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IS THERE A RIGHT TO PHYSICIAN-ASSISTED SUICIDE?

J. David Bleich

We hold these truths to be self-evident, that all men are created equal, they are endowed by their Creator with certain unalienable Rights, that among these, are Life, Liberty, and the Pursuit of Happiness.¹

I. The Dilemma

The opening section of the Declaration of Independence is couched in terms of human rights or immunities from state intervention. Those rights are born of recognition of fundamental moral values that dare not be suppressed. The formulation of the sentiments expressed in this historic document were prompted by the moral theory of John Locke who believed that moral laws are derivable "by the light of nature," i.e., by reason alone.

It is doubtful, to say the least, that anyone would quarrel with the notion that life, liberty and pursuit of happiness represent fundamental human values. Standing alone, each of those values should be promoted; standing alone, none of those rights should be abrogated. But what should be done when one of the members of this triad of values comes into conflict with another?

Life would be so much easier for ethicists as well as for ordinary mortals if all issues were black and white. The ethicist may resort to the expedient of creating his own universe of discourse by positing a *ceteris paribus* clause asserting that "all things being equal" the moral judgment is thus and so. Real life however, is, quite different. "Honor thy father and thy mother"² is a moral maxim that obligates one to provide for the physical comfort of one's parents. But what if one's father suffers from chronic emphysema and wishes to be supplied with cigarettes? How does a moral individual react when confronted by a situation that imposes two conflicting moral imperatives? On the one hand, he is obliged to honor his father's wishes; on the other hand, by virtue of the commandment, "Thou shalt not kill,"³ he is constrained not to aid and abet the

1. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)

2. *Exodus* 20:12.

3. *Exodus* 20:13

wanton destruction of human life. How does a person escape from between the horns of a moral dilemma of such a nature while preserving intact ethical commitments?

Physicists are well aware of the phenomenon of antagonistic vector forces which, when totally equal, cancel each other out. When one force is stronger than the other, the prevailing force is equal to that of the greater minus that of the lesser. When the velocity of an object hurled into space is greater than the force of gravity, it escapes the earth's gravitational pull; when weaker, it falls back to earth; when velocity and the force of gravitational attraction are exactly equal, the object remains suspended in orbit.

Ethical systems operate in much the same manner. Ethical conduct often requires adjudicating between competing moral claims. Every ethical system must, of necessity, not only posit a set of ethical values but must also either arrange those values in a hierarchical order or develop a system of rules to be applied in resolving conflicts between values. Moral vectors operate in a manner which parallels the behavior of physical vector forces. The weaker moral value must give way to the stronger. The ethicist is charged not only with identification and labeling of moral values but also with assessing and determining the relative weight to be assigned to each moral value *vis-a-vis* all others.

An excellent, although perhaps seldom recognized, example of this process is presented in the Robin Hood⁴ narrative. Preservation of human life is certainly a moral goal and so is preservation of property rights. Robin Hood finds himself confronted with a moral dilemma arising from two conflicting and irreconcilable moral claims. His obligation to preserve human life compels him to do whatever is necessary to assuage the hunger of starving widows and orphans; his obligation to respect the property rights of others restrains him from expropriating any object of material value under the jurisdiction of the Sheriff of Nottingham. What is required is a ranking of values so that the moral agent may be guided in his conduct and enabled to preserve or promote the higher moral value. Robin Hood's conduct is predicated upon a determination that the sanctity of human life represents a higher moral value than preservation of property. Presumably, the Sheriff of Nottingham recognizes a different order of moral priorities. Perhaps the most significant aspect of the Robin Hood tale is the role of Friar Tuck who, as a "professor of moral theology," gives ecclesiastic sanction

4. JAMES CLARKE HOLT, *ROBIN HOOD* (1982)

to Robin Hood's value judgment (as opposed to that of the Sheriff of Nottingham) and the course of action that flows therefrom.

The crucial problem is not identification of values. Regardless of our ethical orientation we are all fairly well agreed on the nature and definition of those values. A problem arises only when one value comes into conflict with another. The crucial questions arise in attempting to order those values in a hierarchical series or in attempting to devise rules for purposes of establishing conditions under which one value supersedes another.

John Locke posited the right of enjoyment of one's property as a fundamental moral value. The dilemma faced both by Robin Hood and the Sheriff of Nottingham arose from collision of that value with the value inherent in preservation of life. The tension between those values recurs in the current debates with regard to many current bioethical dilemmas, including universal health care, managed care, treatment of the terminally ill, and many other topical concerns, which, to a significant extent, center upon allocation of societal resources, i.e., conservation of property belonging to the commonweal. Many of those issues can be reduced to a simple and straightforward question: To what extent shall society be compelled to dedicate its material resources to the goal of preserving or prolonging human life?

The debate concerning physician-assisted suicide is not an issue of preservation of life versus enjoyment of property. It does, however, center upon a closely related moral dilemma. In the Declaration of Independence, Locke's enjoyment of property becomes transmuted into happiness. Apparently, to the American mind, both then and now, enjoyment of property and happiness are, if not synonymous, at least closely related concepts. Elimination of pain and happiness are indeed two sides of the same coin. Clearly, pain and happiness cannot coexist. Pain is the antithesis of happiness; removal of pain is itself accompanied by a form of pleasure that may be described as a rudimentary form of happiness. Suicide on the part of the terminally ill is usually motivated by a desire for freedom from pain. But the dilemma that is posed lies in the fact that, although elimination of pain is clearly a moral *desideratum*, when suicide is the instrument for achieving that goal it perforce entails sacrifice of another moral value, namely, preservation of human life.

The right to choose between conflicting values is inherent in liberty, the third member of the triad of values posited by the Founding Fathers. But in such situations, liberty itself is in conflict with

the fundamental value inherent in life. Life and liberty are posited as specific rights discernable by reason. But it is not always possible to pursue both. The inability to enjoy both prompted Patrick Henry to exclaim, "Give me liberty or give me death!"⁵

The question which we are asked to address is not that of self-preservation versus martyrdom in the name of liberty from oppression. Rather, it is the conflict between preservation of life and individual autonomy that is the fulcrum of much of current bioethical debate. In the bioethical context the question is which of those two values should be promoted over the other. In its most extreme formulation the question is: Does commitment to the preservation of life preclude the liberty to commit suicide or does a person enjoy absolute autonomy to the extent that preservation of life is subservient to the principle of liberty? In the context of the ongoing assisted-suicide debate, the libertarian motto has now become "Give me liberty *and* give me death." It is precisely adjudication between the conflicting claims of individual liberty, personal autonomy and self-determination versus preservation of life as a societal value that is at the core of the issue posed by physician-assisted suicide.

II. The Case Against Suicide

The "unalienability" of which the Founding Fathers of this country spoke⁶ refers, not simply to a lack of capacity on the part of any person or power to deprive man of any of these fundamental rights, but also to self-alienation of such rights by the individual himself. Those rights are inherent in the moral condition of mankind and hence man can no more divest himself of those rights than he can divest himself of his humanity. Since freedom is inalienable, a contract providing for the enslavement of an individual is null and void *ab initio*. The British philosopher Thomas Hobbes similarly argued that a contract requiring an individual not to thwart the taking of his life even when that life becomes forfeit through due process of law, i.e., by means of execution as punishment for a crime, is devoid of either legal or moral significance.⁷ The right to life is of paramount moral significance and simply cannot be limited or encumbered.

5. Patrick Henry, Give Me Liberty or Give Me Death, in 2 THE ANNALS OF AMERICA 323 (1976) (reprinted from WILLIAM WIRT, SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY 137-42 (1841)).

6. See *supra* note 1 and accompanying text.

7. THOMAS HOBBS, LEVIATHAN 209-10 (1963).

Common law categorized alienation of the right to life as a crime—the crime of homicide. Criminalization of *felo-de-se*, i.e., suicide, was formalized in England by King Edgar in the year 967.⁸ In the middle of the thirteenth century, Henry de Bracton, the first English legal writer to discuss suicide, wrote that self-destruction is analogous to murder.⁹ Thus, abnegation of one's own right to life (suicide) was regarded as indistinguishable from murder at common law. Since execution was impossible (and even if feasible, execution would hardly have been regarded as an appropriate punishment or have served as a deterrent) the prescribed punishment consisted of 1) denial of burial rites and of interment in consecrated ground; 2) branding the body with "marks of ignominy," e.g., a stake driven through the body and a stone placed on the corpse which was then buried at a cross-roads; and 3) forfeiture of goods and chattels.¹⁰ Although comparable sanctions were never widely adopted in this country, at least three states still consider suicide a crime or an immoral act.¹¹ Some states forbid attempted suicide¹² while criminal sanctions under case or statutory law for aiding and abetting suicide are widespread and exist in the vast majority of states.¹³

8. NORMAN ST. JOHN-STEVAS, *LIFE, DEATH AND THE LAW: LAW AND CHRISTIAN MORALS IN ENGLAND AND THE UNITED STATES* 233 (1961); Hon. Sir John Vincent Barry, *Suicide and the Law*, 5 MELB. U. L. REV. 1, 2 (1965).

9. Barry, *supra* note 8, at 2-3.

10. Keith Burgess-Jackson, *The Legal Status of Suicide in Early America: A Comparison with the English Experience*, 29 WAYNE L. REV. 57, 61, 64, 76-80 (1982).

11. Alabama, Oregon and South Carolina have each held suicide to be a crime. See *Southern Life & Health Ins. Co. v. Wynn*, 194 So. 421, 423 (Ala. Ct. App. 1940); *Wyckoff v. Mutual Life Ins. Co.*, 147 P.2d 227, 229-30 (Ore. 1944); *State v. Levelle*, 13 S.E. 319, 321 (S.C. 1891).

12. See *Royal Circle v. Achterrath*, 68 N.E. 492, 498 (Ill. 1903) (citing *Darrow v. Family Fund Society*, 116 N.Y. 537 (1889)); *Wallace v. State*, 116 N.E.2d 100, 101 (Ind. 1953); *State v. Carney*, 55 A. 44, 45 (N.J. 1903); cf. D.C. CODE ANN. §§ 22-103 (1981); see also 40 AM. JUR. 2D *Homicide* § 583 (1968 & Supp. 1997). But see *Commonwealth v. Dennis*, 105 Mass. 162, 163 (1870).

13. ALASKA STAT. § 11.41.120 (Michie 1996); ARIZ. REV. STAT. ANN. § 13-1103 (West 1989 & Supp. 1997); ARK. CODE ANN. § 5-10-104 (Michie 1993); CAL. PENAL CODE § 401 (West 1987); COLO. REV. STAT. § 18-3-104 (1997); CONN. GEN. STAT. § 53a-56 (1994); DEL. CODE ANN. tit. 11, § 645 (1995); FLA. STAT. ANN. 782.08 (West 1992); HAWAII REV. STAT. § 707-702 (1993 & Supp. 1996); KAN. STAT. ANN. § 21-3406 (1995); ME. REV. STAT. ANN. Tit. 17-A, § 204 (West 1983); MINN. STAT. ANN. § 609.215 (West 1987 & Supp. 1996); MISS. CODE ANN. § 97-3-49 (1994); MO. ANN. STAT. § 565.021 (West 1979); MONT. CODE ANN. § 45-5-105 (1997); NEB. REV. STAT. § 28-307 (1995); N.J. STAT. ANN. 2C:11-6 (West 1995); N.M. STAT. ANN. § 30-2-4 (Michie 1997); N.Y. PENAL LAW § 120.30 (McKinney 1987); OKLA. STAT. ANN. tit. 21 §§ 813-818 (West 1983 & Supp. 1998); OR. REV. STAT. § 163.125 (1990); 18 PA. CONS. STAT. ANN. § 2505 (West 1983); P.R. LAWS ANN. tit. 33, § 1385 (1969); S.D. CODIFIED LAWS ANN. § 22-16-37 (Michie 1988); TEX. PENAL CODE ANN. § 22.08 (West 1994);

The law ascribes criminal liability for causing the death of another not only when an overt act of aggression is involved but also when death is the result of withholding the necessities of life, e.g., food, drink, or medication. Thus, in *Commonwealth v. Konz*,¹⁴ a woman was held criminally liable for removing insulin from a refrigerator, hiding it, and thereby causing the death of her diabetic husband. Similarly, suicide, although primarily a crime of commission, can at times be committed by means of an act of omission. This principle was clearly affirmed by a New Hampshire court a number of years ago.¹⁵ It follows that suicide, the crime of *felo-de-se*, is attendant upon causing one's own death by starvation or dehydration. Criminal sanctions provided by law for aiding and abetting a suicide should similarly apply in instances of passive suicide.

The classification of suicide as a felony in common law may appear to be antithetical to the common law right to bodily self-determination as well as to the recently developed notion of a constitutionally protected right to privacy. The classic and frequently quoted formulation of the self-determination doctrine is that of Justice Benjamin N. Cardozo in *Schloendorff v. Society of New York Hospital*:¹⁶

In the case at hand, the wrong complained of is not merely negligence. It is trespass. Every human being of adult years and sound mind has a right to determine what shall be done with his own body, a surgeon who performs an operation without his pa-

WASH. REV. CODE ANN. § 9A.36.060 (West 1988); WIS. STAT. ANN. § 940.12 (West 1982); see also 40 AM. JUR. 2D *Homicide* § 585 (1968 & Supp. 1997); *Commonwealth v. Hicks*, 82 S.W. 265 (Mass. 1904); *Commonwealth v. Mink*, 123 Mass. 422 (1877); *Blackburn v. State*, 23 Ohio St. 146 (1872); *Turner v. State*, 108 S.W. 1139 (Tenn. 1908).

14. 402 A.2d 692 (Pa. Super. Ct. 1979), *rev'd on other grounds*, 450 A.2d 638 (Pa. 1982). When there exists a legal duty to care for or to protect another, any act of omission results in criminal liability when failure to act proximately causes death and the omission occurs with knowledge of the consequences or through negligence. See WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *HANDBOOK OF CRIMINAL LAW* 182-91 (1st ed. 1972); J. TURNER, *RUSSELL ON CRIME* 402 (12th ed. 1964); G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* (2d ed. 1978); Lionel H. Frankel, *Criminal Omissions: A Legal Microcosm*, II WAYNE L. REV. 367 (1965); P.R. Glazebrook, *Criminal Omissions: The Duty Requirement in Offenses Against the Person*, 76 L.Q. REV. 386 (1960); Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590 (1958); Rollin M. Perkins, *Negative Acts in Criminal Law*, 22 IOWA L. REV. 659 (1937); Wallace M. Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 499 (1965).

15. See *In re Caulk*, 480 A.2d 93, 94, 96-97 (N.H. 1984) (refusing to permit suicide by starvation).

16. 211 N.Y. 125, 105 N.E. 92 (1914).

tient's consent commits an assault, for which he is liable in damages.¹⁷

There is, to be sure, a fundamental tension between an individual's right to liberty and the denial of his right to terminate his own life. Perhaps the simplest resolution of that dilemma is suggested by the philosopher most intimately associated with advocacy of liberty and personal autonomy, John Stewart Mill. In his essay *On Liberty*, Mill argues that commission of an act which forecloses any future enjoyment of liberty beyond that single act cannot be justified on libertarian grounds.¹⁸ In selling himself as a slave a person abdicates his liberty. Hence, argues Mill, the principle of freedom cannot require that a person should be free not to be free: "It is not freedom to be allowed to alienate . . . freedom."¹⁹ A person cannot invoke a right to liberty as justification for being permitted to dispose of his own life. Liberty cannot exist as a transcendental ideal; liberty is meaningful only as an attribute of a subject. Destruction of a human life is *ipso facto* destruction of all the attributes of that life. Hence, to uphold the right to suicide in the name of liberty is illusory and even self-contradictory for it assimilates into an argument for the right to invoke liberty the means to abrogate and extinguish that very same liberty. There is indeed an inherent irony in a claim of a right to destroy the life from which all rights flow and in which all rights adhere.²⁰

Of direct legal significance is the fact that the liberty given constitutional protection by the Fourteenth Amendment²¹ is by no means absolute. Governments retain powers of sovereignty vaguely termed "police powers" relating to the safety, health, morals and general welfare of the public. Enjoyment of both property and liberty are subject to such reasonable conditions as may be imposed by the State in the exercise of its police powers. Courts have long recognized that the Fourteenth Amendment was not designed to interfere with the exercise of such powers.²²

17. *Id.* at 129-30, 105 N.E. at 93.

18. C.L. TEN, *MILL ON LIBERTY* 124 (1980).

19. *Id.* at 117 (internal citation omitted).

20. See Robert M. Byrn, *Compulsory Life Saving Treatment for the Competent Adult*, 44 *FORDHAM L. REV.* 1, 20 (1975); cf. *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J. concurring) ("An executed person has indeed 'lost the right to have rights.'"). At the other end of life, the contradiction has been noted in actions brought by a child for "wrongful birth." See *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967); *Williams v. State*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

21. U.S. CONST. AMEND XIV, § 1.

22. As stated in *Barbier v. Connolly*, 113 U.S. 27, 31 (1884), "neither the [Fourteenth] amendment—broad and comprehensive as it is—nor any other amendment

The interest of the State in preventing suicide was first articulated in the sixteenth-century British case, *Hales v. Petit*.²³ In *Hales*, Justice Dyer enumerated a number of different and diverse objections to suicide. For purposes of later jurisprudence one crucial consideration is that suicide is a crime “[a]gainst the King in that hereby he has lost a subject . . . one of his mystical members.”²⁴ Suicide may be prevented - and punished - by the King because it constitutes interference with his rights as monarch. The notion that suicide constitutes interference with the prerogatives of the monarch was accepted by Blackstone who, in his *Commentaries*, states that “[T]he suicide is guilty of a double offense; one spiritual in evading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects. . . .”²⁵ The common law notion of preservation of life as a monarchical prerogative has been transformed in American legal theory law into an inherent function of government. Thus Thomas Jefferson wrote, “[T]he care of human life and happiness, and not their destruction, is the first and only legitimate object of good government.”²⁶ As an early Massachusetts court noted, “[t]he life of every human being is under the protection of the law and cannot be lawfully taken by himself, or by another with his consent, except by legal authority.”²⁷

The government’s function and purpose is the ordering of a social structure in which individuals may maximally achieve their desires and aspirations. In order to exercise their rights in achieving those goals, members of society permit other rights to be limited or curtailed to the extent that it becomes necessary to do so in order to preserve the social fabric without which all rights are rendered meaningless and nugatory. Prevention of suicide, even by force if necessary, is rooted in the firmly established doctrine that individual rights, whether rooted in common law or constitution-

was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people. . . .” See also, *Lochner v. New York*, 198 U.S. 45 (1905); *Mugler v. Kansas*, 123 U.S. 623 (1887); *In re Kemmler*, 136 U.S. 436 (1890); *Crowley v. Christensen*, 137 U.S. 86 (1890); *Ex parte Converse*, 137 U.S. 624 (1891).

23. *Hales v. Petit*, 75 Eng. Rep. 387 (1562).

24. *Id.* at 400.

25. WILLIAM BLACKSTONE, 4 BLACKSTONE’S COMMENTARIES 189 (1871).

26. THOMAS JEFFERSON, WRITINGS OF THOMAS JEFFERSON 310 (Lipscomb & Bergh eds. 1903).

27. *Commonwealth v. Mink*, 123 Mass. 422, 425 (1877).

ally guaranteed, may be abrogated in the face of a countervailing State interest.

The State interest in prevention of suicide is multi-faceted but clearly definable. The decision in *Hales* posited a monarchial interest in not being deprived of an economically functioning individual. To phrase the same concept in other terms: A suicide has already taken full advantage of the benefits bestowed by the community but seeks to shirk his own duties to the same community. The State enjoys an interest in the productivity of each of its citizens; only by assuring his or her life and well-being can the State reap the benefits of that person's labor. A close parallel is the State's interest for healthy citizens to assure its security and defense. Although earlier common law sources fail to declare explicitly that the King's interest in a need for citizens to serve in his armies or in a need for procreators of soldiers to defend the realm, one New York decision declares that the State interest in preserving the life of each of its citizens is associated, *inter alia*, with its need for citizens capable of bearing arms. Thus, in *People v. Carmichael*,²⁸ the court noted that "[i]t is [in] the interest of the State to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country."²⁹ Accordingly, the court held that legislation requiring motorcycle drivers to wear a protective helmet was a valid purpose of legislative action under the police power of the State. In *State v. Congdon*,³⁰ a New Jersey court held that the state could impose criminal sanctions on individuals who refuse to take cover during an air raid drill, declaring that "the basis of the State's police power is the protection of its citizens. This protection must be granted irrespective of the fact that certain individuals may not wish to be saved or protected."³¹

28. 288 N.Y.S.2d 931; 56 Misc. 2d 388 (Genessee County Ct. 1968).

29. *Id.* at 935, 56 Misc. 2d 390 (quoting *People v. Havner*, 43 N.E. 541, 543-44, 149 N.Y. 195, 203-204 (1896)).

30. 185 A.2d 21 (1963).

31. *Id.* at 31. Similarly, in *Bisenius v. Karns*, 165 N.W.2d 377 (Wisc.), *appeal dismissed*, 395 U.S. 709 (1969), a Wisconsin court declared that if it is deemed fatal to a statute that it seeks only to protect a person against his own actions, many statutes would be suspect, including laws requiring hunters to wear bright jackets, prohibiting riders on motor-driven cycles from attaching same to any other vehicle on the highway, requiring lifeboats to be equipped with life preservers, prohibiting aerial performances without a net, requiring water skiers to wear life preservers, requiring tunnel workers to wear protective helmets and other industrial employees to wear protective goggles.

III. Suicide and Withdrawal of Treatment

The State's interest in preserving the life of each of its citizens, to the extent that it is rooted in the individual's real or potential economic contribution, the State's need for military manpower, the individual's social contribution as a citizen, or any other benefit to the State, diminishes as the individual ages, becomes feeble and approaches death. Those as well as other interests³² may well be balanced against both a right to privacy and a liberty interest. Such a balancing doctrine was first enunciated by the New Jersey Supreme Court in *In re Quinlan*.³³

We think that the State's interest *contra* weakens and the individual's right to privacy grows as the bodily invasion increases and prognosis dims. Ultimately there comes a point at which the individual's rights overcome the State interest.

Although in *Cruzan v. Director, Missouri Department of Health*,³⁴ the U.S. Supreme Court pointedly refrained from doing so,³⁵ a balancing test taken to its extreme may arguably yield the

32. Although the State can derive no "benefit" from a non-sapient patient in a terminal condition, it nevertheless does maintain an interest in: 1) preserving respect for all human life and 2) preventing health care professionals from assisting in the demise of their patients lest their professional and ethical sensitivities be dulled with resulting deleterious effects upon their ministrations to other patients entrusted to their care. These concerns, which apply so strongly in cases of attempted suicide on the part of competent adult patients, have even greater force when related to the terminally ill because of the latter's vulnerability and helplessness. The concern for the interest of the physicians and the hospital were clearly recognized in *John F. Kennedy Memorial Hospital v. Heston*, 279 A.2d 670 (N.J. 1971). Similarly, in *United States v. George*, 239 F. Supp. 752 (D. Conn. 1965), the Court declared that "the doctor's conscience and professional oath must be respected" and accordingly refused to permit the withholding of a blood transfusion labeling such a course of action as "amounting to medical malpractice." *Id.* at 754.

33. 355 A.2d 647 (N.J. 1976).

34. 497 U.S. 261 (1990).

35. The *Cruzan* decision should not be construed as affirming an absolute liberty interest in refusing medical treatment. Quite to the contrary, the Court took pains to note that "the dramatic consequences involved in such a refusal" would have a bearing upon constitutional permissibility. *Id.* at 279. The decision was apparently based upon a determination that, because of the facts of that particular case, the State's interests could not overcome the rights of the individual. Thus, the Court declared:

But determining that a person has a "liberty interest" under the Due Process Clause does not end the inquiry; "whether respondent's constitutional rights have been isolated must be determined by balancing his liberty interest against the relevant state interests." *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982). See also *Mills v. Rogers*, 457 U.S. 291, 299 (1982).

Petitioners insist that under the general holding of our cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person's liberty interest. Although we think the logic of the cases discussed

conclusion that the State's interests are never so great as to require unwanted medical intervention. Indeed, at least one commentator has stated that "The right of a competent person to refuse medical treatment is virtually absolute."³⁶ Although the American legal system may be moving in the direction of recognizing such a "virtually absolute right," existing case law falls short of establishing that principle. The vast majority of relevant cases deals with terminally ill patients. The few cases involving a non-terminally ill person, of which *Bouvia v. Superior Court* (Glenchur),³⁷ is the most significant, affirm such a right only for individuals affected with burdensome, debilitating and degenerative conditions. Two New York decisions that followed closely in the wake of *Bouvia* were similarly limited in application. In *Matter of Delio*,³⁸ the Appellate Division ruled that termination of artificial nutrition and hydration in accordance with the known wishes of the patient may be sanctioned "in cases involving a person existing in a chronic vegetative state with no hope of recovery."³⁹ This decision was rapidly followed by a somewhat more permissive ruling by Justice Edward Conway in *Matter of Brooks*.⁴⁰ Justice Conway felt "bound" by the *Delio* decision to permit a mentally competent nursing home patient not afflicted by a terminal illness to refuse food in order to starve herself to death.

It is indeed true that in two New York cases the courts have refused to order treatment on behalf of competent adult patients who refused life-saving medical intervention despite the fact that, if

above would embrace such a liberty interest, the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible. But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.

Id.

In a non-medical context the *Cruzan* court explicitly recognized the right of the State to prevent a physically able adult from starving himself to death. *Id.* at 280; see *infra*, note 73 and accompanying text.

36. Alan Meisel, *THE RIGHT TO DIE* 470 (2d ed. 1995). See also THE NEW YORK STATE TASK FORCE AND THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 50 (1994) [hereinafter "NEW YORK STATE TASK FORCE REPORT"]; George J. Annas, *The Promised End - Constitutional Aspects of Physician-Assisted Suicide*, 335 NEW ENG. J. MED. 683, 684 (1996); Sandra Johnson, *Setting Limits on Death*, 2 *BIOETHICS* §§ 149-51 (July-Aug. 1996); Susan M. Wolf, *Holding the Line on Euthanasia*, 19 *HASTINGS CENTER REP.* 13 (Jan.-Feb. 1989)

37. 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986).

38. 129 A.D.2d 1, 516 N.Y.S.2d 677 (N.Y. App. Div. 1987).

39. *Id.* at 4, 516 N.Y.S.2d at 680.

40. N.Y.L.J., June 16, 1987, at 1 (Sup. Ct. 1987).

successfully undertaken, the patients would have been restored to normal, healthy and productive lives. In *Erickson v. Dilgard*,⁴¹ the court refused to compel a patient to undergo a blood transfusion in conjunction with an operation for gastrointestinal bleeding, stating that "it is the individual who is the subject of a medical decision who has the final say and that this must necessarily be so in a system of government which gives the greatest possible protection to the individual in the furtherance of his own desire."⁴² *Erickson* involved a situation in which a competent, conscious, adult patient was admitted to a county hospital suffering from intestinal bleeding. An operation was suggested, to be accompanied by a transfusion designed to replace lost blood. The transfusion was deemed necessary in order "to offer the best chance of recovery" in that "there was a very great chance that the patient would have little opportunity to recover without the blood."⁴³ The patient consented to the operation but refused the transfusion. In seeking an order to compel the transfusion, the superintendent of the hospital stated that the refusal represented the patient's calculated decision. The court noted:

The county argues that it is in violation of Penal law to take one's own life and that as a practical matter the patient's decision not to accept blood is just about the taking of his own life. The court [does not] agree . . . because it is always a question of judgment whether the medical decision is correct [I]t is the individual who is the subject of a medical decision who has the final say. . . .⁴⁴

Erickson has been heralded by some as guaranteeing a competent patient the right to die under any and all circumstances.⁴⁵ That, however, is a gross misreading of the *Erickson* decision. *Erickson* is not a "right to die" case; it is a case regarding the patient's right to determine the efficacy and appropriateness of a proposed protocol of treatment. A careful reading of *Erickson* leads to a recognition of three points which make this conclusion inescapable. The court explicitly denied that the patient was unquestionably *in extremis*.⁴⁶ It was the county's contention that the patient's deci-

41. 44 Misc. 2d 27, 252 N.Y.S.2d 705 (N.Y. Sup. Ct. 1962).

42. *Id.* at 28, 252 N.Y.S.2d at 706.

43. *Id.*

44. *Id.*

45. See, David H. Bamberger, *Mercy Hospital Inc. v. Jackson: A Recurring Dilemma for Health Care Providers in the Treatment of Jehovah's Witnesses*, 46 MD. L. REV. 514 (1987).

46. *Id.*

sion not to accept blood was tantamount to a decision to take his own life but "the court [does not] agree . . . because it is always a question of judgment whether the medical decision is correct," i.e., the court did not agree that refusal of blood represented an imminent danger of death.⁴⁷ Although the odds for survival of the operation without a transfusion were poor and transfusing the patient offered the "best chance" for recovery, the procedure might indeed have been successful without a transfusion. Thus, refusal of a blood transfusion was not the functional equivalent of acceptance of death. Finally, and most significantly, every blood transfusion represents a trade-off between the risk inherent in loss of blood against the novel risks introduced by the transfusion itself, as well as the possibility that the transfusion might prove to be totally ineffective. The balancing of these risks is also part of the "judgment whether the medical decision is correct."⁴⁸ Whenever such risks must be weighed, whenever such decisions must be made, "it is the individual who is the subject of a medical decision who has the final say."⁴⁹ As one legal scholar has categorized this decision: "Whether these conclusions of the court were medically correct is irrelevant. They are the premises of the opinion."⁵⁰ Since the patient was not in extremis and the proposed treatment was not regarded as absolutely necessary and, in addition, carried with it no guarantee of success, a question of "a right to die" does not arise.⁵¹ The case was resolved on the basis of the firmly established principle that the patient has the right to make all necessary decisions regarding the efficacy, wisdom and choice of his own treatment. It is this principle - and only this principle - that was definitively enunciated in *Erickson*.

Another case frequently cited in this context is *In re Melideo*.⁵² In *Melideo*, the court refused to compel a life-saving transfusion necessitated by a uterine hemorrhage subsequent to a diagnostic dilation and curettage. The court stated: "[T]he patient is fully competent, is not pregnant, and has no children. Her refusal to submit to a blood transfusion even though it may be necessary to save her life, must be upheld."⁵³ However, in *Melideo*, the patient sought to decline the transfusion on religious grounds. Thus, the

47. *Id.* (emphasis added).

48. *Id.*

49. *Id.*

50. Byrn, *supra* note 20, at 3.

51. *Id.* at 3, n.12.

52. 88 Misc. 2d 974, 390 N.Y.S.2d 523 (Sup. Ct. 1976).

53. *Id.* at 975, 390 N.Y.S.2d at 524.

issue was not simply that of a right to privacy, but of a First Amendment right of free exercise.⁵⁴

Neither the constitutionally protected right to privacy nor the right to Free Exercise as applied to religious practices is absolute. Even the privacies explicitly protected by the Constitution are not absolute. The public good permits searches and seizure with a warrant and, "if reasonable," on probable cause even in the absence of a warrant. Self-incriminating testimony can be compelled if the witness is given immunity from prosecution.⁵⁵ However, a far more stringent standard is imposed for the setting aside of a free exercise privilege than for overcoming a right to privacy.

It is a well established principle of constitutional law that not all rights are equally protected. At least prior to the U.S. Supreme Court's 1996 decision in *Department of Human Resources of Oregon v. Smith*,⁵⁶ constitutionally protected rights guaranteed by the First Amendment occupied a "preferred position."⁵⁷ As later stated by Judge Simons in his concurring opinion in *Fosmire v. Nicoleau*.⁵⁸

[D]efendants' right to relief is manifest. Although her right of self-determination, standing alone, may be restricted if it is outweighed in any degree by cognizable State interests, when the State requires her to undergo treatment which violates her religious beliefs it interferes with her fundamental constitutional rights. Before doing so, it must demonstrate under the 'strict scrutiny' test that the treatment pursues an unusually important or compelling goal and that permitting her to avoid the treatment will hinder the fulfillment of that goal.⁵⁹

54. *Id.*

55. See *Kastigar v. United States*, 406 U.S. 441, 443 (1972).

56. 494 U.S. 872 (1990).

57. See *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion . . . we remain mindful of the fact that the latter occupy a preferred position."). Although rights secured by the First Amendment are for the first time accorded a preferred position *vis-a-vis* other rights in the *Marsh* decision, the phrase "preferred position" has long been used to describe the freedom specified by the First Amendment. See *Jones v. Opelika*, 316 U.S. 584, 608 (1942) (using "preferred position" for the first time in Chief Justice Stone's dissent); *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (employing "preferred position"); *Prince v. Massachusetts*, 321 U.S. 158, 164, 167 (1944) (same); *Saia v. New York*, 334 U.S. 558, 562 (1948) (same); *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949) (same); *Kovacs*, 336 U.S. at 90, 93, 95, 96 (Frankfurter, J., concurring) (same); *Kovacs*, 336 U.S. at 106 (Rutledge, J., dissenting) (same).

58. 75 N.Y.2d 218, 551 N.Y.S.2d 876, 551 N.E.2d 77 (1990).

59. *Id.* at 234, 551 N.Y.S.2d at 885, 551 N.E.2d at 86.

The doctrine in place at the time of the *Melideo* decision was that free exercise of religion might be compromised only in the face of a compelling state interest. Although there is as yet no definitive standard for justifying the abrogation of a right to privacy, it seems clear that the right to privacy is subservient to the realization of legitimate state interests that fall short of the compelling interest standard.⁶⁰ In a long series of decisions, courts have refused to order blood transfusions save in cases involving the state's compelling interest as *parens patriae* in order to safeguard the welfare of children, or to save the life of a mother of young children or of a pregnant woman. Accordingly, the Court in *Melideo* carefully predicated its decision upon the consideration that "where there is not a compelling state interest which justifies overriding an adult patient's decision not to receive a blood transfusion *because of religious beliefs*, such transfusions should not be ordered."⁶¹ Absent such a belief and the concomitant assertion of a free exercise claim,

60. See, e.g., *Wyman v. James*, 400 U.S. 309 (1971) (holding that a home visit by caseworker in conjunction with dispensation of AFCD program is not an unwarranted invasion of personal privacy).

61. *Melideo*, 88 Misc. 2d at 975, 390 N.Y.S.2d at 524 (emphasis added). This statement should not be construed as conferring legal sanction upon all forms of suicide when based upon an assertion of a Free Exercise claim. The Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), in an early formulation of the notion of a compelling state interest, queried rhetorically, "if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?" *Id.* at 166. Presumably, the *Melideo* court regarded the benign neglect of not ordering a blood transfusion as below the threshold that would compromise a compelling state interest, perhaps because of the passive nature by which the life would be lost, perhaps because the patient might have died in any event either because of blood incompatibility or because of the underlying medical problem, possibly because, in the court's estimation, omission of a procedure of such nature would not be perceived as a blatant denigration of the value of life, or possibly because of a combination of these considerations. *But see Morrison v. State*, 252 S.W.2d 97, 103 (Mo. App. 1952) (entertaining the possibility that a "religious zealot" may have the right to fast until death). Nevertheless other courts have ruled that the State may prohibit the handling of poisonous snakes in religious ceremonies even though the danger is limited to only the willing participants. See *Hill v. State*, 88 So. 2d 880 (Ala. Ct. App.), *cert. denied*, 88 So. 2d 887 (1956); *Lawson v. Commonwealth*, 164 S.W.2d 972 (Ky. 1942). Similarly, in *People v. Woody*, 394 P.2d 813 (Cal. 1964) (*en banc*), although a state statute prohibiting the use of peyote was held to be unconstitutional as applied to members of a religious sect which used the drug in its ceremonies, the court implied that had the State shown the substance to be injurious to the morals and health of the practitioners, curtailment of the religious practice would have been justified. In *Quinlan*, the court rejected the plaintiff's argument that the right to die is a religious belief protected by the Free Exercise Clause by drawing the familiar distinction between religious belief and religious practice. See *Quinlan*, 355 A.2d at 661.

the court would have had no hesitation in ordering the transfusion.⁶²

It is also quite clear that *Fosmire v. Nicoleau*⁶³ does not support a doctrine of an absolute right to refuse medical treatment. Although the patient was not terminally or hopelessly ill, her refusal to consent to blood transfusions was motivated in part by her concern "for the dangers associated with transfusion, particularly the risk of contracting a communicable disease such as AIDS."⁶⁴ Nor was there proof in the record "that non-blood medical treatments would have been successful."⁶⁵ In essence, although not decided on those grounds, *Fosmire* could have been construed as a choice of treatment case. However, the Court explicitly took cognizance of the religious objection expressed by the defendant albeit with recognition that the right to refuse treatment even in such cases is not absolute. The Court was, in principle,⁶⁶ quite prepared to apply a balancing test but found that "the hospital has not identified any State interest which would override the patient's rights under these circumstances."⁶⁷

62. Nor does *People v. Robbins*, 83 A.D.2d 271, 443 N.Y.S.2d 1016 (N.Y. App. Div. 1981), support the proposition that a patient is always free to refuse life-saving intervention. In *Robbins*, the court ruled that a husband was not guilty of criminally negligent homicide in not summoning medical attention for his wife who declined such assistance. *Id.* at 274, 443 N.Y.S.2d at 1018. The court did indeed cite *In re Storar*, 420 N.E.2d 64, 52 N.Y.2d 363, 438 N.Y.S.2d 266 (1981), in such a context without acknowledgment of the fact that *Storar* involved a terminally ill patient but only in support of its holding that "[I]t would be an unwarranted extension of the spousal duty of care to impose criminal liability for failure to summon medical aid for a competent adult spouse who had made a rational decision to eschew medical assistance." *Robbins*, 83 A.D.2d at 275, 443 N.Y.S.2d at 1018. Although not emphasized in the court's holding, Mrs. Robbins declined treatment on religious grounds and, presumably, the court would have had little difficulty in affirming her right to do so on Free Exercise grounds. Nevertheless, even if the patient were incapable of asserting a right against which state interest would not prevail, refusal of treatment is certainly recognized in *Robbins* as extinguishing the spousal duty of care. That holding is entirely cogent and does not mitigate the State's right to compel treatment. The State's interest and right in preserving life does not generate a concomitant duty to the spouse rather than to the State.

63. 551 N.E.2d 77, 551 N.Y.S.2d 876,, 75 N.Y.2d 218 (1990).

64. *Fosmire*, 551 N.E.2d at 79, 551 N.Y.S.2d at 878, 75 N.Y.2d at 223.

65. *Id.*

66. "In these and similar cases the courts have to weigh the interest of the individual against the interests asserted on behalf of the State to strike an appropriate balance." *Id.* at 81, 551 N.Y.S.2d at 880, 75 N.Y.2d at 227.

67. *Id.* at 80, 75 N.Y.2d at 225, 551 N.Y.S.2d at 879.

IV. Active Suicide as Distinguished from Passive Suicide

Although it may be appropriate to recognize a balancing test, or even an absolute liberty interest, with regard to refusal of medical treatment, the State's interest in preventing overt acts of suicide is far more compelling. In addition to identifying the King's interest in preservation of the life of each of his subjects, *Hales* identifies a further State interest in prohibiting suicide in declaring that suicide is an offense against the King in that "the King, who has the government of the people, [takes] care that no evil example be given them."⁶⁸ Killing invites imitation; therefore, self-destruction serves as an "evil example" encouraging emulation by other susceptible members of society. Suicide "infringe[s] upon the King's peace" because a suicide is not an isolated individual act.⁶⁹ The harm is not really to the King as an individual but constitutes an offense against society because of potential harm to others. If openly permitted, suicide diminishes commitment to the preservation of life and compromises the State's interest in preserving respect for life which constitutes the fundamental underpinning of the social fabric.

There are indeed many limits upon an individual's right to privacy and bodily autonomy based upon potential harm to others. The right to an abortion ceases at the beginning of the third trimester when the fetus becomes independently viable.⁷⁰ Despite the right of every individual to control his own person, there may be an exemption for intimate examination of a condemned woman to de-

68. 1 Plowden 255, 75 Eng. Rep. 387, 400 (1562).

69. In a study of what has been labeled the Werther Syndrome - the tendency of people to imitate a publicized suicide - Dr. David Phillips, a sociologist at the University of California at San Diego, has found that a significant rise in suicides occurs after every publicized case of suicide. A nationally publicized suicide, he found, increases the suicide rate by approximately 2% and by 7% among teenagers, who are highly imitative. According to Dr. Phillips, "hearing about a suicide seems to make those who are vulnerable feel they have permission to do it." See also ALVAREZ, *THE SAVAGE GOD* 58, 109 (1970). It is of topical interest to note that a recent study by Dr. David Shaffer, a professor of child psychiatry at Columbia University, has demonstrated that the effect of media reports concerning teenage suicide is a significant increase in both successful suicide and suicide attempts among young people. Professor Shaffer notes that there exists considerable imitation or "contagion" with regard to the phenomenon of youth suicide. See *The New York Times*, March 12, 1987, at B6. That item appeared in conjunction with news reports of a suicide pact in which four Bergenfield, N.J. teenagers died. Less than a week later, on March 18, 1987, the *Times* reported the rescue by police of two other teenagers who had almost succeeded in committing suicide in the same place in an identical manner. See *The New York Times*, March 18, 1987, at A1. Another similar incident is reported in *The New York Times*, March 14, 1987, at 30.

70. *Roe v. Wade*, 410 U.S. 113 (1973).

termine if she is pregnant in order to guard against the taking of the life of an unborn child for the crime of the mother.⁷¹ A stop and frisk by policemen on the street may be reasonable despite the severe intrusion upon bodily security.⁷² Similarly, a person may be forced to submit to a vaccination in order to protect the community from disease.⁷³ Likewise, a blood sample may be forcibly extracted from a person for drunken driving.⁷⁴ Accordingly,

it is self-evident that the right to privacy does not include the right to commit suicide. . . . “[O]nly personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ . . . are included in this guarantee of personal privacy.” . . . To characterize a person’s self-destructive acts as entitled to that constitutional protection would be ludicrous.⁷⁵

That it is within the State’s power to prevent an overt act of suicide is beyond question. Indeed, one federal court dismissed a constitutional challenge to an attempted suicide statute for want of a substantial federal question.⁷⁶ More recently, the U. S. Supreme Court in *Cruzan* recognized the authority of the State to prevent suicide even by passive means: “[T]he majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide. We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.”⁷⁷

In a concurring opinion, Justice Scalia affirmed the right of the state to use force, if necessary, in order to restrain a person from committing suicide:

It is not even reasonable, much less required by the Constitution, to maintain that although the State has the right to prevent a person from slashing his wrists, it does not have the power to apply physical force to prevent him from doing so, nor the power, should he succeed, to apply, coercively if necessary, medical measures to stop the flow of blood. The state-run hospital, I am certain, is not liable under 42 U.S.C. § 1983 for violation of constitutional rights, nor the private hospital liable under general tort law, if, in a State where suicide is unlawful, it pumps

71. See *Union Pacific Ry. v. Botsford*, 141 U.S. 250 (1891).

72. See *Terry v. Ohio*, 392 U.S. 1 (1968).

73. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

74. See *Schmerber v. California*, 384 U.S. 757, 770-72 (1966).

75. *Matter of Von Holden v. Chapman*, 87 A.D.2d 66, 68, 450 N.Y.S.2d 623, 625 (4th Dept. 1982) (citations omitted).

76. *Penney v. Mun. Ct. of Cherry Hill*, 312 F. Supp. 938, 940-41 (D.N.J. 1970).

77. *Cruzan*, 497 U.S. at 280.

out the stomach of a person who has intentionally taken an overdose of barbiturates, despite that person's wishes to the contrary.⁷⁸

Nevertheless, the Court did not identify any inconsistency between a prohibition against suicide and a constitutionally protected liberty interest in refusing unwanted medical treatment.⁷⁹ In her concurring opinion, Justice O'Connor further found that refusal of artificially delivered food and water is encompassed within that liberty interest.⁸⁰ Whether the Court recognized an absolute right to refuse treatment⁸¹ or, as noted earlier,⁸² a more limited right involving a balancing of a liberty interest against countervailing state interests is not relevant to the crucial point, namely that liberty interests, even when recognized, do not extend to acts of suicide.

Cruzan does pose a problem in legal logic. If the state has the authority to ban suicide under all circumstances, and if both manslaughter and *felo-de-se* may be committed by acts of omission, how is it possible to assert a liberty interest with regard to unwanted medical treatment including artificial nutrition and hydration?

Reflection upon the doctrine enunciated in *Hales* serves to dispel the problem. As previously noted, in *Hales*, Justice Dyer identified several distinct state interests in the banning of suicide, primarily, (1) the King's interest in being deprived of an economically functioning individual, and (2) restraining an act of violence that infringes upon "the King's peace."

As noted earlier, the benefits that the State derives from its citizens are commensurate with the contributions the individual is capable of making. Those contributions certainly decrease in a manner directly related to declining health and physical prowess. It is thus arguable that, at some point, the State's interests become not only less than compelling, but may even become non-existent, whereas the individual's right to privacy or liberty interest remains undiminished.

Such a balancing test is cogent when it is the State's positive interest in the potential services or contributions of a citizen that is placed in balance. That is indeed the nature of the State's interest as formulated in the first consideration enunciated in *Hales*. How-

78. *Id.* at 298-99.

79. *See id.* at 278.

80. *See id.* at 287, 289 (O'Connor, J. concurring).

81. *See id.* at 278-79.

82. *See supra* notes 65-67 and accompanying text.

ever, when an individual's liberty interest in committing an overt act of suicide is examined in light of the second consideration posited in *Hales*, i.e., the State's interest in eliminating violence, an entirely different and unambiguous conclusion emerges. Since violence is a *malum per se*, the State's interest in preventing violence is well-nigh absolute. Against that interest, an individual's liberty interest fades into insignificance. Acts of violence do lead to emulation. Moreover, violence is violence, whether the victim is a terminally ill, barely competent patient or a vigorous and robust young adult. Abhorrence of violence is absolute and admits of no exception. It is precisely because *felo-de-se* is a violation of "the King's peace" that a balancing test is of no avail. As stated by Justice Nolan in his dissenting opinion in *Brophy v. New England Sinai Hospital*,⁸³ "Suicide is direct self-destruction and is intrinsically evil. No set of circumstances can make it moral."⁸⁴

If the State cannot countenance violence to oneself, *a fortiori*, it cannot countenance violence to another or assistance to another in an act of violence to the self.⁸⁵ Furthermore, a right to self-violence, even if it were discovered, does not entail a similar right to assist or to be assisted in that violence.⁸⁶ Even if one were to maintain that the right to privacy or an individual's liberty interest is, in certain circumstances, stronger than the State's interest in preventing violence to oneself, it does not at all follow that the right to render assistance to others in committing such an act or the right to the assistance of others is equally strong. Surely, no one would argue that a liberty interest might be invoked as justification for consensual murder or as sanction for engaging in the practice of dueling. Violence to another is far more likely to be emulated than violence to the self. By virtue both of its nature and the involvement of more than just the effected person such an act constitutes a far more egregious violation of "the King's peace."

83. 497 N.E.2d 626, 640 (Mass. 1986).

84. *Id.* at 640.

85. The Ninth Circuit's observation, "[W]e see no ethical or constitutionally cognizable difference between a doctor's pulling the plug on a respirator and his prescribing drugs which will permit a terminally ill patient to end his own life," *Compassion in Dying v. Washington*, 79 F.3d 790, 824 (9th Cir. 1996), *rev'd sub nom.*, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997), reflects a failure to recognize that administering a lethal potion is an act of violence against a person, whereas pulling a plug, which simply restrains further delivery of oxygen, is an act of violence against a machine.

86. *Cf. Brophy*, 497 N.E.2d at 639 (accepting hospital's argument "that it ha[d] no . . . right to deny nutrition and hydration to Brophy so as to bring about his death.").

Contra the position of the Ninth Circuit Court of Appeals in *Compassion in Dying v. Washington*,⁸⁷ recognition of suicide as an act of violence negates the conclusion that the State's "interest in preventing suicide in general . . . like the state's interest in preserving life, is substantially diminished in the case of terminally ill competent adults who want to die" and hence violates the Due Process Clause of the Fourteenth Amendment.⁸⁸ On the contrary, although the state's interest in preserving life may be diminished in the case of a terminally ill, incapacitated patient, its interest in preventing an act of violence directed against such a person is substantially enhanced.⁸⁹ The more vulnerable the victim of violence, the more likely that countenancing such an act will result in emulation in the form of further acts of violence against others similarly situated.⁹⁰

Such recognition also serves totally to dispel the notion advanced by the Second Circuit Court of Appeals in *Quill v. Vacco*⁹¹ to the effect that, in violation of the Equal Protection Clause,

New York does not treat similarly circumstanced persons alike: those in the final stages of illness who are on life support systems are allowed to hasten their death by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs.⁹²

Quite to the contrary, all persons are treated alike in their assertion of a liberty interest against forcible medical treatment and all are treated alike in being denied the right to commit violence. Assuredly, the Equal Protection Clause could not be invoked by "those in the final stages of illness" who might direct the removal of life support systems, were they previously attached to such systems, to demand overt termination of their lives by means of euthanasia.⁹³ The distinction lies entirely in the fact that active euthanasia entails an act of violence and that all persons are treated alike in being legally restrained from committing acts of violence. *Mutatis mutandis*, all persons are treated alike in being denied the right to commit violence inherent in *felo-de-se*.

87. 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom.*, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

88. *Id.* at 820.

89. *See Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

90. *Id.*

91. 80 F.3d 716 (2d Cir. 1996), *rev'd*, 117 S. Ct. 2293 (1997).

92. *Id.* at 729.

93. *Compassion in Dying*, 79 F.3d at 840 (Beezer, J. dissenting).

