8: Nonvoluntary Euthanasia and Justice

A. Introductory Considerations

In chapter seven, section A, we summarized an argument, based on the public interest, which is offered for legalizing nonvoluntary euthanasia. Part of the argument was that the kinds of killing generally regarded as justifiable by Americans, including those who oppose euthanasia, seem to provide a precedent for killing those who are a burden upon society, in the public interest of cutting the costs of this burden. In the remainder of chapter seven we examined the various kinds of killing which have been considered jurisprudentially justified in Anglo-American law. We found, in summary, that all of the cases in which killing has been legal until now have been instances in which killing is necessary either to protect the rights of other persons and the rule of law from being overridden by brute force or to provide the best average possibility of survival when some members of a group must be sacrificed to save the lives of others.

The public interests invoked in these justifications of killing are very specific ones. Neither of these justifications provides a rationale on which euthanasia might be justified. Neither would euthanasia prevent acts which if unopposed would violate rights protected by law nor would it vindicate the rule of law against those who reject its authority. Nor would euthanasia killing serve the common interest by protecting to the maximum extent possible every individual's fair share in the good of life when not all locked together in some tragic situation can survive.

The rationale for permitting euthanasia is different. Presumably this type of killing ends lives which are no longer worth living. The assumption is that sometimes individuals would be better off dead, in other words, that sometimes a quick and painless death is preferable to continued life, and that continued life in such cases would be a disvalue. Nonvoluntary euthanasia thus is defended precisely as a form of *euthanasia*—that is, on the basis that it would be beneficial, not harmful, to the individuals killed. And the liberty to stand aloof of those who abhor such killing is said to be outweighed by the

public interest in cutting the costs of caring for certain classes of individuals, especially those who require permanent care in institutions at public expense.

As in previous chapters we are concerned here with the question of what the law ought to be, not with the question of the morality of nonvoluntary euthanasia apart from the law. Also, the subject here is whether killing ought to be legalized, not to what extent treatment ought to be legally required. What the law should demand in the way of treatment for noncompetent individuals will be considered in chapter nine.

Still, from a legal point of view homicide can be committed by omission as well as by positive behavior. In certain hospitals at present defective babies are not given treatment with the expectation that they will die. It has been argued that there is a legal duty in at least some such cases to give the treatment which is not given and that a basis exists for prosecution.[1] While homicide by omission might be difficult to prove beyond reasonable doubt, the distinction between such homicide and homicide by positive behavior is irrelevant to the questions of principle to be discussed here.

Thus what follows is relevant to any cases in which nonvoluntary euthanasia is carried on, whether by positive behavior or by omission. Some proponents of euthanasia have asserted that omission avoids the problem of the consent of the person killed.[2] This is not true in general. It is true only if one omits what is not a legal duty or omits without the intent of bringing about death. If one fails to fulfill a legal duty to someone with the intent that the individual will thereby die, one commits homicide by omission.

Glanville Williams points out that law—in particular, a law forbidding homicide—is a social necessity; society would collapse if people could murder with impunity. However, he maintains, there are forms of murder or near murder, including infanticide and abortion, which it is not socially necessary to forbid. These, he holds, are forbidden as a result of a "philosophical attitude," not for reasons of public security. And Williams strives to convince his readers that euthanasia can be condemned only by a religiously grounded belief in the sanctity of life. He thinks that this fact is sufficient to require that the prohibition of euthanasia be removed from criminal law.[3]

Of course, there have been societies in which types of killing have been legally permitted which are forbidden by Anglo-American law. And it may well be the case that Anglo-American law is as solicitous as it is to protect human life for reasons having historical roots in Christian thought. However, many other elements of our criminal law arguably have the same religious roots—for example, the solicitude of law to avoid convicting the innocent. Such a policy perhaps is not required by social necessity or public security. Even so, its derivation from Christian conceptions can hardly be sufficient to require that this policy be abandoned, and a policy making for greater efficiency in law enforcement be adopted in its stead.

In this chapter we argue that nonvoluntary euthanasia cannot be jurisprudentially justified. The classification of individuals' lives by qualitative standards which would be essential in any program of nonvoluntary euthanasia would violate the requirement of justice that no one be denied equal protection of the laws. We are not arguing here against nonvoluntary euthanasia on the assumption that human life is absolutely inviolable. Opponents of such killing need not take that tack. Instead, we argue simply that since a law of homicide is indispensable, justice requires that it protect the lives of all.

Social necessity and security as a practical matter demand that the class of those to be protected include all whose being killed would create conflict and significant disturbance of the peace. But another principle requires that those protected by the law of homicide not be limited to this special group, and this principle, despite what Glanville Williams says, is by no means a religious one. Equal protection of the laws demands that the prohibition of homicide extend from the protection of the strong and those with strong friends to the weak and friendless. If laws are not extended to benefit the weak and friendless, then they regulate power in the interest of the powerful, and the concept of what is fair becomes wholly unnecessary.

The concept of fairness which underlies equal protection does not altogether exclude rational classifications from the laws. Rational classification is present when a law extends equally to those who are similarly related to the good or the harm which the law is intended to promote or to prevent. However, classifications which exclude any person from the equal protection of basic human and civil rights are highly suspect and can seldom if ever be defended as rational.[4]

When a law aims at the promotion of some good, the principle of rational classification often is held to permit the exclusion of some persons, even though they might be able to benefit, since there always are various sorts of limits to what can be done to promote any good. However, the law of homicide does not protect human life in every possible way. It does not require, for example, that subsistence be provided to all who are in need or that a rescue effort be carried out for all who are in peril. The law of homicide requires only a forbearance: that every person refrain from killing others. The principle of rational classification thus cannot be satisfied in the case of the law of homicide if some persons are excluded from the protection it offers as if there were a practical impossibility in extending this protection to every person.

As we have explained in chapter seven, the principle of rational classification does permit the exclusion from the protection of the law of homicide of those whose acts gravely threaten legally protected rights. It also permits the exception by which some may be killed to maximize the average chance of survival. But in general every individual is similarly situated in respect to the

good of life which is protected by the law of homicide's prohibition of killing. Therefore, in general the law of homicide is fair only if it extends beyond what is socially necessary to protect the lives of all persons, including those who are so weak and friendless that someone's killing them would not detract from the security of society.

To overcome this argument, proponents of nonvoluntary euthanasia must do more than show that Anglo-American legal conceptions of justice, which are embodied in the requirement of equal protection of the laws, have religious roots. Whatever the roots of such conceptions, they are an essential part of the consensus upon which the legitimacy of American government rests. Furthermore, no advocate of euthanasia has challenged the requirement of equal protection of the laws. Thus it is incumbent upon proponents of nonvoluntary euthanasia to show that this practice would not involve the mischief which a fair homicide law seeks to prevent: unjust infringement upon the good which each member of society has in the secure possession of his or her own particular life.

While proponents of the legalization of nonvoluntary euthanasia have not explicitly formulated their arguments in this framework, the manner in which they argue for their proposals shows that they are seeking to meet the requirement of equal protection of the laws with respect to the law of homicide. There are two main ways in which it may be argued that the euthanasia killing of an individual would not infringe upon the good of life in a way which violates justice.

First, it may be argued that the killing is a benefit rather than a harm, for life in the circumstances is a burden rather than a boon. No one is deprived of anything unfairly if something harmful is taken away. Thus if nonvoluntary euthanasia takes away life which is no longer of worth, it is justified. In other words, the argument is that no one harms others by killing them when those killed are better off dead.

Second, it may be argued that certain individuals who are members of the human species nevertheless are not members of society and cannot be legal persons, for they fall short of the conditions necessary for an individual to be a person. This second argument was accepted by the United States Supreme Court with respect to the unborn when the Court declared that the unborn are not legal persons, although the Court concealed the significance of its holding by suggesting that the unborn are only potentially alive and by ignoring the fact that unborn individuals are members of the human species.[5]

Sometimes proponents of nonvoluntary euthanasia seem to propose both that those to be killed would not be harmed and that they are nonpersons, a view suggested by the frequent use of the analogy between such killing and the disposal of animals. Very seldom do proponents of nonvoluntary euthanasia appeal mainly to societal interests in killing some individuals without

trying to show either that this killing would benefit those killed or that the killing might be considered the disposal of substandard individuals who can be considered nonpersons.

B. Proposed Criteria for Denying Equal Protection

Marvin Kohl argues that killing can be a benefit rather than a harm and that euthanasia should be considered justified in case it is a benefit. He does not attempt any general statement of the conditions under which someone who does not volunteer to be killed would be better off dead, although he does attempt to deal with the objection that one cannot tell by empirical evidence that a person who does volunteer would really be benefited by being killed. In this latter case one has the evidence provided by the individual's own expressed preference.

Kohl provides hardly any description of those for whom death without their own consent would be, as he calls it, "the kindest possible treatment." He offers only an example of a child born with some severe defect such as blindness or deafness, with death not imminent as long as care is provided, such that "although unable to move a muscle, he suffers no pain."[6] (Kohl does not explain how anyone would know that someone unable to move a muscle was suffering no pain.) Kohl carefully stipulates that unwanted kindness is still kindness, just as unwanted fire is still fire.[7] Thus he seems to imply what he surely would not assert: that not only nonvoluntary but even involuntary—that is, explicitly refused—euthanasia might be justified, in case someone killed those who would be better off dead but who stubbornly refused to accept what was in their own best interests.

Glanville Williams clearly accepts a quality-of-life justification for euthanasia. He holds that an assertion of the value of human life "in the absence of all the activities that give meaning to life, and in the face of the disintegration of personality that so often follows from prolonged agony, will not stand scrutiny."[8] This formulation is provided in a context in which Williams has voluntary euthanasia in mind. But in another context he urges that it cannot be right to save spina bifida babies; the quality-of-life description Williams gives is that such children may be paralyzed and incontinent or retarded, or all three together.[9]

A. R. Jonsen and others report discussions at a 1974 conference held in California which apparently reached substantial agreement that life-saving treatment is harmful to an infant if it cannot participate even minimally in human experience, and that such an infant might be killed under various conditions—for example, if it is affected by gross physical anomalies and is unwanted by the parents and unneeded by society.[10] What does "participa-

tion in human experience" mean? The authors say that it is a matter of presence or absence of a capacity, not a matter of degree of variation from a statistical norm, and that the capacity is "to respond affectively and cognitively to human attention and to develop toward initiation of communication with others." The authors refuse to quantify or to describe in detail the relevant levels of activity but think that a baby with Down's syndrome would meet the criteria while one with trisomy 18 would not.[11]

Richard A. McCormick had argued for quality-of-life criteria for letting babies die by suggesting potentiality for human relationships as a criterion. When it is thought that an individual totally lacks this potentiality or that it will be wholly subordinated to the struggle for survival, life can be said "to have achieved its potential"—that is, to be worthless.[12] Jonsen and his coauthors quoted McCormick, and the latter has returned the compliment by quoting from their conclusions and endorsing them as similar to his own proposal, which he is willing to formulate in terms of potentiality for "meaningful life." He admits the latter phrase to be packed with implications; he insists that the individual still has a value but urges that life may not be worthwhile if the individual does not stand to gain from it.[13] McCormick writes in terms of letting die rather than of killing and is more concerned with moral than with legal considerations. Still, his approach is one which in a legal perspective would justify killing if it justifies the intentional bringing about of death by calculated omission.

The preceding approaches do not deny the personhood of those to be killed, but rather claim that killing in some cases makes no difference to an individual or is a real benefit. The alternative approach is to deny the personhood of those to be killed and in this way to remove them from the scope of the law forbidding homicide.

Joseph Fletcher is an outstanding example of those who prefer this approach. He has written on the matter more than once.

In 1968 Fletcher maintained that humanness requires self-awareness, conscious relationship to others, and rationality sufficient to support some initiative. He held the difference between man and brute to be a matter of degree, but still a real difference. On this basis he maintained that one who would prolong the life of an infant afflicted with Down's syndrome would be guilty, but not one who killed such an infant: "True guilt arises only from an offense against a person, and a Down's is not a person."[14]

In 1972 Fletcher proposed various indicators of humanhood, among them a standard of minimal intelligence: "Any individual of the species *homo sapiens* who falls below the I.Q. 40-mark in a standard Stanford-Binet test, amplified if you like by other tests, is questionably a person; below the 20-mark, not a person." This would hold either before minimal intelligence is achieved or after it is lost irretrievably.[15] By 1974, although not retracting his

previous statements, Fletcher claimed that neocortical function is the chief criterion of humanhood. He does not mention that this necessary condition is hardly sufficient for the performances he still considers necessary for real humanhood.[16]

Michael Tooley denies that infants at or shortly after birth are persons—that is, human individuals with a serious right to life. Tooley dismisses as irrelevant to the consideration of their rights the fact that such individuals are living members of the human species. He claims that an organism is not a person until it has a concept of itself as a continuing subject of experience. What has such a self-concept to do with having rights? Tooley claims that there is a conceptual relationship between having rights and being able to desire that others respect one's rights. But why should this be the case? Tooley says that the obligations of others corresponding to one's rights are conditional, since an individual can waive rights. This position, however, demands too much, for it would mean that when an individual is irrational or asleep or has been duped into not wanting something, then the individual has no right to it. So Tooley modified his requirement to avoid such cases. But he maintains that one who has never had the appropriate desires can have no rights; otherwise, he maintains, a reproductive system would embody a right to life which would render contraception as much a violation of rights as abortion or infanticide.[17]

H. Tristram Engelhardt, Jr., argued in 1973 that infants with defects might be considered persons with a negative quality of life, such that they would have a right to die.[18] By 1976 Engelhardt argued that life is only a value, not a principle of morality, and that only persons who are moral agents deserve respect such that treatment of them must not be contingent upon their value. If this position is accepted, Engelhardt says, then "it would follow that we do not have obligations to fetuses, infants, animals, and the very senile in the way that we do to normal adult humans, for only normal adult humans are persons in the strict sense of being necessarily objects of respect." Engelhardt refers to Kant as authority for this position but supplies no real argument for it; he simply assumes that rights belong to members of a community and that no one should count as a member of a community who cannot function as such.[19]

C. Critique of the Proposed Criteria

In appraising such proposals as attempts to show how killing some individuals would not violate equal protection of the law of homicide, one must bear in mind what proponents of euthanasia must show. It is not enough for them to establish that many individuals are suffering from conditions which

are bad, deplorable, or pitiable. No one wants a defective baby in one sense: Everyone prays or hopes for a sound and healthy one. Similarly, no one supposes that senility in itself is a desirable condition. Some might argue that an exceptionally high intelligence is not an unmixed blessing, but no one thinks it is a cause for regret if one's intelligence is in the normal rather than in the exceptionally low range. Hence, everyone confronted with descriptions of various wretched individuals will be saddened by their condition.

But advocates of euthanasia must show that some individuals would be better off dead, or that they are nonpersons. Merely showing that people are in bad shape does not prove that they would be better off dead nor does showing that some individuals are so defective that they seem alien to human activities prove that they are nonpersons.

Furthermore, proponents of nonvoluntary euthanasia will say quite sincerely that if they themselves had been or were in the deplorable condition of some other individual, then they should not have wanted to live and would not have minded being killed. If voluntary euthanasia were in question, willingness to be killed would be decisive with respect to the individual expressing it. But liberty precisely means that individuals are entitled to be unwilling where others are willing, and to be willing where others are unwilling. And so proponents of euthanasia must show by some nonarbitrary principle that those who are to be killed nonvoluntarily would be better off dead or are not persons. Otherwise, the practice of nonvoluntary euthanasia would amount to no more than either the imposition upon those to be killed of the subjective preferences and value judgments of others, or the imposition upon them of the world views of others who consider themselves qualified to judge that some human individuals really are not persons.

Glanville Williams is no doubt sincere in saying that he would not have minded being killed had he been in the condition of a spina bifida child, paralyzed and incontinent, or mentally retarded, or all three.[20] But the question remains whether he is entitled to impose this personal preference upon children who happen to be in that condition. Richard Lamerton objects strenuously to the common tendency of advocates of euthanasia to classify damaged persons as vegetables; he also points out that in many cases the prospects of an individual depend very heavily upon the nursing care which is given.[21] This obviously is so with respect to many spina bifida babies.

Jonsen and his coauthors report the agreement of participants in a conference that life is meaningless if there is not potential for human relationships and some prospect of individual initiative. They admit the vagueness of the criterion. John A. Robertson points out that in many cases the potentiality for communication is not necessarily excluded by congenital conditions but is rather blocked by inadequate care. He also urges that there is no ground to demonstrate that an unproductive existence is necessarily unhappy. Even in

the most extreme cases, in which an individual's prospect is life in a crib in an institution, no one else has a valid basis to conclude that if the individual were able to speak, consent to being killed would be given. The standards of others perhaps have little relevance for such individuals. "Life, and life alone, whatever its limitations, might be of sufficient worth to him."[22]

Even if one grants McCormick that some infants have achieved their potential if they have no prospect of participating in human relationships—whatever precisely this means—there remains a question why having achieved their potential would be a relevant criterion for denying that such infants have some good life to be protected. Many middle-aged men perhaps have achieved their potential, are more a burden than a consolation to those with whom they live, and in later years produce nothing equal in quality to what they produced when young. Some people might say that such men have achieved their potential and no longer enjoy human relationships of any significance. Even if this were conceded, it does not seem to be a reasonable ground on which to modify the law of homicide. McCormick can only be sure that someone does not stand to gain from life by assuming that his personal conceptions of a life worth living must apply to others.

Kohl argues that people should be free to choose to die. But when an individual is not capable of choice, Kohl thinks that a responsible individual or, if necessary, the state should be allowed to choose for him or her. In Kohl's view this application of substituted judgment would be in accord with libertarian principles. His explanation of this claim is so remarkable that it deserves quotation:

> The fundamental value of liberty is that it diminishes the risk of injustice and gives men the sense of dignity they need. It is not always easy to know when a person is not free to choose, nor should the transfer of this obligation be taken lightly. However, when fanatical insistence on consent only brings with it continued or increased misery, and when it is clear that neither justice nor dignity is being served, then we must choose and act on behalf of the interests of the individual. It may be concluded, therefore, that this part of the L-P [libertarian] proposal is consistent with the principle of beneficence, and that all men concerned about human welfare ought to subscribe to it.[23]

Kohl seems oblivious to the fact that liberty is important because it allows other people to have a different theory of morality from his and a different conception of what is kindly.

Liberty for Kohl is merely a means to ends which he happens to approve; practical resistance to this reduction of liberty—and also of justice—to Kohl's conception of beneficence seems to him fanaticism. This is the reason why Kohl is able to argue at length in favor of nonvoluntary euthanasia

as kind treatment without it ever occurring to him that he ought to attempt to show that everyone must agree about what is kind and agree with him in regarding euthanasia as kind. People who would consider anyone else's killing them a violation of their rights and dignity no doubt would seem fanatics to Kohl.

Engelhardt's earlier position, which admitted that those he proposes to kill are persons, appealed to lawsuits which attempted to establish a cause of action for wrongful life. Engelhardt did not point out that the courts declined to hold that causing life is a tort, because, as was expressly stated in some cases, there is no rational way of comparing life with defects to nonexistence and demonstrating the latter preferable to the former.[24] A court cannot grant an award in a lawsuit unless there is a rational way to determine the existence and worth in damages of a harm done.

There has been considerable discussion in recent years about the possibility of setting a monetary value upon human lives—for example, in the context of discussions about whether more money should be spent on preventing disasters than upon aiding victims after disasters occur. With respect to such discussions it is important to notice that valuations reflect only the choices people make; they provide no objective standard which has unarguable validity as a principle for making quality-of-life judgments. Indeed, even in the economic sphere attempts to solve problems in which human life is at stake—ordinarily by being at greater or lesser risk of accident—run into the difficulty that there is no accepted way of making interpersonal comparisons of utility; such attempts also must disregard nonquantifiable interests and concerns which nevertheless may be taken into account by individuals in setting their own preferences.[25]

Fletcher's various and inconsistent proposals for excluding some human individuals from the status of personhood obviously are arbitrary; the very inconsistency of these proposals reveals their arbitrariness. Fletcher's assertion that a Down's is not a person also is arbitrary. It would not be accepted by individuals with Down's syndrome who could read and understand what Fletcher says about them.[26] Similarly, Fletcher gives no reason for accepting his view that those with an IQ 40-mark or below are "doubtfully persons." Evidently Fletcher has a special standard of personhood which seems as obvious to him as Kohl's personal conception of kindness seems to him.

Tooley apparently confuses the fact that one can waive certain of one's rights *if one is legally competent*—the rights which one can waive do *not* include the right not to be a victim of homicide—with a quite different proposition: one must be in a position to claim one's rights to have any rights at all. He asserts, not the latter proposition, but only a weakened and qualified version of it. But there are no reasons given for not adding further qualifications to the ones which Tooley admits.

Tooley's suggestion that affirming rights for every human individual would imply a right of a reproductive system not to be contraceptively interfered with is a pure figment of his own imagination. No one has ever posited such a right, and the law of homicide is concerned only with those who are individuals and members of the human species. Why species membership should be irrelevant to having rights Tooley never explains. Tooley, it appears, decided that the unborn and infants are not to be regarded as persons, and on this basis he formulated and stipulated a definition of "person" suited to achieve his purpose.

Engelhardt explicitly appeals to Kant's philosophy for authority to support his own position. Kant's philosophy is only one among many others, and it is one which hardly anyone today attempts to defend. Many criticisms can be made of it.[27] There seems to be no reason suddenly to accept it as a reasonable basis for denying the personhood of large classes of human individuals who are not normal adult humans. Once more, as with Tooley, one has the strong suspicion that Engelhardt's real reason for using the criterion he adopts is that it yields the conclusions he wants.

The diversity of proposals for declaring some human individuals nonpersons points up the arbitrariness of all such proposals. They reflect the special ideals and/or interests of those who advance them. Even if a substantial segment of society were to adopt one or another such proposal, it would remain an expression of the bias of that segment, an expression of its particular world view, from which other members of the society remain at liberty to dissent. Why should it be assumed that those who happen to be incapable of joining in the disagreement by either assenting or dissenting would agree with the world view which would make them nonpersons, extinguish all the legal rights they now enjoy, and smooth the way for themselves to be killed?

As has been pointed out often enough by others, the declaration that some human individuals are not persons is a prelude to mistreatment and killing, for it generates an attitude of indifference in which what is done seems no more significant than what is acceptable in the treatment of animals. Advocates of euthanasia often appeal to the mercy humans show to animals as a ground for permitting nonvoluntary euthanasia of humans. Animals, of course, are not members of society, and they are not presumed by law to have any rights. Hence, law allows human beings to deal with animals according to human conceptions of what is beneficial or harmful to animals (and in the interests of humans). The proponent of nonvoluntary euthanasia similarly wishes to deal with some human individuals as if they were not persons, so that they can be treated in accord with the conceptions of others who decide that these "nonpersons" would be better off dead—or that it is expedient for society to be relieved of the burden of treating them as persons.

D. Arguments Based on an Alleged Public Interest

In chapter seven, section A, we reviewed economic arguments put forward by Sackett, Lennox, Robert Williams, Trubo, Glanville Williams, and Marvin Kohl which might seem to provide a foundation for overriding the liberty to stand aloof of those who abhor killing by establishing a substantial state interest in ridding society of the burden of providing for members who are not and never will be productive. Economic arguments of this sort do not themselves hinge essentially upon quality-of-life considerations, but because the proposed killing is advocated as a type of euthanasia, quality-of-life and economic considerations are intermingled both by authors who emphasize economic considerations and by those who minimize them.

In considering economic arguments one must distinguish between factors which might set an upper limit to the legal duty to provide care for some individuals—a matter we shall consider in chapter nine—and conditions which are urged as good reasons for killing some individuals. Omitting care amounts to homicide by omission only if there is a legal duty to provide care. Glanville Williams's fantasy of individuals living to one thousand years of age and requiring extensive care through most of this life span projects a situation in which it would be impossible to provide the needed care. In such a situation no legal duty to provide care could fall upon anyone, since no one can be bound to do what is impossible.

To help those to die "with dignity" whom society is too niggardly to help to live with dignity might be a great bargain, as Kohl suggests, but it also clearly would be an unjust imposition of the strong upon the weak. Homicide laws provide a minimal protection of each person's individual share of the good of life by requiring everyone to forbear killing. This forbearance is always possible. Hence, there seems to be no reason why those who are not to be cared for should be considered a special class from whom equal protection of the law of homicide could be withdrawn without injustice.

Of course, proponents of nonvoluntary euthanasia will argue that those who are not to be cared for will be better off being killed if the natural causes which would bring about death would be painful: "Would it not be better kindness to substitute human agency?"[28] In other words, society should at least help those to die with dignity whom it is too niggardly to help live with dignity.

Richard Trubo develops this theme at length by describing the miserable conditions in which many individuals who are permanently institutionalized now exist. In some institutions for the retarded less is spent for a patient's food each day than a pet owner would spend to feed a cat; in one hospital understaffing is so severe that patients were left unfed, forced to obtain drinking water from toilets, and generally neglected.[29]

However, either better care is owed such individuals or it is not. If it is, then killing them would merely avoid a lesser injustice by committing a greater. If better care is not owed such individuals, still killing them can be judged better kindness only if conceptions of others are used to judge that they would be better off killed at once than neglected or badly cared for.

Proponents of euthanasia will attack as insignificant the distinction between killing and letting die.[30] The distinction certainly makes no difference in many cases—for example, homicide by omission of care which one has a legal duty to provide is as much homicide as is killing by a positive performance.[31] However, the law does distinguish between acts of omission to which one is not legally obligated—here there is no crime even if the omission results in preventable death—and acts of commission. The basis of this distinction is not irrational, since everyone can forbear to kill others, and demanding this forbearance provides a great deal of protection for each individual's share of the good of life. There also is the practical consideration that if one omits to save another, the other may survive even so, perhaps with the aid of some third party; while if one kills another, alternative possibilities for preserving life are eliminated at a stroke.

In the argument for nonvoluntary euthanasia outlined in chapter seven, section A, the public interest in saving the cost of caring for the permanently dependent, it was argued, could override the liberty to stand aloof from euthanasia of those members of society who abhor such killing. We promised to show in the present chapter that the public interest in saving money is not the sort of interest which a jurisprudence which justly respects liberty would permit to override liberty to stand aloof. We are now in a position to keep this promise.

As it has now been made clear, the killing of permanently institutionalized noncompetent persons and others whose care is a burden to society is not a *necessary* means to easing this financial burden. Society might also cut costs simply by ceasing to provide the care which it now provides. This alternative would leave those from whom care would be withdrawn to die of neglect or to survive by private charity. Such a withdrawal of support from the dependent would be a drastic step, and one we by no means advocate. The point is that it would be a step no more unjust to those abandoned than killing them would be, and a step which could be taken without overriding anyone's liberty.

In fact, such a withdrawal of support from members of society who now depend on it for survival would simply limit the objectives of political society to those which it pursued before the evolution of the modern welfare state. In general, whenever there is a genuine public interest in saving money, the problem can be solved in a similar way: by limiting the role and activities of the state.

Money is only a means, not a substantial public purpose in itself. The

Preamble to the Constitution of the United States mentions justice and liberty, public tranquility and the common defense, civil unity and the general welfare. It does not mention saving money. The limits of the money available to government for public purposes are an expression of the limits of the common will to pursue these purposes. In other words, if a government is compelled to save money, it is being told by the people that there are limits to what they are willing to have the government do. Such limits are a signal not to act but to limit action.

Hence, budgetary considerations as such never offer a compelling reason to override the liberty of citizens, and a jurisprudence with a just respect for liberty will provide no rationale for any government to undertake activities abhorrent to citizens for the sake of cutting the cost of public programs. Rather, reducing or eliminating some of the costly programs will be the solution of choice.

If economic arguments cannot justify euthanasia in the public interest, still there are noneconomic considerations with respect to the public interest which might seem to justify the legalization of such killing.

One can imagine a possible situation in the wake of disaster in which not all could be cared for and it might seem better kindness to kill some than to let them die.

Perhaps in a very difficult situation some would have to be killed to protect others—for instance, from the spread of disease. The latter possibility might fall under the generalized rule which we formulated in chapter seven, section G, according to which it is justifiable to kill some when this is necessary to improve the overall average probability of survival provided that those to be killed are chosen by some fair principle. Thus if it were necessary to kill some to protect public health, neither their prospects for a certain quality of life nor their personhood nor their burdensomeness to society would have to be taken into account. So the justification of such killing would not entail the justification of nonvoluntary euthanasia.

As to the carrying out of a program of nonvoluntary—or even of voluntary—euthanasia in a disaster situation, acceptance of such a measure would only entail acceptance of killing if the program involved killing rather than merely the selection of some for care and treatment in a situation in which care for all is impossible. To admit active killing in a confused and difficult situation would be extremely dangerous. Those allowed to do such killing could in practice kill almost anyone they wished with impunity. Moreover, it is hard to see how the use of scarce personnel and resources to carry out killings could be justified when these same personnel and resources could be employed in more positive ways.

If in less disastrous circumstances it is justifiable to omit care and treatment, the alternative to killing need not be to allow death to occur with

excessive misery. The pain might still be mitigated with drugs. For example, even if it is granted—something we do not concede—that it is justifiable to omit lifesaving surgery in the case of an infant afflicted with Down's syndrome, those who have custody of the infant need not choose between killing it and allowing it to undergo severe suffering as it dies. They can administer palliative care as they would to any other dying patient.

Proponents of euthanasia might argue that in a disaster situation they could state a criterion by which some might be selected for death without unfairness: Those to be killed should be the individuals who are most burdensome to sustain. But it must be noticed that everyone is a more or less grave burden to society. An advocate of euthanasia will respond that the intended criterion is not merely burden but net burden—that is, the burden which is not offset by a contribution. The economic argument for killing those who are permanently institutionalized is not that the cost of their maintenance is great—the cost of maintaining the leading members of society undoubtedly is far vaster—but that this cost is not offset by any contribution.

But who is to judge the worth of various contributions? In a disaster situation one person might think that helping the least afflicted to survive would be a very important contribution, another might think that vengeful retaliation against an already victorious enemy in accord with the plan of deterrence which has failed must take priority, another might think that consoling the dying would be nobler and more worthwhile. A Roman Catholic might believe that the activity of a priest administering the sacraments would be the greatest contribution of all. Clearly, it is impossible to weigh these different contributions and to determine which are worthwhile and how much each is worth without taking for granted some particular world view, some special set of ideals and interests, as a premiss. And so it is equally impossible to determine the net burden.

An advocate of euthanasia on economic grounds will argue that in our present circumstances it is not impossible, nor even difficult, to calculate the net burden to society imposed by those whom Sackett and others describe, for their contribution is nil. But this is to assume that having needs and requiring care and compassion is not itself a contribution to others. Not everyone will accept this assumption; it is far from self-evident and it presupposes a particular world view.

It is particularly odd to maintain that the contribution must be economic in a society in which many people accept the burden of caring for pets for the sake of the noneconomic contribution which pets can make to one who cares for them. The noneconomic contribution of helpless humans to society can be much more significant if it not merely generates psychological satisfactions but provides an occasion for exercising moral qualities of compassion and fairness. Of course, this proposition *also* rests upon a particular world view.

However, the question is: Why should it be fair to impose one of these world views rather than the other upon helpless individuals? Equal protection of the law of homicide ought not to be modified to leave some class of individuals unprotected on the ground that on one or another world view—perhaps even a very widely held set of ideals and interests—such individuals contribute nothing.

Further, if net burden were to be used as a criterion, one should notice that on many conceptions of what is valuable leading members of society are a much greater net burden to society than is any individual who happens to be a permanent inmate of a custodial institution. The wealthy consume tremendous amounts of scarce resources. Whether their contributions begin to approximate the costs they impose upon society is an ideological issue.

Many living in underdeveloped nations and in communist societies would deny that the rich and powerful leaders of developed liberal democratic nations make any worthwhile contribution to human well-being. Perhaps they are right. If so, a criterion of net burden might indicate that a Rockefeller or a justice of the United States Supreme Court imposes a greater net burden on society than does any defective child. Whether they do or not is not a question which can be settled by objective calculation. It all depends on the value one places upon the contributions of such persons and how one appraises the costs they impose upon society.

Of course, there is no likelihood that nonvoluntary euthanasia will be extended to the rich and powerful on the ground that permitting them to live is excessively costly. Being rich and powerful, they can take care of themselves and can see to it that the law will not withdraw its prohibition of homicide insofar as it applies to them and to those whom they want to have protected. But this consideration, while important, has to do with mere power, not with justice. The demand of equal protection of the laws is a matter of justice; according to this standard mere power may well bring about changes in the laws, but it cannot warrant withdrawing protection from anyone who would otherwise be entitled to it.

E. Injustice of Criteria of Selection for Euthanasia

Up to this point we have considered various proposals by advocates of nonvoluntary euthanasia which might seem to justify withdrawing the equal protection of the law of homicide from some individuals who are to be killed if the proposals are accepted. Some proposals emphasize quality-of-life considerations and embody a belief that some people would be better off dead. Other proposals would restrict personhood and rights to some limited class of human individuals by assuming that the excluded individuals share insuffi-

ciently in characteristics which are essential if one is to be a person. And still others emphasize the social costs of caring for some persons who are assumed to make no worthwhile contribution to society.

We have pointed out that all of these proposals involve arbitrary standards. Those who advocate nonvoluntary euthanasia hold one or another world view—embracing a certain set of ideals and interests—which seems to them to justify removing the protection of the law forbidding homicide from a larger or smaller number and variety of human individuals. All persons are of course entitled to hold whatever world view seems right to them. This liberty to hold one's own preferred ultimate conception of things is a very important one which is protected in the United States by the First Amendment's prohibition of the establishment of religion and interference with free exercise of one's fundamental beliefs.

However, although proponents of euthanasia are entitled to hold their own conceptions which might seem to justify killing some other human individuals, they are not entitled to impose upon those they wish to have killed their peculiar conceptions of quality of life, of personhood, and of worthwhile contribution. Indeed, as we shall argue in chapter ten, section A, the effort of proponents of euthanasia to establish their peculiar conceptions as legal standards is an attempt to establish a religion in violation of the First Amendment. Other members of society are at liberty to hold diverse world views. In particular, those whose death is proposed cannot fairly be assumed to accept the views which underlie proposals to kill them—views upon which there is no social consensus.

We come now to another consideration which argues against all of the attempts to justify withdrawing the protection afforded by the law of homicide from some human individuals. All such attempts appeal to various criteria: defectiveness and normality, paralysis and mobility, retardation and intelligence, inability to communicate and potential for relationships, mutilatedness and integrity, unawareness of one's own good and sufficient awareness to demand one's rights, lack of a sense of justice and ability to apply principles of justice, dependence and independence, inability to care for oneself and autonomy, or some other criterion.

The proposals of advocates of nonvoluntary euthanasia appear to offer a workable criterion for deciding whom to kill only because they contrast extreme instances of a negative condition with standard instances of a preferred contrary condition. Thus, Fletcher, for example, contrasts extreme instances of mental retardation with standard instances of intelligence within the range of statistical normality. But let us suppose that some such criterion were adopted to justify allowing nonvoluntary euthanasia, whether on the ground that those to be killed would be better off dead, or on the ground that they are not really persons, or on the ground that they do not contribute enough to

offset the burden they impose upon society. How would any such criterion work? And what would be the implications of adopting it and using it as a basis for allowing some individuals to be killed?

In practice the criterion would have to be applied to draw a line within a continuum of cases, for all of the suggested criteria refer to properties which vary in degree. Cases can be found along the continuum which differ so little that even experts would disagree whether one or another individual was more retarded, more defective, and so on. This problem is concealed by the reticence of most proponents of the various standards concerning the methods of reducing their ideas to operational terms. Clear-cut cases can be given as examples in a theoretical discussion, but borderline cases also will have to be dealt with in practice. If euthanasia were legalized, a line would have to be drawn, and life-or-death decisions made by applying the criteria established to all the cases, including the borderline cases.

Under these conditions any drawing of a line within the continuum of cases inevitably will be arbitrary and thus unfair. Some individuals would be killed while others hardly distinguishable from them would receive the full protection of the law of homicide. The two groups would be separated at the borderline, not by any rationally defensible principle, but only by arbitrary judgments.

There would be a tendency to set the standard somewhat high and then to select for death only those individuals who clearly fall short of the standard. But this strategy would not help matters. The standard in theory makes a cut where there is really no intention of making it in practice. In practice the cases which clearly fall short of the theoretical standard are adjacent to cases which only slightly less clearly fall short of it.

Those who advocate the legalization of nonvoluntary euthanasia might object that this argument is a fallacious wedge or slippery slope argument. But this objection would miss the point entirely. We are not (yet) arguing that the criterion will not stay at the level at which it is initially set. Rather we are pointing out that at any selected level—for example, at any designated degree of retardation or insanity or senility—any criterion used to select those to be killed will inevitably require arbitrary distinctions between very similar cases, and these arbitrary judgments will send some to death who differ by a hardly measurable and surely insignificant degree from others whose lives will be spared.

But, it will be objected, the law draws arbitrary lines all the time— to settle that an individual below a certain age is legally noncompetent and an individual driving above a certain speed is guilty of an offense. We concede that lines drawn in such cases are arbitrary. The same is true when it comes to a teacher's passing and failing borderline students. But all such cases differ from nonvoluntary euthanasia.

In the first place, in many cases the line itself is drawn arbitrarily but—as in a legal age of competency—judgments are clear-cut and not arbitrary. The criterion for euthanasia would involve both an arbitrary cutoff point and the arbitrary discrimination of borderline cases. Moreover, in other cases rights as fundamental as the right to life are not at stake.

Furthermore, usually laws and procedures with arbitrary cutoff points and judgments of borderline cases are *necessary* for purposes which are generally agreed to be legitimate. (Although it is not easy to convince a student who has failed a course of this point if a classmate whose performance was only a single percentage point better passed the course.) The arbitrary discrimination of those to be killed in a program of legalized, nonvoluntary euthanasia can be wholly avoided. It is unnecessary unless such a program is adopted. And there is no consensus upon any important public purpose which nonvoluntary euthanasia would serve.

It will not do to suggest that the problem of making life or death judgments here is no different from problems which courts of criminal law regularly face, especially when the death penalty is used. For the courts at least are looking for something which is not a matter of degree: legal guilt or innocence. Assuming there is guilt, then the degree of it comes into consideration in sentencing, with results which hardly provide grounds for complacency about the use of a similar procedure in any other field. At least where capital punishment has been involved, however, Anglo-American law has not been compelled to settle life or death issues on the basis of a criterion which is no more than a certain degree of some property which is present in only infinitesimally distinct degrees in a multitude of adjacent cases.

Even if there were a criterion which would permit fine discriminations to be made and used as a basis for selecting for euthanasia some persons judged too deficient in a certain quality to deserve to live, still a further difficulty would emerge. Once those who fall short of the original criterion were eliminated, there would be a tendency for standards to rise.

Joseph Fletcher, for example, by one of his stipulations has decided that those below an IQ 20-mark certainly are not persons. Once those who failed their IQ tests at the determined level were killed, it would seem rather foolish to stop the process. Some will have barely passed the required test; as we have pointed out, they will differ very little from individuals already killed. It would hardly seem sensible at this point to forbid the killing of those Fletcher already has deemed doubtful persons—those with an IQ above the 20-mark but below the 40-mark.

Intelligence quotient itself is based upon the average of a test group which is chosen to be representative of the population as a whole. Each time the tests were revised and recalibrated, the new form would always locate a group with an IQ below the 20-mark.[32] Of course, this particular problem

might be avoided, unless it is an intentional part of the program of some proponents of euthanasia, by specifying a criterion in such a way that it would not *automatically* result in constantly higher standards as more deficient groups were eliminated.

However, since the deficiencies are a matter of degree, rising standards would be very difficult to avoid. The most deficient extant instances in comparison with any ideal always seem to be extreme cases, since expectations are determined by the median of instances in comparison to the ideal as much as by the paradigm itself. Every teacher is familiar with this point: The better the group of students with which one is used to dealing, the poorer a given student seems to be. If at first those who are blind and deaf and lacking all four limbs are considered too defective and are legally killed, next those who are blind and deaf and who lack three limbs and part of the fourth will be considered too defective. And so on.

It might be thought that these operational difficulties could be avoided simply by treating as justified only the killing of individuals who have a certain social status. For example, perhaps only the permanently institutionalized should be permitted to be killed. This approach would conform to the franker proposals which emphasize economic considerations. But it would hardly afford any lasting resolution.

Many wholly dependent individuals cared for privately are in a condition as bad as that of those in public institutions. Moreover, most of these individuals are more or less dependent on public financial aid. The law hardly could permit the killing of the institutionalized without extending equal protection of the right to be killed to those under private care. Any individual's chances of surviving infancy and childhood and of being spared whenever in a condition of helpless dependence would depend upon the extent to which sufficiently strong and solvent protectors stepped in to protect life.

There is yet a further implication of accepting criteria based upon properties subject to degree for legalizing the killing of some individuals. Any criterion which would be used must be widely regarded as related to a positive attribute or ideal which is of central human significance. Otherwise deficiency hardly would be a basis for legitimating the killing of defective individuals. Already those who are quite deficient in some of the suggested respects are regarded as inferior; in many ways their rights are afforded minimal respect. When those deficient below a certain level are judged by law to be better off dead or to be nonpersons or to be useless consumers, this judgment certainly will have an effect upon the respect which will be given to other persons who are deficient, although not so deficient as to be candidates for nonvoluntary euthanasia.

The implication is particularly clear in the case of positions which would deny personhood to some individuals in order to withdraw the protection of the law of homicide from them without seeming to restrict unfairly equal

protection. On the one hand, if an IQ 20-mark and below means that one is not a person and an IQ 40-mark and below means that one is doubtfully a person, an IQ 60-mark and below means that one is somewhat less a person than the average. On the other hand, geniuses are more persons than others.

The underlying thesis is that if one is only a person by having a certain minimal degree of some property which persons have in various degrees, then one is more a person the more one has of that property and less a person the less one has of it. Thus the criteria proposed to justify nonvoluntary euthanasia will lead to a legally recognized caste system, which can hardly be limited to the single area of decisions about whose life will be unprotected by the law of homicide.

Certain proponents of beneficent euthanasia will protest that not all proposals for legalizing nonvoluntary euthanasia depend upon the denial of the personhood of those to be killed and that their own proposals would depend upon no such denial. Rather, the idea is to kill those who would be better off dead, not out of disregard for their dignity and their rights, but rather out of respect for those whose lives have become a burden to themselves and whose deaths will be a positive boon.

However, when this judgment is made for one person by another and nonvoluntary euthanasia administered, this is tantamount to a denial of personhood; the views of others are accepted as an adequate ground for exterminating those whose lives are considered not worth living. Moreover, the legal establishment of quality-of-life criteria for killing will give an officially sanctioned status to such criteria, so that application of them to make other discriminations will be irresistible even if the discriminations are not formally made on the basis of more and less personhood. All will be persons, but some more deficient than others in a property which the law admits to be so important that a certain level of deficiency in it renders human life officially not worth living.

The preceding argument is a very powerful one against using qualitative criteria to select certain human individuals for the status of nonpersons or to select them for the status of persons so deficient in a quality that they might be denied the protection of the law of homicide. But the point of this argument must not be misunderstood and overstated. We are not arguing that the use of qualitative criteria for such purposes *logically entails* that others, who are permitted to live although more or less deficient in the quality which serves as a criterion for legalized killing, must be considered persons in various degrees according as they participate the relevant quality.

John Rawls has shown that it is logically possible both to hold that one has the status of personhood by virtue of certain capacities which depend upon the presence of a certain degree of qualities which vary according to more and less, and to hold that all who qualify as persons should enjoy equality in

their basic personal and civil rights. According to Rawls only individuals capable of having a notion of their own good and a sense of justice qualify as moral persons and need be considered persons before the law, yet all such persons, once they do qualify as such, ought to enjoy equality before the law. (It is important to note that Rawls understands "capable of" in a broad sense, so that at least most infants and perhaps even most of the unborn would have the relevant capacity.)

Rawls suggests that the inequality of persons would follow from making personhood depend upon qualities which vary in degree only if one accepted certain additional assumptions, which he does not accept. The additional assumptions are those of a theory of ethics according to which the rightness of action depends upon its efficiency in maximizing good consequences. Given a theory of this sort, individuals who have a greater degree of qualities considered desirable are bound to be treated unequally, since right action will pursue the better consequences of making the most of the possibilities of those individuals who are regarded as the best. Rawls holds a very different ethical theory. On his view, fairness to every individual who qualifies as a person and equal opportunity for all persons to make the most of themselves are far more important in determining what is right and wrong than is getting a maximum of good results. Hence, persons ought to be considered to have equal rights even though they vary in the degree to which they share the qualities by which they have the capacity required for them to be persons at all.[33]

We partly agree with Rawls. It is true that even if individuals qualify as persons by having the level of intelligence and other qualities required for a capacity to understand what is good for themselves and to have a sense of justice, still one can consider personhood as the defining characteristic of a class of entities—namely, that class of individuals who have legal rights and duties—and can hold that all persons have equal rights. Any given individual must either be a member or not be a member of a class of this sort.

The logical point Rawls makes is clear in respect to natural kinds: Natural species are distinguished by their natural capacities, which depend upon qualities subject to degree, and yet one does not regard individuals of such kinds as if they were only more or less the kind of thing they are. For example, humankind is distinguished by the capacities to think and choose, and yet one does not regard different individuals as more or less human depending upon the level of their ability to think and make choices.

However, while evidence of the ability to think and choose sometimes is useful for recognizing humans—for instance, in examining the remains of primitive cultures—other criteria also are ordinarily used to recognize individuals as human. One usually can recognize another as human on sight; one always could do so by a careful study of the individual's genetic makeup,

since all human individuals belong to the same interbreeding population and are genetically similar. Hence, although *humankind* is distinguished by the evidence in some of its members of the abilities to think and to choose, *individuals* are classed as human by their membership in the human family, not by their individual ability to think and to make choices.

It follows that if more is required to qualify for personhood than that one be a living human individual—for example, if one qualifies as a person only by having a certain degree of a quality such as intelligence—then some human individuals will not be persons. Persons will not be individual members of humankind which is distinguished by human capacities to think and choose; persons will be individuals *directly* distinguished by the potential for a certain level of thought and action.

At this point we can see how the approach Rawls takes will run into difficulties. If persons are directly distinguished as such by their *individual* capacities, how are these capacities to be known? The only way to know an individual's capacity, once reasoning about one individual from its resemblance to other members of its family is excluded, is by waiting to see what the individual can do. Hence, if personhood depends upon the presence of a certain degree of a quality which human individuals have in diverse degrees, then one will not be able to recognize any individual as a person until the required degree of the relevant quality actually is displayed.

Even so, one might insist that once the required degree of the relevant quality is displayed, all who reveal it will be considered equal. This position remains logically possible. But we do not think it would be psychologically possible to hold in practice to this position. Even without assuming the sort of ethical theory which Rawls rejects (rightly rejects, as we shall argue in chapter eleven, section C), one who began calling others "persons" only when they actually showed a certain level of intelligence and action would inevitably consider personhood something which comes to be gradually and is achieved more or less perfectly. It would follow that the subnormal would be considered inferior persons and the above normal would be considered superior persons—that is, inferior and superior *precisely as persons*—and between superior and inferior persons there would be differences of status which would place each group in its proper caste.

F. A Just Criterion: Membership in the Human Species

Proponents of euthanasia are likely to object to the preceding argumentation that if no quality-of-life criteria are admitted, than one must hold that all lives are inviolable regardless of their quality. After all, there are intelligent porpoises, parrots which talk, apes which seem to be able to use some simple

tools, and so on. If qualitative considerations are excluded, an unqualified philosophy of reverence for life would require the protection of bacteria against penicillin.

But this objection presupposes the qualitative criteria—sharing in certain abilities to some degree—which the preceding argument has criticized. The opponent of euthanasia need not defend any philosophy of absolute reverence for life. The argument begins with an existing law forbidding homicide. The issue is whether that law ought to be modified to permit some human individuals to be killed whose lives until now have been protected by the law's prohibition. The opponent of the legalization of euthanasia need only defend as reasonable the line drawn by the existing law of homicide or a more inclusive line than that drawn by present law.

The line drawn by the existing law of homicide in Anglo-American jurisdictions protects every living human individual from birth, with the exceptions discussed in chapter seven. Being a human individual is an all-or-none property, not a quality in which one can share in various degrees. Human individuals are members of a well-demarcated biological species. They are easily recognized by their familial relationship with other members of the species, regardless of their individual performances.

Of course, not everything which pertains to human life is a human individual. For example, one's left arm is not a human individual; it is only part of an individual. Similarly, although one's sperm or ovum is alive, human, and an individual cell, it is not a human individual, but only part of some individual. The human individual is the whole organism of the species homo sapiens. In chapter three, section D, we distinguished between the death of such a whole and the death of its parts. Only the death of the whole is the death of a person.

Human individuals are the only natural persons recognized by Anglo-American legal systems. There is nothing else which all those now recognized as protected by the law of homicide have in common beyond the fact that they are members of the human species who have been born alive. Since the preceding argument shows that there is no way to protect some of those now protected while excluding others without introducing unjust principles of discrimination, the conclusion is that the law ought to continue to protect all human individuals without discrimination.

Drawing the line at this point is not at all unreasonable. As Rawls and others have pointed out, the legal system is made by humans for humans. By it human individuals regulate their relationships to each other so that these relationships reflect not merely the interests which humans share with other animals but the peculiarly human ideals of liberty and justice in which other animals do not participate. Still, to qualify for legal personhood and to have one's basic rights protected, in particular one's right to life, nothing beyond

the common property of species membership can be required, or else the problems of quality which varies by degrees will emerge.

As to allowing nonhuman animals the status of legal personhood and the protection of basic rights which attend this status, this theoretical possibility is hardly a point which deserves serious consideration. Existing laws which protect animal life are based upon conceptions of human interests and ideals—for example, conservation for use, prevention of immoral cruelty, and the like.

In practice law cannot undertake to protect any large segment of nonhuman animals by making them legal persons, and there is no significant body of public opinion which would support such an innovation. If nonhuman animals were to be regarded as individuals due respect and in possession of their own rights, then either lines would have to be drawn on some arbitrary basis or even viruses would be included—something obviously unworkable.

G. Legalized Abortion a Violation of Justice

But what about the requirement that human individuals be born alive before being accepted as legal persons? This dividing line excludes from legal personhood a subclass of members of the species, the unborn, which are in reality whole organisms and distinct individuals. At present the law in the English-speaking countries does not consider the unborn to be legal persons, and the law of homicide does not forbid killing unborn individuals. This is true even where laws forbidding abortion provide some protection for such individuals; antiabortion laws are not based upon the assumption of the full legal personhood of the unborn, for if that assumption were accepted, the ordinary homicide laws would apply to them.

Two points may be made by way of jurisprudential defense of the present exclusion of the unborn from protection by the law of homicide.

First, this exclusion is based upon a status which is not a matter of degree. To this extent, using birth as a necessary condition for legal personhood is not legally unworkable in the way that using quality-of-life criteria is. Or, to put the point another way, the repeal of the laws forbidding abortion does not open the door to the killing of an indeterminately large class of individuals other than the unborn from whom this repeal withdraws legal protection.

Second, the exclusion of the unborn from protection by the law of homicide is not *in itself* a novel discrimination introduced as a practical application of one particular world view. As we have pointed out already, antiabortion laws were necessary to protect the unborn precisely because the commonly received legal view was that the unborn are not protected by the law of homicide which protects those who are already born. To permit nonvoluntary euthanasia

would be a more radical step than to legalize abortion, for the legalization of nonvoluntary euthanasia would mean the withdrawal of protection from individuals until now protected by the same law of homicide which protects everyone. Those killed in a program of nonvoluntary euthanasia, whether declared nonpersons or not, would be individuals whose personhood before the law has been universally accepted in Anglo-American jurisdictions until now.

Nevertheless, we think that unborn human individuals ought to be considered legal persons and that the restriction of the law of homicide by which it protects only those who have been born alive ought to be abandoned. The case for this position has been stated at length elsewhere and need not be repeated in full here.[34] However, a few comments are in order.

First, until modern times no one knew when human life begins. It was commonly thought that it began from nonliving materials sometime during pregnancy. But by 1800 it was known that while new human individuals begin, human life as such does not begin but is transmitted continuously. Further, law generally stays close to common sense. From a common sense point of view there is something lacking for the full reality and personhood of an individual until birth occurs and one can begin to interact with the separate and distinct body of the infant. Between the time when spontaneous movement of the fetus is felt (animation) and live birth a common sense view is that the unborn is alive and growing—the baby *is coming*. Hence, there is a tendency to count the unborn as being in an intermediate state between nonbeing and being, between lifeless material and the fully real, liveborn infant. Law also has very important problems with evidence. No one can be held guilty of killing until it is certain that life is present, until it is clear that the act was the cause of death, and so on.

Under these conditions Anglo-American law would have found it extremely difficult to attempt to consider unborn individuals as legal persons whose lives would be protected by the laws forbidding homicide. Some clear dividing line was essential, and birth was quite naturally chosen. At the same time unborn individuals were protected by special laws, already to some extent at common law and later by statutes which were enacted beginning early in the nineteenth century when the real status of the unborn began to be understood more accurately.[35]

In its decision repealing laws forbidding abortion the United States Supreme Court accepted false historical claims by proponents of abortion which called into question the fact that abortion was a crime at common law and which denied that antiabortion statutes were intended to protect the lives of the unborn.[36] A more responsible effort by the Court to discover the relevant history of the law would have revealed the situation summarized in the preceding two paragraphs.[37]

Second, Anglo-American law never has taken a consistent position either

that the unborn are not legal persons or that they are legal persons. In different areas of the law different solutions were reached at different times and places, solutions always recognizing the impossibility of completely excluding the unborn from the human community but never simply affirming their unqualified membership and rights. Nevertheless, if any recognition was to be given at all, it was very difficult not to give increasing legal status to the unborn. The reason for this is simple and obvious enough: If there is a claim of justice, less than full and unqualified recognition of the claimant is injustice. And so until the proabortion movement reversed a long-term trend, Anglo-American law tended for more and more purposes to regard the unborn as already existing legal persons in possession of rights before the law, some of which were actually enforced prior to birth.[38]

In its abortion decision the Supreme Court distorted this state of affairs in two ways. It suggested that there existed disagreement concerning when life begins and it proposed to avoid settling this disputed issue. It then noted that the law did not consistently regard the unborn as legal persons, minimized the respects in which personhood was in fact accorded the unborn by the law, ignored the trend toward fuller recognition, and summed up the situation by saying, "In short, the unborn have never been recognized in the law as persons in the whole sense."[39]

Third, inconsistency in the law with respect to the status of individuals as persons is intolerable. Law can deal with most things in different ways for different purposes. But persons are not simply something within the subject matter of legal concern. Persons are those for whom the law exists. If one is a person, one deserves the whole service of the law; if not, none of its service. The case of the unborn is not the only historical instance of legal inconsistency on this matter. Slaves and Indians also were treated inconsistently, being recognized as persons for certain purposes and denied personal status for other purposes.[40]

The controversy over legalization of abortion forced a decision which would settle the status of the unborn, for if they were persons, then the demand for abortion could not be admitted; while if they were not, it could not be resisted. The issue was not a matter of policy on which consensus or lack of it could be decisive, because the putative right of persons to live was at stake. Nor was it a matter on which a decision could be avoided.

The Supreme Court held that if the unborn were persons, then the case would have to be decided in their favor. But instead of facing the responsibility of settling this crucial issue the Court maintained that the case for personhood was not proved and thus that the unborn should not be considered persons. The question was what consistent policy ought the law to adopt; the Court begged this question by assuming that if the unborn were not already fully recognized as persons, then such recognition could not be given them.[41]

Fourth, the dividing line of birth is not particularly significant either with respect to the status of human individuals as members of the species or with respect to their status as individuals involved in human society. There is very little difference between an infant about to be born and a neonate. And the developments in the law made clear that in many respects the unborn are involved in society—for example, by owning property which must be managed, by needing the support of their fathers, by suffering negligent damage and death, by requiring medical care which a mother might reject for herself on religious grounds, and so on. Also, the quickly developing movement to allow nonvoluntary euthanasia of defective newborns clearly extends the acceptance of abortion to the class least distinct from the unborn.[42] Moreover, the unborn could be recognized as legal persons without any legal impracticality.

To insist upon birth in addition to membership in the human species under these circumstances—taking into account what has been known for more than a century—is discriminatory. Hence, all living human individuals should be considered legal persons; the same law of homicide should protect the lives of all equally.[43]

However, the Supreme Court claimed that killing the unborn must be permitted because they are only *alive* on one debatable theory—a patent absurdity. Still, the Court admitted that there is some sort of life which is other than life "as we know it": a potentiality of life, or potential life, or fetal life. At the point of viability a state can give some protection to this so-called potential life "because the fetus then presumably has the capability of meaningful life outside the mother's womb."[44]

In taking this position the Court implied that the life of all those who survive either spontaneous or induced abortions but who are too young to survive the neonatal period is not meaningful, although such individuals certainly are legal persons and are citizens of the United States according to the Fourteenth Amendment. Thus in its decision on abortion the Court itself began the trend toward belittling the significance of the life of infants already born which is now unfolding in the movement to legalize killing some such persons, whether on the theory that such life is not meaningful and that such persons are better off dead, or on the theory that such individuals should be excluded from personhood, or on the crass view that whether such individuals are persons or not, they simply should be disposed of if they cost more than they are worth.

Our conclusion is that legalized abortion, except to save the life of the mother, is a violation of justice. Equal protection of the laws demands that the unborn be considered legal persons, and their lives be protected by the same law forbidding homicide which protects other persons. We shall return to this subject in chapter ten, section B.

H. The Nazi Experience with Euthanasia

In his article on euthanasia Yale Kamisar argued, as we saw in chapter six, that voluntary euthanasia would lead to nonvoluntary euthanasia. In this connection he suggested that the Nazi action was an example of the "parade of horrors." We omitted this aspect of Kamisar's argument from consideration in chapter six because the Nazi program did not begin with voluntary euthanasia. However, the Nazis did proceed from more to less restricted nonvoluntary euthanasia, and they proceeded from nonvoluntary euthanasia to genocide. Hence, the analogy of the Nazi action deserves consideration here, where the subject is nonvoluntary euthanasia and where the problems of drawing and maintaining firm lines have been discussed.

In discussing the Nazi action we do not intend to rest our case upon this historical analogy. However, Germany is the only nation in modern times which has undertaken a program of nonvoluntary euthanasia about which we have any real information. (Perhaps nonvoluntary euthanasia is practiced in the Soviet Union or elsewhere, but we have been unable to find any significant evidence on the matter.) Hence, the Nazi action deserves some consideration.

At the same time the differences between Nazi Germany and the Anglo-American nations of the 1970s require caution lest one press the evidence of this past experience too far. Certainly, if there were no objection to nonvoluntary euthanasia *except* that based upon the Nazi action, the argument would not be strong. But the preceding arguments have shown that nonvoluntary euthanasia would involve a very serious injustice right from the beginning. Since the Nazi action and the nonvoluntary euthanasia proposed today would share the common characteristic of injustice from the outset, consideration of this analogous instance is instructive.

Proponents of euthanasia have attempted to neutralize the force of the Nazi experience with euthanasia by four diverse lines of argument.

First, it is sometimes maintained that the Nazis were racists and that their euthanasia programs were a means to purification of the Aryan race. Since the end rationally required the means of genocide, this means was used. But since no advocate of the legalization of nonvoluntary euthanasia in an English-speaking nation espouses racism, there is no reason to suppose that this type of killing will get out of hand and lead to the excesses that it did in Nazi Germany.[45]

Second, it is sometimes maintained that the Nazis did not engage in mercy killing at all. What they did was really cruel, strictly merciless murder. Kohl protests vehemently that beneficent euthanasia is intended to be kind, that it does not rest upon a principle of utility, and that its sole point would be to minimize misery and maximize loving treatment. Thus because present soci-

ety so loathes Nazi atrocities, it must avoid cruelty and indifference, and so accept beneficent euthanasia.[46]

Third, it is argued that Anglo-American tradition and law are so different from the totalitarianism of Nazi Germany that there is no reason to fear a repetition of Nazi horrors if nonvoluntary euthanasia were legalized in these democratic and liberty-loving nations. Glanville Williams, for example, points out that American laws permitting sterilization were little used and that men trained to kill in World War II did not return home after the war and continue killing.[47]

Fourth, it is sometimes argued that the Nazi action is not a historical precedent because of the ideological character of Nazi objectives. Their racism was not simply discriminatory; it was totally impractical, a mere abstract ideal. Euthanasia in Anglo-American society would be pragmatic, a matter of rational, cost-benefit calculation. The benefit to society would be a real one, measurable in tax dollars and cents.[48]

As to the first point the authorities whom Kamisar quotes make clear that euthanasia began in Germany quite apart from the anti-Jewish policies of the Nazis. German Jews were at first excluded because it was believed that the blessing of euthanasia should only be granted to "real" Germans. The roots of the program antedated the coming to power of the Nazis, in a propaganda barrage which established the proposition that there is such a thing as valueless life.

Early in the program a protesting official of the Domestic Welfare Council of the German Protestant Church asked, "Where is the borderline? Who is abnormal, antisocial, hopelessly sick?" But persons in institutions were killed, and their relatives were sent a form letter saying, for example, "Because of her grave mental illness, life was a torment for the deceased. You must therefore look on her death as a release." Precisely because the killing of the sick had become somewhat acceptable, the Nazis, using psychiatric certificates as a basis, carried out political killings under the guise of euthanasia.[49]

Frederic Wertham describes at length the unfolding of the euthanasia program in which mental patients and others in institutions were killed. Thousands of German, non-Jewish children were killed by starvation and by drugs. In the early stages only infants suffering serious defects were killed. But the project did not end until allied troops overran Germany, and as time passed, the children became older and the indications slighter—for example, "badly modeled ears," bed wetters, and "difficult to educate."[50] In all, an estimated 275,000 persons who had been in nursing homes, hospitals, and asylums were killed; this number included some indeterminate proportion of foreign workers.[51]

In 1920 two respected professors, Karl Binding and Alfred Hoche, published a booklet defending euthanasia.

Binding, a doctor of jurisprudence and philosophy, began his section of the work by emphasizing that there was no question of recognizing any right to kill; what was at issue were merely the conditions under which, in addition to emergencies, the destruction of human life might be permitted. He went on to argue for *death with dignity* for those desiring it. But he did not stop with voluntary euthanasia. Incurable idiots, whether congenital or not, may be regarded as mere caricatures of real persons. Parents or heads of institutions should be allowed to apply on their behalf for euthanasia; if the latter, a mother might wish to object, and in that case the child could be returned to her care. Ideally a committee should consider each case in advance, but this might not always be desirable. Errors undoubtedly would occur, but only a life of little quality would usually be lost by mistake.

Hoche, a medical doctor and psychiatrist, argued that an individual could lose so many human characteristics that life would be devoid of value. Incurable idiots can be regarded as mentally dead, but they may be able to live for many years with considerable costs for care. Such persons cannot respond to love and do not participate effectively in human relationships. The purpose for destruction of such valueless lives is not primarily pity, since they do not suffer to any great extent, but rather a rational consideration of social interests, for example, in making the best use of scarce hospital and health-care facilities.[52]

The preceding evidence clearly indicates that the Nazis began by endorsing existing proposals for euthanasia. The project was not in the first instance racist. But neither was it based on voluntariness. Rather, the emphasis was on the good of society. The principle seems to have been that when there are individuals who are better off dead or for whom life and death make no difference, then the burden of institutional care for such persons can hardly be justified.

As to the second point—Kohl's argument that beneficent euthanasia has nothing to do with the Nazi action—two things need to be noticed.

First, Kohl's conviction that insistence upon voluntariness is fanatical when the killing would be kind according to Kohl's own view is not reassuring. Many people would hold that killing of a nonwilling person never can be kind. The basic arrogance of judging some human lives not worth living, as if that judgment were an objective fact when it is only an expression of subjective opinion, is common to Kohl and to Hoche and Binding.

Second, as we have seen, the arguments for euthanasia on grounds of social utility are too common to ignore. Kohl talks as if economic considerations are insignificant in the movement of nonvoluntary euthanasia. But, as we showed in chapters six and seven, considerations of costs of care are not a small part of the argument for euthanasia just as they were not a small part of the argument for legalizing abortion. The weak and helpless who are depen-

dent are equally unwanted persons—and likely to be declared nonpersons—whether they happen to be unborn or not. Kohl himself cannot forbear to mention economic considerations. But the most important point is that Kohl is quite ready to impose his conception of kindness upon nonconsenting individuals to justify killing them, just as Fletcher is quite ready to impose his conception of personhood upon some until now considered persons to negate their right to life.

As to the third point—that Anglo-American traditions are very different from Nazi totalitarianism—the distinction no doubt is real and important *up to now*. The question is whether it will continue to be so. To assume that it will is precisely to beg the question which is at issue when it is suggested that the legalization of euthanasia in Germany paved the way to genocide. The German people also had a tradition which rendered the Nazi atrocities incredible. Yet German physicians, even leading members of the medical profession, cooperated quite willingly and enthusiastically in the euthanasia program and in human experimentation. They were not terrorized into what they did. Rather, Nazism gave them an opportunity which they seem to have been waiting for.[53]

Kamisar points out that no one would have expected the United States to mistreat Americans of Japanese ancestry as it did during World War II. A number of other examples are relevant. During World War II Great Britain and the United States carried out terroristic bombing raids. These culminated in the atomic bombing by the United States of Hiroshima and Nagasaki. The terroristic strategy of nuclear deterrence emerged from this experience. The existence of the deterrent overarches American military strategy.

In 1960 many Americans believed that the United States would never carry out antiguerrilla warfare with terror, torture, and reprisals, and with the obliteration of the distinction between combatants and noncombatants, as the French had done in Algeria. It was widely believed that French officers were corrupted by their colonialism and that they were so inept as to be unable to carry out a surgical strike against the enemy's military power. But then there was Vietnam, endless escalation, pacification and cruelty, the "mere-gook rule," and Mai Lai. Any nation which considers itself incorruptible is already corrupt.

Moreover, the United States and nations like it could be even more vulnerable than a totalitarian society to an orgy of murder. At least in a totalitarian society there is some central control, some tendency to limit murder when the national interest is at stake. But a democratic society in which liberty becomes license and the rights of the weak are overriden by claims of privacy by the strong can slip into anarchy. Even when the security of the nation is threatened, even when the majority wish to call a halt to killing, it may not be possible to do so. Near the surface of contemporary democratic societies

there is a tremendous reservoir of aggression, which rioting and civil strife of recent years has only begun to uncover.[54] To remove any of the present inhibitions with respect to killing would be foolhardy indeed.

As to the fourth point—that Nazi euthanasia was ideological while Anglo-American euthanasia would be pragmatic—it is not clear that this distinction, even if it is assumed to hold, makes a great difference. When the way is opened to killing, ideological fanaticism and individual greed can be equally effective motives. But the distinction is not even clear.

As we have explained already, Nazi euthanasia was not at the outset racist. C. P. Blacker quotes with credit a statement by a prominent Nazi, Hermann Brack:

> Hitler's ultimate reason for the establishment of the euthanasia programme in Germany was to eliminate those people confined to insane asylums and similar institutions who could no longer be of any use to the Reich. They were considered as useless objects and Hitler felt that, by exterminating these so-called useless eaters, it would be possible to relieve more doctors, male and female, nurses and other personnel, hospital beds and other facilities, for the Armed Forces.[55]

This concern seems no less pragmatic, rational, utilitarian, and well-grounded in cost-benefit analysis than do the arguments of Walter Sackett, Robert Williams, and others, or the memorandum, which we quoted in chapter six, of Robert Derzon to the United States Secretary of Health, Education, and Welfare. The last, of course, was not advocating active, much less nonvoluntary, euthanasia.

Furthermore, Anglo-American arguments for euthanasia, especially the killing of defective infants, are continuous with arguments for abortion, and the latter simply unfolded the ideology of the birth-control movement. This movement always has involved an ideological commitment. The first American Birth Control Conference passed a eugenics resolution stating that "we advocate a larger racial contribution from those who are of unusual racial value."[56] Margaret Sanger herself strongly supported this view in urging that the procreation of the diseased, the feebleminded, and the poor should be stopped.[57]

This eugenicist coloring persisted in the birth-control movement from its beginning in the 1920s into the mid-1930s.[58] But by the late 1930s the eugenics movement came under a cloud, and the argument was shifted into more democratic terms: It was important to avoid having a disproportionate part of the population come from segments with the least economic opportunity in which healthy development and acculturation of children is impossible.[59]

Population growth, pollution, and poverty—cited by the United States Supreme Court as complicating factors in its abortion decision—can mark out

matters of legitimate public concern. But in much debate of the past two decades these factors have been used to project an ideology of the common welfare which especially conforms to the conceptions of the upper classes as to what is necessary both for their own pursuit of happiness and for the kindest possible treatment of the multitudes of poor people crowding into public parks and drawing sustenance from Aid to Families with Dependent Children and other relief programs.

In sum, there remain important disanalogies between the Nazi situation and the situation which shall come into being in any Anglo-American jurisdiction which legalizes nonvoluntary euthanasia. But the disanalogies are not as great as proponents of euthanasia claim. And it is entirely possible that the legalization of killing within any of the ideological frameworks used by proponents of euthanasia would unfold into a reign of terror even more severe than that of Nazi dictatorship, because it would lack totalitarian restraint and be characterized by the degradation of democratic liberty into anarchic license.

Nevertheless, it also is possible that at least in self-interest the citizens of any Anglo-American jurisdiction would not go beyond killing the weak and unprotected, so that some semblance of law and order would remain. In this case the extremes of cruelty in the awful horror of Nazi genocide might never follow even if nonvoluntary euthanasia is legalized and extended far beyond what anyone would expect at the outset.

Much would depend upon the speed with which killing began and spread. From this point of view the legalization of nonvoluntary euthanasia by a decision of the United States Supreme Court comparable to the abortion decision would be especially dangerous, for this would preempt the normal operation of the political processes in each state and would make it extremely difficult to withdraw or limit the legalization of killing when restraint began to deteriorate seriously.

I. Concluding Remarks

As we pointed out in chapter three, section J, the Congress of the United States has enforcement power under the Fourteenth Amendment whereby it can act to protect basic rights of persons by appropriate legislation. We believe it would be desirable if Congress would enact legislation guaranteeing the protection of the laws of homicide in all jurisdictions under the Constitution to all persons, except in the cases of capital punishment and self-defense, thus to exclude by preemption the legalization of nonvoluntary euthanasia by the various states. An attempt to enact such legislation would, at the very least, be a positive step which would force the euthanasia debate to unfold somewhat faster than proponents of euthanasia might prefer.

Proponents of euthanasia very likely would resist such an effort by claiming that it amounted to an attempt to impose one view upon the whole society, in which there is no longer any consensus regarding the absolute inviolability of human life. After all, democratic government and law is based upon consensus. In this respect there remains an important difference, proponents will insist, between legalizing nonvoluntary euthanasia in a democratic society and in a totalitarian state, since the majority rules in the former society while a few vicious men determine what will be done and enforce their will by terror in the latter.

But this argument would be fallacious. Consensus does extend and limit the purposes to which government can properly direct the common resources and activities of political society. Thus, if there is no consensus that the protection and promotion of human life in itself should be an object of state action, then one must concede that the concept of the sanctity of life cannot be assumed in jurisprudence as a principle.

However, whether all persons shall equally be protected by the law of homicide and whether all human individuals should be considered persons are not questions about purposes. These are not issues about ideals and interests which can be settled by a consensus which would either include protection of rights and recognition of personhood within the sphere of common concern or leave these matters in the domain of liberty outside the field of appropriate state action. Whether society extends the protection of the law of homicide equally to all and whether it recognizes all human individuals as persons are matters on which one position or the other inevitably must be taken, with decisive results for the individuals concerned.[60]

It remains possible, of course, that a majority of citizens with the color of legality will choose to set aside the standard of equal protection of the laws or will choose to declare some until now recognized as persons to be nonpersons, thus to attain the same result. But if this happens, consensus with regard to justice itself will be gone. The acts of government then will be a reflection merely of power, resolving competing interests in a mutually acceptable way. Minority rights will no longer exist, because "rights" will mean no more than what is conceded to members of the group by the dominant part of it.

Such a condition would be, in reality, no more a political society cooperating under law than was the German state under the Nazi regime. For what is lawless about dictatorship is not the fewness of those in power but the arbitrariness with which they exercise power, unrestrained by the requirements of equal liberty and justice for all—that is, for the weak as well as the strong, for the deficient as well as the normal, for the burdensome as well as the productive. What is obnoxious about racist discrimination is not that the principle is race but that the discrimination is unjust. Careful exclusion of racial principles for discrimination of lives too meaningless to live, of human

individuals too unintelligent to be persons, of persons too burdensome to protect from being killed will not make the discrimination just.

In an article arguing for the standard of membership in the human species as sufficient for legal personhood, Joseph L. Lewis has pointed out:

> In a country where racial, social and ideologic tensions between various groups and the state become greater daily and more profound every decade, that neither membership in the human race nor the right to life is to be determined by arbitrary socio-political standards is a good point to have clear, both for the safety of the persons comprising dissident and minority elements and for the safety of those persons comprising both the state, as society, and the governmental state. Not only is it a good point to have clear in general, but it is a good point to have constitutionally clear, in the form of unequivocal written law.
>
> If one group of Homo sapiens can, in the course of history, be singled out and as a class have their right to life and liberty suspended, then in a historic context appropriate to the action, another group of Homo sapiens may be singled out and as a class have their right to life and liberty suspended. Because of the neatness with which society continues to function through its rational systems and established procedure, it is hard to perceive that the Supreme Court's abortion decision has declared a rationalized state of nature among the groups, classes, and individuals of American society. The Supreme Court decision represents a social Darwinistic doctrine of survival of the fittest, and the Supreme Court has arrogated to itself the rationalizing power to say who is the fittest.[61]

Because we agree with Lewis that the unborn surely ought to be recognized as legal persons and their right to life protected, we also agree with him that the Court's decision was a radical injustice to this minority. And the tendency of the present legal situation with respect to the unborn does follow logically: to terminate the rule of law and to substitute the rule of brute force.

However, we think Lewis is mistaken in supposing that the corruption of legality in the United States Supreme Court decision on abortion—and in the more or less extensive legalization of abortion in other jurisdictions within the common law world—totally corrupts legality and throughout society substitutes a struggle for survival for fair cooperation toward common purposes, with respect for liberty beyond the field of common action.

The power of the United States Supreme Court, even the power of the British Parliament, is not so great that a single act on its part can utterly destroy lawful authority in an entire political society. Moreover, the claim of justice in the case of abortion, while clear enough for those prepared to see it, is not so patently clear that those responsible for recognizing it can not have overlooked it, thus perhaps engaging in an exercise of self-deception but not necessarily in an exercise of dissimulation and solemn mockery.

Further, a large part of the society does recognize the injustice and is working for its rectification by lawful means, for example, by seeking an appropriate amendment to the United States Constitution. Many other citizens, we believe, would support this cause if they understood more clearly what is at stake.

Of course, if nonvoluntary euthanasia is legalized and especially if it becomes widely accepted, then the corruption of legality which Lewis is talking about will not be so restricted, especially because in this case it would be very difficult to make a mistake about what is just even with the help of self-deception. And, as we have said, if the legal order as a whole becomes corrupt, formerly democratic societies would no more remain communities under law than was the German state under the Nazi regime.

In such a circumstance even those persons comprising the state as a society and high government officials would no longer be safe, as Lewis points out. Acts intended to defend innocent lives from destruction under the color of legalized nonvoluntary euthanasia might cause great tensions, as judges and lawmakers who decreed the practice and physicians and others who administered it might come to be viewed—whether rightly or wrongly—by those most dedicated to the defense of the right to life as unlawful attackers.

Yet even if those in power were able to keep themselves safe while they killed the powerless, this would not change the fact that such killing would violate justice—the justice which the American people always have hoped to establish in their common life. All of those killed without their consent will be denied equal protection of the law, whether they are killed by the arbitrary judgments of others that they would be better off dead, by the arbitrary imposition on them of criteria which would make them nonpersons, or by the brutal decision to solve finally the problem of dependency by killing the dependent.

Advocates of euthanasia often point out that in certain primitive tribes which lived in very hard environments there was a practice of abandoning the elderly and others who could not keep pace with the group. Even in such a practice, imposed by cruel necessity, there was respect for the dignity of persons who were left behind. The dependent who were killed in a program of nonvoluntary euthanasia would enjoy no such respect for their dignity. They would be deprived at once of life, of liberty, and of justice with the approval of the law of a land which has made its proud boast: liberty and justice for all. And they would be disposed of like refuse by a nation unwilling to care for them, although it is the richest and most powerful nation the world has ever known.