentage of terminally ill Oregonians seem determined to request lethal medication.” Howard Wineberg and James L. Weith Jr., “Physician-Assisted Suicide in Oregon: What Are the Key Factors?” 27 *Death Studies* 501, 501 (2003). This is consistent with national data indicating that “Only a small minority of terminally ill people seek to hasten their own deaths.” “Few Ponder Euthanasia, Study Says,” *Globe and Mail* (Toronto) (Nov. 15, 2000), A-19. See also Robyn Leigh and Brian Kelly, “Family Factors in the Wish to Hasten Death and Euthanasia,” in “Older Adults,” *supra* n. ch. 3 n 13, at 185; (“[T]he over whelming majority of terminally ill patients fight for life to the end and only 2–4 percent of suicides occur in the setting of terminal illness”).
158. John Keown, *supra* ch. 1 n. 4, at 177.
159. There were 69 in 1998 and 71 in 2000. *Id.*, at 176–77.
160. Linda Ganzini, Heidi D. Nelson, Terri A. Schmidt, Dale F. Kraemer, and Molly A. Delorist, “Physicians’ Experiences with the Oregon Death with Dignity Act,” 342 *New Engl. J. Med.* 557, 563 (2000).
161. “People Requesting Assisted Suicide Reportedly Do So to Keep Control,” *Oregonian* (Aug. 22, 2003) [hereinafter “Oregon Hospice”]; Linda Ganzini, Heidi D. Nelson, Melinda A. Lee, Dale F. Kraemer, Terri A. Schmidt, and Molly Delorist, “Oregon Physicians’ Attitudes about the Experience with Dignity Act,” 18 *JAMA* 2363, 2363 [hereinafter “Attitudes about Dignity Act”].
162. “Oregon Hospice,” *supra* n. 161; Kathleen Foley and Herbert Hendin, “The Oregon Experiment,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 171.
163. Linda Ganzini et al., “Attitudes about Dignity Act,” *supra* n. 161, at 2363.
164. Timothy E. Quill, “Kevorkian: Hero, Villain, or Somewhere in Between?” in *Euthanasia: Contemporary Issues Companion* 61 (Lisa Yount, ed., Greenhaven 2002).

165. Barry Rosenfeld, *supra* intro. n. 12, at 159 (“ . . . a referral for more adequate palliative care was the most common physician response to requests for lethal medications . . .”). Cf. Howard Weinberg and James L. Werth Jr., *supra* ch. 4 n. 36, at 511 (“Oregonians do not appear to be taking medications to end their lives because of lack of end-of-life care, given that 80% of those using PAS were enrolled in hospice with the other 20% declining hospice”); Pamela J. Miller, “Life after Death with Dignity: The Oregon Experience,” 45 *Social Work* 263, 268 (2000) (“Oregon has the lowest in-hospital mortality rate in the country, admission rates into hospice have increased 20 percent, and the use of medical morphine has increased 70 percent. Oregon has developed comfort care teams that specifically address pain management.”).

166. “Oregon Hospice,” *supra* n. 161.

167. John Keown, *supra* ch. 1 n. 4, at 178; “Oregon’s Death with Dignity Act: Three Years of Legalized Physician-Assisted Suicide,” report, Department of Human Services, Oregon Health Division, Center for Disease Prevention and Epidemiology 12, 13 (Feb. 22, 2001).

168. John Keown, *supra* ch. 1 n. 4, at 176, 178, 179. Cf. Bert Gordijn, “New Developments,” *supra* ch. 4 n. 74, at 40 (for those seeking euthanasia in the Netherlands, pain is not the most important reason).

169. John Keown, *supra* ch. 1 n. 4, at 172; Daniel Callahan and Margot White, “The Legalization of Physician Assisted Suicide: Creating a Regulatory Potemkin Village,” 30 *U. Richmond L. Rev.* 1, 44 (1996).

170. John Keown, *supra* ch. 1 n. 4, at 72. Cf. Yale Kamisar, “The ‘Right to Die’: On Drawing (and Erasing) Lines,” 35 *Duq. L. Rev.* 418, 504 (1996).

171. John Keown, *supra* ch. 1 n. 4, at 171.

172. *Id.*, at 172; Kathleen Foley and Herbert Hendin, “The Oregon Experiment,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 145; *id.*, at 166 (anonymous study found that 43 percent of those requesting PAS were in pain).

173. John Keown, *supra* ch. 1 n. 4, at 191–96.

174. *Id.*, at 172, 175.

175. Kathleen Foley and Herbert Hendin, “The Oregon Experiment,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 150.

176. John Keown, *supra* ch. 1 n. 4, at 172, 175.

177. *Id.*, at 175; Linda Mancini, Darrin S. Fenn, Melinda A. Lee, Robert Heinz, and Joseph D. Bloom, “Attitudes of Oregon Psychiatrists towards Physician-Assisted Suicide,” 153 *Am. J. Psych.* 1469, 1469 (1996).

178. Tony D. Pasquale and John P. Gluck, *supra* intro. n. 16, at 504.

179. John Keown, *supra* ch. 1 n. 4, at 175. See also Kathleen Foley and Herbert Hendin, “The Oregon Experiment,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 151 (60 percent were depressed).

180. “The Case against Assisted Suicide,” *supra* intro. n. 18, at 145, 172. In 2005, only two of 38 patients who ended their lives through PAS had a “psychiatric referral.” “Physicians for Compassionate Care Analyzes Oregon’s Assisted

Suicide Law: The ‘Medical Killing’ of Vulnerable Patients Continues,” 33 *Right to Life News* (Apr. 1, 2006).

181. Kathleen Foley and Herbert Hendin, “The Oregon Experiment,” in “The Case against Assisted Suicide,” *supra* intro. n. 8, at 166.

182. John Keown, *supra* ch. 1 n. 4, at 177.

183. *Id.*, at 179.

184. Steven White, “Euthanasia Jurisprudence and Physician-Assisted Suicide: What Did *Glucksberg* Teach Us?” 75 *J. Ala. Acad. Sci.* 214, 222, (2004) (“No law can be ‘abuse proofed.’ But no abuses of the Oregon law have been reported since its activation in 1997.”); Linda Ganzini and Steven K. Dobscha, *supra* ch. 3 n. 29, at 121 (“Whatever the reason, these data do not support a slippery slope of increasing death-hastening acts—within or outside the law”); Barry Rosenfeld, *supra* intro. n. 12, at 154 (“Hence, most commentators have continued to suggest that [the Oregon act] has been utilized in an appropriate and thoughtful manner, without evidence of either abuse or misuse, and that fears of a growing reliance on assisted suicide over time have simply not been realized this far [n. omitted]”); B. Steinbeck, “The Case for Physician Assisted Suicide: Not (Yet) Proven,” 31 *J. Med. Ethics* 235 (2005) (“. . . fears that legalizing PAS [by means of the Oregon law] might lead to overuse do not seem to have been realized”). Nonetheless, anti-PAS constituencies point to two cases in which they claim the standards of the act were clearly violated. B. Steinbeck, *supra*, at 42–43; N. Gregory Hamilton, M.D., and Catherine A. Hamilton, M.A., *supra* ch. 3 n. 18, at 1061–62. However, in each of these cases, “there are two ways to see the story” (B. Steinbeck, *supra*, at 39), one of which supports the pro-PAS position that the safeguards of the act are working as envisioned. *Id.*, at 39–40.

In fact, in criticizing the Dutch guidelines as inadequate, the author of an extensive study of the Dutch practice repeatedly cited to various sections of the Oregon guidelines as examples of appropriate guidelines, contrasting the Oregon regime with that of the Dutch. Raphael Cohen-Almager, *supra* ch. 4 n. 69, at 181, 182, 184, 185.

185. Michael Manning, M.D., *supra* intro. n. 6, at 47.

186. *In re Dinnerstein*, 6 Mass. App. 466, 380 NE2d. 134 (1978); *Superintendent of Bekhartown State School et al. v. Saikiewitz*, 373 Mass. 728, 370 NE2d. 412 (1977).

187. *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985); William F. May, Ph.D., “Ethical Considerations in Life and Death Decisions,” in *Life and Death Issues* 62 (James E. Hammer III, D.D.S., Ph.D., and Barbara J. Sax Jacobs, J.D., eds., Univ. of Tenn. 1986); George J. Annas, “The Right to Die in America: Sloganeering from Quintin and Cruzan to Quill and Kevorkian,” 34 *Duq. L. Rev.* 875, 883 (1986); Yale Kamisar, “When Is There a Constitutional Right to Die? When Is There a Constitutional Right to Live?” 25 *Ga. L. Rev.* 1139, 1222 (1991). But see Beth Spring and Ed Laron, *supra* ch. 2 n. 16, at 16 (food and hydration were previously considered “natural support”); “Submission to the Select Committee of

the House of Lords on Medical Ethics by the Linacre Centre for Health Care Ethics,” in “Clinical Practice,” supra ch. 1 n. 3, at 142 (food and hydration are not considered medical treatment).

188. Margaret Somerville, supra ch. 1 n. 10, at 47 (the nature of marker events is that those on one side of the line are different from those on the other side, particularly with regard to avoiding precedent).

189. Marvin Harris, *Cows, Pigs, Witches, and Wars* 107, 196, 206–7 (Vintage 1975); Pennethorne Hughes, *Witches* (Penguin 1965) (author attributes the general elimination of witchcraft practice in Europe to purges by the church and state and also as the result of economics, culminating in the Industrial Revolution, during which peasants, who practiced the “old ways,” were brought in contact with the new ideas of the urban population).

190. Pennethorne Hughes, supra n. 189, at 172–73.

191. Marvin Harris, supra n. 189, at 207 (500,000 killed); Pennethorne Hughes, supra n. 189, at 195 (nine million killed).

192. Pennethorne Hughes, supra n. 189, at 213–15. Cf. also Marvin Harris, supra n. 189, at 243 (author details the resurgence of the occult in modern American life).

193. Pennethorne Hughes, supra n. 189, at 164. Cf. also Exodus 7:8, in *Tanakh: A New Translation of the Holy Scriptures according to the Traditional Hebrew Text* (Jewish Publ. Society 1985) (Moses has a competition with the pharaoh’s court magicians).

194. Pennethorne Hughes, supra n. 189, at 164.

195. Carlos Castenada, *The Teachings of Don Juan* (University of California Press 1968).

196. Pennethorne Hughes, supra n. 189, at 197.

197. Id., at 184.

198. Id., at 190.

199. Id., at 184.

200. Marvin Harris, supra n. 189, at 238.

201. Id.

202. Pennethorne Hughes, supra n. 189, at 202–5; Marvin Harris, supra n. 189, at 213.

203. Pennethorne Hughes, supra n. 189, at 202.

204. Id., at 198.

205. Id., at 206–7.

206. Len Doyle, “Why Active Euthanasia and Physician Assisted Suicide Should Be Legalized,” 323 *BMJ* 1079, 1080 (2001).

207. Daniel Callahan and Margot White, supra ch. 4 n. 169, at 61.

208. Id., at 58–59.

209. See, generally, Daniel Callahan, “Self-Extinction: The Morality of the Helping Hand,” in “Physician-Assisted Suicide,” supra intro. n. 11, at 82 (“There is no way, even in principle, to write or enforce a meaningful law that can guar-

antee effective procedural safeguards [for PAS]). See also Gerald Dworkin, R.G. Frey, and Sissela Bok, *supra* ch. 3 n. 25, at 46–47.

210. See, for example, Michael M. Burgess, “The Medicalization of Dying,” in “Legal Euthanasia: Ethical Issues in an Era of Legalized Dying,” 18 *J. Med. & Phil.* 269, 274 (Margaret P. Battin and Thomas J. Bole III, issue eds.) (1993).

211. See Steve P. Calandrillo, *supra* ch. 4 n. 34, at 91 (describes “a Model Act to Authorize and Regulate Physician-Assisted Suicide”). See also Charles H. Baron et al., “A Model State Act to Authorize and Regulate Physician-Assisted Suicide,” 33 *Harv. J. on Legis.* 1 (1996).

212. “If the law is too bureaucratic, too intrusive, or gives insufficient legal shelter to doctors acting in good faith, it will be ignored in practice and will fail in its objective of re-regulating PAS/AE. The challenge for those interested in minimizing harm is to design a regime that is robust, but which is also more attractive than the stresses and risks of illicit action. Locating this middle ground is all the more controversial because of the feared consequences of ‘unsafe’ law.” R.S. Magnusson, “Euthanasia: Above Ground, below Ground,” 30 *J. Med. Ethics* 441, 444 (2004).

213. See, generally, Daniel Callahan and Margot White, *supra* ch. 4 n. 169.

Issue 5

1. Derek Humphrey and Mary Clement, *supra* intro. n. 4; Sue Woodman, *Last Rights: The Struggle over the Right to Die* (Perseus 1998). See also Wesley J. Smith, *supra* intro. n. 10, at 6; Margaret Somerville, *supra* ch. 1 n. 10, at 312; Bernadette-Tobin, “Did You Think about Buying Her a Cat? Reflections on the Concept of Autonomy,” 11 *J. Contemp. Health Law & Pol’y* 417 (1991); and Steve P. Calandrillo, *supra* ch. 4 n. 34, at 65 (“... autonomy has thus become something of a trump card in the debates of recent years . . .”). Cf. Brian Clark, *Whose Life Is It Anyway?* (Bard 1978).

2. The first argument ties autonomy to sanctity of life. “Submission to the Select Committee of the House of Lords on Medical Ethics by the Linacre Centre for Health Care Ethics,” in “Clinical Practice,” Book Two, “Euthanasia and the Law: The Case against Legalization,” *supra* ch. 1 n. 3, at 132. This argument posits that the principle of sanctity of life is what makes the notion of autonomy coherent. Why should we respect *your* individual choices? Why do we give you equal value regardless of whether you’re rich or poor, brilliant or stupid? The answer, as already discussed, is the commitment of our society to the right and principle of equal justice. The right and principle, in turn, ultimately are based on the notion that all lives have equal value because they are equally sacred. As such, autonomy cannot be relied on to justify a denial of life’s absolute sanctity through taking that life through suicide since our very respect for autonomy is dependent on accepting the sacredness of life.

I do not find this argument persuasive. The commitment to equal justice does

not necessarily require reliance on notions such as sacredness. While admittedly having a moral flavor, equal justice can equally be based on a political philosophy, which reflects the conception of the individual in a modern, liberal society (exemplified by the Western democracies). It is a concept that gives high value to the individual creation of ideas and identity and serves as a form of insurance against the risk that any of us could have had an unlucky draw at birth in the social lottery (e.g., in the distribution of brains, wealth, status, health, and support). But it is just one vision of a society. Some societies do not focus on the individual but on the broader unit, and in that effort they have even discouraged individuality (e.g., in Maoist China or ancient Sparta). Even in America, the land of the rugged individual, movements appear from time to time that ask us to think not as individuals but as a community.

Moreover, the argument does not follow on its own terms. In the context of considering autonomy, it is true that the concept is underlain by the notion that my life has as much value as anyone else's and that my right to choose for myself merits the same respect as another's right to choose. All that said, it still is not clear to me why *I* can't make the choice to end *my* life. Someone making that choice for me against my desires based on their assessment of my comparative value would assuredly violate the principle of equal justice. But that is not what we are talking about here, at least not on a theoretical level (admittedly, on a pragmatic plane, there are concerns about coercion by family members and doctors, which I considered when addressing the slippery slope).

The second argument posits that autonomy cannot logically coexist with self-destruction. See Luke Gormally, "Walton, Davies, Boyd, and the Legalization of Euthanasia," in "Euthanasia Examined," supra intro. n. 2, at 118–19; "Submission to the Select Committee of the House of Lords on Medical Ethics by the Linacre Centre for Health Care Ethics," in "Clinical Practice," Book Two, "Euthanasia and the Law: The Case against Legalization," supra ch. 1 n. 3, at 131 (autonomy is meant to be used so that we might "flourish"); and Michael J. Hyde, supra ch. 4 n. 33, at 165. The purpose of autonomy is to fulfill oneself as a person, to give an individual the full ability to exercise his or her capacity for growth and self-definition. Self-destruction, thus, is antithetical to the very enterprise underlain by autonomy.

I agree with this argument as a descriptive matter. Generally, we do use our autonomy to make choices based on what we believe (sometimes mistakenly) will be a greater fulfillment of our potential as a human being. But it does not follow that self-death is *never* an appropriate choice under *any* circumstances. Someone in the circumstances of my father is beyond the niceties of elevating his being as a full person. He was dying, every function in his body was breaking down, and he was miserable. Under the circumstances, suicide may have been an appropriate choice as a means of protecting the self from further torture while that self existed in any coherent sense and in fulfilling the final destiny of that self in its earthly journey. Thus, I do not find this position convincing.

3. John Harris, “Euthanasia and the Value of Life,” in “Euthanasia Examined,” supra intro. n. 2, at 12; Dan W. Brock, “Physician-Assisted Suicide Is Sometimes Morally Justified,” in “Physician-Assisted Suicide,” intro. n. 11, at 8. But see Richard A. McCormick, supra ch. 3 n. 31.

4. Ronald Dworkin, supra ch. 1 n. 3, at 16.

5. Peter G. Filene, supra intro. n. 1, at 173–74; Anthony Fisher, “Theological Aspects of Euthanasia,” in “Euthanasia Examined,” supra intro. n. 2, at 319 (extreme autonomy is antisocial); Wesley J. Smith, supra intro. n. 10, at 6; Robert I. Mishbin, supra intro. n. 5, at 174–75; Liezl van Zyl, supra intro. n. 18, at 125; Margaret Somerville, supra ch. 1 n. 10, at 343; Ira R. Block, “Physician-Assisted Suicide Is Not an Acceptable Practice for Physicians,” in “Physician-Assisted Suicide,” supra ch. 1 n. 2, at 112–13. See also Patricia S. Mann, “Meanings of Death,” in “Expanding the Debate,” supra intro. n. 8, at 19. Cf. Liezl van Zyl, supra intro. n. 8, at iv (death can provide the opportunity for social connection).

6. Bernadette Tobin, supra n. 1, at 422–25.

7. For a discussion of how experts use cognitive modes and structures in developing problem representations and solutions, see Marilyn Berger and John Mitchell, “Rethinking Advocacy Training,” 16 *Am. J. Trial Adv.* 821, 822–28 (1993); and James Voss et al., *Problem-Solving Skill in the Social Sciences*, 17 *Psychol. Learning & Motivation* 165, 191–212 (1983).

Further elaboration of the basic cognitive processes of making meaning through interpretive frameworks, generally referred to as “schema theory,” can be found in Richard C. Anderson, “The Notion of Schemata and the Educational Enterprise: General Discussion of the Conference,” in *Schooling and the Acquisition of Knowledge* 415, 419 (Richard C. Anderson et al., eds., Lawrence Erlbaum Associates 1977); Robert Glaser, “Education and Thinking the Role of Knowledge,” 39 *Am. Psychol.* 93 (1984); John B. Mitchell, “Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education,” 39 *J. Legal Educ.* 275, 277–83 (1989); and David D. Rumelhart, “Schemata: The Building Blocks of Cognition,” in *Theoretical Issues in Reading Comprehension* 33 (Rand J. Spiro et al., eds., Lawrence Erlbaum Associates 1980). See also Jean Piaget, *The Language and Thought of the Child* (3d ed., Humanities Press 1959) (presents a cognitive, as opposed to behavioral, theory regarding child development). See also Michael J. Hyde, supra ch. 4 n. 33, at 28; and Jos M.V. Welie, supra ch. 3 n. 30, at 145 (philosophers such as Heidegger recognized that every description reflects the stance of the describer).

8. Ronald Dworkin, supra ch. 1 n. 3, at 27, 199–200, 205 (controlling one’s narrative maintains “integrity” in that life); John Harris, “Euthanasia and the Value of Life,” in “Euthanasia Examined,” supra intro. n. 2, at 14.

9. Steve P. Calandrillo, supra ch. 4 n. 34, at 65 (“Contrary to Dworkin, Professor Rebecca Dresser believes that most of us do not have the strong sense of critical interest, autonomy, and continuity of the person necessary to adopt

Dworkin's thesis. . . . She asserts that there is no evidence to support the claim that people want narrative coherence, . . .").

Issue 6

1. Carl Wellman, "A Moral Right to Physician Assisted Suicide," 38 *Am. Phil. Q.* 271 (2000); Karen Lebacqz and H. Tristram Engelhardt Jr., M.D., "Suicide," in "Death-Dying," supra ch. 1 n. 3, at 692, 693.

2. Todd Goldberg, "A Doctor Looks at Assisted Suicide," 1 *Navigator* 35 (1998).

3. *Id.*

4. Margaret Somerville, supra ch. 1 n. 10, at 317–20.

5. Daniel Callahan and Margot White, supra ch. 4 n. 169, at 43; Joel Feinberg, supra ch. 4 n. 8, at 29. Cf. David C. Thomasama, supra ch. 4 n. 13, at 289 (author questions the possibility of a "rational" suicide).

6. Mark Sullivan, Linda Ganzini, and Stuart J. Young, "Should Psychiatrists Serve as Gatekeepers for Physician Assisted Suicide?" 28 *Hastings Center Report* 24, 25 (1998) (the modern medical model is that suicide is never the choice of a rational agent but a symptom of mental illness); Malcolm Parker, supra intro. n. 14, at 526 ("Australian researchers claiming a new psychiatric diagnosis, Demoralization Syndrome (DS), rule out the possibility of a rational suicide, finding the desire to die being symptomatic of the detectable pathology, n. omitted"). See also D. Clarke and D. Kissare, "Demoralization: Its Phenomenology and Importance," 36 *Aust N.Z. Psychiatry* 733 (2002); and Timothy H. Lillie and James L. Werth Jr., "Introduction to Special Issues: End-of-life Issues and Persons with Disabilities," 16 *J. Disability Pol'y Studies* 2, 2 (2005) ("Let me be clear here: I do not agree with the concept of rational suicide, especially as applied to people with disabilities, primarily because of social and cultural concerns"). But see Kyriaki Mystakidou, Efi Parpa, Elini Tsikila, Emmanuela Katsouda, and Lambors Vlahos, "The Evolution of Euthanasia and Its Perceptions in Greek Culture and Civilization," 48 *Perspectives Bio. & Med.* 95 (2005) ("Though suicide is generally viewed to be a pathological state of mind, most often linked to depression, some professionals hypothesize that suicide in some circumstances can be quite rational"); Malcolm Parker, supra intro. n. 14, at 527 (author sees the fact that those refusing to accept that someone can rationally choose PAS but do not make the same claim about the rationality of those who refuse life-sustaining treatment "suggest that a particular moral view about assisted dying is helping to demonstrate the clinical disorder [undermining the capacity for rational suicide]"); James G. Adams, "Life or Death: Physician-Assisted Suicide and Emergency Medicine," 3 *Academic Emergency Med.* 909, 909 (1996) (61 percent of primary care physicians believe that suicide can be rational); and Derek Humphrey and Mary Clement, supra intro. n. 4, at 80 (suicide can be a totally rational response to a particular situation).

7. Kay Redfield Jamison, *supra* intro. n. 5; *Reference Shelf: Suicide* (Robert Emmet Long, ed., H.W. Wilson 1995) (reprints from various magazine articles).
8. Mark Sullivan, Linda Ganzini, and Stuart J. Young, *supra* n. 6, at 27; Linda Ganzini and Melinda Lee, “Psychiatry, and Assisted Suicide in the United States,” 336 *New Eng. J. Med.* 1795, 1825 (1997); Joel Feinberg, *supra* ch. 4 n. 8, at 358.
9. Barry Rosenfeld, *supra* intro. n. 12, at 122–23. But see N. Gregory Hamilton, M.D., and Catherine A. Hamilton, M.A., *supra* ch. 3 n. 18, at 1061 (“. . . the majority of forensic Psychiatrists . . . believe that the presence of a major depressive disorder should result in an automatic finding of incompetence to make decisions about assisted suicide”).
10. Elaine Scarry, *supra* ch. 1 n. 9, at 29, 35; Liezl van Zyl, *supra* intro. n. 18, at 72.
11. Linda Ganzini, Melinda A. Lee, Robert T. Heintz, Joseph D. Bloom, and Darien S. Fenn, “The Effect of Depression Treatment on Elderly Patients’ Preference for Life-Sustaining Medical Therapy,” 151 *Am. J. Psych.* 1631, 1635 (1994).
12. Edmund D. Pellegrino, “The False Promise of Beneficent Killing,” in “Regulating How We Die,” *supra* ch. 1 n. 7, at 81; Yale Kamisar, “Some Non-religious Views against Proposed ‘Mercy Killing’ Legislation,” in “Death-Dying,” *supra* ch. 1 n. 3, at 414, 423–25.
13. Joel Feinberg, *supra* ch. 4 n. 8, at 29.
14. Joyce Anne Schofield, “Care of the Older Person: The Ethical Challenge to American Medicine,” 4 *Issues in Law & Med.* 53, 64 (1988); Liezl van Zyl, *supra* intro. n. 18, at 63 (there do not exist undisputed criteria); Margaret Sommerville, *supra* ch. 1 n. 10, at 300–309 (some of the evaluation is “intuitive”); Mark Sullivan, Linda Ganzini, and Stuart J. Younger, “Should Psychiatrists Serve as Gatekeepers for Physician Assisted Suicide?” *supra* n. 6, at 26; Linda Ganzini, Gregory P. Leong, Darien S. Fenn, J. Aurturo Silva, and Robert Weinstock, “Evaluation of Competence to Consent to Assisted Suicide: View of Forensic Psychiatrists,” 157 *Am. J. Psych.* 595, 599 (competency is not really a scientific concept but represents the balancing of autonomy against paternalism).

Issue 7

1. Paul J. Zwier, *supra* intro. n. 15, at 228.
2. *Basic Questions on Suicide and Euthanasia: Are They Ever Right?* Bio Basics Series 26 (Kregel 1998); Gerald Dworkin, R.G. Frey, and Sissela Bok, *supra* ch. 3 n. 25; Margaret P. Battin, “Is a Physician Ever Obligated to Help a Patient Die?” in “Regulating How We Die,” *supra* ch. 1 n. 7, at 23; Daniel Callahan, “Self-Extinction: The Morality of the Helping Hand,” in “Physician-Assisted Suicide,” *supra* intro. n. 11, at 83 (“The two standard motives for euthanasia and assisted-suicide are said to be our right of self-determination and our claim upon mercy of others, especially doctors to relieve our suffering. These two motives are typically spliced together as a single justification.”).

3. *Schoelendorff v. Society of New York Hosp.*, 211 N.Y. 125, 105 N.E. 92 (1914) (Cardoro, J.). See also *Bovia v. Superior Court*, 225 Cal. Rptr. 297, 179 Cal. App. 3d. 1127 (1986); *In re Conroy*, 98 N.J. 321, 486 A.2d. 1209 (1985).
4. *Bovia v. Superior Court*, 225 Cal. Rptr. 297, 179 Cal. App.3d. 1127 (1986); Barbara A. Blackmond, J.D., “Legal Aspects in Prolonging Life,” in *Life and Death Issues* 67 (James E. Hammer III, D.D.S., Ph.D., and Barbara Sax Jacobs, eds., Univ. of Tenn. 1986).
5. Robert Finn, *Cancer Clinical Trials: Experimental Treatments and How They Can Help You* 41–42 (O’Reilly 1999); Derek Humphrey and Mary Clement, *supra* intro. n. 4, at 40–41; Robert I. Mishbin, *supra* intro. n. 5, at 108; Liezl van Zyl, *supra* intro. n. 18, at 35; William F. May, “Ethical Considerations in Life and Death Decisions,” in *Life and Death Issues* 56 (James E. Hammer III, D.D.S., Ph.D., and Barbara Sax Jacobs, eds., Univ. of Tenn. 1986); Annette E. Clark, *supra* intro. n. 15, at 117.
6. Jos V.M. Welie, *supra* ch. 3 n. 30, at 71. Cf. Carl E. Schneider, *The Practice of Autonomy: Patients, Doctors, and Medical Decisions* 18 (Oxford Univ. Press 1998) (only I will truly protect my interests).
7. Jos V.M. Welie, *supra* ch. 3 n. 30, at 74, 115; Paul J. Zwier, *supra* intro. n. 15, at 228–29, 230 (author offers a “care perspective”); Liezl van Zyl, *supra* intro. n. 18, at 192–93.
8. Carl E. Schneider, *supra* n. 6, at 51, 94.
9. *Id.*, at 49, 51.
10. Raymond S. Duff, M.D., “Neonatology Life and Death Issues,” in *Life and Death Issues* 94 (James E. Hammer III, D.D.S., Ph.D., and Barbara Sax Jacobs, eds., Univ. of Tenn. 1986).
11. Carl E. Schneider, *supra* n. 6, at 41.
12. *Id.*, at xiv.
13. *Id.*, at 49.
14. *Id.*, at xiv.
15. Liezl van Zyl, *supra* intro. n. 18, at 165; David C. Thomasama, *supra* ch. 4 n. 13, at 193; Annette E. Clark, *supra* intro. n. 15, at 115–16.
16. Jessica Cooper, “The Justification for Imprisoning Kevorkian,” in *Euthanasia: Contemporary Issues Companion* 64 (Linda Yount, ed., Greenhaven 2002); Luke Gormally, “Walton, Davies, Boyd, and the Legalization of Euthanasia,” in “Euthanasia Examined,” *supra* intro. n. 2, at 132; Leon R. Kass, “I Will Give No Deadly Drug: Why Doctors Must Not Kill,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 25, 29–30; John Keown, *supra* ch. 1 n. 4, at 78; Nelson Lund, *supra* ch. 4 n. 30, at 919.
17. See J.P. Bishop, “Framing Euthanasia,” *J. Med. Ethics* 225, 227 (2006) (author uses experience with DNR codes to demonstrate how doctors can totally influence their patients’ choices by the specific word choices they use in presenting options). See also Daniel Callahan and Margot White, *supra* ch. 4 n. 169, at 28 (can’t really assess the adequacy of a particular patient’s consent for PAS

because the patient will be dead); and Raphael Cohen-Almadar, *supra*, ch. 4 n. 69, at 97–98 (in fact, by raising the topic of euthanasia as a just “medical” option, doctors can influence their patients’ decisions).

18. David C. Thomasama, *supra* ch. 4 n. 13, at 189; Frances M. Kamm, “Physician Assisted Suicide, Euthanasia, and Intending Death,” in “Expanding the Debate,” *supra* intro. n. 8, at 35 (assisted suicide and euthanasia are permissible when death is a “lesser evil”). But see Arthur J. Dyck, “Beneficent Euthanasia and Benemortasia: Alternative Views of Mercy,” in “Death-Dying,” *supra* ch. 1 n. 3, at 348, 355 (*mercy* means don’t kill and do provide care).

19. Gerald Dworkin, R.G. Frey, and Sissela Bok, *supra* ch. 3 n. 25.

20. Beth Spring and Ed Laron, *supra* ch. 2 n. 16, at 131. As a deontological counterargument to the idea that patient autonomy mixed with mercy can justify PAS, some have pointed out that relieving suffering necessarily implies the existence of a formerly suffering person who is now relieved. If you kill someone, you may end them and their suffering with it, but no one will exist who will be relieved. It is an interesting argument (in the genre of if a tree falls in the forest and there is no one to hear it), but ultimately I believe it begs the real question. Is there a time when stopping suffering is more important than life itself so that assisted suicide is morally justified?

21. James V. Lavery, Joseph Boyle, Bernard M. Dickenson, Helen Maclean, and Peter A. Singer, “Origins of the Desire for Euthanasia and Assisted Suicide in People with HIV-1 or Aids: A Qualitative Study,” 338 *Lancet* 362 (2001) (principal source of suffering includes loss of community, loss of self, and existential misery).

22. Daniel Callahan, *supra* intro. n. 1, at 109, 110; Nelson Lund, *supra* ch. 4 n. 30, at 918–19; Daniel Callahan, Ph.D., “Reason, Self-Determination, and Physician-Assisted Suicide,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 64–65; Edmund D. Pellegrino, M.D., “Compassion Is Not Enough,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 41, 48.

For example, one author interprets the situation in the Netherlands as one in which physicians can abrogate one of the two foundational principles of the Dutch law—patient consent (i.e. autonomy) and unbearable suffering (i.e., mercy)—and still be found sympathetic in carrying out euthanasia if the remaining principle (i.e., autonomy *or* mercy) is sufficiently compelling in the individual case. See Raphael Cohen-Almager, *supra* ch. 4 n. 69, at 169.

Issue 8

1. Yale Kamisar, *supra* ch. 1 n. 42, at 133–34. See also Larry I. Palmer, *Endings and Beginnings: Law, Medicine, and Society in Assisted Life and Death* (Praeger 2000) (contending that PAS is an issue for the legislature, too complex for the courts, as it is a product of institutional arrangements among law, medicine, and such).

2. Kay Redfield Jamison, *supra* intro. n. 6, at 15.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. Beth Spring and Ed Laron, *supra* ch. 2 n. 16, at 64; Steven Miles, Demetra M. Pappas, and Robert Koeppe, “Considerations of Safeguards Proposed in Laws and Guidelines to Legalize Assisted Suicide,” in “Physician-Assisted Suicide,” *supra* intro. n. 11, at 270; Glanville Williams, *supra* ch. 1 n. 41, at 257; Lawrence Gostin, *supra* ch. 1 n. 4, at 95.
8. Beth Spring and Ed Laron, *supra* ch. 2 n. 16, at 64; Steven Miles, Demetra M. Pappas, and Robert Koeppe, “Considerations of Safeguards Proposed in Laws and Guidelines to Legalize Assisted Suicide,” in “Physician-Assisted Suicide,” *supra* intro. n. 11, at 210; Glanville Williams, *supra* ch. 1 n. 41, at 261.
9. U.S. Const. Art I, § 9(3); Stacy L. Mojica and Dan S. Murrel, *supra* intro. n. 5, at 482.
10. Steven Miles, Demetra M. Pappas, and Robert Koeppe, “Considerations of Safeguards Proposed in Laws and Guidelines to Legalize Assisted Suicide,” in “Physician-Assisted Suicide,” *supra* intro. n. 11, at 210; Glanville Williams, *supra* ch. 1 n. 41, at 262; Stacy L. Mojica and Dan S. Murrel, *supra* intro. n. 5, at 95.
11. Yale Kamisar, “Physician Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia,” in “Euthanasia Examined,” *supra* intro. n. 2, at 229.
12. Stacy L. Mojica and Dan S. Murrel, *supra* intro. n. 5, at 473, 500.
13. Sanford H. Kadish, *supra* ch. 1 n. 13, at 863.
14. Wesley J. Smith, *supra* intro. n. 10, at 5; in “Clinical Practice,” Book One, “Euthanasia and Clinical Practice: Trends, Principles, and Alternatives (Working Party Report, 1982),” *supra* ch. 1 n. 3, at 30. See also *Washington v. Glucksberg* 521 U.S. 702, 710–11 (1997); *Vacco v. Quill*, 521 U.S. 793, ante 740–41 (1997) (Stevens, concurring); and *Cruzan v. Missouri Department of Health*, 497 U.S. 261, 335 (1990).
15. See Joshua Dressler, *Understanding Criminal Law* 13, § 2.03 [D] (2d ed., Matthew Bender 1995) (“Why is denunciation desirable [as a purpose of criminal punishment]? First, it’s educative. We inform individuals that the community considers specific conduct improper.”).
16. Liezl van Zyl, *supra* intro. n. 18, at 75. See also *Cruzan v. Missouri Department of Health*, 497 U.S. 261, 335 (1990); *Sue Rodriguez v. Attorney General Canada and Attorney General British Columbia*, 3 *Can. Sup. Ct. Reps.* 603 (Part 4, 1993). But see *Washington v. Glucksberg*, 521 U.S. 702, 752 (Stevens, concurring) (implies that government cannot interfere with constitutional rights solely for educative or symbolic value: “. . . unqualified interest in the preservation of human life’ . . . is not sufficient to outweigh the interest in liberty that may justify the only possible means of preserving a dying person’s dignity and alleviate her intolerable suffering”).

17. Daniel Callahan, *supra* intro. n. 1, at 110; Liezl van Zyl, *supra* intro. n. 18, at 103. Cf. Margaret P. Battin, “Is a Physician Ever Obligated to Help a Patient Die?” in “Regulating How We Die,” *supra* ch. 1 n. 7, at 191–25 (most sick people cannot kill themselves without help).

18. A theoretical argument has also been put forth that suicide and assisted suicide are matters protected by the First Amendment. Ronald Dworkin has written that the current debate over assisted suicide reflects a difference in beliefs over the meaning of what constitutes the “sacredness/sanctity of life.” As this debate, over which the country is divided fundamentally, takes the form of opposing religious values, this essentially involves First Amendment freedom of religion guarantees. Under these circumstances, the Constitution forbids the state the right to intrude. See Ronald Dworkin, *supra* ch. 1 n. 3, at 157, 164–65. See also David McKenzie, “Church, State, and Physician-Assisted Suicide,” 46 *J. Church & State* 787, 809 (2004). While it is intriguing, there appear to be two fundamental problems with this contention. First, there are those who oppose PAS on totally non-religious grounds. See Yale Kamisar, “Some Non-religious Views against Proposed ‘Mercy Killing’ Legislation,” in “Death-Dying,” *supra* ch. 1 n. 3, at 411; Yale Kamisar, *supra* ch. 1 n. 42, at 118; and Phillip Berry, “Euthanasia: A Dialogue,” 26 *J. Med. Ethics* 370 (2000) (author posits dialogue between a patient who desires euthanasia and an atheist physician who refuses to supply it). Second, the court has distinguished religious “belief” (which is constitutionally protected as an absolute) with religious “activity” (which can be regulated). See, for example, *Employment Division v. Smith*, 494 U.S. 872 (1990) (court permits application of drug laws to Native American peyote ceremony); and *Reynolds v. United States*, 98 U.S. (8 Otto) 145 (1878) (even though polygamy is part of the Mormon religious tradition, it may be prohibited under the general law prohibiting polygamy).

Finally, some have posited a constitutional right to assisted suicide for elderly, terminally ill persons based upon the Lockean social contract theory undergirding the American Constitution, see, John B. Mitchell, “My Father, John Locke, and Assisted Suicide: The Real Constitutional Right,” 3 *Ind. Health L. Rev* 47 (2006), or upon the “cruel and unusual” punishment prohibition of the 8th Amendment of the United States Constitution, see Seth F. Kreimer, “The Second Time as Tragedy: The Assisted Suicide Cases and the Heritage of *Roe v. Wade*,” 24 *Hast- ing Const. L. Q.* 863, 893 (1998).

19. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

20. *Vacco v. Quill*, 521 U.S. 793 (1997).

21. Alan Ides and Christopher N. May, *Constitutional Law: Individual Rights* 200 (2d ed., Aspen Law and Business 2001); Ronald Dworkin, *supra* ch. 1 n. 3, at 104.

22. Alan Ides and Christopher N. May, *supra* n. 21, at 205–9 (“narrowly tailored to meet a compelling need”).

23. *Planned Parenthood v. Casey*, 505 U.S. 833, 928 (1992) (Stevens, J., dissenting).

24. M.T. Meulders-Klein, *supra* ch. 1 n. 3, at 29, 56, 61, 78 (1983).

25. M.T. Meulders-Klein, *supra* ch. 1 n. 3, at 44. See also Frances M. Kamm,

“Physician-Assisted Suicide, Euthanasia, and Intending Death,” in “Expanding the Debate,” supra intro. n. 8, at 36; and Rosamond Rhodes, “Physicians, Assisted Suicide, and the Right to Live or Die,” in “Expanding the Debate,” supra intro. n. 8, at 167. But cf. “Clinical Practice,” Book One, “Euthanasia and Clinical Practice: Trends, Principles, and Alternatives (Working Party Report, 1982),” supra ch. 1 n. 3, at 40 (the right involved is really the right “not to be killed”).

26. See, for example, Rule 11, 18 U.S.C.A. Fed. R. Crim. Pro. (West 1986); and *Boykin v. Alabama*, 395 U.S. 238 (1969) (U.S. Supreme Court specifies the required content of the plea ritual).

27. M.T. Meulders-Klein, supra ch. 1 n. 3, at 38 (one cannot consent to a battery and thereby waive one’s right not to be harmfully touched unless battery is part of a violent sport such as boxing or football); *Witmore v. Arkansas*, 495 U.S. 149, 175 n. 1 (1990) (Marshall, J., dissenting) (the justice cites to 13 states prohibiting a waiver by the defendant of a direct appeal in death penalty convictions); Daniel Callahan, supra intro. n. 1, at 105 (one can’t waive the right not to be sold into slavery).

28. Todd Goldberg, supra ch. 6 n. 2, at 41. See also the view of philosopher John Stuart Mill in J.S. Mill, *On Liberty* 101 (Elizabeth Rappaport, ed., Hackett 1978) (1859).

29. See the opinions in *Washington v. Glucksberg*, 521 U.S. 702 (1992) of Justices O’Connor (737, 738), Stevens (742), Ginsberg (789), Breyer (790), and Souter (791, 792). See also Yale Kamisar, “The Rise and Fall of the ‘Right’ to Assisted Suicide,” in “The Case against Assisted Suicide,” supra intro. n. 18, at 78–79, 80; and James F. Breshnahan, “Assisted Suicide Should Be Illegal,” in *Euthanasia: Contemporary Issues Companion* 76–77 (Lisa Yount, ed., Greenhaven 2002).

30. Margaret Somerville, supra ch. 1 n. 10, at 31; Daniel Callahan, supra intro. n. 1, at 36–37, 150 (one can’t control everything in life and some richness can be achieved by not doing so).

31. Daniel Callahan and Margot White, supra ch. 4 n. 169, at 20; Martin Gunderson and David J. Mayo, “Altruism and Physician Assisted Death,” in “Legal Euthanasia: Ethical Issues in an Era of Legalized Dying,” 18 *J. Med. & Phil.* 281, 284–87 (Margaret P. Battin and Thomas J. Bole III, issue eds.) (1993) (we want loved ones to remember us as vital, etc.).

32. Germain Grisez, “Suicide and Euthanasia,” in “Death-Dying,” supra ch. 1 n. 3, at 782; John Finnis, “Misunderstanding the Case against Euthanasia: Response to Harris’s First Reply,” in “Euthanasia Examined,” supra intro. n. 2, at 69; Luke Gormally, “Walton, Davies, Boyd, and the Legalization of Euthanasia,” in “Euthanasia Examined,” supra intro. n. 2, at 115; Fr. Robert Barry, O.P., supra intro. n. 5, at 498; Margaret Somerville, supra ch. 1 n. 10, at 255. Cf. Margaret Somerville, supra ch. 1 n. 10, at 267 (historically, dignity dealt with honor and inequality of attributes; only in the modern view do all persons have equal dignity).

33. Alan Donagan, supra ch. 1 n. 39, at 237.

34. Daniel Callahan, supra intro. n. 1, at 147; Paul Ramsey, “The Indignity of Death with Dignity,” in “Death-Dying,” supra ch. 1 n. 3, at 307; Margaret

Somerville, *supra* ch. 1 n. 10, at 257 (this notion of dignity should be thought of as “social dignity”).

35. Daniel Callahan, *supra* intro. n. 1, at 12 et seq.; Margaret Somerville, *supra* ch. 1 n. 10, at 258–59.

36. The right must be: (1) carefully described, (2) “deeply rooted” in our culture and its traditions, and (3) “implicit in ordered liberty.” *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). Generally, the court requires a “careful description” and “deeply rooted,” or, “implicit in ordered liberty,” but a few cases have suggested the need for both deeply rooted and implicit in ordered liberty. Cf. *Washington v. Glucksberg*, *supra* n. 2, at 521 U.S. at 720; and *Bowers v. Hardwick*, 478 U.S. 186, 191–92 (1986).

37. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

38. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

39. *Bowers v. Hardwick*, 478 U.S. 186, 192–93 (1986). See also *Id.*, at 196 (In concurring, Justice Berger defines the right involved as “homosexual sodomy”).

40. Stephen W. Wise, “Euthanasia Jurisprudence, and Physician-Assisted Suicide: What Did Glucksberg Teach Us?” 75 *J. Ala. Acad. Sci.* 214, 221 (2004):

What is important is this: how one “frames” the “liberty right” determines whether support for it can be found in the history and traditions of the nation. If one frames it narrowly and in negatively charged emotive language, little support will be found. If framed broadly, much support will often be found.

41. *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986). In 2003, the Supreme Court found a fundamental right to “engage in private sexual conduct between consenting adults in one’s home” and reversed *Bowers v. Hardwick* in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

42. *Washington v. Glucksberg*, 521 U.S. 702, 724 (1997).

43. *Id.*

44. *Id.*, 726, 727, quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

45. Lance K. Stell, “Physician-Assisted Suicide: To Decriminalize or Legalize, That Is the Question,” in “Expanding the Debate,” *supra* intro. n. 8, at 225; Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson, “The Philosophers’ Brief [in *Washington v. Glucksberg*],” in “Expanding the Debate,” *supra* intro. n. 8, at 431; Paul J. Zwier, *supra* intro. n. 15, at 7.

46. *Vacco v. Quill*, 521 U.S. 793 (1997). The Supreme Court found that the state law barring assisted suicide is “evenhanded” (*id.*, at 799–800) and meets the “minimum rationality” standard (*id.*, at 801) (distinguishing between PAS and withdrawing treatment is “clearly rational”).

47. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 445–46 (1985) (“[I]t would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others,

who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.”). See also Alan Ides and Christopher N. May, *supra* n. 21, at 246; Yale Kamisar, “The Rise and Fall of the ‘Right’ to Assisted Suicide,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 86 notes 67, 68.

48. See, *Brown v. Board of Education*, 347 U.S. 483 (1952) (the court rejected “separate but equal”).

49. *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973); *Michael M. v. Superior Court*, 450 U.S. 464, 468–69 (1981) (the standard of review requires that the law reflects no gender “stereotypes,” that it serve an “important” governmental objective, and that the objectives be “genuine”).

50. Dana Elizabeth Hirsch, “Euthanasia: Is It Murder or Mercy Killing? A Comparison of the Criminal Laws in the United States, the Netherlands, and Switzerland,” 12 *Loy. L.A. Int’l & Compar. L.J.* 820, 825 n. 22 (1990) (author collects applicable cases). Interestingly, as of 1995, withdrawal of food and hydration was more accepted in acute care hospitals than nursing homes. Alan Meisel, “Barriers to Forgoing Nutrition and Hydration in Nursing Homes,” 21 *Am. J.L. & Med.* 335 (1995).

51. John A. Robertson, “Involuntary Euthanasia of Defective Newborns: A Legal Analysis,” in “Death-Dying,” *supra* ch. 1 n. 3, at 163 note 149; Daniel C. Maguire, *supra* intro. n. 8, at 31, 49; Dana Elizabeth Hirsch, *supra* n. 50, at 833–34. Cf. Gerald Dworkin, R.G. Frey, and Sissela Bok, *supra* ch. 3 n. 25, at 24, 29.

52. David Orentlicher, *supra* ch. 1 n. 47, at 445. Cf. Ronald Dworkin, *supra* ch. 1 n. 3, at 9.

53. Liezl van Zyl, *supra* intro. n. 18, at 91–133; Yale Kamisar, *supra* ch. 4 n. 170, at 495.

Issue 9

1. John Rawls, *A Theory of Justice* (Belknap 1971).

2. John Mitchell, “Redefining the Sixth Amendment,” 67 *So. Cal. L. Rev.* 1215, 1249 n. 115 (1994). Cf. Clifford Orwin and James R. Stoner Jr., “Neoconstitutionalism? Rawls, Dworkin, and Noziak,” in *Confronting the Constitution: The Challenge to Locke, Montesquieu, Jefferson, and the Federalists from Utilitarianism, Historical Marxism, Freudianism, Pragmatism, and Existentialism* 437 (Allan Bloom, ed., AEI Press 1990).

3. Alan Donagan, *supra* ch. 1 n. 39, at 22; Norman Daniels, “Introduction,” in *Reading Rawls: Critical Studies on Rawls’ A Theory of Justice* xviii (Norman Daniels, ed., Basic Books 1974).

4. John Rawls, *supra* n. 1, at 146–52; Alan Donagan, *supra* ch. 1 n. 39, at 22.

5. The concept of maximum ignorance in probability theory is attributed by some to the French scientist Pierre-Simon Laplace (1749–1827). Under this con-

cept, if one is attempting to calculate the probability of a certain event (about which little or nothing is known a priori about the relative possibilities of the outcomes) and there have been no prior trials testing whether or not the event will occur, the probability at this point of maximum ignorance is fifty-fifty. See “Pierre-Simon Laplace” at en.wikipedia.org. In other sources, the concept of maximum ignorance is attributed to Rev. Thomas Bayes. See “Stephen D. Unwin” at en.wikipedia.org. This is not surprising since “[Bayes’s] friend, Richard Price, edited and presented the work in 1763, after Bayes’s death, . . . [and] Pierre-Simon Laplace replicated and extended these results in an essay of 1774, apparently unaware of Bayes’s work.” See “Bayes’ Theorem” at en.wikipedia.org.

6. Ronald Dworkin, *supra* ch. 1 n. 3, at 47.

7. Yale Kamisar, “The Rise and Fall of the ‘Right’ to Assisted Suicide,” in “The Case against Assisted Suicide,” *supra* intro. n. 18, at 88; Lance K. Still, “Physician-Assisted Suicide: To Decriminalize or to Legalize, That Is the Question,” in “Expanding the Debate,” *supra* intro. n. 8, at 246; *Sue Rodriguez v. Attorney General Canada and Attorney General British Columbia*, 3 Can. Sup. Ct. Reps. 603 (Part 4, 1993).

8. *Gonzalez v. Oregon*, 546 U.S. 243, 126 S. Ct. 904, 163 L. Ed. 2d 748

9. B. Steinbock, *supra* ch. 4 n. 36, at 253 (the author takes the consequentialist position balancing the current “need” for PAS with the currently perceived “risks”). Cf. Steve P. Calandrillo, *supra* ch. 4 n. 34, at 100 (“The crucial point to take away from the valuable anti-PAS research is not that the practice should be banned outright, but that it must be carefully scrutinized and regulated”).

10. Annette E. Clark, *supra* intro. n. 15, at 109; Yale Kamisar, *supra* ch. 1 n. 42, at 119.

11. Gerald Dworkin, R.G. Frey, and Sissela Bok, *supra* ch. 3 n. 25, at 65; Lynn Tracy Nerland, *supra* intro. n. 5, at 129–31 (the Japanese give doctors a defense for mercy killing); N.D.A. Kemp, *supra* intro. n. 10, at 219 (the author discusses the “good faith assistance” defense, which was presented to Parliament in 1985 and defeated by a margin of 48 to 15).

12. Julie A. Di Camillo, *supra* ch. 4 n. 140, at 808 n. 10; Gerald Dworkin, R.G. Frey, and Sissela Bok, *supra* ch. 2 n. 25, at 65; Dana Elizabeth Hirsch, *supra* ch. 8 n. 50, at 841; “Canada,” 25; Mustafa D. Sayid, “Euthanasia: A Comparison of the Criminal Laws of Germany, Switzerland, and the United States,” 6 *Bost. Coll. Inter. & Compar. L. Rev.* 533 (1983). Cf. Daniel C. Maguire, *supra* intro. n. 8, at 39 (mercy killing is different in nature than most homicides).

13. See Guido Calibresi and Phillip Bobbitt, *supra* ch. 1 n. 2.

14. The size of the euthanasia underground appears to be significant. See Samia A. Hurst, M.D., “‘Agreed Boundaries’: Are We Asking the Right Questions?” 166 *Arch. Intern. Med.* 126 (2006) (nearly 10 percent of doctors surveyed reported having conducted euthanasia). See also R.S. Magnusson, “Euthanasia: Above Ground, below Ground,” 30 *J. Med. Ethics* 441, 441 (2004) (we can never make PAS completely safe but must consider risks posed by an unregulated underground carrying out an unlawful practice).