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Fritz B. Burns Lecture, Loyola Law School, Los Angeles

November 22, 1996

EUTHANASIA, MORALITY, AND LAW TRANSCRIPT

*Ronald Dworkin**

I. PROFESSOR DWORKIN'S COMMENTS

I had thought when thinking about this occasion that I would not begin as people often do discussing this matter with horror stories. I have known a situation of people dying in protracted pain. John Finnis told us about what might have been a similar experience. Many of you have had such experiences. I was not going to dwell on that, but I think it is well to have in mind that situation when we think that all we are talking about is the risks that might or might not be imposed on people who do not at bottom want to die.

I think we have to begin by having firmly in mind the people that we are actually talking about. John Finnis says that pain can always be relieved and he quotes someone whom he describes—I do not know on whose authority—is the leading Dutch proponent of euthanasia, saying that pain can always be relieved. I have talked to a lot of doctors about that and I have watched people with excellent medical attention, who died near the end screaming in agony. But as I say, perhaps I will come back to this at the end, but I want to respond to John Finnis's characteristically careful and elegant criticism of people who take the position that I am defending—namely they do not do much about answering the question: What right is it? Whose right is it? How far does it stretch in certain circumstances? And so I

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thought as he said that, that I will try to do that in the way that I think is appropriate, and in a way that ties together—as the course of litigation in the United States now often does—the issues of the most profound personal and political morality with the law. So what are these questions?

Well, I suggest to you that in thinking about these matters we ought to think along the following grid of questions. First, we have got to think more carefully about what the right is that people claim with slogans like the "right to die." Secondly, we have to ask what competing considerations might justify a government in nevertheless regulating and restricting that right. Because John Finnis's question—what right and how far does it stretch—has to be answered by deploying principles, competing considerations, and then facing the final question of what legal accommodation would be plausible and defensible in the face of a recognized right, whatever the right is we turn out to recognize, recognize competing interests of government that argue for qualifying that right, whatever interests we choose to recognize in a society that keeps its nerve and does not simply throw up its hands in despair at the difficulty of drawing lines. That is the program that I want to pursue in these remarks.

What is the right in question? It can be approached, and it has been approached at various levels of abstraction and concreteness. A rather remarkable document was filed in the Supreme Court the other day. It was filed on behalf of the government of the United States by the Solicitor General. In that brief the Solicitor General asks that the decisions below be reversed.[1] He argues, however, that there is a right, and that this is a basic fundamental constitutional right deserving of constitutional recognition.[2] He describes it as the right to be free from pain and—notice—indignity.[3]

Other people have described the right, in a somewhat more abstract way, as the right to medical treatment that is in the best interest of the patient.[4] I think there are difficulties with describing the right that way. I am going to hazard a more abstract description of the right that I believe is at stake, but I have to begin a bit back by describing to you the ethics that nurtures, in my view, this right.

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1. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at *28, Washington v. Glucksberg, No. 96-110, *available in* 1996 WL 663185 (U.S. Nov. 12, 1996).

2. *See id.* at *8.

3. *See id.*

4. *See* Brief of Respondents at *17-18, Washington v. Glucksberg, No. 96-110, *available in* 1996 WL 708925 (U.S. Dec. 10, 1996).

Because rights don't exist in a vacuum, they exist in a culture that recognizes responsibilities of people, interests of people, that takes a view on what it is to live well.

In our society, a society that is marked by the point of view that I recently have been calling ethical individualism, one master idea is accepted: that it is not only the case that human beings each have a life to live, but that each human being has a life to make something of—a responsibility to create a life such that he or she can look back on that life with pride rather than misery and take pride in it rather than account it a waste. That is a fundamental human responsibility. It has been denied over many areas and tracks of human history, but not by us. And it carries with it, I want to suggest, a further responsibility. This is the responsibility that—in our moral tradition—is often referred to as autonomy or self-respect or similar names. I think the nerve of that responsibility is this: so far as decisions are made primarily affecting a person's life, and so far as those decisions are made with the aim that that person's life go better, be more successful, run less of a risk of waste, then those decisions must be made by the person whose life it is or, when that's not possible, in accordance, so far as this is possible, with the standards that that person chose. Now, I want to suggest, that responsibility is matched by a right that we have recognized in our tradition. It is called—in the Supreme Court opinion that John Finnis referred to as *Casey*[5]—the right to make personality-defining or life-defining decisions for oneself.[6] But I think the right gets its content from being embedded in that more general responsibility—so far as decisions are to be made with the aim of making my life better, and so far as these are decisions for my life—that these decisions are to be made by me out of my special responsibility for my own life, and they are not to be made by the society collectively and imposed collectively on each individual. That's a deep humanist idea of individual liberty.

And I think John Finnis talked about my views—about the need to find integrity through constitutional law. And I think that if you look at many areas of our constitutional structure—our great concern for freedom of conscience, a special concern for freedom of religion, the special concern that our courts have shown for freedom of choice and autonomy in large decisions affecting marriage, reproduction, and the education of one's children—then, one can see the work that

5. Planned Parenthood v. Casey, 505 U.S. 833 (1992).
6. *See id.* at 851.

the Court—and not just the Court but all of us—has done in creating a constitutional fabric of freedom that can be seen as an attempt to give content in these different ways similar to the law of free speech, which is a fixed star, if there is any fixed star. It is one of the most famous remarks in constitutional law—Justice Jackson's remark: If there's any fixed star firm in constitutional theory, it is that there will be no official view, no orthodoxy in the right answer to deep questions about why human life has sacred or intrinsic value and what it is that makes a life go better and what it is that makes a life go worse.[7]

I think, though, this is certainly not the occasion for pursuing this. The Supreme Court's views about abortion are best understood as reflecting exactly that principle and that is why I believe so many of the courts that have now considered the question that occupies us this evening have turned to the abortion decisions as precedent.

I want to emphasize, particularly in view of what John Finnis said, that this right to make personality-defining and life-defining decisions—decisions about what makes a life go well and what makes it go badly—for yourself is not a right that I believe speaks to one or another side of any of the great issues that I just mentioned and that we are discussing tonight. It was certainly not my intention in the book *Life's Dominion*[8] to defend Nietzche's view, to adopt or recommend any proposal that it is undignified to struggle as Dylan Thomas enjoined in *Do Not Go Gentle into That Good Night*.[9] My book actually was occupied with an attempt to describe as well as I could the perspective of people who feel that dignity so far as requiring a request for death requires a struggle to prolong life as far as possible. No, my argument is not that one or the other side of these terrifying decisions is right or wrong, but that when the decision is made so far as we can do this, it is a decision to be made out of our basic ethical responsibility to ourselves. Just as it would be horrifying to have government impose one decision on us all if that were a decision for death, as I fear it is in many countries and has been in our century. Just as it is horrifying if the decision government imposes is one for death, so it seems to me horrifying because equally violating

7. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

8. RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 212 (1993).

9. *See* Dylan Thomas, *Do Not Go Gentle into That Good Night*, *in* 2 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 2319 (M.H. Abrams ed., 5th ed. 1986).

this tremendously central and important responsibility and accompanying right is if it's a decision the other way.

Well, have I defined a right and told you where that right ends? No, because that's not the right way to think about this matter. The right way to think about matters is to try and identify, as I just did, the values at stake and then to turn to the other side of the question and ask: Does government have a responsibility and, therefore, legitimate power to protect life in these circumstances? And I want to distinguish in answering that question between two general kinds of justification to which government might appeal.

The first is the justification of paternalism. We know better than the individual who makes the choice whether that choice really is in his or her best interest, the choice about education, the choice about death.

The second—I've called it elsewhere a detached reason, rises from the claim of government not that it knows better than the person, for example, who asks for death, what that person's interest is—but that we have a collective interest in certain standards of respect for life being observed and, in particular in this case, that we have an objective, collective interest in doctors especially not acting immorally.

Let's look at these two competing injuries. I think there's something to be said for both of them.

Consider first paternalism. A person asks for death—announces an intention to commit suicide, and asks for help. That person may be someone languishing in a hospital, intubated, sedated to the extent that can relieve the pain of dying of pancreatic cancer. Or that person might be a teenage lover recently jilted who thinks life can hold nothing for him. What is the difference?

There is a difference in what I'm going to call "subjective paternalism." We might very well say as a community—we bet we might be wrong, but we bet—that if the teenage lover lives another two years, maybe even two weeks, he will be very glad not to have taken his own life. Now, the question of what is sometimes called superficial paternalism—I'm now calling it subjective paternalism—is a complicated one, and I'm offering that as a kind of test that I think will serve for this evening's discussion. I want to say that a state has a legitimate interest not in locking a potential suicide up—I don't mean it can do anything to discourage a suicide—but I believe it does have a sufficient interest in denying help and forbidding others to help

someone who announces an intention to end his life, if it is a reasonable judgment. We might, in discussion, explore the question of exactly what this means if it is a reasonable assumption—that that person, if not permitted to die, will be happy, pleased that that act was not taken. That is the justification of subjective paternalism, and many of my colleagues who count themselves liberals as I count myself liberal, are offended when I concede, as they put it, that the state has that interest. But I believe we owe that to one another, and if any of you are shocked by that plan, we can, as I say, explore that later.

To be contrasted with this subjective version of paternalism, is an objective version, which says not according to this person's very own standards which he or she will realize when this moment of special anguish has passed. It's not in this person's interest, but rather, though this person may never realize it, it is not in her interest to die. One particularly strong, rather simple version of this says it can't be in her interest to die because she has an immortal soul and she will suffer in the afterlife if she takes her life. That's only an example of one way in which objective paternalism might seem justified from some perspective. But I think you won't be surprised when I say that the objective form of paternalism, as the example I gave you suggests, is unacceptable in a democracy that accepts the principal I began describing, the principal of ethical independence. Because that principal—the objective version—suggests that we can collectively reach judgment on a religious matter or deeply philosophical matter touching success or failure in life and impose that on individuals, and that's what we can't do. So I offer you that distinction between subjective and objective paternalism.

Now, let me turn to the other kind of justification that is often urged. It is often said, and indeed is said in the Solicitor General's brief that I referred to a few minutes ago, that whatever we think about, whether it's in the interest of some person in terminal disease racked with pain ending his or her life, nevertheless, we must not permit doctors to help, or indeed anyone to help, because that would be sanctioning an immoral act.[10]

It is replied to this, at least within the structure of the legal argument running in parallel with the moral argument, that we have already in the United States constitutionally denied that premise because in the case of doctors who terminate life support once begun,

10. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at *23, Washington v. Glucksberg, No. 96-110, *available in* 1996 WL 663185 (U.S. Nov. 12, 1996).

we have now constitutionally, so it seems, accepted that the state has no power to forbid a doctor from terminating that life support even when death soon and inevitably follows. Therefore, according to this reply that I'm imagining, we, as a society, have already passed that point. We deny that it's immoral for doctors to kill, or at least in our constitutional law, we deny a state in any case the privilege to act on that argument as a justification for forbidding doctors from terminating life support.

Now, there are two ways that somebody who does think that the state has a concern with sanctioning morality, and preventing doctors from doing this terrible thing quite independently of people's interest. There are two replies that you can make. One reply, I expect, is Professor Finnis's reply, namely, that we went wrong in taking that step. The Supreme Court went wrong in its *Cruzan* decision[11] in supposing that doctors cannot be prohibited from terminating life support, and that if we now take the further step and say that in some circumstances doctors can't be prohibited from prescribing lethal pills or indeed injecting lethal drugs, we will simply have compounded the deep error.

But there's another line, a line that will appeal to people involved in the legal argument, and it's the line offered in the Solicitor General's brief to which I have now twice referred, and that is to say no, there's a mistake in the reply that I constructed because there's a great moral distinction between what happens when a doctor either refuses to attach a patient to a life sustaining machine, or disconnects a patient from such a machine.[12] There's an enormously important moral difference between that and what happens when a doctor prescribes pills or indeed injects a lethal drug, and that is the great distinction between killing and letting die, between act and omission. As the Solicitor General says in his brief, if we terminate life support, we simply allow the patient to die.[13] Nature takes its course.[14] The patient dies of the disease, and that is different from the case in which we kill the patient, or someone kills the patient.

Now, I think it's very important, because this argument is going to be at the center, I predict, of the great constitutional debate, not

11. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990).

12. *See* Brief for United States as Amicus Curiae Supporting Petitioners at *9-*10, Vacco v. Quill, No. 95-7028, *available in* 1996 WL 663174 (U.S. Nov. 12, 1996).

13. *See id.*

14. *See id.*

just leading up to and through the oral argument, but as we continue to argue this issue down the road. And I think it's very important that we understand the strengths and limits of the supposed distinction that is often described as the distinction between killing and letting die, and here I believe that I'm agreeing with John Finnis in large part, but not entirely as you'll see. When someone does not wish to die, then there is an important distinction between two things. I am not going to describe yet what that distinction is. I want to illustrate it first.

When one patient is denied a liver transplant that would save his life because there aren't enough livers for all those whose lives can only be saved by a transplant, then know that that person's right, the person who dies for want of a liver, no right of that person has been violated. But if a patient does not wish to die and is killed, perhaps the patient is going to die soon anyway. If that patient is killed against her will in order to supply a liver to another patient, then that person's right has been violated, and something very bad has happened. But this is not, I can now say, explained by saying that there's a great difference between killing and letting die, or letting nature take its course, because I suggest to you that it would be equally bad, equally unacceptable, if a doctor simply let a patient injured in an automobile accident bleed to death in order to have that person's organ quickly available to save the life of someone else.

So now, in something very much like the words that John Finnis used earlier, the important distinction is the distinction between aiming at someone's death and not aiming at that death though, in both cases, death might follow what one does or does not do. Now, I stress that because it's particularly important in thinking about the constitutional issue. I believe that we have taken in the *Cruzan* decision,[15] a decision that the American public seems very comfortable with—I think that we have taken the significant step of supposing that doctors may aim at death. They may aim at death when they violate no one's right in doing so. They may not aim at the death of somebody who does not wish to die, because that violates someone's right, but they may aim at the death of someone who wants to die under appropriate conditions without violating any rights. I don't believe that—well, I know that many doctors disagree with the account that I've just given, and therefore, speaking again of the

15. 497 U.S. 261 (1990).

responsibility I began by describing, a responsibility basically ofconscience, I would never imagine that a doctor who thought it was wrong to aim at death should be required to do so. Indeed, I have some reservations about requiring doctors to terminate life support, but my colleagues assure me that my reservations on that score are very ill-founded.

Now, I imagine a doctor who doesn't accept what many doctors say, indeed what the American Medical Association in its brief has proclaimed: that a doctor's deepest responsibility is to prolong life or to cure.[16] Now, I'm thinking of doctors who take a different view of their deep professional responsibility, who think that a doctor's deepest responsibility is to take care of a patient, to act in that patient's interest with that patient's consent. And I believe that a doctor may in appropriate circumstances aim with the patient together, aim at the patient's death as something in the patient's interest as something good for the patient.

Well, now where does the argument stand? I've described to you what I would call a principle, not a concrete statement of a right, but a principle stating a goal towards which we should move, a consideration we should attempt to honor. We should try and give people control over the grave and grievous moments of their life where the appropriate response is dictated by a philosophical, a moral, a religious, or an ethical conviction. I have also recognized that a state has an important interest. I limited that interest to the case I described as subjective paternalism, but it's an important interest nevertheless.

And now we reach the lawyer's question. The lawyer's question is what scheme of law would be defensible both constitutionally and morally, as in my view those two questions aren't so far apart as an accommodation. It is said, and I believe this—if I've understood it correctly—to be Professor Finnis's opinion, that the right accommodation would be one that follows the following argument. Given the important character of the interests that the state legitimately can protect through its responsibility—limited responsibility of paternalism—the best—indeed, the only morally, and I suspect he thinks perhaps, legally justified—solution is to prohibit all doctor-assisted suicide in all cases.

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16. *See* Brief of the American Medical Association as Amicus Curiae in Support of Petitioners at *5, Vacco v. Quill, No. 95-7028, *available in* 1996 WL 656281 (U.S. Nov. 12, 1996).

Now, that—I'll say more about this in a moment—is an extraordinary claim, really extraordinary. That we recognize a very important interest, an interest of constitutional dimension, and we say that instead of attempting to meet it, instead of attempting to accommodate that interest, perhaps erring on the side of caution through a scheme of regulation, we take the blunt route of simply denying the interest in the case of death all together. What arguments are we given? There's nothing, by the way, that I know of in the legal record of these two cases.

The Solicitor General says the Court ought to decide the case on the ground that a state may reasonably take this approach.[17] That, it seems to me, might be an appropriate recommendation to the Court in a different kind of case—if the question at stake were simply the question often posed in equal protection cases, is there any rational basis for a state taking that position?

That isn't the question posed in this case. The question posed in this case is: is it legitimate for a state to behave in that blunt and crude way after we've acknowledged that there's what, in technical terms, is called a liberty interest, something the Constitution recognizes as of dramatic importance, something stemming from this fundamental personal responsibility I described. We'd expect an argument. And what argument are we given?[18] Many drafts are now available.[19] There are three or four model codes. Just the other day an organization called The Bay Area Ethical Committees released another version of guidelines.[20] We have not been given anything even approaching an explanation of why these guidelines are not adequate to protect against the grievous mistakes, the mistakes that a state in its conceded responsibility of subjective paternalism may try to meet. Instead, we're offered statements which say it can't be done, it's too porous. We're offered again and again and again the Dutch experience. I have never participated in a discussion of these matters

17. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at *7, Vacco v. Quill, No. 95-7028, *available in* 1996 WL 663174 (U.S. Nov. 12, 1996).

18. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners at *8-10, Washington v. Glucksberg, No. 96-110, *available in* 1996 WL 663185 (U.S. Nov. 12, 1996).

19. *See, e.g.*, COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AMERICAN MEDICAL ASSOCIATION, CODE OF MEDICAL ETHICS: ANNOTATED CURRENT OPINIONS (1992).

20. *See* Lori Montgomery, *Guidelines Weighed for Assisted Suicide*, CHARLESTON GAZETTE, Oct. 7, 1996, at B1.

not dominated by the Dutch experience. Well, it's understandable why that is so. But if it is suggested that we cannot draw in this country, or that Oregon didn't draw guidelines less porous than the Dutch, or if it's suggested that we have no mechanism for enforcing paperwork requirements, reporting requirements, and that that's our justification for turning our back on people whose constitutional rights are concededly being ignored, than that's lame. It's simply not good enough.

Let's look more carefully at these imagined mistakes, so grave that we shouldn't even attempt by a sophisticated process of legislation and review to meet them. Let's look at them. They fall into three groups. There is the mistake of misinformation. It is said, and rightly, that no diagnosis of impending death is one hundred percent certain. And it's perfectly true that someone might decide to die because he has been told that he's going to die anyway, or that the pain that racks him can't be relieved, or that it can be relieved only through a sedation that he hates more than the idea of the pain itself, and that can be wrong. So misinformation is one possibility.

Another possibility is incompetence. People might be so depressed, quite understandably depressed by a diagnosis of impending death that they aren't, as we say, thinking straight. And though we have an entire branch of the medical profession, every guideline that I've seen has talked about bringing psychiatrists and psychologists into the story—they too might make a mistake and that's true. So we have misinformation and incompetence and then we have the third category, to which John Finnis referred at several times as weakness.

The vulnerability of people who might find, or feel, or sense that their relatives think that it might be better, in the family's interest, that the grandchild goes to college than if his grandfather lives on another month in pain. And the grandfather might not agree. If the grandfather agrees, it seems to be a perfectly respectable ground for his decision. The grandfather might not agree but be timid about opposing.

Now here, these are the kinds of things that we are asked to say, justify—not caution, not care, which of course, I would concede at once, but justify the blanket prohibition, the crudest response that we could imagine, and they won't do it. It's odd.

Take the three mistakes. These mistakes are equally lively possibilities when the decision is made whether to terminate life support, indeed because the patient is characteristically either not competent or comatose in these cases, the danger of mistakes of these different

kinds is, if anything, livelier. Indeed, when the decision is made to give doses of painkilling medicine that run a substantial risk of death as a by-product, all the risks of misinformation and misdiagnosis are still there. Indeed, when a patient is asked for informed consent to a dangerous medical procedure, many of these risks are there. We have passed the point at which these risks, it seems to me, justify the agnosticism, and I think in the end, the cowardice of saying we have not the nerve to try and do better than a blanket prohibition.

We wouldn't accept the parallel argument if the right in play, the constitutional interest in play, sounded in freedom of speech. It is perfectly true that people are killed in this country from time to time because unpopular political speeches that provoke riots occur.[21] And if someone or some state said, "I'll tell you, what we have decided now is that out of an interest to prevent those disasters which, of course, we have the power and the responsibility to prevent, we are simply going to say: no unpopular political speech that might provoke a riot will be tolerated"; we would rise up in fury.

I'm encouraged to conclude, but I'll have a bit of time in a moment. What shall we say at the end? Well, I said at the beginning that I didn't think it necessary to call your attention to the tragedies that we're talking about, to the desperation of people in the situation at the end of life, the situation in which, in my mind, they deserve, if not automatically, the attention of a doctor who is going to act in their interest, at least the opportunity through procedures established by law to demonstrate that their decision is reasonable, rational, competent, and stable. And as I said, states may err on the side of caution.

John Finnis will say: where do you draw the line? Do you draw the line? What about the parapalegic who feels that life has nothing for him though he's not dying? Is he a candidate? Well, the test that I offered you, the subjective paternalism test, might very well include him. He might be somebody whose decision was rational, reasonable, stable, and competent. It might be—I haven't heard an argument for this—that, nevertheless, special drafting problems occur and there's a matter of wise legislative policy erring on the side of caution. The lines should be drawn so that only those who will die within six months are eligible. That's the line that most of the guidelines that I've seen take.

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21. *See, e.g.*, DOUGLAS A. HOBBS, MASS POLITICAL VIOLENCE: A CROSS NATIONAL CAUSAL ANALYSIS (1973).

These are questions to be discussed with fuller information and after much more public discussion than we have had. All that the Supreme Court is asked now to do is to say two things, first that the right is there in principle and it's such an important right that the state may not just turn its back on all the questions I've been discussing and exclude everyone, and that if the right applies to anyone, it applies to the patient plaintiffs, whose situation is so well described in the Ninth Circuit opinion in that case.

Now, if we are aware of their suffering, and we nevertheless say, "no, we cannot run the risks of the kinds of mistakes that I've just described," what could explain that sense? John Finnis I think, I hope, misreported, perhaps I wrote it wrongly, my answer to that question. I didn't mean to say that the only thing that could explain it was error. I said the only thing that can explain it is a conviction, namely, that compared to the devastating tragedy of a life being taken prematurely, of somebody who on reflection would not have wanted to die, somebody being asked to remain alive in terminal pain, or intubated and sedated beyond sense may take the view, it's not our view, that that pain or indignity mars the last act, yes, of the narrative that person has been making of his or her life. And that, if you think about it, is a terrible thing to do to someone.

To take someone in his most vulnerable moment and to say: You have been in charge of your life, but now at the point of its last act, the point in which something might be done, that to your mind will disfigure your life because it will be an action justified only by a conviction about what gives value to life, that you have spent your life rejecting, that now, now that you're so vulnerable and you can't do it for yourself, we take over and we make that decision for you.

I just want to say, in all our concern for the sanctity of human life, is there no place left for a response to that person, which takes nerve on our part, it takes drafting, it takes energy, and it takes study, but at least it shows something that a flat prohibition doesn't show, which is common human decency. Thank you.