Notes

1: INTRODUCTION

10. U. S. Bureau of the Census. Statistical Abstract, p. 293, No. 459 (calculations from table supplied by subtracting from total federal expenditures expenditures for veterans programs and education, computing the remainder as a percentage of the total, and multiplying this factor by the percentages of GNP and total federal outlays stated in the table); for defense, p. 326, No. 513.
which large numbers of university students agreed that the unfit should be killed by society as a final solution to problems of overpopulation and personal misery.


27. *Ibid.*, pp. 13–17 (reply by Social Security administration) gives the history of the actuarial estimates; Gold, Kutza, and Marmor, *op. cit.*, p. 13, explicitly ask: “whether a diminishing number of workers, through higher taxation, will be willing to support the steadily growing numbers of retirees.”


31. *Developments in Aging: 1976*, pp. 26–32; Derzon, in the memorandum cited in...


34. *Training Needs in Gerontology: Hearing before the Special Committee on Aging, United States Senate, 93d Cong., 1st Sess.* (June 19, 1973), pp. 15–17 (statement by George Ebra).


40. "History of Euthanasia in U.S.: Concept for Our Time," *Euthanasia News*, 1 (November 1975), pp. 2–3. The following paragraph (p. 3) is of special importance: "Legislative initiative had all but ceased and it was decided that there was no chance of getting any bills passed until there was a massive educational effort. By the end of the '60s there were two significant events: the Euthanasia Educational Fund was established in 1967 to disseminate information concerning the problem of euthanasia, and Luis Kutner suggested the Living Will at a meeting of the Society." Kutner published his proposal in an article concerned primarily with active euthanasia which switched with practically no transition to the proposal of the "living will": "Comments: Due Process of Euthanasia: The Living Will, a Proposal," *Indiana Law Journal*, 44 (1969), pp. 539–554, especially pp. 548–550.


46. See note 43 above.

47. The 1969 British bill is printed in A.B. Downing, ed., *Euthanasia and the Right to Die* (London: Peter Owen, 1969), pp. 201–206. Both this bill and the California statute contain similar safeguards: the requirement that one's terminal condition be certified by two physicians for one to become a *qualified patient*, the prescription that a
legal form be used for the directive to physicians, a fourteen-day waiting period after one is qualified before the directive becomes fully effective, and a penalty for homicide specified for anyone forging a directive or concealing its revocation. From one point of view such safeguards may be admirable, but they are precisely the machinery needed for active euthanasia.


61. Case cited note 1 above, at 664.

62. Cf. Glanville Williams, *The Sanctity of Life and the Criminal Law* (New York: Alfred A. Knopf, 1957), p. 16 (where he claims, falsely, that Christians objected to infanticide mainly because of concerns about baptism), p. 193 (where he makes the same claim about abortion), pp. 254–257 (where he maintains the horror of suicide is religious), p. 312 (where he holds that euthanasia, since condemned by religious opinion, must not be prohibited by criminal law).

2: LAW, LIBERTY, AND JUSTICE

1. One of the more adequate treatments is that by Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven and London: Yale University Press, 1964), pp. 33–94. Fuller's conception of law as a purposeful enterprise (pp. 145–151) and his clear dis-
tinction between managerial direction and law (pp. 200–224) seem cogent and are taken for granted in the present chapter.

2. The classic and influential conception of the doctrine of consent, which certainly influenced the American Founding Fathers, was that of John Locke, *Two Treatises of Government*, ed. Peter Laslett, 2nd ed. (Cambridge: Cambridge University Press, 1967), *The Second Treatise*, chapters 6–8 (pp. 321–367). Our account of consent differs from Locke’s by as much as is necessary to meet the objections which have been cogently made against his theory, but we take as our project the articulation of the American proposition as it has unfolded historically in the nation’s public philosophy and law.


4. J. R. Lucas, *The Principles of Politics* (Oxford: Clarendon Press, 1966), pp. 279–301, offers sound arguments, including a development of the point we make here, against the minimum state. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 351, note 1, rejects one of Lucas’s arguments against the minimum state, beyond which Nozick argues (pp. 149–231) one cannot justly go. But Nozick does not deal with the whole of the case Lucas articulated. Moreover, Nozick recognizes only liberty as a per se ground of legitimacy; he fails to see that consent itself would provide no basis for legitimacy if the consent were a mere fact, not a justified act rooted in goods which deserve impartial respect. As soon as justice is made primary, much of Nozick’s ingenious argument loses its plausibility.

5. *Federalist Papers*, No. 84 (pp. 512–513).


9. On the limitations of the concept of equality in efforts to clarify the concept of justice see Lucas, *op. cit.*, pp. 233–261. See also George Sabine, “The Two Democratic Traditions,” *Philosophical Review*, 61 (1952), pp. 451–474, for a clarification of the historical difference between the implications of the egalitarian and the status-respecting conceptions of democracy. The latter, based upon the tradition of the British common law, has fared far better by the test of historical, political experience in providing stable and (in our view) just principles of constitutionality.

10. Since the conception of justice proposed here is somewhat like that proposed by Rawls, it may be helpful to clarify some respects in which the reasonable participant of our account differs from the rational contracting party in the original position as Rawls describes (*op. cit.*, pp. 118–150) such a party. Like Rawls’s contracting party, our reasonable participant is rational in limiting prescriptions to those which can be universalized. But we do not assume mutual disinterestedness, nor do we assume that there are preferences to be ordered lexically. Our reasonable participant considers the substantive purposes of society and everything which enters into the constitution, not merely possi-
ble ordering principles, as a foundation for justice. Our reasonable participant proceeds with many fewer specifications than does Rawls’s rational contracting party; our reasonable participant can consider at each juncture what can be prescribed universalizably by one committed to the common purposes of the society. On our view it is what underlies and justifies the intuitions of the reasonable participant, not what is pronounced in accord with them, which is the core of the concept of justice. The pronouncements of Rawls’s rational contracting party, by contrast, are supposed to define political justice.


12. Although we are concerned here with equal protection of the laws as a standard for legislation rather than as a judicial principle of constitutional law, we suggest as helpful a classic article by Joseph Tussman and Jacobus tenBrock, “The Equal Protection of the Laws,” California Law Review, 37 (1949), pp. 341–381.

13. Once more we are concerned with the ideal of justice expressed by the phrase. In constitutional law the privileges or immunities clause was rendered practically null by the U. S. Supreme Court decision in the Slaughter-House Cases, 83 U. S. (16 Wall.) 36 (1873). It has not yet been revivified, although the due process clause was drafted into service in its place. Cf. Normand G. Benoit, “The Privileges or Immunities Clause of the Fourteenth Amendment: Can There Be Life after Death?” Suffolk University Law Review, 11 (1976), pp. 61–112.


15. In On Liberty Mill did not claim liberty to be a moral principle independent of utility. But Mill considered liberty to be a good which makes its own categorical demand for respect and recognition. Indeed, Mill tended to absolutize this demand of liberty. In this Mill was inconsistent; cf. Himmelfarb, op. cit., pp. 3–139.


18. Ibid., at 1682–1690.
19. Ibid., at 1690–1691.
20. Ibid., at 1694–1707.
24. Ibid., at 756–759.

32. In declaring religious liberty Vatican II, Dignitatis Humanae, 11, explicitly recognizes that this liberty is abused and asserts that it is a divinely revealed truth that this evil ought to be accepted. The rational argument in favor of religious liberty, ibid., 3, is the same as that proposed above: coerced acts of this sort are not conducive to participation in the good of religion.

3: DEFINITION OF DEATH


3. The technique of feeding is described in Matter of Quinlan, 137 N.J. Super. 227, 348 A.2d 801 (1975) at 808; 70 N.J. 10, 355 A.2d 647 (1976) at 655. Karen Quinlan entered hospital 15 April 1975; the New Jersey Supreme Court decided her case 31 March 1976, and at this time remarked (ibid.) that she had lost 40 pounds, yet as this is written in March 1978 she has not yet died.


9. Robert M. Veatch, Death, Dying, and the Biological Revolution: Our Last Quest for Responsibility (New Haven and London: Yale University Press, 1976), p. 32, splits the seam between Ramsey’s view and ours by saying that it is wrong to change the definition because of benefits to others, but right to undertake consideration of the definition, which Veatch nevertheless does not consider to be a matter of fact for this reason.


19. "A Definition of Irreversible Coma," pp. 337–338. An extensive critique of these criteria with references is in Van Till, *op. cit.*, pp. 12–20. Mainly in defense of the Harvard criteria is: "Refinements in Criteria for the Determination of Death: An Appraisal: A Report by the Task Force on Death and Dying of the Institute of Society, Ethics, and the Life Sciences," *Journal of the American Medical Association*, 221 (July 3, 1972), pp. 48–53. The latter relies (pp. 50–51) on an unpublished report of 128 autopsy studies of the brains of individuals who had met the criteria—all were found to have been destroyed—and on reports collected by Daniel Silverman et al., "Irreversible Coma Associated with Electrocerebral Silence," *Neurology*, 20 (1970), pp. 525–533, from 279 electroencephalographers which showed that of 2,650 patients with presumed isoelectric EEGs of up to 24 hours duration, only three, outside the Harvard criteria, recovered cerebral function (p. 533). But this proves nothing whatever about death unless it is assumed that one who is permanently unconscious is dead even if otherwise wholly independent of machinery and apparently merely in a deep sleep. Gerald M. Devins and Robert T. Diamond, "The Determination of Death," *Omega*, 7 (1977), p. 285, summarize evidence indicating that EEG is of little value in most cases and could be contraindicated in some.


35. *Ibid.*, pp. 25–42, quotations at 42; Veatch’s use of “animalistic” here reveals that although he rejects the old-fashioned dualism, he falls into the modern type.
38. Veatch, *Death, Dying*, pp. 48–50 and 53; however, on the limitations of EEG see Devins and Diamond, *loc. cit.*
42. Van Till, *op. cit.*, pp. 8–11.
43. Veatch, *Death, Dying*, p. 36.
45. One of Veatch’s arguments in “The Whole-Brain-Oriented Concept of Death” (pp. 13–14 and 23) is that if one is going to move away from the traditional view, one may as well go further than the whole brain. This makes sense only if there is no reason in principle to stop with the whole brain, but our argument is that going this far and no further is not a matter of choice, as Veatch thinks it is, based on one’s evaluation of characteristics, but rather is a matter of clarifying an existing concept by applying a sound biological theory to the facts.
49. See items cited in note 46, *supra*.

4: THE LIBERTY TO REFUSE MEDICAL TREATMENT

1. Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914) at 93.


21. John F. Kennedy Memorial Hospital v. Heston, 58 N.J. 576, 279 A.2d 670 (1971) at 672; Application of President and Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.) at 1009, *cert.den.*, 377 U.S. 978 (1964). In both of these cases questions also were raised about the current competency of the patients, yet in both it seems clear that the patients did refuse treatment when competent.


5: SUICIDE AND LIBERTY

2. Thus Glanville Williams, *The Sanctity of Life and the Criminal Law* (New York: Alfred A. Knopf, 1957), pp. 248–283, in discussing suicide spends more space on criticism of traditional moral conceptions than on examination of properly jurisprudential considerations; his argument is typical and especially important because his work has influenced many others.


12. N. Y. PENAL LAW § 35.10 (McKinney).

13. ARK. STAT. ANN. § 41–505.

14. PA. STAT. ANN. tit. 18 § 508 (d) (Purdon).

15. WASH. REV. CODE ANN. § 9.11.040 (6).


17. Greenberg, *op. cit.*, pp. 227–269; the argument is persuasive because he shows that if one assumes, as is reasonable, that the burden of proof is upon those who would take away an individual's liberty, then it really cannot be shown that detention gives significant protection to the potential suicide or anyone else. It is important to bear in mind that the fact of suicide does not rebut the presumption of sanity; see 31 C.J.S. *Evidence* § 147 (1964). A fortiori, the fact that someone threatens or attempts suicide does not rebut this presumption. Since diminished responsibility of itself would not
have rendered suicide noncriminal and since this result was desired in a context in which the unalienable character of life could not be directly attacked, those seeking the practical decriminalization of suicide during the past one hundred years or so tended to overstate the mental unbalance of suicides and potential suicides. This was an unfortunate rationalization with negative implications for the basic right of liberty. Since life is no longer regarded as a substantive principle as it used to be, suicide can now be admitted as noncriminal merely because it does not violate justice, and the detriment to liberty can be removed.

21. Ibid.
22. See Williams, Sanctity of Life, pp. 286–304; LaFave and Scott, op. cit., pp. 569–571.
25. PA. STAT. ANN. tit. 18, § 2505; N. Y. PENAL LAW § 120.35 (McKinney).
28. Ibid.
30. N. Y. PENAL LAW § 120.30 (McKinney).
31. FLA. STAT. ANN. § 782.08 (West); cf. MO. ANN. STAT. § 559.080 (Vernon);
MINN. STAT. ANN. § 609.215 (West).
32. CAL. PENAL CODE § 401 (West).
34. Williams, Sanctity of Life, p. 309.
36. See LaFave and Scott, op. cit., pp. 568–571; Schulman, op. cit., pp. 855–862; 83 C.J.S. 781–785. The situation is so erratic that at least until recently assisting another to commit suicide ranged from murder in some jurisdictions to no crime at all in at least one—Texas.

6: VOLUNTARY ACTIVE EUTHANASIA AND LIBERTY


6. Ibid., p. 94.


17. See Philippa Foot, "Euthanasia," Philosophy and Public Affairs, 6 (1977), pp. 100–102; Norman L. Cantor, "A Patient’s Decision to Decline Life-Saving Medical


25. Williams, *Sanctity of Life*, pp. 334–338; the same interpretation was already advanced in the debate itself: *House of Lords* (1936), cols. 497–498 (Earl of Listowel), cols. 502–503 (Lord Ponsonby); *House of Lords* (1950), col. 558 (Lord Chorley, who was challenged on this by Lord Haden-Guest), col. 561 (Lord Denman, claiming that Lord Dawson said more outside the formal debate).


27. Ibid., cols. 484–487.

28. Ibid., col. 492.


32. Lael Tucker Wertenbaker, *Death of a Man* (Boston: Beacon Press, 1974), p. 175, says that her husband took fifteen grains of morphine, which is just twice the maximum dose at the highest estimate cited by Trowell, *op. cit.*, p. 59.


45. See "Res Ipsa Loquitur, Parts I–VII," *Journal of the American Medical Association*, 221 (1972), pp. 537, 633, 1201, 1329, 1441, and 1587; 222 (1972), p. 121. Persons working in hospitals tell tales of even more horrendous mistakes which never reach a court—the survivors remain ignorant or the case is settled.


47. *House of Lords* (1950), col. 596.


64. Kamisar, op. cit., pp. 980–981; Roberts, op. cit., pp. 14–15, saw this difficulty clearly; see House of Lords (1936), cols. 475–476 (Viscount Fitzalan of Derwent), cols. 482–483 (Lord Dawson of Penn), col. 489 (Lord Horder).


66. Ibid., especially pp. 1015–1019.


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77. Fletcher, "Ethics and Euthanasia," pp. 670–675; Williams, Sanctity of Life, pp. 316–317; idem, "'Mercy-Killing' Legislation—A Rejoinder," p. 11; Kohl, "Voluntary Beneficent Euthanasia," in Kohl, ed., op. cit., pp. 139–140; Richard Brandt, "A Moral Principle about Killing," in Kohl, ed., op. cit., p. 113; Steele and Hill, op. cit., p. 328; Sackett, op. cit., pp. 30–39; about Sackett see Kaplan, op. cit., pp. 47 and 54; Eliot Slater, "Assisted Suicide: Some Ethical Considerations," International Journal of Health Services, 6 (1976), pp. 323–324; against this view see Paul Ramsey, "The Indignity of 'Death with Dignity'," in Horan and Mall, eds., op. cit., pp. 306–313. In House of Lords (1936), col. 479, Lord Dawson of Penn clearly formulated the principle of the priority of quality of life; perhaps this is the reason why Williams and others assumed he was proeuthanasia, although their conclusion was not his. Almost every proeuthanasia author quite explicitly accepts some form of quality-of-life ethic which would justify nonvoluntary euthanasia; the places cited in this note are merely a sampling which could be augmented endlessly.

78. This is the point of view of those who see no distinction at all between the concept of euthanasia and that of assisted suicide; their point is that all and only those who choose to be killed should be at liberty to be killed "on demand" for whatever reason and by whomever they wish. The only restriction a view such as this would accept would be in the definite public interest—e.g., to protect others from being killed incidentally.

79. Curiously, several contributors to Kohl, ed., op. cit., present elements of a view of this sort; see Robert Hoffman, "Death and Dignity," p. 78, for a libertarian concept of dignity; Bertram and Elsie Bandman, "Rights, Justice, and Euthanasia," pp. 90–96, for a defense of the libertarian principle of consent against fanatical kindness; Baruch Brody, "Voluntary Euthanasia and the Law," pp. 228–229, for a formulation which excludes the patient's condition and the agent's motives as irrelevant.

80. Morris, op. cit., pp. 254–255, offers a libertarian argument, but then (pp. 266–271) establishes obviously arbitrary limiting conditions; Cole and Shea, op. cit., pp.
838–841, have obvious difficulty in trying to justify limits; Steele and Hill, op. cit., p. 343, fail to ground limits, since obviously anyone who wishes to die is in some sort of distress; On Dying Well, p. 6, points out the general indefensibility of limits proposed; Barbara Yondorf, "The Declining and Wretched," Public Policy, 23 (1975), pp. 480–482, argues that the key condition is simply wretchedness or misery, which is not necessarily related to terminal illness or other easily specified conditions.

81. The argument from animals is especially prevalent in the British debate: House of Lords (1936), col. 473 (Lord Denman); (1950), col 556 (Lord Chorley); answered, cols. 585–586 (Lord Webb-Johnson); nonvoluntariness emphasized, cols. 594–595 (Viscount Jowitt); (1969), col. 1186 (Lord Ailwyn); answered, cols. 1191–1192 (Earl of Longford). Wilshaw, op. cit., p. 7, uses the argument; Trowell, op. cit., p. 18, answers it. Those who use the argument from animal to human euthanasia would do well to study the latter with some care; see, e.g., Modern Veterinary Practice Staff, "Euthanasia: An Act of Compassion or One of Expediency?" Modern Veterinary Practice, 56 (June 1975), pp. 395–400; "Report of the AVMA Panel on Euthanasia," American Veterinary Medical Association Journal, 160 (1972), pp. 761–772. From a veterinary point of view euthanasia is simply killing the animal in a way which is relatively painless for it. In most instances the animal to be killed is not suffering antecedent pain but has simply served its purpose, and the mercy is in killing it painlessly rather than in an unnecessarily painful way. Obviously, if people are going to be killed, euthanasia in this sense is preferable to torture. But should people be killed?

82. A leading case is Strunk v. Strunk, 445 SW2d 145 (Kentucky, 1969), 35 A.L.R. 3d 683, with annotation 692–695; followed by Hart v. Brown, 29 Conn. Sup. 368, 289 A2d 386; opposed by In re Richardson, 284 So.2d 185 (Louisiana, 1973); and by In re Guardianship of Pescinski, 67 Wis.2d 4, 226 N.W.2d 180. The problem is discussed and substitute consent for organ transplants defended by John A. Robertson, "Organ Donations by Incompetents and the Substituted Judgment Doctrine," Columbia Law Review, 76 (1976), pp. 48–78. We shall see in chapter nine that Robertson argues against infant euthanasia. Some case can be made for transplants with substitute consent largely because here the damage and danger is not great, and it is a kind of act which the law approves for competent persons themselves. The implications if voluntary euthanasia is legalized are obvious.

83. In the Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976). The decision is definitely based upon substitute consent (662–664); the Court suggests Miss Quinlan’s right of privacy is to be exercised for her. No right to die is asserted; the right to refuse consent to treatment is assumed and, as we explained in chapter four, unnecessarily couched in terms of privacy.


86. Kohl, "Understanding the Case for Beneficent Euthanasia," p. 118, assures his readers that he is not for but rather against "any theory that solely or ultimately rests upon a principle of economic utility."

87. U.S. Department of Health, Education, and Welfare, Improving Family Planning Services for Teenagers (Washington, D.C.: 1976), pp. 5 and 77. This report was done on contract, and the title page carries a disclaimer of the official status of the views in it, but the text makes clear why the report was contracted and published by the department. (Family planning?)
88. Roe v. Wade, 410 U.S. 113 (1973) at 116; see below, chapter ten, section C.

89. The drive to institutionalize abortion as a publicly supported act and to compel even private institutions to participate willy-nilly in it is evident in Harriet F. Pilpel and Dorothy E. Patton, "Abortion, Conscience, and the Constitution: An Examination of Federal Institutional Conscience Clauses," Columbia Human Rights Law Review, 6 (1974–1975), pp. 278–305. Two survey articles are Marc D. Stern, "Abortion Conscience Clauses," Columbia Journal of Law and Social Problems, 11 (1975), pp. 571–627; Jane Finn, "State Limitations on the Availability and Accessibility of Abortions after Wade and Bolton," Kansas Law Review, 25 (1976), pp. 87–107. Two particularly important cases are: Doe v. Charleston Area Medical Center, 529 F.2d 638 (1975), in which a U.S. Court of Appeals held that since abortion is legal, a private hospital must allow it; Doe v. Bridgeton Hospital Association, 71 N.J. 478, 306 A.2d 641 (1976) in which the New Jersey Supreme Court held (with one dissent) that a statutory conscience clause was unconstitutional in respect to private hospitals. In both of these cases the fact that private hospitals receive public funding was an important consideration. If a "right to die" became similarly legalized and institutionalized, it is doubtful that many who abhor the practice could avoid some specific participation in it.

90. Doe v. Rampton, 366 F.Supp. 189 (1973). This case is peculiar, and it should be noted that while one of the three judges rejected the conscience clause in principle, the second only rejected it as inseverable and the third would have accepted it.


92. Beal v. Doe, 97 S Ct. 2366 (1977); Maher v. Roe, 97 S Ct. 2376 (1977); Poelker v. Doe, 97 S Ct. 2391 (1977). These three cases, decided June 20 by a majority of six to three (Blackmun, Brennan, and Marshall dissenting), only say that the states are not compelled to fund and facilitate abortions. The dissenting opinions make clear that economic considerations play a very important part in thinking on abortion within the Court. See below, chapter ten, section C. For commentaries on the 1977 cases see John T. Noonan, Jr., "A Half-Step Forward: The Justices Retreat on Abortion," The Human Life Review, 3 (Fall 1977), pp. 11–18; Robert M. Byrn, "Which Way for Judicial Imperialism?" The Human Life Review, 3 (Fall 1977), pp. 19–35.


98. Sivling, *op. cit.*, pp. 386–389; Wilson, *op. cit.*, pp. 162–166; Sanders, *op. cit.*, pp. 357–358, considers and rejects; Scher, *op. cit.*, pp. 675–677, views as a step toward legalization; Kamisar, *op. cit.*, pp. 970–971 and 979–980, prescinds from the question; Baughman et al., *op. cit.*, pp. 1229–1237, claim a dilemma in the present situation which would point toward mitigation, but (pp. 1257–1260) offer no solution to their dilemma.


109. Robert G. Twycross, "The Use of Narcotic Analgesics in Terminal Illness," *Journal of Medical Ethics*, 1 (1975), pp. 10-17; Lamerton, *op. cit.*, pp. 105-113; cf. Kamisar, *op. cit.*, 1008-1011. What the work of the hospices shows is that not only the sensation of pain but many annoying symptoms can be removed, and the suffering of dying can be greatly mitigated.

110. British Medical Association, *Problem of Euthanasia*, p. 5. The U. S. Senate, *Death with Dignity*, hearings ought to have led to a legislative program along the lines suggested, but they did not.


7: KILLING WHICH IS CONSIDERED JUSTIFIED

1. See Germain Grisez, *Abortion: The Myths, the Realities, and the Arguments* (New York and Cleveland: Corpus Books, 1970); at common law, abortion was murder if the unborn was delivered alive and subsequently died as a result of the abortive procedure (pp. 186-193, 375-376); by statute in eight states (1965) the willful killing of an unborn quick child was manslaughter, a provision first enacted by New York in 1829 (pp. 376-377); an Oregon Supreme Court decision held abortion manslaughter even if the child was not quick: State v. Ausplund, 86 Ore. 121, 167 P. 1019 (1917), *error dismissed* 251 U.S. 563 (1919).


5. William G. Lennox, "Should They Live? Certain Economic Aspects of Medicine," *American Scholar*, 7 (1938), pp. 454-458. Lennox's approach to epilepsy would have destroyed many people who have been enabled during the intervening four decades to lead normal lives due to improved pharmacological treatment of the disease, with drugs such as mycelin and dilantin with phenobarbital (which are used by a personal friend of one of the authors who has had the disease for over twenty years).


position, which since the nineteenth century was the strictest of any large group; here abortion was regarded as morally permissible if it were not direct, that is, if it were not precisely what one proposed in acting. This position permitted certain acts which the law would have considered intentional abortions to save the mother's life.


17. Ibid., pp. 397–399.

18. Ibid., pp. 399–402.


20. Ibid., p. 405.

21. Hugo A. Bedau, *The Case against the Death Penalty*, a pamphlet published by the American Civil Liberties Union (New York: January, 1973), p. 2. The same organization’s statement, “Policy Statement of the American Civil Liberties Union on State Laws Prohibiting Abortion,” was issued March 25, 1968; it marked a turning point for the proabortion movement by outlining the position that the United States Supreme Court enacted into law the same month Bedau’s pamphlet defending sanctity of life in the case of criminals was published.


28. LaFave and Scott, *op. cit.*, pp. 381–388. Rex v. Bourne, 1 K.B. 687 (1939), often is cited as an application of the defense of necessity. But it is not; rather it is a
case of arbitrary exegesis of a statute which did not mention any exception by means of another statute which did, and the stretching of “had not acted in good faith to preserve the life of the mother” to include preservation of health, and this to include aborting a pregnancy consequent upon rape in the instant case. The background of Bourne is interesting as an example of how far proabortionists will go in exploiting a victim of rape and contriving adjudication to achieve their ends; see Grisez, op. cit., pp. 220–222.

29. Glanville Williams, Criminal Law: The General Part (London: Stevens & Sons, 1961), pp. 741–745, comments on this judicial opinion, and criticizes it upon his own assumptions that the function of law is to deter and that this could not be accomplished in a case of this sort. Even he admits that there is a problem in determining who should be the victim. It seems not to occur to him that hanging Dudley and Stephens would have perhaps deterred some persons in the future from arbitrarily resolving a difficult situation of this sort by killing the youngest, the weakest, and the most unresisting—a point much emphasized by the decision against Dudley and Stephens. The law deters in difficult situations too by making desperate persons think: I may as well be fair about this even if it costs my life, for if I am not fair I shall surely be hanged anyway. (This is not to argue for the death penalty, but this was the law’s specified penalty for Dudley and Stephens, though it was commuted.)


8: NONVOLUNTARY EUTHANASIA AND JUSTICE

4. Joseph Tussman and Jacobus tenBrock, “The Equal Protection of the Laws,” California Law Review, 37 (1949), pp. 341–381. It is especially important to note several points: the concept of equal protection rests on a theory of legislation distinct from that of pressure groups (p. 350); there are classifications which are forbidden or suspect (pp. 353–361); and while underinclusiveness may be acceptable in regulatory legislation, it is not similarly defensible when basic human and civil rights are in question (p. 373). In effect, the argument we offer in this chapter is against admitting as a rational principle of classification the deficiencies on the basis of which nonvoluntary euthanasia is considered justified as an exception to the present law forbidding homicide.
7. Ibid., p. 81. Kohl does not draw the conclusion that involuntary euthanasia would be justified, but he supplies the premisses for it. His respect for liberty is minimal in comparison with his regard for what he considers kind.
8. Williams, Sanctity of Life, p. 316.

11. Ibid., p. 762.


25. See Russell L. Ackhoff, "Does Quality of Life Have to Be Quantified?" *General Systems*, 20 (1975), pp. 216–218; Lewis H. LaRue, "A Comment on Fried, Summers, and the Value of Life," *Cornell Law Review*, 57 (1972), pp. 621–631. LaRue provides a good example of a military leader who accepts greater risk of loss of life for his men to preserve loyalty. Some proponents of euthanasia simplistically claim that since individuals are willing to spend only a certain amount to prevent a risk of death, therefore they have quantified the value of life. But how much people will spend depends greatly on how much they have; by this criterion a Rockefeller’s life would be worth a lot more than the life of the ordinary poor person who lacks medical insurance. This seems questionable. What people will accept as a risk also depends upon many nonquantifiable factors; people do not gamble rationally.

26. Persons afflicted with this condition vary greatly in their capacity to learn and to live satisfying lives. One case of mongolism, admittedly unusual, was a girl of normal intelligence: Frank R. Ford, *Diseases of the Nervous System in Infancy, Childhood, and Adolescence*, 5 ed. (Springfield, Ill.: Charles C. Thomas, 1966), p. 182; another was a boy who attained the linguistic ability of a seventh-grade student and who was anything but lacking in personal quality: May V. Seagoe, *Yesterday Was Tuesday, All Day and All Night* (Boston and Toronto: Little, Brown and Co., 1964). Many persons having Down’s syndrome achieve less, yet their lives seem to be quite meaningful and satisfying to themselves.


37. In addition to the work cited in note 35 see Destro, *op. cit.*, pp. 1267–1292; Byrn, *op. cit.*, pp. 815–839. Nowhere other than in its careless acceptance of proabortion propaganda as historically determinative is the Court's bias and irresponsibility more evident.


42. See Trubo, op. cit., pp. 141–158. Norman Podhoretz, "Beyond ZPG," Commentary, 53 (May 1972), pp. 6 and 8, already argued that if abortion entailed infanticide, as some argued, this should weigh against abortion. F. Raymond Marks, "The Defective Newborn: An Analytic Framework for a Policy Dialog," in Albert R. Jonsen and Michael J. Garland, eds., Ethics of Newborn Intensive Care (San Francisco and Berkeley: University of California, 1976), p. 102, notes that the Court's decision in Roe v. Wade embodies a fiction that the unborn is not a person and thus conceals the adoption of quality-of-life criteria for preferring other lives to its, but Marks argues (pp. 106–125) on the assumption that abortion is now accepted and so infanticide also must be accepted. It is frightening to notice that at every stage of its unfolding the control of life movement has insisted very strongly upon the utter difference between its immediate objective and the next step, and at every stage it has used its achievement as a step toward that next step—notably in using the acceptance of contraception to promote abortion and using liberalization of restrictions upon private activities to promote public programs of contraception and abortion.


53. This point is stressed by Wertham, op. cit., pp. 153–191.


57. Margaret Sanger, "The Morality of Birth Control: Address of November 18, 1921 at the Park Theater," Birth Control Review, 6 (February 1922), p. 25.

eugenicist ideas; he remarks with respect to birth control: "This principle of limiting
certain races through limitation of offspring might be applied intranationally as well as
internationally. Germany in time might have solved her Jewish problems in this way" (p. 461).

59. Frank W. Notestein, "The Importance of Population Trends to the Birth Con­
60. See Joseph M. Boyle, Jr., loc. cit.
61. Lewis, op. cit., p. 892. It is worth noticing that even if one did not hold that the
Supreme Court’s decision violates arbitrarily the right to life of the unborn, one might
still hold that the decision by the Court was lawless because legislative rather than
Wade," Yale Law Journal, 82 (1973), p. 947: The decision "is bad because it is bad
constitutional law, or rather because it is not constitutional law and gives almost no
sense of an obligation to try to be." If the Court should legislate euthanasia, this act
also would be doubly unjust, both as a substantive violation of rights and as a proce­
dural abuse of its own power.

9: JUSTICE AND CARE FOR THE NONCOMPETENT

1. See John A. Robertson, "Involuntary Euthanasia of Defective Newborns: A
his note 28; also see Jerome Hall, General Principles of Criminal Law, 2nd ed. (India­
2. Hall, loc. cit., correctly stresses that a legal duty to act does not specifically
distinguish crimes by omission from other crimes, but he seems to ignore the point
intended by those who stress this requirement for a crime in the case of omissions: that
absent a duty to act, all other conditions of a crime by omission being given, no crime
can be imputed to the potential agent who does not act. In addition to Robertson, loc.
cit., and the works cited by him, an especially helpful discussion is presented by
George P. Fletcher, "Prolonging Life: Some Legal Considerations," in A. B. Downing,
ed., Euthanasia and the Right to Death: The Case for Voluntary Euthanasia (London:
Peter Owen, 1969), pp. 78–83. See also Otto Kirchheimer, "Criminal Omissions,"
ance of duty.
4. See James M. Gustafson, "Mongolism, Parental Desires, and the Right to
Life," Perspectives in Biology and Medicine, 16 (1973), pp. 529–557; Dennis J. Horan,
"Euthanasia, Medical Treatment and the Mongoloid Child: Death as a Treatment of
hospital in Illinois); David H. Smith, "On Letting Some Babies Die," Hastings Center
5. John A. Robertson, "Discretionary Non-Treatment of Defective Newborns," in
Aubrey Milunsky and George J. Annas, eds., Genetics and the Law (New York and
influential article favoring the withholding of necessary treatment in such cases is
of Medicine, 289 (1973), pp. 885–890.


21. Marks, *loc. cit.*; Philip B. Heymann and Sara Holtz, "The Severely Defective Newborn: The Dilemma and the Decision Process," *Public Policy*, 23 (1975), p. 392; explained by Robertson, "Discretionary Non-Treatment of Defective Newborns," pp. 435–436; cf. Warren Reich, "What Rights Have the Newborn?" *Origins* (July 4, 1974), pp. 89–91. John Fletcher, "Abortion, Euthanasia, and Care of Defective Newborns," *New England Journal of Medicine*, 292 (1975), pp. 75–78, makes one of the few attempts to distinguish abortion from infanticide, yet even he admits (p. 78) death as a "good outcome" in some cases and considers acceptable the withholding of treatment precisely to bring about death. Lorber, "Ethical Problems," pp. 57–58, argues most strongly for the continuity between abortion and infanticide yet rejects active euthanasia and favors killing by omission, although he admits: "There is a major inconsistency and perhaps hypocrisy here, yet I, for one, uphold this principle." His reason for drawing the line where he does seems primarily to be the great possibility of abuse of active euthanasia and secondarily the repugnance he would feel toward actively causing the death of an infant. Various cases such as *Edelin* and *Waddill* have focused attention on the close relationship between abortion and infanticide, because in such cases the indistinctness of the dividing line between the two types of killing becomes painfully obvious. A defense attorney in *Edelin* has argued that the point of abortion is to deliver a dead fetus; he holds that any state attempt to limit this is "interference," but even he admits that once the child is live-born, it should be protected: Benjamin B. Sendor, "Medical Responsibility for Fetal Survival under Roe and Doe," *Harvard Civil Rights/Civil Liberties Law Review*, 10 (1975), pp. 444–471. The practice of allowing aborted viable babies to die is reported to be widespread; various states have tried to prevent this by special legislation. See Joseph P. Witherspoon, "The New Pro-Life Legislation: Patterns and Recommendations," *St. Mary’s Law Journal*, 7 (1976), pp. 661–668, for examples of such legislation and discussion, Witherspoon also cites evidence of the killing of persons born alive as a result of abortion, including an affidavit of Dr. Baker, Abele v. Markel, Civil No. B-521 (D. Conn., July 27, 1972), concerning the practice in Yale-New Haven Hospital, where Duff and Campbell report similar practices in the special-care nursery.

and his preferences or probable preferences for care." This position is in defense of allowing unwanted babies to die—or seeking "early death as a management option, to avoid that cruel choice of gradual, often slow, but progressive deterioration of the child who was required under these circumstances in effect to kill himself"—in the special-care nursery of the Yale-New Haven Hospital. Is this double-think?

23. Robertson, "Involuntary Euthanasia of Defective Newborns," pp. 213–244, seems to overlook this point in his otherwise admirable analysis; see Veatch, op. cit., p. 135, note 41.

24. Bryan Jennett and Fred Plum, "Persistent Vegetative State after Brain Damage," Lancet, 1 (1972), pp. 734–737, describe several more or less similar conditions, in some of which the patient is conscious. Edward J. Leadem, "'Guidelines for Health Care Facilities to Implement Procedures Concerning Care of Comatose, Non-Cognitive Patients'—A Perspective," Hospital Progress, 58 (March 1977), pp. 9–10, describes efforts to implement the decision narrowly; B. D. Colen, Karen Ann Quinlan: Dying in the Age of Eternal Life (New York: Nash Publishing, 1976), p. 74 and passim, exemplifies the tendency to extend a decision to cases in which treatment is withdrawn from paralyzed, conscious patients without the patient's consent.


28. Pius XII, "The Prolongation of Life," The Pope Speaks, 4 (1957–1958), pp. 395–396 (AAS, 49 [1957], pp. 1027–1033 at 1030). He perhaps thought the distinction was descriptive; his language in the original French hovers between the descriptive and the frankly moral. In any case, the formulation is vague and at least partially circular, and so of little help unless one can assume an established context of moral principles and practices, as in the Catholic Church.

29. Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), at 658–660, although the Court is careful to say that it does not make the Catholic position a precedent for New Jersey Law; 1977 ARKANSAS GENERAL ASSEMBLY, Act 879.

30. Paul Ramsey, "Prolonged Dying: Not Medically Indicated," Hastings Center Report, 6 (1976), pp. 14–17; Richard A McCormick, "A Proposal for 'Quality of Life' Criteria for Sustaining Life," Hospital Progress, 56 (September 1975), pp. 76–79. The latter errs in our judgment in merging considerations about the means—whatever "extraordinary" and "ordinary" might signify—into considerations about the prospective quality of life if the individual survives, thus to justify homicide by omission in some cases.


still the society more than the individual; Duff and Campbell, "Moral and Ethical Dilemmas," pp. 890–891, consider family economic interests and feelings very important; Freeman, "To Treat or Not to Treat," pp. 135 and 141–142, argues on the basis of social costs and various qualitative criteria against both child's right to life and the unwillingness of others to kill it; Lorber, "Ethical Problems," pp. 52–53, stresses cost and impact on the family; Richard E. Harbin, "Death, Euthanasia and Parental Consent," Pediatric Nursing, 2 (July–August 1976), pp. 26–28, stresses the interests of everyone but the infant, even including the hospital nursing and house staff; Robert E. Cooke, "Whose Suffering?" Journal of Pediatrics, 80 (1972), pp. 906–907, points out that there is more concern about others than about the infant.


34. Crane, op. cit., pp. 20 and 26, makes clear that wantedness by the parents makes a substantial difference to the actions of physicians.


38. Ibid., pp. 257–258; Philip R. Lee and Diane Dooley, "Social Services for the Disabled Child," in Jonsen and Garland, eds., op. cit., pp. 64–69, describe available services but also point out (pp. 70–74) the need for better coordination and improvement of assistance.


44. See the works by Lorber, Smith and Smith, Ames and Shut, Freeman, and Duff and Campbell, cited in notes 6, 8, 9, 12, and 13 above.

45. Robards et al., op. cit., p. 13, speak of those who would have "a quality of life so poor as not to merit survival"; Jonsen et al., "Critical Issues in Newborn Intensive Care," pp. 760–761, would have court weigh quality of life; McCormick, op. cit., pp. 77–78, proposes to redefine the benefit of means to the patient in terms of quality of life expected because of already existing conditions; Gustafson, op. cit., pp. 553–554, who rejects letting Down's syndrome baby starve, draws the line at monsters, without distinguishing, for example, siamese twins from those which cannot survive regardless of treatment.

47. Duff and Campbell, "On Deciding the Care of Severely Handicapped or Dying Persons," p. 488; however, they also argue (p. 492) that society should interfere with what the parents and physicians are doing only if they not only harm the baby and there is a better alternative available but if they also can expect social support in carrying through the unwelcome choice! On this basis anyone who wanted to do armed robbery should go unpunished unless society was willing to provide robbers with bank rolls.


49. Freeman, "Is There a Right to Die—Quickly?" p. 905.

50. Heymann and Holtz, op. cit., pp. 409-414, note the discrimination but assume that the distinction justified subordinating newly born persons.

51. Smith, op. cit., p. 46.


57. Ibid., at 663.


59. See Marks in Jonsen and Garland, eds., op. cit., p. 109, who reports a proposal that euthanasia could become gradually accepted by practice.


62. See Leon R. Kass, "Regarding the End of Medicine and the Pursuit of Health," The Public Interest, 40 (1975), pp. 13-14; Joseph M. Boyle, Jr., "The Concept of Health and the Right to Health Care," Social Thought, 3 (Summer 1977), pp. 7-9. In view of the problems with which we are concerned here, the notion of mental health can be set aside, since treatment for psychological problems is only distantly related to questions of euthanasia.

63. Kass, op. cit., pp. 36-37, urges the need for more preventive medicine; Charles Fried, "Equality and Rights in Medical Care," Hastings Center Report, 6 (February 1976), p. 33, refers to the medical profession as a tight and self-protective guild; Anonymous, "Scarce Medical Resources," p. 641, holds that the Veterans Administration care of nonservice-related problems is discriminatory; George W. Paulson, "Who Should Live?" Geriatrics, 28 (1973), p. 134, makes clear that the patient's demand, the sympathy of the physician for the patient, and the patient's ability to pay make significant differences in how hard physicians try to cure the patient or prevent death.

64. Anonymous, "Scarce Medical Resources," pp. 688-689, stresses the need for priorities and the inevitability of an absolute limit; Fried, op. cit., p. 31, makes the
point very clearly; Boyle, *op. cit.*, pp. 14–15, clarifies the ethical grounds of such a limit; Smith, *op. cit.*, p. 46, stresses the unavoidability of limits while rejecting the quality-of-life solution; Ramsey, *Patient as Person*, pp. 268–269, points out that even the most adequate medical resources are scarce in comparison with needs.


68. Heymann and Holtz, *op. cit.*, pp. 403–405, argue very effectively that to refuse to use available resources on behalf of one individual when not used for another on the excuse of cost would be frightening abandonment. Clearly, where costs must be limited, this must not be done by making resources unavailable to some identified beforehand.


70. Smith, *op. cit.*, p. 44.


74. See works cited in notes 1 and 2 above.


83. For example, by Crane, *op. cit.*, pp. 30–31.


86. George G. Annas, "In re Quinlan: Legal Comfort for Doctors," Hastings Center Report, 6 (June 1976), pp. 29–31, criticized the New Jersey Supreme Court decision on this matter; Shaw, op. cit., p. 886, mentions that a committee was set up at Johns Hopkins following the famous case but questions the point of such a body; Corbett and Raciti, op. cit., pp. 69–73, also question the Quinlan decision in this matter in pointing out that the committee does not protect the individual. Veatch, op. cit., pp. 173–176, points out that a medical committee has most of the disadvantages of the individual physician plus some additional ones.


88. Ibid., pp. 69–73 and 79.

89. 1977 Arkansas General Assembly, act 879.

90. 1977 N. M. Laws, ch. 287.

91. Matter of Quinlan, at 666.

92. Ibid., at 662–664.

93. Ibid., at 668–669.

94. Ibid., at 671. Harold L. Hirsch and Richard E. Donavan, "The Right to Die: Medico-Legal Implications In Re Quinlan," Rutgers Law Review, 30 (1977), pp. 267–303, point out that neither for the future nor even for the instant case are the implications of the decision clear. The decision (at 651) uses the ordinary-extraordinary means distinction, which leads to uncertainty about what may be done.


96. Ibid., at 672.


98. Leadem, loc. cit.; William F. Hyland and David S. Baime, "In Re Quinlan: A Synthesis of Law and Medical Technology," Rutgers-Camden Law Journal, 8 (1976), 58–60. The latter note the ineptness of the attempt of the Court to legislate and the tragic effect this attempt has in putting a false constitutional block in the way of more competent action by the legislature.

99. Matter of Quinlan, at 668–669; cf. Karen Teel, "The Physician's Dilemma: A Doctor's View: What Should the Law Be?" Baylor Law Review, 27 (1975), p. 9. The Court deletes Teel's remarks beginning with, "However, it has its drawbacks." Teel is sensitive to the point that the family might reasonably question whether this group has any right to make decisions, as might the physician.


103. Ibid., at 432.


106. George J. Annas, "The Incompetent's Right to Die: The Case of Joseph Saikewicz," Hastings Center Report, 8 (February 1978), pp. 21–23. Even this sympathetic commentator's article is published with a title which suggests an irrelevant claim to a "right" to die.


10: THE CONSTITUTION, LIFE, LIBERTY, AND JUSTICE


5. Ibid., at 342–344, 1798. The prevailing opinion was held by only four members of the Court. The majority was formed by the concurrence of Justice Harlan, whose separate opinion rejected the opinion's construction of the statute. Yet Harlan held with the others that an unconstitutional establishment of religion could be avoided and religious neutrality nevertheless maintained by the government only if theistic and nontheistic religious beliefs and comparable secular views were treated alike (at 357, 1805).


16. Ibid., at 1360; Planned Parenthood of Central Missouri v. Danforth, at 2855.
19. See Byrn, op. cit., pp. 62–67. It seems to us that there can be no better protection for the unborn than to make clear in the Constitution that they are persons and to exclude any reference to them in laws respecting homicide, for in this case the latter will allow minimal exceptions.
21. Ibid., p. 97.
22. Ibid., pp. 99–100.
24. Ibid., p. 104.
25. Ibid., p. 111.
27. Beal v. Doe, 97 S.Ct. 2366 (1977), the Pennsylvania case, was not decided on constitutional grounds; Maher v. Roe, 97 S.Ct. 2376 (1977), the Connecticut case, was.
33. See above chapter six, notes 88–94 and accompanying text. Those urging the institutionalization of abortion have argued for an extremely inclusive concept of state action, so that the acts of any private entity which receives public funding would be state action. See Jane Finn, loc. cit.; Harriet F. Pilpel and Dorothy E. Patton, "Abortion, Conscience and the Constitution: An Examination of Federal Institutional Conscience Clauses," Columbia Human Rights Law Review, 6 (1974–1975), pp. 279–305; and especially Marc D. Stern, "Abortion Conscience Clauses," Columbia Journal of Law and Social Problems, 11 (1975), pp. 571–627. Their point was to require abortion cooperation on the theory that anyone involved in state action could not abridge the woman’s "right" to an abortion. Our point is that on their theory most abortions involve state action: the people at large are compelled to cooperate in what many regard as murder of unborn persons. This is an infringement on liberty to stand aloof.
34. See above, chapter six, note 63 and accompanying text. A widely used text for values clarification is Sidney B. Simon, Leland W. Howe, and Howard Kirschenbaum, Values Clarification: A Handbook of Practical Strategies for Teachers and Students (New York: Hart Publishing Co., 1972). An official state publication which exemplifies

42. Jackson, dissenting in Everson v. Board of Education, at 23–24, 515.
44. Ibid., at 237–238, 478.
45. The briefs *amicus curiae* of the American Ethical Union and of the American Humanist Association in Abington School District v. Schempp are printed in Philip B.


48. See above, notes 2–6 and accompanying text. It is worth noticing that the Court’s holding that nontheistic world views are religions is not a sudden, recent development but goes back at least to Vidal v. Girard’s Executors, 2 How. 205 (1844), in which deism was held to be a sect along with Judaism and “any other form of infidelity”; Chief Justice Hughes, dissenting in United States v. McIntosh, 293 U.S. 605 (1931), said that “cosmic consciousness of belonging to the human family” is a “religious” belief. A person’s fundamental world view thus is his or her religion.

49. See John Dewey, “My Pedagogic Creed,” *The School Journal*, 14 (January 16, 1897), pp. 77–80, a uniquely clear, succinct, and important summary by the man himself. The creed is divided into five articles, and each of these into brief paragraphs beginning “I believe” and setting forth Dewey’s whole educational philosophy. The fifth article sets out the role of education as the highest duty of society and the mode of social progress and reform, for which the child is to be trained. The final paragraph gathers the whole together in religious language: “I believe that in this way the teacher always is the prophet of the true God and the usherer in of the true kingdom of God.” The emphasis here should be on “true”—that is, the this-worldly, social reality of which Dewey has been speaking. A sympathetic but informative history of the progressive education movement, which has entrenched secular humanism in the public schools, and of Dewey’s important role in it is Lawrence A. Cremin, *The Transformation of the School: Progressivism in American Education, 1876–1957* (New York: Alfred A. Knopf, 1961), especially pp. 100, 115–126, and 234–239.


59. The argument that public funding of separate schools is constitutionally required has been made by Virgil C. Blum, S.J., *Freedom of Choice in Education*, rev. ed. (Glen Rock, N.J.: Paulist Press, 1963). Many careful legal analyses have shown that the Court is giving undue weight to and misinterpreting the Establishment Clause to the great detriment of Free Exercise for those who wish to avoid indoctrination in their local public school and Equal Protection for those who pay to support private schools in which their children are taught in ways which better comport with their religious beliefs than they would be taught in the public schools. On the interpretation of the Establishment Clause see Jesse H. Choper, “The Establishment Clause and Aid to
Parochial Schools," *California Law Review*, 56 (1968), pp. 260–341, especially pp. 283–295; Alan Schwarz, "No Imposition of Religion: The Establishment Clause Value," *Yale Law Journal*, 77 (1968), pp. 692–737, especially pp. 727–737. An excellent statement of the case that the Court is overemphasizing the Establishment Clause and disregarding the competing demands of the Free Exercise and Equal Protection clauses is Paul G. Kauper, "The Supreme Court and the Establishment Clause: Back to Everson?" *Case Western Reserve Law Review*, 25 (1974), pp. 107–129. It also has been argued effectively that the "tests" used by the Court are not reasonable interpretations of the constitutional requirements; in addition to the preceding articles see John E. Nowak, "The Supreme Court, the Religion Clauses, and the Nationalization of Education," *Northwestern University Law Review*, 70 (1976), pp. 883–909, especially pp. 900–909. Alexander Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper and Row, 1970), pp. 121–125 and 136–137, has suggested that the Court’s decisions concerning schools have been intended to further social-policy objectives favored by the justices themselves; this view, if correct, would explain the straining of the Establishment clause evident in the decisions. The political background of the Court’s early decisions is briefly summarized by Richard E. Morgan, *The Supreme Court and Religion* (New York and London: The Free Press, 1972), pp. 81–90; this summary makes clear that the post-World War II decisions were a calculated blocking of public aid to parochial schools. Consistency with any set of principles is hard to find in nearly contemporary decisions; this point is made with regard to some of the more recent decisions by James L. Underwood, "Permissible Entanglement under the Establishment Clause," *Emory Law Journal*, 25 (1976), pp. 17–62.

60. In Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526 (1972), at 1536, the Court has admitted that regulations neutral on their face may offend the constitutional requirement of neutrality by unduly burdening the free exercise of religion. In Yoder, Amish parents wished to avoid sending their children to high school, and the Court accepted their position. In an earlier case, Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790 (1963), the Court held that unemployment benefits could not be denied a person who could not work on Saturday because of religious convictions. These decisions have breathed considerable life into the Free Exercise clause but would not likely be followed to their logical conclusion: Children in religious schools cannot be denied public funding simply because they cannot in conscience attend the established schools. The Ohio Supreme Court has taken one further step in this direction by holding that children attending one of the Christian schools—a development of Evangelical Protestants who object on grounds of conscience to the public schools—could not be forced by the state’s school attendance regulations into the public schools, although their religious school did not meet the state’s minimal standards in a number of respects: State v. Wishner, 47 Ohio St. 2d 181, 351 N.E. 2d 750 (1976). The issue resolves to the ultimate one: What is to be done about liberty when money is at issue? We do not doubt that if the parents of separate school students were not being forced to carry both the burden of their own children’s education and their share of the burden of the education of those attending the established schools, thus to provide a tremendous subsidy for the dominant groups in American society, the true status of education as always embodying some form of religion or another would long since have been admitted by the Court.

11: THEORIES OF ETHICS


8. See Dan W. Brock, "Recent Work in Utilitarianism," *American Philosophical Quarterly*, 10 (1973), pp. 241–269, for a telling survey and criticism of efforts to deal with the perennial difficulties of consequentialist theory.


10. Thomas Aquinas, *Summa contra gentiles*, 3, chs. 121–122, maintains that nothing offends God which is not contrary to human good. He quotes St. Paul, "Let your service be reasonable" (Rom. 12.1) in support of the view that divine law demands of humankind only what is rationally required; see also idem, *Summa theologiae*, 1–2, q. 19, aa. 9 and 10.

11. The maxim is derived from Romans 3.8, where St. Paul rejects the contradictory. Christians, he says, were falsely accused of justifying evildoing. It is noteworthy that this point is in the context of a discussion of divine providence: God permits evil for a good he draws from it. If both this conception of providence and consequentialism were correct, Christians would have a simple ethics: When in doubt, try it! So Paul rejects consequentialism. Joseph Fletcher, *Moral Responsibility: Situation Ethics at Work* (Philadelphia: Westminster Press, 1967), pp. 21–23, as well as in other works, denies the principle which he regards as an unwarranted absolutization of Paul's "remark" by asserting that the end does justify the means. However, Fletcher never takes the trouble to clarify the traditional meaning of the maxim derived from Paul, and he takes the saying that the end does not justify the means as if it meant—what obviously is absurd—that one can act without any end in view.

13. For a development of this argument see Boyle, Grisez, and Tollefsen, *loc. cit.*

14. See Thomas Aquinas, *Summa theologiae*, 1, q. 75, a. 4; q. 76, a. 1; P. F. Strawson, "Persons," in G. N. A. Vesey, ed., *Body and Mind* (London: George Allen & Unwin, 1964), pp. 403–424; Gabriel Marcel, *The Mystery of Being*, vol. 1, *Reflection and Mystery* (Chicago: Henry Regnery, 1960), pp. 127–153. It can be argued that Strawson’s argument itself is too Cartesian, but if so, there are other, more recent analytic critiques of dualism which remedy the defect—for example, B. A. O. Williams, "Are Persons Bodies?" in Stuart F. Spicker, *The Philosophy of the Body: Rejections of Cartesian Dualism* (New York: Quadrangle/New York Times Book Co., 1970), pp. 137–156. Religious readers might be concerned that a firm rejection of dualism will undercut the belief in life after death. However, it is important that for many Jews and for the common Christian tradition the key to personal existence beyond the present life is in the resurrection of the body. This would make little sense if the person were not, in fact, a bodily reality. Thomas Aquinas, commenting upon St. Paul, states that the soul is not the person (he regards the soul after death as immaterial remains of a person): "homo naturaliter desiderat salutem sui ipsius, anima autem cum sit pars corporis hominis, non est totus homo, et anima mea non est ego; unde licet anima consequatur salutem in alia vita, non tamen ego vel quilibet homo" (*Super primam epistolam ad Corinthios lectura*, XV, lec. ii).

12: MORAL RESPONSIBILITIES TOWARD HUMAN LIFE


2. Cf. Thomas Aquinas, *Summa theologiae*, 2–2, q. 40, a. 1; q. 64, a. 2; *Summa contra gentiles*, 3, ch. 146; Aristotle, *Politics i* (1253a19–28); *Nicomachean Ethics i*, 2 (1094b7–11); x, 7–8 (1177b26–1178b23); *Metaphysics xii*, 9 (1074b15–34).


4. Eike-Henner W. Kluge, *The Practice of Death* (New Haven and London: Yale University Press, 1975), pp. 8–9, erroneously assumes that Grisez argues from the genetic structure of the fertilized ovum to its potential personhood. Grisez’s argument has nothing whatsoever to do with "potential personhood," whatever that is, but rather is from the facts which provide no ground for distinguishing the unborn from already born without unprovable metaphysical or theological assumptions to the reasonability of a presumption that the unborn are persons, and hence to the ethical mandate that they be treated as such. When one is killing something which might be a person and has no way of knowing that it is not, one has a moral obligation to be very careful—not to kill it—since otherwise one is willing to kill a person if this happens to be one.

9. Boyle, "Double-effect and a Certain Type of Embryotomy."
20. United Way fund raising contributes to diverse purposes in different places. Some programs might contribute to objectionable causes, but we by no means suggest that all do. The March of Dimes has supported prenatal genetic screening. As a matter of well-established fact, genetic screening primarily is a means used as part of the execution of proposals to abort infants found defective. See Tabitha M. Powledge and Sharmon Sollitto, "Prenatal Diagnosis—The Past and the Future," *Hastings Center Report*, 4 (November 1974), pp. 11–13; Philip Reilly, "Genetic Screening Legislation," *Advances in Human Genetics*, 5 (1975), pp. 354–368. (The latter looks forward to compulsory prenatal screening and government controls of procreation in case defects are found.) Since prenatal screening is used as it is, anyone who says that support of it is not helping to execute abortive acts is either naive or dishonest.