FURTHER DEVELOPMENTS ON PREVIOUS SYMPOSIA

THE RHETORIC OF NEUTRALITY AND THE PHILOSOPHERS' BRIEF: A CRITIQUE OF THE *AMICUS* BRIEF OF SIX MORAL PHILOSOPHERS IN *WASHINGTON V. GLUCKSBERG* AND *VACCO V. QUILL*

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I

INTRODUCTION

In an *amicus* brief to the United States Supreme Court in the companion assisted suicide cases of *Washington v. Glucksberg*[1] and *Vacco v. Quill*,[2] Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson describe themselves as "six moral and political philosophers who differ on many issues of public morality and policy."[3] Perhaps a distinction exists between Rawls's veil of ignorance and Nagel's higher order impartiality, but it is hard to imagine what the word "differ" might mean for these philosophers who are all engaged in the same liberal political discourse regarding contractarian democracy and all teach at elite American universities. Include a communitarian such as Michael Sandel, a Catholic like Alasdair MacIntyre, an evangelical Christian such as David Smolin, or a pragmatist like Richard Rorty and then one could arguably have a group that "differ[s] on many issues of public morality and policy" because such a group would differ on the very paradigm from which its members approached "public morality and policy."

Since its first medical symposium in 1939, *Law and Contemporary Problems* has sustained an analysis of questions pressing on the intersection of law and medicine. At other times, *Law and Contemporary Problems* has addressed the challenges of religion in public life and the legal questions raised by old age.

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1. 117 S. Ct. 2258 (1997) (rejecting a due process right to assisted suicide).

2. 117 S. Ct. 2293 (1997) (rejecting an equal protection claim to assisted suicide).

3. Brief for Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson as *Amici Curiae* in Support of Respondents at 2, Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (No. 96-110) and Vacco v. Quill, 117 S. Ct. 2293 (1997) (No. 95-1858) [hereinafter Philosophers' Brief].

The current debates over euthanasia, one moment of which is represented in the philosophers' brief, bring to a convergence these various topics. This note argues that the philosophers' charge—that prohibiting physician-assisted suicide can only be based on impermissible sectarian religious or ethical premises—is one that can be raised against the philosophers' supposedly "neutral" liberal argument itself. The philosophers' position—advocating a right to assisted suicide—is based on a liberal conception of the good that values individual autonomy, abstract rationality, equality, and tolerance; this conception of the good is no more neutral than other religious or ethical positions. Thus, the philosophers also seek to impose a contentious religious or ethical position on American society. The philosophers' arguments, uncloaked from the liberal rhetoric of neutrality, expose them as just other political participants engaged in promoting a particular ethical position that is neither universally evident nor accepted. This criticism of the philosophers' position is not fatal. Indeed, all positions must represent some such sectarian perspective. However, it makes the thrust of their attack against positions prohibiting assisted suicide—that is, that such positions are impermissible embodiments of sectarian conceptions of the good—ironic and rhetorically less significant.

Relying on the work of Alasdair MacIntyre and Stanley Fish, Part II of this note exposes liberalism as just another substantive conception of the good that includes and precludes other positions by referring back to its own substantive conception of the good. Part III then analyzes the arguments in the philosophers' brief to highlight the liberal rhetorical structure used to get and keep their argument going while at the same time masking the controverted liberal premises which undergird that argument. This analysis also considers former Solicitor General Walter Dellinger's brief in the cases because the philosophers use it as a straw-man to attack positions prohibiting assisted suicide. The central argument of this note is that the position put forward by the philosophers is not neutral at all, but the embodiment of a particular substantive tradition which is just as intolerant of other approaches to seeking the good life as any other religious or philosophical tradition. This argument does not defeat the liberal position, but nonetheless, it makes the philosophers' call for the exclusion of arguments that are based in substantive traditions self-contradictory and therefore vacuous.

II

LIBERALISM AS A SUBSTANTIVE TRADITION

The "neutral" language of rights and autonomy that cloaks liberal arguments is actually a substantive moral position. Liberals' historic claim to neutrality is based on the claim that liberalism allows individuals to pursue whatever conception of the good they wish. Immanuel Kant argues, "[n]o-one can compel me to be happy in accordance with his conception of the welfare of oth-

ers, for each may seek his happiness in whatever way he sees fit."[4] Similarly, John Locke suggests that "[t]he commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing their own civil interests."[5] Likewise, in a more recent formulation of liberalism, Will Kymlicka claims that liberalism "allows people to choose a conception of the good life, and then allows them to reconsider that decision, and adopt a new and hopefully better plan of life."[6]

Despite these claims, the liberal tradition does promote particular substantive values: abstract rationality, equality, individual autonomy, and tolerance in particular. Regarding rationality, Kant argues,

> Friends of the human race and of all that it holds most sacred! Accept whatever seems most credible to you after careful and honest examination, whether it is a matter of facts or of rational arguments; but do not deny reason that prerogative which makes it the greatest good on earth, namely its right to be the ultimate touchstone of truth.[7]

Regarding equality, Kant argues for a radical equality despite differences for which we are or are not responsible:

> This uniform equality of human beings as subjects of a state is, however, perfectly consistent with the utmost inequality of the mass in the degree of its possessions, whether these take the form of physical or mental superiority over others, or of fortuitous external property and of particular rights (of which there may be many) with respect to others.[8]

The move to rationality and equality for Kant facilitated a morality based on a common rationality which, by equalizing all citizens, could make all subject to and protected by the categorical imperative's demand to treat others as ends not means.[9]

Liberalism's focus on individual autonomy and tolerance is demonstrated in the writings of John Stuart Mill: "[I]ndividuality is the same thing with development, and . . . it is only the cultivation of individuality which produces, or can produce, well-developed human beings."[10] Mill's argument for tolerance is grounded in epistemological fallibilism—that is, universal uncertainty which thereby mandates tolerance of other possibly correct opinions.

> [T]he opinion which it is attempted to suppress by authority may possibly be true. . . . To refuse a hearing to an opinion, because they are sure that it is false, is to assume

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4. Immanuel Kant, *On the Common Saying:* "*This May Be True in Theory, but It Does Not Apply in Practice*", *in* KANT'S POLITICAL WRITINGS 61, 74 (Hans Reiss ed., H.B. Nisbet trans., Cambridge 1970) (1793).

5. JOHN LOCKE, A LETTER CONCERNING TOLERATION 17 (William Popple trans., Patrick Romanell ed., Liberal Arts Press 1950) (1689).

6. WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 80 (1995).

7. Immanuel Kant, *What Is Orientation in Thinking?*, *in* KANT'S POLITICAL WRITINGS, *supra* note 4, at 237, 249 (1786).

8. Kant, *supra* note 4, at 75.

9. *See* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS *AND* WHAT IS ENLIGHTENMENT? 28 (Lewis Beck trans., Prentice Hall 1995) (1785).

10. JOHN STUART MILL, ON LIBERTY 60 (David Spitz ed., Norton 1975) (1859).

> that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility.[11]

Again, a modern reformulation of the liberal position is presented by Kymlicka, who argues that liberalism is neutral to conceptions of the good life, but merely mandates "two preconditions for leading a good life. The first is that we lead our life from the inside, in accordance with our beliefs about what gives value to life. . . . The second precondition is that we be free to question those beliefs."[12]

Thus, liberals do assert a substantive position on the good life for both individuals and communities. Further, liberals must assert this substantive position in their supposedly "neutral" theory for two reasons. First, their notion of autonomy must necessarily exclude communitarian conceptions of the good that would demand public implementation. Second, their position must demand acceptance of abstract rationality as the exclusive means for seeking knowledge of the world. Not surprisingly, these rhetorical moves also drive the philosophers' brief.

When liberals confront nonliberal conceptions of the good, their commitment to individualism must come to the forefront. Kant argues that "[i]f a certain use of freedom is itself a hindrance to freedom according to universal laws (that is, unjust), then the use of coercion to counteract it, inasmuch as it is the prevention of a hindrance to freedom, is consistent with freedom according to universal laws."[13] But this requirement that only liberal voices be admitted to the public sphere makes clear the sectarian position liberals are advancing. As Alasdair MacIntyre argues:

> Every individual is to be equally free to propose and to live by whatever conception of the good he or she pleases, derived from whatever theory or tradition he or she may adhere to, unless that conception of the good involves reshaping the life of the rest of the community in accordance with it. . . . And this qualification of course entails not only that liberal individualism does indeed have its own broad conception of the good, which it is engaged in imposing politically, legally, socially, and culturally wherever it has the power to do so, but also that in so doing its toleration of rival conceptions of the good in the public arena is severally limited.[14]

Thus, liberal neutrality breaks down exactly when liberals face a substantive conception of the good contrary to their own. Similarly, Stanley Fish has argued that liberalism

> does not have at its center an adjudicative mechanism that stands apart from any particular moral and political agenda. Rather, it is a very particular moral agenda (privileging the individual over the community, the cognitive over the affective, the abstract over the particular) that has managed, by the very partisan means it claims to transcend, to grab the moral high ground, and to grab it from a discourse—the dis-

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11. *Id*. at 18.

12. KYMLICKA, *supra* note 6, at 81.

13. IMMANUEL KANT, METAPHYSIK DER SITTEN 231 (Meiner 1966) (1797), *quoted in* KENNETH BAYNES, THE NORMATIVE GROUNDS OF SOCIAL CRITICISM: KANT, RAWLS, AND HABERMAS 20 (1992).

14. ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 336 (1988).

> course of religion—that had held it for centuries.[15]

It will be instructive to remember this argument because an attack on religious conceptions of the good drives the philosophers' argument that the Constitution requires neutrality toward controversial religious and philosophical conceptions of the good. But, as David Smolin has complained, neutrality to religious conceptions of the good is a substantive position in itself. "A conception of religion that seeks to 'privatize' it is in itself a non-neutral conception of religion at variance with historic forms of Christianity, Judaism, and Islam."[16]

Liberalism is also a demonstrably particular substantive conception of the good in its exclusion of "nonrational"—meaning nonabstract deductive rational—voices. Fish argues that

> liberalism is informed by a faith . . . in reason as a faculty that operates independently of any particular world view. It is therefore committed at once to allowing competing world views equal access to its deliberative arena, and to disallowing the claims of any one of them to be supreme, unless of course it is demonstrated to be at all points compatible with the principles of reason. . . . The one thing liberalism cannot do is put reason *inside* the battle where it would have to contend with other adjudicative principles and where it could not succeed merely by invoking itself because its own status would be what was at issue.[17]

Thus, liberals claim that only individuals willing to engage in rational discourse are to be admitted into the public discourse.

Liberals justify this exclusion of nonrational voices by suggesting that rationality must be our common ground because it is the only universal, nonparticular feature to which all humans have equal access. As Kant argues:

> Furthermore, it is evident that it is not only of the greatest necessity from a theoretical point of view . . . but also of the utmost practical importance to derive the concepts and laws of morals from pure reason . . . without making the principles depend upon the particular nature of human reason. . . . But since moral laws should hold for every rational being as such, the principles must be derived from the universal concept of a rational being in general. In this manner all morals, which need anthropology for their application to men, must be completely developed first as pure philosophy (i.e. metaphysics), independently of anthropology.[18]

However, as Fish alluded to in the preceding passage, rationality does not exist in the abstract, but is dependent on the community and tradition of discourse within which it is located. "In short, what is and is not a reason will always be a matter of faith, that is, of the assumptions that are bedrock within a discursive system which because it rests upon them cannot (without self-destructing) call them into question."[19]

Again, Fish and MacIntyre agree on this point. MacIntyre argues, "[w]hat the Enlightenment made us for the most part blind to and what we now need to

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15. STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH . . . AND IT'S A GOOD THING TOO 137-38 (1994).

16. David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067, 1091 (1991) (reviewing MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991)).

17. FISH, *supra* note 15, at 134-35.

18. KANT, *supra* note 9, at 28.

19. FISH, *supra* note 15, at 136.

recover is . . . a conception of rational enquiry as embodied in a tradition."[20] Furthermore, MacIntyre finds the inability of liberals themselves to articulate these "neutral" principles of our common rationality to be the strongest argument that no such common principles exist.

> That liberalism fails in this respect, therefore, provides the strongest reason that we can actually have for asserting that there is no such neutral ground, that there is no place for appeals to a practical-rationality-as-such . . . to which all rational persons would by their very rationality be compelled to give their allegiance. There is instead only the practical-rationality-of-this-or-that tradition. . . .[21]

This leads MacIntyre to the conclusion that liberalism, despite its claim of neutrality, is just another sectarian tradition.

In their brief, the philosophers also defer to the role of rationality in adjudicating the assisted suicide cases as if it were a free-floating concept for any individual to appropriate and use without definition or articulation. The philosophers then counterpose this position to supposedly nonrational authoritarian religious conceptions of the good. But, again, this distinction is untenable and only makes evident that the philosophers are arguing for a specific liberal conception of the good. As Fish notes,

> [i]n this [tolerance of only rational enquiry] liberalism does not differ from fundamentalism or from any other system of thought; for any ideology . . . must be founded on some basic conception of what the world is like . . . and while the conception may admit of differences within its boundaries (and thus be, relatively, tolerant) it cannot legitimize differences that would blur its boundaries, for that would be to delegitimize itself. A liberalism that did not "insist on reason as the only legitimate path to knowledge about the world" would not be liberalism; the principle of a rationality that is above the partisan fray . . . is not incidental to liberal thought; it *is* liberal thought. . . .[22]

It is worth addressing several responses liberals might make to the criticisms articulated generally in this section and applied particularly to the philosophers' brief in the next section. The first response would claim that liberalism as enacted may be intolerant of nonrational public conceptions of the good, but theoretically it need not be that way. But, as Fish's argument above makes clear, liberalism's survival necessitates that it preclude conceptions of the good that would undercut its substantive position. It cannot fail to argue for intolerance of nonrational public conceptions of the good exactly because liberals' defense of neutrality, autonomy, and reason, despite liberals' universalistic claims, are particular claims and therefore must be defended.

A second response liberals might present is to acknowledge the above critique—that liberalism is internally inconsistent as a theory in claiming neutrality as a value while espousing a substantive position—but nonetheless argue that the substantive liberal position of neutrality toward positions is embodied in the Constitution and, therefore, is appropriate for the Supreme Court to use in adjudicating cases. Without making a full-fledged historical survey of the

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20. MACINTYRE, *supra* note 14, at 7.
21. *Id*. at 346.
22. FISH, *supra* note 15, at 137 (footnote omitted).

Framer's intentions, one argument in response, which parallels MacIntyre's argument regarding moral discourse more broadly,[23] runs as follows. The Framers of the Constitution focused on individual rights in light of the particular historic moment in which they found themselves, but they saw their work fitting within a broader common law history that they did not wish to abandon completely. Michael Sandel has suggested that for the colonists to find a rhetorical position from which to attack the existing English law, they had to move their dialogue to the abstract to create an argumentative space for their dissenting position. "In order to articulate their protest, the colonists were compelled to abstract the fundamental principles of justice and right from the institutions and traditions in which they were embodied, and to give these principles priority."[24] Thus, one may contend that this abstraction was not an attempt to do away with substantive conceptions of the good, but was merely necessary to attack the substantive English conception of justice from which the colonists wanted to dissent.

However, as MacIntyre has argued that Kant's categorical imperative presupposed a community of discourse that could give substantive content to his abstract statement of ethical duties, so also the Framers presupposed such a historical common law context within which their abstract defense of rights would be understood. Unfortunately, both Kant's and the Framer's projects were destructive of the very traditions upon which they relied. Thus, as ethics and constitutional adjudication have moved away from and destroyed that historical context, both Kant's works and constitutional discourse are now left with only theoretical abstractions that cannot ground coherent substantive ethical and constitutional meanings.[25]

Evidence also exists within the constitutional tradition that communitarian thought and substantive moral positions have both played important roles in our country's political discourse. As the United States Catholic Conference argued in its motion for leave to file an *amicus* brief, "[t]he law has always acted to restrain personal choices that harm persons or the common good."[26] As ex-

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23. *See* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 54-56 (2d ed. 1984).

24. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 29 (1996).

25. MacIntyre argues that Kant's ethical project had to fail because Kant abandoned the telos of humanity (humans as they could be) as the goal of morality and, in its place, substituted abstract rationality. Therefore, Kant was left with only two dissonant pieces of the moral puzzle: humans as they are and their historic moral injunctions. Separated from human's telos, it was impossible to give rational arguments in defense of the moral injunctions that were in contradiction to humans' basic nature (humans as they are). *See* MACINTYRE, *supra* note 23, at 54-55. Furthermore, MacIntyre suggests that Kant and other enlightenment thinkers nonetheless still "presuppose[d] something very like the teleological scheme of God, freedom and happiness as the final crown of virtue. . . . [But] detach morality from that framework and you will no longer have morality; or, at the very least, you will have radically transformed its character." *Id.* at 56. Thus, Kant's moral theory relied on Christianity for its moral teleology at the same time it undermined Christianity. Practically then, what Kant left after the destruction of teleological moral systems was only the "radically transformed character" of pure rational morality.

26. Motion for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* of the United States

amples, the Catholic Conference cited constitutionally permissible prohibitions on unlimited abortions and the requirements that people agree to be vaccinated against contagious diseases, as well as the many unchallenged statutes regulating "prostitution, suicide, voluntary self-mutilation, brutalizing 'bare fist' prize fights, and duels," and limitations on marriage "based on affinity, consanguinity, and gender."[27]

Furthermore, Sandel has responded to Rawls's political liberalism by noting Abraham Lincoln's defense of substantive constitutional discourse. In the Lincoln-Douglas debates, Stephen Douglas suggested bracketing contentious religious or ethical positions regarding slavery, just as the philosophers' brief suggests bracketing such positions regarding assisted suicide. Lincoln challenged such a vacuous, nonsubstantive view of political discourse by arguing that

> [i]s it not a false statesmanship that undertakes to build up a system of policy upon the basis of caring nothing about the *very thing that every body does care the most about*? . . .
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> . . . .
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> He may say he don't care whether an indifferent thing is voted up or down, but he must logically have a choice between a right thing and a wrong thing. He contends that whatever community wants slaves has a right to have them. So they have if it is not a wrong. But if it is a wrong, he cannot say people have a right to do wrong.[28]

The Catholic Conference motion challenged the Court to consider essentially the same question. "At bottom, this case asks whether the kind of society we are to become will reflect our deepest values or *none at all*."[29]

Turning to the philosophers' brief, the task of this note is to expose how the substantive liberal conception of the good highlighted in this section is imported into the philosophers' arguments. Again, this does not defeat the philosophers' position, but it does remove the rhetorical sting from their attack on opponents of assisted suicide.

III

THE PHILOSOPHERS' BRIEF

Much of the basic structure of the philosophers' position is set out in the first few sentences of their brief:

> These cases do not invite or require the Court to make moral, ethical or religious judgments about how people should approach or confront their death or about when it is ethically appropriate to hasten one's own death or to ask others for help in doing so. On the contrary, they ask the Court to recognize that individuals have a constitu-

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Catholic Conference et al. at 13, Vacco v. Quill, 117 S. Ct. 2293 (1997) (No. 95-1858) [hereinafter Catholic Motion] (available on microfiche and on Lexis, 1995 US Briefs 1858). The Court granted the motion, which included a draft of the brief, on October 1, 1996; the final, amended *amici* brief was subsequently filed on November 12, 1996 (available on microfiche and Westlaw, 1996 WL 656248).

27. *Id.* at 13-14.

28. CREATED EQUAL?: THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 389, 392 (Paul M. Angle ed., 1958) (emphasis removed), *quoted in* Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1779-80 (1994) (reviewing JOHN RAWLS, POLITICAL LIBERALISM (1993)).

29. Catholic Motion, *supra* note 26, at 15 (emphasis added).

> tionally protected interest in making those grave judgments for themselves, free from the imposition of any religious or philosophical orthodoxy by court or legislature.[30]

The philosophers continue to argue throughout their brief that allowing physician-assisted suicide is not a substantive moral or ethical position, but is merely the embodiment of neutral rights of autonomy for individuals. But, of course, if the philosophers are correct, if the case really does not "require the Court to make moral, ethical or religious judgments," one must wonder why the Court should care what six moral philosophers think about the issue.

The philosophers counterpose their "neutral" position to those prohibiting assisted suicides, which they contend are only defensible on substantive, and thereby prohibited, religious or ethical grounds.

> Denying that opportunity to terminally-ill patients who are in agonizing pain or otherwise doomed to an existence they regard as intolerable *could only be justified on the basis of a religious or ethical conviction* about the value or meaning of life itself. Our Constitution forbids government to impose such convictions on its citizens.[31]

Although the philosophers are correct in asserting that assisted suicide can only be prohibited on substantive grounds, assisted suicide also can only be *supported* on equally contentious substantive grounds. Thus, the philosophers are not arguing for a "neutral position," but are arguing for just as contentious a substantive position as their opponents. Further, the exclusion of substantive conceptions of the good is itself an embodiment of the liberal values of individual autonomy and tolerance. Thus, both the philosophers' claim to a neutral, nonsubstantive position and their exclusion of substantive conceptions of the good are undercut. This observation does not answer the question of whether the Court's decisions are persuasive regarding physician-assisted suicide, but it removes the neutral liberal gloss from the philosophers' position. And since much of the power of the philosophers' arguments is found in their claim of self-effacing neutrality, it takes much of the rhetorical sting out of their supposedly neutral position.

A. Argument I: Due Process and *Casey*

The philosophers' first argument is that prohibitions on assisted suicide violate the Fourteenth Amendment's guarantee that a citizen not be deprived "of life, liberty, or property without due process of law."[32] The philosophers turn to the language of *Planned Parenthood v. Casey*,[33] which upheld the decision in *Roe v. Wade*,[34] offering the Court's substantive due process argument that "matters [] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[35] The philoso-

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30. Philosophers' Brief, *supra* note 3, at 3.
31. *Id.* (emphasis added).
32. U.S. CONST. amend. XIV, § 1.
33. 505 U.S. 833 (1992).
34. 410 U.S. 113 (1973).
35. *Casey*, 505 U.S. at 851.

phers then present their main thesis regarding such substantive due process decisions: "If there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[36] From this premise the philosophers assert that the decision to prolong life or commit suicide is a mere choice between two unresolvable, competing preferences of equal value: "None of these dramatically different attitudes about the meaning of death can be dismissed as irrational. None should be imposed, either by the pressure of doctors or relatives or by the fiat of government, on people who reject it."[37] As the philosophers see it, some prefer Pepsi; others Coke. The right to die, like the subject of religion under the common Establishment Clause argument, is so important that government legislation should not regard it at all. The philosophers support this contention with the truism, "[d]eath is, for each of us, among the most significant events of life."[38]

An analysis of this first argument highlights many of the liberal themes traced in Part II. First, the philosophers assert the value of autonomy, immediately followed by an argument against imposing particular religious convictions on others. But, as noted above, valuing the individual pursuit of the good—autonomy—above all other conceptions of the good is just such a particular philosophical position. Furthermore, *West Virginia State Board of Education v. Barnette*,[39] from which the philosophers argue that sectarian positions are to be excluded from political discourse, involved a mandatory recitation of the Pledge of Allegiance. Thus, the philosophers attempt to equate the coercive mandatory recital of allegiance to one's country with support for legislation based on a particular belief system. It appears that the philosophers would bar all legislation that is supported by a particular sectarian belief system. But one must ask, how else could one argue for any particular legislative position other than out of one's belief system? And if, as argued above, all positions, even liberal positions, represent particular beliefs, on what grounds could one legislate? It seems a flip of the coin is the only permissible neutral means left for arguing for legislation under the philosophers' premises. Lincoln's argument reverberates here: "Is it not a false statesmanship that undertakes to build up a system of policy upon the basis of caring nothing about the very thing that every body does care the most about?"[40]

The final liberal move the philosophers make to get their argument going is to suggest that "none of these dramatically different attitudes about death can be dismissed as irrational."[41] Thus, they assert the claim of fallibilism that un-

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36. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943), *quoted in* Philosophers' Brief, *supra* note 3, at 6.

37. Philosophers' Brief, *supra* note 3, at 7.

38. *Id.*

39. 319 U.S. 624 (1943).

40. CREATED EQUAL, *supra* note 28, at 389 (emphasis removed).

41. Philosophers' Brief, *supra* note 3, at 7.

dergirds liberalism. Since knowledge of the good is impossible, all rational positions should be tolerated. This presupposition buried in the philosophers' argument undercuts the ability of any participant in the debate to argue that one position is simply wrong. As Locke suggested, "[f]or every church is orthodox to itself; to others, erroneous or heretical."[42] Therefore, one cannot argue that one's position on assisted suicide is a choice about whether or not to disobey the law of God or to live the good life. Once the philosophers have reduced the argument to Pepsi versus Coke—personal preference—it is impossible to argue against assisted suicide. But, again, we return to Lincoln: "He [Douglas] contends that whatever community wants slaves has a right to have them. So they have if it is not a wrong. But if it is a wrong, he cannot say people have a right to do wrong."[43]

B. Argument II: *Casey* and *Cruzan*

The philosophers then look to the Supreme Court's decisions in *Casey* and *Cruzan v. Missouri*[44] to continue their substantive due process analysis. Regarding *Casey*, the Court's famous "mystery phrase" is the center of the philosophers' argument: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[45] The philosophers argue that the applicable principle derived from *Casey* is that "[j]ust as a blanket prohibition on abortion would involve the improper imposition of one conception of the meaning and value of human existence on all individuals, so too would a blanket prohibition on assisted suicide. The liberty interest asserted here cannot be rejected without undermining the rationale of *Casey*."[46] The philosophers again connect this argument with the truism that "a decision to die involves one's very 'destiny.'"[47]

The philosophers are able to exploit *Casey* because of the difficult position in which the government placed itself while arguing the assisted suicide cases. Solicitor General Walter Dellinger's *amicus* brief attempted to argue against assisted suicide while still protecting *Roe* and *Casey*. This was a difficult task because both *Casey* and the philosophers' brief rely on the liberal values of autonomy and individual choice. Thus, in accepting these liberal presuppositions from the *Casey* decision while at the same time attempting to prevent them from running to their logical conclusion in the assisted suicide cases, Dellinger was working against his own first premises. Correspondingly, to attack the philosophers' brief one must attack the decision of *Casey* as well.

Dellinger's brief begins by accepting the *Casey* language of individuality and abstract rationality. "This Court has recently stated [in *Casey*] that the task

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42. LOCKE, *supra* note 5, at 25.
43. CREATED EQUAL, *supra* note 28, at 392.
44. 497 U.S. 261 (1990).
45. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).
46. Philosophers' Brief, *supra* note 3, at 9.
47. *Id.*

of defining the sphere of autonomy and personal dignity encompassed within the meaning of 'liberty' ultimately requires a reliance on 'reasoned judgment.'"[48] He goes on to deny, as the philosophers attempt to do, a general liberty interest in the timing of one's death, but attempts to acknowledge a limited liberty interest in "obtaining relief from the kind of suffering experienced by the plaintiffs in this case."[49] Dellinger then tries to distinguish abortion from the liberty interest involved in assisted suicide. "The fundamental right to choose an abortion rests on a combination of constitutionally protected interests, of which avoiding the pain and suffering associated with being forced to continue an unwanted pregnancy is but one part. A prohibition on abortion interferes with personal autonomy in an extremely consequential way."[50] But, how can the right to die or not to die also not be "an extremely consequential" decision? Nonetheless, Dellinger argues that the state has a compelling interest in making sure only those who are terminally ill are allowed to die, and that no sure test can be fashioned to determine when this would occur. But, of course, the Court created just such an arbitrary line regarding when an abortion could and could not be regulated by the State. Thus Dellinger, after accepting all of the liberal principles that undergird the philosophers' position, cannot sustain a meaningful argument against assisted suicide without relying on some substantive conception of why assisted suicide is simply wrong.

Returning to the philosophers' brief, their next argument focuses on the Court's decision in *Cruzan*, which created a right to refuse life-sustaining medical treatment. The philosophers reject the position that refraining from aid is different from actively inducing death.

> When a competent patient does want to die, the moral situation is obviously different, because then it makes no sense to appeal to the patient's right not to be killed as a reason why an act designed to cause his death is impermissible. From the patient's point of view, there is no morally pertinent difference between a doctor's terminating treatment that keeps him alive, if that is what he wishes, and a doctor's helping him to end his own life by providing lethal pills he may take himself, when ready, if that is what he wishes—except that the latter may be quicker and more humane.[51]

The philosophers then argue that no meaningful difference between suspending treatment and assisting suicide exists as well for the doctors "who believe that their most fundamental professional duty is to act in the patient's interests."[52]

These arguments layer question begging upon question begging. The dispute here is "obviously" (to use the philosophers' term) over what the "pertinent moral principles" are. Thus, the moral situation is not "obviously different" from actively killing an unwilling patient since one of the very debates embodied in the argument is whether a psychologically fragile patient can

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48. Brief for the United States as *Amicus Curiae* Supporting Petitioners at 11, Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (No. 96-110) [hereinafter United States's Brief].

49. *Id*. at 12.

50. *Id*. at 15.

51. Philosophers' Brief, *supra* note 3, at 11.

52. *Id*. at 12.

ever be willing or unwilling. As Dellinger's brief noted, doctors play a critical role in creating a patient's expectations about what is in their best interest. "[P]hysicians may offer lethal medications based on their own judgments concerning the quality of the person's life and their own belief that any rational person in that condition would want assistance in committing suicide."[53] Similarly, regarding a doctor's moral situation, the very question in debate is over what is "in the patient's interests." The philosophers have not presented arguments here, but merely assertions clothed in moral rhetoric.

The philosophers' position is also ironic in the weight it lays on legal precedent. Although precedent is certainly the mode of legal argument, again one wonders why moral philosophers take the time to write an *amicus* brief if the heart of their argument merely contains the legal arguments for a right to assisted suicide. It seems these "diverse" moral philosophers are merely trying to add their moral weight to these legal arguments, yet (in a liberal fashion) still not delve into the substantive arguments for why these legal arguments are morally compelling. But, once again, why would one care what moral philosophers think if they have no substantive position? The philosophers do have a covert position for which they are arguing; if they did not, their brief would contribute nothing to the debate.

More substantively, the philosophers' continued individualistic focus on the patient's rights as the only relevant moral category remains a controverted framing of the issue. One of the key points of an Aristotelian or communitarian perspective is that societies, not individuals, are just; therefore, communities, not individuals, seek the good life. As Sandel argues:

> According to Aristotle, political community is more than "an association for residence on a common site, or for the sake of preventing mutual injustice and easing exchange." . . . "The end and purpose of a polis is the good life, and the institutions of social life are means to that end." It is only as participants in political association that we can realize our nature and fulfill our highest ends.[54]

Likewise, even Dellinger suggests that legislators "must also concern themselves with the effects that creating an exception to that prohibition would have on others."[55] Thus, there is "obviously" a different moral situation from homicide only if one accepts the liberal premise that the only significant moral considerations are those of the two individuals (patient and doctor) involved. But, if one's substantive position is that the actions of individuals shape the moral community that remains, then there may be no great difference between homicide and assisted suicide. Although such communitarian language is not familiar to recent American jurisprudence, its rich embodiment in Aristotelian political ethics should give one pause in ignoring it.

A communitarian conception of adjudication would benefit the Court in this situation and in the situations the Court confronted in *Casey* and *Cruzan*.

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53. United States's Brief, *supra* note 48, at 20.

54. SANDEL, *supra* note 24, at 7 (quoting ARISTOTLE, THE POLITICS 119-20 (Ernest Barker trans., Oxford 1946)).

55. United States's Brief, *supra* note 48, at 18.

The Court often seems to fail to understand that it is not abstract legal plaintiffs and defendants that stand before it, but particular people embedded in specific communities and social contexts. As Judge John T. Noonan, the author of the Ninth Circuit's original rejection of an assisted suicide right, has noted, "[r]ules of law are formed by human beings to shape the attitude and conduct of human beings and applied by human beings to human beings. The human beings are persons. The rules are communications uttered, comprehended, and responded to by persons."[56] Furthermore, individual actions shape and modify the world in which we live and which others will inherit. To fail to see the historic and social context within which people come to the Court is to fail to see the full picture that confronts the moral community in resolving this and other cases.

C. Argument III: The State's Interests

Having made much of Dellinger's acceptance of a constitutional right to die, the philosophers finally turn to three arguments to rebut the existence of a compelling state interest in prohibiting what they describe as "the exercise of a liberty interest of constitutional dimension"[57] in assisted suicide. First, similar risks of mistaken killings apply to protected *Cruzan*-type situations.[58] Second, regulations could protect against mistaken killings.[59] Finally, the risk of mistake should not be considered anyway because it is merely a concern about the influence of family and friends. The philosophers contend that individuals should have a right to determine if the personal beliefs of family and friends will influence them.[60] Thus, the coercion reflected by state prohibition is to be rejected, but the "personal ethics" of patients give them the "right to hear and, if they wish, act on what others might wish to tell or suggest or even hint to them."[61] The philosophers' concern is preventing the "mistake" of "preventing many thousands of competent people who think that it disfigures their lives to continue living, in the only way left to them, from escaping that—to them—terrible injury."[62]

Once again, the philosophers equate two principles as if they were obviously moral equivalents, but the mistake of killing and the mistake of living on are not substantively the same possible mistakes. The mistake made by choosing suicide is irreversible by the very nature of death; the mistake of not aiding suicide is not. Thus, one may decide later that the "terrible injury" of continuing to live was worth it—and this is the very concern that grounds the arguments against assisted suicide.

Ironically, the philosophers follow these arguments with an acknowledg-

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56. JOHN T. NOONAN JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 4 (1976).

57. Philosophers' Brief, *supra* note 3, at 17.

58. *See id.* at 13-14.

59. *See id.* at 14-17.

60. *See id.* at 18.

61. *Id.*

62. *Id.* at 18-19.

ment that the state does have an interest in

> deny[ing] an opportunity for assisted suicide when it acts in what it reasonably judges to be the best interests of the potential suicide, and when its judgment on that issue does not rest on contested judgments about "matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[63]

The philosophers then cite the example of nonterminally ill patients as an example of people who could "reasonably" be prevented from committing suicide on noncontroverted religious or ethical convictions.[64] One can only ponder what those reasonable reasons that all would agree on might be because it seems hard to assert that all decisions regarding when one dies are not "central to dignity and autonomy." Just as Dellinger could not stop the momentum of the liberal first principles, the philosophers' attempt to stop the momentum of their argument fails without relying on some of the substantive positions they want to exclude. Therefore, their argument must logically run to an assisted suicide right for all Americans.

The philosophers conclude by returning to their main contention that "any paternalistic justification for an absolute prohibition of assistance to such patients would of necessity appeal to a widely contested religious or ethical conviction many of them, including the patient-plaintiffs, reject."[65] But once again, one must reiterate that the philosophers are exactly correct; no reason for accepting an assisted suicide right cannot also appeal to "widely contested religious or ethical convictions."

IV

CONCLUSION

The philosophers' position, though cloaked in the language of liberal neutrality and counterposed to supposedly constitutionally suspect sectarian arguments against assisted suicide, is actually just such a contentious sectarian position. Furthermore, the very argument that substantive conceptions of the good should be excluded is a substantive conception of the good for the community. Highlighting this fact does not win the argument for the anti-assisted suicide camp. But, it should make clear that this is just a fight between two sectarian positions. The Supreme Court should not be deceived that excluding sectarian but including "rational neutral" arguments is capable of deciding contentious cases, such as the assisted suicide cases, for there are no "rational neutral" arguments. Instead, competing conceptions of the good exist which deserve serious attention and consideration.

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63. *Id.* at 19 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).
64. *See id.*
65. *Id.*