

Of the decade of the 1960's may, among other things, be designated as the abortion reform decade, the 1970's may appropriately be known as the euthanasia decade. Just as its earlier cousin called forth learned treatises in medicine, theology, philosophy, and the various "social sciences" so too has this decade seen a veritable flood of books and articles emerging mainly from the "death with dignity" or "right to die" movement. In some cases these are no more than the meandering tracts of propagandists or journalists looking for a book that will sell. In other instances physicians have expressed themselves concerning whether it is justified to remove the sick, the dying or simply the deformed and debilitated from life sustaining...

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1. The term "right to die" and its relative "euthanasia" is ambiguous, connoting several kinds of situations that are often lumped together. They can be summarized with the help of two sets of distinctions: 1) active/passive-referring to whether inducement of immediate death is involved or merely a "passive" refusal to apply or to continue life-saving therapy. Active euthanasia is often called "mercy killing." 2) voluntary/non-voluntary-referring to whether the bringing about of death is done at the request of the individual himself or at the insistence of others, e.g., the family. A distinction must also be made between cases where a person is reversably dying, where death cannot be avoided, only prolonged, and where the person is not dying but merely gravely ill and will die without treatment. In this review I am specifically omitting an issue that has engaged the attention of many philosophers, physicians, lawyers and policy writers in the last decade: the problem of infants born with abnormalities such that they need therapy that will save their lives yet leave them severely abnormal either mentally or physically or both. For reasons of space I cannot discuss this question here. Those interested might wish to see John Robertson, "Involuntary Euthanasia of Defective Newborns" *Stanford Law Review* 27 (1975) pp. 213-267; Phillip Heymann and Sarah Holtz "The Severely Defective Newborn: The Dilemma and the Decision Process" *Public Policy* 23 (1975) pp. 381-417.

medical care. Other physicians have argued for the right to kill such individuals for reasons of mercy and kindness—after all, we shoot horses don’t we?

Such activity in the popular and medical press was reflected as well in the legislatures of the various states. As this is written 18 states have, since 1971, revised their legal definitions of death to include as dead persons who have permanent death of the whole brain, even though their vital signs (heartbeat and respiration) are maintained mechanically. Ten states have gone further and legalized various mechanism whereby an individual acting for himself or, in some states, families acting for a member, might secure the removal of life support systems for gravely ill individuals. In the last five years similar legislation has been considered in virtually every state legislature. Given the slender margins in many of these votes the number of states with such laws is bound to increase. In still other states the courts have effectively legislated on the question-offering in some cases the kind of detailed policy guidelines that one would have thought were the proper province of legislative activity in a democratic regime. For example, in the most recent case New York’s appellate judiciary mandated the following:

Accordingly, we hold that the following procedure shall be applicable to the proposed withdrawal of extraordinary life-sustaining measures from the terminally ill and comatose patient. The physicians attending the patient must

3. The medical commentary on these questions is vast; for a useful bibliography of it see O.R. Russel, Freedom to Die (New York: Human Sciences Press, 1975).

4. For example in a 1970 study 3 percent of the physicians studied said that they favored the necessary changes to make active mercy killing legal and 27 percent said they would practice it if it were legal to do so. N.K. Brown, "The Preservation of Life" Journal of the American Medical Association 211 (1970) pp. 76-81.

5. This follows recognized medical criteria that were first enunciated in a famous 1968 report from a committee at the Harvard Medical School.


7. For example in the 1980 legislative session alone bills were filed in 18 states. By my calculations 22 states have considered such legislation in the last five years and another 10 have adopted some form of it.

first certify that he is terminally ill and in an irreversible, permanent or chronic vegetative coma, and that the prospects of his regaining cognitive brain function are extremely remote. Thereafter, the person to whom such certification is made, whether a member of the patient’s family, someone having a close personal relationship with him, or an official of the hospital itself, may present the prognosis to an appropriate hospital committee. If the hospital has a standing committee for such purposes, composed of at least three physicians, then that committee shall either confirm or reject the prognosis. If the hospital has no such standing committee, then, upon the petition of the person seeking relief, the hospital’s chief administrative officer shall appoint a committee consisting of no fewer than three physicians with specialties relevant to the patient’s case. Confirmation of the prognosis shall be by a majority of the members of the committee, although lack of unanimity may later be considered by the court.

Upon confirmation of the prognosis, the person who secured it may commence a proceeding pursuant to article 78 of the Mental Hygiene Law for appointment as the Committee of the incompetent, and for permission to have the life-sustaining measures withdrawn. The Attorney-General and the appropriate District Attorney shall be given notice of the proceeding and, if they deem it necessary, shall be afforded an opportunity to have examinations conducted by physicians of their own choosing. Additionally, a guardian ad litem shall be appointed to assure that the interests of the patient are indeed protected by a neutral and detached party wholly free of self-interest.

Alongside of this practical activity, the teachers of technical philosophy and theology have dispensed themselves at great length on these and related issues. Scores of articles have appeared in scholarly and semi-scholarly journals. Several anthologies devoted to these topics have been edited. Seven serious books have been

9. In the Matter of Eichner 423 NYS 2d 580; appealed as Eichner v. Dillon 426 NYS 2d 317; Interestingly the criticism of this decision has focused entirely on the supposed deficiencies in the policy enunciated with nothing said about the propriety of judges writing such legislation from the bench at all.


published on the question of euthanasia and mercy killing. 12 In several others large sections have been devoted to the question of a supposed "right to die." 13

Given the technical standards of their respective theological or philosophical disciplines some of these works are fairly good—others predictably poor. With one or two exceptions, however, they are all exercises in abstract reasoning, deducing from artificially assumed premises a supposedly "justified" moral conclusion that ought to be adopted by reasonable individuals everywhere. As examples of the dialectical skills of the authors the best of this work is interesting. It is also useful as a place to begin asking some of the basic questions about the types of cases and problems that one encounters when one asks about the "right to die." Nevertheless, with few exceptions no legislator, policy maker or legal draftsman is likely to receive any substantive help from this literature with questions he or she has or ought to have. Reading this material, it is as if the world of political and policy considerations either did not exist or could be subsumed under the moral rubrics employed by philosophers and theologians. 14

This was, of course, the same fantasy of abstraction practiced by John Rawls. But, unfortunately, unlike the case of Rawls there was in this instance no serious students of political philosophy and practice ready to point out the fallacies of such abstractions or the con-


14. Some writers like Flew and Glover expressly disavow any intention of giving policy advice and then proceed to argue for wholesale changes in moral beliefs and attitudes cf. Anthony Flew "The Principle of Euthanasia" in Dowling ed. op. cit. A few writers have considered the specific policy options available to those interested in the right to die but their proposals are so vague and theoretically weak that I have left them out of account here: cf. Barbara Youndorf, "The Declining and Wretched" *Public Policy* 25(1975) pp. 465-462.
verse limitations of the lawyers ready to deduce from rights like "privacy" or "self determination" a corresponding right to have oneself killed whenever one thought one would be better off dead.

Rawls' abstractions dealt with the politically familiar questions of liberal theory and welfare economics (from which most of his work was drawn). As such he was on ground familiar to many others and could be challenged by those with a firmer grasp of either the practical realities of economics or the theoretical presuppositions of liberalism. Where the questions of euthanasia and the right to die are concerned most of us are on unfamiliar ground, left to the guidance of our own intuitions and biases. These are hardly the basis of sane public policy and law. Thus, as a practical matter the legislators and their draftsman in the states have been left with the abstractions of the philosophers and the ill conceived and narrowly deduced recommendations of the lawyers and their students.

This is a major weakness of the current discussion of these issues. What it eliminates is any sense of the political dimensions of these issues as matters of public choice in a liberal regime. For example, in one of the earlier books on the subject Daniel MacGuire devoted a whole chapter to lamenting the "laggardly state of the law" that refuses to permit the mercy killing of the sick and the debilitated but often acts with extreme leniency toward the perpetrators of such acts. The rest of the book is devoted to a vaguely worded and emotionally charged appeal for the moral propriety of mercy killing, both on one's own request and on the request of a family for one of its members. Nothing is heard about the jurisprudential and philosophical background of the common law that is so laggardly in refusing to admit the newest morality into its province. We do not find a discussion of Locke's or Hobbes' rejection of suicide as a corollary of the doctrine of minimal equality-surely a core proposition in liberal theory and its jurisprudence." Nor do we find any serious discussion of how, as a matter of policy and statute we are to correct

this supposed deficiency in the law. How, for example, are we to define this supposed life not worth living so that others may use said definition to kill with impunity. This question our author never answers, content as he is to present heart-rending examples and moral advice.

But, until we have some idea of how far this killing would go, what the range of its victims would be and why, we cannot even assess this proposal. These are questions that one thinking of this as a matter of political choice needs to know. Until they are answered there is nothing here to discuss.

A similar lacunae is contained in an important article by a leading philosopher who concludes that the founding fathers would have endorsed an expansion of personal liberty such that one would have the right to ask to be killed. The so-called "inalienable" right to life was only intended to preclude other persons from deciding to "alienate" the individual's right to life, never to preclude his own choice to give it up. As long as the individual's choice is informed and voluntary it is to be protected by the general presumption in favor of liberty.

The technical skill displayed in this essay is excellent, but the attribution of this view to the founding fathers is simply asserted, never proven. Proving it, moreover, would be no easy task. One would have to dispute with Locke and Hobbes who both explicitly rejected the proposition that a man had the right to commit suicide. One would have to show how the founders could be supposed to have departed so markedly in this matter from their teacher in jurisprudence, Blackstone. Moreover, one would need to consider the question as one of public morality and virtue, as the founding fathers surely would have considered it. If one is to assert that such active mercy killing is publicly acceptable in a regime established by our founders on their principles, as this author surely wishes to hold, then one must wrestle with their concerns for public virtue, civil

18. Feinberg op. cit.
19. Ibid. pp. 118-123.
20. Blackstone, Commentaries on the Laws of England IV pp. 9-12; Blackstone's influence on the founders may have been exaggerated by later writers but that he was influential because he gave expression to their own ideas cannot be denied. See Dennis Nolan, "Sir William Blackstone and the New Republic" The Political Science Reviewer VI (1976) pp. 283-324.
equality and liberty. One cannot simply deduce from a concern for liberty alone the conclusion about publicly approved mercy killings that this author wishes to hold. 21

II

If the philosophers have failed to consider the political acceptability of their proposals so too have the lawyers. 22 But their reasons for doing so are different as are the deficiencies in what they do have to tell us. The voluminous legal materials concerning with the right to die have been largely of two types. First, are those commenting on one or another specific case (e.g. Karen Quinlan) in which these issues have been raised and discussed by a court or one specific state law. Since by design these articles do not raise broad legislative or policy issues they may be left out of account here. 23 A second set of articles directly argues for the enactment of a "right to die" either by legislation minded courts or, more properly, by legislatures themselves. Some of these studies only propose expanding the already acknowledged liberty to refuse a physician's advice to include the right to withdraw from or refuse medical care that is ex-

21. Feinberg quotes second hand a passage from Samuel Adams asserting the inalienability of man's natural rights. He does not seem to manifest any familiarity with the context from which it came or the Hobbesian and Lockean passages of which it is a near copy. More to the point, he seems not to have understood the essentially political import of the doctrine enunciated in the passage and his discussion suffers substantially from this oversight. For example, the one signer of the Declaration of Independence who wrote most directly on the subject, Benjamin Rush, explicitly maintained that suicidal persons must be prevented from acting on their impulses. Rush, of course, was not a philosopher or statesman of the stature of some of his fellows in Philadelphia. Nevertheless, he was at least as well acquainted with the principles of the so called "founding fathers" as any of us today. Unfortunately, Feinberg never mentions Rush, or any other founding father at all cf. Benjamin Rush, Medical Inquiries Upon the Diseases of the Mind (Philadelphia, 1812).

22. The legal literature on the subject is substantial. I have examined over 40 articles published on the subject since 1970.

pected to save one’s life. 24 This is what has been attempted in some states by the enactment of "living will" legislation. Existing legislation however almost always applies only after the patient has been diagnosed as suffering from a terminal illness and usually only takes effect after an explicit statement by the patient himself that he wants no more life-prolonging treatments. 25 The writers in the journals mostly wish to see this freedom expanded to include the right of any patient to refuse any therapy, even if he has not been diagnosed as terminally ill. They also usually wish to let family members decide these things for an aging parent or small child. 26

A second group of legal studies seek to demonstrate the acceptability of the "right to die" in its pristine sense of the right to have oneself or one’s child killed whenever the life in question is believed to be meaningless or miserable. These writers argue from general legal or "social" principles concerning privacy and autonomy and many conclude by offering us proposed statutes for legalizing mercy killing, either for adults or children. 27

While each of these groups of recommendations from the legal profession is different, they both manifest a certain narrowness of vision that is endemic in legal writing. They begin with what the author believes is an important legal assumption (e.g. the right to privacy) or sometimes simply his own value preference (claims about how awful life is for the severely retarded). From these assumptions they then seek to demonstrate how the law could be used to fashion a supposedly "proper" response, namely, one that agrees with their preferences. Precedents from other cases, dicta from appellate courts, opinions from famous jurists are all brought

26. e.g., Strand, op. cit.
27. William Baughman, Francis Gould, John Bruha, "Euthanasia: Criminal,
together, sometimes with real technical skill, in defense of whatever new right or policy a given writer wishes to defend. In this method the lawyers do no more than what they do in court; they defend a case. But just as they are not permitted to let questions of philosophy and political prudence enter into their courtroom strategy neither do most of them allow it to enter into their written essays. When they do so they transcend the limits of the law itself and begin to engage in political philosophy.

The omission of political and policy questions from these legal essays is their chief weakness. We may demonstrate it by analyzing some representative examples, beginning with those who wish to legalize outright mercy killing. In two important papers Arval Morris, Professor of Law at the University of Washington, has defended mercy killing both for adults and children. In his earlier paper Morris only defends the acceptability of "voluntary euthanasia" by which he means killing a person at his request, or at least on the basis of a previously expressed desire committed to writing in the form of a legal document stating that if he is ever in a certain condition he wishes to be killed.

In his second paper, which defends the killing of infants and children, the requirement of voluntary patient consent necessarily vanishes. We may therefore reasonably conclude that Morris would be willing to let the same logic that applies to children apply to incompetent adults, i.e., if we know that they have a "life not worth living" we will do them a favor by terminating it. Since they cannot tell us what they want, we ought to presume that they would be "reasonable" and want what is "good" for them.

But who are these people who can be benefitted by being killed. Morris' answers in both his proposed euthanasia and infanticide laws are almost identical so we may quote only one for our purposes. After stating that a "qualified patient" is one whom two physicians certify to be in an "irremediable" condition, he defines this condition thusly:

"Irremediable condition" means either (1) a serious physical illness which is

diagnosed as incurable and terminal and which is expected to cause a person severe distress or to render him incapable of a rational existence or (2) a condition of brain damage or deterioration such that a person's normal mental faculties are severely and irreparably impaired to such an extent that he has been rendered incapable of leading a rational existence.

As a proposed law this is so poor as to be astonishing. Nowhere is the key concept "rational existence" defined with any precision. No clear lines are drawn to mark off acceptable from unacceptable behavior. No criteria are offered for those who will have to implement such a law. Nothing is offered here except utterly vague claims about the lack of a "rational existence" and the suffering involved in such a life. How physicians are to make such a choice is never mentioned nor is the more important question of why they should make it at all explored. After all, there is nothing in a physician's usual training that enables him to know anything about the deepest philosophic questions of a "rational existence" and the meaning of life. But who is capable of answering these questions in any definitive way? Are the philosophers, in whose province these questions have traditionally fallen, capable of this? Those familiar with the current philosophic scene, beset as it is with analysis and abstraction, would hardly wish to turn there for guidance.

The problem is that modern politics and philosophy have systematically excluded these questions from public life. They may be discussed publicly, but only as matters of personal preference or religious opinion—not as matters of law or public choice. Morris, however, wishes to adopt some public standard, the "rational existence" as the sub rosa qualification to the presumed equal minimal worth of human life. Instead of all men being endowed with such a right to life we now have "all men not determined by a couple of doctors to be incapable of a rational existence..." In this sense Morris and his followers wish to take a path that the founders of liberalism specifically rejected.

Unfortunately, Morris seems oblivious to the serious implications of the fundamental departure from our political tradition which he

30. If one reads over the literature purporting to tell just who should be candidates for euthanasia, either active or passive, one is distressed to find the relentless vagueness of the assertions made therein. Morris is simply one representative of a much broader class.
endorses. Lacking any public orthodoxy on the matter of a "rational existence" citizens are left to their own resources of religious opinion, personal experience and even prejudice. As a public matter, even the most disciplined philosophic inquiry is reduced to the level of opinion in which one belief is as worthwhile as any other. Such a state of affairs leads directly to the most pervasive and minimal injustice possible in a liberal regime—the refusal to treat similar cases similarly. If one set of physicians decides one way under Morris' proposed law and another set decides another way with a similar case how can that even be minimally fair? Morris seems oblivious to the facts of human experience and empirical data that suggest that this is almost certain to occur under his law and he offers us no way to avoid it or even minimize its effects. 31

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Furthermore, given the fourteenth amendment and the reigning court interpretations of that text, it is almost certain that, as a matter of practice, the operations of such a law would be expanded indefinitely to cover the severely retarded and the chronically ill. In both of these categories there are hundreds of thousands of individuals in our public institutions that are demonstrably incapable of a "rational existence" under any standard that would include the cases Morris wants considered for mercy killing. It requires little prescience to conclude that the judiciary or the bureaucracy is unlikely to allow such an "inequitable" situation to go unremedied for long. From their point of view, moreover, it would be positively unjust to refuse to grant the benefit of death to all those who qualify under Morris' proposal.

For all their technical skills, necessary in a regime of written law, lawyers and jurists operate within a context that systematically excludes consideration of the nature of the regime itself and the mat-

31. Cf. Diana Crane, The Sanctity of Social Life (New York: Russell Sage, 1976). Crane found that the prevailing basis of making these judgments for death was an individual physician's assessment that a particular person could not live a "useful life" any longer, even with treatment. In an unpublished paper Joy Skeel and Ron Benson have documented an extraordinary degree of variation among physicians in making these judgments. Skeel and Benson "Medical Indications for Postponing Death."
ters of its governance. The essays under review here amply demonstrate this truth. None of them even hints at an awareness of the political and prudential questions that are at issue in proposals such as Morris'. Would we really find a regime that embodied his principles better than what we have? Would its citizens be more disposed to mercy and compassion, the very virtues that Morris appeals to? Is there any way to embody in written law a judgment such as Morris wishes to make? If not, would we really be satisfied to leave such judgments to the arbitrary whims and prejudices of individual physicians or whoever else might make such decisions?

In essence Morris gives the policy maker or the legislator what he wants most—a model he can copy. But he nowhere gives him what he most needs—a transcendent analysis of the deepest political issues at stake in this problem. Such an understanding would illuminate the choices before him and their relation to the regime in which he legislates. Without this his recommendations remain removed from the real needs of the time. Yet they remain dangerous precisely because of their superficial character; they are easily understood and they are specific, two qualities that may tempt us into utilizing them.

Morris' recommendations are hardly the only ones around but they are representative of the case for mercy killing that is being made in legal and policy-oriented journals. Some writers offer no standards for the application of mercy killing at all. They merely argue for a repeal of all legal restraints on suicide and assisting in suicide and claim for a man the right to dispense with his life whenever he wants to. Their only caveat is a court hearing to determine that the man "knows what he is doing." Others merely assert that there is a "fundamental right to choose death whenever one wants to" (a bill asserting such a right was introduced into the Wisconsin legislature in 1975). On these grounds anyone can get himself killed for any reason. Denying the exercise of such a right violates liberty it is said and, like denying abortion, "consigns an individual to a life he does not choose to lead." Unfortunately such a

32. Steele and Hill op. cit., Cole and Chea op. cit.
33. Ibid.
35. Degado op. cit.
right as this has never been found in the common law and was, in fact, rejected by the founders of liberalism. The questions that such facts ought to lead these authors to address are simply ignored by them.

The studies just noted all defend the active mercy killing of some human beings. As such they are the far edge of the current discussion in the law and policy journals regarding the "right to die." More restrained and more numerous are those articles devoted to the analysis and defense of one or another version of the so-called living will in which an individual declares in advance that under certain conditions he wishes to have medical care withheld or withdrawn. The literature defending the propriety of such a document and the policy that goes with it is enormous. Nevertheless, this discussion too ignores the more fundamental questions at stake in the rush to deduce from other "rights" such as liberty or privacy a policy favorable to the given author's preferences.

Consider, for example, one of the most careful and technically proficient of these studies, by Ronald Kaplan. Kaplan's study was a valuable summary of the legislative activity in the various states concerning the right to die up through early 1976. The precision of his analysis of the bills from the various states is excellent. He painstakingly surveys their virtues and their faults, seeking the best course from the many presented. Should a family be permitted to withdraw treatment for one of its members or should we adhere strictly to a requirement of consent from the doomed individual himself? Must the candidate be terminally ill or merely incurable (two very different things). He surveys these and many other distinctions present in the discussion of these issues. Finally he gives us his own model bill for future legislative draftsmen to consider.

This absorption in detail, however, is useless unless fundamental issues of political acceptability are answered. In this territory Kaplan is, unfortunately, nowhere to be seen. His discussion of a "right to die" takes up one page of a lengthy article. In it he concludes that perhaps there is no legally mandated and enforceable "right to die." Whether there is or isn't wouldn't matter, he asserts,

because his proposal is safe unless it could be shown to violate some constitutional provision. Here he runs squarely into the "right to life" which is usually interpreted in such a manner that it might prohibit activities of the sort he wishes to endorse. Undaunted, he offers us a stunning refutation of this problem in the following passage which is the complete substance of his thought on the question:

"The logical right to consider is the right to "...life liberty and the pursuit of happiness..." Would a euthanasia statute violate a federal constitutional "right to life"? It might if the right to life were absolute. But clearly it is not absolute. Exceptions have been carved out in a number of areas, and therefore, the existence of a "right to life" should not necessarily preclude the existence of a "right to die" as well."

This is it. No discussion of the meaning of a right to life in a liberal polity. No references to the understanding of such matters by the great political philosophers such as Hobbes or Locke, who specifically held that suicide was not among the natural liberties of man, and not unreasonably might have thought that Mr. Kaplan's "right to die" involved the same problems as they saw with suicide. For example, it might reasonably be concluded that a person who wishes to die by shooting his brains out and another who merely wants to stop taking his medicine are really doing what amounts to the same thing. If so might not Mr. Kaplan be trying to make a distinction where the greatest political philosophers did not make one? Perhaps Mr. Kaplan's actual legislative proposal escapes these problems. If it does he never shows us precisely how it does this. He does not even seem to recognize a fundamental problem at this point.

Kaplan's oversight of fundamental problems is endemic in the legal literature concerning the right of the individual to refuse life saving medical care, but it is not universal. In clearly the best article on the subject professor Norman Cantor offers a lucid discussion of the very issues Mr. Kaplan dismisses so cavalierly. His review of the statutory and common law principles relevant to the question and the applicable case law is useful and often penetrating in legal terms. His constitutional commentary is sound if we grant the often erroneous claims of the Supreme Court as the "lawyers test" of what

39. Ibid., p. 59.
the constitution means today. His argument is really quite simple. Given the fact that at least one important aspect of personal liberty, religious conscience, is often involved in these situations and that another right, privacy as defined by the courts, is arguably present in every such case, then there must be some public interest at stake if we are to interfere with a personal choice to refuse life-saving medical care.

He discusses several possibilities, rejects all of them as not universally applicable, and concludes that, except where specific harm to third parties results, interference with a free choice to die is both unwise as policy and forbidden by constitutional mandate.

For our purposes only one of these "interests" is germane—the so-called "sanctity of life." It is, however, a crucial consideration and Cantor's flawed resolution of this issue renders his more practical conclusions questionable. He admits that this principle is not a vague theological tenet. Rather, "it is the foundation of free society." This, I believe, is true. But Cantor merely asserts it, and does not demonstrate why and how it is true or what its truth implies about public policy in a free society. Had he undertaken this further investigation he might have seen the problematic nature of his resolution of the tension between life and liberty in favor of liberty. The most insidious assault on the principle in question certainly would be a legally recognized standard defining some lives as not worth living anymore and therefore not worth the same kinds of protection as are afforded all the rest of the members of the society. Nevertheless, Cantor's solution leads directly to this result unless he is willing to sanction respect for an individual's expressed choice for death in every conceivable case. Barring this he must either tell us when such choices need be respected and when not or else he must let the courts develop a common law standard.

Cantor seems to be led astray by his analogizing of these cases to religious martyrdom. This is an easy mistake to make since the most notorious instances of refusal of life-saving medical care have often involved sincere religious devotees. Yet it is a mistake to think that most situations, as they actually occur, involve the noble ideals

41. Ibid., p. 244.
42. I have worked out some of these central ideas in another forthcoming paper, "Liberalism, Public Policy and the Life Not Worth Living: Abraham Lincoln on Beneficient Euthanasia." American Jour. of Jurisprudence (1981).
43. Ibid. p. 238-246.
of religious conscience. More likely will be those who simply do not wish to live anymore and those who have been "sold" on quackery instead. Perhaps we should respect these choices too, but Cantor's analogy to religious devotion does not give us any reason for doing so.

The same defect appears in his attempt to distinguish the refusal of life-saving medical care from suicide. Prima facie the two appear very similar, with a similar intent to die. Nevertheless, Cantor argues, they are, in most cases, quite dissimilar. Firstly, suicide usually stems from some form of mental illness, broadly understood. Such a disorder produces either rash desire to die or a distorted "cry for help." In either case the choice for suicide is hardly worthy of respect. Such is not the case with refusal of treatment since, he argues, it is usually motivated by religious conviction. However, this is doubtful empirically and unproven theoretically. It is hardly likely that Cantor would sanction a policy of non-intervention when a "Jim Jones" instructs his "religious" followers to kill themselves. To believe that all those who will die under the religious banner are patterned after St. Anthony is simply false.

Moreover, as he admits, there are those whose suicidal acts are every bit as sincere as are the conscientious treatment refusals he wishes to endorse. He is thus led to conclude that their liberty to commit suicide ought to be respected. Unfortunately this is a policy of selective suicide that is almost certainly incapable of being transformed into a workable public policy. In any case, even if such judgments could be made they would entail the announcement of standards for deciding when the intention to die was reasonable (i.e., when it is reasonable to conclude that life is not worth living). Such standards would be a direct repudiation of the supposed inalienable right to life that even Cantor seems to admit is crucial in a liberal regime.

If Cantor's troubled resolution of the problem of suicide is problematic, his discussion of mercy killing is patently incapable of sustaining the position he wishes to hold. He proclaims himself bothered by any policy that would legalize mercy killing, even at an

44. Ibid. pp. 254-258.
45. Ibid. p. 256.
46. Ibid. p. 258.
47. Ibid. p. 261.
individual's own request. To adopt such a policy, would, he admits, entail a wholesale revision of the criminal law, which has heretofore held that consent of the victim is not a defense to a criminal charge. Furthermore it would entail official recognition of the worthlessness of some lives. Despite these damaging admissions he considers the case for voluntary mercy killing "appealing" and he cannot offer any coherent reason for opposing it, except his own professedly idiosyncratic "uneasiness." 

Given this sheer relativism, it is not surprising that Cantor cannot find any principled distinction between what he does propose and the outright killing of the sick and the debilitated. All he can refer to is the fact that the law could consider mercy killing to be murder while some courts, at least, do approve of a refusal of life-saving medical care. By extension he thinks we ought to respect all decisions to refuse treatment, from anyone, for any reason. Since mercy killing remains illegal we should respect that judgment too. This is positivism at its worst. Unable to offer any principled distinction between the two he falls back on the mere fact that, perhaps inconsistently, contemporary jurists consider them different.

Cantor's article is clearly superior to most of the other journal literature on the subject. Even he, however, displays major weaknesses on both substantive and policy grounds. By not probing his own contention that the "sanctity of life" is fundamental in a free society, he is led to overlook the ways in which his own proposals contradict the essence of this principle. He merely states that such a principle is important and never offers any serious articulation of the meaning of the principle or the ways in which it is important or ought to be reflected in policy. On the policy level he fails to provide what good law surely ought to provide—substantive guidance to those who must act on his recommendations or where necessary enact them into the statute books.

III

In the literature on the "right to die" only two books may be said to go beyond the generally superficial level of analysis just noted in

48. Ibid.
49. Ibid. p. 260.
50. p. 260-263.
the journal literature. The first of these is Robert Veatch’s 1976 statement, *Death, Dying and the Biological Revolution*. His book treats more than just the right to die. Chapters are also included on the questions of the proper definition of death and the morality of withholding a terminal diagnosis from the patient and/or family. But there are seven substantive chapters that do discuss the question of a right to die in its many forms and ramifications. More importantly, for our purposes, he does offer clear, detailed policy recommendations for public and legislative consideration.

Veatch’s discussion is helpful in several ways. He is clearly concerned to provide practical guidance and his writing manifests that concern. Moreover, at several points he lets practical considerations, not abstract philosophy, decide a crucial matter (e.g., the difference, if any, between active mercy killing and the withdrawal of admittedly life saving therapy, pp. 96-99). This is surely a more prudent approach if one really wishes to offer policy guidance than is the alternative engaged in by many philosophers and theologians. He also understands the relevant legal cases and principles and refers to them frequently (pp. 116-131). But he is not slavishly attached to these cases as a jurist would be. Rather, he uses the cases as helpful evidence for the existence or lack thereof, of a social consensus on certain questions. For example, the unanimous opinion of courts refusing to let a parent forego life-saving treatment for his young child is understood, rightly, by Veatch to signify a deeply held and widely shared opinion that ought to be incorporated into policy.

At a somewhat theoretical level he attempts to formulate his own policy proposals with reference to what he believes are widely shared and legally defensible views. He does not appeal to such new and vague rights as “privacy” nor to such as yet unrecognized rights as “the right to die.” Generally he stays within recognized boundaries and a common sense approach to what might be feasible as public policy. Analogies are drawn to other areas of law and public policy and relevant materials from medicine, psychology, and philosophy are consulted, where necessary and useful (pp. 164-203).

In short Veatch appears to have met the need of the legislator for a non-technical analysis that combines respect for public opinion, a knowledge of the relevant legal framework and appropriate precedents and a willingness to consider the policy dimensions of the problem and offer solutions to it.
This much said, it seems to me that Veatch is alternatively too broad and too narrow in his focus. These difficulties render the justification for his proposed resolution of key issues very tenuous and unpersuasive at best. Following this, his specific proposal itself is so vague as to be almost meaningless.

Each of these problems deserves comment.

First, Veatch's proposals stand in that middle ground between actual policy drafting and abstract theory. Nevertheless he has ignored the necessity for a firm philosophic grasp of the nature of a liberal regime if one is to offer wise guidance to the practical politicians in such a regime, especially in such a momentous area as this. In so doing he offers us shortsighted and ultimately very problematic policies that, when considered soberly, may lead to more mischief than they could ever hope to correct.

Consider his specific recommendation in favor of a patient's right to withdraw from recognizably life-saving medical care. Veatch derives this policy from the legally recognized right to refuse medical care (pp. 197-203). Such a liberty as this is surely a relevant consideration in the formulation of policy. But it is limited. What about the basis of such judicial opinions as he cites in support of this policy? Surely they did not spring full blown like Athena from the minds of our jurists. Would it not be better to consider this as simply one aspect of the personal liberty that liberal regimes supposedly protect and foster?

Such a move as this, however, would force Veatch to offer the reader an understanding of the principles on which the regime itself was founded, not merely those currently in fashion with jurists. Taking this approach, though, would generate serious problems for Veatch and his project. In the first place, it would necessitate a consideration of the "right to life" or, alternatively, the "equal minimal worth of each human being" as a principle which is certainly as central in the foundation of liberalism as is the concern for personal liberty that Veatch espouses. Veatch does not discuss this "principle" in any serious manner. If he did I think the superficial plausibility of his recommendations would disappear quite rapidly.

At one point Veatch attempts to distinguish his recommendations from those who wish to establish some "quality of life" or "life not worth living" standard for determining which lives should be saved and which should not. But his own view moves almost imperceptibly into this very position. Surely Veatch would not respect any request from any individual for withholding or withdrawing medical
care that was necessary to save the person's life. He explicitly wishes to respect only those requests that are "reasonable." Veatch tells us that this judgment cannot be made except in the context of specific choices by specific individuals. Such an evaluation must of necessity evaluate the choice itself: "Is it reasonable?" I submit that, as a practical matter, this is the same as asking whether or not the individual has or will have after treatment a "life not worth living." Only after we have judged that it would be reasonable to conclude that he would have such a life would it then be justified to conclude that his decision to forego treatment was also reasonable.

As noted above, however, liberal regimes have consistently denied that any human life was this worthless. More to the point they have asserted that to ask for such a standard as would be required in these cases is to deny the principle of equal minimal worth on which liberalism is based. Veatch nowhere manifests any awareness of these problems. But he is clearly in trouble here. If he tries to provide us with a clear standard for judging when a decision to alienate one's right to life by refusing treatment is "reasonable" then it seems that he is willing to deny the principle of equality in favor of the concept of a "life not worth living." On the other hand, if he fails to give a standard, either because it is impossible to frame or because of a prudent regard for the evil it might lead to, he runs into even greater problems. In the absence of a standard the subjective beliefs of individual physicians would determine whether a given choice is "reasonable" and thereby merits respect. Aside from the fact that this still involves the "life not worth living" judgment, made now on an ad hoc basis, it is hard to see how this result adheres to even the formal requirements of fairness and consistency that are espoused by contemporary policy analysts, including Veatch himself (pp. 167-173).

Veatch may have been brought to a deeper consideration of these problems had he been willing to consider more forthrightly the question of suicide. He contents himself, however, with a very brief attempt to distinguish between the cases he is considering and suicide (pp. 114-116). He offers four reasons for doing so, none of which are wholly successful. He first asserts that suicide does involve the "life not worth living" judgment while his proposal does not, a claim that we have just seen is very dubious. Secondly, he believes that suicide is an action causing death rather than simply discontinuing treatment, where a disease causes death. It is hard to see what difference this would make if the intention of the prospective victim is iden-
tical. Thirdly, in the case of suicide the individual acts for himself, while a physician is almost always involved in "pulling the plug." If anything, this fact ought to make suicide more acceptable. If it is true, then suicide involves liberty in its pristine sense and does not require the involvement of another person in a dubiously justified moral act. Nevertheless, any consideration of the problems of suicide prevention and the involvement of other persons and society in that process will demonstrate that Veatch's assertion on this point is far from correct.

The final reason offered may give us the reason we seek, but only in some cases and only if Veatch revised his own proposals substantially. Suicide involves many more people than those who are actually dying, while we could keep treatment refusal limited to those who will die anyway and for whom treatment will only prolong the inevitable. Despite some passages which seem to support such a limitation, it is not clear that this is what Veatch wants. For example, he cites with obvious approval many cases in which such a limitation of his general policy to only those who are actually dying was not followed, where the treatment would actually have saved a life not merely postponed an already inevitable death (pp. 117-122, 194-201). Furthermore, the specific text of his suggestions for legislative consideration makes no mention of any such limitation.

Despite his attempt, the problem of suicide cannot be so glibly dismissed from a serious consideration of Veatch's proposals or the problem with which he wrestles. Suicide raises central questions, both for philosophy and for political practice—a fact acknowledged by the discussion of suicide in the works of most of the greatest political philosophers. Had Veatch meditated more seriously on the problem he might have been led to see the essential judgment in suicide, concerning the worthlessness of life, is present in many if not most of the cases he wishes to endorse. This might have deepened his inquiry into the nature of this judgment and its problematic inconsistency with the principles on which his own polity was founded. He would then have offered us a more nuanced account of the relation between the liberty which he so ardently defends and the principle of equal minimal worth which he ignores.

The difficulties with the details of the "workable public policy" which Veatch tries to formulate stem directly from this philosophic oversight. His intention is generally correct: to formulate a policy that is legally sound and which gives directions to the agents involved in the situations with which it is concerned. Furthermore he
seems to stay away from the most controversial cases, those involving children (pp. 124-131).

The essence of his proposal is captured in this one statement: "While it may not always be moral to refuse treatment the principle of individual freedom requires that it should be legal for any competent dying patient to do so" (p. 198). As noted before it is not clear that Veatch really does wish to limit himself to persons who are dying. If he does not, then the problems referred to there will remain. Even abstracting from those theoretical problems, this formulation will not do. How the agents involved are to assess competency is never discussed. It would, however, seem to be necessary to evaluate the choice offered by the person. For example, it seems reasonable that we should refuse to consider someone competent who wanted to be drawn and quartered. Similarly would not competency in Veatch's proposal be judged in the light of the reasonableness or unreasonableness of a given choice?

Such a judgment as this, however, necessitates some standard of review beyond the mere presence or absence of a verbal refusal or assent by the individual patient involved. If, as Veatch wishes, we exclude our own moral opinions from consideration, then he never gives us any indication of what this alternative standard for "reasonableness" might be. His own moral opinion of what constitutes reasonableness at this point is so vague as to be both useless as substantive policy and dangerous in the wrong hands.

A reasonable person would find refusal unreasonable...if the treatment is useful in treating a patient's condition (though not necessarily life saving) and at the same time does not give rise to any significant patient centered objections based on physical or mental burden; familial, social or economic concern; or religious belief (p. 112).

This clarifies nothing. Key terms are left undefined. The nature of the "burdens" and "concerns" that are supposedly relevant to the judgment in question are never specified, nor is the amount of significance which they must have to be determinative ever delineated. Applying such a statement in practice would be next to impossible. Writing it into law would invite the worst abuses of judicial discretion and case by case chaos.

IV

Despite its limitations Veatch's book was useful when it appeared.
But it has now been clearly surpassed by what, in my estimation, is the best single work in the field, at least from the political and policy point of view: Germain Grisez and Joseph Boyle, *Life and Death with Liberty and Justice*. In view of its size (463 pages with 46 pages of notes) and its importance, the rest of this review will be devoted to a critical discussion of it.

The virtues of this work are evident even in the title. Here are two committed Thomistic philosophers who have managed to do what more secular writers have not—separate their own moral opinions from the beliefs and policies that they believe ought to govern citizens in a given regime. They do not draw their standards for good law from the pages of St. Thomas or from the revered texts of Catholic moral teaching. Rather their standards are drawn sensibly from what they conceive of as a "working consensus underlying American government." Moreover they do not merely assert the existence of such a consensus, nor do they try to delineate it from the opinions of jurists (and then, circularly, try to derive good law from that). Rather they begin with a fairly brief but detailed discussion of just what they believe is contained in this "American consensus." On this basis then they consider the questions of the definition of death, suicide, euthanasia, (both voluntary and non-voluntary, active mercy killing and passive withdrawal of treatment). They conclude with two chapters in which they delineate in concise fashion their own moral position which, paradoxically, leads to a much more stringent private morality than they think necessary for public policy and to a defense of the liberal regime in which such supposedly immoral acts can be performed with impunity.

The key to the authors' whole argument lies in their understanding of the "American proposition." For them this consensus is largely subsumable under the phrase "liberty and justice for all." More specifically the justice they are interested in is "the justice a fair constitution should embody and will communicate to laws made in accord with it" (p. 25). This could be understood in a more abstract and prescriptive sense than they wish. Translated, I think a fair interpretation would be that American government seems to rest on two minimal principles: 1) a concern for personal liberty of thought and action, and 2) a concern that everyone be treated fairly by government (pp. 39-50).

Just law begins with the consent of the governed, not necessarily consent to every act of government (e.g., in foreign affairs) but to the constitutional framework of republican federalism which makes
law and policy possible and responsive to popular will. But according to Grisez and Boyle, consent is by itself insufficient to produce just law. To assume this would be to derive "ought" from "is," a supposed error that no self-respecting theorist ought to make (p. 27). But if consent by itself is insufficient, whence comes the necessary additions by which we may judge its adequacy? Here, despite their protestations to the contrary, they back into a notion similar to Rawls' "primary goods." What makes consent moral is the citizens' concern for certain things which have "an inherent and common appeal to reasonable persons."

The moral justification for consent begins to appear if one notices that there is nothing irresponsible or arbitrary in the concern of people for basic goods such as life, liberty and the pursuit of happiness. Security in such goods is not mere subjective demand. It is a requirement entailed by reasonable care about them, not only as they pertain to oneself but also as they can be shared in by others-including in others both those for whom one especially cares as one's family and friends, and also those for whom one has no more but also no less than the respect for any fellow human being from whom one would wish a like respect towards oneself (p. 28).

Government is said to derive its legitimacy from its similar concern for these basic goods, chiefly life, liberty and the "pursuit of happiness," the only such goods specifically mentioned in the text.

From the vantage point of this insight it is clear that the idea of fundamental rights and the idea that one's consent is necessary for the legitimacy of government are closely related. One ought to consent to government because it is more than a device for getting what one wants, more even than a common facility by which all living in a certain place can obtain together what they want individually. Government is required to secure rights. Rights are grounded in goods of persons which are prior to their merely factual desires-prior in the sense that goods make the desires reasonable as well as stimulate them psychologically (p. 29).

As a description of the conventions that form the basis of the American regime, this presentation has much to be said for it, especially if the actual "goods" considered are limited to those actually mentioned in the text and not expanded like Rawls to include economic goods. Such a description, however, ignores the justice of the republican form of government itself. This in turn leads to a curious, but still distinctly modern understanding of the common
good as an aggregate of individual goods pursued in common (pp. 35-38).  

The account so far is not perfect but the central problem in their presentation comes in their description of justice. They have just concentrated on political goods as discrete entities like Rawls' "primary goods"—things like life and liberty. But they then assert that justice is the "chief common good" and proceed to give a structural account of justice as a sort of basic fairness in governmental actions. "Equal protection" and "due process" basically define "fairness" and together they delineate the essence of our constitutional framework (pp. 39-44). But this "formal," in the classical sense, account of justice needs supplementing from somewhere. The form must embody something worthwhile if it is to be worthy of support. The authors recognize this but their attempt to specify what this might be is still loose and procedurally oriented.

Another way of articulating the point we have just made is that the fairness which constitutes a political society in justice is no more and no less than equality in human dignity and mutual respect which is dictated by the golden rule or principle of universalizability (p. 41).

Thus, justice seems to require some adherence to the notion of equality in human dignity which liberal government supposedly presupposes. But precisely what this dignity might be and what kind of limits it might place on government are never delineated. Furthermore, the authors specifically would not include in "dignity" anything approaching a "sanctity of life" principle, even one nuanced to take account such practices as capital punishment and war. They frankly assert that any such principle necessarily conflicts with the required a-theological character of liberal regimes (pp. 48-49, 458-461). The assumption being that any such principle is irremediably theological. Justice, not life itself, is the good directly at stake in political society. If a society could exist without any laws prohibiting homicide then there would be nothing wrong in that society leaving all its members equally unprotected (p. 311). This seems patently inconsistent with the asserted moral basis of political consent in the founding of democratic regimes, namely, the "inherent appeal" of certain goods to the fostering of which government must dedicate itself. Nevertheless, this may not be its chief

weakness. What it does do is lay the basis for a skewed treatment of specific policy questions later on in the book.

By making these moves Grisez and Boyle set up a flawed and one-sided dichotomy. They assert that liberty and justice are the organizing principles of the regime and in the making of policy these two principles are to be played off against each other. But this sets up a good of structure and procedure (justice) against a good of substance (liberty). In such a dialectic other goods against which liberty may be in conflict will come off rather badly provided the liberty to dispense with these goods can be exercised in a procedurally just manner.

This understanding of the organizing principles of the American regime is fundamentally just asserted, never argued for at length and in dialogue with alternatives as are their policy proposals which are developed in the rest of the book. This is unfortunate. What they need to show is why liberty and justice, defined as they do, should be the "essential common good" to be taken into account by policy makers and legislatures. Why should this be taken for granted when, for example, Locke and the founding fathers always spoke of the essential core of liberalism as containing the tension between equal rights to life and liberty? Taking this as a starting point one would have thought that the most natural problematic would have been the tension between a view that held that the liberty of individuals and families to dispense with life when they saw fit should be given preference whenever it applies and a view that held that innocent life must be preserved in every circumstance. Though such a dialectic does not form the essential problem with which this book is concerned, a good case can be made that it ought to. We do not hear from these authors any real justification for rejecting it except a largely irrelevant concern for the necessarily a-religious tenor of American public discourse.

This preference for formal justice over substantive right, a most modern and unthomistic bias, leads to questionable recommendations for public policy in a number of areas. To begin with, consider the authors' treatment of suicide. They conclude that suicide involves liberty in a pristine sense and does not involve third parties or government itself (pp. 121-138). Given this understanding of the
problem, they adopt an extreme libertarian position on the policy issues involved. Following suggestions made earlier by other writers they would allow state intervention only to the extent of a brief restraint to insure that the individual was not intoxicated with drugs or alcohol. The mental health policies in every state which permit involuntary hospitalization purely on grounds of suicidal intent are thus a serious infringement of personal liberty.

Assisting or counseling suicide is another matter. The reasons for this are all of the practical, policy-oriented sort. For example, if assisting in suicide were not a crime (but coercion was) then an almost unsurmountable barrier to prosecution is established by the need to prove coercion in a situation where the coerced party is now dead. Suicide, they admit, still has "socially disturbing effects and costs" and while a person's liberty in this regard ought not to be infringed, neither should society encourage it either (pp. 131-134).

This view of suicide is consistent with the understanding of the American polity adopted in earlier chapters; but it is not the only one to which liberal regimes need be attached, nor might it be the best. Alcohol and drugs are not the only things which prevent a rational choice for suicide. To assert that they are is false. Yet, to admit that we might intervene to prevent some suicides is to ask us not merely to judge a man's inebriation but to judge his reasons for wishing to kill himself e.g., is it reasonable for a person like this to kill himself? At this point they can either give us the "life not worth living" criteria that they elsewhere claim are impossible to formulate and apply fairly, or they can let this judgment be rendered on a purely ad hoc basis. This latter procedure would hardly seem to be better able to ensure their own announced values of consistency and fairness.

They are led to this conclusion by their refusal to consider the judgment of life's worthlessness to be questionable in itself as the basis of policy. The only questions raised later concern the practical ability of rendering such a judgment (pp. 229-236). As a result of not


54. They recognize that from many points of view the two cases are substantially different. However they do assume that they are alike in the crucial sense of posing a similar question of individual liberty.
considering this fundamental question they are left with the priority of liberty and the undeniable fact that some individuals are deranged to the point of being incapable of any liberty.

This theoretical oversight of what may be the most fundamental question involved distorts the other policy sections of their book as well. The liberty to refuse medical treatment, even treatment designed to save one's life, poses for these authors questions similar to suicide (pp. 120-122). It is resolved in the same basic manner, even though many of the details differ. They do offer useful criticisms of existing "living will" legislation that is designed to foster the exercise of this right in the terminal situation. They also criticize existing judicial attempts to set policy on the basis of entirely inapplicable rights such as "privacy" (pp. 96-109). Procedurally, they believe that, in view of the gravity of the situation, a separate hearing must be held on each life-denying request in order to determine the true wishes of the individual. The final section of this chapter contains a model statute designed to implement their position on the issue of life-denying treatment refusal (pp. 109-118).

If liberty is really sought, however, why burden it with court adjudication in all cases. Why not simply allow querulous parties the opportunity to demonstrate a particular individual's mental incompetence in court. At this point the authors betray an uneasiness with their own position. Is it not the case that court adjudication is made reasonable by the manifestly questionable choice of an individual who prefers death to life. If democratic government rests, as they claim, on the "inherent appeal" to reasonable men of life itself as a "basic good," then doesn't a choice for death manifest, prima facie, the most primordial unreason? If so, then it is hardly the "ordered liberty" cherished by free government. At this point their recommendation belies a fundamental but unarticulated tension between liberty and life as the end of free government. Framing the issue as one concerning liberty alone the authors are led to endorse a policy that itself symbolizes the narrowness of this posture and points instead to a more fundamental tension between life and liberty than they are willing to consider.

What has gone before may be considered important, but it is really preliminary to the heart of the book which is an attack on the desirability of a public policy of active euthanasia, whether voluntary or non-voluntary. This they regard as the creeping evil of the 1980's, just as abortion law reform was the creeping evil of the
However, the theoretical weakness discussed above fatally mar the argument. Since they cannot regard this form of killing as a direct attack on the good which the regime itself must protect they can only advance lower order reasons for its unadvisability. The strategy is simple. They present an insoluble practical dilemma: either we have vague guidelines for active euthanasia, with few real safeguards or we have rigid, closely drawn legal criteria. The former alternative would surely violate the minimum standards for formal justice and innocent, non-consenting people would be killed (pp. 140-162, 229-236). The second alternative would involve government directly in the business of killing. This is said to be bad solely because it would violate the conscience of many citizens and as citizens would involve them in a morally offensive governmental policy (pp. 163-168). When the conscientious objector policy is adduced as a refutation of this argument they claim that in the case of war a substantial public interest is at stake, an interest shared by objector and soldier alike, even if they disagree about how to further this aim. No such public interest is even remotely present in active mercy killing (pp. 164-165).

This is the weakest part of the book. They explicitly claim that strict statutory controls on mercy killing could be drafted and enforced such that any abuse would be minimal and not determinative of the evil of the policy itself. Of course, since they are against such a policy they never show us just how such a statute might read and what it might do in practice, though they do admirably point to the deficiencies of others. Admitting this possibility they are forced to refute it with the tendentious argument above. It does not work. Liberty is almost always a liberty to pursue private ends with little relationship to the common good. Yet this does not make the liberty any less important for being directed toward essentially private ends. In numerous instances government, at one level or another, is deeply involved in matters of private import which are nevertheless morally offensive to some citizens: divorce, for example. If liberty is important it is important across the board, in monumental matters of state and in the seemingly insignificant situations where the liberty of the average man is exercised. If we really took this argument about the supposed "liberty to stand aloof" from morally offensive governmental actions seriously it would severely limit even necessary governmental actions at the local and state levels. The fringe element is a perennial fact of American political life and most
of the fringe finds different moral banners under which to march. Almost any governmental function from the inspection of meat to the regulation of the distribution and sale of liquor can be found to offend the moral sensitivities of some of these groups.

At this point the authors' argument falls apart, unless we assert something special about the case of "mercy killing." To do this however will involve us in a decision about the importance of the good that mercy killing denies—life itself. This is a move the authors' steadfastly refuse to make. By doing so they are forced to fall back on the confused argument concerning a "liberty to stand aloof" which we have just found wanting.

At the center of their analysis of the American regime in the 1970s is the conviction that both liberty and justice are threatened today by a relentlessly hostile judiciary and an indifferent legislature. Justice is threatened by a failure to apply the constraints of the homicide laws to all persons, irrespective of their condition in life. Liberty on the other hand is threatened by a judiciary militantly bent on enforcing the religion of secular humanism as a national "faith." It thus denies any constitutional standing to other religious convictions in plain violation of the first amendment (pp. 298-335). While quibbling over details I believe that there is much to be said for their complaints, particularly the latter. Their solutions to these problems, however, raise even more problems than they solve.

Fundamentally, they want to see these problems rectified by constitutional amendment. In the case of justice they propose an amendment that would define all living beings born or unborn, regardless of defect or disability, as persons within the meaning of the fourteenth amendment. Hence, they would all be entitled to fairness in the administration of the homicide laws in the various states. Congress is granted the power to enforce the amendment, including, but not limited to, the power to determine which entities are homo sapiens and thus within the intended protection of the act (pp. 305-313).

If one agrees with the authors that justice is threatened in the manner they describe, it is tempting to approve of this solution as well. Nevertheless, it is an extremely problematic answer; The only

explicit precedent for such an enactment is the anti-slavery thirteenth amendment. It likewise puts into the constitution a matter that might look better in the codes of the several states. As John Noonan reminds us on the question of abortion, however, the thirteenth amendment was only added after the total defeat of its opponents in a brutal war. It could not have been added otherwise. Furthermore, the thirteenth amendment is a simple statement prohibiting slavery. There are no exceptions because the subject is easily understood and easily definable. No public purpose at all would be served by exceptions.

In distinction to this clear, simple statement Grisez and Boyle’s "every person a human" amendment is fraught with practical and interpretive difficulties very much unlike the anti-slavery enactment. The text itself tells us nothing about the meaning of "every living individual" of the species homo sapiens. One supposes from the text that congress would be empowered to define it. This, however, could lead directly back to the situation we have today, with congress merely substituting its secular prejudices for those of the court. If this is unacceptable then the amendment itself would need to define presumptively just when an individual exists.

We might reasonably conclude, however, that the authors mean to hold that an individual is present from conception on. Accepting this view would result in the automatic illegality, under the proposed amendment, of abortion for almost any reason, including cases of rape and incest which are widely held to be just reasons for abortion even by those who are sympathetic to the authors' position. Furthermore, it would render illegal the widely used contraceptive IUD which acts as an abortifacent. Taking account of these problems with appropriate caveats would transform an already unwieldy amendment into a criminal statute. This is both inappropriate for a constitution and, in a federal system, a matter properly dealt with by state legislatures.

57. Their draft amendment states "Congress shall have the power to enforce this article by appropriate legislation. This power shall include but not be limited to deciding disagreements which may arise in any jurisdiction subject to this constitution concerning whether any class of individuals is a class of entities each of which is a member of the species homo sapiens."
58. See the somber remarks on the problem of drafting an appropriate anti-abortion amendment in Noonan *op. cit.* pp. 182-184.
Their constitutional solution to the perceived assault on liberty comes off no better. Their criticism of the current situation is, I believe, largely accurate, though they do not cite the best contemporary scholarship in its defense. One can easily cite examples from the school prayer and aid to parochial school cases where the courts have enacted the religion of secular humanism into law (pp. 313-320). Like obscenity, however, it easier to cite instances of the evil than to define it with the clarity needed for statutory construction. Grisez and Boyle give us citations from avowed humanists like Dewey correlated with court opinions (pp. 320-331). This obscures the fundamental problem. Politics is a human enterprise. It is governed, especially in liberal regimes, by a temporal view of the good. As the great political philosophers have always known there is a fundamental tension between religion and political rule. On the most primeval of religious questions—the possibility of a temporal good of sufficient magnitude to move men to patriotism and courage—politics must assume the earthly side. It must teach the value of the goods which patriotism and bravery defend. Taking any path out of this dilemma (e.g., the thomistic) is certain to offend deeply the religious sensibilities of others (e.g., Protestants). The kind of religious neutrality that these authors seek may simply be one of the fictions on which liberal government rests—necessary as rhetoric but incapable of consistent and coherent application in statutory or constitutional text.

By focusing on the obvious evils of our contemporary judiciary the authors are led to ignore the deeper problems just noted. In this sense their resolution of the issues is weak. Even on its own terms, however, their amendment falls apart. They wish government to be absolutely neutral as regards activities "repugnant to a minority" unless it can be demonstrated that such activities are absolutely necessary to fulfill a "substantial public purpose" (p. 332). On these grounds even local communities would be prohibited from continuing many of the programs they now provide, with the support of the community itself. Zoos would be a good example. They deeply offend those concerned about "animal rights" either on religious or secular grounds, and it can hardly be maintained that a substantial public purpose is served thereby.

60. Anyone familiar with the works of Machiavelli, Hobbes, Locke, Rousseau, and Tocqueville can document this point extensively for themselves.
It seems to me that when the constitution is to be employed for such purposes we have reached the nadir in our capacity for political creativity and judgment. Moreover, we have badly confused the functions of constitutional and statutory law. What these authors have tried to do is provide a comprehensive solution to problems that have arisen from the fantasies of the courts on a case by case basis. The problem, however, may not be soluble in a fully coherent, comprehensive way, at least not without a much fuller discussion than is offered here. Perhaps in the meantime the issues should be handled piecemeal in the same manner in which they present themselves for public resolution to begin with.

Like many philosophers Grisez and Boyle seem enamored of the coherent, comprehensive answer. They seek the master stroke by which the problems they pose can be solved and the republic once again returned to its founding principles. Much as we might wish that this latter goal were achieved, it is doubtful that a master stroke or two will do it. Politics is the most comprehensive and thus most complex of human arts. The problems they pose are coeval with political life, especially in a liberal regime; it does not seem likely that we shall be able to solve them in a few paragraphs of constitutional language. Once the master stroke disappears our statesmen and legislators will need more comprehensive guidance on the fundamental principles of our regime than is provided here.

The master stroke they seek is a constitutional solution. In pursuing this resolution of the matters at hand they belie a fundamental unconcern with what is surely as much a part of the "American proposition" as is the devotion to liberty and justice they describe: federalism. It may be that the evils that they describe are so basic that, like slavery, we cannot survive without a resolution that is of constitutional magnitude. But they give us no real argument for this enormous assumption. Moreover, it seems inherently dubious. Aside from the Supreme Court's egregious abortion rulings one finds few instances in which the problems of life and death that they discuss have become matters of constitutional concern. 61 Again with the exception of abortion all of the cases cited in their notes have come from state courts, mostly relying on state and common law precedents.

61. Some courts have employed the inappropriate concept "privacy" that has been elevated to constitutional standing by the judiciary itself. However, this does not yet play a controlling role in the resolution of these cases.
The search for a federal constitutional solution is appealing to those who seek a comprehensive answer to difficult problems. It may be that on the euthanasia question some such answer must be forthcoming. On the problem of religion, however, the search for such a solution may be an even greater threat to liberty. Political liberty as conceived in a federal republic is not only the liberty of individual but the liberty of states and individuals to manage their own affairs as they see fit. Such liberty has been part of the genius of American political life. If an urban ethnic community wishes to aid parochial schools (on the same theory that students attending such schools eased the public burden), it was supposedly free to do so. Other communities could reject such a plan and spend their money elsewhere. Certainly the evils that Grisez and Boyle point to have eroded this and other liberties in recent years. But when one realizes that their own solution would render such aid to parochial schools impermissible one might wonder if their search for a constitutional answer is not merely a subtler version of the same problem.

If forced to choose we might prefer Grisez's and Boyle's resolution of these problems to what exists in our judiciary now. But this gives us no reason to prefer their proposed resolution to others that they do not consider. That they do not enter into dialogue with these alternatives is a major weakness. In the end their examination of the "American proposition" is a philosopher's examination. A considerable amount is given on the "value choice" implicit in our republic, nothing on its unique political organization and freedom for individual communities that it was designed to foster. Under the authors' amendment much of that liberty disappears, for there will always be those who can claim that their moral conscience is offended by a governmental activity. This may be as much an invasion of liberty as that which they seek to remedy.

The most comprehensive philosophic weakness of Grisez and Boyle is one which they share with almost everyone else who has written in this area in recent years. It is the conviction that the supposed "inalienable" right to life is alienable after all if not with the assistance of others, as some would have it, then at least by oneself. This is the result of their sanction of suicide and, if my analysis is correct, their resolution of the problem of an individual's refusal of life saving treatment as well. It is, however, never made clear just why we should assume this proposition in the way they wish us to.

This is a crucial lacunae in the literature. The founders of
liberalism, Hobbes and Locke, did not accept such an assumption and made their point in explicitly political works purporting to give a comprehensive political teaching, not merely moral advice. Until we have properly understood their teaching we are in no position to take the move away from it that Grisez and Boyle outline. This is a task that I and others have attempted elsewhere and it is inap-
propriate to survey that material here. What must be stressed, however, is the crucial nature of a proper confrontation with the notion of "inalienable rights" as it is taught by the founders of liberalism. If they are right? then there is an intimate connection between political liberty, limited government, and the doctrine of inalienable rights. The denial of an equally held and inalienable right to life left some men without the most minimal of rights, reduced to the bestial status of animals whose liberty was at the mercy of man. Furthermore if one could rightly assent to the killing of himself then he could just as rightly consent to the alienating of any of his other rights-such as in slavery for instance. Specifically for Hobbes and Locke he could justly consent to absolute government."

This teaching may be debated, of course. But we are ill prepared to criticize it when we do not understand it. When a book of the magnitude of Grisez and Boyle's makes no reference to it, does not try to engage it critically or distinguish itself from it how can those whom they wish to enlighten be expected to come to grips with this teaching?

The material that we have looked at in the body of this review has often gone unread by the practitioners of policy analysis as well as those concerned with the nature of a democratic polity. Supposedly these questions, like the topic of abortion, are a matter of "con-
science," religion or personal values all of which are unamenable to the econometrically based methods of the "science" of policy analysis. Nor can they be treated merely in the terms of the formal constraints like consistency that are set before us by those seeking to demonstrate the "principles" nature of policy analysis.

62. See Glenn op. cit. and Sherlock op. cit.  
63. Here I am indebted to Gary Glenn "Hobbes on Inalienable Rights: The Prob-
It is true that in the restricted terms and narrow methodologies in which the study of public policy is now conducted its students cannot have anything to say on issues such as "the right to die." Yet any acquaintance with current affairs will demonstrate that this set of issues is at least as much a matter of legislative activity and court review (which defacto sets policy) as many of the concerns that keep appearing in the professional literature. The failure of those concerned with public life, as distinct from moralists, to engage these issues properly generally leaves those actually creating policy and law with only their own "feelings" as a guide. As the founding fathers knew untutored passion is the great threat to democratic rule and when, as in Wisconsin in 1975, one sees submitted for legislative consideration a bill proposing to allow anyone over the age of 7 to consent to his being killed we may have reached an eclipse of legislative good sense.

Until the public and its leaders receive sober advice of these matters, freed from moral sectarianism, we cannot expect much better on their part. To engage these issues in this way, however, will require transcending the narrow limits of contemporary policy analysis itself. This in turn will require the very philosophic engagement that contemporary policy analysts have sought to avoid and which many of them are unprepared to undertake. Yet the alternatives are no less problematic and if we cannot be articulate these problems someday, somewhere the Wisconsin bill will become law and some court will approve it as the epitome of liberty and justice.

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