Notes

1: INTRODUCTION

1. Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), at 654–655, 657–658, and 670–672.

2. *In the Matter of Karen Quinlan,* vol. 1 (Washington, D.C.: University Publications of America, 1975), p. 57.

3. Robert M. Veatch, *Death, Dying, and the Biological Revolution: Our Last Quest for Responsibility* (New Haven and London: Yale University Press, 1976), pp. 21–23.

4. Willard Gaylin, "Harvesting the Dead," *Harper's,* 249 (September 1974), pp. 23–30.

5. B. D. Colen, *Karen Ann Quinlan: Dying in the Age of Eternal Life* (New York: Nash Publishing Co., 1976), pp. 74 and 94–95.

6. U. S. Bureau of the Census, *Statistical Abstract of the United States: 1976,* 97 ed. (Washington, D.C.: Superintendent of Documents, 1976), p. 72, No. 104 and No. 105.

7. Claire F. Ryder and Diane M. Ross, "Terminal Care—Issues and Alternatives," *Public Health Reports,* 92 (1977), pp. 20–29.

8. Odin W. Anderson, "Reflections on the Sick Aged and Helping Systems," in Bernice L. Neugarten and Robert J. Havinghurst, eds., *Social Policy, Social Ethics and the Aging Society* (Washington, D.C.: Superintendent of Documents, 1976), pp. 89–95.

9. Byron Gold, Elizabeth Kutza, and Theodore R. Marmor, "United States Social Policy on Old Age: Present Patterns and Predictions," in Neugarten and Havinghurst, eds., *op. cit.,* pp. 9–21.

10. U. S. Bureau of the Census. *Statistical Abstract,* p. 293, No. 459 (calculations from table supplied by subtracting from total federal expenditures expenditures for veterans programs and education, computing the remainder as a percentage of the total, and multiplying this factor by the percentages of GNP and total federal outlays stated in the table); for defense, p. 326, No. 513.

11. See Anderson, *op. cit.,* p. 94; Robert A. Derzon, administrator, Health Care Financing Administration, Memorandum to the Secretary, U. S. Department of Health, Education, and Welfare, "Additional Cost-Saving Initiatives—ACTION," June 4, 1977, pp. 8–9. Helge Hilding Mansson, "Justifying the Final Solution," *Omega,* 3 (1972), pp. 79–87, reports the chilling results of a social psychology experiment in

which large numbers of university students agreed that the unfit should be killed by society as a final solution to problems of overpopulation and personal misery.

12. See Herbert B. Eckstein, Geoffrey Hatcher, and Eliot Slater, "Severely Malformed Children," *British Medical Journal*, 2 (1975), pp. 285–289.

13. Ronald W. Conley, *The Economics of Mental Retardation* (Baltimore and London: Johns Hopkins University Press, 1973), p. 87.

14. *Ibid.*, pp. 78–79; Morton Kramer *et al.*, *Mental Disorders/Suicide* (Cambridge, Mass.: Harvard University Press, 1972), p. 64.

15. *Developments in Aging: 1976; A Report of the Special Committee on Aging, U.S. Senate, pursuant to Sen. Res. 373* (March 1, 1976), 95th Cong., 1st Sess., p. 46; Bernard A. Stotsky, "Extended Care and Institutional Care," in Ewald W. Busse and Eric Pfeiffer, *Mental Illness in Later Life* (Washington, D.C.: American Psychiatric Association, 1973), p. 172.

16. Walter W. Sackett, "Statement," in *Death with Dignity: An Inquiry into Related Public Issues: Hearings before the Special Committee on Aging, U. S. Senate,* 92nd Cong., 2nd Sess., part 1 (August 7, 1972), p. 30.

17. U. S. Bureau of the Census, *Statistical Abstract,* p. 86, No. 136; Conley, *op. cit.*, pp. 96–97.

18. U. S. Bureau of the Census, *Census of Population: 1970; Subject Reports: Persons in Institutions and Other Group Quarters* (Washington, D.C.: Superintendent of Documents, 1973), p. 61, table 28; *Statistical Abstract,* p. 86, No. 136.

19. U. S. Bureau of the Census, *Census of Population: Persons in Institutions,* p. 44, table 25; *Statistical Abstract,* p. 109, No. 168; *Developments in Aging: 1976,* p. 46.

20. *Developments in Aging: 1976,* p. 43; *Census of Population: Persons in Institutions,* p. 11, table 6; *Statistical Abstract,* p. 85, No. 133.

21. *Developments in Aging: 1976,* pp. 44–47; Conley, *op. cit.*, pp. 360–362.

22. Conley, *op cit.*, p. 39.

23. *Developments in Aging: 1976,* pp. 4 and 33.

24. U. S. Bureau of the Census, *Statistical Abstract,* p. 433, No. 700, shows consumer price inflation at 4.6 percent per year average 1966–1970, 7.4 percent per year average 1971–1975; p. 305, No. 479, shows investment income and profit/loss on sales of investments for all private pension funds other than those managed by insurance companies at less than 4 percent per year.

25. *Financing the Social Security System: Hearings before the Subcommittee on Social Security of the Committee on Ways and Means, House of Representatives,* 94th Cong., 1st Sess. (May 7 to June 19, 1975), p. 185 (report of the quadrennial advisory council).

26. *Ibid.*, pp. 369–379 (statement of John A. Brittain, Brookings Institution), pp. 102–103 (statement of W. Allen Wallis).

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

28. *Financing the Social Security System,* p. 181 (report of the quadrennial advisory council).

29. *Ibid.*, pp. 392–393 (statement of Conrad Taeuber).

30. *Ibid.*, pp. 102–103 (statement of W. Allen Wallis), pp. 275–276 (report of the quadrennial advisory council), p. 382 (statement of Martin Feldstein).

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

note 11 above, estimates fraud in Medicaid alone at 800–900 million dollars per year (p. 2).

32. *Financing the Social Security System,* p. 113 (statement of J. W. van Gorkum), pp. 199–200 (report of the quadrennial advisory council), p. 419 (remarks of Congressman James A. Burke, chairman of the subcommittee).

33. *Medicine and Aging: An Assessment of Opportunities and Neglect: Hearing before the Special Committee on Aging, United States Senate,* 94th Cong., 2d Sess. (October 13, 1976), p. 13.

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

35. *Developments in Aging: 1976,* p. xix; Theodore R. Marmor, in Neugarten and Havinghurst, eds., *op. cit.,* p. 24.

36. Anderson, *op. cit.,* p. 94.

37. For the history of the legalization of abortion see Germain Grisez, *Abortion: The Myths, the Realities, and the Arguments* (New York and Cleveland: Corpus Books, 1970), pp. 185–266. For the Soviet attitude toward nuclear war see Richard Pipes, "Why the Soviet Union Thinks It Could Fight and Win a Nuclear War," *Commentary,* 58 (July 1977), pp. 21–34.

38. See Grisez, *op. cit.,* pp. 117–150.

39. See John M. Ostheimer and Leonard G. Ritt, "Life and Death: Current Public Attitudes," in Nancy C. Ostheimer and John M. Ostheimer, eds., *Life or Death—Who Controls?* (New York: Springer Publishing Co., 1976), pp. 286–289.

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

41. "Society Names New President," *Euthanasia News,* 1 (February 1975), p. 1.

42. Cf. the list inside the back cover of *Death with Dignity: Legislative Manual,* 1976 ed. (New York: Society for the Right to Die, 1976), with the list on the back cover of *Death and Decisions: Excerpts from Papers and Discussion at the Seventh Annual Euthanasia Conference* (New York: The Euthanasia Educational Council, 1976).

43. Cf. "Model Bill," *Death with Dignity: Legislative Manual,* pp. 95–96, with the New Mexico statute, 1977 N. M. LAWS, ch. 287.

44. CAL. HEALTH & SAFETY CODE §§7185–7195 (1976).

45. 1977 N. M. LAWS, ch. 287; 1977 ARK. ACTS, act 879; 1977 N. C. LAWS, ch. 815; 1977 IDAHO LAWS, ch. 106; 1977 TEXAS LEGISLATIVE SERVICE, S.B. 148; 1977 OREGON LEGISLATIVE ASSEMBLY, S.B. 438; 1977 NEVADA LEGISLATURE, Assembly Bill 8.

46. See note 43 above.

47. The 1969 British bill is printed in A.B. Downing, ed., *Euthanasia and the Right to Die* (London: Peter Owen, 1969), pp. 201–206. Both this bill and the California statute contain similar safeguards: the requirement that one's terminal condition be certified by two physicians for one to become a *qualified patient,* the prescription that a

legal form be used for the *directive to physicians,* a fourteen-day *waiting period* after one is qualified before the directive becomes fully effective, and a penalty for *homicide* specified for anyone forging a directive or concealing its revocation. From one point of view such safeguards may be admirable, but they are precisely the machinery needed for active euthanasia.

48. See James M. Gustafson, "Mongolism, Parental Desires, and the Right to Life," *Perspectives in Biology and Medicine,* 16 (1973), pp. 529–557.

49. See Dennis J. Horan, "Euthanasia, Medical Treatment and the Mongoloid Child: Death as a Treatment of Choice?" *Baylor Law Review,* 27 (1975), pp. 76–77.

50. Anthony Shaw, "Dilemmas of 'Informed Consent' in Children," and Raymond S. Duff and A. G. M. Campbell, "Moral and Ethical Dilemmas in the Special-Care Nursery," *New England Journal of Medicine,* 289 (October 25, 1973), pp. 885–890 and 890–894.

51. John M. Freeman, "Is There a Right to Die—Quickly?" *Journal of Pediatrics,* 80 (1972), pp. 904–905.

52. Raymond S. Duff and A. G. M. Campbell, "On Deciding the Care of Severely Handicapped or Dying Persons: With Particular Reference to Infants," *Pediatrics,* 57 (1976), p. 492.

53. James Rachels, "Active and Passive Euthanasia," *New England Journal of Medicine,* 292 (1975), pp. 78–80.

54. John A. Robertson, "Involuntary Euthanasia of Defective Newborns: A Legal Analysis," *Stanford Law Review,* 27 (1975), pp. 217–244.

55. Cf. Harvey A. Stevens and Richard A. Conn, "Right to Life/Involuntary Pediatric Euthanasia," *Mental Retardation,* 14 (1976), pp. 3–6.

56. Joseph Fletcher, "The Right to Die: A Theologian Comments," *Atlantic,* 221 (April 1968), p. 63.

57. See Robert A. Burt, "Authorizing Death for Anomalous Newborns," in Aubrey Milunsky and George J. Annas, eds., *Genetics and the Law* (New York and London: Plenum Press, 1976), p. 441.

58. Joseph Fletcher, "Indicators of Humanhood: A Tentative Profile of Man," *Hastings Center Report,* 2 (November 1972), p. 1.

59. See Eliot Slater, "Assisted Suicide: Some Ethical Considerations," *International Journal of Health Services,* 6 (1976), pp. 321–330.

60. John A. Robertson, "Organ Donations by Incompetents and the Substituted Consent Doctrine," *Columbia Law Review,* 76 (1976), pp. 48–78.

61. Case cited note 1 above, at 664.

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

2: LAW, LIBERTY, AND JUSTICE

1. One of the more adequate treatments is that by Lon L. Fuller, *The Morality of Law,* rev. ed. (New Haven and London: Yale University Press, 1964), pp. 33–94. Fuller's conception of law as a purposeful enterprise (pp. 145–151) and his clear dis-

tinction between managerial direction and law (pp. 200–224) seem cogent and are taken for granted in the present chapter.

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

3. Cf. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers,* ed. Clinton Rossiter (New York, Scarborough, London: New American Library, 1961), No. 49 (pp. 313–314), No. 78 (pp. 467–468), No. 84 (p. 513), and *passim.*

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

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

6. *Annals,* 1st Congress, 1st session, pp. 435–439, in Charles S. Hyneman and George W. Carey, eds., *A Second Federalist: Congress Creates a Government* (New York: Appelton-Century-Crofts, 1967), pp. 266–271.

7. With our discussion of religious liberty cf. John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* (New York: Sheed & Ward, 1960), pp. 45–78.

8. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971), pp. 22–27, makes the familiar point against a utilitarian conception of government. For an extensive critique of all forms of utilitarianism see Germain Grisez, "Against Consequentialism," *American Journal of Jurisprudence,* 23 (1978), forthcoming.

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

10. Since the conception of justice proposed here is somewhat like that proposed by Rawls, it may be helpful to clarify some respects in which the reasonable participant of our account differs from the rational contracting party in the original position as Rawls describes (*op. cit.,* pp. 118–150) such a party. Like Rawls's contracting party, our reasonable participant is rational in limiting prescriptions to those which can be universalized. But we do not assume mutual disinterestedness, nor do we assume that there are preferences to be ordered lexically. Our reasonable participant considers the substantive purposes of society and everything which enters into the constitution, not merely possi-

ble ordering principles, as a foundation for justice. Our reasonable participant proceeds with many fewer specifications than does Rawls's rational contracting party; our reasonable participant can consider at each juncture what can be prescribed universalizably by one committed to the common purposes of the society. On our view it is what underlies and justifies the intuitions of the reasonable participant, not what is pronounced in accord with them, which is the core of the concept of justice. The pronouncements of Rawls's rational contracting party, by contrast, are supposed to define political justice.

11. The strain of trying to interpret Fifth Amendment protections on a utilitarian theory is evident in many cases, such as those cited by Yale Kamisar, "Some Non-Religious Views against Proposed 'Mercy Killing' Legislation," *Minnesota Law Review,* 42 (1958), pp. 1038–1041. Herbert Packer, *The Limits of the Criminal Sanction* (Stanford, California: Stanford University Press, 1968), pp. 149–173, contrasts the "due process model" with the "crime control model" of criminal law procedure. See also Gertrude Himmelfarb, *On Liberty and Liberalism: The Case of John Stuart Mill* (New York: Alfred A. Knopf, 1974), p. 323.

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

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

14. H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 181–195, formulates a minimalistic concept of "natural law," which has become widely assumed; we do not consider it adequate as an account of natural law or of the natural foundations of law.

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

16. Louis Henkin, "Morals and the Constitution: The Sin of Obscenity," *Columbia Law Review,* 63 (1963), pp. 401–414, proposed a standard of utilitarian rationality, to the exclusion of any alternative standard, as the norm for acceptable legislation aimed at control of behavior.

17. Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678 (1965) at 1681–1682.

18. *Ibid.,* at 1682–1690.

19. *Ibid.,* at 1690–1691.

20. *Ibid.,* at 1694–1707.

21. Stanley v. Georgia, 397 U.S. 557 (1969) at 564.

22. Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029 (1972) at 1038.

23. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973) at 726–728.

24. *Ibid.,* at 756–759.

25. Louis Henkin, "Privacy and Autonomy," *Columbia Law Review,* 74 (1974), pp. 1424–1431.

26. John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe* v. *Wade,*" *Yale Law Journal,* 82 (1973), pp. 932–933.

27. Henkin, "Privacy and Autonomy," p. 1427.

28. Archibald Cox, *The Role of the Supreme Court in American Government* (London, Oxford, New York: Oxford University Press, 1976), pp. 51–55 and 112–115, takes a less negative position than Ely's toward the Court's work but demands that the Court act in a principled manner beyond mere pragmatism, because a Court which is completely pragmatic will lose status as an impartial arbitrator, become enmeshed in the political process, and so become unable to function effectively. See also Arnold H. Loewy, "Abortive Reasons and Obscene Standards: A Comment on the Abortion and Obscenity Cases," *North Carolina Law Review,* 52 (1973), pp. 223–234; Richard A. Epstein, "Substantive Due Process by Any Other Name: The Abortion Cases," 1973 *Supreme Court Review,* pp. 159–185; Norman Viera, "Roe and Doe: Substantive Due Process and the Right of Abortion," *Hastings Law Journal,* 25 (1974), pp. 867–879; Robert A. Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," *California Law Review,* 63 (1975), pp. 1250–1351, especially p. 1304. Perhaps the most significant attempt to rationalize the Court's decisions in the *Abortion Cases* is Laurence H. Tribe, "Foreword: Toward a Model of Roles in the Due Process of Life and Law," *Harvard Law Review,* 87 (1973), pp. 1–53; Tribe's effort was effectively criticized by Joseph W. Dellapenna, "Nor Piety Nor Wit: The Supreme Court on Abortion," *Columbia Human Rights Law Review,* 6 (1974), pp. 379–413, especially pp. 384–389. See also Michael J. Perry, "Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process," *U.C.L.A. Law Review,* 23 (1976), pp. 692–693; Frank R. Strong, "Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes," *North Carolina Law Review,* 55 (1976), pp. 96–105; Robert G. Dixon, Jr., "The 'New' Substantive Due Process and the Democratic Ethic: A Prolegomenon," *Brigham Young University Law Review* (1976), pp. 84–87.

29. On the motorcycle and snake cases see Norman L. Cantor, "A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life," *Rutgers Law Review,* 26 (1973), pp. 246–247; "Notes: Informed Consent and the Dying Patient," *Yale Law Journal,* 83 (1974), p. 1644, note 73. Cf. Henkin, "Privacy and Autonomy," pp. 1425–1433.

30. Basil Mitchell, *Law, Morality and Religion in a Secular Society* (London, New York, Toronto: Oxford University Press, 1967), expounds and masterfully criticizes the views of H. L. A. Hart, Lord Devlin, and others; his own conclusions differ little from the view we articulate on this point.

31. Cf. Lucas, *op. cit.,* pp. 162–167.

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

3: DEFINITION OF DEATH

1. Cf. Carl E. Wasmuth, Jr., "The Concept of Death," *Ohio State Law Journal,* 30 (1969), pp. 41–44; Daniel J. Conway, "Medical and Legal Views of Death: Confrontation and Reconciliation," *St. Louis University Law Journal,* 19 (1974), pp. 176–178.

2. See Gunnar Biörck, "When Is Death?" *Wisconsin Law Review,* 1968 (1968), p. 493; Wasmuth, *op. cit.,* pp. 34–38.

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

4. See Biörck, *op. cit.,* pp. 491–492 and 495; cf. Ronald Converse, "But When Did He Die?: *Tucker v. Lower* and the Brain-Death Concept," *San Diego Law Review,* 12 (1975), pp. 424–435, makes graphically clear in the circumstances of a particular case the relationship between the definition of death debate and transplant surgery, in particular transplantation of the heart.

5. Cf. Paul Ramsey, *The Patient as Person: Explorations in Medical Ethics* (New Haven and London: Yale University Press, 1970), p. 83; David W. Louisell, "Transplantation: Existing Legal Constraints," in Gordon Wolstenholme and Maeve O'Conner, eds, *Law and Ethics of Transplantation* (London: J. A. Churchill, 1968), pp. 91–93.

6. See Luis Kutner, "Due Process of Human Transplants: A Proposal," *University of Miami Law Review,* 24 (1970), pp. 799–803; for an illustration of the problem see "Uniform Anatomical Gift Act—Death Construed by Court Consonant with Medical Standard of Brain Death—*New York City Health & Hospitals Corp. v. Sulsona,*" *Rutgers Law Review,* 29 (1976), pp. 484–498.

7. Willard Gaylin, "Harvesting the Dead," *Harper's,* 249 (September 1974), pp. 23–24, 26–28, and 30.

8. Ramsey, *op. cit.,* p. 103.

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

10. Cf. *ibid.,* p. 23; Ramsey, *op. cit.,* pp. 98–101; H. A. H. Van Till, "Diagnosis of Death in Comatose Patients under Resuscitation Treatment: A Critical Review of the Harvard Report," *American Journal of Law and Medicine,* 2 (1976), pp. 1–5 and 31–38.

11. American Medical Association, *Opinions and Reports of the Judicial Council* (Chicago: American Medical Association, 1977), p. 23.

12. Cf. Van Till, *op. cit.,* pp. 29–30; Veatch, *op. cit.,* pp. 55–61; Alexander Morgan Capron and Leon R. Kass, "A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal," *University of Pennsylvania Law Review,* 121 (1972), pp. 92–101.

13. "A Definition of Irreversible Coma: Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Death," *Journal of the American Medical Association,* 205 (August 5, 1968), pp. 337–340.

14. *Ibid.,* pp. 337 and 340; this interpretation is confirmed by the separate article of the chairman, Henry K. Beecher, "The New Definition of Death: Some Opposing Viewpoints," *International Journal of Clinical Pharmacology,* 5 (1971), pp. 120 (note summary, item 2) and 121.

15. "A Definition of Irreversible Coma," pp. 337 and 340.

16. Beecher, *op. cit.,* pp. 120–121 (italics his).

17. "A Definition of Irreversible Coma," p. 339.

18. Cf. Van Till, *op. cit.*, pp. 15–16; Ramsey, *op. cit.*, pp. 89–109; and the bitter reply to his critics by Beecher, *op. cit.*, pp. 122–124.

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

20. See Van Till, *op. cit.*, pp. 20–25; Veatch, *op. cit.*, p. 47 and the works he cites.

21. Robert S. Morison, "Death: Process or Event?" (Paper delivered at a symposium at the AAAS meeting in Chicago, Ill., 29 December 1970), *Science,* 173 (20 August 1971), pp. 694–698.

22. Leon R. Kass, "Death as an Event: A Commentary on Robert Morison," *Science,* 173 (20 August 1971), pp. 698–702.

23. Roger B. Dworkin, "Death in Context," *Indiana Law Journal,* 48 (1973), pp. 623–639.

24. Alexander Morgan Capron, "The Purpose of Death: A Reply to Professor Dworkin," *Indiana Law Journal,* 48 (1973), pp. 640–646.

25. On the person and the law see Germain Grisez, *Abortion: The Myths, the Realities, and the Arguments* (New York and Cleveland: Corpus Books, 1970), pp. 402–410; on the confusion which results from uncertainty see Kutner, *op. cit.*, pp. 793–803.

26. William C. Charron, "Death: A Philosophical Perspective on the Legal Definitions," *Washington University Law Quarterly,* 1975 (1975), pp. 979–1005.

27. *Ibid.*, p. 983.

28. See two representatives of the distinct major types of contemporary philosophy: P. F. Strawson, "Persons," in G. N. A. Vesey, ed., *Body and Mind* (London: George Allen & Unwin, 1964), pp. 403–424; Gabriel Marcel, *The Mystery of Being,* vol. 1, *Reflection and Mystery* (Chicago: Henry Regnery, 1960), pp. 127–153.

29. Joseph Fletcher, *Morals and Medicine* (Boston: Beacon Press, 1960), p. 211 (italics his).

30. Joseph Fletcher, "New Definitions of Death," *Prism,* 2 (January 1974), p. 14.

31. *Ibid.*, p. 36.

32. Hans Jonas, *Philosophical Essays: From Ancient Creed to Technological Man* (Englewood Cliffs, N.J.: Prentice-Hall, 1974), p. 139.

33. In addition to the book, Veatch has presented his view on this matter somewhat more simply and straightforwardly in an article: "The Whole-Brain-Oriented Concept of Death: An Outmoded Philosophical Formulation," *Journal of Thanatology,* 3 (1975), pp. 13–30.

34. Veatch, *Death, Dying,* p. 25.

35. *Ibid.,* pp. 25–42, quotations at 42; Veatch's use of "animalistic" here reveals that although he rejects the old-fashioned dualism, he falls into the modern type.

36. *Ibid.,* pp. 36–38, 46–47 and 53; cf. idem, "The Whole-Brain-Oriented Concept of Death," pp. 23–28.

37. Veatch, "The Whole-Brain-Oriented Concept of Death," pp. 20–23; idem, *Death, Dying,* pp. 38–42.

38. Veatch, *Death, Dying,* pp. 48–50 and 53; however, on the limitations of EEG see Devins and Diamond, *loc. cit.*

39. Veatch, *Death, Dying,* p. 36.

40. *Ibid.,* pp. 72–76.

41. Ibid., p. 30.

42. Van Till, *op. cit.,* pp. 8–11.

43. Veatch, *Death, Dying,* p. 36.

44. See David Jensen, *The Principles of Physiology* (New York: Appleton-Century-Crofts, 1976), pp. 44–50; see also Kass, *op. cit.,* p. 699.

45. One of Veatch's arguments in "The Whole-Brain-Oriented Concept of Death" (pp. 13–14 and 23) is that if one is going to move away from the traditional view, one may as well go further than the whole brain. This makes sense only if there is no reason in principle to stop with the whole brain, but our argument is that going this far and no further is not a matter of choice, as Veatch thinks it is, based on one's evaluation of characteristics, but rather is a matter of clarifying an existing concept by applying a sound biological theory to the facts.

46. Van Till, *op. cit.,* pp. 21–25; cf. Peter McL. Black, "Criteria of Death: Review and Comparison," *Postgraduate Medicine,* 57 (February 1975), pp. 69–74.

47. KAN. STAT. § 77–202 (1970); cf. MD. CODE ANN. PUB. GEN. LAWS § 54 F (1972).

48. See Ian McColl Kennedy, "The Kansas Statute on Death—An Appraisal," *New England Journal of Medicine,* 285 (1971), pp. 946–950; Capron and Kass, *op. cit.,* pp. 108–111; Veatch, *Death, Dying,* pp. 62–68.

49. See items cited in note 46, *supra.*

50. CAL. HEALTH & SAFETY CODE § 7180 (1974). Cf. ALASKA STAT. § 09.65.120 (1974); N. M. STAT. ANN. § 1–2–2.2 (1973); VA. CODE § 32–364.3:1 (1973).

51. MICH. COMP. LAWS § 336.8b (1975); cf. GA CODE ANN. § 88.1715.1 (1975); ILL. ANN. STAT., ch. 3 § 552b (1975); OKLA. STAT. ANN. tit. 63 § 1–301g (1975); 1975 OK. LAWS, ch. 565; W. VA. CODE § 16–19–1c (1975); LA. REV. STAT. ANN. § 9:111 (1976); 1976 IOWA ACTS § 208.

52. "House of Delegates Redefines Death, Urges Redefinition of Rape, and Undoes the Houston Amendments," *American Bar Association Journal,* 61 (1975), pp. 463–464.

53. McCarthy DeMere, "Report of the Committee on Medicine and Law," *The Forum,* 11 (1976), pp. 300–316.

54. *Ibid.,* p. 302.

55. TENN. CODE ANN. § 53–459 (1976); cf. 1977 IDAHO SESS. LAWS ch. 130; 1977 MONT. LAWS, ch. 377.

56. N. C. SESS. LAWS, ch. 815 (1977).

57. Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976) at 671.

58. Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717 (1966) at 1722; see also Robert A. Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," *California Law Review,* 63 (1975), pp. 1288–1289 and 1332–1333; Joseph D. Cronin, "Private Hospitals that Receive Public Funds under the Hill-Burton Pro-

gram: The State Action Implications," *New England Law Review,* 12 (1977), pp. 573–574.

4: THE LIBERTY TO REFUSE MEDICAL TREATMENT

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

2. Angela Roddey Holder, *Medical Malpractice Law* (New York, London, Sydney, Toronto: John Wiley & Sons, 1975), pp. 225–234; Norman L. Cantor, "A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life," *Rutgers Law Review,* 26 (1973), pp. 236–237.

3. Nancy Rice, "Informed Consent: The Illusion of Patient Choice," *Emory Law Journal,* 23 (1974), pp. 503–522.

4. Robert M. Veatch, *Death, Dying, and the Biological Revolution: Our Last Quest for Responsibility* (New Haven and London: Yale University Press, 1976), pp. 204–248; Milton D. Heifetz with Charles Mangel, *The Right to Die* (New York: Berkley Medallion Books, 1975), pp. 17–21.

5. Anonymous, "Notes: Informed Consent and the Dying Patient," *Yale Law Journal,* 83 (1974), pp. 1645–1647.

6. See Robert M. Byrn, "Compulsory Lifesaving Treatment for the Competent Adult," *Fordham Law Review,* 44 (1975), p. 31; John J. Paris, "Compulsory Medical Treatment and Religious Freedom: Whose Law Shall Prevail?" *University of San Francisco Law Review,* 10 (1975), pp. 25–28.

7. 61 Am. Jur. 2d, § 159; Holder, *op. cit.,* p. 227; Kenney F. Hegland, "Unauthorized Rendition of Lifesaving Medical Treatment," *California Law Review,* 53 (1965), pp. 863–864.

8. 61 Am. Jur. 2d, §§ 159 and 161; cf. Byrn, *op. cit.,* pp. 14–15.

9. Holder, *op. cit.,* pp. 40–64; cf. Matter of Quinlan, 137 N.J. Super. 227, 348 A.2d 801 (1975) at 818.

10. Luis Kutner, "Comments: Due Process of Euthanasia: The Living Will, a Proposal," *Indiana Law Journal,* 44 (1969), pp. 547–548; Thomas H. Sharp, Jr., and Thomas H. Crofts, Jr., "Death with Dignity: The Physician's Liability," *Baylor Law Review,* 27 (1975), pp. 100–102: Byrn, *op. cit.,* pp. 29–31; "Notes: Informed Consent and the Dying Patient," pp. 1649–1650.

11. Richard A. McCormick and André E. Hellegers, "Legislation and the Living Will," *America,* 136 (March 12, 1977), pp. 210–211.

12. Matter of Quinlan, 137 N.J. Super. 227, 348 A.2d 801 (1975) at 806, 813–814, 817–819, 824; 70 N.J. 10, 355 A.2d 647 (1976) at 666–669.

13. In addition to "Notes: Informed Consent and the Dying Patient" and the studies of Cantor, Byrn, and Paris, cited in notes 2 and 6 above, see Veatch, *op. cit.,* pp. 116–163, and Peter J. Riga, "Compulsory Medical Treatment of Adults," *Catholic Lawyer,* 22 (1976), pp. 105–137.

14. Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960) at 1104.

15. Jacobson v. Massachusetts, 197 U.S. 11 (1905); cf. Byrn, *op. cit.,* p. 35.

16. Cf. Riga, *op. cit.,* pp. 112–113.

17. *Ibid.,* pp. 122, 126–127; Byrn, *op. cit.,* p. 30.

18. Veatch, *op. cit.,* pp. 156–159.

19. Cf. places cited in notes 17 and 18; also Cantor, *op. cit.*, pp. 231–233 and 251–254.

20. Byrn, *op. cit.*, p. 25; Riga, *op. cit.*, pp. 123–126; Veatch, *op. cit.*, pp. 152–156.

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

22. Byrn, *op. cit.*, pp. 16–22; Riga, *op. cit.*, pp. 123–126 and 135; Cantor, *op. cit.*, pp. 234, 242–249, and 254–258; Paris, *op. cit.*, pp. 22–25.

23. Byrn, *op. cit.*, p. 18.

24. Cantor, *op. cit.*, pp. 254–258.

25. United States v. George, 239 F. Supp. 752 (D. Conn.1965) at 754; cf. Paris, *op. cit.*, p. 25.

26. The best treatment is in Byrn, *op. cit.*, pp. 22–33; also see Cantor, *op. cit.*, pp. 233 and 250–251; Paris, *op. cit.*, pp. 25–28.

27. In re Yetter, 62 Pa. D. & C. 2d 619 (C.P. Northampton County Ct. 1973) at 623.

28. John F. Kennedy Memorial Hospital v. Heston, *loc. cit.*

29. Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976) at 662–665, 669–670.

30. *Ibid.*, at 664.

31. Veatch, *op. cit.*, pp. 164–186, considers several methods.

32. CAL. HEALTH & SAFETY CODE § 7185–7195 (1976); 1977 TEXAS LEGISLATIVE SERVICE, Senate Bill 148; 1977 OREGON LEGISLATIVE ASSEMBLY, Senate Bill 438; 1977 IDAHO LAWS, ch. 106; 1977 NEVADA LEGISLATURE, Assembly Bill 8; 1977 NORTH CAROLINA GENERAL ASSEMBLY, ch. 815; 1977 NEW MEXICO LEGISLATURE, ch. 287; 1977 ARKANSAS GENERAL ASSEMBLY, act 879.

33. Kutner, *op. cit.*, p. 552.

34. Scott R. Cox, "The Qualified Right to Refuse Medical Treatment and Its Application in a Trust for the Terminally Ill," *Journal of Family Law*, 13 (1973), pp. 153–163.

35. Michael T. Sullivan, "The Dying Person: His Plight and His Right," *New England Law Review*, 8 (1973), pp. 197–215.

36. Jeffrey Alan Smyth, "Antidysthanasia Contracts: A Proposal for Legalizing Death with Dignity," *Pacific Law Journal*, 5 (1974), pp. 738–763.

37. Veatch, *op. cit.*, pp. 184–186.

38. *Ibid.*, pp. 199–202.

39. Cf. G. Emmett Raitt, Jr., "The Minor's Right to Consent to Medical Treatment: A Corollary of the Constitutional Right of Privacy," *Southern California Law Review*, 48 (1975), pp. 1417–1456; Richard Gosse, "Consent to Medical Treatment: A Minor Digression," *University of British Columbia Law Review*, 9 (1974), pp. 56–84.

5: SUICIDE AND LIBERTY

1. Suicide does sometimes serve as a do-it-oneself euthanasia. See, for example, Norman L. Farberow, Edwin S. Shneidman, and Calista V. Leonard, "Suicide among Patients with Malignant Neoplasms," in Edwin S. Shneidman, Norman L. Farberow, and Robert E. Litman, eds., *The Psychology of Suicide* (New York: Science House, 1970), pp. 325–344.

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

3. See Wayne R. LaFave and Austin W. Scott, Jr., *Handbook on Criminal Law* (St. Paul, Minn.: West Publishing Co., 1972), pp. 568–569; 83 C.J.S. 781–782; Robert M. Byrn, "Compulsory Lifesaving Treatment for the Competent Adult," *Fordham Law Review*, 44 (1975), p. 16. It should be noticed that in ordinary language not every self-killing is "suicide"; proponents of legalization and tolerant attitudes toward suicide often tendentiously classify the deeds of martyrs and heroes as suicides, but this is linguistically arbitrary stipulation. See David Daube, "The Linguistics of Suicide," *Philosophy and Public Affairs*, 1 (1971–1972), pp. 387–437, especially 433–437, for the limits of "suicide" and related expressions in several languages.

4. LaFave and Scott, *op. cit.*, p. 569; 83 C.J.S. 783; R. E. Schulman, "Suicide and Suicide Prevention: A Legal Analysis," *American Bar Association Journal*, 54 (1968), p. 856.

5. Byrn, *op. cit.*, pp. 20–22; the case cited is Hales v. Petit, 75 Eng. Rep. 387 (C.B. 1562).

6. See LaFave and Scott, *op. cit.*, p. 569; Williams, *op. cit.*, pp. 273–283 and 288–290; Norman St. John-Stevas, *The Right to Life* (New York, Chicago, San Francisco: Holt, Rinehart and Winston, 1964), pp. 67–70.

7. St. John-Stevas, *op. cit.*, pp. 71–77; Williams, *op. cit.*, pp. 276–286; George Rosen, "History," in Seymour Perlin, ed., *A Handbook for the Study of Suicide* (New York, London, Toronto: Oxford University Press, 1975), pp. 19–26; David F. Greenberg, "Involuntary Psychiatric Commitments to Prevent Suicide," *New York University Law Review*, 49 (1974), pp. 227–236.

8. Cf. Glanville Williams, "The Right to Commit Suicide," *Medico-Legal Journal*, 41 (1973), pp. 26–29; Richard Delgado, "Euthanasia Reconsidered—The Choice of Death as an Aspect of the Right of Privacy," *Arizona Law Review*, 17 (1975), pp. 474–494.

9. E.g., Delgado, *loc. cit.*; William H. Baughman, John C. Bruha, and Francis J. Gould, "Euthanasia: Criminal, Tort, Constitutional, and Legislative Considerations," *Notre Dame Lawyer*, 48 (1973), pp. 1237–1252; Morris D. Forkosch, "Privacy, Human Dignity, Euthanasia—Are These Independent Constitutional Rights?" *University of San Fernando Law Review*, 3 (1974), pp. 18–25.

10. Greenberg, *op. cit.*, pp. 237–242.

11. Williams, *Sanctity of Life*, p. 292.

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

13. ARK. STAT. ANN. § 41–505.

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

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

16. Williams, *Sanctity of Life*, pp. 292–293.

17. Greenberg, *op. cit.*, pp. 227–269; the argument is persuasive because he shows that if one assumes, as is reasonable, that the burden of proof is upon those who would take away an individual's liberty, then it really cannot be shown that detention gives significant protection to the potential suicide or anyone else. It is important to bear in mind that the fact of suicide does not rebut the presumption of sanity; see 31 C.J.S. *Evidence* § 147 (1964). A fortiori, the fact that someone threatens or attempts suicide does not rebut this presumption. Since diminished responsibility of itself would not

have rendered suicide noncriminal and since this result was desired in a context in which the unalienable character of life could not be directly attacked, those seeking the practical decriminalization of suicide during the past one hundred years or so tended to overstate the mental unbalance of suicides and potential suicides. This was an unfortunate rationalization with negative implications for the basic right of liberty. Since life is no longer regarded as a substantive principle as it used to be, suicide can now be admitted as noncriminal merely because it does not violate justice, and the detriment to liberty can be removed.

18. Cf. Williams, "The Right to Commit Suicide," p. 26.

19. Farberow, Shneidman, and Leonard, *op. cit.*, p. 334; Robert E. Litman and Norman L. Farberow, "Suicide Prevention in Hospitals," in *The Psychology of Suicide*, pp. 461–473.

20. Henry A. Davidson, "Suicide in the Hospital," *Hospitals: Journal of the American Hospital Association*, 43 (November 16, 1969), pp. 55–59.

21. *Ibid.*

22. See Williams, *Sanctity of Life*, pp. 286–304; LaFave and Scott, *op. cit.*, pp. 569–571.

23. See Helen Silving, "Euthanasia: A Study in Comparative Criminal Law," *University of Pennsylvania Law Review*, 103 (1954), pp. 369–386.

24. *Model Penal Code, Proposed Official Draft*, May 4, 1962 (Philadelphia: The American Law Institute), § 210.5 (1).

25. PA. STAT. ANN. tit. 18, § 2505; N. Y. PENAL LAW § 120.35 (McKinney).

26. Suicide Act, 9 & 10 Eliz., 2, c. 60 (1961); cf. St. John-Stevas, *op. cit.*, pp. 76–77; William Ll. Parry-Jones, "Criminal Law and Complicity in Suicide and Attempted Suicide," *Medicine, Science, and the Law*, 13 (1973), pp. 110–119.

27. *Time*, September 5, 1977, p. 21; *MCCL Newsletter*, September 1977, p. 4.

28. *Ibid.*

29. *Model Penal Code, Proposed Official Draft*, § 210.5 (2). For a discussion of aiding and abetting suicide at common law and in American law to 1920 see 13 A.L.R. 1259–1264.

30. N. Y. PENAL LAW § 120.30 (McKinney).

31. FLA. STAT. ANN. § 782.08 (West); cf. MO. ANN. STAT. § 559.080 (Vernon); MINN. STAT. ANN. § 609.215 (West).

32. CAL. PENAL CODE § 401 (West).

33. See Silving, *op. cit.*, pp. 376–377.

34. Williams, *Sanctity of Life*, p. 309.

35. *Model Penal Code, Tentative Draft No. 9*, May 8, 1959 (Philadelphia: The American Law Institute), comments on section 201.5, p. 57.

36. See LaFave and Scott, *op. cit.*, pp. 568–571; Schulman, *op. cit.*, pp. 855–862; 83 C.J.S. 781–785. The situation is so erratic that at least until recently assisting another to commit suicide ranged from murder in some jurisdictions to no crime at all in at least one—Texas.

6: VOLUNTARY ACTIVE EUTHANASIA AND LIBERTY

1. See Nancy Lee Vaughan, "The Right to Die," *California Western Law Review*, 10 (1974), pp. 613–615; Arval A. Morris, "Voluntary Euthanasia," *Washington Law Review*, 45 (1970), pp. 242–243.

2. Marvin Kohl, "Voluntary Beneficent Euthanasia," in Marvin Kohl, ed., *Beneficent Euthanasia* (Buffalo, New York: Prometheus Books, 1975), p. 134.

3. So is the case with the two proposals most seriously debated, those considered by the British House of Lords in 1936 and 1969. The former is printed in Harry Roberts, *Euthanasia and Other Aspects of Life and Death* (London: Constable & Co., 1936), pp. 19–25; the latter in A. B. Downing, ed., *Euthanasia and the Right to Death: The Case for Voluntary Euthanasia* (London: Peter Owen, 1969), pp. 197–206.

4. Kohl, *loc. cit.*

5. Sissela Ann Bok, *Voluntary Euthanasia,* unpublished Ph. D. Dissertation, Department of Philosophy, Harvard University, 1970, pp. 87–109.

6. *Ibid.,* p. 94.

7. *Ibid.,* pp. 110–114.

8. See Yale Kamisar, "Some Non-Religious Views against Proposed 'Mercy Killing' Legislation," *Minnesota Law Review,* 42 (1958), pp. 970–971; Edward J. Gurney, "Is There a Right to Die?—A Study of the Law of Euthanasia," *Cumberland-Samford Law Review,* 2 (1972), pp. 238–240; Jerry B. Wilson, *Death by Decision: The Medical, Moral, and Legal Dilemmas of Euthanasia* (Philadelphia: Westminster Press, 1975), pp. 142–145; Helen Silving, "Euthanasia: A Study in Comparative Criminal Law," *University of Pennsylvania Law Review,* 103 (1954), pp. 352–353 and 379; *On Dying Well: An Anglican Contribution to the Debate on Euthanasia* (London: Church Information Office, 1975), pp. 51–58.

9. Wilson, *op. cit.,* pp. 142–143; Kamisar, *op. cit.,* pp. 970–971, note 9; William H. Baughman, John C. Bruha, and Francis J. Gould, "Survey: Euthanasia: Criminal, Tort, Constitutional and Legislative Considerations," *Notre Dame Lawyer,* 48 (1973), pp. 1204–1206.

10. Joseph Sanders, "Euthanasia: None Dare Call It Murder," *Journal of Criminal Law, Criminology, and Police Science,* 60 (1969), pp. 351–359; Vaughan, *op. cit.,* pp. 613–615; Morris, *loc. cit.;* Wilson, *op. cit.,* pp. 148–155; Baughman *et al., op. cit.,* pp. 1213–1215; Silving, *op. cit.,* pp. 353–354.

11. Kamisar, *op. cit.,* pp. 971–972.

12. People v. Roberts, 178 N.W. 690, 211 Mich. 187, 13 A.L.R. Ann. 1253 (1920) with annotation at 1259–1264; cf. 25 A.L.R. Ann. 1007–1008.

13. E. g., Morris, *op. cit.,* pp. 240, 244, 247–248; Joseph Fletcher, "The Patient's Right to Die," *Harper's Magazine,* 220 (October 1960), pp. 139–140; Marvin M. Moore, "The Case for Voluntary Euthanasia," *University of Missouri at Kansas City Law Review,* 42 (1974), pp. 332–333; *Parliamentary Debates, House of Lords* (5th ser.), 300 (25 March 1969), col. 1196 (Lord Soper), cols. 1203–1204 (Lord Platt).

14. Baughman *et al., op. cit.,* p. 1205 and notes 22–23.

15. Moore, *op. cit.,* p. 337; James Rachels, "Active and Passive Euthanasia," *New England Journal of Medicine,* 292 (Jan. 9, 1975), pp. 78–80; Edward M. Scher, "Legal Aspects of Euthanasia," *Albany Law Review,* 36 (1972), pp. 692–694; Elizabeth Barkin and Sally B. Macdonald, "The Option of Death! Euthanasia: An Issue for the Seventies," *University of San Fernando Law Review,* 4 (1975), pp. 305–309; Walter W. Steele, Jr. and Bill B. Hill, Jr., "A Plea for a Legal Right to Die," *Oklahoma Law Review,* 29 (1976), pp. 332–333, 335–336, 339–340.

16. See Glen William Argan, "The Killing/Letting-Die Controversy: An Aspect of the Morality of Euthanasia," unpublished M. A. Thesis, Department of Philosophy, University of New Brunswick, 1977.

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

Treatment: Bodily Integrity versus Preservation of Life," *Rutgers Law Review,* 26 (1973), pp. 260–261; David W. Louisell, "Euthanasia and Biathanasia: On Dying and Killing," *Catholic University Law Review,* 22 (1973), pp. 739–744; George P. Fletcher, "Prolonging Life: Some Legal Considerations," in Downing, ed., *op. cit.,* pp. 75–83.

18. Baughman *et al., op. cit.,* pp. 1207–1210; Kamisar, *op. cit.,* pp. 982–983, esp. note 42.

19. Morris, *op. cit.,* pp. 251–254; *A Plan for Voluntary Euthanasia* (London: Euthanasia Society, 1962), pp. 5–9; C. Killick Millard, "The Case for Euthanasia," *Fortnightly Review,* 136 (December 1931), p. 712; Parliamentary Debates, House of Lords (5th ser.), 103 (1 December 1936), col. 474 (Lord Denman), col. 499 (Earl of Listowel); 169 (28 November 1950), cols. 569–570 (Lord Horder, commenting adversely); Glanville Williams, " 'Mercy-Killing' Legislation—A Rejoinder," *Minnesota Law Review,* 43 (1958), pp. 1–2; idem, "Euthanasia and Abortion," *Colorado Law Review,* 38 (1969), p. 182; Richard Delgado, "Euthanasia Reconsidered—The Choice of Death as an Aspect of the Right of Privacy," *Arizona Law Review,* 17 (1975), p. 479; Marvin Kohl, "Understanding the Case for Beneficent Euthanasia," *Science, Medicine & Man,* 1 (1973), p. 113 and p. 119.

20. Morris, *op. cit.,* pp. 262–264; Glanville Williams, *Sanctity of Life and the Criminal Law* (New York: Alfred A. Knopf, 1957), p. 325; *A Plan for Voluntary Euthanasia,* p. 20; *House of Lords* (1950), cols. 589–590 (Earl of Huntingdon); John Hinton, *Dying* (Harmondsworth, England: Penguin Books, 1967), pp. 65–78.

21. Morris, *op. cit.,* pp. 249–250; Williams, " 'Mercy-Killing' Legislation," p. 2; idem, "Euthanasia and Abortion," pp. 179–180, 183–184; idem, *Sanctity of Life,* pp. 311–315, 317–318; Kohl, "Understanding the Case for Beneficent Euthanasia," pp. 111–112; Antony Flew, "The Principle of Euthanasia," in Downing, ed., *op. cit.,* pp. 32–33; Arthur A. Levisohn, "Voluntary Mercy Deaths: Socio-Legal Aspects of Euthanasia," *Journal of Forensic Medicine,* 8 (April–June 1961), pp. 71–74. Much of this argument commits the fallacy of the circumstantial ad hominem ("poisoning the wells") by attempting to dismiss *all* antieuthanasia argumentation as religious and so as illegitimate.

22. *A Plan for Voluntary Euthanasia,* pp. 5–9.

23. Steele and Hill, *op. cit.,* pp. 333–334; Moore, *op. cit.,* p. 333; Williams, "Euthanasia and Abortion," pp. 181–182; idem, *Sanctity of Life,* pp. 338–339 and 345; Charles Wilshaw, *The Right to Die: A Rational Approach to Voluntary Euthanasia* (London: British Humanist Association, no date), pp. 3–4 and 17–18; Lord Raglan, "The Case for Voluntary Euthanasia," *The Problem of Euthanasia* (Cockenzie, Scotland: Contact Ltd., 1972), p. 11.

24. Kamisar, *op. cit.,* pp. 984–985; *The Problem of Euthanasia* (London: British Medical Association, 1971), p. 2.

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

26. *House of Lords* (1936), col. 483.

27. *Ibid.,* cols. 484–487.

28. *Ibid.,* col. 492.

29. *House of Lords* (1950), col. 568.

30. *House of Lords* (1936), cols. 467–468.

31. *On Dying Well,* pp. 63–65; Hugh Trowell, *The Unfinished Debate on Euthanasia* (London: Institute of Religion and Medicine, 1971), pp. 26–29 and 58–60.

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

33. Trowell, *op. cit.,* pp. 27–28.

34. Glanville Williams, "Euthanasia and the Physician," in Kohl, ed., *op. cit.,* pp. 146–147.

35. Roberts, *op. cit.,* p. 10; *On Dying Well,* p. 60.

36. Baughman *et al., op. cit.,* pp. 1229–1231; Williams, *Sanctity of Life,* p. 328; Luis Kutner, "Comments: Due Process of Euthanasia: The Living Will, A Proposal," *Indiana Law Journal,* 44 (1969), pp. 542–543; Sheila Schiff Cole and Marta Sachey Shea, "Voluntary Euthanasia: A Proposed Remedy," *Albany Law Review,* 39 (1975), p. 834; Silving, *op. cit.,* p. 354; Kamisar, *op. cit.,* pp. 971–973, answers this sort of argument.

37. Kamisar, *op. cit.,* pp. 971–974; Silving, *op. cit.,* pp. 387–389, urges a lesser punishment rather than legalization of such killing.

38. Joe P. Tupin, "Some Psychiatric Issues in Euthanasia," in Kohl, ed., *op. cit.,* pp. 194–197, outlines with unusual clarity what would be involved in informed consent.

39. *House of Lords* (1936), col. 500 (Earl of Crawford).

40. Elisabeth Kübler-Ross, *On Death and Dying* (New York: Macmillan Publishing Co., 1970), pp. 112–137 and 157–180; *Questions and Answers on Death and Dying* (New York and London: Macmillan Publishing Co. and Collier Macmillan, 1974), pp. 52–73 and 86.

41. Kamisar, *op. cit.,* pp. 993–1013; Trowell, *op. cit.,* pp. 50–52; *Problem of Euthanasia* (British Medical Association), p. 6; Laurence V. Foye, Jr., "Statement," in U. S. Senate, Special Committee on the Aging, 92d Cong., 2d Sess., *Death with Dignity: An Inquiry Into Related Public Issues,* part I, pp. 22–25.

42. Millard, *op. cit.,* p. 717.

43. Tupin, *op. cit.,* pp. 194–197; Kamisar, *op. cit.,* pp. 985–993; Scher, *op. cit.,* pp. 690–692; Kutner, *op. cit.,* p. 545; *House of Lords* (1936), col. 485 (Archbishop of Canterbury); *House of Lords* (1950), cols. 564–565 (Archbishop of York).

44. Steele and Hill, *op. cit.,* pp. 341–342.

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

46. In Roberts, *op. cit.,* pp. 21–25.

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

48. Williams, *Sanctity of Life,* pp. 339–341.

49. *Ibid.,* p. 345.

50. Moore, *op. cit.,* p. 339.

51. In Downing, ed., *op. cit.,* pp. 201–206.

52. *House of Lords* (1969), cols, 1152–1155.

53. *Ibid.,* cols. 1171–1172.

54. *Ibid.,* cols. 1234–1235.

55. *Ibid.,* cols. 1240–1241.

56. Morris, *op. cit.,* p. 259.

57. Walter W. Sackett, "Statement," in U. S. Senate, *Death with Dignity,* p. 36.

58. Kamisar, *op. cit.,* pp. 976–977.

59. Bruce Vodiga, "Euthanasia and the Right to Die—Moral, Ethical and Legal Perspectives," *Chicago-Kent Law Review,* 51 (1974), p. 8.

60. Marvin Kohl, *The Morality of Killing: Sanctity of Life, Abortion and Euthanasia* (Atlantic Highlands, N.J.: Humanities Press, 1974), p. 17.

61. Williams, " 'Mercy-Killing' Legislation—A Rejoinder," pp. 3–4.

62. Millard, *op. cit.,* pp. 708–709; Roberts, *op. cit.,* pp. 22–23; Kamisar, *op. cit.,* pp. 978–979, on both British and American bills; *Plan for Voluntary Euthanasia,* p. 15; Moore, *op. cit.,* p. 338, note 72; Levisohn, *op. cit.,* p. 70; Cole and Shea, *op. cit.,* pp. 842–844, 854–855; Joseph Fletcher, *Morals and Medicine* (Boston: Beacon Press, 1960), pp. 187–188; New South Wales Humanist Society, *Euthanasia* (Winston Hills, N.S.W.: 1973), p. 4; O. Ruth Russell, "Moral and Legal Aspects of Euthanasia," *The Humanist,* 34 (July/August 1974), p. 26; *House of Lords* (1969), col. 1164 (Lord Newton).

63. Objections to what the schools are doing are registered in a vast literature, of uneven quality. But the literature does show the extent of dissatisfaction. The following items are taken as examples: Onalee McGraw, *Secular Humanism and the Schools: The Issue Whose Time Has Come* (Washington, D.C.: The Heritage Foundation, 1976); John Steinbacher, *The Child Seducers* (Fullertown, California: Educator Publications, 1970); Russ Walton, *One Nation Under God* (Old Tappan, N.J.: Third Century Publishers, 1975), pp. 100–134; Susan M. Marshner, *Man: A Course of Study—Prototype for Federalized Textbooks?* (Washington, D.C.: The Heritage Foundation, 1975); United States General Accounting Office, *Report to the House Committee on Science and Technology by the Comptroller General of the United States: Administration of the Science Education Project "Man: A Course of Study" (MACOS)* (October 14, 1975), pp. 1–10, includes descriptive information about the program and its wide use; Barbara M. Morris, "A Parent's Guide to Understanding and Recognizing the Religion of Humanism in Public Schools," mimeograph, Ellicott City, Maryland, 1976; Virginia L. Gray and Timothy L. Hastings, "Humanistic Education in Southern Illinois," mimeograph, West Frankfort, Illinois, 1977; Brief of Appellant, Hobolth v. Greenway, filed in the Court of Appeals, State of Michigan, October 15, 1973. Arguments that the exclusive grip of the public schools on public support of education chills the exercise of religious liberty are presented by Joseph F. Costanzo, *This Nation Under God: Church, State and Schools in America* (New York: Herder and Herder, 1964), pp. 211–212, 294–296, and *passim;* Virgil C. Blum, S.J., *Catholic Parents: Political Eunuchs* (St. Cloud, Minnesota: Media + Materials, 1972), pp. 43–58. See below, chapter ten, section D.

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

65. Kamisar, *op. cit.,* pp. 1015–1030 and 1030–1041.

66. *Ibid.,* especially pp. 1015–1019.

67. See Sackett, *op. cit.,* pp. 30–39; cf. David Mall, "Death and the Rhetoric of Unknowing," in Dennis J. Horan and David Mall, eds., *Death, Dying, and Euthanasia* (Washington, D.C.: University Publications of America, 1977), pp. 654–656.

68. Kamisar, *op. cit.,* pp. 1019–1025.

69. Williams, "Euthanasia and Abortion," pp. 184–187; Vaughan, *op. cit.,* pp. 614–615 and 622; Steele and Hill, *op. cit.,* 337–338; Morris, *op. cit.,* pp. 242–243; Moore, *op. cit.,* pp. 331–333; Levisohn, *op. cit.,* p. 66; Baughman *et al., op. cit.,* pp. 1204, 1206, and 1213–1215; Cole and Shea, *op. cit.,* pp. 832, 836; Fletcher, "The Patient's Right to Die," p. 139; Downing, ed., *op. cit.,* pp. 20–21; Kutner, *op. cit.,* pp. 540–541; Barkin and Macdonald, *op. cit.,* pp. 303–304; Rowine Hayes Brown and Richard B. Truitt, "Euthanasia and the Right to Die," *Ohio Northern University Law Review,* 3

(1976), pp. 616–621; Daniel C. Maguire, *Death by Choice* (New York: Schocken Books, 1975), pp. 23–26, 150, 173–177; Marya Mannes, *Last Rights* (New York: Signet, 1975), pp. 92–99; *House of Lords* (1969), col. 1218 (Earl of Huntingdon), cols. 1222–1223 (Lord Ritchie-Calder), cols. 1244–1245 (Lord Segal).

70. Kamisar, *op. cit.*, pp. 1024–1029.

71. Joseph Fletcher, "The Right to Die: A Theologian Comments," *Atlantic*, 221 (April 1968), pp. 63–64; idem, "Ethics and Euthanasia," *American Journal of Nursing*, 73 (1973), p. 674; Williams, "Euthanasia and Abortion," p. 182; idem, " 'Mercy-Killing' Legislation—A Rejoinder," pp. 9–12; idem, "Euthanasia," *Medico-Legal Journal*, 41 (1973), pp. 23–24; idem, "Euthanasia and the Physician," pp. 154–157; Kohl, "Understanding the Case for Beneficent Euthanasia," pp. 112–113; Sackett, *op. cit.*, pp. 30–39; Maguire, *op. cit.*, pp. 173–177; Moore, *op. cit.*, pp. 335 and 339; Steele and Hill, *op. cit.*, pp. 343–346; Ronald P. Kaplan, "Euthanasia Legislation: A Survey and a Model Act," *American Journal of Law & Medicine*, 21 (1976), pp. 69–70 and 93–94; New South Wales Humanist Society, *op. cit.*, p. 6; Russell, *op. cit.*, p. 26.

72. Williams, *Sanctity of Life*, pp. 314–315.

73. Kamisar, *op. cit.*, pp. 1030–1031 and 1038–1039.

74. Williams, *Sanctity of Life*, pp. 315–316; idem, "Euthanasia and Abortion," p. 181; idem, " 'Mercy-Killing' Legislation—A Rejoinder," pp. 9–11.

75. Kohl, "Understanding the Case for Beneficent Euthanasia," pp. 113–114.

76. Arthur Dyck, "Beneficent Euthanasia and Benemortasia: Alternative Views of Mercy," in Kohl, ed., *op. cit.*, pp. 120–122 and 128.

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

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

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

80. Morris, *op. cit.*, pp. 254–255, offers a libertarian argument, but then (pp. 266–271) establishes obviously arbitrary limiting conditions; Cole and Shea, *op. cit.*, pp.

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

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

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

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

84. Superintendent of Belchertown State School v. Saikewicz, Mass. 370 N.E.2d 417 (1977) at 427–429.

85. John M. Freeman, "Is There a Right to Die—Quickly?" *Journal of Pediatrics*, 80 (1972), pp. 904–905; James Rachels, "Active and Passive Euthanasia," *New England Journal of Medicine*, 292 (1975), pp. 78–80.

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

87. U.S. Department of Health, Education, and Welfare, *Improving Family Planning Services for Teenagers* (Washington, D.C.: 1976), pp. 5 and 77. This report was done on contract, and the title page carries a disclaimer of the official status of the views in it, but the text makes clear why the report was contracted and published by the department. (*Family* planning?)

88. Roe v. Wade, 410 U.S. 113 (1973) at 116; see below, chapter ten, section C.

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

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

91. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831 (1976) at 2842–2844.

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

93. See "A Five Year Plan: 1976–1980, for the Planned Parenthood Federation of America, Inc.," mimeograph, approved by the PPFA Membership, October 22, 1975, Seattle, Washington, pp. 2–3, 6–7, and 16; "A Guide to Sources of Family Planning Program Assistance," *Population Reports,* series J, number 15 (March 1977), J 267, 269, 271–272; "Abortion Funds Ordered," *Washington Post,* 22 April 1978, p. 1; "Taxpayer's Guide to Federal Anti-Life Programs," *Pro-Life Reporter,* 5 (Spring 1977), pp. 6–13; Randy Engel, *A Pro-Life Report On Population Growth and the American Future* (private publication, 1972), pp. 1–16.

94. Testimony of Harriet F. Pilpel on behalf of the New York Civil Liberties Union before the Committee on Health, New York State Assembly (mimeograph), March 7, 1966; cf. Martha Robinson, Jean Pakter, and Martin Svigir, "Medicaid Coverage of Abortions in New York City: Costs and Benefits," *Family Planning Perspectives,* 6 (Fall 1974), pp. 202–208; see below, chapter ten, section C, for comments by Leo Pfeffer and analysis. The importance of keeping the right appearances is noted by James E. Allen, "An Appearance of Genocide: A Review of Governmental Family-Planning Program Policies," *Perspectives in Biology and Medicine,* 20 (1977), pp. 300–306; a negative view of the antilibertarian implications of the legalization of abortion is proposed by George S. Swan, "Compulsory Abortion: Next Challenge to Liberated Women?" *Ohio Northern University Law Review,* 3 (1975), pp. 152–175.

95. Richard Delgado, "Euthanasia Reconsidered—The Choice of Death as an Aspect of the Right of Privacy," *Arizona Law Review,* 17 (1975), pp. 479–480; cf. R. F. R. Gardner, "A New Ethical Approach to Abortion and Its Implications for the Euthanasia Dispute," *Journal of Medical Ethics,* 1 (1975), pp. 129–130.

96. Sackett, *op. cit.,* p. 30.

97. "Memorandum, Department of Health, Education and Welfare, Health Care Financing Administration," June 4, 1977, from Robert A. Derzon, administrator, Health Care Financing Administration; to The Secretary (photocopy), pp. 8–9.

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

99. Ramsey, *op. cit.,* pp. 305–330.

100. Elizabeth A. Maclaren, "Dignity," *Journal of Medical Ethics,* 3 (1977), pp. 40–41, is suggestive; note the repeated and noncognitive use of "dignity" in idem, "A Plea for Beneficent Euthanasia," *Humanist,* 34 (July/August 1974), pp. 4–5.

101. Edward F. Dobihal, "Statement," in U.S. Senate, *Death with Dignity,* part 3, pp. 129–136; Sonya Rudikoff, "The Problem of Euthanasia," *Commentary,* 57 (February 1974), p. 67; Fletcher, "The Patient's Right to Die," p. 141.

102. Ronald Koenig, "Dying vs. Well-Being," *Omega,* 4 (1973), pp. 181–194; Richard Schulz and David Aderman, "How Medical Staff Copes with Dying Patients: A Critical Review," *Omega,* 7 (1976), pp. 11–21.

103. C. Condrau, "The Dying Patient—a Challenge for the Doctor," *Hexagon (Roche),* 3 (1975), pp. 15–24.

104. Kübler-Ross, *On Death and Dying,* pp. 269–276; Hinton, *op. cit.,* pp. 111–125; the ethics of this was spelled out by Paul Ramsey, *The Patient as Person: Explorations in Medical Ethics* (New Haven and London: Yale University Press, 1970), pp. 124–157, but (pp. 161–164) he arbitrarily allows active euthanasia in certain cases which could never be distinguished from a continuum of cases, and the exceptions seem to include nonvoluntary euthanasia. Good nursing has always aimed at appropriate care; see Virginia W. Kasley, "As Life Ebbs," *American Journal of Nursing,* 38 (1938), pp. 1191–1198; Ned H. Cassem and Rege S. Stewart, "Management and Care of the Dying Patient," *International Journal of Psychiatry in Medicine,* 6 (1975), pp. 293–304.

105. Thomas P. Hackett, "Psychological Assistance for the Dying Patient and His Family," *American Review of Medicine,* 27 (1976), pp. 371–378; G. Gail Gardner, "Childhood, Death, and Human Dignity: Hypnotherapy for David," *International Journal of Clinical and Experimental Hypnosis,* 24 (1976), pp. 122–139; Rita Jean Dubrey and Laura Amy Terrill, "The Loneliness of the Dying Person: An Exploratory Study," *Omega,* 6 (1975), pp. 357–371.

106. Robert E. Neale, "Between the Nipple and the Everlasting Arms," *Archives of the Foundation of Thanatology,* 3 (1971), pp. 21–30; Cicely Saunders, "Living with Dying," *Man and Medicine,* 1 (1976), pp. 227–242; Richard Lamerton, *Care of the Dying* (London: Priory Press, 1973); Dobihal, *loc. cit.;* "Oct. 1976 Report/Rapport," Royal Victoria Hospital, McGill University, Montreal, Palliative Care Service/Service de Soins Palliatifs. For discussion see Claire F. Ryder and Diane M. Ross, "Terminal Care—Issues and Alternatives," *Public Health Reports,* 92 (1977), pp. 20–29.

107. *House of Lords* (1969), col. 1146.

108. Lamerton, *op. cit.,* pp. 43–61, is the best summary of the procedures, although Saunders, *loc. cit.,* conveys more the spirit of hospice-care.

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

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

111. Cf. *On Dying Well,* pp. 44–50.

7: KILLING WHICH IS CONSIDERED JUSTIFIED

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

2. See Yale Kamisar, "Some Non-Religious Views against Proposed 'Mercy-Killing' Legislation," *Minnesota Law Review,* 42 (1958), pp. 994 and 1017; he refers to *New York Times,* February 14, 1939, p. 2, col. 6.

3. Foster Kennedy, "The Problem of Social Control of the Congenital Defective: Education, Sterilization, Euthanasia," *American Journal of Psychiatry,* 99 (July 1942), pp. 13–16.

4. Walter W. Sackett, "Statement," in *Death with Dignity: An Inquiry into Related Public Issues: Hearings before the Special Committee on Aging, United States Senate,* 92nd Cong., 2d Sess. (August 7, 1972), p. 30.

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

6. Robert H. Williams, "Our Role in the Generation, Modification, and Termination of Life," *Archives of Internal Medicine,* 124 (1969), p. 232.

7. Robert H. Williams, "Number, Types, and Duration of Human Lives," *Northwest Medicine,* 69 (1970), pp. 493–496.

8. Richard Trubo, *An Act of Mercy* (Los Angeles: Nash Publishing, 1973), p. 153.

9. Glanville Williams, " 'Mercy-Killing' Legislation—A Rejoinder," *Minnesota Law Review,* 43 (1958), p. 11.

10. Marvin Kohl, *The Morality of Killing: Sanctity of Life, Abortion and Euthanasia* (Atlantic Highlands, N.J.: Humanities Press, 1974), p. 109.

11. See John Connery, S.J., *Abortion: The Development of the Roman Catholic Perspective* (Chicago: Loyola University Press, 1977), pp. 284–303, for the Catholic

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

12. Cf. Daniel C. Maguire, *Death by Choice* (New York: Schocken Books, 1975), pp. 209–216.

13. Thomas Aquinas, *Summa theologiae,* 2–2, qu. 40, art. 1.

14. See Franziskus Stratmann, O.P., *The Church and War: A Catholic Study* (London: 1928), pp. 52–80, for a discussion of the development and weakening of the theological account of the justifiable war.

15. See Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven: Yale University Press, 1961); Wolfgang Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1964); and Julius Stone, *Legal Controls of International Conflict* (New York: Rinehart, 1959).

16. Wayne R. LaFave and Austin W. Scott, Jr., *Handbook on Criminal Law* (St. Paul, Minnesota: West Publishing Co., 1972), p. 391.

17. *Ibid.,* pp. 397–399.

18. *Ibid.,* pp. 399–402.

19. *Ibid.,* pp. 402–403 and 406–407.

20. *Ibid.,* p. 405.

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

22. The deterrent effect of the death penalty—or the lack of it—was discussed at length by the justices in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972). Marshall, 345–355, 2780–2785, provides an extensive and useful survey of the literature; Burger, 395–396, 2807, says the debate is a "stalemate" or an "unresolved factual question." Powell, 446, 2841, note 63, quotes the Report of the President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society* (1967) in stating that it is "impossible to say with certainty whether capital punishment significantly reduces the incidence of heinous crimes." A thorough study of the deterrent question is Ezzat Abdel Fattah, *A Study of the Deterrent Effect of Capital Punishment with Special Reference to the Canadian Situation,* Research Centre Report 2, Department of the Solicitor General (Ottawa: 1972).

23. See John T. Noonan, Jr., "Why a Constitutional Amendment?" *Human Life Review,* 1 (Winter 1975), pp. 26–30.

24. Cf. Baruch Brody, *Abortion and the Sanctity of Human Life: A Philosophical View* (Cambridge, Mass. and London: MIT Press, 1975), pp. 6–12.

25. Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs,* 1 (1971), pp. 47–66.

26. United States v. Holmes, 1 Wall. Jr. 1, 26 Fed. Cas. 360, No. 15, 383 (C.C.E.D. Pa. 1842).

27. R. v. Dudley and Stephens, L.R. 14 Q.B.D. 273 (1884).

28. LaFave and Scott, *op. cit.,* pp. 381–388. Rex v. Bourne, 1 K.B. 687 (1939), often is cited as an application of the defense of necessity. But it is not; rather it is a

case of arbitrary exegesis of a statute which did not mention any exception by means of another statute which did, and the stretching of "had not acted in good faith to preserve the life of the mother" to include preservation of health, and this to include aborting a pregnancy consequent upon rape in the instant case. The background of *Bourne* is interesting as an example of how far proabortionists will go in exploiting a victim of rape and contriving adjudication to achieve their ends; see Grisez, *op. cit.*, pp. 220–222.

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

30. Cf. LaFave and Scott, *op. cit.*, pp. 384–385.

8: NONVOLUNTARY EUTHANASIA AND JUSTICE

1. John A. Robertson, "Involuntary Euthanasia of Defective Newborns: A Legal Analysis," *Stanford Law Review*, 27 (1975), pp. 217–244.

2. Glanville Williams, "Euthanasia," *Medico-Legal Journal*, 41 (1973), p. 22.

3. Glanville Williams, *Sanctity of Life and the Criminal Law* (New York: Alfred A. Knopf, 1957), pp. x and 312.

4. Joseph Tussman and Jacobus tenBrock, "The Equal Protection of the Laws," *California Law Review*, 37 (1949), pp. 341–381. It is especially important to note several points: the concept of equal protection rests on a theory of legislation distinct from that of pressure groups (p. 350); there are classifications which are forbidden or suspect (pp. 353–361); and while underinclusiveness may be acceptable in regulatory legislation, it is not similarly defensible when basic human and civil rights are in question (p. 373). In effect, the argument we offer in this chapter is against admitting as a rational principle of classification the deficiencies on the basis of which nonvoluntary euthanasia is considered justified as an exception to the present law forbidding homicide.

5. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973) at 156–164, 728–732.

6. Marvin Kohl, *The Morality of Killing: Sanctity of Life, Abortion and Euthanasia* (Atlantic Highlands, N.J.: Humanities Press, 1974), p. 96; pp. 74–76 on consent as a criterion.

7. *Ibid.*, p. 81. Kohl does not draw the conclusion that involuntary euthanasia would be justified, but he supplies the premisses for it. His respect for liberty is minimal in comparison with his regard for what he considers kind.

8. Williams, *Sanctity of Life*, p. 316.

9. Williams, "Euthanasia," pp. 22–24.

10. A. R. Jonsen, R. H. Phibbs, W. H. Tooley, and M. J. Garland, "Critical Issues in Newborn Intensive Care: A Conference Report and Policy Proposal," *Pediatrics,* 55 (1975), pp. 760 and 767.

11. *Ibid.,* p. 762.

12. Richard A. McCormick, "To Save or Let Die: The Dilemma of Modern Medicine," *Journal of the American Medical Association,* 229 (1974), p. 175.

13. Richard A. McCormick, "A Proposal of 'Quality of Life' Criteria for Sustaining Life," *Hospital Progress,* 56 (September 1975), p. 79.

14. Joseph Fletcher, "The Right to Die," *Atlantic Monthly,* 221 (April 1968), pp. 63–64.

15. Joseph Fletcher, "Indicators of Humanhood: A Tentative Profile of Man," *Hastings Center Report,* 2 (November 1972), p. 1.

16. Joseph Fletcher, "Four Indicators of Humanhood—The Enquiry Matures," *Hastings Center Report,* 4 (December 1974), p. 7, but note section III, pp. 5–6.

17. Michael Tooley, "Abortion and Infanticide," *Philosophy and Public Affairs,* 2 (1972), pp. 37–65, especially 44–48.

18. H. Tristram Engelhardt, Jr., "Euthanasia and Children: The Injury of Continued Existence," *Journal of Pediatrics,* 83 (1973), pp. 170–171.

19. H. Tristram Engelhardt, Jr., "On the Bounds of Freedom: From the Treatment of Fetuses to Euthanasia," *Connecticut Medicine,* 40 (1976), pp. 51–52.

20. Williams, "Euthanasia," p. 24.

21. Richard Lamerton, "Vegetables?" *Nursing Times,* 70 (1974), pp. 1184–1185.

22. Robertson, *op. cit.,* pp. 253–254.

23. Kohl, *op. cit.,* p. 103.

24. The most interesting such case is Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967). For discussion of this and other cases see Germain Grisez, *Abortion: The Myths, the Realities, and the Arguments* (New York and Cleveland: Corpus Books, 1970), pp. 397–402.

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

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

27. See Germain Grisez, *Beyond the New Theism: A Philosophy of Religion* (Notre Dame and London: University of Notre Dame Press, 1975), pp. 152–180.

28. Glanville Williams, " 'Mercy-Killing' Legislation—A Rejoinder," *Minnesota Law Review*, 43 (1958), p. 12.

29. Richard Trubo, *An Act of Mercy* (Los Angeles: Nash Publishing Co., 1973), pp. 154–155.

30. Thus James Rachels, "Active and Passive Euthanasia," *New England Journal of Medicine*, 292 (1975), pp. 78–80. Rachels both ignores the fact that in law the omitting of treatment can be criminal homicide and misrepresents the extent to which the AMA statement he criticizes condones omitting treatment. Note reactions in "Correspondence," pp. 863–867.

31. Robertson, *op. cit.*, pp. 217–218; Yale Kamisar, "Some Non-Religious Views against Proposed 'Mercy-Killing' Legislation," *Minnesota Law Review*, 42 (1958), pp. 982–983.

32. Cf. Clifford T. Morgan and Richard A. King, *Introduction to Psychology*, 3 ed. (New York: McGraw-Hill Book Co., 1966), pp. 419–441.

33. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971), pp. 504–512.

34. Joseph M. Boyle, Jr., "That the Fetus Should Be Considered a Legal Person," *American Journal of Jurisprudence*, 24 (1979), forthcoming. See also Grisez, *Abortion*, pp. 361–442; Dennis J. Horan *et al.*, "The Legal Case for the Unborn Child," in Thomas W. Hilgers and Dennis J. Horan, eds., *Abortion and Social Justice* (New York: Sheed & Ward, 1972), pp. 105–141 and 301–328; Robert A. Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," *California Law Review*, 63 (1975), pp. 1250–1292 and 1331–1341; Joseph W. Dellapenna, "Nor Piety Nor Wit: The Supreme Court on Abortion," *Columbia Human Rights Law Review*, 6 (1974), pp. 389–409; Robert M. Byrn, "An American Tragedy: The Supreme Court on Abortion," *Fordham Law Review*, 41 (1973), pp. 807–862.

35. Grisez, *Abortion*, pp. 186–193 and 374–397.

36. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973) at 133–137 and 148–153, 718–721 and 724–726.

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

38. Grisez, *Abortion*, pp. 361–402; Horan *et al.*, *op. cit.*, pp. 109–127.

39. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973) at 160–163, 730–731.

40. U.S. Constitution, art. 1, § 2; see James Madison, No. 54 of Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, Clinton Rossiter, ed. (New York and Scarborough, Ont.: New American Library, 1961), pp. 336–340, in which Madison avoids arguing for this provision by putting its defense into the mouth of a fictional southerner. Cf. Destro, *op. cit.*, pp. 1284–1289; Joseph Parker Witherspoon, "Impact of the Abortion Decisions upon the Father's Role," *Jurist*, 35 (Winter 1975), pp. 41–47. Dee Brown, *Bury My Heart at Wounded Knee: An Indian History of the American West* (New York, Chicago, San Francisco: Holt, Rinehart & Winston, 1970), pp. 351–366 and *passim*, shows how the rights of American native people continued to be violated even after the ratification of the post-Civil War amendments and how they continued to be treated as semipersons.

41. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973) at 160–163, 730–731. See comments by Byrn, *op. cit.*, pp. 809–814 and 840–852; Destro, *op. cit.*, pp. 1263–1267; Baruch Brody, *Abortion and the Sanctity of Human Life: A Philosophical View* (Cambridge, Mass. and London: MIT Press, 1976), pp. 127–129.

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

43. See Grisez, *Abortion,* pp. 403–431; and other works cited in note 34, above. See also Joseph L. Lewis, "Homo Sapienism: Critique of *Roe v. Wade* and Abortion," *Albany Law Review,* 39 (1975), pp. 856–893.

44. Roe v. Wade, at 162–163, 731–732.

45. Arval A. Morris, "Voluntary Euthanasia," *Washington Law Review,* 45 (1970), pp. 264–265; Lucy Dawidowicz, in "Biomedical Ethics and the Shadow of Nazism," *Hastings Center Report,* 6, Special supplement (1976), p. 3.

46. Kohl, *op. cit.*, pp. 98–100.

47. Williams, "Rejoinder," pp. 10–11; idem, "Euthanasia and Abortion," *University of Colorado Law Review,* 38 (1966), p. 181.

48. Dawidowicz, *op. cit.*, p. 17.

49. Kamisar, *op. cit.*, pp. 1031–1034.

50. See Frederic Wertham, *A Sign for Cain: An Exploration of Human Violence* (New York: Macmillan Co., 1966), pp. 153–191, especially 161–163, 167–169, 175, and 178–180.

51. Maximilian Koessler, "Euthanasia in the Hadamar Sanatorium and International Law," *Journal of Criminal Law,* 43 (1953), pp. 736–737.

52. Karl Binding and Alfred Hoche, *Die Freigabe der Vernichtung Lebensunwerten Lebens* (Leipsig: Felix Meiner, 1920), tr. with commentary by Robert L. Sassone, *The Release of the Destruction of Life Devoid of Value: Its Measure and Its Form* (Santa Ana, Cal.: Life Quality Paperback, 1975). Note (p. 4) reference to this work in war crimes trials.

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

54. See James Hitchcock, "The Roots of American Violence," *Human Life Review,* 3 (Summer 1977), pp. 17–28.

55. C. P. Blacker, " 'Eugenic' Experiments Conducted by the Nazis on Human Subjects," *Eugenics Review,* 44 (April 1952), p. 12.

56. "Resolutions Passed at First American Birth Control Conference," *Birth Control Review,* 6 (January 1922), p. 18.

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

58. See Grisez, *Abortion,* pp. 60–65. Also see references to Raymond Pearl, *ibid.*, pp. 55–56. William G. Lennox, "Should They Live? Certain Economic Aspects of Medicine," *American Scholar,* 7 (1938), pp. 457–458, cites with approval Pearl's remarks in favor of disposing of idiots and monsters. Lennox's own statements are full of

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

59. Frank W. Notestein, "The Importance of Population Trends to the Birth Control Movement," *Birth Control Review,* 22 (April 1938), p. 76.

60. See Joseph M. Boyle, Jr., *loc. cit.*

61. Lewis, *op. cit.,* p. 892. It is worth noticing that even if one did not hold that the Supreme Court's decision violates arbitrarily the right to life of the unborn, one might still hold that the decision by the Court was lawless because legislative rather than interpretative; thus John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe* v. *Wade,*" *Yale Law Journal,* 82 (1973), p. 947: The decision "is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be." If the Court should legislate euthanasia, this act also would be doubly unjust, both as a substantive violation of rights and as a procedural abuse of its own power.

9: JUSTICE AND CARE FOR THE NONCOMPETENT

1. See John A. Robertson, "Involuntary Euthanasia of Defective Newborns: A Legal Analysis," *Stanford Law Review,* 27 (1975), pp. 217–218, and the works cited in his note 28; also see Jerome Hall, *General Principles of Criminal Law,* 2nd ed. (Indianapolis and New York: Bobbs-Merrill Co., 1960), pp. 190–205.

2. Hall, *loc. cit.,* correctly stresses that a legal duty to act does not specifically distinguish crimes by omission from other crimes, but he seems to ignore the point intended by those who stress this requirement for a crime in the case of omissions: that absent a duty to act, all other conditions of a crime by omission being given, no crime can be imputed to the potential agent who does not act. In addition to Robertson, *loc. cit.,* and the works cited by him, an especially helpful discussion is presented by George P. Fletcher, "Prolonging Life: Some Legal Considerations," in A. B. Downing, ed., *Euthanasia and the Right to Death: The Case for Voluntary Euthanasia* (London: Peter Owen, 1969), pp. 78–83. See also Otto Kirchheimer, "Criminal Omissions," *Harvard Law Review,* 55 (1942), pp. 617–636, on questions of causality and the relevance of duty.

3. Robertson, *op. cit.,* pp. 217–244.

4. See James M. Gustafson, "Mongolism, Parental Desires, and the Right to Life," *Perspectives in Biology and Medicine,* 16 (1973), pp. 529–557; Dennis J. Horan, "Euthanasia, Medical Treatment and the Mongoloid Child: Death as a Treatment of Choice?" *Baylor Law Review,* 27 (1975), pp. 76–85 (discussion of a case in a Catholic hospital in Illinois); David H. Smith, "On Letting Some Babies Die," *Hastings Center Studies,* 2 (1974), pp. 37–46.

5. John A. Robertson, "Discretionary Non-Treatment of Defective Newborns," in Aubrey Milunsky and George J. Annas, eds., *Genetics and the Law* (New York and London: Plenum Press, 1976), p. 460, cites a survey of Massachusetts pediatricians. An influential article favoring the withholding of necessary treatment in such cases is Anthony Shaw, "Dilemmas of 'Informed Consent' in Children," *New England Journal of Medicine,* 289 (1973), pp. 885–890.

6. See Robertson, "Involuntary Euthanasia of Defective Newborns," pp. 213–217; Robert M. Veatch, *Death, Dying, and the Biological Revolution: Our Last Quest for Responsibility* (New Haven and London: Yale University Press, 1976), pp. 134–136. We are ignoring here a number of distinctions in respect to the condition which are needed for medical accuracy but not relevant to our present purpose. See John Lorber, "Ethical Problems in the Management of Myelomeningocele and Hydrocephalus," *Journal of the Royal College of Physicians,* 10 (October 1975), pp. 47–52, for brief historical information about the phases of treatment and nontreatment and the results of each; see also G. Keys Smith and E. Durham Smith, "Selection for Treatment in Spina Bifida Cystica," *British Medical Journal,* 4 (1973), pp. 189–197, who present a great deal of information about outcomes and who evaluate the results more optimistically than Lorber.

7. See P. P. Rickham, "The Swing of the Pendulum: The Indications for Operating on Myelomeningoceles," *Medical Journal of Australia,* 2 (1976), pp. 743–746, for a frank expression concerning the motives for selection.

8. See Mary D. Ames and Luis Shut, "Results of Treatment of 171 Consecutive Myelomeningoceles—1962–1968," *Pediatrics,* 50 (1972), pp. 466–470; Smith and Smith, *op. cit.,* p. 189, exclude 27 percent; John Lorber, "Early Results of Selective Treatment of Spina Bifida Cystica," *British Medical Journal,* 4 (1973), pp. 201–204, excludes 68 percent; Rickham, *op. cit.,* pp. 743–744, who points out that the selection is based upon probabilities.

9. Lorber, "Ethical Problems," p. 55; Rickham, *op. cit.,* p. 744; John Lorber, "Selective Treatment of Myelomeningocele: To Treat or Not to Treat?" *Pediatrics,* 53 (1974), p. 308; John M. Freeman, "To Treat or Not to Treat: Ethical Dilemmas of Treating the Infant with a Myelomeningocele," *Clinical Neurosurgery,* 20 (1973), pp. 135–137.

10. Lorber, "Ethical Problems," pp. 54–55.

11. Smith and Smith, *op. cit.,* pp. 195–196; M. F. Robards, G. G. Thomas, and L. Rosenbloom, "Survival of Infants with Unoperated Myeloceles," *British Medical Journal,* 4 (1975), pp. 12–13.

12. John M. Freeman, "Is There a Right to Die—Quickly?" *Journal of Pediatrics,* 80 (1972), pp. 904–905; idem, "The Short-Sighted Treatment of Myelomeningocele: A Long-Term Case Report," *Pediatrics,* 53 (1974), pp. 311–313.

13. Freeman, "To Treat or Not to Treat," pp. 143–146; Raymond S. Duff and A. G. M. Campbell, "On Deciding the Care of Severely Handicapped or Dying Persons: With Particular Reference to Infants," *Pediatrics,* 57 (1976), pp. 487–493.

14. Lorber, "Ethical Problems," pp. 57–58, considers the distinction important; J. Engelbert Dunphy, "Annual Discourse—On Caring for the Patient with Cancer," *New England Journal of Medicine,* 295 (1976), p. 317, stresses it; Raymond S. Duff considers it a quibble in Beverly Kelsey, "An Interview with Dr. Raymond S. Duff: Which Infants Should Live? Who Should Decide?" *Hastings Center Report,* 5 (April 1975), p. 7.

15. Raymond S. Duff and A. G. M. Campbell, "Moral and Ethical Dilemmas in the Special-Care Nursery," *New England Journal of Medicine,* 289 (1973), p. 893; Charles L. Paxson, Jr., "To the Editor," *New England Journal of Medicine,* 290 (1974), p. 518.

16. See Geoffrey Hatcher and Eliot Slater, "Severely Malformed Children," *British Medical Journal,* 2 (1975), pp. 285–286.

17. Rickham, *op. cit.,* p. 746; D. A. De Lange, "Selection for Treatment of Patients with Spina Bifida Aperta," *Developmental Medicine and Child Neurology,* 16, supp. 32 (1974), pp. 27–30.

18. Rickham, *op. cit.*, p. 744; Duff and Campbell, "Moral and Ethical Dilemmas," pp. 890–894.

19. With respect to the elderly cf. Michael B. Miller, "Challenges of the Chronic Ill Aged," *Geriatrics*, 25 (1970), pp. 102–110; in general, Joseph Fletcher, "Ethics and Euthanasia," *American Journal of Nursing*, 73 (1973), pp. 670–675.

20. See "Editorial: A New Ethic for Medicine and Society," *California Medicine*, 113 (1970), pp. 67–68. Duff and Campbell, "Moral and Ethical Dilemmas," and Shaw, *op. cit.*, brought into the open the killing by omission of defective infants just nine months after the decision in Roe v. Wade. See also the sociological remarks of Diana Crane, "Decisions to Treat Critically Ill Patients: A Comparison of Social versus Medical Considerations," *MMFQ/ Health and Society*, 53 (1975), pp. 29–30. F. Raymond Marks, "The Defective Newborn: An Analytic Framework for a Policy Dialog," in Albert R. Jonsen and Michael J. Garland, eds., *Ethics of Intensive Newborn Care* (San Francisco and Berkeley: University of California, 1976), pp. 101–103 and 106, uses *Roe* and *Doe* to justify infanticide.

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

22. Especially Duff and Campbell, "On Deciding the Care of Severely Handicapped or Dying Persons," pp. 490–492; idem, "Moral and Ethical Dilemmas," pp. 890–894; in Kelsey, *op. cit.*, p. 7; "To the Editor," *New England Journal of Medicine*, 290 (1974), p. 520. The last contains the remarkable assertion: "The family more than anyone loves the patient and is most likely to know intimate details of the patient's personal and social life

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

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

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

25. F. Patrick McKegney and Paul Lange, "The Decision No Longer to Live on Chronic Hemodialysis," *American Journal of Psychiatry*, 128 (1971), pp. 267–274.

26. Superintendent of Belchertown State School v. Saikewicz, Mass. 370 N.E.2d 417 (1977); cf. Kathleen A. Corbett and Robert M. Raciti, "Witholding Life-Prolonging Medical Treatment from the Institutionalized Person—Who Decides?" *New England Journal on Prison Law*, 3 (1976), pp. 53–56, 65, and 73.

27. For example, in cases of anencephaly; see K. M. Laurence, "Abnormalities of the Central Nervous System," in A. P. Norman, ed., *Congenital Abnormalities in Infancy* (Oxford: Blackwell, 1963), pp. 22–24; for a medical judgment from an ethically conservative viewpoint see Edward J. Kilroy, "To Treat or Not to Treat," *Linacre Quarterly*, 43 (February 1976), p. 4.

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

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

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

31. A. R. Jonsen, R. H. Phibbs, W. H. Tooley, and M. J. Garland, "Critical Issues in Newborn Intensive Care: A Conference Report and Policy Proposal," *Pediatrics*, 55 (1975), p. 763.

32. Eliot Slater, "Death: The Biological Aspect," in A. B. Downing, ed., *op. cit.*, p. 59, argues for death as good for the species; idem, "Wanted—A New Basic Approach," *British Medical Journal*, 2 (1973), pp. 285–286, considers human aspects, but

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

33. H. Tristram Engelhardt, Jr., "Ethical Issues in Aiding the Death of Young Children," in Marvin Kohl, ed., *Beneficent Euthanasia* (Buffalo, N.Y.: Prometheus Books, 1975), pp. 183–184, does not consider infant a person and weights the judgment in favor of the parents.

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

35. See Robertson, "Involuntary Euthanasia of Defective Newborns," p. 242, note 179.

36. E.g., 29 U.S.C. § 794; 42 U.S.C. § 6705; cf. "Helping the Handicapped," *Time*, December 5, 1977, p. 16.

37. Cf. Robertson, "Involuntary Euthanasia of Defective Newborns," pp. 255–256.

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

39. Robertson, "Involuntary Euthanasia of Defective Newborns," p. 219, note 37.

40. See Patricia W. Hayden, David B. Shurtleff, and Arline B. Broy, "Custody of the Myelodysplastic Child: Implications for Selection for Early Treatment," *Pediatrics*, 53 (1974), pp. 253–256.

41. Anonymous, "Scarce Medical Resources," *Colorado Law Review*, 69 (1969), pp. 658–659.

42. *Ibid.*, p. 661; Paul Ramsey, *The Patient as Person: Explorations in Medical Ethics* (New Haven and London: Yale University Press, 1970), pp. 242–252; Harry S. Abram, "Survival by Machine: The Psychological Stress of Chronic Hemodialysis," *Psychiatry in Medicine*, 1 (1970), pp. 38–39; James F. Childress, "Who Shall Live When Not All Can Live?" *Soundings*, 53 (1970), pp. 344–346.

43. Anonymous, "Scarce Medical Resources," pp. 643–644.

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

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

46. Robertson, "Involuntary Euthanasia of Defective Newborns," p. 254; William B. Hobbins, "What Is a Day of Life Worth?" *National Magazine for Nurses*, 38 (April 1975), pp. 33–34.

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

48. *Ibid.*, p. 492; Herbert B. Eckstein, Geoffrey Hatcher, and Eliot Slater, "Severely Malformed Children," *British Medical Journal,* 2 (1975), pp. 286–289; Freeman, "To Treat or Not to Treat," pp. 140–146.

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

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

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

52. Jennett and Plum, *loc cit.;* on "vegetables" see Helen Creighton, "Choose Life or Let Die?" *Supervisor Nurse,* 6 (August 1975), pp. 12–14, including letter of Sondra Diamond, which appeared in *Newsweek,* December 3, 1973.

53. See Leslie S. Libow, "Pseudo-Senility: Acute and Reversible Organic Brain Syndromes," *Journal of the American Geriatrics Society,* 21 (1973), pp. 112–120.

54. McCormick, *op. cit.*, pp. 78–79; cf. Richard A. McCormick, "To Save or Let Die: The Dilemma of Modern Medicine," *Journal of the American Medical Association,* 229 (1974), pp. 174–175.

55. Matter of Quinlan, at 655, 657, 663, 667; cf. *In the Matter of Karen Quinlan,* 2 vols. (Washington, D.C.: University Publications of America, 1976), vol. 2, pp. 28, 219, and 225–226.

56. Matter of Quinlan, at 664.

57. *Ibid.*, at 663.

58. Angela Roddey Holder, *Medical Malpractice Law* (New York, London, Sydney, Toronto: John Wiley & Sons, 1975), pp. 40–64.

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

60. Lorber, "Ethical Problems," p. 52; idem, "Early Results of Selective Treatment," p. 202.

61. Cf. Virginia Henderson, "The Nature of Nursing," *American Journal of Nursing,* 64 (August 1964), p. 63.

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

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

64. Anonymous, "Scarce Medical Resources," pp. 688–689, stresses the need for priorities and the inevitability of an absolute limit; Fried, *op. cit.*, p. 31, makes the

point very clearly; Boyle, *op. cit.*, pp. 14–15, clarifies the ethical grounds of such a limit; Smith, *op. cit.*, p. 46, stresses the unavoidability of limits while rejecting the quality-of-life solution; Ramsey, *Patient as Person*, pp. 268–269, points out that even the most adequate medical resources are scarce in comparison with needs.

65. Ramsey, *Patient as Person*, pp. 240–252; Anonymous, "Scarce Medical Resources," p. 652; Smith, *op. cit.*, pp. 45–46; Kass, *op. cit.*, pp. 12 and 39–40.

66. Anonymous, "Scarce Medical Resources," pp. 662–663; Boyle, *op. cit.*, pp. 12–15; Gene Outka, "Social Justice and Equal Access to Health-Care," *Journal of Religious Ethics*, 2 (1974), pp. 21–25; Bernard Williams, "The Idea of Equality," in Joel Feinberg, ed., *Moral Concepts* (London and New York: Oxford University Press, 1970), p. 163.

67. See Robertson, "Involuntary Euthanasia of Defective Newborns," pp. 258–259.

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

69. Paulson, *op. cit.*, p. 133.

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

71. De Lange, *op. cit.*, p. 29.

72. H. Richard Beresford, "Who Should Decide to Withhold Care in Chronic Coma?" *Archives of Neurology* (Chicago), 33 (1976), p. 371.

73. Dunphy, *op. cit.*, p. 315.

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

75. Superintendent of Belchertown State School v. Saikewicz, Mass. 370 N.E.2d 417 (1977).

76. *Ibid.*, at 426.

77. *Ibid.*, at 431–432.

78. McKegney and Lange, *op. cit.*, pp. 269–272; Abram, *op. cit.*, pp. 42–49.

79. Miller, *op. cit.*, p. 104, provides good examples.

80. See Robertson, "Involuntary Euthanasia of Defective Newborns," pp. 222 and 232; James A. Baker, "Court Ordered Non-Emergency Care for Infants," *Cleveland-Marshall Law Review*, 18 (1969), pp. 298 and 306–307.

81. Cf. Robertson, "Involuntary Euthanasia of Defective Newborns," pp. 216 and 263.

82. Milton Viederman, "Saying 'No' to Hemodialysis," *Hastings Center Report*, 4 (September 1974), pp. 8–10; John E. Schowalter, Julian B. Ferholt, and Nancy M. Mann, "The Adolescent Patient's Decision to Die," *Pediatrics*, 51 (1973), pp. 97–103.

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

84. Melvin D. Levine, "Disconnection: The Clinician's View," *Hastings Center Report*, 6 (February 1976), pp. 11–12; Paulson, *op. cit.*, p. 136; against: Smith, *op. cit.*, p. 39; Daniel C. Maguire, *Death by Choice* (New York: Schocken Books, 1975), pp. 177–184; Stanley Hauerwas, "Selecting Children to Live or Die: An Ethical Analysis of the Debate between Dr. Lorber and Dr. Freeman on the Treatment of Meningomyelocele," in Dennis J. Horan and David Mall, eds., *Death, Dying and Euthanasia* (Washington, D.C.: University Publications of America, Inc., 1977), pp. 241–242. See Veatch, *op. cit.*, pp. 168–173, against the physician as competent to make moral decisions for patient who can make them; the argument suggests that also in the case of the noncompetent the problem ought to be viewed as finding a suitable person to make decisions *for the patient*, and there is no special reason to put a physician in this role.

85. Marks, *op. cit.*, in Jonsen and Garland, eds., *op. cit.*, p. 122, on the model of abortion; this approach is criticized by Robertson, "Involuntary Euthanasia of Defective Newborns," pp. 262–264.

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

87. See Corbett and Raciti, *op. cit.*, pp. 65–68.

88. *Ibid.*, pp. 69–73 and 79.

89. 1977 ARKANSAS GENERAL ASSEMBLY, act 879.

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

91. Matter of Quinlan, at 666.

92. *Ibid.*, at 662–664.

93. *Ibid.*, at 668–669.

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

95. Matter of Quinlan, at 657, 667.

96. *Ibid.*, at 672.

97. *In the Matter of Karen Quinlan,* vol. 1, pp. 486 and 504.

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

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

100. Cf. Veatch, *op. cit.*, pp. 137–143 and 173–176.

101. Matter of Quinlan, at 669.

102. Superintendent of Belchertown State School v. Saikewicz, at 432–435.

103. *Ibid.*, at 432.

104. William J. Curran, "Law-Medicine Notes: The Saikewicz Decision," *New England Journal of Medicine,* 298 (1978), p. 500.

105. Arnold S. Relman, "The Saikewicz Decision: Judges as Physicians," *New England Journal of Medicine,* 298 (1978), pp. 508–509.

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

107. See Alan Sussman, "Reporting Child Abuse: A Review of the Literature," *Family Law Quarterly,* 8 (1974), pp. 245–313; Lon B. Isaacson, "Child Abuse Report-

ing Statutes: The Case for Holding Physicians Civilly Liable for Failing to Report," *San Diego Law Review,* 12 (1975), pp. 743–777.

10: THE CONSTITUTION, LIFE, LIBERTY, AND JUSTICE

1. Louis Henkin, "Morals and the Constitution: The Sin of Obscenity," *Columbia Law Review,* 63 (1963), p. 408. Henkin makes clear (pp. 407–411) that he considers utilitarian reasons to have an exclusive claim on rationality.

2. Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680 (1961); note the holding at 495–496, 1683–1684, and the dictum in footnote 11.

3. U.S. v. Seeger, 380 U.S. 163, 85 S.Ct. 850 (1965) at 184, 863. The fact that the Court interprets a statute in this case does not make it less significant for constitutional law, since the alternative clearly would have been to find the statute unconstitutional; cf. Robert L. Rabin, "When Is a Religious Belief Religious: *United States* v. *Seeger* and the Scope of Free Exercise," *Cornell Law Quarterly,* 51 (1966), pp. 240–244.

4. Welsh v. U.S., 398 U.S. 333, 90 S.Ct. 1792 (1970), at 340, 1796.

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

6. Paul Ramsey, "Some Terms of Reference for the Abortion Debate," manuscript of a paper delivered at the Harvard-Kennedy Conference on Abortion (Washington, D.C.: September 6–8, 1967), p. 7.

7. John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe* v. *Wade,*" *Yale Law Journal,* 82 (1973), p. 947.

8. See James L. Buckley, "A Human Life Amendment," *Human Life Review,* 1 (Winter 1975), pp. 7–20; John T. Noonan, Jr., "Why a Constitutional Amendment?" *Human Life Review,* 1 (Winter 1975), pp. 26–43; Robert M. Byrn, "A Human Life Amendment: What Would It Mean?" *Human Life Review,* 1 (Spring 1975), pp. 50–76 and 102–103; David W. Louisell, "The Burdick Proposal: A Life-Support Amendment," *Human Life Review,* 1 (Fall 1975), pp. 9–16; Robert A. Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," *Human Life Review,* 2 (Fall 1976), pp. 30–108; Jesse Helms, "A Human Life Amendment," *Human Life Review,* 3 (Spring 1977), pp. 7–42.

9. Byrn, *op. cit.,* pp. 51–53; Helms, *op. cit.,* pp. 24–26.

10. Roe v. Wade, 410 U.S. 163, 93 S. Ct. 705 (1973) at 732.

11. See Dennis J. Horan, "Abortion and the Conscience Clause: Current Status," *Catholic Lawyer,* 20 (1974), pp. 297–302; Germain Grisez, *Abortion: The Myths, the Realities, and the Arguments* (New York and Cleveland: Corpus Books, 1970), pp. 32–33.

12. Davenport Hooker, "Early Human Fetal Behavior, with a Preliminary Note on Double Simultaneous Fetal Stimulation," in Davenport Hooker and Clarence C. Hare, eds., *Genetics and the Inheritance of Integrated Neurological and Psychiatric Patterns,* Research Publications: Association for Research in Nervous and Mental Disease, vol. 33 (Baltimore: Williams and Wilkins Co., 1959), pp. 49–67.

13. Peter G. Guthrie, "Proof of Live Birth in Prosecution for Killing Newborn Child," 65 A.L.R. 3d, pp. 413–428.

14. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831 (1976) at 2847–2848.

15. Hodgson v. Lawson, 542 F.2d 1350 (1976) at 1355.

16. *Ibid.*, at 1360; Planned Parenthood of Central Missouri v. Danforth, at 2855.

17. Joseph P. Witherspoon, "Statement," *Proposed Constitutional Amendments on Abortion: Hearings before the Civil and Constitutional Rights Committee of the Judiciary, House of Representatives,* 94th Cong., 2d Sess., part 1 (1976), pp. 17–20.

18. Cf. Grisez, *op. cit.*, pp. 410–423.

19. See Byrn, *op. cit.*, pp. 62–67. It seems to us that there can be no better protection for the unborn than to make clear in the Constitution that they are persons and to exclude any reference to them in laws respecting homicide, for in this case the latter will allow minimal exceptions.

20. Leo Pfeffer, *God, Caesar, and the Constitution: The Court as Referee of Church-State Confrontation* (Boston: Beacon Press, 1975), p. 96.

21. *Ibid.*, p. 97.

22. *Ibid.*, pp. 99–100.

23. *Ibid.*, p. 101.

24. *Ibid.*, p. 104.

25. *Ibid.*, p. 111.

26. Jane Finn, "State Limitations upon the Availability and Accessibility of Abortions after *Wade* and *Bolton*," *Kansas Law Review,* 25 (1976), pp. 87–107.

27. Beal v. Doe, 97 S.Ct. 2366 (1977), the Pennsylvania case, was not decided on constitutional grounds; Maher v. Roe, 97 S.Ct. 2376 (1977), the Connecticut case, was.

28. Poelker v. Doe, 97 S.Ct. 2391 (1977).

29. Cf. John T. Noonan, Jr., "A Half-Step Forward: The Justices Retreat on Abortion," *Human Life Review,* 3 (Fall 1977), pp. 11–18; Robert M. Byrn, "Which Way for Judicial Imperialism?" *Human Life Review,* 3 (Fall 1977), pp. 19–35.

30. Brennan, dissenting, in Beal v. Doe, at 2376.

31. Blackmun, joined by Brennan and Marshall, dissenting in Beal v. Doe, Maher v. Roe, and Poelker v. Doe, at 2398–2399.

32. Marshall, dissenting in Beal v. Doe, Maher v. Roe, and Poelker v. Doe, at 2395–2396.

33. See above chapter six, notes 88–94 and accompanying text. Those urging the institutionalization of abortion have argued for an extremely inclusive concept of state action, so that the acts of any private entity which receives public funding would be state action. See Jane Finn, *loc. cit.;* Harriet F. Pilpel and Dorothy E. Patton, "Abortion, Conscience and the Constitution: An Examination of Federal Institutional Conscience Clauses," *Columbia Human Rights Law Review,* 6 (1974–1975), pp. 279–305; and especially Marc D. Stern, "Abortion Conscience Clauses," *Columbia Journal of Law and Social Problems,* 11 (1975), pp. 571–627. Their point was to require abortion cooperation on the theory that anyone involved in state action could not abridge the woman's "right" to an abortion. Our point is that on their theory most abortions involve state action: the people at large are compelled to cooperate in what many regard as murder of unborn persons. This is an infringement on liberty to stand aloof.

34. See above, chapter six, note 63 and accompanying text. A widely used text for values clarification is Sidney B. Simon, Leland W. Howe, and Howard Kirschenbaum, *Values Clarification: A Handbook of Practical Strategies for Teachers and Students* (New York: Hart Publishing Co., 1972). An official state publication which exemplifies

the typical, consequentialist approach of the new value instruction is *Valuing: A Discussion Guide* (Albany, New York: The Board of Regents, 1976). A revealing work directed to teachers is Ronald G. Havelock, *The Change Agent's Guide to Innovation* (Englewood Cliffs, N.J.: Educational Technology Publications, 1973), portions of which were developed under Contract No. OEC-0-8-080603-4535 (010), Office of Education, United States Department of Health, Education and Welfare. For a statement concerning the impossibility of neutrality, the way in which the school teaches values even by trying to be neutral, and the new directions in value formation see Robert D. Barr, ed., *Values and Youth* (Washington, D.C.: National Council for the Social Sciences, 1971), pp. 21–24; this book as a whole also contains much illuminating material about the new values education. It would be an interesting but endless task to demonstrate precisely what is going on in the values courses by examining the books in use. An interesting example of the genre, taken from a book which on the whole is not a horrible example, is a little section "What are value theories?" in a high school textbook, Carl A. Elder, *Making Value Judgments: Decisions for Today* (Columbus, Ohio: Charles E. Merrill Publishing Co., 1972), pp. 16–17. Boards of education have considerable power; parents have objected unsuccessfully to secular humanist content in the public school curricula; see Kenneth A. Schulman, "Parental Control of Public School Curriculum," *Catholic Lawyer*, 21 (1975), pp. 197–210, concerning Williams v. Board of Education, 388 F.Supp. (S.D.W.Va. 1975), aff'd, Civil No. 75-1455 (4th Cir., Dec. 3, 1975). The values clarification approach in sex education is exemplified by Eleanor S. Morrison and Mila Underhill Price, *Values in Sexuality* (New York: Hart Publishing Co., 1974). In this field the Sex Information and Education Council of the U.S. (SIECUS), formed in 1964 and closely related to Planned Parenthood, has had great influence. Much revealing material exists: for example, a manual in which many of the leaders of the organization wrote specialized articles to form the educators: Carlfred B. Broderick and Jesse Bernard, eds., *The Individual, Sex, & Society: A SIECUS Handbook for Teachers and Counselors* (Baltimore and London: Johns Hopkins Press, 1969). Of special interest in this book is the chapter by Lester A. Kirkendall and Roger W. Libby, "Trends in Sex Education," pp. 5–21, where the predicament of the teacher who must deal pro or con with premarital intercourse is discussed, and the solution of letting students decide for themselves is suggested—one makes one's point more effectively if one does *not* overtly make it. Even the annotated bibliographies in this volume are revealing.

35. See Annotation, "Sectarianism in schools," 5 A.L.R. 866, 141 A.L.R. 1144.

36. Leo Pfeffer, "Uneasy Trinity: Church, State, and Constitution," *Civil Liberties Review*, 2 (1975), pp. 145–146; cf. idem, *God, Caesar, and the Constitution*, pp. 168–179.

37. See Annotation, "Sectarianism in schools," 5 A.L.R. 879–884; 141 A.L.R. 1148–1153; 68 Am. Jur. 2d 617–623.

38. Everson v. Board of Education of Ewing Tp., 330 U.S. 1, 67 S.Ct. 504 (1947).

39. McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461 (1948).

40. Pfeffer, *God, Caesar, and the Constitution*, p. 195.

41. Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261 (1962); School District of Abington Township v. Schempp, 374 U.S. 203, 83 S.Ct. 1560 (1963).

42. Jackson, dissenting in Everson v. Board of Education, at 23–24, 515.

43. Jackson, concurring in McCollum v. Board of Education, at 236, 477.

44. *Ibid.*, at 237–238, 478.

45. The briefs *amicus curiae* of the American Ethical Union and of the American Humanist Association in Abington School District v. Schempp are printed in Philip B.

Kurland and Gerhard Casper, eds., *Landmark Briefs and Arguments of the Supreme Court of the United States,* vol. 57 (Washington, D.C.: University Publications of America, Inc.), pp. 809–856. See pp. 813, 828–829, and 847 (p. 2 of the Ethical Union brief; pp. 1–2 and 20 of the Humanist Association brief).

46. *Ibid.,* pp. 815–816 (pp. 4–5 of the Ethical Union brief).

47. *Ibid.,* pp. 829–830 (pp. 2–3 of the Humanist Association brief).

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

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

50. Abington School District v. Schempp, at 225, 1573.

51. See James D. Smart, *The Cultural Subversion of the Biblical Faith* (Philadelphia: Westminster Press, 1977), pp. 21–29 and 100–104; Russell E. Richey and Donald G. Jones, eds., *American Civil Religion* (New York, Evanston, San Francisco, and London: Harper & Row, 1974); Perry C. Cotham, *Politics, Americanism, and Christianity* (Grand Rapids, Mich.: Baker Book House, 1976), esp. pp. 127–179.

52. Abington School District v. Schempp, Brennan concurring, at 241–242, 1582.

53. Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923.

54. Lemon v. Kurtzman, Earley v. DiCenso, Robinson v. DiCenso, 403 U.S. 602, 29 L. Ed. 2d 745 (1971), at 752–763.

55. *Ibid.,* Douglas concurring, at 766–772.

56. *Ibid.,* Brennan concurring, at 776–781.

57. *Ibid.,* White dissenting, at 784–789.

58. Cf. *ibid.,* Douglas concurring, at 766.

59. The argument that public funding of separate schools is constitutionally *required* has been made by Virgil C. Blum, S.J., *Freedom of Choice in Education,* rev. ed. (Glen Rock, N.J.: Paulist Press, 1963). Many careful legal analyses have shown that the Court is giving undue weight to and misinterpreting the Establishment Clause to the great detriment of Free Exercise for those who wish to avoid indoctrination in their local public school and Equal Protection for those who pay to support private schools in which their children are taught in ways which better comport with their religious beliefs than they would be taught in the public schools. On the interpretation of the Establishment Clause see Jesse H. Choper, "The Establishment Clause and Aid to

Parochial Schools," *California Law Review,* 56 (1968), pp. 260–341, especially pp. 283–295; Alan Schwarz, "No Imposition of Religion: The Establishment Clause Value," *Yale Law Journal,* 77 (1968), pp. 692–737, especially pp. 727–737. An excellent statement of the case that the Court is overemphasizing the Establishment Clause and disregarding the competing demands of the Free Exercise and Equal Protection clauses is Paul G. Kauper, "The Supreme Court and the Establishment Clause: Back to *Everson*?" *Case Western Reserve Law Review,* 25 (1974), pp. 107–129. It also has been argued effectively that the "tests" used by the Court are not reasonable interpretations of the constitutional requirements; in addition to the preceding articles see John E. Nowak, "The Supreme Court, the Religion Clauses, and the Nationalization of Education," *Northwestern University Law Review,* 70 (1976), pp. 883–909, especially pp. 900–909. Alexander Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper and Row, 1970), pp. 121–125 and 136–137, has suggested that the Court's decisions concerning schools have been intended to further social-policy objectives favored by the justices themselves; this view, if correct, would explain the straining of the Establishment clause evident in the decisions. The political background of the Court's early decisions is briefly summarized by Richard E. Morgan, *The Supreme Court and Religion* (New York and London: The Free Press, 1972), pp. 81–90; this summary makes clear that the post-World War II decisions were a calculated blocking of public aid to parochial schools. Consistency with any set of principles is hard to find in nearly contemporary decisions; this point is made with regard to some of the more recent decisions by James L. Underwood, "Permissible Entanglement under the Establishment Clause," *Emory Law Journal,* 25 (1976), pp. 17–62.

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

61. A clear and extensive argument for the proposition that Free Exercise requires a general recognition of the right of conscientious objection is articulated by J. Morris Clark, "Guidelines for the Free Exercise Clause," *Harvard Law Review,* 83 (1969), pp. 327–365.

11: THEORIES OF ETHICS

1. Three introductions to twentieth-century ethics, each from a somewhat different viewpoint and valuable for its special approach, are W. D. Hudson, *Modern Moral Philosophy* (Garden City, New York: Doubleday & Co., 1970), G. J. Warnock, *Contemporary Moral Philosophy* (London, Melbourne, Toronto, New York: Macmillan, St. Martin's Press, 1967); Ronald Lawler, *Philosophical Analysis and Ethics* (Milwaukee: Bruce Publishing Co., 1968).

2. For an exposition and critique of Kant's ethics by a sympathetic scholar see Lewis White Beck, *A Commentary on Kant's Critique of Practical Reason* (Chicago: University of Chicago Press, 1960), esp. pp. 176–208; for the present authors' critique of Kant's attempted compatibilism see Joseph M. Boyle, Jr., Germain Grisez, and Olaf Tollefsen, *Free Choice: A Self-Referential Argument* (Notre Dame and London: University of Notre Dame Press, 1976), pp. 110–121.

3. Thomas Aquinas, *Summa theologiae*, 1–2, q. 94, a. 2; cf. Germain Grisez, "The First Principle of Practical Reason: A Commentary on the *Summa theologiae*, 1–2, Question 94, Article 2," *Natural Law Forum*, 10 (1965), pp. 168–201.

4. For a classification of many forms of utilitarianism see William K. Frankena, *Ethics*, 2nd ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1973), pp. 34–39. David Lyons, *Forms and Limits of Utilitarianism* (London: Oxford University Press, 1965), argues at length that all the more interesting forms of utilitarianism amount to the same thing.

5. See John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971), pp. 22–27.

6. The critique of consequentialism is developed more fully in certain respects in Germain Grisez, "Against Consequentialism," *American Journal of Jurisprudence*, 23 (1978).

7. See Joseph M. Boyle, Jr., "Aquinas and Prescriptive Ethics," *Proceedings of the American Catholic Philosophical Association*, 49 (1975), pp. 82–95.

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

9. For an interesting thought experiment against any form of hedonism see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 42–45.

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

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

12. Fletcher, *op. cit.*, pp. 151–152.

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

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

12: MORAL RESPONSIBILITIES TOWARD HUMAN LIFE

1. Germain Grisez, "Toward a Consistent Natural-Law Ethics of Killing," *The American Journal of Jurisprudence*, 15 (1970), pp. 64–96; Joseph M. Boyle, Jr., "Double-effect and a Certain Type of Embryotomy," *Irish Theological Quarterly*, 44 (1977), pp. 303–318; Joseph M. Boyle, Jr., "Toward Understanding the Principle of Double Effect," forthcoming.

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

3. Germain Grisez, *Abortion: The Myths, the Realities, and the Arguments* (New York and Cleveland: Corpus Books, 1970), pp. 273–346; Boyle, "Double-effect and a Certain Type of Embryotomy."

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

5. See the remarks of Harriet Pilpel in a telecast "Firing Line," broadcast by Public Broadcasting System the week of Nov. 4, 1977, published in Appendix C, *Human Life Review*, 4 (Winter 1978), p. 98; Roe v. Wade, 410 U.S. 149, 93 S.Ct. 725 (1973), especially note 44.

6. "Editorial: A New Ethic for Medicine and Society," *California Medicine,* 113 (September 1970), pp. 67–68.

7. Judith Blake, "The Supreme Court's Abortion Decisions and Public Opinion in the United States," *Human Life Review,* 4 (Winter 1978), pp. 72–73.

8. See John Connery, *Abortion: The Development of the Roman Catholic Perspective* (Chicago: Loyola University Press, 1977), pp. 284–303.

9. Boyle, "Double-effect and a Certain Type of Embryotomy."

10. Paul Ramsey, "Abortion: A Review Article," *The Thomist,* 37 (1973), pp. 212–218.

11. Grisez, *Abortion,* p. 343.

12. Ramsey, *op. cit.,* pp. 224–226.

13. See David Daube, "The Linguistics of Suicide," *Philosophy and Public Affairs,* 1 (1971–1972), pp. 433–437.

14. See Edwin S. Shneidman, Norman L. Farberow, and Robert E. Litman, *The Psychology of Suicide* (New York: 1970), pp. 3–93, 227–304, and *passim.*

15. Ludwig Wittgenstein, *Notebooks, 1914–1916,* trans. G.E.M. Anscombe (New York and Evanston: 1961), p. 91e.

16. See Gerald Hughes, "Killing and Letting Die," *The Month,* 236 (1975), pp. 43–44.

17. See James Rachels, "Active and Passive Euthanasia," *New England Journal of Medicine,* 292 (1975), pp. 78–80; for a critique: Joseph M. Boyle, Jr., "On Killing and Letting Die," *The New Scholasticism,* 51 (1977), pp. 433–452.

18. See Michael Tooley, "A Defense of Abortion and Infanticide," in Joel Feinberg, ed., *The Problem of Abortion* (Belmont, California: Wadsworth Publishing Co., 1973), pp. 84–85; see Boyle, "On Killing and Letting Die," for discussion of this and other relevant literature.

19. Pius XII, "The Prolongation of Life," *The Pope Speaks,* 4 (1957–1958), pp. 395–396 (*AAS,* 49 [1957], pp. 1027–1033 at 1030).

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