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THE FAILURE OF THE FREEDOM-BASED AND UTILITARIAN ARGUMENTS FOR ASSISTED SUICIDE

BY SCOTT FITZGIBBON

"Judge freedom to be happiness and courage to be freedom."²

In recent years, numerous initiatives have been launched to promote physician-assisted suicide. Numerous statutes have been proposed,³ and one (in Oregon) has been enacted.⁴ The United States Court of Appeals for the Ninth Circuit⁵ and the United States Court of Appeals for the Second Circuit⁶ were recently persuaded to recognize constitutionally protected rights to assisted suicide, although their decisions have been reversed by the

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2. Pericles' funeral oration, in Thucydides, History of the Peloponnesian War, book two, p. 43 (vol. one of the Loeb Classics edition, Charles Forster Smith, tr.,1928). I have altered the first word from "judging" to "judge." This does not distort Pericles' point, which is imperative in meaning if not in mood. The entire sentence is: "Do you, therefore, now make these men your examples, and judging freedom to be happiness and courage to be freedom, be not too anxious about the dangers of war."


An international organization called the World Federation of Right-to-Die Societies furthers such efforts in other countries.

The two most common justifications for such initiatives are that assisted suicide enhances freedom or liberty, and that it maximizes utility. Would freedom be enhanced by the practice of physician assistance in suicide or by legal doctrines permitting it? Would utility be maximized?

Walk into a room containing the corpse of a recent suicide surrounded by his bewildered friends and relatives and you may not readily identify it as a scene of liberation and rejoicing. This article concludes that your intuition is correct: that assisted suicide does not enhance freedom or promote utility.

PART ONE: FREEDOM

"[M]any persons . . . love liberty better than they understand it." 9

I. INTRODUCTION

Initiatives promoting assisted suicide are often supported with assertions that they increase freedom or liberty. The recent Ninth Circuit decision, for example, relied on the conclusion that assisted suicide is part of a person's "liberty interest." 10 (Few writers seem to ascribe different meanings to the words "freedom" and "liberty," and no difference is recognized in this article.) 11 These assertions are often left unsupported, as though the point

11. So, for example, when a work contains statements about the nature of liberty this article treats them as though they were statements about the nature of freedom unless that work identifies a distinction between those terms.

"Autonomy" is a related term which some authorities use to identify the value alleged to be promoted by assisted suicide. See, e.g., Charles Baron, Clyde Bergstresser, Dan W. Brock, Garrick F. Cole, Nancy S. Dorfman, Judith A. Johnson, Lowell E. Schnipper, James Vorenberg, & Sidney H. Wanzer, "A Model Statute to Authorize and Regulate Physician-Assisted Suicide," 33 Harv. J. of Legis. 1, 5 (1996). Autonomy seems to be a different thing from freedom: autonomy seems to be a condition in foro interno, whereas freedom has much to do with external conditions. See Gerald Dworkin, The Theory and Practice of Autonomy, 108 (1988)("Autonomy is a second-order capacity to reflect critically upon one's first-order preferences and desires . . ."); Richard J. Arneson, "Freedom and Desire," 15 Canadian J. Phil. 425, 433-34 (1985)("A person is morally autonomous to the extent that she acts only so as to conform to self-imposed rules . . . . Autonomy so understood is a possession of a certain sort of character. . . . [It] is not the same as freedom construed as a benefit that can be doled out to a person, consisting in a range of opportunity open to that person."). For
were obvious. It is, however, far from obvious when one begins to reflect on the nature of freedom and the various aspects of that condition which deserve theoretical attention.

In part one of this article, I attempt to establish that assisting in suicide does not promote the assisted person’s (the “subject’s”) freedom. I try to shed light on the much vexed problem of defining that good. My aim is not to uncover truths suitable for use in constitutional law: it is not, for example, to create a definition of “ordered liberty” or “liberty interest” for Fourteenth Amendment purposes.

Specifically, as to assisted suicide, this article advances four lines of argument. First, looking to the subject’s future, it maintains that assisted suicide violates the subject’s freedom because it puts an end to further activities and projects. Second, looking to the subject’s past, it maintains that assisted suicide violates the subject’s freedom when it violates commitments he may have made—for example, in marriage. Third, it presents a detailed argument for the view that the basic purposes embraced by the person in question are an important guide to determining whether he does or does not possess his freedom, and that assisted suicide does not enhance his freedom in those many instances in which it is contrary to what he has accepted as his basic purposes and fundamental commitments. Fourth, it acknowledges the importance of criteria beyond those of the subject’s basic purposes, but concludes that application of such criteria do not lead to the conclusion that assisted suicide enhances freedom.

Left aside are certain related arguments that might persuasively be advanced against assisted-suicide programs, such as that they impair the freedom of the subject’s friends and family, of doctors, and of other

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1. Professor Berlin referred to “the more than two hundred senses, of this protean word” (freedom). Isaiah Berlin, *Two Concepts of Liberty*, 6 (Inaugural Lecture before the University of Oxford, October 31, 1958)(hereinafter referred to as Berlin, *Two Concepts*). (This work was reprinted in modified form in Isaiah Berlin, *Four Essays on Liberty*, 118 (1969).) The eminent classicist Professor M.I. Finley stated: “Men have for centuries exercised their minds in vain to find a workable definition of ‘freedom’. I do not propose to add yet another attempt to the mountain of failures . . . .” M. I. Finley, *Economy and Society in Ancient Greece*, 77 (1981).

2. Perhaps, however, some constitutional law scholars and higher court judges would find it helpful to reflect on the philosophical problems involved in understanding freedom. Judges seldom do that at present.

3. For citations to studies depicting the devastating effect that suicide may have on friends and family members, see notes 148-50, infra.

affected persons, or that the freedom that such programs allegedly promote must be overridden in order to promote respect for life.

A broader purpose of part one of this article is to shed some light on the project of defining freedom. Misunderstandings and misguided lines of analysis seem to be responsible for many ill-conceived reform measures in recent decades, not only in the area of suicide.

The analysis will repeatedly refer to Circe's advice to Odysseus, as follows:

Square in your ship's path are the Seirenes, crying beauty to bewitch men coasting by; woe to the innocent who hears that sound! He will not see his lady nor his children in joy, crowding around him, home from sea; the Seirenes will sing his mind away on their sweet meadow lolling. There are bones of dead men rotting in a pile beside them and flayed skins shrivel around the spot. Steer wide; keep well to seaward; plug your oarsmen's ears with beeswax kneaded soft . . . . But if you wish to listen, let men tie you in the lugger, hand and foot, back to the mast, lashed to the mast, so you may hear those harpies' thrilling voices; shout as you will, begging to be untied, your crew must only twist more line around you and keep their stroke up, till the singers fade.

16. For authorities relating to "copy-cat" suicides, see note 200, infra.
II. A PRELIMINARY LOOK AT THE DEFINITION OF FREEDOM

A. Freedom is an Aspect of the Human Condition.—Freedom is an aspect of the human condition that involves external circumstances as they bear upon the subject. To assert that someone possesses freedom is to assert something about how he stands in relation to conditions around him.

A useful comparison can be made to the term “nourishment.” Whether supplying food to someone nourishes him depends in part on who he is and how he is situated. (Contrast the verb “to feed,” which can be used to describe events of an entirely objective, foro externo nature, as when film is “fed” into a projector.19) Similarly, whether someone’s freedom is enhanced by a change in conditions depends on subjective factors. (Contrast the verb “to free,” which can be used to describe things of an entirely objective nature: removing an obstruction may “free” a river to flow smoothly, but it would be odd to talk about the freedom of a river.20)

B. You Know It When You Have It and Even Ordinary People Can Possess Freedom.—Freedom is not, in Professor Isaiah Berlin’s brilliant choice of term, an “occult” good or a good of an “occult” entity.21 It can be a condition of ordinary life. Or at least that is the perception of many ordinary people who immigrate and emigrate to obtain it and risk their lives to defend it. Thus it is not, like the condition of mystics or the illuminati, a condition accessible only to the elect, or to persons in a state of moral or intellectual perfection.

19. A river can be “fed” (by a stream) but cannot, except by distant analogy, be “given nourishment” by it. In the case of human beings, to feed someone is usually to enhance his nourishment, but not always. “To feed” can be understood entirely based on externals, as a film can be “fed” into a projector; and thus you might be said to be “feeding” someone when you spoon into his mouth some comestible of which he has already consumed more than he wants and more than is good for him; something which his system will reject by way of nausea; something he will refuse to swallow; or even something addictive and poisonous. You can be said to be “feeding” perhaps, but not “nourishing” him. Feeding usually nourishes, but not always. (If the English word for nourishment was constructed on the verb “to feed,” as the French word nouriture is related to the verb nourir—if the English word for nourishment or nourished were “enfeedment” or “fedness”—it would obscure the distinction. How could you feed someone, we might unreflectingly demand, without augmenting his fedness?)

20. Sometimes philosophical arguments proceed from “free” to “freedom” without pause (e.g. in G.A. Cohen, Self-Ownership, Freedom and Equality, 64 (1995), in Cohen, “The Structure of Proletarian Unfreedom,” 12 Philosophy and Public Affairs 3, 26 (1983), and in J.P. Day, “On Liberty and the Real Will,” 45 Philosophy 177, 191 (1970)) on the assumption, perhaps, that one’s freedom is an aggregation of all the things one is free to do, just as one’s aspirations seem to be an aggregation of all the things one aspires to and one’s store of food seems to be the sum of all the food one has acquired.

C. Freedom is an Aspect of the Good.—Freedom is a condition, then; and obviously it is a desirable condition. It is a good. Freedom is the state of possessing, across time and in general, the good that freeing characteristically (but not always) confers.

This, then, is to reject the position of "restrictivists" who "view freedom as primarily a descriptive concept [and who] . . . repudiate the contention that evaluative judgments and moral and political commitments must inevitably inform any judgment we make about freedom." It is to reject the effort to construct a "non-normative" or "value-free" or conventionalist account. A "value-free" account makes it impossible to defend social programs on the grounds that they may enhance freedom: impossible, for example, to defend assisted-suicide programs on that basis. Thus rejecting such an account stands here as a concession to the advocates of assisted suicide.

Prominent writers tell us that freedom is "God's most precious gift to human nature, for by it we are made happy here as men, and happy as gods in the beyond," that it is "our unalterable destiny," "an inalienable

22. See generally Joseph Raz, The Morality of Freedom (1986)(rejecting a purely linguistic or usage-based analysis and insisting on an approach based on political theory); John Gray, "Against Cohen on Proletarian Unfreedom," in Capitalism, 77, 103 (Ellen Frankel Paul, Fred D. Miller Jr., & John Ahrens, eds., 1989)("The task of a theory of freedom is to give freedom a definite content by reference to a larger moral and political theory. Most particularly, it is to specify the liberty that is demanded by justice. The demands of justice are, further, to be explained in terms of the requirements of the well-being of individuals . . . ").

23. This is true of the parallel with "nourishment": nourishment or being nourished is the condition that characteristically ensues from having been fed in the right way and on the right foods. To be nourished is to participate in the good of food.


27. E.g. Nancy Hirschmann, "Toward a Feminist Theory of Freedom," 24 Political Theory 46, 52 (1996)("Context is what makes meaning possible, and meaning makes 'reality.' Thus the value that we place on freedom, as well as the meaning we give to that word, is in no way essential or natural but the product of particular historical relationships that have developed through time.")(reference omitted).

28. Furthermore, freedom seems not to be of instrumental value only: not something that could reasonably be dispensed with if only we could serve our "needs" or other ends more efficiently without it. This, then, is to reject views such as that of Professor von Hayek, who wrote: "If there were omniscient men, if we could know not only all that affects the attainment of our present wishes but also our future wants and desires, there would be little case for liberty." F.A. Hayek, The Constitution of Liberty, 29 (1960).

29. Dante Alighieri, Monarchy, book one, XII (1309-17)(Donald Nicholl, tr., 1947). To be precise, one should note that Dante is speaking here of "the fundamental principle of
ingredient in what makes human beings human,"31 something "of which a human being cannot divest himself or be deprived without temporarily or permanently ceasing to be human,"32 the source of love,33 and the principal subject of both tragedy and comedy.34 Professors Germain Grisez and Joseph Boyle conclude that it is unjust to restrict it except in cases of necessity, Professor Ronald Dworkin urges that "a decent government must regret" restricting it,35 and Professor Joseph Raz concludes that the state has a duty to promote it.36 An account of the nature of freedom is more successful if it can identify a condition which is a worthy subject of statements like these; if it portrays freedom as the sort of thing to which people could reasonably set up statues in New York Harbor and Tiananmen Square.37

D. The Good to Which Freedom Relates Has to Do with Being the Author of One's Own Life, with the Development of Character, and with Moral Responsibility.—So, then, what actually is the good of freedom?

Perhaps a theorist of freedom can escape the responsibility of expounding a comprehensive theory of ethics. But an account of freedom must at least portray a condition that is compatible with relevant aspects of ethics. An

all our liberty,” namely “free choice.” Dante also states that “the human race is at its best when most are free.” Id.


31. Isaiah Berlin, Four Essays on Liberty, lx (1969)("[T] hose who have ever valued liberty for its own sake believed that to be free to choose, and not to be chosen for, is an inalienable ingredient in what makes human beings human . . . .”).


37. Furthermore, freedom is a single good rather than a collection of unrelated “freedoms” or “liberties.” This, then, is to reject the view which seems to be advanced by Professor Rawls when he states that “[n]o priority is to be assigned to liberty as such, as if the exercise of something called ‘liberty’ has a preeminent value” and when he recommends instead the formulation of a list of liberties (specified at one point as “freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law”). John Rawls, Political Liberalism, 291 (1993). But see id. at 295 (“The priority of liberty implies in practice that a basic liberty can be limited or denied solely for the sake of one or more other basic liberties . . . .). See generally H.L.A. Hart, “Rawls on Liberty and its Priority,” 40 U. Chi. L. Rev. 551 (1973), reprinted in Reading Rawls: Critical Studies on Rawls’ ‘A Theory of Justice’, 230 (Norman Daniels, ed., 1989).
account of nourishment has to make some contact with its proximate good, which seems to be that of health, and will go astray if it badly misunderstands health (misunderstands it to be a form of pleasure, for example, or physical power). Similarly, an account of freedom ought to make contact with the aspect of the good condition to which it principally relates. (Sometimes disagreements about the requirements of freedom turn out to be disagreements about other aspects of ethics.)

There seem to be three principal ways in which freedom plays a part in a satisfactory human life. First, freedom is a component of the good of doing any reasonable thing and "being a player." It is not enough merely to think out what might be done and what might be achieved; nor enough to see those happy outcomes occur; it is the better also actually to do the things one has settled on as worth doing and see the commendable outcomes occur as a result of one's own actions. Being in jail, and unable to act, would be a sorry state because it would deprive you of this opportunity. It would be a sorry state even if some genie brought about the changes in the outer world which you would have sought to achieve had you been at liberty to act. The good life has much to do with doing things; with being involved in the translation of plans into achievements. Freedom is a component of the good of human action when it is human in the fullest sense; when the person is fully involved as the author of his acts.38

Second, freedom relates to the moral standing of good action. When an action is a good one: when the objective, foro externo aspects of the action are commendable, then not only the act but also the person himself—the actor—may deserve credit. Freedom is a necessary condition for this. Only when he exercises freedom in acting is he fully the author of the act and only then does he fully deserve credit for it.39

A third aspect of the good of freedom, widely noticed in the literature, consists in learning, in self-development, and in self-realization.40 Doing good things and participating in good projects is a way to develop one's knowledge of their goodness. (Thought without action cannot achieve this fully: you could not know intimately the good of loyalty to a spouse or children without being married and caring for children.) Doing good things

38. Cf. Gerald Dworkin, The Theory and Practice of Autonomy, 81, 111 (1988)("what makes a life ours is that it is shaped by our choices. . . . * * * The exercise of the capacity of autonomy is what makes my life mine."). See generally Christine Swanton, Freedom: A Coherence Theory (1992), especially at 40-48 (discussing the relationship between freedom and "flourishing").

39. See Gerald Dworkin, The Theory and Practice of Autonomy, 110 (1988)("It is because other persons are creators of their own lives, are shapers of their own values, are originators of projects and plans, that their interests must be taken into account, their rights respected, their projects valued.").

40. See John Finnis, Natural Law and Natural Rights, 88 (1980).
and participating in good projects is a way of bringing their goodness into yourself and making it a part of yourself.\(^{41}\) (A good spouse is something you become; it is not just the name for a collection of activities.) It is good to have an excellent character (courageous and kind, wise and appreciative of the good). It is good to have the version of a good character one has identified for oneself as the best. But it is better still to have this character as a result of one's own striving; one's own actions and projects. (Better than if some genie had conferred your virtues on you.) Freedom is a component of the life of self-development and self-realization.\(^{42}\)

E. Is Freedom Impaired Only by Human Action; Only by Outright Prohibitions and not by Mere Burdens; Only by Obstacles and Impediments and not by Absence of Means?—Some authors take the view that only impediments imposed by humans impair freedom, not obstacles encountered in nature, so that, for example, a hiker who falls into a pit has not lost his freedom.\(^{43}\) Some take the view that only impediments imposed by governments impair freedom,\(^{44}\) or only impediments imposed

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\(^{41}\) See John Paul II, *Apostolic Exhortation: The Role of the Christian Family in the Modern World (Familiaris Consortio)* (Vatican translation, St. Paul ed., 1982), § 34 at 56 (“[M]an, who has been called to live God's wise and loving design in a responsible manner, is an historical being who day by day builds himself up through his many free decisions; and so he knows, loves and accomplishes moral good by stages of growth.”); John Finnis, *Fundamentals of Ethics*, 141 (1983)(“[O]ne's free choices... constitute the sort of person... one has made oneself.”)

\(^{42}\) And when one's character is the product of one's own actions the good of deserving credit for it—for one's good character as well as one's good actions—emerges as another aspect of the good of freedom. See Germain Grisez, *Christian Moral Principles*, vol. one of *The Way of the Lord Jesus* (“One shapes one's own life, one determines one's self, by one's free choices. To be responsible ultimately means to be a self one cannot blame on heredity, environment, or anything else other than one's own free choices.”)(footnote omitted).

The analysis in this subsection is consistent with the assertion in note 28, supra, that freedom is not only instrumentally a good; it is a component, not only a cause, of the goods of being the author of an act, deserving the credit, and being self-constituting. Cf. Lawrence Crocker, *Positive Liberty: An Essay in Normative Political Philosophy*, 114 (1980)(“My general strategy in arguing for the intrinsic value of liberty is to show that it is a non-causal necessary condition of an intrinsically valuable complex and contributes value to that complex.”)

\(^{43}\) E.g. F.A. Hayek, *The Constitution of Liberty*, 12-13 (1960)(stating that only coercion infringes freedom “in our sense” of that word); Berlin, “Two Concepts” in *Four Essays in Liberty*, supra note 12, at 121-2 (identifying liberty—“negative liberty”—as “involved in the answer to the question, ‘What is the area within which the subject... is or should be left to do or be what he wants to do or be, without interference by other persons.’” (emphasis added.)

in the exercise of discretionary or arbitrary authority.\textsuperscript{45} Some take the view that only insuperable impediments count, thus excluding obstacles that can be overcome.\textsuperscript{46} In theories like these, poverty does not infringe freedom, nor other instances of deprivation of means.\textsuperscript{47} Assisted-suicide programs do not enhance freedom under many of these definitions insofar as they extend means and merely make it easier for the subject to perform the act. Extending a further concession to the proponents of assisted-suicide-programs, this article will not rely on this line of argument.

III. THE FIRST ARGUMENT AGAINST THE CASE FOR PHYSICIAN-ASSISTED SUICIDE: WHAT ABOUT THE FUTURE?

Because freedom is a condition, a reasonable account of it must look beyond the moment and get a longer perspective on the subject’s life. Any reasonable argument that to act in a certain way promotes freedom must take into account consequences beyond the immediate.\textsuperscript{48}

Assisting someone to become a slave would not promote his freedom but deprive him of it.\textsuperscript{49} Nor would locking someone up and throwing away the key (even with his consent). To determine whether we have promoted someone’s freedom, we must consider his future as a whole. Assisting someone to die would effect an even more severe deprivation than would enslaving him. Helping him to die puts an end to all his opportunities for action and to any possibility of his participation in the good of freedom.\textsuperscript{50}


\textsuperscript{48} See John Kutlgen, \textit{Autonomy and Intervention: Parentalism in the Caring Life}, 90 (1995) (“What must be respected is the person’s aggregate autonomy realized throughout her lifetime. What must be considered about a paternalistic intervention is its effect, as far as this can be anticipated, on her future stream of autonomous actions and satisfying experiences.”).

\textsuperscript{49} See generally Joel Feinberg, \textit{Harm to Self}, 71 et seq., (1986) vol. three of \textit{The Moral Limits of the Criminal Law} (discussing slavery contracts, and accepting that the law may rightly refuse to enforce them); David Archard, “Freedom Not to be Free: The Case of the Slavery Contract in J.S. Mill’s \textit{On Liberty},” 40 \textit{Phil. Q.} 453 (1990). The recurrent philosophical puzzle of the “contented slave” is discussed at the test accompanying notes 59-61, 87-93, and 114, infra.

\textsuperscript{50} Here and throughout this article the discussion is limited to effects in this life. As to the next, see \textit{The Comedy of Dante Alighieri}, Cantica I, Canto XIII (c. 1314).

The arguments in this section and the next are directed only to the freedom of the person who uses assistance in suicide and actually kills himself. Perhaps, however, it will be argued that an assisted-suicide program enhances the freedom of those who do not use it. Certainly it does seem to be the case that an option may enhance freedom even though it ends up being left unexercised. This thesis is discussed (and accepted) in the text accompanying notes 109-
IV. THE SECOND ARGUMENT AGAINST THE CASE FOR PHYSICIAN-ASSISTED SUICIDE: WHAT ABOUT THE PAST?

A second point looks not forward in time but backward. Any reasonable theory of freedom must take previous commitments into account. This is why enforcing contracts usually promotes freedom rather than restricts it—"freedom of contract." When someone is obliged to honor a contract, he is held to a course of action he chose for himself; he is led to bring to completion a project to which he has already set his hand. The same can be said of obliging someone to honor other voluntary concordances: relationships of trust, of guardianship, of marriage, of parenting, and of friendship, for example.

The implications for suicide are obvious: in those many instances where the subject is married to someone who relies and depends upon him, or has children, or has obligations to fellow workers or employees, suicide effects a departure from what the subject has undertaken, and assisting with the suicide constricts his freedom rather than enhances it.51

This line of argument becomes the more compelling and the more widely applicable to the extent that you embrace strongly communitarian doctrines. (Further, if you—uncharacteristically among present-day thinkers—adhere to strongly statist or collectivist views you may be led to condemn suicide as a violation of the obligations of citizenship or class membership.) Assisted-suicide initiatives are rooted in radical individualism, of the sort recently manifested by John Powell and Adam Cohen when they advocated a right to suicide even for parents of small children on the grounds that "[t]he general rule in American law is that people do not have a duty to care for others if they do not wish to do so."52

(Suppose pursuing the Sirens would not result in Odysseus' immediate death, but that he could survive, reach shore, and linger among them for many carefree years. Still, we can judge that untying him would infringe rather than promote his freedom once we consider his freely undertaken obligations to his shipmates and to Penelope, Telemachus, and the people of Ithaca.)

117, infra, but the conclusion that assisted-suicide programs enhance the freedom of those who do not use them is rebutted in the text accompanying notes 115-17.

51. Cf. Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," 7 Phil. & Pub. Affairs 93, 119 (1978)(noting that while voluntary euthanasia may be defensible, "[m]ost people in normal circumstances do have a duty not to kill themselves that is derived from the rights of other people who rely or depend on them").

V. THE THIRD ARGUMENT: PHYSICIAN-ASSISTED SUICIDE USUALLY VIOLATES THE SUBJECT’S BASIC PURPOSES

One debate about the nature of freedom concerns whether that condition must be defined in part to have a subjective element, or whether instead it must be defined wholly objectively so that a constraint would be recognized as impairing freedom regardless of what the constrained person might think of the situation and regardless of any other aspect of his character. This section concludes in favor of a subjective element: his freedom is impaired by obstacles along his own intended path, not someone else’s. Then this section takes up the question of what aspects of the subject’s mentality count in assessing his freedom, and concludes that the key is his basic purposes: his more fundamental aims and commitments. Removing impediments to a course of action enhances freedom, it is concluded, when the course of action is consistent with the subject’s basic purposes. This conclusion is then applied to the question of suicide, and it is argued, relying on medical and psychiatric evidence, that suicide is seldom consistent with a person’s basic purposes.

A. The Desire-Based Account of Freedom and its Shortcomings.—Some formulations make freedom depend in part on the subject’s desires or “wants.” This approach was suggested by Professor Isaiah Berlin at the point in his lecture Two Concepts of Liberty where he identified liberty as “simply the area within which a man can do what he wants.”

But this leads to the dubious conclusion that you can expand your freedom by constricting your desires or wants. Epictetus stated that “freedom is not acquired by satisfying yourself with what you desire, but by destroying your desire.” But putting you in jail infringes your freedom, it seems, whether you like jail or not. Having been thrown in jail, you

53. This section refers recurrently to constraints, impediments, and obstacles, but it is not intended to overlook lack of means as a possible infringement of freedom. The pattern of argument here presented would be much the same as to them.

54. Berlin, Two Concepts, supra note 12, at 6-7 (“[p]olitical liberty in this sense is simply the area within which a man can do what he wants.”)(emphasis added). Professor Berlin also identified liberty (“negative liberty”) as “involved in the answer to the question, ‘What is the area within which the subject... is or should be left to do or be what he wants to do or be, without interference by other persons.’” Id. (emphasis added). Professor Berlin uses the terms “freedom” and “liberty” interchangeably. Id. at 6.

55. This is a dubious conclusion, just as it is dubious that you could increase your nourishment by constricting your desire for food.


could not restore your freedom, surely, by inducing yourself to enjoy the
place, or to detest the outside world. (Even contemptus mundi could not
free you, surely, if contemptus mundi is nothing more than what Professor
Berlin called the “sublime . . . form of the doctrine of sour grapes.”58)
Still less acceptable is the implication that the oppressive government that
put you in jail could restore your freedom by brainwashing you into liking
your treatment. Similarly unacceptable is the implication that an owner of
a rebellious slave gives him his freedom by breaking his spirit, so that the
more servile he becomes the more freedom he possesses. Jail is jail and
slavery is slavery, and these institutions, it seems, always infringe the
freedom of their victims.59 Recognizing the force of such arguments,
Professor Berlin abandoned the desire-based formula60 and adopted an
objectivist account.

An interesting inversion of the “destroy your desires” argument can be
performed by introducing instances in which desires are expanded rather
than contracted. The more places you long to enter, among those you
cannot penetrate, the less freedom you have according to desire-based
analysis. Thus a society diminishes the freedom of its poorer members
when it allows preserves for the prosperous—such as country clubs,
yachting resorts, prestigious universities—to proliferate. And the freedom
of a society’s poorer members will diminish to the extent that they learn of
such preserves and aspire to enter them. (A corollary is that the media
constrict freedom when they create an illusion that many such aspirations
can be achieved and that all such grapes are sweet.)

Desires have a highly fluid quality and therefore afford an unstable basis
for an account of freedom. The desire-based theorist is led to the
embarrassing conclusion that someone’s freedom expands and contracts
many times in the course of a day.61

59. A modification of this conclusion for certain unusual circumstances is suggested in
the text at note 88, infra.

In the original version of Two Concepts of Liberty, I speak of liberty as the absence of
obstacles to the fulfillment of a man’s desires. This is a common, perhaps the most
common, sense in which the term is used, but it does not represent my position. For
if to be free—negatively—is simply not to be prevented by other persons from doing
whatever one wishes, then one of the ways of attaining such freedom is by extinguishing
one’s wishes . . . If degrees of freedom were a function of the satisfaction of desires,
I could increase freedom as effectively by eliminating desires as by satisfying them; I
could render men (including myself) free by conditioning them into losing the original
desires which I have desired not to satisfy.

61. And when desire is extinguished by deep sleep, it seems that freedom is maximized.
Perhaps the desire theorist can escape these criticisms by making his theory refer only
to sustained or habitual desires. The person who is constrained from satisfying them lacks
Another argument notes that the desire-based approach produces a very odd result when applied to the question of threats. Assume you are not the unusual character who likes jail: you normally loathe to be confined, and therefore imprisonment usually infringes your freedom, even on the desire-based account. But suppose now you are confined not only by locks but also by threats: the jailer threatens to shoot you (not mortally) if you try to leave. This threat, of course, works by exploiting your desires. Once you hear the threat, you desire to refrain from exiting the jail because of your aversion to pain. Therefore, according to the desire-based theory, although you are confined, you have your freedom. Indeed, your jailer has given you your freedom. (If a nasty regime threatened to torture those who escaped, it would thereby confer freedom on everyone in its prisons.)

A more fundamental objection to the desire-based account is that it makes it difficult to establish a relationship between freedom and the basic good. Perhaps a utilitarian would see little difficulty here, but adherents of other schools of ethics will not accept that it is a significant good to be unhampered in pursuing all desires, however transient and mutually contradictory. Still less will they understand why someone can be said to be fully human only if he possesses freedom if that is how freedom is defined. A desire, after all, may be something that even its possessor does not approve of or plan to act upon. Further, it seems doubtful that the desire-based account is compatible with the insight, set forth above, that freedom has much to do with self-constitution—with the development of character—and with the related insight that freedom supports the subject’s freedom, according to this version, even when he is not experiencing the desire. This move leaves the theory open to difficulties with respect to people whose desires are entirely fluctuant. (This may indeed be the condition of slaves in a society where a dominant ideology half-persuades them to forget about their wishes to act freely, or who drown their sorrows in drink or drugs.) The theory seems to lead to the improbable conclusion that a slave with fluctuant desires is free.

62. See generally Steiner, supra note 46.
63. This is most clearly the case where the effect of the threat is to extinguish the desire to exit the jail. It must be conceded, however, that often this is not the way threats work. Threats often leave the victim with conflicting desires: the prisoner may experience a fear of the threatened pain and at the same time a hunger for the forbidden pleasure. How would a desire-based account of freedom handle cases of conflicting desires? The obvious approach would be to adopt a criterion based on intensity, and to embrace the doctrine that in cases of conflict freedom is impaired only by impediments to fulfilling the strongest desire. But this approach would leave the account vulnerable to the argument advanced above in the text: the theorist must conclude that when avoidance of the gun dominates the prisoner’s feelings he has his freedom because jail is an obstacle to the fulfillment only of the weaker desire.
64. As depicted in section II B C, supra.
65. Cf. Dante Alighieri, Monarchy, book one, XII (1309-17)(Donald Nicholl, tr., 1947)("[I]f the judgment is in any way deflected or influenced by the appetite it cannot be free, because it is not independent but is dragged along captive in the wake of another.").
worthiness for credit. Having a range of choices among things one desires—such as is afforded by a dessert tray—may lead to improving one’s sensibilities and refining one’s appetites; one may gain more credit among judges of culinary taste; but those who hold to an ethic other than the Epicurean will not accept this as a sufficient sort of self-development or as the most important sort of credit, and will be left looking for a better account of freedom.

B. The Objectivist Account of Freedom and its Shortcomings.—Noting the first of the lines of criticism set forth above (illustrated by the happy prisoner and the contented slave), Professor Berlin revised his position as follows:

The sense of freedom, in which I use this term, entails not simply the absence of frustration (which may be obtained by killing desires), but the absence of obstacles to possible choices and activities—absence of obstructions on roads along which a man can decide to walk. Such freedom ultimately depends not on whether I wish to walk at all, or how far, but on how many doors are open, upon their relative importance in my life . . . .

A stark and uncompromising version of the objectivist theory is presented by Hillel Steiner, who develops a test based on “the amount of physical space and/or material objects the use of which is blocked.”

But if I put a wall around a house in Hong Kong I surely infringe your freedom in no material way; certainly far less than if I put a wall around your house; and this seems to be explicable only because of you—of your condition: in other words, explicable based on some subjective element.

If I prevent you from reading NASA periodicals (lock them away in a

66. The term “choice” in this article refers to one among a plurality of possible courses of action. The term is not used to refer to the act or process of selection.

67. Isaiah Berlin, *Four Essays on Liberty*, xxxix (1969). A subjective element seems to be retained by the phrase “relative importance in my life” and elsewhere—e.g. at page 130 n.1, where he states that the extent of freedom seems to depend on “what value . . . the agent . . . puts on the various possibilities” open to him.


69. The objectivist might make only a modest concession here, and modify his doctrine to provide that freedom is infringed by every objective impediment to things the subject would otherwise have the ability to do. (Language in both Berlin and Steiner suggests this.) Maybe this handles the Hong Kong hypothetical if you could not (easily?) go there. (One argument against a disability-based definition of freedom proceeds along the same lines as the argument about the contented prisoner: it seems that jail would no longer infringe the freedom of a prisoner who became crippled and was therefore unable to leave the scene anyway. It seems that the evil jailer who cripples him thereby frees him.) But the objection works just as well in instances which cannot be handled by this modest concession, as the hypothetical about the NASA publications, next set forth in the text above, establishes.
government safe), surely I do not materially impair your freedom if you are not a rocket scientist; not to the extent I would if I prevented you from studying road maps or reading fiction. Blocking or unblocking a road you will never travel or a house you will never visit or locking up and unlocking documents you will never read cannot often have much to do with your condition or with the good for you and therefore—because, as asserted, freedom is a basic good and a part of a good condition—cannot fundamentally determine your freedom. (Blocking and locking up places and things that are irrelevant to you will not affect what you do, or the development of your character, or your eligibility for moral credit.) This line of reasoning establishes that some aspect of your life—perhaps your plans, purposes, aims and intentions—must be a part of the analysis of what importantly impairs your freedom.

Furthermore, the objectivist theory seems to run into difficulties, although these difficulties differ from those encountered in the desire-based theory. Suppose your jailer leaves the cell door open but stands ready to shoot and cripple you if you attempt to exit. (You will still escape, probably: he usually cripples the arms.) You are not physically blocked. But surely you are not in possession of your freedom. Two paradigmatic cases of freedom-infringers—dictators and slave-owners—work their will mainly through threats. So do most laws; the objectivist theory seems to lead to the conclusion that laws do not impede freedom.

So we are brought to reject unqualified objectivism and to return to the subject, aiming now to find something about him other than his "wants" or desires on which to fix.

C. Subjectivism Revisited.—Can we identify an episode in which the subject does increase his freedom by changes that are, in important part, subjective?

Imagine a political dissident in China in 1990, hunted by the police for his part in the Tiananmen Square demonstration. Surely he is not free, hiding in basements and unable safely to show himself in public. A certain large and prosperous country with a democratic political system is willing to accept refugees like him. For some months he is reluctant to surrender the struggle and leave his homeland. Eventually he changes his mind and enters the democratic country's embassy, is flown out and given citizenship because of his status as a political refugee.

Plainly he has increased his freedom. But we cannot explain that based only on the accounts of freedom considered to this point. Both before and after his departure, all doors are closed to him in his country of origin; many doors open to him in the second country. Both before and after his

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70. See generally the discussion of the relationship of freedom to the good in section II D of this article, supra.
departure, he loves his native country and ardently desires to be there and
do many of the things he is debarred from doing, such as attending its
leading university. Both on the objectivist theory, and on the desire-based
one, it might seem that his freedom is materially impaired both before and
after his trip. (Indeed, it might seem that according to these theories his
flight makes him less free if he would thereafter be denied reentry to his
homeland.)

Let us see whether an account of the subjective side of freedom, different
from the desire-based one, can be constructed to explain his case.

D. Toward a Subjective Element More Fundamental Than Wants
and Desires.—Many of the difficulties with the desire-based account seem
to relate to the transient nature of desires and the fact that they are often
disapproved of even by the subject himself. This suggests the strategy of
looking for something more stable and basic on which to found the account
of freedom. What more fundamental aspect of the subject’s character
remains when desire evaporates?

The search for the “true self” has a long and worrisome history in the
philosophy of freedom, characterized with considerable vehemence by
Professor Berlin:

Have not men had the experience of liberating themselves from spiritual
slavery, or slavery to nature, and do they not in the course of it become
aware, on the one hand, of a self which dominates . . . identified with
reason, with my ‘higher nature’, . . . with my ‘real’, or ‘ideal’, or
‘autonomous’ self . . . which is then contrasted with . . . my ‘lower’
nature, the pursuit of immediate pleasures, my ‘empirical’ or
‘heteronomous’ self[?] . . . Presently . . . the real self may be
conceived as something wider than the individual . . . : a tribe, a race, a
church, a state . . . This entity is then identified as being the ‘true’ self
which, by imposing its collective, or ‘organic’, single will upon its
recalcitrant ‘members’, achieves its own, and, therefore, their, ‘higher’
freedom . . . . I may declare that they are actually aiming at what in
their benighted state they consciously resist, because there exists within
them an occult entity—their latent rational will, or their ‘true’
purpose—and that this entity, although it is belied by all that they overtly
feel and do and say, is their ‘real’ self, of which the poor empirical self
in space and time may know nothing . . . . Once I take this view, I am
in a position to . . . bully, oppress, torture them in the name, and on
behalf, of their ‘real’ selves . . . .

71. Two Concepts of Liberty, supra note 12, at 17-18. A good example of what
Professor Berlin condemns can be found in Bernard Bosanquet, The Philosophical Theory of
the State, 117-18 (3d ed., 1920):
Why not found an account of freedom on the absence of impediments to the functioning of some "occult self"? Because of fear—surely this accounts for the gripping power of Professor Berlin's address—fear of the evil uses to which such theories may be put. Two Concepts of Liberty is in this respect characteristic of much English-language philosophy of the 1950s and early 1960s: it recoils from abstraction and "occult" concepts because of the horror induced by the specters of fascism and communism.

It seeks refuge in empiricism. This endeavor can only run into embarrassment, because there is no entirely "empirical self." Mirroring much unsuccessful philosophical anthropology from its era, the account runs first to founding an account of freedom on desires—a sort of empiricism of the foro interno. Then it turns, as described above, to objectivism. It develops the narrowness of a dietician who listens only to a behaviorist's account of health. It loses its involvement with the humanitas of the subject—the person whose good condition is at issue in all questions of freedom.

Professor Berlin is surely right to seek to found the account of freedom on something which is not mysterious. Freedom is, as noted, a condition; an aspect of the good life; an aspect of the good which can be sought by ordinary people, fought for by ordinary people, and possessed by people who live ordinary lives and not the lives of illuminati or inhabitants of some pinnacle of social development. (Freedom ought not to be characterized, as some modern theologians have done, as something that is possessed or exercised in its true state only once, at the moment, perhaps unknown even to the subject, when he exercises his "fundamental option." Unt)

The self or life which extends beyond our average private existence... is more real than we are... * * * [L]iberty... must be a condition relevant to our continued struggle to assert the control of something... which we recognize as... our real self... Thus it is that we can speak, without a contradiction, of being forced to be free. It is possible for us to acquiesce as human beings, in a law and order which on the whole makes for the possibility of asserting our true or universal selves, at the very moment when this law and order is constraining our particular private wills in a way which we resent, or even condemn.

(Note omitted.)

72. An interesting example, published during the year previous to Two Concepts of Liberty, is Leonard Krieger, The German Idea of Freedom: History of a Political Tradition (1957). This work concludes (at page 468) that "From the 16th century to the 20th... the political history of Germany had been dominated by the successive absorptions of the various claims to human freedom piecemeal into the structure of monarchical government without undermining the independent authority of that government."

73. This is true to the comparison to "nourishment," which ought not to be defined as "that which would contribute to the health of the Higher Man."

74. "The central core of myself, the 'I' which is my personhood, is confronted with a reality that transcends all categories. It is confronted with the reality of my world, my situation, my body, my feelings, my attitudes and prejudices. In fact it is confronted even..."
To avoid the fictitious and the occult, we need not embrace empiricism. Instead, it will suffice to stick with common sense. Let us construct an account of freedom based on the subject’s life as he is actually living it; to his life and thoughts and character as he himself might describe them; to things as they actually are (supplemented by some reasonable suppositions about how his life and character might develop in a real, not an idealized, future).

E. Purposes as an Element in the Definition of Freedom.

1. Purposes and Desires Contrasted; Purposes a Better Basis for a Theory of Freedom than Desires.—We can explain the case of the political refugee if we dispense with desires and “wants” as the foundation of the account and instead adopt purposes as a key. The refugee’s desires may not have changed as a result of his journey. Perhaps, owing to homesickness, he desires more than ever to do the things forbidden to him. But his purposes have changed.

The distinction can be found in the elements of reflecting, assessing, and judging. You may have a desire without having reflected upon it, or assessed its merits, or judged it to be appropriate, or determined to let it guide your actions. The same cannot be said of a purpose. The will and the deliberative faculties are involved in the project of settling upon a purpose. The refugee may have had the same desires at the beginning and the end of the story; but when he decided to flee, and did leave, and entered upon the project integrating himself into his new country, his purposes developed and changed. He elected not to be guided by his desires relating to his native country, and instead chose to pursue projects in his adoptive one.

This change makes it possible to explain the conclusion that his freedom has been enhanced. Let us define freedom, subject to further improvements, as “the absence of impediments to acting in accordance with one’s

by the condition of the possibility of that reality: namely, God. And from the perspective of my own core, the subjectivity that I am, this cosmically inclusive objectivity presents itself for decision. A simple, singular decision: yes or no. The freedom of the human person, then, is not categorical freedom at all. Rather, it is a freedom that transcends all categories, it is ‘transcendental freedom.’” Timothy E. O’Connell, Principles for a Catholic Morality, 62 (1978), quoted in Germain Grisez, Christian Moral Principles, 383-84, (1983) vol. one of The Way of the Lord Jesus.

75. Professor Berlin seems to open the door to this line of analysis by stating, in a much-discussed footnote, “The extent of my freedom seems to depend on (a) how many possibilities are open to me [and] . . . (c) how important in my plan of life, given my character and circumstances, these possibilities are.” Isaiah Berlin, “Two Concepts of Liberty,” in Four Essays on Liberty, 130 n. 1 (1969). He similarly states, in the introduction to this work at xxxix, “[s]uch freedom ultimately depends . . . on how many doors are open [and] . . . upon their relative importance in my life. . . .” These passages are discussed in Richard J. Arneson, “Freedom and Desire,” 15 Can. J. Phil. 425, 429-30 (1985).
purposes.” As he changed his purposes, his freedom was enhanced. (No surprising limitations are imported by using the word “purposes”; let that term be here broadly understood to mean “fixed judgments as to action.”)

2. An Account of Freedom Based on Basic Purposes.—Professor Gerald Dworkin in The Theory and Practice of Autonomy uses the story of Odysseus and the Sirens to present the question: When a person is of two minds, which one counts? When his purposes conflict, which one defines his freedom?

The reasonable approach seems to be to identify a ranking or hierarchy of purposes, identifying some as more important or basic. Freedom has mainly to do with the basic purposes, as suggested by Professor Charles Taylor:

A man who is driven by spite to jeopardize his most important relationships, in spite of himself, as it were, or who is prevented by unreasoning fear from taking up the career he truly wants, is not really made more free if one lifts the external obstacles to his venting his spite or acting on his fear. Or at least he is liberated into a very impoverished freedom.

We may thus conclude: Freedom consists in opportunities to act in accordance with one’s purposes; and, preeminently, one’s basic purposes. Freedom is most importantly enhanced by the availability of opportunities to pursue basic purposes, and it is materially infringed by impediments to pursuing such opportunities. When purposes conflict, frustrating the superficial in furtherance of the basic serves freedom. Tying Odysseus to the mast promoted his freedom rather than infringed it because that action served his basic purposes and disserved only superficial ones.

77. Professor Dworkin at this point discusses which ones apply to determining autonomy; he makes a distinction between autonomy and liberty: tying up Odysseus infringes his liberty but not his autonomy. Id. at 106.
79. It would not seem correct to exclude superficial (or intermediate-level) purposes from consideration altogether; the test proposed in the text excludes them only when they conflict with basic purposes. The refugee from China may never have altered his basic purposes (obtaining prosperity, education, wisdom, love) but only intermediate-level ones (citizenship here rather than there, pursuing one line of work rather than another, attending this university rather than that one). His intermediate level purposes remained well integrated with his basic ones, unlike with Odysseus, and therefore deserve to be counted in determining what adds to his freedom.
80. Perhaps Professor Berlin embraces this approach when he states, “The extent of my freedom seems to depend on (a) how many possibilities are open to me [and] . . . (c) how important in my plan of life, given my character and circumstances, these possibilities are.” Isaiah Berlin, “Two Concepts of Liberty,” in Four Essays on Liberty, 130 n. 1 (1969) (emphasis added).
What establishes a purpose as basic? One possibility could be derived from Professor Harry Frankfurt’s important 1971 article, “Freedom of the Will and the Concept of a Person,” in which he introduces the concept of “second-order volitions.” An individual who had only desires would be a “wanton.” He would not, according to Professor Frankfurt, be a person at all, because personhood requires having “volitions,” that is, determinations involving the will. Second-order volitions are volitions about one’s desires. Thus, a drug addict who wills to free himself of his craving for heroin has a second-order volition: a volition about his own desire.

We might take a cue from this and say—Professor Frankfurt himself comes close to saying—that freedom is defined mainly by second-order volitions. This would certainly lead to a reasonable result in the case of the drug addict: depriving him of drugs seems to enhance his freedom rather than constrict it because it serves his second-order volition. However, this criterion seems to be a very narrow one in recognizing, as determinative of freedom, only what we might call reflexive volitions or purposes: ones which are about other purposes or desires. But might not a purpose be basic without being reflexive? Odysseus’ basic purposes may not include the reflexive one of not having the desire to go to the Sirens. He may even enjoy those frustrating feelings. His basic purposes are getting back to Ithaca and so on. Those are not reflexive, but surely they define his freedom.

Another possibility is suggested by Professor Taylor’s article:

We experience our desires and purposes as quantitatively discriminated, as higher or lower, noble or base, integrated or fragmented, significant or trivial, good and bad. This means that we experience some of our desires and goals as intrinsically more significant than others.... When I am convinced that some career, or an expedition to the Andes, or a love relationship, is of fundamental importance to me... it cannot be just because of the throbs, elan, or tremors I feel; I must also have some sense that these are of great significance for me, meet important, long-lasting needs, represent a fulfillment of something central to me, will bring me closer to what I really am, or something of the sort.

This analysis is distorted in an experiential direction: pursuit of a vocation, surely, is a basic purpose for the subject not just because he “experiences” it as basic. It seems that whether a purpose is basic depends on its position in relation to other purposes, not on how one feels about it.

81. 68 J. Phil. 5, 10.
82. The material in the Frankfurt article referred to up to this point is in id. at 10-12.
83. Id. at 15, 17.
85. As some of the language in Professor Taylor’s article suggests.
The better approach seems to be one which looks to the subject's judgments of relative importance. A test along these lines has been suggested by Professor Arneson, who states, "a desire for something is basic if that thing is desired for its own sake, not as a means to some further end." This is an excessively exclusive test of what is basic: it counts only final ends. A purpose may be relatively basic for a subject even if he does not think like a philosopher and is agnostic as to its finality. A purpose may be relatively basic for a subject even if he accords some further purpose a yet more fundamental status in his thinking. Reunion with Penelope and taking his place in the political order of Ithaca were basic purposes for Odysseus, even though those may have been instrumental to the goods of friendship and justice. A purpose is basic, as defined in this article, if the subject has ranked it as dominant in his plan of life, and as worthy to govern in instances of conflicts with other purposes.

An account of freedom founded on basic purposes improves the analysis of the cases of the happy prisoner and the contented slave. A person may perhaps "destroy his desire" or be brainwashed or have his spirit broken in such a way as no longer to experience a longing to escape. But even after such psychic changes most people would retain longer-term commitments, so that, were they released and given an opportunity for quiet reflection, they would take up the threads of their lives again, and return to their families and their jobs. They would, in other words, abandon their artificially altered affective state as a guide to action and embrace once more the pursuit of their basic purposes. For people like these—almost everyone, in other words—jail is jail and slavery is slavery and freedom is served by escape and release. (On the other hand, the analysis to this point allows the conclusion that a prisoner or slave might obtain freedom by embracing new basic purposes. If someone sold into slavery were to undergo a spiritual conversion and decided to devote his life to ministering to fellow slaves, the analysis to this point leads to the conclusion—not an implausible one—that he has his freedom.)

86. Richard J. Arneson, "Freedom and Desire," 15 Canadian J. Phil. 425, 435 (1985). Another approach suggested by Professor Arneson is based on a distinction between "vital options" and "inert options." "[A]n option is vital for a person to the extent that its very availability will bring it about that the person acquires an increased basic desire either for having the option or exercising it or both." Id. at 437. This would seem to make an option important to the extent it excites the appetites.

87. Can it be damagingly objected that whenever purposes conflict, the basic purpose will be the one the subject chooses to act upon, since by choosing that way he manifests what he identifies to be basic? Common sense suggests that this is not how temptation affects people. Common sense insists that even while he longs for the Sirens' shore, Odysseus' plans for returning to Ithaca are still "there" in his character, and retain a basic voice in his deliberations, though one that has been temporarily drowned out.

88. See section VI D of this article, infra, for further discussion of this issue.
An account of freedom along these lines solves the problem about threats that was found to be mishandled by the desire-based (and by the objectivist) accounts. The threat to hurt the prisoner if he escapes may change his desires but not his basic purposes, which continue to be frustrated by prison. This account of freedom is compatible with the account set forth above of freedom as a part of the good. Freedom is good because only the free man can "be a player," be the author of his life; freedom protects, in other words, the relationship between what the man thinks, on the one hand, and action, on the other. Purposes—not desires or impulses, but fixed fundamental intentions—establish this relationship. Freedom is also good because only the free man deserves full credit for meritorious actions; here again, purposes are a key element; people fully deserve praise and reward only for the things they do on purpose. Freedom is also good because it makes it possible to develop character; only the free man is the author of his own character. And it seems that it is planned, deliberate, purposive action that allows us most to participate in the good of the things we aim at.

The "basic purposes" account implies that someone cannot possess freedom in a full way unless he has a reasonably well developed array of basic purposes. (Only someone "who has a well-considered path of life mapped out before him" is free according to Cicero.) This account would add another element to the analysis of the happy prisoner and the contented slave: if they are happy and contented because they have abandoned not only their normal desires but all their basic purposes they could not be said to possess freedom. Contentment though purposive lobotomy does not enhance freedom.

89. See text at notes 62-63 and towards the end of section V B, supra.
90. In section II C and D, supra.
91. Cf. John Finnis, Fundamentals of Ethics, 139 (1983)("All free choices . . . change the person . . . . The more strategic or architectonic the choice of X, the greater the degree of commitment and the more substantial the lasting of that choice.").
92. Cicero, Paradoxa Stoicorum Paradox V, 284, 285 (Loeb Classic Series No. 349, H. Rackham, tr., 1942)("For what is freedom? The power to live as you will. Who then lives as he wills except one who follows the things that are right, who delights in his duty, who has a well-considered path of life mapped out before him . . . ?").
93. Further, it seems that someone does not possess freedom fully unless he has an array of purposes which he embraces and develops in the normal and optimal way: that is, through the exercise of balanced and mature judgment.

A further development of the theory would unpack some of the implications of the phrase "in accordance with" in the proposition "Freedom consists in opportunities to act in accordance with basic purposes." John Stuart Mill indicates that the state does not impermissibly infringe freedom when it impedes access to a bridge which will collapse under traffic. If a course of action cannot further the subject's basic purposes, then obstructing it seems not to infringe freedom even when the subject, owing to ignorance, seeks to follow that course.
F. What All This Tells Us About Assisted-Suicide Programs.—The above analysis has no surprising or restrictive implications for most government policies. Opening the door to the prison cell, freeing the slave, allowing exit for the political dissident—the things that seem on first glance to enhance freedom generally do indeed enhance it in most cases.

But assisted-suicide programs are distinguishable, because they involve permitting or facilitating not any of a range of options (as freeing a prisoner or a slave permits a wide variety of projects) but one specific sort of act. It is an act unique in all of human experience, and because freedom is a human condition that cannot be understood without involvement in the *humanitas* of the subject, it calls for a unique and careful analysis. Suicide turns out to have special features in the subjectivity of those who commit or contemplate it, as here set forth.

*Persons who commit or contemplate suicide are seldom guided by their basic purposes.*94 Some of them are in the grip of depression or other severe psychological distress.95 Even those that are not are seldom guided by their basic purposes. Professor Edwin Shneidman, in his recent book *The Suicidal Mind*,96 describes a phenomenon he calls “constriction,” captured in the image of “the diaphragm of a camera closing down on the tightest focus”:

In suicide, the diaphragm of the mind narrows and focuses on the single goal of escape to the exclusion of all else—parents, spouse, children. Those other persons in the life are not forgotten: they are simply not within the narrow focus of the suicidal lens. Suddenly they are just not in the picture.97

Again:

There is . . . one . . . aspect of mental life and behavior that is characteristic of the suicidal state of mind. It is called constriction, and refers to a narrowing or tunneling of the focus of attention. It comes out . . . in the use of certain words . . . * * * The single most dangerous word in all of suicidology is the four-letter word only—as in this brief excerpt from the words of a young woman who jumped from a high place and just luckily survived.

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95. Professional literature discussing this is cited and described at notes 104-108 & 125-31 and accompanying text, *infra*.


97. *Id.* at 60. *See id.* at 134 (“A person who commits suicide turns off all ties to the past, declares a kind of mental bankruptcy, and his or her memories have no lien.”).
I was so desperate. I felt, my God, I can’t face this thing. Everything was like a terrible whirlpool of confusion. And I thought to myself, there’s only one thing to do. I just have to lose consciousness. That’s the only way to get away from it. And the only way to lose consciousness, I thought, was to jump off something good and high. * * * And then I got to the fifth floor and everything just got very dark all of a sudden, and all I could see was this balcony. Everything around it just blacked out. It was just like a circle. That was all I could see. Just the balcony. And I climbed over it and just let go. 98

A similar account is given by the English writer A. Alvarez, who himself attempted suicide: “Once a man decides to take his own life he enters a shut-off, impregnable but wholly convincing world where every detail fits and every incident reinforces his decision.”99 And by Boris Pasternak, who wrote of the suicides of young poets persecuted by the Stalinist regime:

Having arrived at the thought of suicide, one abandons all hope, one turns away from one’s past, one declares oneself a bankrupt and one’s memories as nonexistent. These memories are no longer capable of reaching the would-be suicide to save him, to sustain him. The continuity of one’s inner existence is destroyed, the personality has ceased to exist. In the end, perhaps, one kills oneself not out of loyalty to the decision one has made, but because one can no longer endure the agony that does not seem to belong to anyone in particular, the suffering in the absence of a sufferer, the empty suspense which is not filled up by a life that still goes on. 100

Another common thread is the overwhelming of the self: “I am powerless over my emotions. . . . I’m like a helpless 12 year old.”101 “The rejections, fears and frustrations overwhelm me. There is no way to pull myself out of this hell.”102 “The bad mood had taken over. I described it then as a monster that was bigger than I was. I was tired, very tired, and I gave in to it.”103

And what about suicidal medical patients: people, in other words, in the position of many likely subjects of physician-assisted suicide? The medical literature reveals that important causes of suicidal acts and desires among patients include “impulsivity, . . . subtle cognitive impairments,”104

98. Id. at 59.
100. I Remember: Sketch for an Autobiography, 89 (David Magarshack, tr., 1958).
102. Id. at 15.
103. Id. at 75.
aggressive tendencies, "a wish not to be here for a time (impulse control)," \(^{105}\) "preexisting substance abuse disorders," \(^{106}\) and "depression and impaired decision-making capacity." \(^{107}\) No firm application of basic purposes is usually involved. Consider the testimony of a leading hospice physician: "In my experience, patients who request euthanasia almost invariably change their minds." \(^{108}\)

G. Conclusion.—Suicides and attempted suicides are Odysseus released from the mast. They are seldom instances of action in pursuit of basic purposes. There may be exceptions, as discussed in Section VII below, but those who propose new social programs must not rely too heavily on exceptional cases.

Suicides and attempted suicides are not instances of the exercise of freedom when freedom is properly understood using basic purposes as the

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(1995)(noting that "[n]onpsychiatrist physicians frequently fail to recognize, diagnose, and appropriately treat these disorders"). The authors also state:

In a more extreme form, self-reliance, perfectionism, self-control, rigidity, and the tendency to be judgmental may be conceptualized as part of a narcissistic or obsessive-compulsive personality disorder. In our experience, these are the most common personality configurations seen in patients whose physical, psychosocial, and spiritual problems are well managed and who persistently seek hastened death.

*Id.* at 450.


107. *Id.* at 451. Furthermore, some suicidal persons mischaracterize to themselves what suicide actually entails, acting pursuant to "a wish not to be here for a time" (Apter, Gothelf, Orbach, Weizman, Ratzoni, Har-Even, & Tyano, *supra* note 105) or interpreting "death as reunion, death as rebirth" (Herbert Hendin, "Psychodynamics of Suicide, with Particular Reference to the Young," *148 Am. J. Psychiatry* 1150, 1152 (1992)).

Earlier authorities finding that suicidal patients generally are under the influence of abnormal mental states are described in Robert G. Twycross, "Where there is hope there is life: a view from the hospice," in *Euthanasia Examined: Ethical, Clinical and Legal Perspectives*, 141, 145-46 (John Keown, ed., 1995).

Most of these distorted mental states are not of the sort that would cause a patient to be screened out by the standard sort of competence requirement contained in assisted-suicide initiatives. See New York State Task Force on Life and the Law, "When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context - Supplement to Report" (April, 1997)("Many individuals who contemplate suicide—including those who are terminally ill—suffer from treatable mental disorders, most commonly clinical depression. Yet, physicians routinely fail to diagnose and treat these disorders, particularly among patients at the end of life. As such, if assisted suicide is legalized, many requests based on mental illness are likely to be granted, even though they do not reflect a competent, settled decision to die.").

criterion. Professor Shneidman advises, “never commit suicide while you are suicidal”, to which we can now add, “it does not enhance a person’s freedom to assist him to commit suicide while he is suicidal.”

VI. BEYOND BASIC PURPOSES

“Opportunities to serve basic purposes” is not a sufficiently demanding account of freedom. This section introduces further criteria and then applies them to assisted suicide.

A. Why “Opportunities to Serve Basic Purposes” Cannot Suffice: Freedom Involves a Range of Opportunities.—Suppose a person whose future is determined within precise confines, but suppose those confines conform precisely to his basic purposes. Some telepathic Guardian discerns his thinking and decrees his destiny in considerable detail, fixing his fate so that, for example, only one college and one graduate school will accept him (but the one he wants to attend or the one which best conforms to his aims); one young lady will take an interest in marrying him, one employer hire him, and so on. Basic purposes seem to be served, but at the same time his freedom seems not to be complete. This indicates that freedom in a full sense is absent when a person has no more than one option, however suitable. Full freedom requires a range of options.

Full freedom, therefore, requires options not optimally compatible with basic purposes; and it requires the presence of options not all of which, obviously, will end up being exercised. (This line of thought is much emphasized by Professor Joseph Raz in his book The Morality of Freedom.) Freedom involves a journey through life not down a single path but along a many paths which are continually branching out before the subject. Exercising freedom involves the play of the mind across the range of choices.

This conclusion is suggested by the ways freedom is related to the good. Freedom, it was concluded above, is a component of the good of action and the good of self-constitution. Now, the subject with the Guardian is to some extent the author of his acts, his projects and his life, in that the Guardian uses the subject’s basic purposes as a guide in constructing his destiny. But he is not the author in so full a sense as he would have been without the Guardian. His involvement in his own life is less than normal. This is so in two ways. First, without the Guardian he would have been presented with opportunities he would actually end up taking: opportunities

109. Shneidman, supra note 96.
110. Contemporaneously; as basic purposes change so do the Guardian’s decrees.
111. This point is made in Joseph Raz, The Morality of Freedom (1986) at many points including pages 398 and 425 (in connection with autonomy).
112. (1986).
113. In Section II C and D.
outside his basic purposes but which once encountered would lead him to rethink those purposes. Second, without the Guardian he would have been presented with opportunities that he would not take, but which would help in his deliberations. For most people, pursuing a project involves not only framing basic purposes, but also clarifying them as life presents new opportunities, discerning methods of pursuing purposes, crafting techniques, struggling to persevere as tempting alternatives beckon, reexamining commitments as difficulties arise, and doing all these things across time as information develops more fully. To dispense with such aspects of life by falling under the control of the Guardian is to dispense with much of what is character-forming in life and much of what earns people credit for how they live.

So, a range of choices is required; what should such a range consist of? Consider now another guardian—call him a Guardian of Freedom, and not just of basic purposes. This guardian is eager to offer the subject whatever promotes freedom. What sort of options does this Guardian afford the subject?

Faithful to the understanding of freedom as a condition, the answer must identify choices which will form a part of the subject’s life. Here is the key to what the Guardian of Freedom affords. He affords opportunities which are within the subject’s deliberative scope.

B. Freedom Involves Opportunities Related to “Extended Purposes.”—One obvious category of such opportunities is that category with opportunities near the subject’s purposes. Full freedom requires the presence of opportunities penumbral to the subject’s purposes. If he aims to go to law school and become a litigator, he needs also, to be more fully free, to be presented with the opportunity to go to law school and become a corporate lawyer, or to go to a school of government and become a civil servant. (Whereas it may have little bearing on his freedom whether or not some minor league baseball club will or will not recruit him.) His mind will range across opportunities closely related to his basic purposes and his character will form in contemplating them. The Guardian of Freedom would be inclined to offer an opportunity to the subject if the Guardian could conclude, “this option will give someone who thinks like the subject something to ponder.”

A corollary is the wider the purposes of the subject, the broader the penumbra. The more “open ended” the purposes of the subject—the more fluid and protean they are—the wider the penumbra. Odysseus requires a wider range of choices than does the Cyclops.

Furthermore, the better the subject pursues the goods of freedom, the wider the penumbra. The more use the subject makes of opportunities within his deliberative scope: the more he actually deliberates about each opportunity, using it to develop his practical reason and beliefs about the good, and the more capaciously he does this, attending to uncongenial and
unconventional possibilities as they present themselves—the wider the penumbra that will enhance his freedom. Contrariwise, someone who is in a pathological condition of estrangement from his own acts and thoughts, as brilliantly portrayed in Sylvia Plath's book *The Bell Jar*, or who attempts with some degree of success to "put off his actions like soiled clothing," attempting to live as though he were not the person who committed them, fails to participate fully in the good of freedom. Extending further opportunities to a person in that condition may not foster his freedom in any full sense, rather as offering food to someone whose digestive system will reject it owing to illness does not nourish him.

C. Freedom Involves Opportunities Related to Natural or "Appropriate and Reasonable" Purposes.—Suppose the Sirens had so far affected Odysseus as to cause him not only to forget his longer-term purposes but also to expunge them from even the subconscious areas of his mind. Could we nevertheless conclude that tying him to the mast enhances his freedom? Not on the account presented to this point; but on a reasonable extension of it, here proposed. Heading a household, raising a son, ruling a city were reasonable possibilities for Odysseus whether he held to such purposes or not, and therefore holding those opportunities open to him seems to enhance his freedom.

This suggests the concept of "natural purposes" or, to use a phrase with a modern flavor, "appropriate and reasonable purposes." (The Supreme Court sometimes uses language like that in expounding on the nature and extent of fundamental liberties.) Freedom in the full sense includes opportunities to pursue projects that, though not focused on by the subject or penumbral to those that have been, could if they presented themselves to the subject attract his serious consideration by reason of their compatibility with his abilities and his social and economic conditions. On this ground the intending lawyer's freedom may be significantly infringed when he is forbidden to join even a political organization he at present disagrees with, or to serve in the military in time of national peril, or to pursue a religious vocation he as yet has no inclination to take up.

Introducing this element effects an important departure, because it introduces a "non-positive" element: it demands the presence of options based on criteria which have not been "posited" ("put there") by the subject. It demands the presence of options based in part on directions and goals which are attributed to the subject whether or not he has given any thought to anything related. The Guardian of Freedom would ask, "Would this opportunity, if I presented it to him, give him something worthwhile to think about?" Worthwhile in that if he thought it over he would participate in the goods of freedom as he did so.
D. These Extensions Shed Further Light on the Cases of the Happy Slave and the Contented Prisoner.—From the preceding, it might be concluded that a prisoner or slave is lacking in freedom even if he has adjusted his basic purposes—for example, as discussed above, by determining to pursue ends consistent with his condition. If an intelligent prisoner reorients his basic purposes so as to devote himself compulsively to the cleanliness of corridors, he can readily be described as lacking freedom because lacking opportunities to fulfill purposes that would be reasonable and appropriate for him. (But if a devout prisoner reorients his life to prayer and the service of the other inmates, refraining from even considering another way of life for himself, and if his doing this is “reasonable and appropriate,” then perhaps he is a free prisoner.)

E. How Extensive a Range of Opportunities Beyond Basic Purposes? Which Opportunities Within That Range?—When it comes to basic purposes, it seems that every material impediment impairs freedom. When it comes to opportunities penumbral to basic purposes, and opportunities that relate to natural or reasonable purposes which have not been embraced by the subject, it seems that a more moderate requirement is appropriate. People can be entirely in possession of their freedom, it seems, without possessing the full range of opportunities of these collateral sorts.

The Guardian of Freedom would ask in each case whether an opportunity would, if presented to the subject, serve one of the goods of freedom. The Guardian of Freedom is like a law professor considering whether to advance a hypothetical: he will do it if it will sharpen the subject’s understanding either in the course of eliciting a negative or a positive answer.

The Guardian would not advance opportunities otherwise. A few various and thought-provoking alternatives are enough to make the subject the true author of what he does, to set him on the path of character-development, and to entitle him to credit for what he selects. The good of standing up to the attack of a German tank unit is achieved when the volunteer acts coolly and not under the baton of a sergeant, and he possesses that good in its fullness under those circumstances. He need not be offered three different directions in which to run away, or various opportunities to effect a quick transfer to a staff position.

F. Does All This Require Us to Revise our Conclusions About Assisted-Suicide Programs?—So, then, would the Guardian of Freedom offer the opportunity to commit suicide?

That opportunity would not be within the penumbra of basic purposes for the normal case of the person who was in no way contemplating it. Further, it would not be within the penumbra for the person who was near the brink

114. In the text at note 88, supra.
and afflicted by the "constriction" identified by Professor Shneidman or by conditions such as impulsiveness and depression and impaired decision-making capacity reported in the medical literature on suicide. These conditions involve loss of touch with basic purposes (call this "vertical constriction") and a loss of vitality in regards to those purposes (call this "horizontal constriction"). They involve a contraction of the deliberative scope; a loss of that inquiring, vigorous, protean, Odysseus-like quality which most fully demands freedom be enhanced by way of penumbral alternatives. Giving an option to a person in this state of mind is unlikely to help him in his deliberations and so serve the good of freedom.

Further, it will rarely—probably never—be possible to say that it is consistent with his natural purposes or his appropriate and reasonable ends. And like the soldier whose freedom to be brave is adequately served without his being afforded multiple ways of running away, a person's freedom to "affirm life" is served by the possibility almost everyone has of committing suicide without physician assistance or of disaffirming life and avoiding its goods in various ways short of self-assassination.

VII. WHAT ABOUT THE SPECIAL CASE OF THE SUICIDAL PERSON WHO IS NOT "CONSTRICTED" AND IS ACTING ON HIS BASIC PURPOSES?

The arguments advanced in sections V and VI should suffice to establish that assisted-suicide programs do not enhance freedom in the large range of cases in which the mentality of the potential suicide is as described by Professor Shniedman and other professional investigators. But are there cases which escape this analysis? Would you enhance such a person's freedom by handing him the gun or the rope?

What is the mentality of someone who approaches suicide "with his eyes wide open" and in full possession of his analytic faculties? Leo Tolstoy is an example:

[F]ive years ago something very strange began to happen to me. At first I began having moments of bewilderment, when my life would come to a halt, as if I did not know how to live or what to do; I would lose my presence of mind and fall into a state of depression.... Whenever my life came to a halt, the question would arise: Why? And what next? * * * And like points concentrated into one spot, these questions without answers came together to form a single black stain.

It happened with me as it happens with everyone who contracts a fatal internal disease. At first there were the insignificant symptoms of an ailment, which the patient ignores; then these symptoms recur more and

115. See note 96, supra.
116. See notes 96-98, supra, and related text.
more frequently, until they merge into one continuous duration of suffer-
ing. The suffering increases, and before he can turn around the patient
discovers what he already knew: the thing he had taken for a mere indis-
position is in fact the most important thing on earth to him, is in fact
death.

This is exactly what happened to me. I realized that... if the same
questions should continue to recur, I would have to answer them. And
I tried to answer them... But as soon as I laid my hands on them and
tried to resolve them, I was immediately convinced, first of all, that they
were not childish and foolish questions but the most vital and profound
questions in life, and, secondly, that no matter how much I pondered
them there was no way I could resolve them. Before I could be occupied
with my Samara estate, with the education of my son, or with the writing
of my books, I had to know why I was doing these things. ** **

My life came to a stop. I could breathe, eat, drink, and sleep...
...[b]ut there was no life in me because I had no desires whose
satisfaction I would have found reasonable. If I wanted something, I
knew beforehand that it did not matter whether or not I got it.

If a fairy had come and offered to fulfill my every wish, I would not
have known what to wish for... I knew that it was all a delusion, that
I really desired nothing... I did not even want to discover truth anymore
because I had guessed what it was. The truth was that life is
meaningless. ** **

I grew sick of life; some irresistible force was leading me to somehow
get rid of it. It was not that I wanted to kill myself. The force that was
leading me away from life was more powerful, more absolute, more all-
encompassing than any desire. With all my strength I struggled to get
away from life. The thought of suicide... was such a temptation that
I had to use cunning against myself in order not to go through with it too
hastily... And there I was... carrying a rope from my room, where
I was alone every night as I undressed, so that I would not hang myself
from the beam between the closets. And I quit going hunting with a gun,
so that I would not be too easily tempted to rid myself of life.117

Tolstoy's condition was not one like that of Odysseus before the Sirens,
whose desires for a time might have risen up and overwhelmed his basic
purposes; nor like those patients described by Professor Shneidman, whose
basic purposes were occluded owing to the phenomenon of constriction. It
is therefore impossible to use the analysis advanced above relating to
"constriction" and similar mentalities.

On the other hand, it is impossible to conclude that by handing him the
rope one would further his basic purposes and therefore his freedom. His
structure of basic purposes had collapsed entirely, owing to his inability to

117. Leo Tolstoy, Confession, 26-28 (1884)(David Patterson, trans., 1983).
believe that there was anything in life worth aiming at. A similar phenomenon is described by Mr. Castro Reyes, whose brilliant sketch of his own suicidal mentality is described by Professor Shneidman:

I had done all I could and was still sinking. I sat many hours seeking answers and all there was a silent wind and no answers. The answer was clear. Die. I didn’t sleep. The dreams were reality and reality dreams. My will to survive and succeed had been crushed and defeated. I was like a general alone on a battlefield being encroached upon by my enemy and its hordes: Fear, hate, self-depreciation, desolation. I felt I had to have the upper hand, to control my destiny, so I sought to die rather than surrender. . . . Death swallowed me long before I pulled the trigger. I was locked within myself. . . . There comes a time when all things cease to shine, when the rays of hope are lost. I placed the gun to my head.

In instances like these the structure of basic purposes has collapsed. The mentality is not precisely one of constriction: that is, inability to focus on a range of purposes. Rather, it is the maiming of the aspect of the personality which leads a person to embrace any purpose.

Could it be otherwise? Could there be a remaining category of cases, in which the subject attends “with his eyes open” and in which his basic purposes do not collapse but lead in a coherent way to suicide as their end and goal? The answer to this question obviously depends on the truth about anthropology, and not all readers will agree. But the correct view in the opinion of this author is that this is a most improbable development. The human purposive system has a certain natural aspect to it just as the digestive system does; and like the digestive system it can collapse or malfunction or cease to function, but it cannot reconstitute itself into an orderly structure for the poisoning or assassination of the subject. It resists such a function: that seems to be what effects the collapse. In Tolstoy’s words: “[A]s convinced as my reason might have been, this was not enough. All of these arguments [establishing the “vanity of life”] could not persuade me to follow my thinking to its logical end, that is, to kill myself.”

The purposive structure can collapse; the collapse leaves what Tolstoy called a “void”; into the void rushes what he called a “force,” which impels a person toward death and which is experienced as alien to that person. We cannot extend the account of freedom to encompass cooperation with that. That dark force is something that really might be called “occult.”

118. Shneidman, supra note 96, at 12-13. “Castro Reyes” is a pseudonym assigned by Professor Shneidman. Id. at 12.
119. Tolstoy, supra note 117, at 55.
PART TWO: UTILITY

Initiatives promoting assisted suicide are often defended on utilitarian grounds—typically the classic, pleasures-and-pains act utilitarianism of Bentham and Mill. In this form, utilitarianism is

[t]he creed which accepts as the foundation of morals “utility” or the “greatest happiness principle.” [It] holds that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain; by unhappiness, pain and the privation of pleasure.

A cognate conclusion is that the value of a person’s life rests on his capacity for enjoyment and for conferring pleasure.

Let us ask those who advance this justification eight hard questions:

1. Will Potential Suicides Perform the Utilitarian Calculus?—The utilitarian argument must rest on the view that assisted suicide increases utility. This conclusion must rest on the prediction that persons considering suicide will perform the utilitarian calculus, accurately computing the consequences and relying on the outcome of the computation to determine whether or not to act.

Would they do that? The familiar assumption, by writers in the utilitarian tradition, that humans are “economic” persons who aim (skillfully) to maximize their utility is indefensible in general, and especially

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123. It is not supported by conclusive empirical evidence. See Sen, supra note 122, at 18. It is rejected by prominent ethicists and economists. See Amartya K. Sen, “The Formulation of Rational Choice,” 84 Am. Ec. Rev. 385, 386 (1994)(“A divergence between choice and well-being can easily arise when behavior is influenced by some motivation other than the pursuit of one’s own interest or welfare.”).
hard to support in the instance of people contemplating suicide. The medical literature establishes what common sense would in any event suggest: many people contemplating self-destruction are in no way thinking like some Enlightenment philosophe.124

Pain would not determine their decisions. At least that is the implication of a recent major study: "The results suggest that having pain does not predispose a person to desire or take actions to end his or her life."125 "Patients experiencing pain were not inclined to euthanasia or physician-assisted suicide."126

Instead, important causes of suicidal acts and desires include "impulsivity, . . . subtle cognitive impairments[,]"127 aggressive tendencies, "a wish not to be here for a time (impulse control)"128 and "preexisting substance abuse disorders."129 Another factor is a self-destructive state of mind:

Self-destructive patients with borderline personality disorder may also seek physician-assisted death. Self-destructive patients may be unconsciously seeking a physician to hurt or abuse them to confirm their views of themselves as damaged and unworthy. These patients often have significant associated depression and impaired decision-making capacity.130

124. See generally Shneidman, supra note 96, passim. This work is discussed supra in the text accompanying notes 96 and 115.


126. Id. (further stating that "[t]his finding is consistent with data from the Netherlands demonstrating that pain was the only reason for euthanasia in just 10% of cases and a contributing factor in fewer than 50% of cases. It is also consistent with data from American physicians who had carried out euthanasia."(references omitted)). This article also states that "[p]atients in pain were significantly more likely to find euthanasia and physician-assisted suicide unacceptable" (p. 1807) and that "those who had pain . . . were not more likely to have discussed euthanasia or physician-assisted suicide or to have read Final Exit" (p. 1808).

127. Block & Billings, supra note 104, at 449 (noting that "[n]onpsychiatrist physicians frequently fail to recognize, diagnose, and appropriately treat these disorders"). The authors also state:

In a more extreme form, self-reliance, perfectionism, self-control, rigidity, and the tendency to be judgmental may be conceptualized as part of a narcissistic or obsessive-compulsive personality disorder. In our experience, these are the most common personality configurations seen in patients whose physical, psychosocial, and spiritual problems are well managed and who persistently seek hastened death.

Id. at 450.

128. Apter, Gothelf, Orbach, Weizman, Ratzoni, Har-Even, & Tyano, supra note 105.

129. Block & Billings, supra note 104, at 459.

130. Id. at 451.
"Rage, hopelessness, despair, and guilt are important affective states in which young patients commit suicide." Young people may assign unusual "conscious (cognitive) and unconscious meanings" to death, such as "death as reunion, death as rebirth, death as retaliatory abandonment, death as revenge, and death as self-punishment or atonement."

2. Could Anyone Apply the Utilitarian Calculus Successfully to the Question of Suicide?—To work the utilitarian calculus, the person considering suicide would have to foresee the experiences that would be endured if he lived and compare them to those involved in self-inflicted death.

He would have to predict his pain and its possible palliation. A recent article reveals:

Undertreatment of pain is common, attributable to deficiencies in health professionals' education about pain management as well as concerns about addiction among patients, family members, and clinicians. . . . In the Netherlands, an estimated 85% of patients withdraw their requests for hastened death after receiving better symptom palliation. More than 90% of patients with cancer pain respond to simple analgesic measures.

A leading hospice physician reports: "In my experience, patients who request euthanasia almost invariably change their minds. The reason for this varies. Often, it relates to good palliative care . . . ." To work the utilitarian calculus, the person considering suicide would have to predict pain's consequences for personality development, not always foreseeable and not always deleterious:

What is the nature of [the] patient's suffering such that death is preferable to loss of control and loss of an intact self? Exploration of these questions often identifies and highlights personality characteristics such as self-reliance, perfectionism, self-control, rigidity, and the tendency to respond judgmentally. These defensive styles may have been highly adaptive in many spheres of life. However, in the setting of terminal illness, self-reliance may be expressed as difficulty in trusting others, accepting help, and being dependent; perfectionism as frustration with personal weakness and neediness; self-control as intolerance of the noncontrollable vicissitudes and uncertainties of illness; and the tendency

132. Id.
133. See Twycross, supra note 107, at 147 ("No patient should be forced to request euthanasia because of unrelieved pain or other distressing sympotms such as vomiting or shortness of breath. Methods exist to control such symptoms, either completely or to a great extent."). This article contains a detailed discussion of the success of medical efforts to alleviate pain and discomfort at pages 147-51.
134. Block & Billings, supra note 104, at 447.
135. Twycross, supra note 107, at 155.
to be judgmental as self-criticism and self-blame over being ill and incapacitated. Giving up control, accepting dependency, and tolerating physical deterioration may be so intolerable that hastening death becomes a way to preserve the self. * * * Psychiatric intervention may help such patients reframe their experience; alternate expressions of control and of living up to high personal standards of behavior include forebearance in the face of uncertainty and difficulty, the capacity to model grace in confronting impending annihilation, and receiving help as a means of permitting others to master their feelings of loss.  

Afflictions may lead to fundamental personality developments and even to a reconstruction of the character in which “the parts of the person are assembled in a new manner.” The sufferer may come to terms with his affliction by “transcendence”—“the sufferer is not isolated by pain but is brought closer to a transpersonal source of meaning and to the human community that shares that meaning.” Beforehand, can he assess what that will be like?  

He would have to appraise self-inflicted death, an experience which may be neither quick nor comfortable. Nearly a quarter of patients “who receive life-ending medication linger for several hours to four days before death occurs.” Death by taking pills, for example, can last three hours or more. “A patient can spill the medicine or choke or vomit or fall asleep before the full dose has been taken.”  

And then there is the experience of death itself. Not yet having encountered it, none of us is well positioned to predict what it will be like when we meet what Henry James called, when he saw it approach, the Distinguished Thing.  

Many critics of utilitarianism doubt the possibility of performing the utilitarian comparison where alternatives involve incommensurable

136. Id.  
138. Id. at 45.  
142. Id. (quoting a physician who practices euthanasia in the Netherlands as saying, “This creates a lot more tension, also among others who accompany the patient. There are risks because people are terribly sick.”)  
143. “So here it is at last, the distinguished thing!” quoted in Edith Wharton, A Backward Glance, 367 (1934).
The outcomes at issue here—pain; natural death; suicide—involve qualitative difference as extreme as can well be imagined.

3. Are Pleasures and Pains Really the Proper Guides When Life is at Stake?—Many critics have noted as a defect of utilitarianism that it leads, in many circumstances, to an unacceptable willingness to sacrifice human life.

It leads to the conclusion, in certain instances, that killing the innocent is justified. For example, it leads to the conclusion—Philippa Foot’s example—that it would be a good thing to induce cancer in someone as a part of a research project that would eventually alleviate much suffering, and to the view that an innocent victim must be executed when the populace believes he is guilty and will riot if he is freed. It leads to these conclusions because human life has no independent weight in the system; no value other than as a bearer of pleasures and pains. In this respect utilitarianism contradicts universal common sense; most of us cling to our own lives even in adversity and stoutly condemn homicide whatever pleasure it may confer. To kill is to act against important goods unknown to utilitarianism.

To commit suicide is to act against important spiritual goods unknown to utilitarianism. “About 50% of patients have a significant change in attitude and world view in the last 3 months of life, moving from a desire for acute intervention and the postponement of death towards acceptance, and psychological and spiritual peace.” An act of suicide would “mean that many people will be denying themselves this crucial time when half of them are likely to have major shifts in their emotional and spiritual attitudes.”

4. What about the Effects on Other Individuals such as Family Members?—Radical individualism is a besetting fault of many assisted-suicide initiatives. Of course, the effects on friends and family members—


146. Twycross, supra note 107, at 153 (discussing AIDS patients in London).

147. Id., quoting R. George, “Euthanasia: The AIDS Dimension” in Death Without Dignity (N.M. de S. Cameron, ed.)(discussing euthanasia and not assisted suicide at this point).


minor children, for example—may also be dramatic and long lasting. The pains of grief are not the half of it. Far more telling are the effects on the relationship itself, which in a sense continues after death, since, as Proust said, "a sort of cutting taken from one person and grafted on the heart of another continues to carry on its existence, even when the person from whom it had been detached has perished." What interpretation—surely often a devastating one—may a wife or a child put on the blotted signature at the bottom of the page of their love?

And here again pleasures and pains cannot be the only concerns. Other relevant considerations include ones of obligation: of the marriage oath; of the natural duty to support minor children; of the ties of friendship.

5. What About Consequences for the Relations Between the Patient and the Physician?—Many physicians have expressed concern that discussion of physician-assisted suicide may undermine patient confidence.


151. See generally Compassion in Dying v. Washington, 79 F.3d 790, 827 (9th Cir. 1996)("The state clearly has a legitimate interest in safeguarding the interests of innocent third parties such as minor children and other family members dependent on persons who wish to commit suicide."). rev’d. sub nom. Washington v. Glucksberg, 117 S. Ct. 2258 (1997).


153. A similar question can be raised about the relationship between patients and their families and friends:

[T]he absolute fixed tabu against suicide . . . has served to make the patient's right to expect the care of her family or community fixed and unquestioned. As long as a human being's natural life exists the family and/or institutional caretakers are morally obligated to offer support and care. * * * When the option or choice to end a life is morally permitted, then the interpersonal situation changes. One must justify his or her choice to go on living and ask why one should voluntarily continue to exact care or be dependent on others.


If the physician appears sympathetic to the patient's interest in suicide, it may convey the impression that the physician feels assisted suicide is a desirable alternative. Such an impression may not be very comforting to the patient. Moreover, if the patient
between patients and physicians on 'end-of-life care that included explicit mention of euthanasia or physician-assisted suicide' would reduce patients' trust in the physician."

This should be a special concern to those who reject the liberal view of medicine—the highly individualistic one which awards a central place to rights—and instead accept a "relational" account. Dr. Cassell urges physicians:

[R]each out to the suffering person to bring him or her back with the rest of us. You must communicate to the person that no matter what happens or how difficult it is, you are going to be there and help. * * * Social contacts must be facilitated. Relationships within the family should be bolstered. Barriers to familial closeness erected during serious illness by, for example, untruths, false optimism, repugnance, and fear can usually be removed with little effort by teaching members of the family how to interact with a sick person.

The case for this "relational" approach is especially compelling in instances of the terminally ill who begin to discuss suicide:

The vast majority of terminally ill patients who consider or discuss suicide do not kill themselves. For terminally ill patients, as for their non-terminally ill counterparts, talk of suicide is a signal to physicians and family that the patient's fears and needs have not been adequately addressed. Therefore, the first task for physicians . . . is to elicit the patient's concerns and try to relieve them . . . Most terminally ill patients find reasons to continue to live after their concerns or symptoms are assuaged.

(Reference omitted).

155. Emanuel, supra note 125, at 1808. Smaller percentages of patients and the general public thought that such discussions would have that effect. Id. "19.0% of patients and 26.5% of the general public thought they would change physicians if their physician told them he or she "had provided euthanasia or assisted suicide for other patients."" Id.

156. Cassell, supra note 137, at 246-47.

But these wise suggestions might not be universally taken after the institution of physician-assisted suicide programs. Two palliative care specialists recently expressed the apprehension that if euthanasia and assisted suicide were to become legal, some physicians might come to hope for their patients to die:

An appropriate response of health care professionals [to a patient’s request for euthanasia] is to listen carefully to patients’ feelings of despair and to embark with them on a shared journey of exploration about meaning, all the while reinforcing that, as people, they are of value no matter how frail and ill. Skilled physical care must always be provided. Can physicians continue to strive to better the lot of seriously ill and dying patients when a possible option is to act on their request to bring about death? At what point in care would death become a more attractive option to both parties?

Physicians and health care delivery systems face increased pressure to practise more efficiently and expediently and more cost-effectively. It is doubtful that physicians could continue to care for seriously ill patients who are not likely to survive without developing a bias toward their patients’ earlier death.  

6. What About Further Consequences to the Medical Professions?—Further consequences could be extensive. Studies suggest that a great many patients would request assisted suicide, and that a sizeable percentage of physicians would receive such requests. At
issue is nothing less than a fundamental reorientation of the ethics of the health care professions.\cite{161}

A physician who assisted in suicide would violate the Hippocratic Oath, in which the physician pledges: "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect."\cite{162} Regrettably, many graduating medical students these days are not asked to take the Hippocratic Oath. However, medical authorities continue to condemn assisting in suicide.\cite{163} The AMA's Code of Medical Ethics states that "[p]hysician assisted suicide is fundamentally incompatible with the physician's role as healer."\cite{164} A leading treatise on medical ethics states that a right to physician-assisted suicide has almost never been recognized in law or in codes of medical ethics. The traditional belief is that we should altogether prohibit such forms of assistance in health care while authorizing letting die in a certain range of cases. Standards of health care ethics from the time of the Hippocratic oath to the present strictly prohibit direct assistance in death, even if a patient has good reasons for wanting to die. For example, in 1991, the American Geriatrics Society opposed all physician involvement in killing or assistance in suicide. In an influential statement passed in 1973 and

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[W]e were struck by the gravity of what we had done. Doubts kept creeping into our minds. We each experienced a wave of disquieting emotion, feelings that we had killed this patient. . . . This anguish continued in both of us for several days. One of us sought counsel from a psychiatrist who reinforced our belief that we did the right thing.

\item Ludwig Edelstein, The Hippocratic Oath: Text, Translation and Interpretation, 3 (1943). See also Hippocrates, "Oath," reprinted in 1 Hippocrates 299 (W.H.S. Jones trans., 1923)("Neither will I administer a poison to anybody when asked to do so, nor will I suggest such a course.").


\item Council on Ethical and Judicial Affairs, American Medical Association, Code of Medical Ethics § 2.211 (1994)(further noting that the practice "would be difficult or impossible to control, and would pose serious societal risks").
\end{enumerate}
\end{footnotesize}
revised in 1988 and 1991, the American Medical Association Council on 
Ethical and Judicial Affairs allowed forgoing life-sustaining treatments 
but prohibited any "intentional termination of the life of one human being 
by another—mercy killing." Whether letting particular patients die is 
morally acceptable depends on several factors in this policy, but if the 
deaths involve killing—even in circumstances identical to those in which 
a patient is allowed to die—they are never justifiable.\textsuperscript{165}

Nursing ethics are equally decisive:

The American Nurses Association . . . believes that the nurse should not 
participate in assisted suicide. Such an act is in violation of the \textit{Code for Nurses} . . . and the ethical traditions of the profession. \textsuperscript{166} The 
profession of nursing is built upon the Hippocratic tradition "do no harm" 
and an ethic of moral opposition to killing another human being. \textsuperscript{166} Nursing has a social contract with society that is based on trust 
and therefore patients must be able to trust that nurses will not actively take 
human life.\textsuperscript{166}

A similar tradition guides the hospice movement, which was founded speci-

dically because of objection to euthanasia and in an effort to provide an 
alternative to it. The National Hospice Association has stated that eutha-

nasia and assisted suicide violate "all aspects of medical ethics."\textsuperscript{167}

Medical ethics may already be in a somewhat fluid state owing to the 
advent of managed care and changes in the law relating to withdrawal of life 
support.\textsuperscript{168} Medical academics at Hebrew University in Jerusalem, in a 
recent analysis of American practice, conclude that:

—"[d]uring the last few years, [American] physicians have become more 
concerned with societal needs than with their individual patient 
needs";\textsuperscript{169}

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  \item \textsuperscript{165} Beauchamp \& Childress, \textit{supra} note 163, at 226-27.
  \item \textsuperscript{166} American Nurses Association, \textit{Position Statement on Assisted Suicide}, 1, 3 (1994).
  \item \textsuperscript{167} Campbell, Hare \& Matthews, \textit{supra} note 140, at 38 (quoting the National Hospice Organization).
  
  A shift in the professional ethic about medical killing from a substantive conclusion 
against physician-assisted suicide or voluntary active euthanasia to one of nonjudg-
mental process, consent, and bureaucratic contracts signals a fundamental change in the 
moral boundaries and relationships between healers, patients, and society. Meanwhile, 
the United States is restructuring the clinician-patient relationship into new . . . 
configurations within powerful institutions in which clinicians are accountable for the 
health of both individuals and of populations on a finite budget . . . . The tide is running 
too fast to recalibrate this gyrocompass . . . .
  \item \textsuperscript{169} Charles L. Sprung, Leonid A. Eidelman \& Reuven Pizov, "Changes in Forgoing
—it has become much more common in recent years for American physicians to withhold or withdraw treatment in critical-care units;¹⁷⁰ and
—“[u]p to 79% of deaths in the ICU have been shown to occur after the forgoing of life-prolonging therapies. Treatments such as CPR, which initially were mandatory in all patients in the ICU, have become optional and have ultimately become unavailable for some patients.”¹⁷¹

Medical ethics would be further changed by physician-assisted suicide measures and, in many cases, supplanted by statutes and regulations. This should be objectionable to physicians and other health care workers because it means further legal colonization of their professions. It should be objectionable to anyone who believes that the historical traditions of the healing professions are a reliable guide to the practices consistent with good medical care. It will be objectionable to many: fifty-two percent of Michigan physicians in a recent survey said they would not participate in physician-assisted suicide even if it were legal.¹⁷²

Because it would be objectionable to many, it might result in a fragmentation of the medical profession. Fragmentation over this issue is already afflicting the profession of hospice workers in Oregon:

[The Oregon Death with Dignity Act] permits providers and institutions to opt out of participation in the law. Yet to many hospice caregivers this provision for dissent and conscientious objection appears to permit abandonment of a patient. Thus, an important policy and practical question for the hospice community . . . concerns whether fidelity and nonabandonment of the hospice patient requires some level of participation by the hospice.

. . . . [D]ifferences emerged not only among hospice programs, but also within them, with some caregivers expressing fervent opposition to participation and other hospice staff equally adamant in support of


¹⁷⁰. Sprung, Eidelman & Pizov, supra note 169, at 513. For similar observations, not specifically about critical care units, see Orentlicher, supra note 158, at 2103.


participation. Thus, the moral fallout [of the Act] . . . involved a collapse of the shared value framework that has guided hospice for the last two decades. * * *

. . . . At the very least, every hospice will undergo some internal discomfort and, at the worst, complete upheaval and long-lasting injuries . . . . [T]he nature and mission of the Hospice in Oregon will be irreversibly altered.173

The unity of a profession depends on its members’ acceptance of common purposes and principles. When basic divergences develop over fundamental and recurrent matters, the profession stands to lose its coherence. The crisis among hospices in Oregon could engulf all the healing professions.

These alterations could only be expected to grow deeper during the months and years after the adoption of an assisted-suicide provision. Some people profess contempt for slippery-slope arguments,174 but there is nothing foolish about fear of a slope when powerful ideological groups—internationally organized under the umbrella of the World Federation of Right-to-Die Societies175—are standing nearby waiting to give you a push. Here in the United States, suicide-assistance legislation has been proposed in many states in recent years.176 Were such a provision to be enacted, efforts to broaden it would follow soon after.

Some such efforts might succeed through challenges to the constitutionality of legal restrictions. A state has a well recognized interest in “the protection and preservation of human life,”177 but once it has vitiated that protection in an important way the state may find it hard to defend “technical” limitations against assertions of irrationality, arbitrariness, discrimination, vagueness, and infringement on the right to privacy.178 It may become difficult to defend a competence requirement against challenges brought “on behalf of” incompetent patients who “seek” death by proxy consent. Thus it might become legally permissible (even under certain circumstances legally mandatory179) to terminate the lives of the mentally
ill and those of other incapacitated persons.\textsuperscript{180} It may become difficult to defend the requirements which assure that the actual killing will be done by the patient rather than the physician. Proponents of assisted suicide will argue, as some have already argued in the \textit{New England Journal of Medicine},\textsuperscript{181} that such requirements are unfair to patients who are physically unable to commit suicide. Thus it may become legally permissible, and perhaps in some circumstances even mandatory, to commit euthanasia. A leading treatise on medical ethics states that "[i]t seems likely that assisted suicide will be the driving force behind efforts to alter rules against killing in medicine."\textsuperscript{182} A similar strategy is being pursued in Germany, where the German Society for Humane Dying takes the view that legalizing assisted suicide is a necessary step towards legalizing euthanasia.\textsuperscript{183}

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The ethical distinction, if any, between physician-assisted suicide and voluntary euthanasia has been debated extensively. Allowing voluntary euthanasia means that in many cases it will be easier to administer substances intravenously and thus improve the reliability of absorption, the rapidity of death, and the ability to titrate the dose to obtain the effect. Disallowing euthanasia would make physician-assisted death unavailable to patients who are competent to request assistance but physically unable to administer the necessary substances themselves.

(References omitted.)

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\item 182. Beauchamp & Childress, \textit{supra} note 163, at 227.
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\item [1]In China, there has always been the practice of "filial piety" in order to allow the aged to live happily in their remaining years. . . . But the epoch has changed, and ideas are changing. With the development of human society there comes new cultural thought—the life value theory. It says that hopeless life can only bring about suffering, so it is not valuable. . . . One hopes that by the efforts of the experts in medicine, ethics and law and the public, active euthanasia will become acceptable to the people of the world.
\end{itemize}

Things have reached the point in the Netherlands where, owing to the leniency of the authorities, the rate of voluntary, active euthanasia has increased rapidly in recent years. That practice accounted for at least 2.3% of all deaths in 1995. Half of all Dutch doctors have performed euthanasia. And, demonstrating that Holland has descended to the next level of horror, many of these deaths are involuntary or not based on sufficient consent. Fully 0.7% of deaths involved ending the patient’s life without the patient’s explicit, concurrent request. In 48% of these “no explicit, concurrent request” cases the physician had no information establishing that the patient had expressed a wish for euthanasia. It


In the interview study 2.3 percent of all deaths resulted from euthanasia, as compared with 2.4 percent in the death-certificate study. In 1990 the rates were 1.9 and 1.7 percent, respectively. Assisted suicide occurred in 0.4 percent of deaths in the interview study and 0.2 percent of deaths in the death-certificate study, as compared with 0.3 and 0.2 percent, respectively, in 1990.

This study is criticized, and its darker implications are explored, in Herbert Hendin, Chris Rutenfrans, & Zbigniew Zylicz, “Physician-Assisted Suicide and Euthanasia in the Netherlands,” 277 JAMA 1720 (1997).
186. G.H. Blijham, “The Person from Porlock. Ethical Issues in Terminal Care: The Dutch Perspective,” 3 Support Care Cancer 61 (1995). See also van der Mass, van der Wal, Haverkate, de Graaff, Kester, Onwuteaka-Philipsen, van der Heide, Bosma & Willems, supra note 185, at 1701 (reporting that 53% of Dutch physicians interviewed said they had performed euthanasia, and that 29% confirmed that they had done so during the previous 24 months).
187. See Keown, “Slippery Slope,” supra note 184, at 426-32:

If one includes cases in which the patient’s death is referred to as part of what the doctor aimed to achieve, then the total number of intentional killings by doctors [in the Netherlands in 1990] may not be far short of 26,350, in 15,258 (58%) of which the patient had not explicitly asked for death to be hastened.

Id. at 431-32.
188. See van der Mass, van der Wal, Haverkate, de Graaff, Kester, Onwuteaka-Philipsen, van der Heide, Bosma & Willems, supra note 185, at 1700.
appears that in some such cases the physician omitted to discuss the matter even with colleagues and nurses.190

According to leading Dutch authorities, "once one accepts euthanasia and assisted suicide, the principle of universalizability forces one to accept termination of life without explicit request."191 "[S]ome of the legal authorities in the Netherlands now openly condone non-voluntary euthanasia in certain circumstances." 192 A substantial body of Dutch medical opinion now favors the practice, when "quality of life" considerations suggest it, of terminating the lives of babies.193 This may in fact have been done in some cases.194

7. What About Implications for the Law?—Assisting someone to kill himself, like committing euthanasia, is an act of homicide. Except to the extent that the law may have been modified by modern reforms of the type discussed in this article, it constitutes a felony.

Although more and more of Anglo-American law has become plasticized, "fact-sensitive," malleable before circumstances, the law of homicide has not displayed such characteristics.195 Although more and more of the law has become "economic," accepting utility as a guide; and libertarian, accepting the consent of affected parties as the prime determinant, the law of homicide has generally remained firmly nonconsequentialist and moralistic. Anglo-American courts have not, for example, embraced the principle that appears in Dutch euthanasia cases accepting that a "force majeure" or necessity defense is established by patient suffering.196 Anglo-American law has traditionally been uncompromising about the defense of innocent human life.

190. See van der Mass, van der Wal, Haverkate, de Graaff, Kester, Onwuteaka-Philipsen, van der Heide, Bosma & Willems, supra note 185, at 1701-02.
192. Keown, Slippery Slope, supra note 184, at 439.

The Dutch Pediatric Association reports consensus among its members regarding the necessity to take the future quality of life into account when reaching decisions regarding the continuation or dis-continuation of life-prolonging treatment. The paramount importance of the discussion with the parents is stressed. Dissension exists regarding active euthanasia in the newborn, both opinions being respected. If dissension exists within the profession parents should be informed and if necessary referred to a doctor who shares their moral views.

194. See Simons, supra note 141 (referring to "incidents [of euthanasia] when people have not explicitly asked for death, like those involving a comatose patient or severely deformed newborn babies").
It has not accepted consent as a defense to the law of homicide. It has not accepted consent as a defense to the crime of mutilating assault. It has traditionally not accepted considerations of the “meaninglessness” or sufferings of a life as reasons for destroying it.

Proponents of assisted-suicide reforms thus aim to modify the law of homicide at its most fundamental level. Their proposed reforms introduce the principle that killing may or may not be illicit depending on the extent to which the subject may have gone along with the project and the extent to which the subject’s life was a worthwhile one. Accept these views and euthanasia is the next likely step. And further permissiveness about killing can be defended by developing more elastic ideas about what constitutes sufficient subject consent (for example in the case of minors or incompetents) and what constitutes a “meaningless” or insufferable life. What about a life that is perceived as not worthwhile owing to nonphysical “pain”: depression, for example? Or a life which is judged unsatisfactory according to criteria other than pain: criteria, for example, which look to the subject’s social integration (whether he is “wanted”). Or even criteria which look to where he stands in relation to the political order.

In the wake of the Holocaust, it was largely uncompromising Anglo-American legal doctrines which justified the Nuremberg trials and the international conventions which followed.

Undermine them at our peril.

8. What About Wider Social and Political Implications?—Perhaps a very large population would come to take advantage of the services contemplated by assisted-suicide programs. A recent study finds that 55% of HIV-infected patients had considered physician-assisted suicide for themselves. Substantial desire for death or interest in suicide has also been reported among cancer patients. What of the changes that may be wrought in the larger communities affected: on a town, for example, by the practice of suicide among some of

197. See Jay A. Jacobson, Evelyn M. Kasworm, Margaret P. Battin, Jeffrey R. Botkin, Leslie P. Francis, & David Green, “Decedents’ Reported Preferences for Physician-Assisted Death: A Survey of Informants Listed on Death Certificates in Utah,” 6 J. Clinical Ethics 149, 150 (1995) (“about 16 percent of decedents reportedly would have wanted either physician-assisted suicide or euthanasia”). A large increase in the number of patients seeking active euthanasia or physician-assisted suicide in the Netherlands is reported in van der Mass, van der Wal, Haverkate, de Graaff, Kester, Onwuteaka-Philipsen, van der Heide, Bosma & Willems, supra note 185, at 1700.


its residents? Some communities have reported the occurrence of "copy-cat" suicides.\textsuperscript{200}

And what of the effects on our public morality, and our sense of what we owe one another and what we stand for as a national community and as a wider civilization? The understanding that every man's death diminishes me; that human life is sacred; that social and political institutions have a trust looking towards the preservation of life—these elements have been hard won across history and have in this century been subjected to both violent assault and quiet vitiation. Alter practice as regards preserving life and you go a long way towards altering the principle that it deserves to be preserved.

The poor, the vulnerable, and the elderly are notoriously neglected in many parts of the health-care system. An important American Medical Association study released recently underlines this concern as applied to dying patients:

Hospice is mostly available to adults with . . . families with enough wealth to provide unpaid care indefinitely . . . . [The] homeless, [or] isolated . . . are regularly excluded . . . . * * * Expertise in pain management is often not available to patients, and comprehensive and enduring care is the exception. * * * In the current system of care, many dying persons suffer needlessly, burden their families, and die isolated from family and community.\textsuperscript{201}

An increasingly uncaring attitude towards the poor and the elderly can be detected today in many quarters. If assisted suicide were made legal, it is not unlikely that we would eventually encounter the argument, "if they are so badly off they can always get a physician-assisted suicide."\textsuperscript{202} "Why

\textsuperscript{200} See Block & Billings, \textit{supra} note 104, at 446:

Practitioners report anecdotally that recent attention to legislative proposals for legalization of euthanasia, the publication of \textit{Final Exit}, and widely reported cases of assisted suicide appear to be associated with increased frequency of such requests. These impressionistic data are reinforced by the evidence of recent increase in suicide rates among Danish patients and by a study that documented an increase in the frequency of suicide by asphyxiation, as recommended in \textit{Final Exit}, following the book's publication.

(References omitted.) \textit{But see} Brent, Perper, Moritz, Allman, Schweers, Roth Balach, Cannobio, & Liotus, \textit{supra} note 148 (unable to detect a "copy-cat" effect).

\textsuperscript{201} Council on Scientific Affairs, American Medical Association, \textit{supra} note 157, at 476, 477. The report notes that terminally ill patients "with serious pain might be effectively treated for an intent to commit suicide by having effective pain treatment." \textit{Id.} at 475.

\textsuperscript{202} \textit{See also} Compassion in Dying v. Washington, 79 F.3d 790, 826 (9th Cir. 1996) ("[W]e are reluctant to say that, in a society in which the costs of protracted health care can be so exorbitant, it is improper for competent, terminally ill adults to take the economic
respond to calls for better palliative care and pain management” and “why spend money for hospices: they are uneconomical because they will only diminish the numbers of people choosing suicide.”

Such consequences are especially likely where the medical profession is recruited into the projects of death. A policy generally applied by doctors, in the hospitals to which we entrust our sick friends and where we have our babies, will come to be wrapped with the authority of the physician’s prestige as a minister to the body and an anciently recognized guardian of health.

This prestige helped the Nazis conceal the Holocaust and surround it with an aura of respectability:

The key word in the healing-killing reversal [at Auschwitz] is Sonderbehandlung, or “special treatment” . . . . [T]his euphemism for killing insinuated something on the order of medical therapy, along with a standing that was “more legal than legal.” In general bureaucratic usage, “special” [the prefix] was the opposite of “regular”: special trains and regular trains, special courts and regular courts, etc. Special procedures were deemed necessary because of special conditions. The word not only detoxified killing and aided in this routinization but, at the same time, infused that killing with a near-mystical priority for the “Auschwitz self” in carrying it out. Killing assumed a certain feeling of necessity and appropriateness, enhanced by the medical, as well as the military, aura surrounding it.


203. See American Nurses Association, supra note 166, at 3 (“The availability of assisted suicide could foreseeably weaken the goal of providing quality care for the dying”); Hendin, Rutenfrans, & Zylicz supra note 185:

[E]uthanasia, intended originally for the exceptional case, has become an accepted way of dealing with serious or terminal illness in the Netherlands. In the process, palliative care is one of the casualties, while hospice care lags behind that of other countries. For the Dutch, accepting the option of euthanasia seems to be costing them the opportunity to take advantage of the developments in palliative care of the past decade.

204. Robert Jay Lifton, The Nazi Doctors: Medical Killing and the Psychology of Genocide, 150-51 (1986) (the bracketed words “the prefix” are also present, bracketed, in the original).