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CONTROL FREAKS

*John H. Garvey**

Last year, in *Washington v. Glucksberg*,¹ the Supreme Court decided that the Constitution does not afford us a right to commit assisted suicide.² I endorse this conclusion. I might less modestly say that it endorses me, for the Court's understanding of freedom is similar to the one I propose in *What Are Freedoms For?*,³ and the theory it rejects is the one I am most concerned to combat.

I. AUTONOMY

Let me begin by describing the theory that the Court and I reject. If I had to state it in one sentence, it would be this: freedom is a right to make choices. Here we have a choice between life and death and, the theory holds, we are not free unless we can choose either option. There are other ways of understanding freedom. I will propose a different one later on. But this is a powerful and popular theory, and it warrants close examination. It persuaded Judge Reinhardt and an en banc panel of the Ninth Circuit, whose decision the Supreme Court reversed.⁴ And it was supported in the Supreme Court by an amicus brief filed by six of America's best-known moral philosophers.⁵ Why would such a distinguished lot of judges and academics insist on a right to commit suicide?

The first clue can be found in the Ninth Circuit's observation that "[d]espite the marvels of technology, Americans frequently die with less dignity than they did in the days when ravaging diseases typically ended their lives quickly. [Many] terminally ill patients . . . die protracted and painful deaths."⁶ A protracted and painful death is an awful thing, to be sure. But is it necessarily undignified? The Ninth Circuit assumed that it was.⁷ And being a court, not a moral philosophy forum,

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1. *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

2. *Id.* at 2261.

3. JOHN GARVEY, *WHAT ARE FREEDOMS FOR?* (1996).

4. *Compassion in Dying v. Washington*, 79 F.3d 790, 839 (9th Cir. 1996), *rev'd sub nom. Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

5. Brief for Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson as Amici Curiae in Support of Respondents, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (Nos. 95-1858, 96-110).

6. *Compassion in Dying v. Washington*, 79 F.3d at 812.

7. *Id.* at 794.

it probably had in mind the deaths of the plaintiffs, who had sued to invalidate Washington's law against assisted suicide. One of them, Jane Roe, was a sixty-nine-year-old woman with cancer who had less than six months to live.⁸ She was bedridden, medicated, and in pain.⁹ She also, the court said, suffered from "poor appetite, nausea and vomiting, impaired vision, incontinence of bowel, and general weakness."¹⁰ James Poe, also sixty-nine, was dying of emphysema and heart failure.¹¹ He was hooked to an oxygen tank at all times and took morphine to calm his fear of suffocation.¹² John Doe, a former painter, was dying of AIDS at the age of forty-four.¹³ He was going blind, had chronic infections, grand mal seizures, and extreme fatigue.¹⁴

The second clue to the court's way of thinking lies in those symptoms that it chose to stress. All of the patients were weak: Jane Roe was bedridden, James Poe was tied to an oxygen tank, and John Doe suffered from extreme fatigue.¹⁵ Sometimes, along with a lack of strength, went a loss of ordinary senses: John Doe suffered from seizures; he and Jane Roe were losing their sight.¹⁶ This was especially difficult for John Doe, who was a painter.¹⁷ The loss of control would occasionally extend to more ordinary and embarrassing functions: Jane Roe suffered from nausea, vomiting, and incontinence.¹⁸ Finally, all these people were of course in pain.¹⁹ Jane Roe's cancer had spread throughout her skeleton, and moving caused her severe pain which medication could not fully alleviate.²⁰ James Poe took morphine to calm his panic at the feeling of suffocation.²¹

These symptoms signify a loss of control over the patient's own life. As the court put it at one point, each of these people was "reduced at the end of his existence to a childlike state of helplessness, diapered, sedated, incontinent."²² When the court spoke of dying with dignity, what it meant was dying while still in control—before the onset of helplessness and second childhood. Death is not a very attractive choice

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- 8. *Id.*
 - 9. *Id.* at 795.
 - 10. *Id.* at 794.
 - 11. *Id.* at 795.
 - 12. *Id.*
 - 13. *Id.*
 - 14. *Id.*
 - 15. *Id.* at 794-95.
 - 16. *Id.*
 - 17. *Id.* at 795.
 - 18. *Id.* at 794.
 - 19. *Id.* at 794-95.
 - 20. *Id.* at 794.
 - 21. *Id.* at 795.
 - 22. *Id.* at 814.

in the ordinary case but, the court opined, people might want to choose it rather than lose control over their lives.²³

This is a coherent theory, but it is not yet a constitutional argument. There is nothing in the language or history of the Constitution suggesting that it was meant to secure to us this measure of control. Indeed, the Due Process Clause suggests the contrary: it protects *life*, liberty, and property against government interference.²⁴ It does not protect death. There is, however, some legal precedent for the court of appeals' decision. In *Roe v. Wade*²⁵ the Supreme Court held that a pregnant woman had a constitutional right to end the life inside her,²⁶ though there continues to be disagreement about whether that life is a fully human person like you and me. In *Planned Parenthood v. Casey*²⁷ the Court explained why that right was one of the liberties guaranteed us by the Due Process Clause:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.²⁸

This sounds like a bad freshman philosophy paper—the “concept of existence, of meaning, of the universe.”²⁹ But the idea it tries to express is this: it is a good thing for me to be in control of my own life. That is what “autonomy” means—being self-governing. I am only in control if I can make the choices I want. Freedom is the right to make those choices. Indeed, in some ways *Glucksberg* is an easier case than *Roe* and *Casey*. The person who commits suicide takes her own life, of which she is in control. The person who procures an abortion takes the life of another. If that is protected, then a fortiori this case should be.

Let me return now to the thumbnail description of freedom I began with: I said that according to one theory, it is a right to make choices. This means that freedom is a two-way street. Unless I can travel in both directions, I cannot define my “own concept of existence, of meaning, of the universe.”³⁰ Thus, the Supreme Court has said that “[t]he right to speak and the right to refrain from speaking are

23. *Id.* at 838-39.

24. U.S. CONST. amend. XIV, § 1.

25. *Roe v. Wade*, 410 U.S. 113 (1973).

26. *Id.* at 164.

27. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

28. *Id.* at 851.

29. *Id.*

30. *Id.*

complementary components of the broader concept of 'individual freedom of mind.'"³¹ The First Amendment freedom to exercise one's religion protects atheists as well as believers.³² The "concept of personal liberty [protects] a woman's decision whether or not to terminate her pregnancy."³³ And so it should be with life and death: the freedom to live should entail the freedom to "determin[e] the time and manner of one's own death."³⁴

I expect that this theory sounds pretty familiar—maybe even self-evident. But the Court rejected it in *Glucksberg*, and so do I. Why? I will mention four difficulties that I discuss at greater length in my book: (1) It is too powerful; (2) It ignores history; (3) It makes controversial assumptions about human nature; and (4) It commits us to a moral program that many people reject.

A. *It Is Too Powerful*

The idea that freedom is a two-way street rests on the deeper moral right to autonomy—"to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."³⁵ But if there really were such a right, it would allow us to travel in any direction we wanted, not just to and fro over half a dozen streets. *Bowers v. Hardwick*³⁶ would be wrong because it prevents people from defining themselves as homosexuals.³⁷ So would *City of New Orleans v. Dukes*,³⁸ which prevents me from defining myself as a pushcart food vendor,³⁹ and *Kelley v. Johnson*,⁴⁰ where the plaintiff (a cop) was unable to wear long hair.⁴¹ That may seem trivial, but it is not our place to say so. Justice Marshall, for one, would have held that "the right in one's personal appearance is inextricably bound up with . . . identity and personal integrity."⁴² Unless we are willing to throw out all these cases, we need to find a way to distinguish some choices from others—without saying that there are more and less important ones.

31. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *Board of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

32. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

33. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

34. *Compassion in Dying v. Washington*, 79 F.3d 790, 793 (9th Cir. 1996), *rev'd sub nom. Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

35. *Planned Parenthood v. Casey*, 505 U.S. at 851.

36. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

37. *Id.* at 196.

38. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976).

39. *Id.* at 305-06.

40. *Kelley v. Johnson*, 425 U.S. 238 (1976).

41. *Id.* at 248-49.

42. *Id.* at 253.

B. *It Ignores History*

Late twentieth century Americans may see nothing odd in the suggestion that freedom is a two-way street. But the people who wrote our Constitution would have found it a strange idea. I do not view this as a fatal objection, but it has some weight; and it counts against the theory I am criticizing. Consider the case of the First Amendment. Mark DeWolfe Howe, in a wonderful book called *The Garden and the Wilderness*,⁴³ has explained that the Establishment Clause is as much a theological rule as a political one, designed to keep the wilderness of the world from encroaching on the garden of the church.⁴⁴ And the twin rule of religious freedom has a similar provenance: “Though it would be possible, of course, that men who were deeply skeptical in religious matters should demand a constitutional prohibition against abridgments of religious liberty, surely it is more probable that the demand should come from those who themselves were believers.”⁴⁵

The Supreme Court in *Glucksberg* took a similar approach in rejecting the right to commit suicide. The plaintiffs, the philosophers, and the court of appeals argued that the right to life was a two-way street—that as we have a right to live, so we have a “right to die.”⁴⁶ The Supreme Court, by contrast, assumed that every free act requires its own justification.⁴⁷ And as it turns out, the right to life is a one-way street.

In deciding which way people can travel on that street, the Court said, we examine “our Nation’s history, legal traditions, and practices.”⁴⁸ And “for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.”⁴⁹ The philosophers assert that freedoms are always two-way streets, but they are going against the grain of legal and cultural opinion. The idea is more novel than you might think.

C. *It Makes Controversial Assumptions About Human Nature*

The “mystery” passage I quoted from *Casey* asserts that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters . . . define the

43. MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* (1965).

44. *Id.* at 7-8.

45. *Id.* at 15.

46. *Compassion in Dying v. Washington*, 79 F.3d 790, 816 (9th Cir. 1996), *rev’d sub nom. Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

47. *Washington v. Glucksberg*, 117 S. Ct. at 2271.

48. *Id.* at 2263.

49. *Id.*

attributes of personhood”⁵⁰ This is a pretty promethian claim. I will talk in a moment about whether we *ought* to behave this way. But here I want to suggest that it is not clear we *can* behave this way. *Casey* assumes that there are no givens in life—that our persons are our own creations, and always open to recreation. This is how Gerald Dworkin describes the process:

[Autonomy is] a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values. By exercising such a capacity, persons define their nature, give meaning and coherence to their lives, and take responsibility for the kind of person they are.⁵¹

It is not at all clear, though, that we have this capacity or that it can do the work its proponents assign to it. Some say that our “preferences, desires, wishes, and so forth” are the product of biology or nurture, and are impervious to our efforts to dislodge, reform, or replace them.⁵² In fact, some say, it is they that drive us, not we them. This is how Hobbes describes the process of critical reflection Dworkin is imagining: “In *deliberation*, the last appetite, or aversion, immediately adhering to the action, or to the omission thereof, is that we call the WILL; the act, not the faculty, of *willing*.”⁵³ In Hobbes’s world there is no self capable of stepping off the train of desires and redirecting it to another destination. “Will” is a name for something that happens to us—the last appetite we have before acting.

I myself am not quite such a fatalist as Hobbes, but there are many who would agree with his description of the human situation. Freudian psychologists imagine a self capable of observing its own preferences. But it is a self that is, as Yeats says, “sick with desire [a]nd fastened to a dying animal.”⁵⁴ Neurosurgeons reject altogether the notion of a para-mechanical self; they look for chemical and electrical explanations of our inclinations and behavior.

Here is another description of the human situation which many people find convincing, and which also rejects the idea that we control our own personalities. One important strand of Christian theology holds that human beings, as a result of Adam’s fall, are incapable of doing good without God’s help.⁵⁵ Martin Luther makes this claim in *The Bondage of the Will*.⁵⁶

50. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

51. GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 20 (1988).

52. *Id.*

53. THOMAS HOBBS, *LEVIATHAN* 54 (Michael Oakeshott ed., 1969).

54. WILLIAM BUTLER YEATS, *THE TOWER: Sailing to Byzantium*, in *THE COLLECTED POEMS OF W.B. YEATS* 189, 191 (1972).

55. MARTIN LUTHER, *THE BONDAGE OF THE WILL* 72-73 (Henry Cole trans., 1931).

56. MARTIN LUTHER, *THE BONDAGE OF THE WILL* (Henry Cole trans., 1931).

[The] desire of doing evil [one] cannot, by his own power, leave off, restrain, or change This is what we mean by the necessity of immutability—that the will cannot change itself, nor give itself another bent

But . . . when God works in us, the will, being changed and sweetly breathed on by the Spirit of God, desires and acts [willingly. It] goes on to desire, crave after, and love that which is good; even as before, it desired, craved after, and loved that which was evil.⁵⁷

This is, of course, a theological proposition, and I understand that there are those who dispute it. I accept that. In fact I want to make the same point about my opponents' position. To say that "God is the answer to the mystery of human life," and to say that "God is not the answer; I am," are comparable propositions. If we can consider one in designing a rule of freedom, we can consider the other.

D. *It Commits Us to a Moral Program That Many People Reject*

I have been quarreling with the view of human nature that the court of appeals and the philosophers ask us to assume in *Glucksberg*. This is a claim about how things *are*, or at least how we think they are—that it is possible for us to control our own lives. But this is also a state of affairs that they applaud. They want to combat any interference with our efforts at control because they think it is a good thing for us to be autonomous. As Bruce Ackerman once put it, "autonomy [is] the best thing that there is. . . . What could be better for a person than his own development of a plan of life that seems to him good?"⁵⁸ It follows from this assertion that freedom should be a right to make choices—a two-way street. Otherwise the law might let us travel west but not east, and we would not be in charge of the direction of our lives. But it is not self-evidently true that autonomy is the best thing there is. Any number of people might deny this.

One such group are the Christian apologists I mentioned a moment ago. They think it is impious to try to control our own lives. Jesus set the proper example when he prayed before his death, "Father, if you are willing, take this cup from me; not my will, but yours be done."⁵⁹ To modern ears it sounds strange to advocate relinquishing control of one's life as the proper ethical stance. But it makes sense if you begin with modest expectations about what we can accomplish on our own. If you think, as some Christian apologists do, that we are unable to will doing good without God's help, then we should put ourselves in God's hands. So we find Martin Luther saying, "'Free-will' is nothing, and neither does, nor can do good, without

57. *Id.* at 72-73.

58. BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 368 (1980).

59. *Luke* 22:42 (New International).

grace."⁶⁰ Therefore we should make ourselves the "servants and captives" of God, for that "is the royal liberty."⁶¹

II. COURAGE

Let me turn now from the view of freedom espoused by Judge Reinhardt and the philosophers to the one that I argue for in my book and that the Court sided with in *Glucksberg*. The former, I have said, is a right to make choices. I have used the metaphor of a two-way street to emphasize the proposition that our choices can go either way (speech ⇔ silence; childbirth ⇔ abortion; life ⇔ death). There is no preferred destination. My own view is very different. I think that freedoms are rights to go in some ways and not others. We might picture them as one-way streets. They might protect childbirth but not abortion, religion but not atheism,⁶² life but not death. The right still does important work in this more modest highway system. If I am free to travel west (let us say) on a particular road, my right means that the government may not put up stop signs, speed traps, or bumps to inhibit my progress in that direction. But it can regulate my going the other way.⁶³

The difference in metaphors says something about our difference in values. In my system, direction matters because we are travelling toward a particular destination. We protect the right to travel west because California (let us suppose) is the promised land. Here the good (getting to California) is logically prior to the right (the freedom to travel west). In the system favored by Judge Reinhardt and the philosophers, we all have our own promised lands. The system of rights makes no assumption about which way a person should travel. It is designed to enable each person to find her heart's desire. As one of the philosophers put it in a now-famous book, "the concept of right is prior to that of the good."⁶⁴

In Part I of my book, I try to illustrate my way of thinking about freedoms by showing what the freedoms of association, religion, and speech might look like if I

60. LUTHER, *supra* note 55, at 76.

61. *Id.* at 74.

62. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Given more space I would qualify this point. As I explain in chapter 3 of my book, we will often want to protect nonreligious actors for religious reasons. See *GARVEY*, *supra* note 3, at 42-57. The Church of England should not force either Jews or atheists to attend services on Sunday, chiefly because there is no religious merit in forced observance. *Id.* at 50, 55-57.

63. Once again, I must add a qualification. The only point I insist on is that the right to travel west does not *entail* the right to travel east. Freedoms are not *necessarily* rights to make contradictory choices. It may happen that we can support a right to travel east on grounds entirely separate from those that justify the right to travel west.

64. JOHN RAWLS, *A THEORY OF JUSTICE* 31 (1971).

had my way.⁶⁵ I give examples of acts that the constitution protects, and explain why it does so. Here I need to make a different sort of case—to explain why people like the plaintiffs in *Glucksberg* do *not* have the freedom to kill themselves. I think I can best do this by explaining (if I can) why the government can act to keep them alive, by making and enforcing laws against assisted suicide.

I have been thinking about death a lot the last two years. Two years ago my father died. Last year my wife's mother died. Their deaths were very different, and the difference between them helps to show that dignity is not the same thing as control. It is a blessed thing to die the way we want. We all prefer it to the alternative. So too is it nice to be rich and beautiful rather than otherwise. But we live our lives to a very large extent in circumstances beyond our control, and those givens are not the measure of our worth.

My father died the way Jim Brown left football. He was seventy-six years old and we expected him to live another twenty years, as his father did. He still practiced law with some relish. He had just finished a long-term plan for expansion of the local hospital, where he served on the board. He was getting ready to try a bankruptcy case. He and mother had come to visit us at Christmas and spent a week, more time than his schedule would usually permit, and we had had a wonderful time. They drove out and back, and when they were leaving I had to insist on carrying their suitcases to the car. He was always at the front of the line when there was work to be done. On the day he died, my sister Annette was visiting from Denver with my father's twenty-sixth grandchild—the first to be named after him. (That happens when your name is Cyril.) The baby was sick and dad took him to the pediatrician. We have a picture of dad and the baby taken that night on Annette's camera, which records the date and time on prints. They are both smiling. Three hours later, with almost no warning, he died in bed of a heart attack. Mother was beside him, and she knew immediately what had happened.

We all said that it was very much like him to die that way. There is a family story about his father that fits dad as well. Dad's parents lived next door to us, well into their nineties. Grandma died first. When they were both getting on in years, my cousin asked grandma what it would be like if grandpa died first. "Oh, he would never do that," grandma said. "He's too much of a gentleman." It was like that with dad. He was never, like the plaintiffs in *Glucksberg*, weak, infirm, dependent, sick, or in pain. (We cannot be sure about the last. He would not have mentioned it.) He always took care of us, and there was little we could do for him. (Or so it seemed. When I was cleaning out his office, I found a cabinet full of letters I had written, articles and briefs I had sent, and so on. My own happiness and success were a gift to him that I had not appreciated.) Mother and I settled his estate the week after the

65. GARVEY, *supra* note 3, at 3-77.

funeral. Everything was in the kind of order you want your clients' affairs to be. There was plenty of money for mother, careful estate planning. He died the way he had lived. I do not remember a time when he was not strong, generous, loving, and admirable. I hope I go like that.

My wife's mother had a harder time. She was ninety years old, and in her own way, as tough as my father. When I first met her she was sixty-five. I know her childhood and middle age only from stories. The family were Quakers, but they were hell-raising Quakers. The first pair of shoes Dot bought herself were boots that had a sleeve to hold a knife. Her dad ran a livery stable (among other things), and as a child, she broke her arm riding horses for him. She smoked all her life and drank until she was eighty, when she finally gave it up. For this she paid in her later years. She had emphysema and was prone to bronchitis and pneumonia. She got Parkinson's disease, colon cancer, cataracts, and water on the brain. When she was about eighty-six, she fell down the steps and broke her shoulder, and at that point she moved in with us. For her last couple of years, she was on an oxygen tank, she needed help feeding herself, and was confined to a wheelchair. At the end she got pretty quiet and very confused about everything except her daughter, her grandchildren, and me.

In the midst of all this, she was, as I have never tired of saying, a great old lady. She woke up every day with a smile on her face. She never complained about how she felt, what she ate, where she lived (we moved twice; she shared a room with our youngest child), or what she could not do. On the contrary, she thanked my wife every day for taking such good care of her. She spoiled the children and accepted their teasing with good humor. I hope I die the way my father did, but my mother-in-law set a better example. Dying just happened to my dad. It was something that Dot did, and I am glad that our family got to go through it with her.

A second observation that I have made about her life and death is this. I think she, like all of us, did better at some periods than others. My own adolescence probably drove my father toward his premature death. Dot had a difficult middle age. She hinted to my wife that she lived with some regret about that part of her life. However that might have been, her old age redeemed the whole enterprise, and this was a thing worth doing for its own sake. Had she taken her life at eighty-six when she broke her shoulder, she would have spared herself a lot of pain, indignity, and dependence. But it would have been a poorer and less admirable life than the one she lived out. In saying this, I assume that it is inherently worthwhile to live a life of great virtue.⁶⁶ It just *is* a good thing that Dot finished her days so well. This is not the same thing as happiness. She lived through a great deal of hardship, and there was no effort to disguise it from her or us. Her life would have been happier, more

66. I make parallel claims in my book about a variety of activities. I assert that love is a good thing. *Id.* at 28. So is the pursuit of knowledge. *Id.* at 65.

pleasant, if she had died sooner. She would have been more in control of her affairs if she had died at seventy-six, like my father. But control is not a virtue. It is a blessing for which we can take no credit. Dot cultivated and displayed the virtue of courage to an admirable degree. It is good that she did this. Her behavior is something that we should imitate.

We often make the mistake of confusing the virtue of courage with the exercise of power or control. In the movie *The Edge*,⁶⁷ Anthony Hopkins plays a rich man who gets stranded in the Alaskan wilderness while on a photographic expedition. Before he can get back home safely, he is obliged to kill a bear with his hands and disarm his own companion, who is intent on taking his life. As he explains early and late in the movie, the rabbit is not afraid of the fox, because the rabbit knows that he is smarter. This is our image of courage: the ability to take control of a difficult situation and bring about the outcome we desire.

The important part of this picture, however, is not the outcome but the attitude with which one faces death. The character played by Anthony Hopkins is little more than a cartoon figure compared to Oedipus, who fell from kingship to rags but bore his fate to death heroically. *Oedipus at Colonus*⁶⁸ tells the story of his last days. Twenty years after he left Thebes, the blinded Oedipus came with Antigone to Colonus in Attica, about a mile from Athens.⁶⁹ He tells on his arrival of how he reacted to the knowledge of his fate:

The truth is that at first
My mind was a boiling caldron; nothing so sweet
As death, death by stoning, could have been given me;
Yet no one there would grant me that desire.
It was only later, when my madness cooled,
And I had begun to think my rage excessive,
My punishment too great for what I had done;
Then it was that the city—in its good time!—
Decided to be harsh, and drove me out.⁷⁰

From then until his arrival at Colonus he wandered “blind, bearded and ragged.”⁷¹ He had fallen as far as he could from the proud king who unwittingly killed his father and married his mother. He confesses that he is no longer in control. He depends upon Antigone to lead him:

67. THE EDGE (Twentieth Century Fox 1997).

68. SOPHOCLES, *Oedipus at Colonus*, in 3 GREEK TRAGEDIES 107 (David Grene & Richmond Lattimore eds. & Robert Fitzgerald trans., Univ. of Chicago Press 1968) [hereinafter *Oedipus at Colonus*].

69. *Id.* at 111.

70. *Id.* at 130-31.

71. *Id.* at 111.

Pity a man's poor carcass and his ghost,
For Oedipus is not the strength he was.

...

That must be evident: why, otherwise,
Should I need this girl
To lead me, her frailty to put my weight on?⁷²

And yet he is an admirable character, above all because he lives out to the end the chorus's injunction: "Whatever God has brought about is to be borne with courage."⁷³ Even at the end he is no angel. His interviews with Creon and with Polyneices show the anger of his youth and the bitterness of his old age. But he rewards Athens with a blessing for receiving him to die. And when Antigone reflects upon her part in his last days, she seems to strike exactly the right note:

One may long for the past
Though at the time indeed it seemed
Nothing but wretchedness and evil.
Life was not sweet, yet I found it so
When I could put my arms around my father.⁷⁴

My wife has observed that unless we have gone through it, we may make the mistake of supposing that caring for the old and feeble, even when their minds begin to fail, is a relationship that only runs one way. When they die courageously they may give us as much as we give them. Oedipus, like Antigone, reflects on this in his last words to his daughters:

Children, this day your father is gone from you.
All that was mine is gone. You shall no longer
Bear the burden of taking care of me —
I know it was hard, my children. — And yet one word
Makes all those difficulties disappear:
That word is love. You never shall have more
From any man than you have had from me.⁷⁵

Had he had his wish and died at the peak of his misery, Oedipus would have spared himself years of suffering and disgrace. His life would in that sense have finished with a better balance of happiness and pain. But he would not have shown the virtue of courage that redeemed his failures. Sophocles puts his own reflection

72. *Id.* at 116, 118.

73. *Id.* at 183.

74. *Id.* at 183-84.

75. *Id.* at 180-81.

into the mouth of the messenger who opens the last scene: “[I]ndeed his end was wonderful if mortal’s ever was.”⁷⁶

I have been trying to make the point that living out the virtue of courage is an act, or more precisely an attitude, that is good in itself. It is not so just for those who choose to see it that way. It is something we all should admire, and if we find ourselves in the unfortunate circumstances where it is called for, we should hope to imitate. This is not a proposition I can prove. It is nonetheless one whose truth I think we can recognize, particularly if we stand it beside the thinner ideal of staying in control, getting what we want, and, at a minimum, avoiding a painful end. It is better, though harder, to live courageously than to die quickly by one’s own hand. That is what I mean when I assert that the right to life is a one-way street.

Of course, it is easy for me to say this as I, in the prime of life, reflect on other peoples’ misery. I do not condemn those who commit suicide while in the depths of despair or in the thrall of pain. I am making a more modest point. It is simply that although I can understand the temptation of suicide, I do not view it as an act so infused with value that we should classify it as a fundamental right. I would not punish those who attempt it and fail, and I would certainly not attack the estates of those who succeed. But I think we should not encourage or assist people to take that path, and the states are right to punish those who do.

To this point, I have focused only on the virtue of courage at the hour of death. I now want to make two other points. The first is that the consequences of suicide linger back as well as on. The way we die affects the way we live. This sounds paradoxical—like talking about Shakespeare’s effect on Plutarch. But I mean it in a fairly literal sense. I have already alluded to one facet of this interplay. It is the fashion, in the literature of popular psychology, to talk about the stages of life, as though we spanned so many baseball seasons, each with its own drama and conclusion. But our judgments of people take their whole lives into account. Oedipus at Colonus is the same person as Oedipus Rex. His death redeems his life. It did not look that way when the chorus closed upon him in *Oedipus Rex*:

You that live in my ancestral Thebes, behold this Oedipus,—
 him who knew the famous riddles and was a man most masterful;
 not a citizen who did not look with envy on his lot—
 see him now and see the breakers of misfortune swallow him!
 Look upon that last day always. Count no mortal happy till
 he has passed the final limit of his life secure from pain.⁷⁷

76. *Id.* at 182.

77. SOPHOCLES, *Oedipus Rex*, in 1 GREEK TRAGEDIES 107, 176 (David Grene & Richmond Lattimore eds. & David Grene trans., Univ. of Chicago Press 1968).

At that point, his loss of mastery seemed to spell the end of an enviable life. But his end was further off, and it "was wonderful if ever mortal's was."⁷⁸ Our rounded judgment of him is much kinder than the chorus suggested it would be.

Our deaths affect our lives in another, more literal, sense that I have not yet spoken of. I love my children dearly, and it would be my delight in life to have them move in next door to us when they are grown and married. But I began telling them at an early age, "Once you graduate from college, you are out of the house." My older and wiser friends tell me this is a vain hope. Nevertheless, they understand my point, which is this: I would like my children to become self-reliant, to prepare themselves eventually to support themselves, and to live lives of their own. Their typical reaction early on has been one of disbelief. "Dad, you don't really mean that if I couldn't find a job and had no money you would turn me away?" But I have assured them repeatedly that I mean exactly that (or at least I think I do), and that bleak prospect has now become an accepted fact of life—or maybe a regrettable consequence of my hard-heartedness.

The contemplation of our own death is not unlike this. It is a fact that we awaken to at a fairly early age, and the lesson is reinforced from time to time as those close to us die—grandparents, parents, uncles, aunts, friends, brothers, and sisters. Those events figure importantly in the accounts of our lives, but our reflection upon them is itself a subject of common consideration. Think of paintings like Caravaggio's *St. Jerome Writing*, or Georges de la Tour's *The Repentant Magdalen*. In the first, an aged St. Jerome wrapped in a red blanket leans on a desk, his pen poised, studying a large book upon which he is writing a commentary. To his right, perched precariously on a couple more books, is a skull silently observing him through sightless eyes. He seems to ignore it at the moment, but it is surely present in the back of his mind. After all he put it there, as recently as he opened the book it rests upon. It is as relevant to his composition as the text he is poring over—one supposes the vulgate translation of the Bible. I do not imagine, though he is old, that it is the nearness of the event that prompts his reflection on it (as though he were actually doing two things, rather than one, and watching the biological clock to make sure he finished before quitting time). His own bald head has the same shape as the skull; they lean toward each other at the same angle and on about the same level. The one reflects the other. One gets the feeling that they are the same person, one version dressed up a bit more. Jerome's own death is present in his life, while he is in the very act of doing his most important work.

La Tour's *Magdalen* makes a similar point. She sits at a table looking into a mirror. Her left hand grazes a skull perched at shoulder level on a thick book. One cannot tell from the angle of the mirror whether she sees her own face. What we see,

78. *Oedipus at Colonus*, *supra* note 68, at 182.

looking from her side, is the back of the skull. It has the same high forehead and straight face as she does. Unlike Jerome, she is still young. And her reflection on her own death is more active. She is an apt subject for the painting. La Tour means to show the connection between her repentance and her meditation on death—the prospect of it will affect the way she lives her life.

To take just one more example, consider John Donne's frequent reflections on death in prose and poetry. In *The Anniversaries*,⁷⁹ Donne advances a procedure for "Contemplation of our state in our deathbed," "Think thyself laboring now with broken breath," "Think thyself parched with fever's violence."⁸⁰ And in his *Devotions upon Emergent Occasions*,⁸¹ he pictures the final outcome:

Now all the parts built up, and knit by a lovely soul, now but a statue of clay, and now, these limbs melted off, as if that clay were but snow; and now, the whole house is but a handful of sand, so much dust, and but a peck of rubbidge, so much bone. If he, who, as this bell tells me, is gone now, were some excellent artificer, who comes to him for a clock, or for a garment now? Or for counsel, if he were a lawyer? If a magistrate, for justice?⁸²

I could go on, but you see what I mean about death lingering back. My point, though, is not just that we worry about the prospect. It is that we think about it in preparation, asking ourselves, as Daniel Callahan has said, "How should I want to live in order that I may die well?"⁸³ If it is our ambition to maintain control at all costs, even if it means self-destruction to cheat the reaper, that attitude will work its way into our daily life. There are, after all, innumerable reverses that we all must suffer before the end—pain, debility, failure, loss. It is one thing to try our best to overcome them. That is the natural and right reaction. But we will not always prevail. And when we do not, the resolution to deal with death by suicide finds an earlier outlet in a desire to run, or deny our shortcomings. If our dignity depends on our ability to control our bodies, our lives, and our surroundings, as Judge Reinhardt's opinion suggests, we cannot face failure without a loss of self-respect.

Our attitude will be different if we understand that heroes are born from the struggle with necessity.⁸⁴ By preparing ourselves to face death with courage, we will

79. JOHN DONNE, *JOHN DONNE: THE ANNIVERSARIES* (Frank Manley ed., Johns Hopkins Press 1963) (1612).

80. *Id.* at 94.

81. JOHN DONNE, *DEVOTIONS UPON EMERGENT OCCASIONS* (Anthony Raspa ed., McGill-Queen's Univ. Press 1975) (1624).

82. *Id.* at 93 (emphases deleted and spelling and capitalization modernized). For a discussion of the tradition which Donne exemplifies, see LOUIS L. MARTZ, *THE POETRY OF MEDITATION* 135-44 (1954).

83. DANIEL CALLAHAN, *THE TROUBLED DREAM OF LIFE* 148 (1993).

84. *Id.* at 125.

make ourselves into the kind of people who can face life with the same attitude. Physical disability, sickness, and pain do not diminish our dignity. On the contrary, much as we rightly dread them, they are occasions for a life of courage.

I said I wanted to make two further points about the virtue of courage before the hour of death. The first had to do with our own lives. The second concerns our dealings with other people. The character we cultivate in anticipation of death affects them too. The preoccupation with self-control that we see in the court of appeals' opinion and the philosophers' brief is often connected with, or grows out of, a conviction that I am the most important person in my life, that you are the most important person in yours, and that the government is only justified in regulating our behavior when it impinges on another's personal space. Acts that are purely self-regarding—and suicide is one of them—are not the government's concern.

I dispute this. I do not think that our lives are strictly our own, and I think that suicide affects the lives of others in several ways, some of which warrant efforts to prevent it. There are, to begin with, the obligations that arise from family and other social responsibilities that we will shirk by leaving. Some, like mine to my wife and children, we undertake voluntarily. Others, to our parents or siblings, for example, we do not. There are, I suppose, some unfortunate people, whose despair at life can be explained at least in part by the absence of such ties, who might object that their debts of that kind have all been satisfied, and it is an interesting question whether they still owe duties to a larger community sufficiently important to warrant their being kept alive. Durkheim reports that in ancient Athens a citizen had to get permission of the Senate before committing suicide—a fact that implies a belief that the state had an interest in insisting on some people's continued service.⁸⁵ Fidel Castro in 1964 made the following statement about a man named Augusto Martinez Sanchez, an official of the Cuban revolutionary government who had committed suicide: "We believe that Comrade Martinez could not consciously have committed this act, since every revolutionary knows that he does not have the right to deprive his cause of a life that does not belong to him, and that he can only sacrifice against an enemy."⁸⁶ These are not arguments we hear in the United States, and the reason probably is that we take a different view of our relations to the state. But though I prefer our concept of citizenship to these, I am not sure that it is a necessary or a happy feature of ours that we should have no obligation to live for one another.

I pass over this speculation without further comment, because I want to direct attention to two further effects that our suicides may have on others, and that are more closely bound up with the virtue of courage. The first of these is the mundane observation that others may follow our example. In forming our own lives we often look to others whom we admire for a pattern to follow. We are ourselves, though

85. EMILE DURKHEIM, *SUICIDE* 330 (John A. Spaulding & George Simpson trans., 1951).

86. MICHAEL WALZER, *OBLIGATIONS* 172 (1970) (footnote omitted).

perhaps unwittingly, the objects of this same kind of imitation. It is no statistical anomaly that suicide increases the likelihood of further suicides among family members.⁸⁷ Our moral responsibility for these consequences is obviously tempered by the fact that we do not intend them. We are nevertheless aware of them, and that alone (causation plus knowledge) is sometimes a sufficient ground for moral responsibility. To put it in old-fashioned terms, it is bad to cause scandal.⁸⁸ The flip side of this is equally worthy of our attention: when we exemplify the virtue of courage in the way we deal with misfortune we set a good example that not only deserves praise but also inspires imitation.

The case of assisted suicide gives a further accent to this observation. The patients in *Glucksberg* wanted not just to end their own lives, but to get the assistance of their doctors in doing so.⁸⁹ If we suppose that actions like suicide are purely self-regarding and have no adverse social effects, then doctors and others do no wrong in enabling us to get what we want. But if we bear some moral responsibility for the pattern we offer for others to imitate, we do a further wrong by drawing others in. Their assistance improves our chances of succeeding (that, after all, was the reason for the lawsuit). It also adds respectability to our choice by enlisting more participants in our cause.

The second of the further effects that I had in mind is this: I suggested earlier that the way we die affects the way we live—the character we form in preparation for death is the one we bring to bear on crises short of the last. We should keep that in mind because it affects the goodness of our own lives, not just of our deaths. But it also has spillover effects on the way we see and deal with others. If I think my own dignity depends on my ability to control my mind and body, I will probably make a similar judgment about you. I might consider you less deserving of my respect when you have lost the battle with pain, debility, or mental illness. Opponents of assisted suicide often claim that it is only a short step away from euthanasia. There is more truth to this than we might think. It is not just that the right to choose one's own destiny ("define one's own concept of existence"⁹⁰) demands extension to ever larger classes of claimants (even those who, because of mental debility, are unable to assert it for themselves). It is that by equating human dignity with control we invite the conclusion that they can be lost together. Defective newborns, the retarded, the aged and senile, and others who are not autonomous actors may lose our respect as well.

87. CALLAHAN, *supra* note 83, at 152.

88. I give a fuller explanation of this point in John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQUETTE L. REV. 303 (1998).

89. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2261 (1997).

90. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

