REPLY

ASSISTED SUICIDE, LIBERAL INDIVIDUALISM, AND VISCERAL JURISPRUDENCE: A REPLY TO PROFESSOR CHEMERINSKY

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This Reply answers a critique by Professor Erwin Chemerinsky of the Alaska Supreme Court's recent decision upholding the state's ban on assisted suicide. The author argues that a constitutional right to assisted suicide would have to be grounded on the detrimental assumption that disabilities make life less worthy of protection. The author also argues that recognition of a right to assisted suicide would paradoxically diminish personal freedom by exposing society's most vulnerable members to coercion to end their lives.

I. INTRODUCTION

On the occasion of Justice Jay Rabinowitz's retirement from the Alaska Supreme Court in 1997, former law clerk Steve Williams delivered a short tribute in which he commented upon Justice Rabinowitz's "commitment to intellectual integrity, [and] to rigor-

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ous analysis."[1] Williams recalled that as a clerk he once had made the mistake of asking Justice Rabinowitz how he "felt" about an issue in a case.[2] Justice Rabinowitz responded: "We don't practice visceral jurisprudence here."[3]

"Visceral jurisprudence" is just what Professor Erwin Chemerinsky has offered up in his recent critique[4] of the Alaska Supreme Court's decision in *Sampson v. State*.[5] In *Sampson*, the Alaska Supreme Court addressed the wrenching question whether terminally ill persons have a right to the assistance of a physician in committing suicide.[6] Any adequate response to this question must, of course, reckon with the powerful emotions evoked by the dying process. So it is appropriate that Professor Chemerinsky begins his critique of *Sampson* by recounting the suffering endured by his father during his final days.[7] But Professor Chemerinsky's reaction to his father's suffering does not merely inform his analysis; it serves as a substitute for analysis. From his experience, Professor Chemerinsky moves directly to the conclusion that the right to privacy "must include a right, for those like my father, to die with dignity."[8] He treats the court's disagreement with him as a kind of insensitivity and, of even more concern, as a betrayal of Justice Rabinowitz, "the visionary and architect of so much Alaska constitutional law, including the right to privacy."[9]

In his haste to bring his experience to bear on the issue, Professor Chemerinsky gets even the basics wrong. The Alaska Supreme Court did not, for example, apply a "rational basis" test to Sampson's claim that he was entitled to the assistance of a physician in committing suicide.[10] The court found, as it had in its land-

1. Steve Williams, *Rabinowitz Tributes*, 15 ALASKA L. REV. 205, 206 (1998).

2. *Id*.

3. *Id*.

4. Erwin Chemerinsky, *Privacy and the Alaska Constitution: Failing to Fulfill the Promise*, 20 ALASKA L. REV. 29 (2003).

5. 31 P.3d 88 (Alaska 2001).

6. *Id*. at 90.

7. Chemerinsky, *supra* note 4, at 38.

8. *Id*.

9. *Id.* at 48 (citing Ravin v. State, 537 P.2d 494 (Alaska 1975)).

10. *Id*. at 37. Professor Chemerinsky's mistake appears to be attributable to an assumption that the Alaska courts apply the same two-tiered framework as do the federal courts; thus, he assumes that the court's refusal to recognize a "fundamental right" to assisted suicide foreclosed any form of review but mere "rational basis" review. This assumption, though understandable, is wrong. The Alaska courts have always recognized the availability of intermediate levels of scrutiny in the privacy context and in other contexts. *See Ravin*, 537 P.2d at 504 (applying

mark decision in *Ravin v. State*,[11] that the state's action implicated a "non-fundamental privacy or liberty interest[]."[12] And the court accordingly applied to Sampson's claim the same intermediate level of scrutiny that it had applied to Ravin's: the court required the state to "identify a legitimate government purpose and show that the challenged limitation bears a close and substantial relationship to that purpose."[13]

But the flaws in Professor Chemerinsky's critique go far deeper than this. As explained below, the recognition of a right to assisted suicide would endanger the very values Professor Chemerinsky purports to embrace. Instead of "respecting people," the recognition of a right to assisted suicide might "endanger personhood" by exposing vulnerable persons to coercion to end their lives.[14] Further, because a right to assisted suicide would have to be based on an objective determination that the disabilities accompanying terminal illness make life less worthy of protection, recognition of that right would have the effect of reinforcing the common misperception that life as a disabled person is "undignified" or "degraded."

II. ASSISTED SUICIDE AND EQUALITY

During oral argument in *Sampson*, the plaintiffs' attorneys framed the question presented as whether the state should be required to respect individuals' "deeply held personal beliefs" about dying.[15] According to the plaintiffs' attorneys, the plaintiffs believed that terminal illness had robbed their lives of dignity and the plaintiffs' attorneys argued that the State ought to be required to respect this belief.[16] In response, Justice Bryner asked plaintiffs' attorney Kathryn Tucker whether the plaintiffs' argument would not, in fact, require the court not only to *respect* this view but to adopt it

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intermediate scrutiny in privacy context); Alaska Pac. Assur. Co. v. Brown, 687 P.2d 264, 269 (Alaska 1984) (indicating various levels of scrutiny).

11. 537 P.2d at 504.

12. Sampson v. State, 31 P.3d 88, 95 (Alaska 2001).

13. *Id.* at 95-96; *see Ravin*, 537 P.2d at 504 (requiring the state to show a "close and substantial relationship" between the government's interest and corresponding limitation).

14. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-11, at 1370-71 (2d ed. 1988) ("[L]egalizing euthanasia, rather than respecting people, may endanger personhood.").

15. Audio tape: Oral Argument, Sampson v. State, No. S-9338 (Nov. 14, 2000) (on file with Clerk of Alaska Appellate Courts).

16. *Id*.

and even "constitutionalize" it.[17] Tucker moved confidently past this question.[18] But this question by Justice Bryner, the author of the *Sampson* opinion, actually goes to the heart of the debate over assisted suicide.

Because the proposed constitutional right to assisted suicide would extend to some persons but not to others,[19] the right cannot be based merely on respect for individuals' strongly held personal convictions. Respecting strongly held personal convictions would mean respecting not just the convictions of those who think that terminal illness makes life valueless, but also the convictions of those who think that being poor or ugly or chronically (but not terminally) ill makes life valueless. It would also mean respecting the convictions of those who believe that life is not worth living under any conditions; after all, there is nothing *irrational* about "look[ing] upon our life as an episode unprofitably disturbing the blessed calm of nothingness."[20] Because Professor Chemerinsky presumably does not, and realistically could not, advocate providing lethal drugs to everyone who sincerely believes his or her life to be valueless, his right must be based on the conclusion that some lives are *objectively* less valuable than others.[21]

Further, this objective valuation would have to be based on disability, rather than on, say, physical pain. The 1999 report on Oregon's experiment with assisted suicide showed that pain was not a decisive factor in the decisions of the "case patients" to commit suicide.[22] Only one of the fifteen patients who committed physician-assisted suicide expressed concern to the physician about inadequate pain control.[23] This data is consistent with numerous other studies, which show that requests for assisted suicide rarely are motivated by pain or fear of pain.[24] Not surprisingly, physical

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17. *Id.*

18. *Id.* Tucker argued that "the role for the court is to define the nature and scope of the constitutional right and the State then has the option to come in and seek to meet its legitimate interests through reasonable legislation." *Id.*

19. The plaintiffs in *Sampson*, for example, argued that the right should extend only to those in the "final phase of a terminal illness." *Id.*

20. ARTHUR SCHOPENHAUER, *On the Suffering of the World, in* SCHOPENHAUER: ESSAYS AND APHORISMS 41, 47 (1851) (R. J. Hollingdale ed., 1970).

21. *Cf.* TRIBE, *supra* note 14, § 15-11, at 1367-68 (acknowledging the danger inherent in "having the state regularly make judgments about the value of a life").

22. Arthur Chin et al., *Legalized Physician-Assisted Suicide in Oregon: The First Year's Experience*, 340 NEW ENG. J. MED. 577, 581 tbl.3 (1999).

23. *Id.* at 581.

24. *See, e.g.*, Anthony L. Back et al., *Physician-Assisted Suicide and Euthanasia in Washington State: Patient Requests and Physician Responses*, 275 JAMA 919,

pain played only a very minor role in the efforts of the *Sampson* plaintiffs to justify assisted suicide. The plaintiffs argued, for example, that creation of a right to assisted suicide would be justified "[e]ven if it were possible to eliminate all pain for a dying patient."[25]

The principal basis for the plaintiffs' argument was the "indignity" that supposedly accompanies the dying process, not the pain. The plaintiffs said that the dying process itself deprives the terminally ill person of "dignity" and even of "any real and remnant humanity."[26] They further described the disability that accompanies the dying process as "degradation."[27] And they argued that assisted suicide enables the terminally ill person to "preserve or regain some element of personal dignity."[28] Likewise, Professor Chemerinsky frames the question presented by *Sampson* as whether terminally ill persons should have a right "to die with dignity."[29]

Unlike the concept of pain, the concepts of "dignity" and "degradation" are expressions of prevailing social norms. As Professor Peter Hammer has said, "[d]ignity is inherently a relational concept, defining the person with respect to her community."[30] Thus, feelings of indignity or degradation are not caused directly by terminal illness. Rather, they are caused by the community's reactions to the disabilities that accompany terminal illness or by the patient's expectation of adverse community reaction. In Professor Hammer's words, "[f]eelings of indignity are largely fears of rejection by our community."[31] Two of the most important fears of rejection that accompany the dying process are the fear of violating

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924 (1996); Ezekiel J. Emanuel et al., *Euthanasia and Physician-Assisted Suicide: Attitudes and Experiences of Oncology Patients, Oncologists, and the Public*, 347 LANCET 1805, 1809, 1810 nn. 6, 12 (1996).

25. Appellants' Opening Brief at 20, Sampson v. State, 31 P.3d 88 (Alaska 2001) (No. S-09338).

26. *Id.* at 36.

27. *Id.* at 20.

28. *Id.* at 36.

29. Chemerinsky, *supra* note 4, at 38.

30. Peter Hammer, *The Individual, the Community, and Physician-Assisted Suicide*, 42 U. MICH. L. QUAD. NOTES No. 2, 84, 86 (1999); *see also* OXFORD ENGLISH DICTIONARY 726 (Compact ed. 1971) (defining "dignity" as "[t]he quality of being worthy or admirable; worthiness, worth, nobleness, excellence"); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 324 (10th ed. 1999) (defining "dignity" as "the quality or state of being worthy, honored, or esteemed").

31. Hammer, *supra* note 30, at 86.

social norms related to incontinence and the fear of violating social norms related to dependence on others.[32]

The violation of social norms related to incontinence is what proponents of assisted suicide often mean by "indignity" and "degradation." As the Oregon government acknowledged in its 1999 and 2000 reports on the practice of assisted suicide in Oregon, the desire to commit assisted suicide is strongly associated with concerns about "the loss of control of bodily functions."[33] Plaintiff Kevin Sampson himself relied on the "embarrassment" associated with urinary incontinence in explaining his own desire to commit suicide.[34]

The violation of social norms related to dependency and productivity are another important aspect of what proponents of assisted suicide mean by "indignity." In its 2000 report, the Oregon government acknowledged that one of the factors driving patients' requests for lethal drugs was a concern about being a burden on friends and family.[35] Of the patients who died by assisted suicide in Oregon during 1999, twenty-six percent affirmatively expressed concern to their physicians about being a "burden on friends, family or other caregivers."[36] Tellingly, in the Alaska Civil Liberties Union's amicus brief for *Sampson*, the organization treated lack of productivity as a reason to commit suicide. It began its brief with a quotation from Charlotte Perkins Gilman's suicide note, where she said that a "quick and easy death" is appropriate "when all usefulness is over."[37]

Social norms related to incontinence and to "usefulness" are remediable.[38] That is, feelings of disapproval and disgust toward

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32. Chin et al., *supra* note 22, at 581.

33. *Id*. at 581 tbl.3; Amy Sullivan et al., *Legalized Physician-Assisted Suicide in Oregon: The Second Year*, 342 NEW ENG. J. MED. 598, 601 tbl.2 (2000).

34. Appellants' Opening Brief at 5, *Sampson v. State*, 31 P.3d 88 (Alaska 2001) (No. S-09338). *Cf.* WILLIAM MILLER, THE ANATOMY OF DISGUST 101 (1997) (exploring "extended metaphorization" wherein "the anus is seen as the footing on which our dignity depends," though not in the context of incontinence).

35. Sullivan et al., *supra* note 33, at 601 tbl.2.

36. *Id.*

37. Brief of Amici Curiae Alaska Civil Liberties Union at 5, Sampson v. State, 31 P.3d 88 (Alaska 2001) (No. S-09338); *cf.* MILLER, *supra* note 34, at 136 (affirming that social norms require the patient somehow to "earn this right [of dignity], or pay for it in some way by recognizing a reciprocity in the relation"). Of course, the terminally ill person ordinarily will lack the ability to reciprocate.

38. This very point was made by physicians in the wake of the first Oregon report. For example, the editors of the American Medical News pointed out: "Fears over loss of autonomy or of bodily function are dramatically different than intractable pain. They represent perception, fear, anticipation, abstraction."

those whose physical disabilities make them unproductive or incontinent are not a necessary element of every human being's worldview. These social norms can be displaced by social norms grounded on "recognition of the intrinsic worth and the inherent dignity of man"[39]—on recognition that every person "possesses innate value as a human being,"[40] regardless of whether his disabilities make him unproductive or incontinent.

What is most troubling, though, about the arguments of the *Sampson* plaintiffs is not that the plaintiffs overlooked the remediability of the "indignities" and "degradation" that accompany the dying process. It is that the plaintiffs asked the court to ratify the very social norms that give rise to these feelings of indignity and, worse yet, to hold that *suicide* is an appropriate alternative to violating these norms.

Imagine the effect of this decision, not just on the terminally ill, but on the disabled community as a whole. In his memoir, *Moving Violations*, paraplegic reporter John Hockenberry ponders the question of how his friend Roger, a quadriplegic "who constantly needed others to take care of his basic needs," would react to questions about the possibility of assisted suicide.[41] He asks: "How might Roger laugh off the nagging suspicion that the person dressing him believed that suicide would be a more elegant solution to his predicament than going on with his life?"[42]

Assisted Suicide: Lesson Learned in Oregon, AM. MED. NEWS, Mar. 22/29, 1999, at 20, *available at* http://www.amaassn.org/scipubs/amnews/amn_99/edit0322.htm. Two physicians made the same point in a letter to the editor of the New England Journal of Medicine, which had published the Oregon report. *Legalized Physician-Assisted Suicide in Oregon*, 341 NEW ENG. J. MED. No. 3, 212 (1999). After pointing out that the Oregon report had cited loss of autonomy and control of bodily functions as factors most strongly associated with requests for physician-assisted suicide, they urged other physicians to "recognize that physical disability is not the same as the loss of spiritual, emotional, intellectual, or environmental autonomy. To reduce the desire for physician-assisted suicide, we must try to alleviate disability and loss of autonomy, as well as the stigma attached to these conditions." *Id*.

39. State v. Lancaster, 550 P.2d 1257, 1259 (Alaska 1976) (recognizing that society values rehabilitation of criminals because there is an underlying value that must be recognized in all individuals regardless of what such persons have done).

40. *Id*.

41. JOHN HOCKENBERRY, MOVING VIOLATIONS 77 (1995).

42. *Id*.; *see also* Yale Kamisar, *Physician-Assisted Suicide: The Problems Presented by the Compelling, Heartwrench Case*, 88 J. CRIM. L. & CRIMINOLOGY 1121, 1134 (1998) ("[T]he legalization of PAS/euthanasia for certain patients would change the way these patients and those around them would view their lives—and the 'hastening' of their deaths.").

The psychological effects on the disabled of a court decision recognizing a limited constitutional right to choose suicide over disability are not a trivial or peripheral issue. Similar concerns formed the crux of the Supreme Court's decision in *Brown v. Board of Education*,[43] in which the Court famously said that a separate but equal education for African-American children "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[44] Similar concerns formed a critical part of Justice Kennedy's powerful opinion last term in *Lawrence v. Texas*.[45] In recognizing for the first time that consensual sexual relations among members of the same sex are protected by the constitutional right to privacy, Justice Kennedy relied in part on the psychological impact of sodomy statutes and of the Court's own decision in *Bowers v. Hardwick*.[46] Of *Bowers* he said, movingly: "Its continuance as precedent demeans the lives of homosexual persons."[47] Similarly, the recognition of a limited constitutional right "to die with dignity" would demean the lives of those who must daily endure the very "indignities" that form the basis for the arguments of proponents of assisted suicide.

This, of course, is primarily an argument about equality (which is protected by the Alaska Constitution).[48] But it is also an argument about autonomy. As Justice Kennedy pointed out in *Lawrence*, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects."[49] A court decision that consciously perpetuated the social norms that currently oppress the disabled would not merely be an assault upon equality. It would be an assault on freedom, too.

III. ASSISTED SUICIDE AND AUTONOMY

In Peter Handke's 1972 novel *Short Letter, Long Farewell*, the narrator travels to America and then across it, ostensibly in pursuit of his estranged wife.[50] For part of his journey, he is joined by an American friend, Claire. At one point, the narrator explains to

43. 347 U.S. 483 (1954).
44. *Id*. at 494.
45. 123 S.Ct. 2472 (2003).
46. *Id*. at 2478 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).
47. *Id*. at 2482.
48. *See* ALASKA CONST. art. I, § 1.
49. *Lawrence*, 123 S.Ct. at 2482.
50. *See generally* PETER HANDKE, SHORT LETTER, LONG FAREWELL (Ralph Mannheim trans. 1974).

Claire that, since arriving in America, he has felt as though the world really were "open" to him.[51] Though he associates this feeling—"that the world is open to each one of us"—with the 19th century, he announces his intention "to take it seriously and to examine it." Claire responds: "Until you run out of money."[52]

The recognition that genuine autonomy requires something more than freedom from government interference—like money, for instance—is what differentiates present-day liberal individualism from its 19th century predecessor. Our distance from the earlier form of liberal individualism is apparent when we reread the majority opinion in *Lochner v. New York*.[53] In justifying its decision to strike down a New York law that would have limited bakery employees to a sixty-hour work week, the majority used the language of personal liberty. It said, for example, that wage and hour laws failed the test that legislation must not be "an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty."[54] One cannot help but perceive the court's use of these words as a misuse. For, although *Lochner* did limit government interference in the affairs of individuals, it did not advance the cause of "personal liberty" as we now conceive of it.

As we now think, wage and hour laws advance autonomy by protecting the individual from coercion by other persons or by impersonal economic forces.[55] A baker who has the "liberty" to work more than sixty hours per week may well lack the freedom to work *less than* sixty hours per week. And a baker who has the "liberty" to sell his labor for less than minimum wage may well lack the freedom to sell it for more. In a *laissez faire* society, the people who work in bakeries are "free" to make decisions about the disposition of their labor only until they run out of money. Once they run out of money, they are subject to the coercion of market forces.

Wage and hour laws are not the only laws that advance personal autonomy by restricting individual liberties. For example, laws prohibiting prostitution protect women from physical coercion by other persons, as well as from economic coercion.[56] Similarly,

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51. *Id*. at 120-21.

52. *Id*. at 120.

53. 198 U.S. 45 (1905) (upholding the freedom to contract under the Fourteenth Amendment).

54. *Id.* at 57.

55. *See* TRIBE, *supra* note 14, at 578 (discussing the abandonment of *Lochner's* premises due to economic considerations).

56. *See* Alexandra B. Stremler, *Sex for Money and the Morning After: Listening to Women and the Feminist Voice in Prostitution Discourse*, 7 U. FLA. J.L. &

decisions refusing to recognize a "consent" defense to charges of domestic violence assault, which essentially deny women the right to participate voluntarily in abusive relationships, protect women from coercion by other forces, including economic distress.[57]

In short, these examples demonstrate that, in some circumstances, the alternative to government coercion is coercion by other forces. Where an individual, but for government regulation, would be exposed to coercion by economic forces or by other private individuals, and where those coercive forces are not themselves readily amenable to regulation, the interests of individual autonomy often will be, paradoxically, advanced by government coercion of the individual herself. As Professor Tribe has said: "a court must decide, in this society and at this time, whether a person's choice to act or think in a certain way should be fundamentally protected against coercion by law, *recognizing that the alternative in some situations may be coercion by economic or peer pressure.*"[58]

This was the very dilemma faced by the Alaska Supreme Court in *Sampson*. The court did not choose between personal autonomy and some other competing value, as Professor Chemerinsky suggests. It chose, as it had to, between permitting government coercion, on the one hand, and exposing the terminally ill person to ungovernable coercion from other sources, on the other. The court quoted from the report of the New York Task Force on Life and Law, which had aptly summarized the choice: "if assisted suicide and euthanasia are legalized, the autonomy of some patients would be extended while the autonomy of others would be compromised by the pressures to exercise these new options."[59] The court decided, of course, that the dangers of recognizing a constitutional right to assisted suicide—the dangers that vulnerable persons would be pressured to commit suicide by family members

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PUB. POL'Y 189, 200 (1994-1995); *see also* Summers v. Anchorage, 589 P.2d 863, 870 (Alaska 1979) (rejecting the claim that prostitution is protected by the right to privacy); Hilbers v. Anchorage, 611 P.2d 31, 41-43 (Alaska 1980) (rejecting the claim that a statute violated the right to privacy by prohibiting the exposure of the patron's or masseuse's genitals in massage parlor).

57. *See* State v. Brown, 364 A.2d 27, 31 (N.J. Super. 1976) (holding that a victim cannot consent to assault and battery as a matter of law).

58. TRIBE, *supra* note 14, at 1307 (emphasis added).

59. Sampson v. State, 31 P.3d 88, 96 (Alaska 2001) (citing NEW YORK TASK FORCE ON LIFE & THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 134 (1994)).

or by social or economic forces—were serious enough to justify leaving the question to democratic processes.[60]

Professor Chemerinsky argues that "the Alaska Supreme Court overstated the problems of recognizing a right to physician-assisted suicide."[61] He dismisses the court's concerns about "protecting vulnerable individuals"[62] in a single sentence: "Oregon has dealt with these concerns in its 'Death with Dignity' law allowing physician-assisted suicide, as have foreign countries such as the Netherlands."[63] But this is inadequate for several reasons.

First, the Netherlands experience, far from sustaining Professor Chemerinsky's argument, goes a long way toward refuting it. Though the Dutch courts, in theory, require a request from the patient that is "entirely free and voluntary" as well as "well considered, durable, and persistent,"[64] these legal guidelines appear to have had little or no impact on the actual practice of euthanasia in the Netherlands. For example, the results of a study commissioned by the Dutch government showed that "doctors administered a lethal drug without an express request in 1000 cases—almost half as many as they did on request."[65] What is perhaps most chilling about the Netherlands' experience is the insistence of the Dutch government that nothing is wrong.[66] "[B]oth the government and [the Royal Dutch Medical Association] seem determined to reveal nothing that is seriously critical of Dutch euthanasia policies."[67]

The same, unfortunately, is true of the Oregon government's supposed efforts to monitor its brief experiment with assisted suicide.[68] Perhaps the best example of the methodological bias in the Oregon reports is the decision of the 2000 report's authors to interview only the physicians who had prescribed lethal drugs to the "case patients," not those who had refused to prescribe such medication.[69] (The 2000 report was issued while *Sampson* was before

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60. *Id.* at 58.

61. Chemerinsky, *supra* note 4, at 39.

62. *Sampson*, 31 P.3d at 96.

63. Chemerinsky, *supra* note 4, at 39.

64. JOHN KEOWN, EUTHANASIA EXAMINED 264 (1997).

65. *Id*. at 276.

66. *See* HERBERT HENDIN, SEDUCED BY DEATH 134-35 (1997) (citing Dutch government-sanctioned reports that fail to criticize euthanasia policies).

67. *Id*. at 134.

68. Kathleen Foley & Herbert Hendin, *The Oregon Report: Don't Ask, Don't Tell*, HASTINGS CENTER REPORT, May-June 1999, at 42 ("[T]hose administering the law and those sanctioned by the government to analyze its operation have become its advocates.").

69. Sullivan et al., *supra* note 33, at 598.

the Alaska Supreme Court and was addressed by both parties during the appeal.) Of the twenty-seven patients who were given lethal drugs in 1999 and for whom data were available, only eight received the lethal medication from the first physician they asked.[70] Ten of the patients were refused the drugs by one physician.[71] Eight of the patients were refused the lethal drugs by two or three doctors before finding a doctor who would prescribe them.[72] But the authors of the report did not even interview the non-prescribing doctors.[73] Thus, there is no information in the report, for example, as to whether the doctors' decisions not to prescribe the drugs were driven by concerns about depression or coercion. The authors only noted that because terminally ill patients often have more than one physician, "to maintain consistency in data collection, we only interviewed the prescribing physician."[74] Needless to say, these kinds of reports are not the stuff of which constitutional rights are made.

Further, Professor Chemerinsky errs in assuming that close predictive judgments about the dangers of legalizing assisted suicide are the appropriate domain of the courts. The Alaska Supreme Court has always recognized that the court's particular aptitude is the resolution of questions of "adjudicative fact[]"—"who did what, when, where, how, and with what motive and intent."[75] Courts are not well suited to the resolution of questions of "legislative fact"; that is, to the re-examination of the broad economic, social, and scientific assumptions upon which the legislature bases its policy judgments.[76] Accordingly, even where the right to privacy is at stake, the Alaska courts often have deferred to the legislature in the close calculation of the potential harm from an activity. This was true, for example, in *State v. Erickson*, where the Alaska Supreme Court deferred to the legislature's judgment on the dangers of cocaine.[77] It was also true in *Harrison v. State*,[78] where the

70. *Id*. at 601.

71. *Id*. at 599.

72. *Id*.

73. *Id*.

74. CENTER FOR DISEASE PREVENTION AND EPIDEMIOLOGY, OREGON DEPARTMENT OF HUMAN SERVICES, OREGON'S DEATH WITH DIGNITY ACT: THREE YEARS OF LEGALIZED PHYSICIAN ASSISTED SUICIDE 8 (2001), *available at* http://www.ohd.hr.state. or.us/publichealth/chs/pas/year2/ar-about.cfm.

75. State v. Erickson, 574 P.2d 1, 4-5 (Alaska 1978).

76. *Id*. at 17 ("[I]t is not the function of this court to reassess the scientific evidence in the manner of a legislature. . . .[A] holding that a legislative enactment is invalid cannot rest on a debatable medical issue.").

77. *Id*. at 17-18.

Alaska Court of Appeals effectively deferred to the legislature's judgment on the dangers of alcohol.[79]

Finally, Professor Chemerinsky's argument reflects a fundamental misperception of the task facing the court in *Sampson*. The court was called upon to decide whether to deny the people of Alaska a voice in resolving one of the most important and difficult questions the state has ever faced. The assumption that the court would do so *lightly*—on the basis of passing references to Oregon and the Netherlands and to the opinion of Professor Tribe—is not only inconsistent with the court's history, it is fundamentally at odds with the values embodied in liberal individualism. Participation, through the democratic process, in the shaping of one's society was not perceived by either America's or Alaska's founding fathers as a disfavored adjunct to individual autonomy; it was perceived as an integral part—perhaps the most important part—of autonomy. As Judge Andrew Kleinfeld of the Ninth Circuit (a former law clerk to Justice Rabinowitz) said in his dissent in *Compassion in Dying v. Washington*[80]: "That a question is important does not imply that it is constitutional. The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary."[81]

IV. CONCLUSION

Some or all of the justices of the Alaska Supreme Court undoubtedly brought to the *Sampson* case experiences comparable to Professor Chemerinsky's experience at his father's deathbed. And some or all of the justices undoubtedly would have liked to make the option of assisted suicide available to their loved ones. What distinguished their decision in *Sampson* was, in part, their willingness to look beyond their own experiences to the very different experiences of those to whom the recognition of a right to assisted suicide would prove profoundly dangerous:

> [I]t must be recognized that assisted suicide and euthanasia will be practiced through the prism of social inequality and prejudice that characterizes the delivery of services in all segments of society, including health care. Those who will be most vulnerable to abuse, error, or indifference are the poor, minorities, and those who are least educated and least empowered . . . .

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78. 687 P.2d 332 (Alaska Ct. App. 1984).

79. *Id*. at 339.

80. 79 F.3d 790 (9th Cir. 1996) (Kleinfeld, J., dissenting), *rev'd sub nom.* Washington v. Glucksberg, 117 S.Ct. 2258 (1997).

81. *Id*. at 858.

> . . . [T]here [is no] reason to believe that the practices, whatever safeguards are erected, will be unaffected by the broader social and medical context in which they will be operating. This assumption is naïve and unsupportable.[82]

The Alaska Supreme Court's decision was not a capitulation to the forces of conservatism, or even to the forces of moderation. To the contrary, the decision expressed the court's continuing commitment to personal liberty, as well as its continuing "commitment to intellectual integrity, [and] to rigorous analysis."[83] The people of Alaska can be thankful that the court's commitment to intellectual integrity and rigorous analysis—and the court's resultant recognition of the grave dangers posed to vulnerable populations by a right to assisted suicide—meant more to the court than the opportunity to be, in Professor Chemerinsky's words, "a national leader."[84]

82. Sampson v. State, 31 P.3d 88, 97 (Alaska 2001) (quoting NEW YORK TASK FORCE ON LIFE & LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 125 (1994)).

83. Williams, *supra* note 1, at 206.

84. Chemerinsky, *supra* note 4, at 48.