Assisted Suicide: The State versus The People

John P. Safranek, M.D., Ph.D.[*]
Stephen J. Safranek, J.D.[**]

I. INTRODUCTION

The Ninth Circuit Court of Appeals grounded a right to assisted suicide in *Compassion in Dying v. Washington* on the principles of personal dignity and autonomy.[1] Although the court determined that these principles justify a right to assisted suicide as coherently as they would a right to the "intimate and personal choice" of abortion,[2] assisted suicide differs from abortion because it implicates the state's power to protect actual—rather than potential[3]—human life. Because the Court in *Roe v. Wade* classified the fetus as only a potential human being,[4] the Court did not defer to the states' traditional authority to protect human life. In contrast, the Court recognized that the human life at stake in the case of assisted suicide is an actual one. Therefore, to justify a right of assisted suicide, the judiciary must defend arrogating power that it has historically ceded to the states.

This Article will examine the Ninth Circuit's appeal to personal dignity and autonomy to justify a constitutional right of assisted suicide in the face of pluralist opposition, that is, a law duly enacted by a majority of elected representatives in a state or by the people directly.[5] Scrutiny of the Ninth Circuit's decision will reveal the

---

* John P. Safranek, Associate, Creighton University Center for Health Policy and Ethics; B.A. University of San Francisco; M.D. University of Nebraska; Ph.D. The Catholic University of America. Dr. Safranek is a practicing physician.

** Stephen J. Safranek, Associate Professor of Law, University of Detroit Mercy School of Law; B.A. University of San Francisco; M.A. University of Dallas; J.D. University of Notre Dame. The authors gratefully acknowledge the substantive and technical critiques offered by Louis Safranek, M.D., Ph.D.

1. *See* Compassion in Dying v. Washington, 79 F.3d 790, 838 (9th Cir. 1996) (en banc), *rev'd sub nom.* Washington v. Glucksberg, 117 S. Ct. 2258 (1997).

2. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992). "[T]he most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Id.*

3. *See* Roe v. Wade, 410 U.S. 113, 159-163 (1973).

4. *See id.* at 159.

5. The term pluralism has many different meanings. In this article, pluralism means government where the people enact laws directly or through their elected representatives.

formidable jurisprudential obstacles to basing a right to assisted suicide on dignity and autonomy, obstacles the Supreme Court refused to overcome in revoking *Compassion in Dying*.[6] This examination is divided into three parts: the first analyzes attempts to justify rights on the principle of liberty, to which autonomy and dignity reduce; the second focuses specifically on the Ninth Circuit's attempt to ground a right to assisted suicide on this principle; and the third examines three responses to the challenge that pluralism presents to the Ninth Circuit's decision.

II. DIGNITY AND AUTONOMY

A. *Neutrality Is Necessary*

A crucial tenet of contemporary liberal legal and political theory asserts that the government must remain neutral to competing views of the good, or morality. Championed by such eminent liberals as Ronald Dworkin[7] and John Rawls,[8] this tenet has gained currency as a jurisprudential principle: jurists cite it to override state laws regarding matters of personal morality. For example, a Michigan Supreme Court justice upheld a right to assisted suicide, claiming: "Defining liberty, therefore, cannot involve a morality play by any group or by a general disapproval by the majority of this Court."[9]

The argument for pluralism would also justify the decision of Oregon citizens to legalize assisted suicide. Pluralists are committed to democracy, whether it be direct or representative; pluralists would support both the Oregon plebiscite that supported a right to assisted suicide and the Washington Legislature's proscription of the act. This Article neither defends nor criticizes the right to assisted suicide per se, but focuses only on the judiciary's justification for overriding the citizenry's choice regarding assisted suicide, whatever the choice might be.

6. The Supreme Court reversed primarily because, under current Due Process methodology, (1) the proposed right is not carefully formulated and deeply rooted in this nation's history and tradition and is thus not a fundamental liberty interest, and (2) Washington's ban is rationally related to a legitimate governmental interest. *See Glucksberg*, 117 S. Ct. at 2271. This Article constructs a philosophical criticism of the Ninth Circuit's decision on the basis of pluralism and on that decision's misapplication of the concepts of liberty, autonomy, and dignity.

7. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 191 (1985) [hereinafter DWORKIN, PRINCIPLE]. "[E]quality supposes that political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life. . . . [T]he government does not treat [citizens] as equals if it prefers one conception to another. . . ." *Id. See also* Peter De Marneffe, *Liberalism, Liberty, and Neutrality*, 19 PHIL. & PUB. AFF. 253 (1990) (effectively critiquing Dworkin's position, particularly with regard to freedom of religion).

8. *See* JOHN RAWLS, POLITICAL LIBERALISM 191-194 (1993) (defending the necessity of neutrality much more vigorously than Dworkin as well as offering a more philosophical understanding of neutrality).

9. People v. Kevorkian, 527 N.W.2d 714, 752 (Mich. 1994) (Mallett, J., concurring in part and dissenting in part). *See also Casey*, 505 U.S. at 850 (stating that "[o]ur obligation is to define the liberty of all, not to mandate our own moral code").

Therefore, liberal scholars and jurists bear the self-imposed burden of justifying a right to assisted suicide without imposing morality.

B. The Equivalence of Liberty, Autonomy, and Dignity

The Ninth Circuit upheld a right to assisted suicide in *Compassion in Dying v. Washington*, agreeing with the Supreme Court's statement in *Planned Parenthood of Southeastern Pennsylvania v. Casey* that "choices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment."[10] Therefore, to secure the protection of the Fourteenth Amendment, the act of assisted suicide must fulfill two requirements: the choice to participate in this act must be central to personal dignity and autonomy, and the liberty guaranteed by the Due Process Clause must encompass choices related to personal dignity and autonomy. The former claim will be conceded; the latter, however, is problematic.

The substance of the Due Process Clause has been disputed at least since the Warren Court initially invoked it to justify individual rights.[11] The Due Process Clause does not protect every act of liberty, and in the last thirty years the Supreme Court has attempted to articulate criteria establishing which free acts the general right to liberty protects.[12] Previously the Court claimed that acts of a certain private nature enjoy constitutional protection and employed this criterion to justify rights to the liberties of purchasing contraceptives[13] and obtaining an abortion.[14]

In *Casey*, the Justices eschewed privacy in favor of two other criteria—dignity and autonomy—to distinguish among acts of liberty that the Due Process Clause protects.[15] The Ninth Circuit's justification in *Compassion in Dying* of a right to assisted suicide, which appealed directly to *Casey*'s criteria, depends entirely on the coherence of dignity and autonomy as jurisprudential principles.[16]

If the concepts of dignity and autonomy distinguish those acts of liberty that the Fourteenth Amendment guarantees, then these concepts must differ in some relevant respect from liberty; otherwise jurists would be attempting to distinguish among acts of liberty by the

---

10. *Compassion in Dying*, 79 F.3d at 801 (quoting *Casey*, 505 U.S. at 851).
11. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).
12. *See, e.g.*, Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977); Village of Belle Terre Boraas, 416 U.S. 1 (1974).
13. *See Griswold*, 381 U.S. at 483.
14. *See Casey*, 505 U.S. at 915 (Stevens, J., concurring in part and dissenting in part).
15. *See id.* at 851.
16. *Compassion in Dying*, 79 F.3d at 790.

criterion of liberty, which is not possible. However, neither the judiciary nor legal scholars have ever clearly differentiated either autonomy or dignity from liberty.

The Supreme Court has frequently employed autonomy in constitutional jurisprudence. For example, it has recognized the autonomy of the individual to control unwanted mail,[17] to represent herself in court,[18] and to choose the editorial content of publications.[19] In all of these instances, the Court could have substituted liberty for autonomy without altering the import of these rights. In *Casey*, the Court also used liberty and autonomy indistinguishably, claiming, "[t]he woman's constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature";[20] and, "[d]ecisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own view of what is best."[21] In constitutional jurisprudence, both liberty and autonomy protect a woman's right to make important personal decisions for herself.[22] Thus, the Court has identified autonomy with liberty for many decades, and recently has employed it to ground important personal rights.

Liberal scholars also identify autonomy with the classical understanding of liberty. Joseph Raz claims that personal autonomy "is essentially about the freedom of persons to choose their own lives,"[23] and Ronald Dworkin states that individuals' right to autonomy is "a right to make important decisions defining their own

---

17. *See* Rowan v. United States Post Office Dep't, 397 U.S. 728, 736 (1970).

18. *See* Faretta v. California, 422 U.S. 806, 817 (1975).

19. *See* Herbert v. Lando, 441 U.S. 153, 178 (Powell, J., concurring).

20. *Casey*, 505 U.S. at 915 (Stevens, J., concurring in part and dissenting in part). This identification of autonomy and liberty follows extant legal scholarship. *See also* Note, *Physician-Assisted Suicide and the Right to Die with Assistance*, 105 HARV. L. REV. 2021, 2025 (1992) ("The right to be free from governmental interference in making fundamental personal decisions is the core notion of due process liberty. The right to privacy, which state courts often cite as a basis for a right to die, is also rooted in an ideal of individual autonomy.") (citations omitted).

21. *Casey*, 505 U.S. at 916 (Stevens, J., concurring in part and dissenting in part). Justice Stevens stated that "[p]art of the constitutional liberty to choose is the equal dignity to which each of us is entitled." *Id.* at 920.

22. *See* JOHN STUART MILL, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 73 (J.M. Dent and Sons Ltd. eds., 1910) (arguing that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others").

23. JOSEPH RAZ, THE MORALITY OF FREEDOM 370, n.2 (1986) "Is the autonomous wrongdoer a morally better person than the non-autonomous wrongdoer? Our intuitions rebel against such a view. It is surely the other way around." *Id.* at 380.

lives for themselves."[24] John Stuart Mill, the classical liberal, stated that the principle of liberty "requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character. . . ."[25] Hence, it appears that neither the Supreme Court nor liberal scholars have differentiated autonomy from liberty.

The Supreme Court has also used dignity in a sense indistinguishable from autonomy or liberty, namely, the freedom or right of individuals to decide important personal matters for themselves. In *Casey*, the Court claimed, "A woman considering abortion faces a difficult choice having serious and personal consequences of major importance to her own future—perhaps to the salvation of her own immortal soul. The authority to make such traumatic and yet empowering decisions is an element of basic dignity."[26]

The judiciary must cast dignity in the same voluntarist light as autonomy; otherwise, it would patently impose a view of the good. It cannot claim, for example, that everyone suffering grievously from terminal cancer must partake in assisted suicide in order to preserve dignity; rather, death with dignity is the death that the individual autonomously chooses, whether by assisted suicide or natural causes. If jurists proposed a substantive code of dignified human action, then they would be imposing an axiology and constraining an individual's choice—whatever it might be—in important personal matters. Thus, when it asserts that human dignity safeguards an individual's choice regarding the manner of her death, the judiciary reduces dignity to autonomy and liberty.

C. The Ethical Basis of the Harm Principle

If personal dignity and autonomy do not relevantly differ from liberty, then the concept of liberty must protect important personal decisions, such as the right to assisted suicide, from the tyranny of pluralism, i.e., the majority vote of elected representatives or the people themselves. The point of departure for establishing claims to liberty is John Stuart Mill's harm principle, which prohibits the majority from

---

24. RONALD DWORKIN, LIFE'S DOMINION 222 (1993). *See also* JOSEPH V. DOLAN, S.J., *Ethics as Philosophy of Freedom*, *in* FREEDOM AND VALUES 29-49 (Robert & Johann ed., 1976) (making the same distinctions regarding liberty as others do about autonomy, i.e., the characteristics required by the capacity of liberty versus the actual exercise of it).

25. MILL, *supra* note 22, at 75.

26. *Casey*, 505 U.S. at 916 (Stevens, J., concurring in part and dissenting in part) (citations omitted).

circumscribing an individual's liberty unless the act harms others.[27] The judiciary routinely adjudicates liberty claims on the basis of their harmful ramifications, as paradigmatically illustrated in Justice Holmes's rejection of the free speech act of screaming "Fire!" in a movie theater because of the act's potential harm.[28]

Although the harm principle animates nearly all liberal political and legal theory,[29] it presents contemporary liberalism with an insoluble contradiction: an individual judges an act as harmful only when she thinks a good is being subverted. As Joseph Raz notes,

> Since 'causing harm' entails by its very meaning that the action is prima facie wrong, it is a normative concept acquiring its specific meaning from the moral theory within which it is embedded. Without such a connection to a moral theory, the harm principle is a formal principle lacking specific concrete content and leading to no policy conclusions.[30]

The contradiction facing contemporary liberals is that when a jurist recognizes an individual right because of the harm caused by some statute, or proscribes the liberty to an act that the jurist considers harmful, she necessarily invokes a theory of the good or morality. Therefore, when jurists recognize a personal right because of some important interests at stake, they adjudicate on the basis of an axiology, in which some values or goods occupy a more prominent position than other values.

If the goods in question are nearly universally acknowledged, then recognition of rights to the goods will be uncontroversial. Jurists did not create a controversy when they recognized the autonomy of the individual to be free of unwanted mail because the vast majority of citizens acknowledged this good.[31] Nor should the recognition of an individual's right to marry, socialize, or receive an education raise opposition, because of the near-unanimous assent to these goods.[32]

However, prevalent dissent regarding other unenumerated constitutional rights stems precisely from the disparate views of the

---

27. *See* MILL, *supra* note 22, at 73 (arguing that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others").

28. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

29. Nearly every liberal scholar recurs to the harm principle in his or her legal theory. *See, e.g.*, RAZ, *supra* note 23, at 412-20; *see also* H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963); JOEL FEINBERG, HARMLESS WRONGDOING (1988).

30. *See* RAZ, *supra* note 23, at 414.

31. *See Rowan*, 397 U.S. at 736.

32. *See* Washington v. Glucksberg, 117 S. Ct. 2258, 2267 (1997) (citations omitted).

good that jurists, legal scholars, and other citizens retain, and the consequent disagreement regarding whether harm is created when these goods are infringed. For example, the extant conflict regarding hate-speech codes hinges on disparate notions of the good: supporters of such codes point to the good of self-awareness or civility that racist or sexist speech violates;[33] opponents advert to the good of free expression that speech codes impede.[34] Similarly, pornography is perceived as harmful by those who esteem the multidimensional nature of women, while its suppression is harmful to those who uphold the good of free speech.[35] Hence, a jurist adjudicates rights' claims according to her estimation of the goods underlying each particular claim.

The harm principle is an essential component of every legal or political theory because members of society cannot tolerate every act of liberty, and therefore they invoke the harm principle to eschew acts that conflict with their view of the human good. But if the harm principle requires a theory of the good in application, then the judiciary imposes a theory of the good whenever it upholds or denies a constitutional right based on the harms a statute inflicts upon an individual's dignity and autonomy (i.e., liberty). As such, it thereby institutes what it and liberal scholars prohibit the legislative branch of the government from enacting, namely, a state-imposed view of the good.

Liberal scholars have overlooked that Mill explicitly tethered his doctrine of liberty to utilitarianism,[36] and therefore he was able to justify individual liberties or rights by appealing to their utility, e.g., free speech is good and must be protected because it facilitates the good of attaining the truth.[37] Mill perceived that in defending rights to individual liberties, he would be upholding a view of the good,

---

33. *See* Richard H. Fallon Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 895 (1994).

34. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 59 (1989); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 279-285 (1991).

35. *See, e.g.*, Smith v. California, 361 U.S. 147, 154 (1959) (holding a California statute which dispensed with any mens rea requirement as to the contents of an obscene book would violate the First Amendment).

36. *See* MILL, *supra* note 22, at 74. Mill further stated, "I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of a man as a progressive being. Those interests, I contend, authorize the subjection of individual spontaneity to external control, only in respect to those actions of each, which concern the interests of other people." *Id.*

37. *See id.* at 82 ("There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument; but fact and arguments, to produce any effect on the mind, must be brought before it.").

which in his theory was utilitarianism.[38] Contemporary liberal scholars seek to isolate rights from morality, but in appealing to autonomy and dignity—which they use indistinguishably from liberty—to demarcate the limits of individual liberty, they unwittingly impose a view of the good. In addition, this argument is a tautology: if autonomy and dignity do not differ from liberty, then just as the concept of liberty cannot discriminate among acts of liberty that engage the Due Process Clause, neither can dignity nor autonomy.[39]

D. The Ethical Basis of Adjudication

If, instead of appealing to autonomy and dignity, liberal scholars appropriately appealed to the goods or "interests" that autonomy and dignity are instrumental in obtaining, then autonomy and dignity would not justify the rights.[40] However, the rights would then depend on a view of the good, which would undermine contemporary liberal dogma.[41] Thus, liberal scholars and jurists face the quandary of justifying the liberty to engage in certain acts such as assisted suicide by either invoking the tautologous concepts of autonomy and dignity, which therefore justify nothing, or appealing to a view of the good, which would undermine the very basis of contemporary liberalism.

Jurists conceal the moral basis of constitutional jurisprudence by describing disputes over rights as conflicts between citizens' "interests" because this term retains an aura of neutrality that "goods" does not. However, something is an interest for an individual only if it is good for her, either in a teleological or voluntarist sense: the Aristotelian proponent would maintain that certain acts of free speech are in an individual's interest because they are perfective of her;[42] the Hobbesian supporter would claim that such acts are in her interest only if she finds these acts good or (equivalently for Hobbes) desirable.[43] Hence,

---

38. *See id.* at 1-60.

39. *See supra* notes 27-29 and accompanying text.

40. For a similar argument, see Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 536-38 (1989).

41. *See id.* at 537.

42. *See* ARISTOTLE, NICOMACHEAN ETHICS, Bk. X, Ch. 5, 603 (H. Rackham ed., Harvard University Press 1962) (1926) ("[S]ince activities differ in moral value, and some are to be adoopted, others to be avoided, and others again are neutral, the same is true also of their pleasures: for each activity has a pleasure of its own.").

43. *See* THOMAS HOBBES, LEVIATHAN 39 (Richard Tuck ed., Cambridge University Press 1991) (1651) ("But whatsoever is the object of any man's appetite or desire, that is it which he for his part calleth *good*. . . . For these words of *good*, *evil*, and *contemptible*, are ever used with relation to the person that useth them: there being nothing simply and absolutely so. . . .").

whether construed in a teleological or voluntarist sense, "interests" are inextricably linked to a theory of the good, and the act of balancing "interests" is in fact balancing conflicting goods.

Jurists further obscure the moral dimension of certain constitutional disputes by framing disputes over rights as conflicts between the interests of the individual and the "state." However, the disputes that jurists mediate do not concern the individual and the state so much as discrepant views of the good. In regard to assisted suicide, for example, some citizens support a right to assisted suicide because of the good it entails and the harm it prevents; others oppose it because of the potential harm incurred by the act.[44] This dispute does not pit the individual against the state; rather, it involves two groups of individuals—each represented by some legislators—who seek to attain conflicting goods. Therefore, regardless of which interests the legislature or the Ninth Circuit supported, each would ineluctably impose a view of the good. The next section will analyze the conflicting views of the goods at stake in *Compassion in Dying v. Washington*.[45]

III. THE COURTS VERSUS THE PEOPLE

This section will apply the critique set forth in the previous section to the Ninth Circuit's decision, in particular its attempt to employ dignity and autonomy without imposing morality. Rather than justifying a right to assisted suicide, the Ninth Circuit's opinion will manifest the cogency of the pluralist challenge.

At the outset of *Compassion in Dying v. Washington*, the Ninth Circuit majority acknowledged an individual's liberty interest in choosing the time and manner of her death, because this choice is central to personal dignity and autonomy.[46] But it claims that a right can be granted only if this liberty interest outweighs the state's competing interests, among which are its interests in preserving life,[47] preventing suicide,[48] avoiding undue influences of third parties,[49] preventing a slide to more dubious types of killing,[50] protecting family

44. *See Compassion in Dying*, 79 F.3d at 790.
45. *Id.*
46. *See id.* at 801.
47. *See id.* at 818.
48. *See id.* at 820-24.
49. *See id.* at 825-27.
50. *See id.* at 830-32.

members,[51] and safeguarding the integrity of the medical profession.[52]

The Ninth Circuit majority putatively undermined the state's interest in preserving life and preventing suicide by equating the suspension of life-support with assisting in suicide: since the state permits the former, then it must allow the latter.[53] The jurists further claimed that the state could circumvent abuses by implementing a precise set of restrictions.[54] After also vitiating the other interests that the legislature cited, the jurists upheld an individual's interest in assisted suicide as more compelling, "for no decision is more painful, delicate, personal, important, or final than the decision of how and when one's life shall end."[55] Thus, the Ninth Circuit concluded that the Washington statute violated the Equal Protection Clause, by falsely distinguishing the acts of killing and letting die, and the Due Process Clause, by denying an individual the autonomy to make the important and personal choice to be assisted in suicide.

But the question persists: why should the judiciary's weighing of interests supplant the legislature's? The legislature undoubtedly considered the interests of some individuals in committing suicide and those of others in forbidding it, and then decided that the latter were more compelling than the former.[56] It could not have been oblivious

---

51. *See id.* at 827.

52. *See id.* at 827-30.

53. *See id.* at 821-24. The Ninth Circuit's attempt to equate acts of withdrawing life-support with acts of intentionally killing by overdose also involves a moral claim. The idea that the acts of killing and letting die are relevantly similar can only be maintained within a utilitarian framework. For utilitarians, only the consequences of an act—not the agent's intention—determine the moral character of any act. If one person is removed from a ventilator, with the foreknowledge that this act will eventuate in his death, and the patient dies, while another dies after receiving an intentionally lethal overdose, the two acts are judged similarly.

But this rationale contradicts the western moral tradition which has always considered intent in the moral judgment of any act. For example, a legislature's decision to increase the speed limit on highways will knowingly result in more deaths; however, the legislature's act is not morally equivalent to a sniper's act of killing motorists; the legislature's act might be imprudent, but it is not homicidal.

Moreover, the American legal tradition has always acknowledged the role of intent in distinguishing between certain acts. The distinction between manslaughter and second-degree murder is based precisely on intent: the perpetrator of manslaughter does not intend his victim's death, while the second-degree murderer does. Hence, jurists who maintain the similarity between acts of killing and letting die embrace a theory that undermines important elements of the American legal tradition. Moreover, even if jurists could defend this theory, they would still be imposing a moral theory, namely, utilitarianism, on the majority.

54. *See Compassion in Dying*, 79 F.3d at 833.

55. *Id.* at 837.

56. *See generally id.* at 790 (weighing all respective interests and discussing the Washington Legislature's weighing of all interests).

to the "painful, delicate, personal important, or final" nature of this choice, or to the suffering that might be endured if it proscribed assisted suicide.[57] Only after the legislature weighed and debated the conflicting views of the good, or interests, did the majority of legislators opt to ban assisted suicide; only after this deliberation did the good of banning the act become a "state" interest, even though it remained the interests of individuals—a majority of them.

The Ninth Circuit tried to distinguish its deliberation from the Legislature's by citing only the Legislature's reasons for opposing assisted suicide, while neglecting to mention that the legislators considered the impact of their legislation on the lives of all individuals, including themselves and their loved ones.[58] The Ninth Circuit claimed that it balanced the state interests against the interests of the individual, as if the Legislature overlooked the latter. In fact, the Washington Legislature weighed the respective interests of both parties—as did the Ninth Circuit.[59]

But if both the Legislature and the jurists weighed the same interests, then the jurists must justify substituting their judgment of what are the more weighty or compelling interests. In the conclusion of its opinion, the Ninth Circuit majority assented to the proposition that matters of life and death should not be determined by the judiciary.[60] However, they claimed to be submitting to a constitutional mandate to take such decisions out of the hands of government and put them in the hands of the people. Whence comes such a mandate? Not directly from the Constitution, but from the *Casey* decision's claim regarding the concepts of personal dignity and autonomy. The jurists declared "[u]nder our constitutional system, neither the state nor the majority of the people in a state can impose its will upon the individual in a matter so highly 'central to personal dignity and autonomy.'"[61] Hence, the jurists invoked the principles of personal dignity and autonomy—which depend on morality—to usurp the power of the state to protect the good of actual human life. The Ninth Circuit thereby imposed its own theory or "will" to safeguard citizens from their own morality, as imposed by their

57. *See id.*

58. *See id.* at 790.

59. *See generally id.* (weighing all respective interests and discussing the Washington Legislature's weighing of all interests).

60. *See id.* at 838-39.

61. *Id.* at 839 (quoting *Casey*, 505 U.S. at 851).

democratically elected representatives.[62] The jurists overlooked that the legislators or the majority of citizens can avail themselves of the concepts of dignity and autonomy as readily as the individuals seeking a right to assisted suicide. If dignity and autonomy are the paramount values that the Constitution protects, then the judiciary denies dignity and autonomy to the majority of individuals or their elected representatives, for whom protecting actual human life and preventing social deterioration are central to autonomy and dignity.

In response, the judiciary could claim that those denied assisted suicide by the state lose a greater amount of dignity and autonomy than the majority enacting the law, but then the judiciary must quantify values that defy quantification.[63] The only coherent means of quantifying these values in our democracy is to invest each person's dignity and autonomy with equal value and then count heads, which is a process that resembles pluralism. Without imposing a view of the good, the judiciary certainly cannot claim that the interests associated with the right to assisted suicide are more essential to dignity and autonomy than are those interests associated with the act's proscription.[64]

The judiciary might claim that those denied assisted suicide suffer more by the state's legislation than the majority does by the judicial recognition of the right, but this response fails on several counts. First, suffering is no more quantifiable than autonomy,[65] especially if all types of suffering are taken into account. The judiciary must include in its calculations the mental suffering of people who would fear that they will be euthanized involuntarily. Second, if the judiciary were to overrule any law that imposes more pain on the individual than on the majority, then the judiciary would need to invalidate many such laws, including most criminal laws.

---

62. This contradiction is all the more egregious insofar as the Ninth Circuit majority acknowledges that a person's philosophy and values will influence her conclusions regarding assisted suicide. *Id.* at 800. "One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitude toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions. . . ." *Id.* (citing Roe v. Wade, 410 U.S. 113, 116 (1973)). Yet the jurists, who are susceptible to the same influence, proceeded to adjudicate the issue.

63. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 270 (1977) (criticizing attempts to establish basic rights by adverting to the "greater" loss of liberty involved, which would require quantifying liberty).

64. The Ninth Circuit hints at such an axiology above in claiming that no decision is "more painful, delicate, personal, important, or final. . . ." Furthermore pluralists can claim that the decision to prohibit the act is also personal and painful. *See Compassion in Dying*, 79 F.3d at 837.

65. One of the shortcomings of utilitarianism stems from its historical failure to offer some means of quantifying pleasure and pain.

The crucial constitutional question at stake is whose view of dignity and autonomy should be legislated: that of the minority, for whom assisted suicide comports with dignity and autonomy, or the majority, for whom it does not? Jurists who override state law by appealing to *Casey* beg this question because individuals on either side of the issue risk loss of their autonomy and dignity; therefore, the judiciary must justify upholding the minority's view of autonomy and dignity as it relates to assisted suicide at the expense of the majority's view.[66] The next section will examine several attempts to defend this judicial usurpation of legislative power.

IV. ATTEMPTED REFUTATIONS OF PLURALISM

This section will explore three responses to the pluralist critique, two of which were offered in the context of assisted suicide. The first response displays the malign neglect with which some jurists treat pluralism; the other two reveal its cogency.

A. Judicial Response for Pluralism

The first response to the pluralist challenge is contained in the Ninth Circuit majority's opinion in *Compassion in Dying v. Washington*.[67] To defend their invalidation of the statute prohibiting assisted suicide, the Ninth Circuit jurists assert that balancing the individual's interests and the state's is "quintessentially a judicial role."[68] They claim that, despite the efforts of generations of courts to attach values to the different factors in cases such as assisted suicide, balancing the interests "entails the exercise of judicial judgment rather than the application of scientific or mathematical formulae. No legislative body can perform the task for us. Nor can any computer. In the end . . . we must rely on our judgment, guided by the facts and the law as we perceive them."[69]

The Ninth Circuit's attempt to justify its action—in the face of a pluralist proscription of assisted suicide—is deficient. Obviously no scientific or mathematical formula can resolve the conflict between the discrepant interests or morality of individual citizens: no one has ever maintained otherwise. But the majority classifies the tenable alternative, namely, representative democracy, among patently untenable

66. Note that the judiciary would face the same pluralist argument if it invalidated legislation guaranteeing a right to assisted suicide.

67. 79 F.3d 790 (9th Cir. 1996) (en banc).

68. *Id.* at 836.

69. *Id.*

options, as if it were not even worthy of discussion. This is not a probative response to pluralism, nor a sufficient justification for judicial activism; rather, it is malign neglect of the entire issue.

Remarkably, the majority later criticizes those who oppose assisted suicide for attempting to force their views and philosophies "on all the other members of a democratic society."[70] The question left unanswered is why the elected representatives are unfit to mediate the conflicting interests of those supporting or opposing assisted suicide. Only a court oblivious to the moral and philosophical underpinnings of its own position can accuse those opposed to assisted suicide—whose views persuaded an elected, representative majority of legislators—of imposing their views on the citizens of a democratic society.

B. The Right to Privacy and Pluralism

A second response to the pluralist challenge is offered by Jeb Rubenfeld, who dispositively critiques attempts to ground a right to assisted suicide on the liberty of defining one's personhood.[71] Rubenfeld claims that the right to privacy can ground a right to assisted suicide because state proscriptions against assisted suicide force the individual to live a particular, all-consuming, totally dependent, rigidly standardized life.[72] Rubenfeld holds that the state does not retain the power to foist this type of life on citizens.[73]

Even if Rubenfeld's mischaracterization of the lives of the terminally ill were accurate, his notion of privacy would prevent the state from conscripting armies or imprisoning citizens. In both of these lawful actions, the majority (or their representatives) more rigidly standardizes the lives of citizens than in proscribing assisted suicide. When elected representatives conscript an army, they force individuals to forego their families, friends, education, and employment—in short, the most meaningful aspects of their lives. Their commanding officers then attempt to standardize nearly every aspect of conscripts' lives, prescribing how to walk, talk, dress, and eat, among myriad other details. Moreover, they might ultimately be ordered to risk their lives

---

70. *Id.* at 839.

71. Jeb Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 754-55 (1989) ("Where is our self-definition *not* at stake? Virtually every action a person takes could arguably be said to be an element of his self-definition.").

72. *See id.* at 795. ("For right-to-die patients, being forced to live is in fact to be forced into a particular, all-consuming, totally dependent, and indeed rigidly standardized life: the life of one confined to a hospital bed, attached to medical machinery, and tended to by medical professionals.").

73. *See id.* at 795-96.

for their country. If the state lawfully retains the power to conscript and then rigidly standardize nearly every aspect of soldiers' lives, then it should also be free to forbid citizens from assisting in suicide. Rubenfeld might attempt to justify the state's right to conscript soldiers by appealing to the importance of the general welfare in wartime, but he thereby admits that the needs or desires of the majority to attain some good outweighs the individual's right to avoid standardization. This same argument justifies proscription of assisted suicide.

Legislative majorities likewise enact laws that mandate imprisonment for certain acts. If the state or the majority retains the authority to standardize an individual's existence by incarceration—even for the rest of her life—then it should also retain the power to prohibit assisted suicide. Critics might respond that society incarcerates only those who transgress the law, but this response would miss the point. The majority not only establishes certain acts as unlawful, but it also imprisons some transgressors. Rubenfeld's notion of privacy might allow the majority to punish by fines or other similar measures, but it would undermine the majority's right to incarcerate. Thus, Rubenfeld's attempt to uphold a right to assisted suicide in the face of majority opposition cannot be sustained if the majority can lawfully standardize citizens by conscription or incarceration.

Rubenfeld's argument illuminates the inadequacy of a right to privacy; namely, it does not differ from the right to autonomy in contemporary jurisprudence.[74] The Supreme Court, for example, claims that the right to privacy grounds an individual's important personal choices,[75] which is precisely what the right to autonomy safeguards.[76] Like autonomy, liberty, and dignity, privacy reduces to a voluntarist conception of law: the constitution protects a person's self-defining choices because the person chooses them. But the ethical basis of these rights is manifested by the judiciary's specification of only particular acts as fundamental, e.g., to marry[77] or procreate,[78] but not others, e.g., to gamble.[79] And the Court even restricts the acts that it protects by permitting only certain forms of these self-

74. *See id.*

75. *See* Griswold v. Connecticut 381 U.S. 479, 483 (1965); *Casey*, 505 U.S. at 915 (Stevens, J., concurring in part and dissenting in part).

76. *See* Rubenfeld, *supra* note 71, at 795-96.

77. *See* Turner v. Safley, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right.").

78. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

79. *See* Lewis v. United States, 348 U.S. 419, 423 (1955).

defining practices, such as monogamy, but not others that might be equally important to one's personhood, such as polygamy. Irrespective of the terminology that jurists employ in discussing rights, they can justify certain practices only by adverting to their attendant benefits or harms, which ultimately depend on a view of the good. Therefore, attempts to justify assisted suicide by appealing to other rights will incur the same criticism as the right to autonomy.

C. The Pluralist Challenge to Dworkin's Democracy

The third response to the pluralist challenge is offered by Ronald Dworkin, previously an outspoken advocate of government neutrality on issues of "personal morality,"[80] who has recently abandoned this position. In the introduction of his latest work, Dworkin admits that the government, or at least its judicial branch, imposes morality in interpreting the Constitution.[81] Dworkin's admission exposes him to the force of the pluralist challenge, which he attempts to undermine.

Dworkin denies that a constitutional conception of democracy, in which the judiciary enjoys ultimate control over individual rights, infringes the citizens' liberty of self-government.[82] Dworkin claims that democracy prevails only if all citizens enjoy moral membership in a political community, which he describes as the type of membership that engages self-government. An individual truly participates in self-government only if several conditions are met.[83] One of the conditions is moral independence; a genuine political community is a community of independent moral agents,[84] because "[s]omeone who believes in his own responsibility for the central values of his life cannot yield that responsibility to a group even if he has an equal vote in its deliberations."[85] Hence, democracy does not prevail if individuals cannot take responsibility for their central values.

---

80. *See* DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 1-6 (1996) [hereinafter Dworkin, Freedom's Law].

81. [W]e all—judges, lawyers, citizens—interpret and apply these abstract [constitutional] clauses on the understanding that they invoke moral principles about political decency and justice. The First Amendment, for example, recognizes a moral principle. . . . The moral reading therefore brings political morality into the heart of constitutional law. . . . Judges whose political convictions are conservative will naturally interpret abstract constitutional principles in a conservative way. . . . Judges whose convictions are more liberal will naturally interpret those principles in a liberal way. . . .

Id. at 2-3.

82. See DWORKIN, FREEDOM'S LAW, *supra* note 80, at 17.

83. *See id.* at 24 ("The democratic conditions are the conditions of moral membership in a political community.").

84. *See id.*

85. *Id.* at 26.

According to Dworkin, "majoritarianism" does not guarantee self-government unless all members of a political community are treated as moral members. Thus, even if German Jews had been granted the franchise to determine whether they would be exterminated, they would not have been treated as moral members.[86] Therefore, a body other than the majority must determine the conditions of moral membership, that is, which important personal values a citizen should determine for herself; for Dworkin, the judiciary should assume this role.[87] Once the judiciary safeguards the conditions of moral membership, then citizens may legislate the remaining political and social issues.

Although Dworkin offers a novel defense of contemporary constitutional jurisprudence, such as the Ninth Circuit's decision, his theory is vulnerable on several counts. First, he attempts to justify his notion of a constitutional democracy by selectively citing cases that the Supreme Court has adjudicated, such as *Brown v. Board of Education of Topeka*.[88] However, Dworkin never explains how his notion of constitutional democracy overcomes the legacy of *Dred Scott*,[89] *Plessy v. Ferguson*,[90] *Buck v. Bell*,[91] or other infamous cases in which the judiciary denied moral membership to individuals. If past or potential injustices are the reason to abandon pluralism (or "majoritarianism"), then a constitutional democracy has proved as dangerous as a pluralist form of government. Therefore, if the *raison d'etre* of a constitutional democracy is to guarantee inclusion of everyone in the moral community, then Dworkin's criticism of pluralism's potential errors undermines the tenability of a constitutional democracy as well.

The second deficiency of Dworkin's theory is contained in his claim that a person cannot cede the responsibility for the central values of her life to a group, even if she can participate in its vote.[92] But Dworkin never explains why an individual should yield the same responsibility to a group in which she cannot even participate, i.e., the judiciary. An individual would foolishly imperil her central values by

---

86. *See id.* at 23.

87. See DWORKIN, FREEDOM'S LAW, *supra* note 80, at 24.

88. 347 U.S. 483 (1954).

89. 60 U.S. 393 (1856), *superseded by Constitutional Amendments XIII and XIV as stated in* Oliver v. Donovan, 293 F. Supp. 958 (E.D.N.Y. 1968).

90. 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

91. 274 U.S. 200 (1927).

92. *See* DWORKIN, FREEDOM'S LAW, *supra* note 80, at 26.

vouchsafing her "moral independence" or liberty to a body she cannot influence.

Once Dworkin admits that jurists interpret the Constitution according to "their different understandings of central moral values embedded in the Constitution's text,"[93] and that each judge interprets this document in accord with her political convictions, whether liberal or conservative,[94] then the people can demand the right to impose the morality of the majority, rather than tether their moral lives to the caprice of federal judges. Even more sobering is Dworkin's claim that an individual's impact on the democratic process through her one vote is so negligible that constitutional restraints "cannot be thought to diminish [her power] enough to count as objectionable for that reason."[95] Such notions undermine not only pluralism, but democracy as well.

V. CONCLUSION

The Ninth Circuit decision in *Compassion in Dying v. Washington* manifests the dangers of judicial governance, which subverts pluralism by undermining citizens' right of self-governance. Moreover, the legal principles invoked by the Ninth Circuit, namely, autonomy and dignity, cannot coherently justify judicial proscriptions of a right to assisted suicide.

The continuing controversy over assisted suicide, resolved for now by the Supreme Court,[96] highlights two discrepant notions of the good: one side upholds the interest or good of individuals in avoiding suffering and dying in the manner they choose; the other extols the interest or good of individuals in safeguarding innocent third parties, discouraging suicide, and protecting human life. The judiciary and the legislature weigh the same interests in the same manner; not according to some constitutional principle—because there is none, least of all liberty or autonomy—but according to the theory of good that each retains. Therefore, the judiciary arrogates the citizenry's right to self-

---

93. *Id.* at 2.

94. *See id.* at 2-3.

95. *Id.* at 21 (Dworkin dismisses a "statistical" understanding of democracy, in which decisions are made by the majority, because "an individual's control over the collective decisions that affect his life is measured by his power, on his own, to influence the result, and in a large democracy the power of any individual over national decisions is so tiny that constitutional restraints cannot be thought to diminish it enough to count as objectionable for that reason.").

96. The Supreme Court reversed the Ninth Circuit's decision in *Compassion in Dying v. Washington*, finding no fundamental right to assisted suicide. Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd sub nom.* Washington v. Glucksberg, 117 S. Ct. 2258 (1997).

governance when they invalidate the decision of the people or their representatives, whether that decision be to legalize or criminalize acts of assisted suicide.

When actual human life is in question, liberal scholars must address whose morality should prevail in a democratic republic. Two possibilities exist: the judiciary's or the legislature's. Neither is infallible, and neither can claim greater moral certainty for its decisions; human interests can be weighed as readily by one branch of the government as the other. In the future, if the Supreme Court were to uphold a right to assisted suicide, liberal scholars and jurists must justify foisting on the majority in a democratic republic the morality of a number of unelected officials, namely, five justices on the Supreme Court, whose tenures are refractory to democratic recall.

Contemporary liberal scholars are committed to the notion of individual liberty, particularly the individual's freedom from government-imposed morality. By allowing the jurists to dictate morality for the majority of citizens, liberal scholars permit them to subvert the freedom of a greater number of individuals and thereby violate the crucial liberal freedom of self-government. The potency of the pluralist challenge has been understated and underestimated—but has yet to be undermined.