MISTAKES ABOUT INTENTION IN THE LAW OF BIOETHICS

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I
INTRODUCTION

Much of law and ethics at the end of life turns on whether there is a moral and legal distinction between killing and letting die. That distinction, in turn, relies on a difference between intention (what one purposely aims to bring about in his actions) and foresight (what one merely believes to be likely or even substantially certain). On this distinction rests the plausibility of the legal prohibition against physician-assisted suicide and many other important moral and legal prohibitions in bioethics, the ethics of warfare, and much else. The distinction between intention and foresight is the subject of frequent philosophical and legal criticism, ranging from Thomas Scanlon's recent book *Moral Dimensions* (the first chapter of which is devoted to an argument against the principle of the double effect and the intention–foresight distinction) to legal scholarship.[1]

My goal in this article is to bring the work of Stanley Hauerwas to bear on the law of bioethics, which I will accomplish through a discussion of how debates over intention in moral philosophy, moral theology, and law have shaped—and confused—bioethics. Writing about Stanley Hauerwas on law and bioethics may strike those who know Hauerwas's work as an odd project—just as Peter Geach noted in his essay *The Religion of Thomas Hobbes* that perhaps he had chosen to write on an empty subject, much like G.K. Chesterton's Lord Darnaway put such titles as *The Snakes of Ireland* and *The Religion of Frederick the Great* on the spines of the dummy books in his library.[2] So also one might think about "Hauerwas on bioethics and law," for one of Hauerwas's (mostly salutary, to my view) contributions to theological bioethics has been his persistent refusal to acquiesce to the overly professionalized and bureaucratic

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1. THOMAS M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME (2008).
2. Peter Geach, *The Religion of Thomas Hobbes*, 17 RELIGIOUS STUDIES 549 (1981).

set of concerns that dominate the field of bioethics today.[3] If that is true of "bioethics," it is even more so with "law" on account of Hauerwas's suspicion of the modern nation-state and its dominant political and legal forms.[4]

But there is more to be said about "Hauerwas on bioethics and law" than might appear, for much of Hauerwas's criticism of theological bioethics applies to the law of bioethics, as well. More specifically, the area of law that largely gave rise to law and bioethics—intentional torts in the law of informed consent and battery—has become muddled in ways that Hauerwas's own critique of bioethics and his earliest work in the philosophy of action indicate. Part II of this article sets forth Hauerwas's early work on intention in moral theory and bioethics, as well as the broader moral, philosophical, and theological framework of that work. Part III moves to the topic of intention in tort law. Drawing on the historical and jurisprudential work of James Gordley, John Finnis, John Goldberg, and Benjamin Zipursky, I argue that the twentieth century trend away from an understanding of tort law as a manifestation of Aristotelian commutative justice (or simply tort as a "wrong") has deprived tort law of an adequate account of intentional wrongdoing. In part IV, I argue that this shift in tort law's historical and philosophical understanding of intentional wrongdoing has played out specifically (and detrimentally) in the law of bioethics by making it ever more difficult to distinguish between intention and foresight. The early law of bioethics—centered on the concepts of informed consent and battery—assumed a background of Aristotelian commutative justice along with the robust account of intention that Hauerwas, among others, has defended. Deprived of that basis, the law of bioethics has increasingly become unable to make the necessary distinctions between purposely harmful acts and acts that cause harm as a side effect. I will focus on one consequence of this loss: the confusion in the physician-assisted suicide debate over whether the

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3. For the history of how bioethics was transformed from a subfield of moral philosophy and moral theology into an autonomous discipline, see JOHN H. EVANS, PLAYING GOD?: HUMAN GENETIC ENGINEERING AND THE RATIONALIZATION OF PUBLIC BIOETHICAL DEBATE (2002); ALBERT R. JONSEN, THE BIRTH OF BIOETHICS (2003); and DAVID J. ROTHMAN, STRANGERS AT THE BEDSIDE: A HISTORY OF HOW LAW AND BIOETHICS TRANSFORMED MEDICAL DECISION MAKING (1992). Hauerwas has frequently distanced himself from the "bioethicist" label:

> Our problem is simply that in the absence of any good beyond our basic physical survival, we lack any sense of what limits might be placed on the good that medicine serves . . . . Any attempt to limit medical care in such a context cannot help but appear arbitrary and cruel. As a result, medical care becomes increasingly just another form of liberal bureaucracy that must be subject to the same kinds of rules so characteristic of the wider political life. I therefore take medical ethics to be but one form which that kind of bureaucratic maintenance assumes. That, of course, is why I do not aspire to be a medical ethicist.

STANLEY HAUERWAS, *Communitarians and Medical Ethicists: Or "Why I Am None of the Above", in* DISPATCHES FROM THE FRONT: THEOLOGICAL ENGAGEMENTS WITH THE SECULAR 153, 162 (1994).

4. *See, e.g.*, Stanley Hauerwas, *On Being a Christian and an American*, *in* A BETTER HOPE: RESOURCES FOR A CHURCH CONFRONTING CAPITALISM, DEMOCRACY, AND POSTMODERNITY 23 (2000).

distinction between withdrawing treatment and acting to cause the patient's death is morally and legally defensible.

II
INTENTION IN MORAL PHILOSOPHY AND MORAL THEOLOGY

A. Hauerwas and Anscombe on Intention

Even avid readers of Hauerwas's work over the past forty years might forget that much of his earliest work was on the philosophy of action, intention, and how intention relates to character and the virtues.[5] By immersing himself in disputes about the philosophy of action and intention, Hauerwas was able to develop an account of the virtues as arising from a character-constituting set of intentional acts. Building on Elizabeth Anscombe's watershed work on intention,[6] Hauerwas argued in the early 1970s that

> there is a vast difference between calling human action purposive and calling it intentional. The concept of intention is confined in its application to language-using, reflective creatures who are able to characterize their own conduct, whereas the concept of purpose is not so limited. Only men can be characterized as intending what they do, whereas animals may be said to have purposes. Thus to argue that action is basically intentional is to point to the fact that action can only ultimately be described and understood by reference to the intention of the agent. Only the agent can supply the correct description of an action, whereas purpose can be characterized from the observer's point of view.[7]

Though Hauerwas's initial work in the actual field of bioethics was a decade away,[8] his initial foray into an issue of significance to bioethics was here, in his early writings on the problem of intention as it emerged from the context of twentieth century debates in moral philosophy and moral theology.[9]

In the law of bioethics, intention has often been discussed in the context of the principle of double effect.[10] Anscombe's work situates the current debate:

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5. As Hauerwas writes in his memoir about his early work, "I was reading Charles Taylor, Stuart Hampshire, and Elizabeth Anscombe to try and develop an account of agency." STANLEY HAUERWAS, HANNAH'S CHILD: A THEOLOGIAN'S MEMOIR 68 (2010).

6. G.E.M. ANSCOMBE, INTENTION (2d ed. 1963).

7. STANLEY HAUERWAS, VISION AND VIRTUE 56–57 (1974) [hereinafter HAUERWAS, VISION AND VIRTUE]. *See also* STANLEY HAUERWAS, CHARACTER AND THE CHRISTIAN LIFE: A STUDY IN THEOLOGICAL ETHICS 100–06 (1975) [hereinafter HAUERWAS, CHARACTER AND THE CHRISTIAN LIFE] (discussing the intention and descriptions of action).

8. Hauerwas's first collection of essays on bioethics was STANLEY HAUERWAS, SUFFERING PRESENCE: THEOLOGICAL REFLECTIONS ON MEDICINE, THE MENTALLY HANDICAPPED AND THE CHURCH (1986).

9. For an extended discussion of the influence of Anscombe on Hauerwas, see MARK RYAN, THE POLITICS OF PRACTICAL REASON (2011).

10. Joseph M. Boyle, Jr., *Toward Understanding the Principle of Double Effect*, 90 ETHICS 527, 528 (1980) ("The classic modern formulation of the PDE is presented in J. P. Gury's widely used and often revised manual, *Compendium theologiae moralis*: 'It is licit to posit a cause which is either good or indifferent from which there follows a twofold effect, one good, the other evil, if a proportionately grave reason is present, and if the end of the agent is honorable—that is, if he does not intend the evil

throughout her career, she maintained an interest both in theoretical issues in the philosophy of action and in defending a traditional formulation of the principle of double effect. Anscombe used double effect to analyze moral issues in the ethics of war and other topics.[11] For example, Anscombe argued that the obliteration bombing of cities during World War II was immoral on account of the absolute prohibition on intentionally killing the innocent and the Allies' abuse of double-effect reasoning to justify such indiscriminate bombing.[12] The opposition to "consequentialism" (a term coined by Anscombe to denote much of English moral philosophy since the utilitarian Henry Sidgwick) that drives much of Anscombe's classic paper *Modern Moral Philosophy* is due, she argues, to the consequentialist conflation of the distinction between intended and foreseen consequences.[13] As summarized by Anscombe in her well known paper *War and Murder*, "[t]he denial of [the principle of double effect] has been the corruption of non-Catholic thought, and its abuse the corruption of Catholic thought."[14]

Anscombe's landmark essay *Modern Moral Philosophy* and her monograph *Intention* resurrected interest in and launched much of the current debate about the philosophy of action.[15] Anscombe's warning to the moral philosophers of her day—that, in the absence of an adequate moral psychology and account of action (including intention), moral philosophy should be abandoned—persists

effect.' In a clarification of this statement Gury makes it clear that the PDE contains four conditions, all of which together are required for the type of act in question to be licit: (1) the agent's end must be morally acceptable (*honestus*), (2) the cause must be good or at least indifferent, (3) the good effect must be immediate, and (4) there must be a grave reason for positing the cause.").

11. *See, e.g.*, 3 G.E.M. ANSCOMBE, *The Justice of the Present War Examined*, *in* THE COLLECTED PHILOSOPHICAL PAPERS OF G.E.M. ANSCOMBE: ETHICS, RELIGION AND POLITICS 72 (1981).

12. *Id.* at 78–79.

13. 3 G.E.M. ANSCOMBE, *Modern Moral Philosophy*, *in* THE COLLECTED PHILOSOPHICAL PAPERS OF G.E.M. ANSCOMBE, *supra* note 11, at 26, 33–34. Anscombe noted that Sidgwick's massive influence on English-speaking moral philosophy was because of his denial of any distinction between responsibility for foreseen consequences and responsibility for intended consequences of an act: "*This* move on the part of Sidgwick explains the difference between old-fashioned Utilitarianism and that *consequentialism*, as I name it, which marks him and every English academic moral philosopher since him." *Id.* at 12 (emphasis in original).

14. 3 G.E.M. ANSCOMBE, *War and Murder*, *in* THE COLLECTED PHILOSOPHICAL PAPERS OF G.E.M. ANSCOMBE, *supra note* 11, at 51, 54. As a historical matter, the principle of double effect did not attain widespread use in moral theology until approximately 1630 under the Portuguese Thomist, John of St. Thomas. *See* Joseph T. Mangan, *An Historical Analysis of the Principle of Double Effect*, 10 THEOLOGICAL STUDIES 40, 41 (1949); JOHN T. NOONAN, JR., CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS 541 n.48 (1965). Philippa Foot argued that the principle of double effect's strength is in its distinction between what one *does* (denoted by Foot as "direct" intention) and what one *allows* (denoted as "oblique" intention). Phillipa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, *in* VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19, 25 (1978). Foot eventually argued against the widespread applicability of double effect reasoning, but her insight on the strength of the direct–oblique intention distinction remains valuable.

15. G.E.M. ANSCOMBE, INTENTION (2d ed. 1963). Donald Davidson remarked that Anscombe's book was the most important contribution to the philosophy of action since Aristotle. *See* DONALD DAVIDSON, *Aristotle's Action*, *in* TRUTH, LANGUAGE, AND HISTORY 277, 283 (2005).

today, especially in applying the principle of the double effect. Among the conditions of the principle of double effect is a distinction between the intended and (merely) foreseen consequences of one's actions.[16] Much turns, then, on the sense in which one does (or does not) act intentionally when bringing about some harmful effect. It is at this point that the principle of double effect depends upon the resolution of problems in the philosophy of action.

My brief summary of some important aspects of Anscombe's account of intention relies on two arguments from the beginning of her monograph *Intention*.[17] First, she asserts that the "different senses" of intention in (a) "I am going to do such-and-such" (what we might term "predictive intention"), (b) acting intentionally, and (c) acting *with* intention are "clearly not equivocal."[18] To hold that intention in those different uses is equivocal or ambiguous would be, in Anscombe's words, "implausible." However, she simply notes this fact and moves on to "tak[e] [the] topic piecemeal" throughout the rest of the book.[19] Of course, "intention" in all three uses is *linguistically* univocal—if by that we mean that the same term (intention) is used in three different kinds of expression. One suspects, however, that Anscombe's opposition (following Wittgenstein) to ascribing each different use of "intention" to a different mental state (a more plausible view) drives her assertion that the three uses of intention in different linguistic expressions are unambiguous and univocal.[20]

The second claim—already implicit in the first—is that intention cannot be the expression of a mental state. Anscombe inveighs against the view that "if we wish to understand what intention is, we must be investigating something whose existence is purely in the sphere of the mind."[21] This is so because "Wittgenstein has shown the impossibility of answering the question" of what a person's intention is by reference to mental states.[22] In a later paper, Anscombe argues that those who hold that intention "can't be known to anyone but the agent" (holding, in other words, a reductive variant of mentalist intention) "have been

16. In the traditional formulation of the principle of double effect, an action with both a good and bad effect is morally permissible if (1) the act is morally good or indifferent, (2) the agent intends only the good effect and merely foresees the bad effect, (3) the good effect is not brought about by means of the bad effect, and (4) the good effect is proportionate to the bad effect. I agree with commentators who suggest that the second condition does considerably more work than the other three, particularly insofar as the scope of permitted acts under condition (1) is partly determined by how one parses the distinction between intention and mere foresight in condition (2). *See, e.g.*, R.A. Duff, *Absolute Principles and Double Effect*, 36 ANALYSIS 68, 74 (1976); *see also*, Alison McIntyre, *Doing Away with Double Effect*, 111 ETHICS 219 (2001).

17. ANSCOMBE, *supra* note 15.

18. *Id.* at § 1.

19. *Id.*

20. *But see id.* at § 27 (arguing for a limited role for "interior performance" in determining intentions).

21. *Id.* at § 4.

22. *Id.* at § 3.

misled by bad teaching" insofar as this view is "in general absurd."[23] Inspired partly by Anscombe, Hauerwas argues that

> [m]an's capacity for self-determination is dependent on his ability to envision and fix his attention on certain descriptions and to form his actions (and thus his self) in accordance with them. A man's character is largely the result of such sustained attention. His reasons for action, his motives and intentions are really explanatory because they are the essential aspect in the formation of the act and consequently in his own formation. His reasons do not "cause" him to act, but by embodying them he as the agent effects the corresponding action.[24]

B. Intention in Twentieth Century Catholic Moral Theology

During the last half of the twentieth century, the debate in Catholic moral theology over intention was concurrent with, but largely separate from, the argument over intention in Anglo-American moral philosophy. The separation was for reasons of linguistic, sociological, and intellectual isolation. Since the seventeenth century, the dominant methodology in Catholic moral theology had been that of the moral manuals used in the education of clergy.[25] Beginning in the years preceding Vatican II, Continental theologians such as Bernard Häring, Joseph Fuchs, and Peter Knauer faulted these manuals for their physicalist understanding of human action. They were followed in this assessment by American figures such as Richard McCormick, S.J. (one of the fathers of American bioethics along with such figures as Paul Ramsey and Daniel Callahan).[26] The manuals, these theologians argued, were so concentrated on the physical description of action and the enumeration of sins that they offered a distorted view of moral agency by neglecting virtues and intentions.

Although the history of twentieth century Catholic moral theology is complex and rife with academic and ecclesiastical subplots,[27] the central debate was arguably over the application of the principle of double effect to

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23. G.E.M. Anscombe, *Medalist's Address: Action, Intention, and "Double Effect",* 56 PROC. AM. CATHOLIC PHIL. ASS'N 12, 18 (1982).

24. HAUERWAS, VISION AND VIRTUE, *supra* note 7, at 58.

25. JOHN MAHONEY, THE MAKING OF MORAL THEOLOGY: A STUDY OF THE ROMAN CATHOLIC TRADITION (1989). During the sixth century, "moral manuals" were initially used as a guide that instructed monks on the on various sins and the sacrament of penance. By the Middle Ages, the manuals of moral theology had evolved, largely due to the work of Thomas Aquinas, into instructive manuals that not only enumerated sins and their corresponding penance, but also described to the clergy how exactly to administer appropriate penance and punishment for sins, resulting in a more utilitarian use of the manuals in the seminaries themselves.

26. *See, e.g.*, RICHARD A. MCCORMICK, HOW BRAVE A NEW WORLD?: DILEMMAS IN BIOETHICS (1986); RICHARD A. MCCORMICK, NOTES ON MORAL THEOLOGY 1981 THROUGH 1984 (1984); RICHARD A. MCCORMICK, NOTES ON MORAL THEOLOGY 1965 THROUGH 1980 (1981).

27. Hauerwas has occasionally commented upon these intramural disputes within Catholic moral theology. *See, e.g.*, STANLEY HAUERWAS, *Gay Friendship: A Thought Experiment in Catholic Moral Theology*, *in* SANCTIFY THEM IN THE TRUTH: HOLINESS EXEMPLIFIED 105, 110 (1998) ("At least one of the lessons we need to learn from recent debates in Catholic moral theology is that it is a dangerously over-determined tradition. For example, when you identify grace with a 'fundamental option,' and specify 'biblical theology' by a concept like 'covenant,' you have an indication that moral theology has become so specialized it is by no means clear what it means for it to be called theology.").

particularly difficult moral questions, many drawn from bioethics. The principle of double effect, purportedly derivable from Aquinas's analysis of killing in self-defense, includes, as noted earlier, the condition that one may not directly intend the evil effect of an act that has both good and evil effects. Peter Knauer's 1967 article *The Hermeneutic Function of the Principle of Double Effect* led to a trend in moral theology that replaced the moral analysis of the manuals with an emphasis on the intentions of agents to act proportionally for the greater good.[28] The manuals had offered a catalog of sins and potential exceptions to them through the application of the principle of double effect. Proportionalists, as they came to be known, responded by labeling the manualist understanding "physicalist" and "casuistic." The proportionalists argued for an alternative interpretation in which the exercise of reason to intend the greater good in a situation of conflicting goods justified certain acts.[29] In this development, intention—or at least one account of it—became the crucial concept. According to the revisionist moral theologians, the totality of factors in a moral act, including the circumstances and the agent's intention, should be considered, as opposed to the allegedly "photographic" or non-contextual assessment of action imputed to the manuals.

McCormick and other proportionalists claimed that their account returned the agent's intention to its rightfully central place in moral evaluation and escaped the physicalist account found in the manuals. In turn, John Finnis and Martin Rhonheimer have argued that proportionalism should be considered a species of the "consequentialism" that Anscombe rightly attacked.[30] The argument between these two positions was sharpened by the claim of both parties to offer an interpretation of Aquinas. Among the proportionalists, both Knauer and Louis Janssens claimed Aquinas for their position.[31] Finnis and Rhonheimer responded in kind, writing expositions of Aquinas's doctrine of intention and object in moral judgment (Finnis) and the Thomist inspiration of *Veritatis Splendor* (Rhonheimer).[32] *Veritatis Splendor* includes an attack on

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28. *See* Peter Knauer, *The Hermeneutic Function of the Principle of Double Effect*, *in* 1 READINGS IN MORAL THEOLOGY: MORAL NORMS AND CATHOLIC TRADITION 1 (Charles Curran & Richard McCormick, S.J. eds., 1979).

29. For a history of the moral manuals and the reaction against them, see JOHN GALLAGHER, TIME PAST, TIME FUTURE: A HISTORICAL STUDY OF CATHOLIC MORAL THEOLOGY (1990); MAHONEY, *supra* note 25. For a sympathetic portrayal of proportionalism, see BERNARD HOOSE, PROPORTIONALISM: THE AMERICAN DEBATE AND ITS EUROPEAN ROOTS (1987). For an unsympathetic view, see JOHN FINNIS, MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH (1991).

30. For the place of intention and the philosophy of action in the proportionalist debate and a proposed solution to the impasse in the debate, see Michael J. Quirk, *Why the Debate on Proportionalism is Misconceived*, 13 MODERN THEOLOGY 501 (1997).

31. *See* Louis Janssens, *Ontic Evil and Moral Evil*, 4 LOUVAIN STUDIES 115 (1972).

32. *See* John Finnis, *Object and Intention in Moral Judgments According to Aquinas*, 55 THOMIST 1 (1991); JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 139 (1998); Martin Rhonheimer, *"Intrinsically Evil Acts" and the Moral Viewpoint: Clarifying a Central Teaching of Veritatis Splendor*, 58 THOMIST 1 (1994); *Intentional Actions and the Meaning of Object: A Reply to Richard*

proportionalism, though a new debate arose over whether the encyclical criticized merely a caricature of proportionalism.[33]

Hauerwas largely and wisely sidestepped the proportionalist debate, but he was one of the first non-Catholics in the field of Christian ethics to take Aquinas seriously and he relied on aspects of Aquinas's account of intention in his early work.[34] Aquinas's account of intention is best viewed through two contexts: (1) its relationship to end and object in moral action, and (2) its relation to the virtues. As I. T. Eschmann argues, at the heart of Thomistic ethics is the concept of action for an end:

> The accent on "the end" is quite purposeful in the "treatise on morals." "End" or the "Order of the end" carries of itself the morally decisive notions of the moral good and evil which, again with the idea of the end, are susceptible of an immediate elaboration [in *Summa Contra Gentiles* III.9] by bringing out the idea of "measure," of "reason."[35]

Intention, understood in this moral context, is the "determination of the will to will the end."[36] Any account of intention, then, will have to explore the nature of moral action for an end.[37] In his initial work on Aquinas, Hauerwas also calls attention to the significance of "end" for Aquinas' account of intention: "For Aquinas this means that choice is the result of man's intention, for intention (intention) is the inclining of the will toward its object."[38]

Second, just as action for an end figures pivotally in Aquinas, so also intention is significant for an ethic of the virtues, particularly prudence, which Hauerwas noted in his early work:

> Character is thus the qualification of our self-agency, formed by our having certain intentions (and beliefs) rather than others. Character is not a mere public appearance that leaves a more fundamental self hidden; it is the very reality of who we are as self-

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McCormick, 59 THOMIST 279 (1995).

33. See collected essays in CONSIDERING VERITATIS SPLENDOR (John Wilkens ed., 1994), especially those by Richard McCormick, Bernard Haring, John Finnis, Germain Grisez, Herbert McCabe, and Lisa Sowle Cahill. For a discussion of *Veritatis Splendor* from Hauerwas, see STANLEY HAUERWAS, IN GOOD COMPANY: THE CHURCH AS POLIS (1997).

34. Hauerwas's mentors at Yale included some of the initial American Protestant Christian ethicists who engaged Aquinas. *See* JAMES GUSTAFSON, PROTESTANT AND ROMAN CATHOLIC ETHICS: PROSPECTS FOR RAPPROCHEMENT (1978); GEORGE A. LINDBECK, THE NATURE OF DOCTRINE: RELIGION AND THEOLOGY IN A POSTLIBERAL AGE (1984).

35. I.T. ESCHMANN, THE ETHICS OF SAINT THOMAS AQUINAS: TWO COURSES 55 (Edward Synan ed., 1997).

36. *Id.* at 60.

37. The problem is complicated by the introduction of the term "object," for the relation of the end and the object of acts is a delicate question to which Aquinas devotes considerable attention. Not surprisingly, it is in debates over interpretation of the "end" in action (action's "teleological" character) and whether action is "for an end" that lies at the root of much contemporary disagreement on intention. "The loss of the reality of the object of intention in modern thought," writes Daniel Westberg, "has led to unfortunate consequences and misinterpretations of the theory of St. Thomas. . . . This can be explained by the separation of *finis* and *objectum* such that the actual object of the action understood in an exterior sense was demoted to an 'accidental value,' while what was important was the subjective intention." DANIEL WESTBERG, RIGHT PRACTICAL REASON: ARISTOTLE, ACTION, AND PRUDENCE IN AQUINAS 143 (1994).

38. HAUERWAS, CHARACTER AND THE CHRISTIAN LIFE, *supra* note 7, at 65.

> determining agents. . . . Our character is our deliberate disposition to use a certain range of reasons for actions rather than others (such a range is usually what is meant by moral vision), for it is by having reasons and forming our actions accordingly that our character is at once revealed and molded.[39]

But other than occasional references in some works on the moral theory of the virtues,[40] the role of intention has often been consigned to a discrete and atomistic depiction of human action.[41] Actions are often described apart from the character of the agent, leading to the problem of how to denote the intention in an act of "killing," for example. Furthermore, and as a result of this portrayal of action (in both the proportionalist debate and in much of twentieth century moral philosophy), intention is conceived merely as a mental property of moral agents, not primarily as a term of moral analysis and description.[42] As summarized by Anscombe, "The intentionalness of an action," in the mentalist view, "can't be known to anyone but the agent."[43] Fergus Kerr, amid a discussion of Wittgenstein's significance for Catholic moral theology, observes that such a "mentalist individualism in epistemology breeds what has been called radical volitionism as regards human action."[44] By contrast, Aquinas argues that intention is the term applied to the act of the will tending toward the end at which an action aims, and such a description is possible only in light of the virtues one possesses or fails to possess.[45] Intentions emerge from character, just

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39. HAUERWAS, VISION AND VIRTUE, *supra* note 7, at 59.

40. *See* ALASDAIR MACINTYRE, AFTER VIRTUE 210 (3d ed. 2007); PETER GEACH, THE VIRTUES (1977).

41. For a criticism of such accounts, see Charles Taylor, *Explaining Action*, 13 INQUIRY 54 (1970).

42. *See* Alasdair MacIntyre, *How Moral Agents Became Ghosts or Why the History of Ethics Diverged from that of the Philosophy of Mind*, 53 SYNTHESE 295 (1982).

43. G.E.M. Anscombe, *Medalist's Address: Action, Intention, and "Double Effect,"* 56 PROC. AM. CATHOLIC PHIL. ASS'N 12, 18 (1982). In *Intention*, Anscombe notes that "it can easily seem that in general the question what a man's intentions are is only authoritatively settled by him." ANSCOMBE, *supra* note 15, at 9. "Hence," she contends, "if we wish to understand what intention is, we must be investigating something whose existence is purely in the sphere of mind; and that although intention issues in actions, and the way this happens also presents interesting questions, still what physically takes place, i.e. what a man actually does, is the very last thing we need consider in our enquiry. Whereas I wish to say that it is the first." *Id.*

44. FERGUS KERR, THEOLOGY AFTER WITTGENSTEIN 173 (2d ed. 1997). The mistake in the "mentalist" view, according to Kerr (and also Anscombe), is to depict intentions as a mental property known privately by the agent.

45. Following the questions on the voluntary and involuntary, questions eight to twelve of the *Prima secundae* are concerned with "those acts of the will whereby it is moved to the end." "It seems that there are three acts of the will in reference to the end," Aquinas writes, "volition, enjoyment, and intention" (I-II, 8. prologue). Question twelve takes up intention and is divided by Aquinas into five articles. Two topics will be explored in these articles: (1) the relation of intention and ends of human action, and (2) the entailment of ends and means in action, the focus of article four, bearing upon intention and election. A third problem, the assessment of good and evil in human acts and intention's role in moral judgment, will conclude the chapter, using I-II, 19.7 and 8. The former asks "whether the goodness of the will, as regards the means, depends on the intention of the end" (a Thomistic variation of the Abelardian problem whether a good end justifies a bad means). The latter article elaborates upon the previous article by introducing considerations of degree.

In the *Secunda secundae*, Aquinas considers particular virtues and employs the account of

as the virtues specify such character, and character shapes intentions. It is not surprising, then, that Anscombe's article and book, which played such an important role in both the renewal of the philosophy of action and the analysis of intention, have also been taken by Hauerwas and others as a source for the recovery of virtue ethics in contemporary moral philosophy.

III
INTENTION IN THE LAW OF BIOETHICS

With this highly selective account of intention in recent moral philosophy and theology as background, I turn to the legal implications of confusion about intention. Such issues as intention from the philosophy of action are part of several areas of legal doctrine. For example, the criminal law doctrine of mens rea and the elaboration in the Model Penal Code of different mental states (namely, purpose, knowledge, recklessness, and negligence), are rife with philosophical discussions of intention and action theory.[46] In tort law, the question of when one may be held liable for one's actions turns on topics such as intention, foresight, and standards of care, all of which are pertinent to the philosophy of action. Nonetheless, legal scholars have, for the most part, been reluctant to engage the philosophical and theological work on intention and seldom mine such debates for their legal implications.

A. Battery and Informed Consent in the Law of Bioethics

Before turning to the muddle of intention in contemporary tort law, I begin with how the law of bioethics came to be framed around intentional torts, specifically the tort of battery and lack of informed consent. The rise of informed consent over the course of the twentieth century and its predominance in the law of bioethics today might obscure the relative novelty of informed consent in medical practice. Indeed, physicians have not always been required to obtain a patient's consent for medical procedures, and for some time obtaining consent was actively discouraged. In ancient Greece, for example, it was considered undesirable for patients to be involved in

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intention elaborated in the *Prima secundae*. In relation to the second sub-question of the problem (the relation of intention and virtue), acts pertaining to two virtues will be examined. In the treatment of charity, Aquinas takes up the issue of war. A necessary component of a just war, he argues, is that those making war have *recta intentio* (II-II, 40.1). In the consideration of justice, two acts are analyzed in which intention plays a significant role in evaluating the action. In killing in self-defense, Aquinas uses the famous concept of *praeter intentionem* (II-II, 64.7), and the later tradition will derive the principle of double effect from this. At II-II, 110.1, also pertaining to the virtue of justice, Aquinas argues that the intention to deceive is of decisive importance in the ethics of lying and truth-telling.

46. For a critical discussion of the role of Glanville Williams in importing a utilitarian account of intention and foresight into the Model Penal Code and the law of bioethics in both the United Kingdom and the United States, see John Keown & David Jones, *Surveying the Foundations of Medical Law: A Reassessment of Glanville Williams's* The Sanctity of Life and the Criminal Law, 16 MED. L. REV. 85 (2008).

decisionmaking for medical treatment.[47] In the Middle Ages, physicians were permitted to be manipulative and deceitful when necessary. Views began to change as patients came to be seen as capable of listening to physicians, but deception was still thought to be occasionally necessary for patient care. In the 1800s, physicians began to consider that patients should be informed of dire prognoses, but most still thought that patients should not be fully informed of their conditions.

The tort of battery (an unconsented-to touching) formed the basis of a claim against a physician for performing surgery without consent.[48] The usual cite for establishing the link between battery and medical treatment without consent is to Judge Cardozo's opinion in *Schloendorff v. Society of New York Hospital*: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages."[49] The conventional view is that Judge Cardozo's assertion in *Schloendorff* led, however inchoately, to a patient's right to self-determination and informed consent, thereby providing the initial framework for the later elaboration of a set of doctrines in the law of bioethics. For example, Kellen Rodriguez argues that the principle that non-consensual medical treatment is a battery was first articulated in *Schloendorff*,[50] and Danuta Mendelson claims that *Schloendorff* expressly introduced the idea of a patient's right to self-determination.[51] Similarly, H. Tristam Engelhardt argues that *Schloendorff* founded a patient's right to consent to and refuse treatment based on patient autonomy.[52]

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47. *See* RUTH R. FADEN ET AL., A HISTORY AND THEORY OF INFORMED CONSENT 53–101 (1986); Peter M. Murray, *The History of Informed Consent*, 10 IOWA ORTHOPAEDIC J. 104, 104 (1990).

48. Marjorie Maguire Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 224 (1985).

49. Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914).

50. Kellen F. Rodriguez, *Suing Health Care Providers for Saving Lives*, 20 J. LEGAL MED. 1, 12 (1999).

51. Danuta Mendelson, *Historical Evolution and Modern Implications of Concepts of Consent to, and Refusal of, Medical Treatment in the Law of Trespass*, 17 J. LEGAL MED 1, 20 (1996).

52. H. TRISTRAM ENGELHARDT, JR., FOUNDATIONS OF BIOETHICS 264 (1986). Others, however, argue that Judge Cardozo's opinion has been given an unduly important role in articulating the importance of informed consent and should be viewed as merely stating widely accepted legal doctrine at the time. By 1914, it was arguably well-settled that a patient's consent was required before medical treatment could be provided—indeed, Judge Cardozo himself must have been aware of this because he authoritatively cites *Mohr v. Williams*, 95 Minn. 261 (1905), and *Pratt v. Davis*, 118 Ill. App. 161 (1905), both of which were cases in which defendants were found liable for battery because they performed treatment without a patient's consent. *See* Paul A. Lombardo, *Phantom Tumors and Hysterical Women: Revising our View of the* Schloendorff *Case*, 33 J.L. MED & ETHICS 791, 798 (2005). Similarly, Jay Katz has argued that the case should be memorable not for a pronouncement of self-determination, but rather for the unfortunate necessity reminding physicians of such an elementary restraint on their authority. *See* JAY KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT 52 (1984).

Regardless of the credit Judge Cardozo's opinion in *Schloendorff* deserves, consent has been incorporated into the law of bioethics through the common law tort of battery, even if the protection that battery-defined consent provides patients might be inadequate. For example, if a particular action does not involve touching (such as a decision *not* to treat), then a patient's right to consent to the action would not be protected.[53] Also, in cases where medical intervention leads to harm, a doctor who would ordinarily be liable for malpractice but did not want to disclose pertinent facts might violate the patient's right to informed consent but would probably not be liable under a traditional battery analysis.[54] Finally, some have noted that courts are wary of applying a doctrine shaped mostly by violent physical confrontations to the medical context. Consequently, the courts have limited battery claims to circumstances where a procedure is performed without any consent at all and have handled other cases of lack of fully informed consent as negligence claims.[55]

In light of these problems with applying the doctrine of informed consent in medicine through battery principles, some have argued that battery-driven informed consent should be modified to afford greater protection to patient autonomy. This could be done by expanding the battery doctrine to apply to questions that would typically be analyzed under other doctrines of tort law, such as negligence.[56] Shultz argues that some circumstances, such as conflicts of interest, call for stronger protection of patient interests and that battery should be applied to such cases.[57] She also notes that courts do, and should, analyze cases in battery where optional treatments are involved.[58] Shultz explains that this provides greater protection than mere negligence because battery rightly applies where there has not been consent. She also notes that determining whether to apply battery is difficult where a finding of consent rests on whether a treatment exceeded consent to a lesser procedure; courts, however, are most likely to apply it when cosmetic surgery or reproductive treatments are involved because both are optional.[59] But some would modify battery-based consent to

53. Shultz, *supra* note 48, at 229–30; *see also* Mendelson, *supra* note 51, at 39 (noting that an anomaly in legal rules relating to right of self-determination exists because a medical practitioner may refuse to administer treatment even if a patient requests it, but cannot ignore a patient's request to be allowed to die).

54. Shultz, *supra* note 48, at 260.

55. *Id.* at 226. Pennsylvania treats lack of fully informed consent by a physician as battery, not negligence. *See* Montgomery v. Bazaz-Sehgal, 798 A.2d 742 (Pa. 2002). Conversely, there is a concern that enforcing consent in medical practice by way of rigid common law battery principles actually over-protects patients at the expense of physicians' discretion. *See* Mendelson, *supra* note 51, at 20.

56. Shultz, *supra* note 48, at 258–60 (noting that the court applied battery principles to the question of informed consent for prescription drugs, which would generally be resolved under negligence principles).

57. *Id.* at 260.

58. *Id.* at 264.

59. *Id.* at 265–66.

apply in fewer circumstances and agree with the trend of applying battery only to situations where no consent was given whatsoever. Some would limit this even more by avoiding recognition of a battery claim when beneficial, non-consensual medical treatment has occurred.[60]

Still, some would apply battery principles to every case involving informed consent in light of informed consent's historical roots in battery.[61] In *Mink v. University of Chicago*,[62] a case in which the plaintiffs were administered DES during a research experiment, the plaintiffs brought both negligence and battery claims when alleging that an increased risk of cancer to their children had not been disclosed. Shultz pointed out that battery principles would not normally have fit because a prescription does not constitute contact and the plaintiffs voluntarily ingested the drug. Although the court rejected the negligence claim, the court was willing to characterize the nondisclosure as a battery, ignoring the absence of physical contact by explaining that the "gravamen of a battery action is the plaintiff's lack of consent, not the form of touching."[63]

Another example comes from *Morgan v. MacPhail*,[64] where a plaintiff sued her doctor for nondisclosure of potential side effects of nerve block injections. The court in *Morgan* decided to apply a battery analysis by distinguishing between surgical and medical treatments and holding that informed consent was only required for surgical procedures. Thus, the court decided that informed consent should apply only in circumstances that could give rise to traditional batteries. For the court, the invasive nature of surgery created the need to inform the patient of risks. But Grimm notes that the prevailing view is that informed consent is needed for all non-diagnostic medical procedures and that a negligence standard applies when evaluating the adequacy of the informed consent.[65]

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60. Mendelson, *supra* note 51, at 20.

61. *See* Douglas Andrew Grimm, *Informed Consent for All! No Exceptions*, 37 N.M. L. REV. 39, 40 (2007).

62. Mink v. Univ. of Chi., 460 F. Supp. 713 (E.D. Ill. 1978) (One thousand women were given the drug Diethylstilbestrol (DES) as part of an experiment, carried out by Eli Lilly & Company, to determine the drug's efficacy in preventing miscarriages while they were at the University of Chicago's Hospital for prenatal care. The women were not told they were part of an experiment and were not told that the pills given to them were DES. The women claimed that their daughters were at an increased risk of cervical cancers due to the side effects of the drug, and brought both negligence and battery claims against Eli Lilly and the University of Chicago. The court characterized the action as a battery claim, and not a lack of informed consent claim rooted in negligence, and found that the administration of the drug was intentional and constituted contact, fulfilling the requirements for battery under Illinois state law. The court dismissed the defendant's argument that the patient's had consented to the touching when they admitted themselves to the hospital and stated that the administration of the drug DES clearly fell outside of what the patients had consented to upon admission to the hospital for prenatal care.).

63. Shultz, *supra* note 48, at 258.

64. Morgan v. MacPhail, 704 A.2d 617 (Pa. 1997).

65. Grimm, *supra* note 61, at 66.

Most importantly for the law of bioethics at the end of life, similar questions arise when a patient (or a proxy decisionmaker) attempts to refuse or withdraw life-sustaining treatment. Because the unlawfulness of battery usually stems from non-consensual touching, contact does not need to be harmful to give rise to liability.[66] Battery principles thus provide a foundation for an individual's right to refuse medical treatment. As is often noted, the tort of battery is based on the rights of individual self-determination and autonomy.[67] As illustrated by landmark informed consent cases such as *Canterbury v. Spence*,[68] self-determination gradually became more important in tort law and bioethics. Consequently, the right to refuse medical treatment became more firmly supported by battery principles.

Battery arguably became the most plausible claim for tort recovery of unwanted life-sustaining medical treatment because it protects the fundamental right not to be touched without consent.[69] Indeed, in *Cruzan v. Director, Missouri Department of Health*,[70] the Supreme Court noted that battery is available to remedy a violation of the right to refuse medical treatment. Similarly, a state court in *Leach v. Shapiro*[71] allowed the plaintiff to recover for a wrongful resuscitation on battery grounds, and the court in *Bouvia v. Superior Court*[72] recognized a patient's right to have a nasogastric tube withdrawn on the basis of a battery-based right to refuse life-sustaining treatment.

Kellen Rodriguez examines the refusal of life-sustaining treatment from the perspective of both competent and incompetent patients. For competent patients, establishing a battery claim is fairly straightforward because the patient expresses wishes that the physician must then follow if the physician is to avoid liability.[73] For incompetent patients (those unable to expressly state their wishes), however, it is less straightforward because they must convey their wishes through an advance directive or other proxy decision. Rodriguez notes that in a non-emergency situation where an incompetent person has left an

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66. S. Elizabeth Wilborn Malloy, *Beyond Misguided Paternalism: Resuscitating the Right to Refuse Medical Treatment*, 33 WAKE FOREST L. REV. 1035, 1044–45 (1998).

67. *See* Shultz, *supra* note 48, at 224 ("Patient autonomy was initially identified with and subsumed under an interest in physical security, protected by rules proscribing unconsented touch. Medical care often involves touching, and may be considered battery if the touching is unconsented. By mandating patient consent to specific procedures, battery doctrine counters the implication that doctors acquire authority to make decisions simply by virtue of the contract for professional services. Moreover, professional competence is no defense to a medical battery action. Under battery analysis, the patient's wishes take priority over even the fully competent recommendation of a doctor, unless an exception applies. Apart from traditional defenses, the right to be secure against unconsented touching is close to absolute. Application of battery doctrine to medical care thus establishes an uncompromising base-line of protection for patients' self-determination.").

68. Canterbury v. Spence, 464 F.2d 772, 782–83 (1972); *see also* Mendelson, *supra* note 51, at 21.

69. Rodriguez, *supra* note 50, at 13.

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

71. Estate of Leach v. Shapiro, 469 N.E.2d 1047 (Ohio Ct. App. 1984).

72. Bouvia v. Superior Court, 225 Cal. Rptr. 297 (Ct. App. 1986).

73. Rodriguez, *supra* note 50, at 14.

advance directive or a surrogate testifies to the patient's wishes, physicians are hesitant to withdraw treatment because they want to be absolutely sure the patient would have so decided.[74] Conversely, some courts have held that physicians must seek consent from the patient or a surrogate before beginning life-sustaining treatment and that a battery claim exists for wrongfully maintaining the patient with the treatment.[75] Rodriguez argues that in a non-emergency, physicians should obtain consent or turn to an ethics committee or court before administering treatment.[76]

Rodriguez notes that the approach differs for an incompetent patient during an emergency. Traditionally, consent is implied in an emergency, but Rodriguez explains that this does not apply when an advance directive has ordered refusal of treatment.[77] Rodriguez points out that both *Leach v. Shapiro* and *Anderson v. St. Francis–St. George Hospital*[78] support the view that implied consent during emergencies can be overcome by a prior decision to refuse treatment.[79]

Even though battery principles seem applicable to cases involving a refusal of treatment and courts have sometimes applied them, there are still shortcomings to employing an account of consent developed through battery principles. One is that patient requests involve potential interpretive problems that make it difficult to determine if the contact was consensual. Even with competent patients, refusal of treatment can be ambiguous if overly broad language is used. Rodriguez explains that while doctors could simply ask for clarification, studies have shown they are hesitant to discuss life-sustaining treatment with patients, and a patient in need of such treatment is likely to be very ill and could quickly become incompetent as a result.[80] Interpretive problems can also arise with the advance directives of incompetent patients.[81] For incompetent patients in emergency situations who have advance directives refusing treatment, there is the additional problem of ensuring that the emergency room staff is aware of the directive.[82]

Overall, then, the tort of battery has had a considerable effect in developing the approaches taken by courts to issues of consent. When consent became incorporated into bioethics, it was still deeply influenced by the principles of intentional torts. Even today, battery has important implications for questions of consent—indeed, familiar cases involving simple questions of pure consent and botched surgeries on the wrong limb are far from things of the past.[83]

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74. *Id.* at 22.
75. *Id.* at 23.
76. *Id.* at 25.
77. *Id.* at 32.
78. Anderson v. St. Francis–St. George Hosp., Inc., 671 N.E.2d 225 (Ohio 1996).
79. Rodriguez, *supra* note 50, at 32.
80. *Id.* at 14.
81. *Id.* at 27–28.
82. *Id.* at 34.
83. Sandra G. Boodman, *The Pain of Wrong Site Surgery*, WASH. POST, June 20, 2011, at E01,

B. Confusion About Intention in the Law of Torts

American tort law has, John Finnis writes, "generally embraced a position which at least in its formulation is congenial to utilitarian moral thought and far less congenial to traditional common morality."[84] Though the *Restatement (First) of Torts* in 1934 did not even set out to define "intention," the *Restatement (Second)*, issued in 1965, inserted a new section on intention. The section states, "The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it."[85] Here, one already sees the collapse of any distinction between intention and foresight. In the *Restatement (Third)*, the definition of intention expressly collapses the distinction between intention and foresight: "A person acts with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result."[86]

As noted above, the law of bioethics in the United States emerged from such discussions of intent in tort law, specifically the law of battery and informed consent.[87] With this background, I want to revisit the perennial question of whether there is a moral, philosophical, or legal distinction between physician-assisted suicide or forms of so-called "active" euthanasia and decisions to withhold or withdraw treatment. My purpose is to show some of the deeply confused and misguided understandings of intention in tort law, reflected most recently in the *Restatement (Third) of Torts*. If the definition of intent for intentional torts is beset by such problems, we should not be surprised if the law frequently fails to draw the necessary distinctions between intention and foresight (and killing and letting die).

In *The Foundations of Private Law*, James Gordley shows how the modern common law of torts was only partially successful at incorporating categories of

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available at http://www.washingtonpost.com/national/the-pain-of-wrong-site-surgery/2011/06/07/AGK3uLdH_story.html (noting a recent study indicating that the prevalence of surgeries on wrong body parts has not decreased in frequency and may actually be more common now than in the past).

84. 2 JOHN FINNIS, *Intention in Tort Law*, *in* THE COLLECTED ESSAYS OF JOHN FINNIS: INTENTION AND IDENTITY 198, 211 (2011) [hereinafter 2 FINNIS, *Intention in Tort Law*]; *see also* 2 JOHN FINNIS, *Intention and Side Effects*, *in* THE COLLECTED ESSAYS OF JOHN FINNIS: INTENTION AND IDENTITY, *supra*, at 173, 173 (2011) ("The distinction between what is intended and what is not intended but brought about as a side effect is at the basis of the vast modern law of tortious liability in negligence; it is the focus, too, of the criminal law's long-accepted distinction between murder and manslaughter. As those facts suggest, it is not the esoteric preserve of some sectarian moral teaching, but a morally significant distinction which in intrinsic to practical reasonableness.").

85. RESTATEMENT (SECOND) OF TORTS § 8A (1965).

86. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 (2010); *see also* Anthony J. Sebok, *Purpose, Belief, and Recklessness: Pruning the Restatement (Third)'s Definition of Intent*, 54 VAND. L. REV. 1165 (2001).

87. *See* Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972); Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92 (N.Y. 1914).

tort liability inherited from the civil law. As the common law of torts moved from the formalism of writs to today's tort law with causes of action, levels of liability, and so forth, it tried to pour the civil law account of "wrong" (delict) into the mold of English common law. As Gordley argues, the Roman jurists based liability for tort (*delictus*) on the category of Aristotelian commutative justice. For Aristotle (and later commentators such as Aquinas), commutative (rather than distributive) justice required that when one took something from another unlawfully, then one was required to restore (make compensation for) the loss. Drawing on Roman sources, the civil law developed an account of commutative justice in both voluntary (contracts) and involuntary (torts) transactions: "If one citizen is involuntarily deprived of resources by another, commutative justice requires the person who did so to restore his victim's share of resources."[88] Civil lawyers interpreted these categories with the aid, Gordley argues, of Aristotelian and late scholastic accounts of justice: "By voluntarily harming the plaintiff, [the defendant] has chosen to use the plaintiff's resources for his own ends."[89] As John Goldberg has argued, the

> broader, medieval usage [of "tort"] as a synonym for "wrong" or "trespass" also persisted. Even jurists who did not use tort in the first sense seem to have recognized the department of law to which "tort," in that usage, referred. They merely used different labels for it, such as the law of "private wrongs," "personal wrongs," or "delict."[90]

What is the "wrong" that a defendant commits when he intentionally inflicts a battery on a plaintiff? For the Aristotelian tradition, the wrong is based in the defendant's fulfillment of his will, where an intent to cause harm is willed. The defendant who "fulfills his will" is liable because a will to cause harm is unjust insofar as it violates the equality of commutative justice.[91] The fact that a "plaintiff has suffered a loss" is independent of the claim that a "defendant should be liable."[92] Gordley argues that a concern only with the defendant's conduct "will conceive of tort law as an indirect way of accomplishing ends that

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88. JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 161 (2006).

89. *Id.* at 183.

90. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 516 (2003); *see also id.* at 516–17 ("[L]ate eighteenth- and early nineteenth-century jurists operated with a certain conception of 'tort.' To them, tort was the part of the civil side of common law that identified, and provided redress for, injurious wrongs committed by a citizen—or, in certain instances, a state actor—against another.").

91. *See* 3 FINNIS, *Intention in Tort Law*, *supra* note 84, at 214 ("Common, non-utilitarian morality's principle that one must never choose (intend) harm to the person of any human individual both expresses and preserves the understanding that each human individual is more than just a locus of utility or wealth (to be measured at some arbitrarily chosen future moment), or a channel or conduit for maximizing that wealth or utility (again, a maximum as measured at some *chosen* future moment). It expresses and preserves each individual's *density*, so to speak, or *dignity*, if you will, as an equal of *everyone* else in basic rights. To choose harm to the person is paradigmatic wrong, the exemplary instance of denial of right.").

92. *See* Jules L. Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 CHI.-KENT L. REV. 451, 461 (1987).

are directly addressed by criminal law: deterring the defendant from harming others or punishing him."[93] (Such is the view of many law and economics scholars of tort law, who regard tort law as an elaborate means of regulating risks posed by would-be defendants' conduct.)[94] But if, Gordley argues, one is concerned only with the plaintiff's loss, it does not seem to matter whether the defendant acted intentionally or not. An account centrally concerned with commutative justice is at pains to show both why *this* (intentionally wrongdoing) defendant should be liable for the harm inflicted on *this* plaintiff.

This account of intentional wrongdoing and its tight relation to commutative justice was gradually displaced by moral skepticism about tort law. "[T]he traditional account," writes Goldberg, "supposed that, by applying legal rules, principles, and concepts in this manner, judges and jurors were bringing to bear social norms of responsibility that had been refined and elaborated over time through lawyerly analysis."[95] Benjamin Zipursky and Goldberg have argued that it was Holmes who injected a dose of American pragmatism into the common law of torts and thereby turned torts from a common law system of commutative justice into a regulatory scheme:

> In [Holmes's] view, tort law, like all common law, was essentially regulatory; it was a device that the state employed to advance a particular set of public goals—in this case, the goals of deterring harmful conduct and indemnifying citizens for invasions of their security. . . . [M]odern tort law could not be described as reflecting or enforcing moral or conventionally-recognized duties owed by one citizen to another. In modern societies, there were no such duties. Instead, the courts imposed liability for unreasonable conduct because they had concluded that it was the only rule that provided deterrence and compensation without unduly interfering with individual freedom.[96]

With this change over the course of the twentieth century, tort law became less and less focused on corrective justice for wrongful actions by a defendant toward a particular plaintiff and more focused on compensation and deterrence as part of an overall scheme of regulation. One aspect of this change was a diminishment in blurring the line between intentional torts and negligence, most clearly expressed in the ascription of intention to cases involving substantially certain foreknowledge[97] but also as expressed in some formulations of law and

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93. GORDLEY, *supra* note 88, at 184.

94. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987).

95. *Id.* at 518.

96. John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of Macpherson*, 146 U. PA. L. REV. 1733, 1755–56 (1998).

97. *See* Anthony J. Sebok, *Purpose, Belief, and Recklessness*, 54 VAND. L. REV. 1165, 1173 (2001) ("[A]ny serious application of the belief prong requires us to engage in strange verbal contortions. The strangest of all, of course, is the concept of "substantial certainty" itself, which, like Voltaire's God, seems to have been invented out of necessity, since it resembles no intuitively familiar mental state and is famously difficult to explain to skeptical first year students who have not yet checked their common sense at the law school's front door. It is something less than certainty (which would be too strong) and more than highly probable (which would be too weak, and would collapse the whole category into recklessness). It is a concept, which, having no fixed meaning, can . . . mean whatever a judge wants.").

economics.[98] James Henderson and Aaron Twerski argue that "the way to avoid difficulty is to conceptualize acts as 'volitional,' rather than necessarily 'intended,' thereby allowing the concepts of intent and recklessness to focus on the consequences of acts, rather than on the acts themselves."[99] What is lost, however, is the reality of the moral judgments underlying tort law's structure of liability for intentional harms.[100]

IV
CONCLUSION: INTENTION AND PHYSICIAN-ASSISTED SUICIDE

We are now able to assess briefly the costs of this confusion over intention in the field of bioethics and the law, with a particular focus on debates over end-of-life treatment. In a contemporary manifestation of this loss of intelligibility around intention in the context of bioethics and the law, consider the debate over physician-assisted suicide. In 1997, the Supreme Court rejected due process and equal protection challenges to state law prohibitions on physician-assisted suicide. In the first case, *Glucksberg v. Washington*, the Court considered a due process claim against Washington's assisted suicide statute. A panel opinion of the United States Court of Appeals for the Ninth Circuit was written by Judge John T. Noonan, Jr., himself no stranger to the topic of intention.[101] In the Ninth Circuit case, *Compassion in Dying v. Washington*,[102] the appellate court reviewed a district court ruling that the plaintiff patients and physicians were deprived of due process and denied equal protection by the Washington statute. Rejecting the view that the Supreme Court's decision in *Planned Parenthood v. Casey* had expanded the scope of due process liberty to include all decisions affecting personal autonomy, Judge Noonan wrote that "[a]ny reader of judicial opinions knows that they often attempt a generality of expression and a sententiousness

98. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 119 (2d ed. 1977) ("Most accidental injuries are intentional in the sense that the injurer knew that he could have reduced the probability of the accident by taking additional precautions.").

99. James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating the Law*, 54 VAND. L. REV. 1133, 1137 (2001); *see also id.* at 1138 ("Assuming that a distinction has been successfully drawn between volition (part of the meaning of "act") and intent (relating to the consequences of acts); and that, properly conceived, intent is neither necessarily linked with tangible harm nor inherently wrongful; one must still identify the state(s) of mind that constitute intent on the part of an actor to cause a particular consequence of an act. Upon reflection, two (and only two) states of mind qualify. An actor intends the consequence of an act when the actor desires that consequence to follow; and an actor intends the consequence, even if the actor does not desire the consequence, if she is aware that the consequence is certain to follow and goes ahead and acts with that awareness.").

100. 4 JOHN FINNIS, *A Grand Tour of Legal Theory*, *in* THE COLLECTED ESSAYS OF JOHN FINNIS: PHILOSOPHY OF LAW, 91, 138–39 (2011) ("Tort law's distinctive project of compensation is clearly dependent on a set of judgments about what forms of interaction between persons are acceptable within a given community. The backbone of tort is a set of moral—natural law—principles identifying as wrongful all choices precisely to harm or to deceive.").

101. *See* NOONAN, *supra* note 14, at 459 (discussion of direct and indirect intention).

102. 49 F.3d 586 (9th Cir. 1995).

of phrase that extend far beyond the problem addressed."[103] Because a right to physician-assisted suicide has never been recognized, "[u]nless the federal judiciary is to be a floating constitutional convention, a federal court should not invent a constitutional right unknown to the past and antithetical to the defense of human life that has been a chief responsibility of our constitutional government."[104]

Judge Noonan's opinion is an especially helpful survey of the possible arguments offered on behalf of the state's interest in prohibiting assisted suicide. First, the state has an "interest in not having physicians in the role of killers of their patients."[105] As argued more elaborately by Leon Kass, among others, legal permission for physician-assisted suicide would transform the nature of the medical profession and present a marked transformation in the role of physicians in their relationships with patients.[106] Second, the state has an interest in protecting patients from "psychological pressure to consent to their own deaths."[107] Financial pressures on families and despair over terminal conditions might lead to coercion that would make the choice for assisted suicide less than fully autonomous.[108] Third, the state is legitimately concerned with protecting the poor and minorities from exploitation and manipulation. Fourth, the disabled would be especially vulnerable to pressure to avail themselves of assisted suicide. In the 1990s, this argument gave rise to a concerted anti-euthanasia effort among the disability rights community. Fifth, the state is legitimately worried that there might be a slippery slope from permitting terminally ill patients to have the aid of a physician in committing suicide to giving the same option to suffering (but not terminally ill) competent patients, and finally, to involuntary euthanasia.

An en banc panel of the Ninth Circuit vacated Judge Noonan's opinion. Writing for the court, Judge Stephen Reinhardt began his analysis of the liberty interest by positing "the fact that we have previously failed to acknowledge the existence of a particular liberty interest or even that we have previously prohibited its exercise is no barrier to recognizing its existence."[109] Building on the Supreme Court's decisions in *Casey* and *Cruzan*, the en banc Ninth Circuit held that terminally ill patients have a due process liberty interest in procuring the aid of a physician in ending their lives. The Ninth Circuit panel also rejected

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103. *Id.* at 590.

104. *Id.* at 591.

105. *Id.* at 592.

106. Leon R. Kass, *Neither for Love nor Money: Why Doctors Must Not Kill*, 94 PUB. INT. 25 (1989).

107. *Compassion in Dying*, 49 F.3d at 592.

108. The role of "autonomy" in the assisted suicide debate and in bioethics more generally is much contested. Two very fine treatments of the topic are CARL E. SCHNEIDER, THE PRACTICE OF AUTONOMY: PATIENTS, DOCTORS, AND MEDICAL DECISIONS (1998) and ONORA O'NEILL, AUTONOMY AND TRUST IN BIOETHICS (2002).

109. Compassion in Dying v. Washington, 79 F.3d 790, 805 (9th Cir. 1996).

any plausible basis for distinguishing between withholding or withdrawing treatment and physician-assisted suicide.[110]

Similar litigation against New York's prohibition on assisted suicide began when Dr. Timothy Quill, who had written a controversial piece in the *New England Journal of Medicine* describing an assisted suicide, filed suit. The Second Circuit did not follow the Ninth Circuit's lead in concluding that there was a Fourteenth Amendment due process liberty interest in assisted suicide, but it did agree that the statutory prohibition against assisted suicide violated the Equal Protection clause. The court reasoned that the longstanding right to refuse medical treatment—which dates back to Judge Cardozo's opinion in *Schloendorff v. Society of N.Y. Hospital*—results in an unequal treatment of patients in end-of-life settings. A competent patient who seeks to refuse medical treatment or removal of life sustaining treatment is protected under New York law. The patient who cannot hasten his death in such a manner, though, and seeks instead to have the assistance of a physician in ending his life is not given such a right under New York law:

> [I]t seems clear that New York does not treat similarly circumstanced persons alike: those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths 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.[111]

Underlying the court's reasoning is an assault on the distinction between killing and letting die, which has been a familiar argument in the bioethical literature.[112] The court seized on the argument from the district court that there is a difference between "allowing nature to take its course," on the one hand, and hastening death, on the other. But "there is nothing 'natural' about causing death by means other than the original illness or its complications," the court argues, and the withdrawal of life-sustaining treatment "hastens . . . death by means that are not natural in any sense. It certainly cannot be said that the death that immediately ensues is the natural result of the progression of disease or condition from which the patient suffers."[113] Withdrawing medical treatment,

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110. *Id*. at 822–23 ("The distinctions suggested by the state do not individually or collectively serve to distinguish the medical practices society currently accepts. The first distinction—the line between commission and omission—is a distinction without a difference now that patients are permitted not only to decline all medical treatment, but to instruct their doctors to terminate whatever treatment, artificial or otherwise, they are receiving. In disconnecting a respirator, or authorizing its disconnection, a doctor is unquestionably committing an act; he is taking an active role in bringing about the patient's death. In fact, there can be no doubt that in such instances the doctor intends that, as the result of his action, the patient will die an earlier death than he otherwise would.").

111. Quill v. Vacco, 80 F.3d 716, 729 (2d Cir 1996).

112. Much of the current debate derives from James Rachel's 1975 article, *Active and Passive Euthanasia*, 292 NEW ENG. J. MED. 75 (1975). For a thorough treatment of the issue, see Daniel Patrick Sulmasy, Killing and Allowing to Die (July 20, 1995) (unpublished Ph.D. dissertation, Georgetown University).

113. *Quill*, 80 F.3d at 729.

in the view of the Second Circuit, "is nothing more nor less than assisted suicide."[114]

The Supreme Court decided both the Ninth Circuit due process challenge and the Second Circuit equal protection challenge on the same day and rejected both arguments.[115] The Court noted that "[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."[116] More importantly for our purposes, the Court rejected the Ninth and Second Circuits' view that there is no relevant distinction between killing and letting die, let alone that permitting withdrawal–withholding of treatment, but prohibiting physician-assisted suicide, rises to the level of an equal protection violation. Writing for the Court, Chief Justice Rehnquist stated, "[W]e think the distinction between assisting suicide and withdrawing life-sustaining treatment a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational."[117] With that and some brief paragraphs asserting that the distinction "comports" with legal principles of "causation" and "intent," the Court roundly rejected the Ninth and Second Circuits' reasoning.

Fourteen years later, doubts linger over the Supreme Court's terse approval of the killing–letting-die distinction.[118] In his book on euthanasia and assisted suicide, Neil Gorsuch reconstructs the Court's adoption of the distinction and offers three proposed bases for it: (1) the distinction between act and omission, (2) causation, and (3) intention.[119] He rejects the first two. Gorsuch views the act–omission distinction as inadequate. As Stephen Brock notes, "[N]on-occurences and non-actions, to the extent they can be thought about and to that extent 'are,' can also be directly intended. . . . [I]f [an agent] intends not to do it, there is still some conduct involved . . . and to this extent the non-occurrence is pretty well assimilable to an action."[120] So also "the argument from causation wilts under examination,"[121] which leaves everything to intention. That is precisely where Hauerwas pointed us forty years ago.

The crucial question for the future is whether the concept of intention in the law of bioethics can continue to provide the basis for drawing a distinction between killing and letting die. As the character-constituting nature of our free and deliberate actions becomes obscured and confidence in the capacity of

114. *Id.*

115. Washington v. Glucksberg, 521 U.S. 702 (1997); Vacco v. Quill, 521 U.S. 793 (1997).

116. *Glucksberg*, 521 U.S. at 735.

117. *Vacco*, 521 U.S. at 800–01.

118. *See* Steven D. Smith, *De-Moralized: Glucksberg in the Malaise*, 106 MICH. L. REV. 1571 (2008).

119. NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA (2006).

120. STEPHEN L. BROCK, ACTION AND CONDUCT: THOMAS AQUINAS AND THE THEORY OF ACTION 224 (1998).

121. STEVEN D. SMITH, THE DISENCHANTMENT OF SECULAR DISCOURSE 48 (2008).

practical reason to genuinely choose (or elect responsibility for) goods becomes diminished, all that remains are acts causing consequences, whether intended or foreseen. Torts and bioethics, tort's doctrinal child, race to keep up with these shifts in moral theory, obscuring and muddling the distinction between intention and foresight. As Hauerwas notes ruefully, "[W]e may have arrived at a time when we have achieved an unspeakable thing: a medical profession without a moral philosophy in a society without one either."[122]

122. STANLEY HAUERWAS, TRUTHFULNESS AND TRAGEDY: FURTHER INVESTIGATIONS INTO CHRISTIAN ETHICS 131 (1977).