5: Suicide and Liberty

A. Introduction

The relationship between suicide and euthanasia is not difficult to understand. On the one hand, suicide can be self-administered euthanasia. Even if the law does not permit physicians or others to kill at their request persons suffering from prolonged or painful illnesses, still it cannot stop such persons from trying to kill themselves.[1] On the other hand, some argue that if suicide ought not to be treated as criminal, then euthanasia, which can be considered assisted suicide, ought not to be treated as criminal. Why should it be wrong to help others do what they themselves are free to do?

Our concern with suicide in this chapter is limited to a discussion of what the law ought to be with respect to suicide, assisting suicide, and preventing suicide. We are not concerned here with the morality of suicide. The latter topic will be considered in chapter twelve. Just as it was too quickly assumed in the past that the proper legal position on suicide was settled by a widely accepted moral condemnation of it, so it is sometimes too quickly assumed today that the proper legal position on suicide should be settled by a widely accepted moral approval of it (or, at least, by the absolving as guiltless of those driven to it).[2] But moral judgments are not *directly* relevant to what the law in respect to suicide ought to be. The question is rather what our basic principles of liberty and justice demand.

In discussing suicide we assume that euthanasia, even of a voluntary sort, is a special problem. Moreover, in the present chapter we assume that all active euthanasia is excluded. If subsequent examination shows that voluntary active euthanasia ought to be permitted under certain conditions, its permission would be by way of amendment or exception to the general provisions of law in respect to both homicide and suicide, to the extent that these provisions are incompatible with voluntary euthanasia. In proceeding in this way we are not begging the question about voluntary euthanasia; we simply reserve this question for discussion in chapter six.

In common use all who deliberately kill themselves are called "suicides." In law the word is used in a narrower sense. People who kill themselves are suicides only if they are legally competent and act with self-destructive intent, voluntarily and intentionally doing something which causes their own death.[3] Thus children, insane persons, and those whose deaths occur in the course of some risky undertaking are not legally considered suicides even though they might be called "suicides" in common use if they act purposely or recklessly in a way which leads to their deaths.

B. The Changing Law on Suicide

Why is the legal concept of suicide narrower than the popular one? The reason is that in Anglo-American law suicide was considered a crime, a form of murder. The suicide was a *felo-de-se*—a felon or evildoer in respect to himself or herself. If killing a person is a great evil, killing oneself was not considered to be an exception; the identity of the agent and the victim was incidental. In British legal practice the suicide was punished after death by an ignominious burial and by forfeiture of property; the latter was part of the punishment for many serious crimes. American legal practice was not so severe. In some jurisdictions suicide probably never was a crime, although even in these it perhaps was considered a public wrong and unlawful.[4]

Thus, one could not be a legal suicide unless in killing oneself one met all the conditions one would have to meet to make the act of killing murder if it were done upon another person. Since children and insane persons cannot commit crimes and since reckless and self-destructive behavior would not be self-murder (but, at most, self-reckless homicide), some self-killings fall outside the legal concept of suicide.

Robert M. Byrn explains the attitude of the common law toward suicide in a most illuminating way by recalling the objections against suicide stated by a sixteenth-century judge and then by transposing these objections into more contemporary concepts and language.

The four bases on which suicide was considered unlawful four centuries ago were (1) that it is an unnatural act which violates the natural tendency of self-preservation, (2) that it is a breach of the divine commandment prohibiting killing, (3) that it is a kind of mutilation of the king, since it destroys one of his subjects, and (4) that it also is against the king, since it runs counter to his intention to prevent bad example.

Byrn translates (1) into the modern language of rights: suicide can be seen as a self-defeating claim to a right to destroy life which is the precondition of all rights. He translates (2) into the value of human lives simply as human lives: suicide seems to treat life as if it were property at one's own disposal.

He translates (3) into the modern concept that it is an inherent function of government to protect life, so that a person cannot lawfully commit suicide or consent to being killed by another. He translates (4) into the concept that it is legitimate public policy to bar conduct which would encourage suicide. In each case the translated basis for considering suicide unlawful has some support in recent case law.[5]

Now, the fact of the matter is that gradually, over the last century or so, suicide and attempted suicide have lost the legal status of crimes. With the disuse of forfeiture and ignominious burial as penalties suicide itself simply could not be punished. A successful suicide is like a successful revolutionary in standing beyond the reach of the law. And while persons attempting suicide were occasionally punished until the last few years, this practice also fell into increasing disfavor.[6]

Undoubtedly, part of the reason for the disfavor was that modern conceptions of responsibility have tended to support the view that even if the typical person committing or attempting suicide is not legally insane, still such persons are somehow not themselves and do not deserve to be dealt with as criminals. As criminal prosecution of persons attempting suicide declined, efforts to treat such persons as ill increased; indeed, the main use of statutes forbidding suicide attempts seemed to be their leverage in bringing about commitment of persons considered to require treatment for their suicidal tendencies.[7]

But there is more to the decriminalization of suicide than the changing conception of responsibility. After all, changed conceptions of responsibility have led to changed attitudes toward crime and criminals in general, and especially toward those committing the more unusual and more violent crimes.

But there is no general trend toward the decriminalization of crimes such as treason, murder, and rape. Such crimes are frightening to a large part of the public; they involve obvious injustice. The threat of criminal prosecution probably has a very substantial deterrent effect—not, of course, on those who do commit crimes, but on those many persons who are selfish and cruel enough toward others in ways unregulated by law to suggest that they would not stop short of crimes such as murder or rape were they not led by self-interest to respect the threat of legal punishment.

Suicide is different. It upsets and perhaps appalls others but does not frighten them for their own safety. It does not involve any obvious injustice to the victim, although the suicide may be regarded sympathetically as a victim of some injustice. And this act hardly seems likely to be deterred by any criminal sanction.

Suicide *always* differed from crimes against others in these ways. But, as the sixteenth-century judge quoted by Byrn makes clear, suicide formerly

was sufficiently similar to other crimes to be considered a form of criminal evildoing, since it violated life, broke a divine command, and offended the king. Even with Byrn's translation of the objections into contemporary terms, however, the older rationale for considering suicide criminal seems to have lost its cogency.

A suicide need not make a self-defeating claim to a right to destroy his or her rights, but only a claim to a liberty to bring about his or her own death—the destruction of rights being accepted along with the loss of certain other good things as an unwanted but inevitable side effect. And the suicide need not suppose that his or her own life is property or make the rather obvious mistake of thinking that it can be alienated as property can be; yet the suicide may think that life itself is only instrumentally and not inherently good, and that death at times also can be instrumentally good, as a last resort to solve otherwise intractable problems. As for the suppositions that suicide infringes upon the concern of law to protect life and to prevent bad example, the exclusion of any other acceptable grounds for considering suicide unlawful leads many people to regard these suppositions as weak or as question-begging.

Central to the change in attitude toward suicide, we think, is a widespread decline in the belief that human life has sanctity which deserves reverence, or at least absolute inherent dignity which deserves respect without exception. Life is valued, but its value is widely believed today to be a function of its serving as a foundation for conscious experience. On this view, if conscious experience is rich and desirable, then life is valuable; but if conscious experience is impoverished, repugnant, lacking in the satisfaction of fulfilling relationships, then life is no longer "meaningful." In other words, the value of life is considered to be a function of the quality of life.

As we pointed out in chapter two, section F, because of this change many today do not accept the view that there is anything like a naturally given unalienable right to life; they do not consider life itself to be among the goods which of themselves ground the legitimacy of the legal claims of a political society upon its members. For this reason, as we have explained, we do not think that our present, pluralistic society can base legislation precisely and directly upon the sanctity or inherent absolute dignity of human life. (At the same time, as we shall make clear in chapters eleven and twelve, our own *ethical* position is that life is of itself an inherent personal good which ought never to be directly violated.)

Consequently, we think that the decriminalization of suicide reflects a change in the consensus—which constitutes our political society and gives government the moral basis for using power. When justice is violated, then life can be protected. For example, the lives of the unborn, if they were admitted to be persons, could be protected by law on the ground that it is unfair to protect others and to abandon them. But in the case of suicide, even

if *morally* speaking the right to life is unalienable and even if one grants that *morally* speaking people can violate their own unalienable rights, justice certainly is not violated. Thus the traditional ground for regarding suicide as a crime has been removed. Unless there is some other basis for considering it such, respect for liberty demands that suicide be left outside the scope of criminal law.

C. Liberty and a "Right" to Suicide

As soon as one says that people must be at liberty to do any sort of act, many quickly draw the conclusion that a "right" has been posited to do that sort of act. And if a right, then there will be advanced at least a claim to protection from all public or private interference, and at most a claim to the necessary means to exercise the right.[8]

However, not every liberty entails a right in any strong sense. For example, religious liberty does not carry with it an entitlement to the means necessary for the exercise of religion. And the liberty of parents to disappoint their children by breaking promises made to them, to damage their children psychologically by playing favorites, to cause them pain by severe punishments—this liberty is no more than immunity from public intervention into the relationships of the family. Parental misbehavior is tolerated by political society, even though it may carry with it some damage to the common good, provided it remains within certain limits. And so while a parent is at liberty to be a bad parent, no parent has any right to be a bad parent.

Even if the criminal law should not be concerned with suicide and attempted suicide, such acts remain in many ways socially disturbing and costly. Many people who are not well balanced can be influenced by the example of others who kill themselves; if suicide became widely accepted, this influence could become more significant than it now is. A suicide sometimes leaves dependents uncared for and other duties unfulfilled. An individual who commits suicide often endangers others directly, by causing risk for those who try to help. Sometimes there is a significant indirect danger to others who are wrongly held responsible or blamed for the suicide's act.

If persons in difficult circumstances committed suicide fairly often, their doing so would create a social expectation that persons in difficulty need not be helped; they can solve their problems without the assistance of others by killing themselves. Moreover, the costs to the public of handling suicide cases can be considerable, for each such case is an instance of sudden and violent death which requires some investigation.

Finally, it is possible for a murderer to arrange things so that murder appears to be and is mistakenly taken to be suicide. No single suicide bears

responsibility for creating the possibililty of deception. But if there were no suicides, such deception could not occur, and the more suicides there are, the easier such deception is likely to be, as each case which initially appears to be suicide must be subjected to less exacting scrutiny.

This last point, we think, is extremely important. That there are some instances of genuine suicide creates a danger which would not otherwise exist to every person who might be murdered and the murder made to appear a suicide. This danger is well known and generally recognized. But the responsibility of suicides for this danger is unremarked in discussions of suicide.

Probably there are two reasons why this factor is ignored. First, no single suicide creates it, and no single abstention from suicide would mitigate it. Second, many suicides do make an effort to leave sufficient evidence—for example, an explanatory note—to prevent confusion about the cause of their deaths. Still, if treating suicide and attempted suicide as criminal could eliminate this danger, there certainly would be a plausible basis in added security for the lives of others to forbid suicide. Of course, potential suicides are hardly likely to be deterred by any law forbidding suicide regardless of the purpose such a statute is intended to serve. Moreover, many of the other disturbances and social costs of suicide can be offset, even if the law not only considers suicide no crime but even treats it with a somewhat more permissive attitude than at present.

In recent literature some legal commentators have suggested that the right of privacy which was introduced by the Supreme Court of the United States in declaring laws forbidding the use of contraceptives unconstitutional and used most importantly in nullifying all of the statutes against abortion might be broad enough to encompass a "right to die."[9] In chapter four, section E, we said that privacy is irrelevant to the liberty of competent persons to refuse medical treatment. The right of privacy might seem more relevant to suicide, for here the subject is behavior which has been regarded as criminal. Since the right of privacy is said to be a fundamental right which can be overridden only by a compelling state interest, the establishment of the view that this right encompasses suicide would dictate a policy of minimum regulation.

However, as we argued in chapter two, section G, the right of privacy is nothing more than certain aspects of the liberty which is reserved to the people by the Ninth Amendment and protected by the privileges or immunities clause of the Fourteenth Amendment of the United States Constitution. Clearly, not every liberty can be given the status of the fundamental rights of freedom of speech and of religion.

The Supreme Court has suggested various grounds on which a liberty could be considered fundamental. But the liberty to commit suicide does not seem to be fundamental on any suggested ground. This liberty is not commended by the collective conscience of the American people; it is not one of the

fundamental and pervasive elements of liberty and justice; it is not connected with any explicitly recognized right. Suicide rather is an act considered either wrong or pitiable, depending on the psychological condition of the person who commits it. The liberty to kill oneself thus seems to be nothing more than immunity from criminal prosecution and from such interference as would have no rational relationship to any legitimate state interest. Hence, we see no ground for holding that there is a fundamental right to kill oneself—a right which could be overridden only by a compelling state interest.

D. Restraints on Attempted Suicide

The most plausible basis for some authorized interference with suicide attempts is that many of them do not seem to be seriously intended; others, if seriously intended, probably are not carried out by individuals who are fully themselves. Although technically and legally sane enough, most people who kill or attempt to kill themselves probably are in a state of unusual stress, a state often compounded by alcohol or other drugs.[10]

Thus most people reason: People in their right minds do not seriously harm themselves, but that is what is going on here; therefore, the individual probably is not himself or herself; and so interference to prevent self-destruction and to limit harm as much as possible is appropriate. As Glanville Williams states it:

> . . . the law should allow some right of interposition to prevent a suicide. Self-destruction is frequently the outcome not of the settled philosophical determination of a balanced mind but of a passing impulse or temporary depression. The natural and human thing to do with a person who is suddenly discovered attempting suicide is to interpose to prevent it. This interposition, where only mild force is used, cannot be accounted a battery upon the would-be suicide.[11]

We have found no one who disagrees with this view.

Thus a sound legal policy will authorize the use of force—short of that force which would be likely to cause serious or permanent injury—to prevent a person from committing suicide. In chapter four we proposed for the same reason that the general liberty to refuse medical care should not extend to emergency treatment required to remedy a condition caused by an attempt at suicide or self-mutilation. Such persons must be presumed to be in a disturbed state of mind, and physicians should provide necessary treatment even over the express refusal of these patients.

Existing statutes in various states take somewhat different approaches to the problem of authorizing force to restrain someone from suicide. New York treats the use of force as justifiable under the following circumstances:

> A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious physical injury upon himself may use physical force upon such person to the extent that he reasonably believes it necessary to thwart such result.[12]

The Arkansas statute on this subject is similar, except that it adds the qualification—certainly harmless and probably desirable—that the force be nondeadly.[13] Substantially following the Model Penal Code of the American Law Institute, Pennsylvania law is:

> The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to prevent such other person from committing suicide, inflicting serious bodily injury upon himself. . . .

The statute also provides that such force must be nondeadly.[14]

In one respect the Pennsylvania formulation is superior: It makes clear that the necessity to use force must be immediate. But in another respect this formulation seems to us inferior to that of New York: It conditions justification on the mere belief, not the *reasonable* belief, of the person using force.

It must be remembered that although these provisions ultimately intend the protection of persons from themselves, their immediate focus is upon legal justification of a person who forcibly interferes with another. Taken strictly, the Pennsylvania formulation would permit someone who forcibly restrained another to claim that the force was used in the *belief,* sincere although perhaps unreasonable, that it was immediately necessary to prevent a suicide attempt. What anyone believes is hard to prove and what anyone claims to have believed is hard to disprove. Thus this formulation is open to abuse. It would be better to require that the belief be reasonable: "when a reasonable person in the circumstances would believe. . . . "

Washington treats together the lawfulness of the use of force to prevent suicide and to compel a person to accept treatment. Force is lawful:

> Whenever used by any person to prevent an idiot, lunatic or insane person from committing an act dangerous to himself or another, or in enforcing necessary restraint for the protection of his person, or his restoration to health, during such period only as shall be necessary to obtain legal authority for the restraint or custody of his person.[15]

Here the legitimation of the use of force is conditioned upon the fact that the one upon whom it is used is an idiot, lunatic, or insane.

Probably most persons who attempt suicide do not fall into these categories if they are taken in any very strict sense, and it is hardly reasonable to expect someone who is confronted with an apparent suicide attempt to ascertain the facts about the state of mind of the individual before trying to stop the

attempt. Very likely in practice the conditions would be understood broadly if one intervened when the suicidal act was imminent, going on, or completed, and if one acted only to the extent required to obtain care for the suicidal person or to gain time in which to summon the help of the police. The explicit authorization of force in medical treatment of the attempted suicide together with the limitation of restraint or custody to the time necessary to obtain legal authorization seems to be a sound provision.

Glanville Williams urges that a person who has attempted suicide should not be restrained without a magistrate's order, and that the order of detention should have a very short time limit and not be subject to renewal until after the lapse of a substantial period intervening unless the individual is committed.[16] David F. Greenberg makes a very persuasive argument against the nonvoluntary civil commitment of persons considered suicidal, but he also holds that immediate restraint is justified by the fact that most who attempt suicide will be grateful subsequently for having been prevented.[17]

We agree with Greenberg that there is no justification for infringing on the liberty of many persons who are mistakenly considered or maliciously claimed to be suicidal in the process of restraining persons by nonvoluntary commitment merely on the ground that there is some danger of their committing suicide. Of course, if one who attempts suicide is observed to have other symptoms which would justify commitment even apart from the suicide attempt, then the fact that these symptoms are observed when treating the individual after an attempt at suicide should not interfere with necessary nonvoluntary commitment.

On the assumption that suicide and attempts at it ought not to be considered crimes we think a good statute concerned with suicide should include the following provisions with respect to its prevention. First, any person should be permitted to use immediately necessary nondeadly force to restrain another from an act which a reasonable person in the circumstances would believe likely to cause death or serious bodily harm to the one acting; however, if the need for restraint is not immediate, a private person should be required to turn the matter over to the police without delay. Second, a physician should be permitted to treat a person who appears to be suffering from an attempt at suicide or self-mutilation even over the protest of the patient provided that the treatment is immediately necessary. Third, neither the police nor a hospital should be permitted to restrain any person—that is, hold a person in custody despite his or her protest—without obtaining a court order promptly. And any such order ought to be limited to a short, definite period, such as twenty-four hours. Fourth, nonvoluntary civil commitment should not be carried out merely because someone has attempted or is threatening suicide.

Conditions such as these ought to be sufficient to protect typical suicidal

persons without infringing unduly upon the liberty of individuals who make a deliberate, rational decision to kill themselves. As Glanville Williams points out, most people living in normal conditions do not need a protected "right" to commit suicide. If circumstances are arranged which are private and which will forestall interference by others, and if a means is used which is not likely to endanger or unduly inconvenience others, the liberty to kill oneself will be adequately protected by a legal situation which prevents the unsuccessful attempter both from being punished and from being unwillingly committed.[18]

Even if voluntary euthanasia remains illegal, proponents of such killing will not be wholly frustrated as long as the liberty to commit suicide is protected. People can kill themselves by drugs or drowning, or by other methods that do not present the danger to others involved in jumping from high places, smashing an automobile into a solid barrier, or shooting oneself. Persons who deliberately attempt to kill themselves in ways which endanger others or create a public nuisance should be punished, but various existing laws—disturbing the peace, reckless driving, firing a gun within a city, and so forth—are likely to be applicable in such cases.

The situations of persons who are confined in institutions and are subject to continuous custodial care presents a distinct situation. Someone who is in a hospital and too ill to leave, in a home for the aged or the incompetent, or in prison cannot so easily commit suicide. Still, even such persons can do so if they really wish to.[19] In the institutional context the institution and its personnel are likely to be held responsible if they do not do what is reasonably possible to prevent suicides.[20] For the protection of persons who are not attempting to execute deliberate, rational suicidal choices, institutions can hardly be relieved of liability if they allow inmates or patients to kill themselves.

However, there is some reason to think that too many restrictions do not benefit typical suicidal patients.[21] On the basis that persons in institutions also have rights, we think that the law ought to limit institutional liability if special restrictions, restraints, and surveillance are not imposed upon residents, patients, or inmates merely because they have attempted suicide, and if persons suspected of suicidal tendencies are nevertheless permitted the modicum of privacy and liberty to move about which most persons in their condition would desire.

There is one method of committing suicide which is available to anyone sufficiently determined to use it: the refusal of all nourishment. If an individual refuses to eat, force-feeding can be carried out. But this procedure not only overrides the liberty to kill oneself but also significantly violates bodily intangibility. We think that due respect for liberty would exclude the force-feeding of any person over that person's refusal unless the person were a child or were declared noncompetent by a court. If any person has the persistence to starve to death, many of the objections to other modes of suicide fail.

Moreover, in a case of this sort there is ample opportunity to talk with the suicidal person and to seek the intervention of a court if the person seems to be acting irrationally and indeliberately.

E. Assisted Suicide

There are special legal problems about suicide pacts and about cases in which someone incidentally harms another while attempting to commit suicide.[22] Neither of these sorts of problems is especially relevant to euthanasia, and so we omit treating both. The relevant problem is that of the legal status of a person who helps another to commit suicide.

Obviously, if it ought in general to be permissible for one person to help another to commit suicide *and* if killing another at the request or with the consent of the person killed is considered assistance in suicide, then the issue concerning voluntary euthanasia is solved. However, we think neither that criminal law should permit assistance in suicide nor that the distinction between assisted suicide and homicide with consent should be eliminated. We deal with assisted suicide here to the extent that it affects cases other than those in which euthanasia would be involved; we have reserved the consideration of euthanasia for chapter six.

Superficially there might seem to be very little difference between assisted suicide and homicide upon request. What difference is there, for example, if one person hands another a gun with which to commit suicide or if the first takes deadly aim and fires the gun at the request of the second?[23] Ethically it is difficult to think of any difference, and this is so regardless of the system of ethics one applies to the two cases. However, assisting suicide and committing homicide with the consent of the victim have often been legally distinguished, and we think that with respect to the technical question of the definition of the offenses this is as it should be.

On the one hand, where the evidence is that one person has killed another, the case ought to be tried as homicide. Even if the consent of the victim is to be considered a mitigating factor, the burden of proof for establishing this circumstance should fall on the accused. Otherwise the prosecution would be burdened with establishing that the victim did not consent; making the proof of this element necessary to establish murder would make things much too easy for murderers and much too risky for potential victims.

On the other hand, where the evidence is that a person has committed suicide, then the prosecution can be reasonably required to establish that another has helped if this is to be considered criminal.

Consequently, even if the penalties for homicide with consent and for assisting suicide were to be made equivalent—which we consider would be

reasonable in view of the equivalence of the malice of the two forms of action—the two should continue to be treated by criminal law as technically distinct offenses.

But why should assisting suicide be considered a crime? There is one kind of case which borders on assisted suicide in which no one is likely to argue that the act should not be a crime. The Model Penal Code deals with this kind of case:

> *Causing Suicide as Criminal Homicide.* A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by force, duress or deception.[24]

Some states have adopted this provision or something similar to it.[25] The idea surely is reasonable. A person who brings about the death of another by the other's own but nonvoluntary hand is committing virtual homicide, not merely assisting suicide. But this provision is not broad enough to include many closely related cases which are more properly called "assisted suicide" and which ought also to be covered.

One who is a competent adult and who instigates and assists the suicide of a child, especially a child under fourteen or another legally noncompetent person, is equally engaged in homicide. There is a hazy borderline in this matter. What are we to think of cases in which a person in order to facilitate inheritance urges and assists an intoxicated or debilitated relative to commit suicide? It seems to us that if some cases of assisting suicide should be considered murder, the general rule ought to be that to assist suicide is to commit murder. Only such a rule offers adequate protection for those who do not bring about their own deaths with full voluntariness. This general rule might be qualified to permit mitigation when the defendant can show that the suicide was competent and acted voluntarily, no duress, force, or fraud having been exercised.

If this were the general rule for cases of assisted suicide, the question remains why genuine assistance should be a mitigated offense rather than no offense at all. We think there are several reasons for taking this position.

In the first place, if assistance with a genuinely voluntary suicidal act is considered no crime at all, then at least in practice the burden of proof will fall upon the prosecution to show that the suicidal act was not wholly voluntary.

In the second place, even if we grant that people ought to be at liberty to commit suicide, still there are enough reasons for regarding suicide with reserve—the socially disturbing effects and costs of such behavior which we mentioned in section C—that there are plausible reasons for trying to inhibit suicide by treating as crimes acts intended to help others to kill themselves.

In the third place, the fact that a person who commits suicide acts in many

cases with mitigated responsibility and the fact that the criminal law cannot touch such a person are excellent reasons for not considering the act of self-killing a crime. Also, the typical diminished responsibility of the attempter together with lack of effective deterrent effect are good reasons for not considering suicide attempts criminal. But one who assists another to commit suicide need not be acting with reduced responsibility, and in many cases the prospect of legal liability will restrain the accessory.

In the fourth place, individuals can be induced in some circumstances to do things damaging to themselves and contrary to public policy without their own fully voluntary cooperation being eliminated. Prostitution is a case in point. The law certainly is not irrational if it considers criminal at least those who exploit others and induce them to act contrary to their own interests and dignity. If assisting suicide were no crime—and especially if homicide with consent were treated for purposes of punishment as equivalent to assisted suicide—wholly repulsive practices of ultimate exploitation and degradation would be legalized. In ancient times some individuals did kill themselves or sell themselves to be killed for the amusement of others as a way of obtaining money to provide for dependents. If assisted suicide were legal, an individual in need of money might agree to a proposition to fight wild animals, or to play Russian roulette, or to engage in some other type of self-destructive behavior for the amusement of spectators. The prospect of such an abuse is perhaps not great at present, but one can think of cases which differ in degree rather than in kind from such gross instances of exploitation. Certain professional sports verge upon gladiatorial combat.

Without engaging in prostitution individuals give sexual favors in situations which more or less approach the model of outright sale of oneself. Similarly, one committing suicide might be subjected to varying degrees of psychological leverage if the instigation and assistance of suicide is considered noncriminal. Since the liberty to kill oneself is not one which sound public policy must regard with complete neutrality, it seems to us altogether legitimate that the instigation and assisting of suicide should be held criminal to provide a context in which there will remain a line of defense for those who would be subjected to pressure to kill themselves.

The point is illustrated by a British case. By the Suicide Act of 1961 the law by which suicide was a crime in England and Wales was abrogated. However, the offense of assisting suicide was created and made an option to prosecution for murder or manslaughter:

> 2.—(1) A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.
>
> (2) If on the trial of an indictment for murder or manslaughter it is

> proved that the accused aided, abetted, counselled or procured the suicide of the person in question, the jury may find him guilty of that offense.[26]

Early in 1977 Yolande McShane was convicted under this provision and sentenced to two years in prison.

In March 1976 Mrs. McShane had visited her eighty-seven-year-old mother, Edith Mott, in a nursing home. McShane was in debt and stood to inherit $70,000 upon Mrs. Mott's death. McShane gave her mother fifteen Nembutal tablets and urged her to take them with whiskey. A concealed police camera filmed the scene as the two women talked:

> "How many have you brought?" asks the mother.
> "Fifteen."
> "But does it take fifteen?"
> "For most ten are fatal, but if you take them with whisky, five are enough."
> "It is a mortal sin."
> "People are doing it left, right and center. It's not a sin anymore. It's nothing nowadays. But it's up to you."
> "But is it cowardly to do it?"
> "No, it isn't cowardly. If you had a dog in this state, you would take it to the vet, wouldn't you?"
> "A dog hasn't got a soul."[27]

After a visit of three and one-half hours, McShane departed and was arrested; the nursing sisters found the pills hidden in a bag of candy.[28]

If assisting and counseling suicide were not a crime, many reluctant persons would face such badgering, and often those in a debilitated condition would finally yield. In some ways creating the context for the badgering itself is even more repugnant than permitting the consequent deaths.

F. Criticism of Some Present and Proposed Laws

The suicide provisions of the Model Penal Code would treat McShane's act as a misdemeanor, because, unlike the British statute, the provision proposed by the Model Penal Code distinguishes between cases in which an attempt at suicide is actually made and those in which no attempt is made:

> *Aiding or Soliciting Suicide as an Independent Offense.* A person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor.[29]

This is more protective than many existing laws.

New York, for example, defines the crime as "promoting a suicide attempt"

and imposes the penalty only if one "causes or aids another person to attempt suicide."[30] Obviously, McShane only tried but did not succeed in getting her mother to attempt suicide, and thus she did not cause or aid any attempt. Other states define the crime in such a way that even if Mott had attempted but did not succeed in suicide, McShane would have been guiltless. Florida, for example, provides: "Every person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter. . . ."[31] California, on the contrary, appears to include any form of advice or encouragement to commit suicide with assistance in a successful attempt: "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony."[32]

These statutes do not seem to be well thought out. It is hardly likely that there is any reasonable explanation for their differing provisions.

To forbid anyone to encourage another to commit suicide would be to treat as a crime the writing of a philosophical or theological essay urging suicide as a legitimate way of solving one's problems. Freedom of speech demands that the crime be defined more narrowly.

It seems to us that even to forbid the advising or counseling of suicide violates liberty of speech and invades privacy in the strict sense by forbidding forms of personal communication which may not be morally defensible but which hardly offend any legitimate public interest in the way that assisting suicide does. For these reasons we think the language of the California statute and even of the English Suicide Act too broad. The Model Penal Code's "aids or solicits" comes nearer the mark, for behavior begins to have a potentially causal and objectionable role in a particular suicide attempt only when it becomes practical by inciting a specific act, providing directions for doing it, and perhaps also supplying some material means for carrying out the plan.

However, the Model Penal Code proposal does not distinguish between cases in which aiding and soliciting suicide leads to death and cases in which it only leads to an unsuccessful attempt. Perhaps from a moral point of view the two kinds of act differ little or not at all, but the law frequently distinguishes successful from attempted crimes and treats the former as worse, perhaps partly on the basis that success often is a sign of more planning and determination.

However that may be, aiding and soliciting someone who actually commits suicide is much more serious than similar behavior which does not result in death, for when death results the situation is not always easy to distinguish from murder and from the cases of causing suicide which, as we have argued previously, should be treated as murder. But when aid and solicitation does not result in death, the person who might have committed suicide is able to testify concerning what happened, and so the unsuccessful accessory does not present as dangerous a problem.

At the same time the Model Penal Code proposal makes a sharp distinction between cases in which the aid and solicitation results in an attempt and cases in which it does not. Not only are these two kinds of cases indistinguishable on any ethical theory we know of, but they also are very alike in their undesirable aspects so far as the public interest is concerned. Thus we see no good reason to distinguish between them.

In Switzerland the criminality of assisting suicide has turned upon the presence of a selfish motive.[33] Glanville Williams supports the acceptance of this approach in Anglo-American law, although he admits it would be novel; he also would merge assisting suicide with homicide with consent, and recognizes that doing this would cause a danger of false evidence but brushes aside this danger.[34] We think that the commentator on the draft of the Model Penal Code was correct in pointing out that motives often are mixed and that it is preferable to allow them to be taken into account at the sentencing stage.[35] As we have pointed out already, in cases in which death results it is important to avoid defining the crime of assisting suicide in a way which with Anglo-American (though perhaps not with Continental) legal procedures would result in setting too high a burden of proof upon the prosecution in cases which sometimes are not distinguishable from cold-blooded murder.

G. Recommendations for a Statute on Suicide

Present American law with respect to suicide is none too definite nor is it any too rational.[36] It seems clear to us that careful recodification is needed in this area to protect liberty and justice for everyone concerned. What needs to be done will vary somewhat from one jurisdiction to another, depending upon technical problems and the present state of the law in each. However, the following summary of the conclusions reached in this chapter indicates what shape we think the law of suicide should take in the areas which we have considered.

First, criminal law should explicitly state that suicide and attempted suicide are not crimes. This provision would eliminate any danger that a suicide attempt would be used as leverage to obtain a civil commitment not otherwise obtainable.

Second, criminal and civil liability should not fall upon anyone who does what is immediately necessary to restrain an agent or to mitigate the harm in circumstances in which a reasonable person would judge that another might kill or seriously harm himself or herself.

Third, criminal and civil liability should fall upon anyone who restrains another longer than necessary to call upon the police, and police and hospitals should not restrain people for their own good without promptly seeking a

court order. A temporary court order for an individual's own protection should be limited to a very short time. Nonvoluntary civil commitment solely on the grounds that individuals have attempted or are expected to attempt suicide should be excluded. Forced feeding also should be excluded.

Fourth, criminal law should provide that anyone who supplies or offers aid, or solicits and urges another, to commit suicide shall be guilty of attempted manslaughter regardless of whether the intended suicide makes an attempt or does not make one. Here the criminality of the act must hang upon the intent that what is provided or said should bring about the suicide of the particular individual, and upon the fact that a reasonable person would expect that what is provided or said might have the intended result.

Fifth, criminal law should treat as a principal in murder anyone who aids another in actually committing suicide. Here—where a death occurs and the charge is murder—"aids" should be defined narrowly to exclude even practical directions and urgent solicitation. What must be prevented is the sort of behavior which creates the serious problem of false evidence. In cases of this sort evidence provided by the defense to show that force, duress, or fraud was not used, and that the person who committed suicide was a competent adult acting without special pressure or exploitation from the side of the defendant, should be considered in mitigation, and thus taken into account in sentencing. The burden of proof to show that aggravating conditions are present must not be on the prosecution.

If the law were arranged in this way, the liberty of those who deliberately and rationally choose to kill themselves would be protected to a considerable extent. Those who consider suicide appropriate can say so and can distribute information about how to proceed most efficiently by using various techniques. Mere general recommendation of suicide or even advice to an individual would not by itself be criminal. Those who fail in a first attempt at suicide will not be prevented, if they are determined, from promptly making another attempt. Even those in institutions who really wish to kill themselves will be able to do so.

At the same time strict provisions will tend to protect the public at large by discouraging persons from committing murder and trying to make the death appear a case of suicide. Also, the right to life of those who might be caused to kill themselves by a nonvoluntary or seriously pressured act will be protected; the law will be solicitous as it should be to protect the weak. Yet anyone who can establish factors mitigating guilt for assisting another's death will obtain consideration in sentencing.

Under such a statute many of those whose conditions arouse great sympathy for the argument in favor of legalization of voluntary euthanasia could solve their problem, if they wished, by self-administered euthanasia: suicide. In practice it would even be possible for others to provide substantial assis-

tance. Persons contemplating suicide who considered it acceptable could discuss their condition with like-minded friends and receive moral support to carry out a decision to kill themselves without imperiling such friends; encouragement would not be solicitation. A physician could provide a patient with drugs suited to deaden pain or promote sleep or emotional tranquility, while he warned the patient to avoid a fatal overdose. A warning given in the hearing of witnesses undoubtedly would suffice to protect the physician provided that the patient really was competent and in such a condition that a reasonable person would expect such a patient to be able to understand the advice and to heed the warning.

Still, it will be argued, not everyone can bring about a desired death either by refusing treatment or by personal, suicidal action. Some need help, because they are too weak to help themselves, perhaps too closely cared for in an institutional setting to die otherwise than by self-starvation, which can be slow and difficult. For those who need such help proponents of voluntary euthanasia urge beneficent killing at the patient's own request. We turn now to this central problem.