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Fritz B. Burns Lecture: Euthanasia, Morality and the Law—Introduction: Euthanasia at the Intersection of Law and Morality

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EUTHANASIA, MORALITY, AND LAW

INTRODUCTION

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I. INTRODUCTION: EUTHANASIA AT THE INTERSECTION OF LAW AND MORALITY[1]

A. Moral Questions, Legal Questions

The topic of the 1996 Burns Lecture was *Euthanasia, Morality and the Law*. This topic raises a set of issues that have occupied the national stage in recent years, in part because of the urgent debate over the propriety of physician-assisted suicide that has been provoked by the actions of Dr. Jack Kevorkian.[2] Kevorkian's actions have provoked a legal response, but the glare of publicity has also touched off an intense moral debate about physician-assisted suicide in particular and *euthanasia* in general. It is perhaps not surprising that as Kevorkian's actions have required law enforcement to take a stand on physician-assisted suicide, a constitutional debate over the questions of individual liberty and state power has also come to a

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1. The Fifth Annual Fritz B. Burns Lecture was held on November 22, 1996, at Loyola Law School. The participants were Ronald Dworkin and John Finnis. The transcript reproduced here is based on Professor Dworkin's and Professor Finnis's presentations but has been edited for clarity. The Introduction was written by Professor Solum and was not presented at the Lecture.—*Eds.*

2. *See, e.g.*, James Ricci, *Friends Say Ill Woman Chose Her 'Final Exit' Death: The Body of Elaine Day, a 79-Year-Old Victim of ALS, Was Found in Dr. Jack Kevorkian's Van*, L.A. TIMES, Feb. 5, 1997, at B7; *Kevorkian Is Investigated in 2 New Michigan Deaths*, L.A. TIMES, Feb. 4, 1997, at A14; *New Prosecutor Drops Charges Against Kevorkian*, L.A. TIMES, Jan. 11, 1997, at A14.

head. In January of 1996, the United States Supreme Court heard oral argument on the constitutional dimensions of the issue in two cases, *Vacco v. Quill*[3] and *Washington v. Glucksberg*.[4] The constitutional issues raised in these cases have already received scholarly attention,[5] and more is sure to follow a decision on the merits.

The topic of euthanasia calls into question the proper relationship between morality and law. In this introduction, I shall focus our attention on two questions, the question of morality and the question of law. Consider first the question of morality. Citizens in a democratic society face a moral question, whether assisted suicide or euthanasia is ever the best choice—the choice that virtue requires. Each of us approaches this moral question from our own standpoint, from the moral and religious traditions in which we participate. And the question has different answers. Some of us believe strongly in the sanctity of human life, and oppose the deliberate taking of life by assisted suicide. Others believe in a moral responsibility to end unnecessary suffering or a strong right to self-determination on issues of life and death, affirming that in some circumstances, assistance in the ending of life is morally required.

In addition to this moral question, we must face another question, the question as to how laws should treat euthanasia and assisted suicide. In the cases heard by the Supreme Court in January 1997, the legal question was whether a state can prohibit physician-assisted suicide without violating a fundamental right protected by the United States Constitution. But this specific question points to a larger question of political morality. Given the fact of moral and religious pluralism, how should the law treat issues on which there is fundamental moral disagreement at the very deepest level?

In this Introduction, I shall not attempt to answer these questions; rather, I shall call our attention to some of the considerations that may bear on our deliberations. My aim is to point to considerations that might be neglected given the intensity of the debate and the real importance of concerns about suffering, self-determination, and the sanctity of life.

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3. Quill v. Koppell, 870 F. Supp. 78 (S.D.N.Y. 1994), *modified sub nom.* Quill v. Vacco, 80 F.3d 716 (2d Cir.), *cert. granted,* Vacco v. Quill, 117 S. Ct. 36 (1996).

4. Compassion in Dying v. Washington, 850 F. Supp. 1454 (W.D. Wash. 1994), *rev'd,* 49 F.3d 586 (9th Cir. 1995), *aff'd en banc,* 79 F.3d 790, *cert. granted,* 117 S. Ct. 37 (1996).

5. *See, e.g.,* Cass R. Sunstein, *The Right to Die,* 106 YALE L.J. 1123 (1997).

B. Virtue at the End of Life

Consider first the moral dimension of euthanasia. Each of us may be faced with the question whether our own life should be prolonged artificially, whether our pain should be eased when that may entail that our life is shortened, or even whether we might seek assistance in ending our life, when its continuation would mean great pain or indignity without hope of eventual recovery. We may face these same questions with respect to our parents, our spouses, or even our children.

What resources of mind and spirit could help us to face such wrenching questions of life and death? One would hope, of course, to face such ultimate choices with one's values and faculties intact. That is, one would hope for the resources of intellect and spirit that would enable one to see clearly and choose wisely. And if one faced the end of life with a failing body and impaired faculties, one would hope that friends or family and care-givers would bring compassion and insight to any decision that would need to be made on one's behalf. In other words, the sort of resource that can aid in making the most difficult decisions at the end of life are resources of character—in particular, the moral and intellectual resources that we call the "virtues."

In recent years, there has been a revival of interest in Aristotelian moral theory and especially in Aristotle's theory of the virtues.[6] For Aristotle, the virtues are acquired dispositional qualities;[7] they are potentialities or powers which are states of character or of mind.[8] Aristotle characterizes the virtues as intellectual or moral,[9] and his views can be sketched by examining these two categories.

The moral virtues are states of character concerned with choice;[10] examples include courage, temperance, and justice. Aristotle thought that each of the moral virtues could be seen as the mean between two opposing vices: thus, courage is a mean between the vices

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6. *See, e.g.*, PHILIPPA FOOT, VIRTUES AND VICES (1978); PETER GEACH, THE VIRTUES (1978); ALASDAIR MACINTYRE, AFTER VIRTUE (2d ed. 1984). This development is in part traceable to Elizabeth Anscombe's essay, *Modern Moral Philosophy*. G.E.M. Anscombe, *Modern Moral Philosophy in* JUDITH J. THOMPSON & GERALD DWORKIN, ETHICS (1968).

7. *See* W. HARDIE, ARISTOTLE'S ETHICAL THEORY 107-08 (2d ed. 1980).

8. *See id.* at 99.

9. *See* ARISTOTLE, *Nicomachean Ethics* 1103 a6-10 (J.O. Urmson ed. & W.D. Ross trans.) *in* 2 THE COMPLETE WORKS OF ARISTOTLE 1742 (Jonathan Barnes ed. 1984) [hereinafter *Nicomachean Ethics*].

10. *See* HARDIE, *supra* note 7, at 116.

of timidity and recklessness.[11] Moral virtues, says Aristotle, are acquired as a result of habit; one must act courageously in order to become courageous.[12]

The intellectual virtues are practical and theoretical wisdom. Practical wisdom or *phronesis* is excellence in deliberation: the man of practical reason is able to choose good ends and the means to achieve those ends.[13] Practical wisdom operates in the realm of *praxis*: action in particular situations. Theoretical wisdom or *sophia*, on the other hand, operates in the realm of *theoria:* abstract thinking, science, and theory.[14] The intellectual virtues are initially developed by teaching and mature through experience.[15]

My suggestion is that when we think about the decisions that may be faced at the end of life, we ought to reflect on the resources that virtue can provide in making these decisions.[16] We hope to face these decisions with the moral virtues of integrity, courage, and compassion. Crucially, I believe, we want to make a decision that is sensitive to the particular situation—to concrete individuals who are affected by the choice, to the medical condition of the patient, and to the values that gave meaning to the life that person lived. We hope to be able to see clearly, to perceive the morally salient features of the choice that must be made. Decisions about the end of life should be guided by our values and our ideals, but neither abstract moral principles nor a calculation of utilities is a sufficient basis for navigating the poorly charted waters of the end of life. Wisdom, common

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11. *See Nicomachean Ethics, supra* note 9, at 1115 a6-7; HARDIE, *supra* note 7, at 118.

12. *See Nicomachean Ethics, supra* note 9, at 1103 a14; HARDIE, *supra* note 7, at 99-100.

13. *See Nicomachean Ethics, supra* note 9, at 1140 a25-28.

14. *See* HARDIE, *supra* note 7, at 336-57.

15. *See Nicomachean Ethics, supra* note 9, at 1103 a14; HARDIE, *supra* note 7, at 99-100.

16. Some of the writing on the topic of euthanasia does refer to virtue ethics. For example, Charles Dougherty has written:

> Virtue or moral excellence lies between excess and deficiency; extremes should be avoided. But there is one expense in our health care system that has been decried by ethicists and social critics throughout the late twentieth century, namely, fixation on cure to the detriment of care. Euthanasia is the apotheosis of this tendency. Instead of enhancing care for the dying patient, the condition is cured by killing the patient. Legalization will exacerbate this excess and move the health care system further away from balance and moral excellence.

Charles J. Dougherty, *The Common Good, Terminal Illness, and Euthanasia*, 9 ISSUES L. & MED. 151, 161 (1993). Dougherty's brief discussion does not offer a full or balanced account of the implications of the virtues for decisions at the end of life.

sense, clarity of vision, courage, compassion, and integrity—these are the virtues to which we should aspire in making decisions about the end of life.[17]

C. Public Reason and the Constitutional Debate

The relationship between *euthanasia* and morality comes to the fore in the most private of contexts, the conversations between patient, family, and physician provoked by the imminent end of life. By way of contrast, the relationship between *euthanasia* and law is necessarily a public matter, requiring our articulation of public reasons for the legislative and judicial choices we believe should be made concerning the legal status of *euthanasia* and physician-assisted suicide. What I should like to suggest is that our discussion of the legal dimension should be guided by an ideal of public reason that reflects the political virtue of civility.

Civility and public reason are particularly important in a society like ours, which is characterized by the fact of pluralism. Citizens in modern democratic societies affirm a variety of moral and religious doctrines. Our religious beliefs include Islam, Buddhism, Catholicism, and Protestantism, and these religious doctrines share the stage with a variety of secular beliefs about what constitutes the good and what is ultimately meaningful in life. Our historical experience suggests that the fact of pluralism is likely, for the foreseeable future, to be an unchanging feature of modern social life. We are unlikely to agree on a single religion or a single philosophy, at least so long as we live in a free society.

What is an appropriate ideal of public reason for a pluralist society like ours? The notion that our discussion of important public matters, such as our essential constitutional liberties, should be constrained by an ideal of public reason has recently been articulated by John Rawls. Rawls contends that the public reason of a political society is its "way of formulating its plans, of putting its ends in an order of priority and of making its decisions accordingly."[18] Thus, public reason contrasts with the "nonpublic reasons of churches and of

17. I am greatly indebted to Philippa Foot for her work, which lays the foundations of the perspective that I offer here. *See* PHILIPPA FOOT, *Euthanasia*, *in* VIRTUES AND VICES 33 (1978).

18. JOHN RAWLS, POLITICAL LIBERALISM 212 (paper ed. 1996); Lawrence B. Solum, *Novel Public Reasons*, 29 LOY. L.A. L. REV. 1453 (1996); Lawrence B. Solum, *Inclusive Public Reason*, 75 PAC. PHIL. Q. 217 (1994); Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729 (1993).

many other associations in civil society."[19] Public and nonpublic reason share simple rules of inference and evidence—these features are essential to reason itself.[20] But public reasons are limited to premises and modes of reasoning that can be viewed as reasonable by reasonable citizens; the criterion for public reason is availability to the public at large. Rawls argues that these include, but are not necessarily limited to, "presently accepted general beliefs and forms of reasoning found in common sense, and the methods of science when these are not controversial."[21]

Nonpublic reasons would include reasons located within the deep premises of a comprehensive religious doctrine or philosophical moral theory. Consider two examples of nonpublic reasons: first, the hedonistic utilitarian premise that only pleasures and pains are of fundamental value, and second, a religious belief that a particular text is sacred and that its authoritative interpretation by church leaders is the source of binding moral reasons. Although the utilitarian premise is secular and the theological premise is religious, both are nonpublic reasons because neither can be accepted as a reasonable ground for action by the public at large—understood as the body of citizens who are in full possession of the powers of human reason and who nevertheless believe in a variety of reasonable comprehensive doctrines.

Rawls argues that the duty of civility and hence his ideal of public reason applies to citizens and public officials when they engage in political advocacy in a public forum; it also governs the decisions that officials make and the votes that citizens cast in elections. The ideal does not, however, apply to what Rawls calls the background culture; the reason of civil society includes discussion within a variety of special institutions, such as universities and churches, as well as dialogue between the adherents of a variety of comprehensive religious and secular doctrines. Moreover, the ideal does not apply to personal reflection and deliberation about political questions. It does not apply to such reflection or deliberation about questions that are not political in nature.[22] Finally, Rawls believes that the most appropriate ideal of public reason for a modern democratic society is an inclusive or wide, as opposed to exclusive or narrow, interpretation of the ideal of public reason. Citizens and public officials do not breach the duty

19. RAWLS, *supra* note 18, at 213.
20. *See id.* at 220.
21. *Id.* at 224.
22. *See id.*

of civility when they offer nonpublic reasons as the foundations for—or supplements to—public ones.

Why should we adhere to an ideal of public reason when we consider the legal questions raised by *euthanasia* and in particular the questions whether the constitution protects a right to refuse medical treatment or to physician-assisted suicide? Rawls's justification for his ideal of public reason is based on the liberal principle of legitimacy: "our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution, the essentials of which all citizens may reasonably be expected to endorse in light of principles and ideals acceptable to them as reasonable and rational."[23] It is because of this principle that "the ideal of citizenship imposes . . . the duty of civility—to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason."[24]

What are the implications of public reason for the legal debate over the issue of *euthanasia*? My aim in addressing this question is not to argue for any particular resolution of the constitutional issues that the Supreme Court faces this term. Rather, I should like to suggest that whatever our views, that the public debate over these issues be conducted in accord with the political virtue of civility and that our positions should be expressed in a manner that is accessible to our fellow citizens.

When the stakes are life and death, there is a special temptation to escalate the public debate to ultimate questions of good and evil. On the one hand, some of us worry that the deliberate and intentional ending of a human life violates one of the most fundamental moral and legal principles, the prohibition of murder. On the other hand, others among us believe strongly that interference with self-determination at the end of life would violate a fundamental human right to control one's own destiny.

Partisans on either side of this debate may succumb to the strong temptation to escalate public political debate over euthanasia into a fundamental debate over ultimate questions and to set aside the virtue of civility so that the passion of ultimate conviction may have its say. We may be tempted to question motives and speculate on hidden agendas. In a society that protects the freedom of speech and

23. *Id.* at 217.
24. *Id.*

conscience, the quality of public deliberation depends in large part on the self-restraint and hence on the virtue of the citizenry at large.

But there is another way of proceeding. When we debate the legal issues raised by euthanasia and physician-assisted suicide, we can search for common ground, rather than focus on the questions that divide us. This is not to say that we can or should disregard our most fundamental beliefs about ultimate matters when we debate euthanasia in public. It is to say that we should search for the ways in which our deepest beliefs converge and overlap with those of our fellow citizens. The values that are brought to bear on the legal issues surrounding euthanasia are not necessarily ones that divide us. The belief in the sanctity of human life, the belief that suffering should be alleviated, and the belief that human dignity requires freedom and self-determination—these are values that are widely shared, although the proper balance between them may be a subject of sharp disagreement. A patient and respectful search for agreement using the common resources of our shared public reason may repay us with understanding and reconciliation, even if it does not repay us in the dearer coin of a consensus on what the law ought to be.

As I say, the stakes involved in the debate over euthanasia, morality, and law are high and so the temptations are strong. But the point of the virtue of civility is to enable us to overcome passions of anger and indignation, so that we can treat our fellow citizens with the respect they deserve. Our common public reason and our shared political values may yet allow us to reach a measure of agreement. We may yet resolve the debates over euthanasia, morality, and law in a way that each of us can affirm as legitimate, even though many of us would choose otherwise if the choice were ours alone.