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Constitutional Tragedy in Dying: Responses to Some Common Arguments Against the Constitutional Right to Die

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CONSTITUTIONAL TRAGEDY IN DYING: RESPONSES TO SOME COMMON ARGUMENTS AGAINST THE CONSTITUTIONAL RIGHT TO DIE

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> [W]e are ourselves authors of a tragedy, and that the finest and best we know how to make. [O]ur whole polity has been constructed as a dramatization of a noble and perfect life; that is what we hold to be in truth the most real of tragedies.[1]

I. Introduction

I shall argue for the constitutional right to die, including the right of terminally ill persons to physician-assisted suicide. Indeed, I shall argue that it would be a constitutional tragedy if the Supreme Court were to hold that the Constitution does not protect such a right to die,[2] and thus to overrule the Ninth Circuit decision in *Compassion in Dying v. Washington*[3] (to say nothing of the Second Circuit decision in *Quill v. Vacco*[4]). First, such a holding would

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1. PLATO, THE LAWS, BOOK VII, at 817b (A.E. Taylor trans.), *in* THE COLLECTED DIALOGUES OF PLATO (Edith Hamilton & Huntington Cairns eds., 1961).

2. This essay speaks as of May 1, 1997, before the Supreme Court handed down its predictable and regrettable decisions rejecting the right of terminally ill persons to physician-assisted suicide. *See* Washington v. Glucksberg, 117 S. Ct. 2258 (1997); Vacco v. Quill, 117 S. Ct 2293 (1997). I have not revised the essay in light of those decisions. I plan to criticize those decisions in subsequent work.

3. *See* 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd sub nom.*, Washington v. Glucksberg, 117 S. Ct. 2258 (1997). I shall put to one side all of the difficult issues concerning whether there are crucial distinctions between the right to die conceived as the right to refuse unwanted medical treatment and the right to die conceived as the right to physician-assisted suicide. I believe that Judge Reinhardt convincingly showed that many proffered distinctions of this sort, although familiar, are distinctions without a difference. *Id.* at 820-24. I also believe that Reinhardt persuasively argued that state interests, such as avoiding the involvement of third parties, and precluding the use of arbitrary, unfair, or undue influence, do not justify a total ban on physician-assisted suicide, although they do justify the creation of procedural safeguards. *Id.* at 825-27, 832-33.

4. *See* 80 F.3d 716 (2d Cir. 1996), *rev'd*, 117 S. Ct. 2293 (1997).

entail that the Constitution sanctions a grievous wrong, a horrible form of tyranny: allowing the state to impose upon some citizens, against the grain of their conscientious, considered convictions about dying with dignity, what they regard as a ruinous, tragic ending of their lives.[5] Second, such a decision would represent an awful interpretive tragedy: for the Constitution, rightly interpreted, does not permit this dreadful evil but to the contrary allows citizens to author their own tragic endings. Here, I shall draw upon an essay I wrote for a recent Symposium on "Constitutional Tragedies."[6]

Then, I shall respond to some of the most common arguments against such a right, including several policy arguments that have been made in this Symposium. My general tack will be to argue that, whatever the merits of those arguments, none provides a good constitutional argument against recognizing a constitutional right to die, including physician-assisted suicide. Furthermore, all of those arguments, to the extent that they have merit, can be addressed through procedural safeguards surrounding the exercise of that constitutional right or through governmental provision of basic services. I fear that much of the discussion about the right to die proceeds at the level of policy arguments that lose sight of the fact that a fundamental constitutional right is at stake here. As the final panelist in "A Symposium on Health Care, Poverty and Autonomy,"[7] I believe that it is incumbent upon me, especially after what we have heard on this panel, to shore up autonomy as a constitutional right.

II. Constitutional Tragedy in Dying

It would be tragic if the Supreme Court were to hold that the Constitution does not protect the right to die, including the right of terminally ill persons to physician-assisted suicide. First, the state's proscription of physician-assisted suicide is tantamount to conscription of terminally ill persons into involuntary servitude.[8] For the

5. *See* RONALD DWORKIN, LIFE'S DOMINION 217 (1993). *See also* Ronald Dworkin et al., *Assisted Suicide: The Philosophers' Brief*, N.Y. REV. BOOKS, Mar. 27, 1997, at 41.

6. *See* James E. Fleming, *Constitutional Tragedy in Dying: Or Whose Tragedy Is It, Anyway? in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. & Sanford Levinson, eds., forthcoming 1998). I prepared that essay for a program on "Constitutional Tragedies," held at the Annual Meeting of the Association of American Law Schools, January 7, 1997.

7. 24 FORDHAM URB. L.J. 663 (1997).

8. *Cf.* Planned Parenthood v. Casey, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (arguing that "[b]y restricting the right to terminate pregnancies, the State conscripts women's

state commandeers those persons' bodies, lives, and deaths into service in fostering its conception of how to honor the sanctity of life. It exposes its dangerous presupposition that ultimately persons do not own themselves but are "mere creatures of the state" or of God.[9] What is more, the state exacts such service in the face of those persons' conscientious, considered convictions about how to lead their own lives and deaths, and indeed about how to respect the sanctity of life.[10] Thus, the state attempts to use terminally ill persons' bodies, lives, and deaths as pulpits for preaching a message or viewpoint about sanctity which they themselves conscientiously reject.

In effect, the state tries to impose a sentence of life imprisonment, or imprisonment in life, upon terminally ill persons who wish to end their own lives. To be sure, the state seeks to justify this evil, requiring this undignified sacrifice and unspeakable suffering, in the name of a supreme good or ultimate value, promoting respect for the sanctity of life. That effort does not redeem the evil but to the contrary makes it more terrible and tyrannical. For it shows that the state's asserted power to promote respect for the sanctity of life by prohibiting physician-assisted suicide is "an in-

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bodies into its service . . . ."). I realize that some will object that the state does not compel terminally ill persons to do anything, much less conscript them into involuntary servitude. In particular, they may contend that the state does not forbid such persons from committing suicide; it simply prohibits them from getting physicians' assistance in doing so. But that claim does not defeat the analogy to involuntary servitude, any more than a similar claim would defeat the analogy between involuntary servitude and the forced continuation of a pregnancy. It would be absurd to say that the Constitution protects the right of women to decide whether to terminate a pregnancy, but does not protect the right to physician-assisted abortion (as if the right to abortion embraced only self-performed abortion). It would be equally problematic to say that the Constitution protects the right of terminally ill persons to decide whether to terminate their lives, but does not protect the right to physician-assisted suicide (as if the right to die encompassed only self-performed suicide). As for the tirelessly repeated claims that there is a fundamental difference between "passive" and "active" euthanasia, I have nothing to add to Judge Reinhardt's powerful rejection of those claims. *See Compassion in Dying*, 79 F.3d at 820-24.

9. *See* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (stating that "[t]he child is not the mere creature of the State . . . ."). *But see* Stephen L. Carter, *Rush to a Lethal Judgment*, N.Y. TIMES MAG., July 21, 1996, at 28 (approvingly stating that the laws in England and America that prohibited suicide "reflected a strong belief that the lives of individuals belonged not to themselves alone but to the communities in which they lived and to the God who gave them breath."). *See also* Michael J. Sandel, *Last Rights*, THE NEW REPUBLIC, Apr. 14, 1997, at 27.

10. *See* DWORKIN, *supra* note 5, at 217.

jury got up as a gift," an intolerable evil disguised and imposed as a supreme good.[11]

Second, the state's prohibition of physician-assisted suicide usurps citizens' power to make certain important decisions for themselves. Elsewhere, I have argued that the right to die is among the basic liberties that are essential to deliberative autonomy (as distinguished from deliberative democracy): Such rights reserve to persons the power to deliberate about and decide how to live their own lives, with respect to certain matters unusually important for such self-government, over a complete life, from cradle to grave.[12] Put another way, these basic liberties are significant preconditions for persons' development and exercise of deliberative autonomy in making certain fundamental decisions affecting their destiny, identity, or way of life, and they span a complete lifetime. Decisions concerning the timing and manner of a person's death are among the most significant decisions for deliberative autonomy that a person may make in a lifetime. If the Constitution does not reserve such decisions to persons, it betrays its "promise" of a "rational continuum" of liberty.[13] A Constitution that does not protect the right to die, paradoxically, is not worth living under and not worth dying for.

These claims about conscription and usurpation suggest that the Constitution, if interpreted not to protect the right to die, would be woefully imperfect from the standpoint of a vigorous conception of deliberative autonomy. But would this amount to a constitutional tragedy? It would be tragic because it would entail that the Constitution sanctions a terrible evil, a horrible form of tyranny: allowing the state to impose upon some citizens, against the grain of their conscientious, considered convictions about dying with dignity, what they regard as a ruinous, tragic ending of their lives. The Constitution would permit the state to do this at the crucial moment when terminally ill persons were seeking to author the final chapters of their own personal tragedies.

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11. *Cf.* Catharine A. MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade*, *in* FEMINISM UNMODIFIED 93, 100 (1987) (arguing that the right of privacy may readily prove, for women, to be "an injury got up as a gift"). Similarly, Judge Reinhardt criticized the district court decision invalidating Oregon's Death With Dignity Act because it "treats a *burden* [prohibition of physician-assisted suicide] as a *benefit* and a *benefit* [the right to physician-assisted suicide] as a *burden*." *Compassion in Dying*, 79 F.3d at 838 (criticizing Lee v. State of Oregon, 891 F. Supp. 1429, 1438 (D. Or. 1995)).

12. *See* James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 9 (1995).

13. Planned Parenthood v. Casey, 505 U.S. 833, 848-50, 901 (1992) (joint opinion).

The noble protagonists in this constitutional tragedy are citizens who have the courage to use their own deliberative reason and to take responsibility for their own lives and for their own judgments about how to respect the sanctity of life. The tragic flaw of these protagonists—the characteristic that is both their greatness and their downfall—is their autonomy, their daring to live autonomously rather than as mere creatures of the state or of God. They seek to exercise their deliberative autonomy, to give their tragedies a good, dignified, and noble ending, to write their own final chapters in character with, or so as to maintain integrity with, their conceptions of a good life—to die, as to live, with dignity.[14] The state, however, wishes to usurp their authorship of their own tragedies, to conscript them as mere players in its own tragedy about the sanctity of life. Thus, the state refuses to "[v]ex not [their] ghost[s]" as they lie terminally ill, at death's door.[15] Instead, it prolongs their pain and exacerbates their anguish, in effect maintaining wards of would-be cadavers as monuments to its view of the sanctity of life.

Most problematically, the state asserts, at terminally ill persons' ultimate moment of self-authorship, that they are not in fact the authors of their own lives and tragedies. The state proclaims that it is the author of their lives, at least of their tragedies. It basically says to them what the Athenian Stranger (on behalf of the state) says to the tragedians in Plato's *Laws*: "[W]e are ourselves authors of a tragedy, and that the finest and best we know how to make. [O]ur whole polity has been constructed as a dramatization of a noble and perfect life; that is what we hold to be in truth the most real of tragedies."[16] But in our constitutional democracy, citizens are not mere creatures of the state or of God, nor are we mere players in the state's tragedy, its "dramatization of a noble and perfect life." Rather, we citizens are the authors of our own tragedies, "the finest and best we know how to make." The state is not authorized to act as the master tragedian.[17] We must ask: "Whose

14. *See* DWORKIN, *supra* note 5, at 199-213.

15. WILLIAM SHAKESPEARE, THE TRAGEDY OF KING LEAR act V, sc. 3, (cited in *Compassion in Dying*, 79 F.3d at 821).

16. *See* PLATO, *supra* note 1, at 817b.

17. *See* Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923) ("[The] ideas touching the relation between individual and state [in Plato's ideal commonwealth, which 'submerge the individual and develop ideal citizens'] were wholly different from those upon which our institutions rest . . . .").

tragedy is it, anyway?"[18] In our constitutional democracy, the answer is: "It is each citizen's, not the state's."

III. Responses to Some Common Arguments Against the Constitutional Right to Physician-Assisted Suicide

Next, I want to outline responses to some common arguments against the constitutional right to die, including the right of terminally ill persons to physician-assisted suicide. First, we sometimes hear the argument that many people who would exercise the right to physician-assisted suicide are mentally ill, clinically depressed, or in great pain.[19] But this is not an argument against protecting the right to die. One might just as well argue, from the fact that many people who vote are poorly informed about the candidates and issues, against recognizing the right to vote. That is, this is instead an argument for providing care to the mentally ill or clinically depressed who wish to commit physician-assisted suicide and treatment to those in pain. Similarly, the observation regarding voting justifies an argument for providing better education and encouraging people to be responsible citizens who are well informed about candidates and issues. Again, this concern about mentally ill or clinically depressed persons is better as an argument for health care for those persons than as an argument against recognizing the right to die. Let us provide them with that care and then let them make their own decisions.

Second, we sometimes hear the argument that there are risks for vulnerable communities, such as urban poor and racial minorities. We have heard these arguments before, against a right to abortion. In arguing against protection of the constitutional right to abortion, some argued that poor women, including racial minorities, would be vulnerable to pressure to have abortions instead of carrying their fetuses to term.[20] In fact, to the contrary, we got the Hyde Amendments, which forbid Medicaid funding of abortions for poor women while paying for childbirth.[21] Thus, if anything, the government provides incentives (if not pressure) for poor women not to have abortions. Predictably, we have already seen the same move

18. I allude, of course, to BRIAN CLARK, WHOSE LIFE IS IT, ANYWAY? (1980).

19. *See, e.g.*, Ellen H. Moskowitz, *Mental Illness, Physical Illness, and the Legalization of Physician-Assisted Suicide*, 24 FORDHAM URB. L.J. 781 (1997).

20. *See Compassion in Dying*, 79 F.3d at 830 (noting that opponents of the right to abortion contended that legalizing abortion would lead to its widespread use as a means of racial genocide).

21. The constitutionality of the Hyde Amendment in the context of abortion funding was upheld in Harris v. McRae, 448 U.S. 297 (1980).

with respect to the right to physician-assisted suicide. On April 30, 1997, President Clinton signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibits the use of federal funds in support of physician-assisted suicide.[22] Thus, the federal government forbids funding of physician-assisted suicide for poor people while paying for medical expenses related to keeping them alive.

Beyond the analogy between physician-assisted suicide and abortion, I want to make the more general point that it is common to overstate the extent to which people would succumb to pressure to request physician-assisted suicide. I believe that this argument terribly underestimates persons' strong drive for self-preservation. I doubt that persons' will can be so easily overborne with respect to such life and death decisions. Having said that, I would argue that if indeed there are legitimate worries about risks for vulnerable communities, they can be met by procedural safeguards against undue influence or duress or the like. That is, these worries justify such procedural safeguards, but they do not justify denying the constitutional right to die. I believe that Professor Alan Meisel's analysis was quite cogent in that respect.[23]

Third, a further analogy between abortion and physician-assisted suicide is appropriate. I acknowledge that some reasonable persons, physicians, and clergy are morally opposed to physician-assisted suicide, just as some are opposed to abortion. But that should not be dispositive of the question whether the Constitution protects such rights. In considering this question, we should remember the important words from the joint opinion in *Planned Parenthood v. Casey*: "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."[24] I believe that many persons, physicians, and clergy who argue against the right to die and the right to abortion ignore or lose sight of this important point.

At the risk of seeming flippant or disrespectful, I will mention that recently, I received a catalog advertising political tee-shirts and buttons. I saw a tee-shirt that said: "Against abortion? Don't have one." I would like to make the analogous statement to opponents of physician-assisted suicide: "Against physician-assisted sui-

22. Pub. L. No. 105-12, 111 Stat. 23 (1997) (codified at 42 U.S.C. §§ 14401-14408).

23. *See* Alan Meisel, *Physician-Assisted Suicide: A Common Law Roadmap for State Courts*, 24 FORDHAM URB. L.J. 817 (1997).

24. *Casey*, 505 U.S. at 850.

cide? Don't have one." And to physicians: "Against physician-assisted suicide? Don't provide such assistance." And to clergy: "Against physician-assisted suicide? Preach it in your church or synagogue." But seriously, recognizing a constitutional right to die (or to abortion) leaves room for moral disagreement and debate among citizens about that right.

Fourth, we sometimes hear the argument that protecting the right to die will change the moral environment for the worse, for it will undermine respect for the sanctity of life. This formulation misconceives the argument about the right to die. The argument is not between those who affirm the value of respect for the sanctity of life (by opposing this right) and those who deny the value of respect for the sanctity of life (by supporting this right). Rather, the argument is about a different question: Who should decide how best to respect the sanctity of life, the state or individuals (in the exercise of their deliberative autonomy)? This brings us to the question: Whose life is it, anyway? Or, again: Whose tragedy is it, anyway?[25]

My argument is that our Constitution leaves to individuals the right and the responsibility to decide how best to respect the sanctity of life in deciding such questions of one's own life and death. I repeat: It is a horrible form of tyranny for the state to usurp this decisionmaking authority by treating persons as mere creatures of the state or of God. Protecting that right—and that allocation of responsibility—secures the moral environment within which our basic liberties thrive. Furthermore, protecting the right of individuals to make the decision regarding physician-assisted suicide does not preclude the state from adopting measures that seek to encourage reflective, deliberative, and responsible decisionmaking about such significant matters. But the state may not enact measures that compel persons to make the decision that it prefers.

Finally, we sometimes hear the argument that it would be cruelly ironic if we got a right to kill ourselves before we got the right to be kept alive, that is, the right to health care. Put another way, the claim is that it would be ironic if we got the affirmative right to physician-assisted suicide before we got the affirmative right to health care generally. But this supposed irony dissolves under close analysis. It exploits two different senses of affirmative: first, affirmative in the sense of "active" euthanasia versus "passive" euthanasia, and second, affirmative in the sense of a positive right

25. *See supra* text accompanying note 18.

that the government affirmatively fund the exercise of one's constitutional rights.

The right to physician-assisted suicide is not really an affirmative right in either of these senses. As for the first sense, the fact that the right to die includes the right to physician-assisted suicide is no more "affirmative" or "active" than the fact that the right to abortion includes the right to physician-assisted abortion. It would be absurd to say that the Constitution protects the right of women to decide whether to terminate a pregnancy, but does not protect the right to physician-assisted abortion (as if the right to abortion embraced only self-performed abortion). It would be equally problematic to say that the Constitution protects the right of terminally ill persons to decide whether to terminate their own lives, but does not protect the right to physician-assisted suicide (as if the right to die encompassed only self-performed suicide). As for the second sense, neither the Ninth Circuit decision in *Compassion in Dying* nor the Second Circuit decision in *Quill* recognized an affirmative right to die in the sense of a positive right that the government affirmatively fund the exercise of that right.

Even if I concede that there is an irony here, I would argue that the irony points to the need to make the case for provision for health care generally rather than suggesting a justification for denying the right to die. It is indeed a terrible shortcoming of constitutional law today that people think we have a negative Constitution rather than a Constitution that imposes affirmative obligations upon government to provide for basic needs of all persons. It is also a deplorable shortcoming of American politics today that the citizenry evidently lacks the political will to honor such obligations. But it is cruel to make terminally ill persons who seek physician-assisted suicide suffer because of these shortcomings of constitutional law and American politics.