1988

Suicidal Rights

Michael S. Ariens
St. Mary's University School of Law, mariens@stmarytx.edu

SUICIDAL RIGHTS

*Michael Ariens**

It is altogether unlawful to kill oneself, for three reasons. First, because everything naturally loves itself. . . . Wherefore suicide is contrary to the inclination of nature, and to charity whereby every man should love himself. Hence suicide is always a mortal sin, as being contrary to the natural law and to charity.

Secondly, because every part, as such, belongs to the whole. Now every man is part of the community, and so, as such, he belongs to the community. Hence by killing himself he injures the community, as the Philosopher declares.

Thirdly, because life is God's gift to man, and is subject to His power, Who kills and makes to live. Hence whoever takes his own life, sins against God. . . .[1]

Has not everyone, of consequence, the free disposal of his own life? And may he not lawfully employ that power with which nature has endowed him? In order to destroy the evidence of this conclusion, we must show a reason why this particular case is excepted; is it because human life is of so great importance, that 'tis a presumption for human prudence to dispose of it? But the life of a man is of no greater importance to the universe than that of an oyster.

A man who retires from life does no harm to society; he only ceases to do good; which, if it is an injury, is of the lowest kind. All our obligations to do good to society seem to imply something reciprocal. I receive the benefits of society and therefore ought to promote its interests, but when I withdraw myself altogether from society, can I be bound any longer?[2]

---

* Assistant Professor, St. Mary's University School of Law, San Antonio, Texas. B.A. 1979, St. Norbert College; J.D. 1982, Marquette University; LL.M. 1987, Harvard University. My thanks to my colleagues, Vicki Mather and Mark Cochran, for their thorough readings and suggestions.

1. ST. THOMAS AQUINAS, II SUMMA THEOLOGICA Q64 art. 5 (Benzinger Bros., Inc. 1947)

2. Hume, *On Suicide, reprinted in* ETHICAL ISSUES IN DEATH AND DYING 107, 109 (T. Beauchamp & S. Perlin eds. 1986). An interesting view of Hume is found in O. SACKS, THE MAN WHO MISTOOK HIS WIFE FOR A HAT AND OTHER CLINICAL TALES 119 (1985), in which the author, a neurologist, discussed the case of a person suffering from Tourett's Syndrome, and said, "[F]or Hume, personal identity is a fiction — we do not exist, we are but a consecution of sensations, or perceptions." *Id.* at 119.

I. INTRODUCTION

A paradox of liberal political thought in the United States may be best expressed by those not of it. The "debate" between Aquinas and Hume informs the terrain to be surveyed in appraising the ethical and moral precepts concerning a "right" to commit suicide.[3] In a markedly legalistic society like the United States, it also aids in organizing the legal responses to suicidal acts and attempts. Like most ethical issues presently confronting the people of the United States, a solution is sought by resort to courts of law.[4]

This legal debate requires a critical review of the relationship between the individual and the community in present liberal political thought. Modern liberal political thought postulates that the government or community must be neutral about what is good for both members of the community and the community itself.[5] It also postulates that there exists a sphere of action which affects solely an individual. That is, there exists a boundary in which certain actions will harm only oneself rather than others.[6] The neutrality postulate and the harm of self/harm to others dichotomy are best explicated by John Stuart Mill in his essay *On Liberty*:

---

3. One example which indicates that the structure of the debate remains remarkably similar is found in Symposium, *Aiding a Suicide Attempt*, 4 CRIM. JUST. ETHICS 72, 72-79 (1985). *Compare* Finnis, *Legal Enforcement of Duties to Oneself: Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433 (1987) *with* Richards, *Kantian Ethics and the Harm Principle: A Reply to John Finnis*, 87 COLUM. L. REV. 457 (1987).

4. *See* Handler, *Social Dilemmas, Judicial [Ir]resolutions*, 40 RUTGERS L. REV. 1 (1987) (discussing, among other social dilemmas, what New Jersey Supreme Court Justice Handler calls "right to die" cases).

5. Whether that particular kind of political thought called liberalism requires a neutral conception of the good life is deeply disputed. *Compare* R. Dworkin, *Liberalism, reprinted in* A MATTER OF PRINCIPLE 191-92 (1986); B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10-12 (1980); J. RAWLS, A THEORY OF JUSTICE 446-52 (1971) (liberal theorists arguing that liberalism requires a neutral conception of the good life) *with* Teachout, *The Burden of the Liberal Song*, 62 IND. L.J. 1283 (1987); West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985); Shiffrin, *Liberalism, Radicalism and Legal Scholarship*, 30 UCLA L. REV. 1103 (1984) (liberal scholars arguing that liberalism, properly understood, does not require that the state have a neutral conception of the good life). Critics have also attacked liberalism for its purported neutral conception of the good life. *See* A. MACINTYRE, AFTER VIRTUE (1984); R. UNGER, KNOWLEDGE AND POLITICS (1976); Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

It is my view that, regardless of the answer to this question, there is an understanding of liberalism in constitutional law adjudication as atomistic individualism. This is in contrast to the communitarian vision found in areas outside of constitutional law.

6. Of course, in this post-realist age, the idea has taken a beating from critics. *See, e.g.*, Mensch, *The History of Mainstream Legal Thought, reprinted in* THE POLITICS OF LAW

> That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinion of others, to do so would be wise or even right.[7]

Mill's separation and categorization of the individual and the community has animated much of constitutional law discourse over the past twenty-five years. In fact, the dichotomy has become an archetype for structuring a number of important constitutional law decisions. The explicit adoption of a constitutional right of privacy in *Griswold v. Connecticut*[8] and its expansion in *Roe v. Wade*[9] is an affirmation of the Millian paradigm in constitutional law.[10] In tort law, criminal law and other nonconstitutional

---

(D. Kairys ed. 1982); Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468 (1984).

An excellent essay concerning the need for some boundaries in constitutional law is Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006 (1987). *Cf.* Spann, *Secret Rights*, 71 MINN. L. REV. 669 (1987).

7. J. MILL, ON LIBERTY 15 (ch. 1, para. 9) (M. Fawcett ed. 1971). Two recent cases which quote this passage in support of a right to choose to die are Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 430, 497 N.E.2d 626, 633 (1986) and *In re* Caulk, 125 N.H. 226, 236, 480 A.2d 93, 100 (1984) (Douglas, J., dissenting).

In a recent article by Thomas Morawetz, *Persons Without History: Liberal Theory and Human Experience*, 66 B.U. L. REV. 1013 (1986), the author suggests the liberalism of John Stuart Mill is animated by political skepticism, and the work of more recent liberal theorists such as Ronald Dworkin and John Rawls as based on moral skepticism. *Id.* at 1023. I do not believe that this dichotomy has animated the use of Mill in recent cases. Instead, Mill provides a liberal paradigm which courts use to justify a moral *and* political skepticism.

8. 381 U.S. 479 (1965).

9. 410 U.S. 113 (1973).

10. I thus disagree with the conservative "spin" placed on these cases by Professor Thomas Grey. *See* Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROB. 83 (Summer 1980). The author concluded as follows:

> To summarize, the Court has consistently protected traditional familial institutions, bonds and authority against the centrifugal forces of an anomic modern society. Where less traditional values have been directly protected, conspicuously in the cases involving contraception and abortion, the decisions reflect not any Millian glorification of diverse individuality, but the stability-centered concerns of moderate conservative family and population policy.
>
> The alternative is to see the Court as engaged in the covert promotion of Mill's principle. The failure to carry the principle through, then, must represent a prudential guess that to place the protection of the Constitution behind what most people still reject as unnatural sexual practices would too much strain the Court's limited stock of public good will. Such a theory might indeed explain *Doe v. Commonwealth's Attorney*. Perhaps the Court has been surprised by the depth and persistence of the opposition to the abortion decisions, and the swing justices were

law areas, however, this model is being replaced by a more communitarian model.[11]

The use of Millian thought in constitutional law is an attempt to alleviate the tension[12] between claims of right by an individual and claims of community interest by the state. This article will demonstrate that such an attempt (1) is in conflict with legal thought outside of constitutional law, and (2) cannot succeed in structuring a solution to a debate about a right to commit suicide, but can only result in exacerbating the tensions found in American liberalism.

The Millian paradigm cannot structure a "solution" for several reasons. First, this model treats the individual as an impersonal "rights-holder," whose existence transcends an historical community. It views the community as both unnecessary and unimportant.[13] A human being is replaced by an impersonal legal fiction.[14] The Millian archetype is

---

not ready to risk a foray into the explosive issue of gay rights. But if Mill's principle is in the wings, why have no hints of it appeared in opinions? At least why has the Court not taken some first step, perhaps striking down one of the absurd "crime against nature" statutes on vagueness grounds — a decision that would invite little public wrath outside the lunatic fringe?

Id. at 90 (citation omitted). One reason might be that this principle can more readily be effectuated by state courts, which decide thousands more cases each year than the Supreme Court of the United States. Another reason may be that the Justices themselves are divided over the value of the Millian principle.

11. *See infra* notes 27-195.

12. It has been suggested by several authors that liberalism, at least as developed in the United States, both creates and requires a tension between the individual and the community. *See* Macneil, *Bureaucracy, Liberalism, and Community —American Style*, 79 NW. U.L. REV. 900, 901 n.5 (1984-85); Presser, *Some Realism About Orphism or The Critical Legal Studies Movement and the New Great Chain of Being: An English Legal Academic's Guide to the Current State of American Law*, 70 NW. U.L. REV. 869, 875-76 n.33 (1984-85). Professor Duncan Kennedy calls this tension an irresolvable fundamental contradiction. Kennedy, *The Structure of Blackstone's Commentaries*, 29 BUFFALO L. REV. 205, 211 (1979).

13. *See* Morawetz, *supra* note 7; Fowler, *God and Mammon and Democratic Capitalism*, 62 TEX. L. REV. 949 (1984).

14. *See* J. NOONAN, PERSONS AND MASKS OF THE LAW (1976), in which the author argues that law and lawyers use legal masks to disguise the human beings who become enmeshed in legal disputes. *See also* J. NOONAN, THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS (1977); R. COVER, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS (1975); McFeely, *Were These People Property?* New York Times, Jan. 18, 1987 (Book Review) at 9-10 (review of H. JONES, MUTINY ON THE AMISTAD (1987)) for works discussing the treatment of enslaved persons without regard to their humanness.

One example of treating persons as legal personalities in discussing the "jurisprudence of life and death" is found in G. FLETCHER, RETHINKING CRIMINAL LAW (1978).

It is not entirely clear whether we should use the term "person," "human being," or "live" person to state what it is to be one of us. The word "alive" is not apt, for the

premised on a vision that we, as individuals, are who we are in spite of others, not because of others.

Second, rights discourse is indeterminate.[15] It is indeterminate because one can always appeal to a broader or narrower level of generality in order to secure or refuse to protect any particular right.[16] While all rights need not be deconstructed so as to better protect the powerless and create a better community, discourse only in terms of rights is destructive of the community and the powerless. It leads to an atomistic, emotivist individualism, and limits any broader vision of human beings.

Third, the community is viewed not as a social entity which declares substantive goals and ideals, and acts to further those goals and ideals, but as a legal, ahistorical and instrumental entity which may wield power only as a neutral (as between two rights-asserting individuals) rules-enforcer. This view denies the community the chance to state a moral vision, and in the particular case of suicide, an opportunity to foster an ideal of hope and reconciliation for both the community and all of its members. This ideal is expressed both necessarily and limited through the unwieldy source of law.[17] Indeed, it may require the community to facilitate individual choices otherwise disapproved of or condemned.[18]

---

fetus is unquestionably alive from the moment of conception. What is at stake is not life, but the acquisition of a legal personality."

Id. at 373.

15. "Rights talk" has been attacked as reifying real experience, *see* Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364 (1984), and as indeterminate, *see* Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984) and defended as a discourse which enables a community to continually construct itself, *see* Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1876 (1987) and as a commitment by a community, *see* Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 424 (1987).

16. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986). Justice White's opinion is based on reading the "right" as a specific right to commit sodomy. Justice Blackmun's dissent is based on reading the "right" as an abstract right to be let alone.

17. *See* Wellington, *Common Law Rules and Constitutional Double-Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 280-84 (1973). *See also* Marcin, *Justice and Love*, 33 CATH. U. L. REV. 363 (1984). This can also be seen in a review of the common-law limitations of a duty to rescue. *See* Jackson v. City of Joliet, 715 F.2d 1200, 1201-02 (7th Cir. 1983) (failure of police officer to determine whether any persons were in a burning car or to call ambulance did not state a claim for relief under section 1 of the Civil Rights Act of 1871, in part because police officer under no common law duty to rescue). *Cf* Prentice, *Expanding the Duty to Rescue*, 19 SUFFOLK U.L. REV. 15 (1985); Note, *The Role of Law in Suicide Prevention: Beyond Civil Commitment — Bystander Duty to Report Suicide Threats*, 39 STAN. L. REV. 929 (1987) (arguing in favor of imposing civil liability for failure of bystander to report threat of suicide).

18. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175 (1982), believes this should be considered a shift from liberty to autonomy:

The turn from liberty to autonomy reflects a shift from higher law views that

Fourth, a vision of an individual autonomous from a community has already been rejected by courts and legislatures outside of constitutional law when the issue is suicide.[19] This vision was rejected because it could not comport with a view that human beings have a history and are part of a cultural community. Another vision of the individual and the community, one in which the self and the community are created and changed by each other in an attempt to reconcile one with the other, exists in nonconstitutional legal responses to suicide. Courts and commentators alike have ignored this latter view in discussing a constitutionalized right to commit suicide.[20] These two visions are incompatible.[21]

No case has explicitly adopted a constitutionally protected right to commit suicide.[22] In fact, one of the asserted state interests in so-called "right to die" cases[23] is the prevention of suicide.[24]

---

justified the liberal state as the means of achieving a specific substantive goal, securing certain natural rights, to more relativistic stances that defend the state because it allows for the pursuit of self-chosen ends, now held to be the only ends that are legitimate. Whereas the liberty of the early liberals was understood to be confined to activities guided by human reason, modern theorists question the existence of any self-evident, rational limits on personal choice. Autonomy, therefore, often connotes significantly broader notions of what conduct must be not only permitted but protected.

Id. at 177. *Cf.* Bowers v. Hardwick, 478 U.S. 186 (1986) (no fundamental right to engage in sodomy). *See also* A. MACINTYRE, *supra* note 5:

The specifically modern self, the self that I have called emotivist, finds no limits set to that on which it may pass judgment for such limits could only derive from rational criteria for evaluation and, as we have seen, the emotivist self lacks any such criteria. Everything may be criticized from whatever standpoint the self has adopted, including the self's choice of standpoint to adopt.

Id. at 31. *See* Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229. In my view, acceptance of the Mill paradigm requires the community to facilitate requests to commit suicide.

19. *See infra* notes 27-195.

20. *See, e.g., supra* notes 7 & 10.

21. It is difficult to understand why articles and cases concerning a right to privacy, or a right to die or commit suicide have not contrasted developments in torts, criminal law, evidence and other areas with constitutional developments.

22. Zant v. Prevatte, 248 Ga. 832, 286 S.E.2d 715 (1982), is a case in which Prevatte, a prisoner who had no dependents and had once been sentenced to die, was permitted to refuse medical treatment even though he was starving himself to death. *Id.* at 833-34, 286 S.E.2d at 716. The state's request to feed Prevatte intravenously was denied. *Id.* at 834, 286 S.E.2d at 717. *See also* Boston Globe, Feb. 7, 1987, at 9, col. 5 (reporting death of a quadriplegic man who starved to death in hospital after Colorado court ordered hospital to remove feeding tubes). A similar case is Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986), in which the California Court of Appeal issued an order requiring the hospital to stop feeding Elizabeth Bouvia and refused to issue a stay of its order.

23. *See infra* notes 196-232 and accompanying text.

24. The state interest in preventing suicide was first explicated in Superintendent of

It is clear, however, that courts have not concluded that there is no constitutional right to commit suicide. Instead, courts are simply defining suicide in an increasingly narrow sense,[25] and are narrowing the level of generality "right to die" cases to encompass a specific right to commit suicide. There is also an attempt to use the Mill paradigm without acknowledging it or recognizing its consequences. Commentators have taken the Mill paradigm to advance a right to commit suicide.[26] Acceptance of this model can lead to no other result.

The next section concerns nonconstitutional legal responses to suicide in American history. These responses recognized and rejected the Mill paradigm in favor of an ideal of reconciliation and hope.

II. LEGAL RESPONSE TO SUICIDE

A. Criminal Law

Historically, the first and only considered response to suicide was to criminalize the act.[27] This response appeared in the English case of *Hales v. Petit*,[28] a case in which Lady Margaret Hales, widow of Sir James Hales, who had drowned himself, sued Cyriack Petit on a writ of trespass to lands leased jointly to her and Sir James for a term of years.[29] In dismissing the writ, the court held that Sir James' suicide was murder[30] and that the term

---

Belchertown State School v. Saikewicz, 373 Mass. 728, 740-43, 370 N.E.2d 417, 424-26 (1977). It has been adopted by nearly all courts faced with right to die cases. *See, e.g., In re* Conroy, 98 N.J. 321, 348-49, 486 A.2d 1209, 1233 (1985).

25. *See, e.g., Zant*, 248 Ga. at 833-34, 286 S.E.2d at 716-17.

26. Richards, *Constitutional Privacy, The Right to Die and the Meaning of Life: A Moral Analysis*, 22 WM. & MARY L. REV. 327 (1981) (asserting as primary any rational, individual choice as against any community interest); *see also* Engelhardt & Malloy, *Suicide and Assisting Suicide: A Critique of Legal Sanctions*, 36 SW. L.J. 1003 (1982). *See generally* D. RICHARDS, TOLERATION AND THE CONSTITUTION (1986); D. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION (1982).

27. *Compare* Marzen, O'Dowd, Crone & Balch, *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 63-108 (1985) *with* Burgess-Jackson, *The Legal Status of Suicide in Early America: A Comparison with the English Experience*, 29 WAYNE L. REV. 57 (1982) for a more intensive study of the history of the criminalization of suicide in early America. For a tracing of the legal response to suicide from Roman law to English common law to American law, *see* Mikell, *Is Suicide Murder?*, 3 COLUM. L. REV. 379 (1903), and G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW ch. 7 (1957). *See also* Comment, *Criminal Aspects of Suicide in the United States*, 7 N.C. CENT. L.J. 156 (1975).

28. 1 Plowden 253, 75 Eng. Rep. 387 (K.B. 1562).

29. *Id.* at 257-58, 75 Eng. Rep. at 394.

30. *Id.* at 261, 75 Eng. Rep. at 399-400.

of years was forfeited to the King.[31] Utilizing Aquinas, the court found suicide unlawful because

> it is an offence against nature, against God, and against the King. Against nature, because it is contrary to the rules of self-preservation, which is the principle of nature, for every thing living does by instinct of nature defend itself from destruction, and then to destroy one's self is contrary to nature, and a thing most horrible. Against God, in that it is a breach of His commandment, *thou shalt not kill*; and to kill himself, by which act he kills in presumption his own soul, is a greater offence than to kill another. Against the King in that hereby he has lost a subject, and [as Brown termed it] he being the head has lost one of his mystical members. Also he has offended the King, in giving such an example to his subjects, and it belongs to the King, who has the government of the people, to take care that no evil example be given them, and an evil example is an offence against him.[32]

The court condemned the act, but even at this point in history, it did not wholly condemn the actor. His soul was presumed lost, but not concluded lost. The court rendered its decision to deter others from committing suicide.

Blackstone, whose Commentaries[33] were the influential source for American lawyers and judges in defining the common law from the late eighteenth century,[34] used *Hales* as an example of the punishments available against one who committed suicide. Blackstone agreed with the conclusion that suicide was a form of self-murder.[35]

At least two colonies passed laws criminalizing suicide, and imposed punishments against the person (and family) who committed suicide. In May 1647, the General Court for the Colony and Province of Rhode Island passed the following law:

> Self-murder is by all agreed to be the most unnatural, and it is by this present Assembly declared to be that, wherein he that doth it, kills himself out of a premeditated hatred against his own life or other humor: his death being presented and thus found upon record by the coroner, his goods and chattels are the king's custom, but not his debts nor lands; but in case he be an infant, a lunatic, mad or disturbed man, he forfeits nothing.[36]

---

31. *Id.* at 263, 75 Eng. Rep. at 403-04.

32. *Id.* at 261, 75 Eng. Rep. at 400 (emphasis in original).

33. *See* 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 189-90 (1st American ed. 1771).

34. G. GILMORE, THE AGES OF AMERICAN LAW 5 & n.4 (1977); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 112 (1985); G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 35 (1970).

35. W. BLACKSTONE, *supra* note 33, at 189.

36. *Acts and Orders of the First General Assembly for the Colony and Province of*

In October 1660, the General Court for the Massachusetts Bay Colony enacted a law punishing[37] one who had committed suicide:

> This Court considering how far Satan doth prevail upon several persons within this Jurisdiction, to make away themselves, judgeth that God calls them to bear testimony against such wicked and unnatural practices, that others may be deterred therefrom;
>
> Do therefore, Order, that from henceforth, if any person, Inhabitant or Stranger, shall at any time be found by any Jury to lay violent hands on themselves, or be willfully guilty of their own Death, every such person shall be denied the priviledge [sic] of being Buried in the Common Burying place of Christians, but shall be Buried in some Common High-way where the Select-men of the Town where such person did inhabit shall appoint, and a Cart-load of Stones laid upon the Grave as a Brand of Infamy and as a warning to others to beware of the like Damnable practices.[38]

Some records also indicate that Virginia utilized punishments of forfeiture and ignominious burial from the mid-seventeenth century until some time early in the eighteenth century.[39]

These laws imposed a severe punishment for suicide. It was already understood, however, that these laws permitted an excuse. In vainly attempting to use law to protect the members of the community from the act and consequences of suicide, the laws never failed to note the possibility of reconciliation of the person and the community, if the person could be said not to have known what he was doing when he committed suicide.

Providence (1647), *reprinted in* THE EARLIEST ACTS AND LAWS OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 19 (J. Cushing ed. 1977).

37. Forfeiture was never an authorized punishment for an act of suicide.

> It is also Ordered, and by this Court Declared, that all our Lands and Heritages shall be free from Fines and Licenses, upon Alienations, and from all Hariots, Wardships, Liveries, Primerseizins, year, day and waste, Escheats and forfeitures upon the Death of Parents or Ancestors, natural, unnatural, casual or judicial and that forever.

The General Laws and Liberties of the Massachusetts Bay Colony (E. Rawson ed. 1672), *reprinted in* THE COLONIAL LAWS OF MASSACHUSETTS 88 (W. Whitmore ed. 1887).

38. *Id.* at 137. *See also* 4 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND PART I 432 (N. Shurtleff ed. 1854). This law apparently fell into disuse in the early decades of the 18th century. An instance of the implementation of the Act in 1707, with burial near rather under a highway, is found in Noble, *A Glance at Suicide as Dealt With in the Colony and in the Province of the Massachusetts Bay*, 16 PROC. MASS. HIST. SOC'Y 521, 521-23 (2d ser. 1902). In 1723 or 1724, John Valentine hanged himself. The coroner's jury found he was *non compos mentis*, and so he was not denied a Christian burial. His death led ministers to preach Increase Mather's sermon against suicide, and the Reverend Mr. Myles refused to read the office of burial and two bearers declined to serve at the funeral. Davis, *Valentine — Vans Currency Pamphlets*, 43 PROC. MASS. HIST. SOC'Y 428, 440-41 (3d ser. 1910).

39. A. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 198-99 nn. 15-16 (1930).

In 1701 the colony of Pennsylvania abolished forfeiture as a punishment for suicide.[40] Blackstone notwithstanding, most colonies (and later, states) followed Pennsylvania and abolished forfeiture and all other punishments for suicide by the end of the eighteenth century.[41] The movement in America to abolish English common law punishments for suicide has been argued as evidence that persons had a right or liberty to commit suicide.[42] A review of later criminal law cases indicates that this is not correct.

The three most important criminal law cases concerning suicide in the nineteenth century were decided in Massachusetts. In *Commonwealth v. Bowen*,[43] Chief Justice Parker instructed a jury that the defendant's counseling another prisoner named Jewett to hang himself before being hanged by the Commonwealth subjected him to a charge of murder as principal, "considering the similarity between the nature of suicide and the murder of another. . . ."[44]

In *Commonwealth v. Dennis*,[45] the court held that attempted suicide was not an indictable offense in Massachusetts.[46] Its reasoning is instructive:

> The end of punishment is the prevention of crime, and it may have been thought of at least impolitic to punish an attempt to do that which is itself dispunishable, when the direct effect of the penalty must be to increase the secrecy and efficiency of the means employed to accomplish the end proposed.[47]

The third Massachusetts case, *Commonwealth v. Mink*,[48] concerned

---

40. *The Charter of Privileges to the Province and Counties [of Pennsylvania] Section 8* (1701), *reprinted in* THE EARLIEST PRINTED LAWS OF PENNSYLVANIA 1681-1713 209 (J. Cushing ed. 1978).

41. *See* Marzen, O'Dowd, Crone & Balch, *supra* note 27, at 67-68 & nn.454-60. *See also supra* note 37.

42. Burgess-Jackson, *supra* note 27, at 84.

43. 13 Mass. 356 (1816).

44. *Id.* at 359. Bowen was apparently followed in Massachusetts even after the repeal of the Act of 1660 and the Legislature's omission of making a felony an attempted suicide. Commonwealth v. Mink, 123 Mass. 422, 429 (1877) (*citing* the unreported case of Commonwealth v. Pratt (Pa. 1862)).

45. 105 Mass. 162 (1870).

46. *Id.*

47. *Id.* at 162-63. *Accord* May v. Pennell, 101 Me. 516, 64 A. 885 (1906).

48. 123 Mass. 422 (1877). *Cf.* Commonwealth v. Trefethen, 157 Mass. 180, 31 N.E. 961 (1892) (evidence that alleged victim intended to commit suicide held admissible in homicide action). A contrary result was reached in Greenacre v. Filby, 276 Ill. 294, 114 N.E. 536 (1916) (civil action for wrongful death of plaintiff's husband against a liquor dealers).

the legality of a verdict of criminal homicide against Lucy Mink.[49] In attempting to kill herself, she had shot and killed her lover, who was attempting to prevent her suicide.[50] The court stated:

> Since it has been provided by statute that "any crime punishable by death or imprisonment in the state prison is a felony, and no other crime shall be so considered," it may well be that suicide is not technically a felony in this Commonwealth. But being unlawful and criminal as *malum in se*, any attempt to commit it is likewise unlawful and criminal. Everyone has the same right and duty to interpose to save a life from being so unlawfully and criminally taken, that he would have to defeat an attempt to unlawfully to take the life of a third person.[51]

The court was attempting to express an ideal of persons responsible for one another. Through the negative sanction of the criminal law, the court was searching for a justification of an ideal of a community. There is hope for the community only as long as there is hope for all members of the community.[52]

The criminal law cases following the set of Massachusetts cases are consonant with the tenor of those decisions. Two early twentieth century Texas cases, *Grace v. State*[53] and *Sanders v. State*,[54] have been interpreted as promoting the Millian model in criminal jurisprudence.[55] This interpretation misapprehends the reasoning of the Texas courts in those cases.

Instead of promoting the Millian paradigm, there was a conscious

---

49. *Mink*, 123 Mass. at 422.

50. *Id.* at 422-23.

51. *Id.* at 429 (citations omitted) (emphasis in original).

52. *See also* Blackburn v. State, 23 Ohio St. 146 (1872), in which the Ohio Supreme Court upheld the murder conviction of one who provided poison to another who used it to commit suicide. Its rationale:

> True, the atrocity of the crime, in a moral sense, would be greatly diminished by the fact that suicide was intended; yet the law, as we understand it, makes no discrimination on that account. The lives of all are equally under the protection of the law, and under that protection to their last moment. The life of those to whom life has become a burden — of those who are hopelessly diseased or fatally wounded — nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live.

Id. at 163. *Cf.* State v. Sage, 31 Ohio St. 3d 174, 510 N.E.2d 343 (1987) (reversing, in effect, *Blackburn*); State v. Levelle, 34 S.C. 120, 13 S.E. 319 (1890) (accidentally killing another while attempting to commit suicide is murder).

53. 44 Tex. Crim. 193, 69 S.W. 529 (1902).

54. 54 Tex. Crim. 101, 112 S.W. 68 (1908), *overruled by* Aven v. State, 102 Tex. Crim. 478, 277 S.W. 1080 (1925).

55. Engelhardt & Malloy, *supra* note 26, at 1021-24 (arguing that the Texas cases of Grace v. State, 44 Tex. Crim. 193, 69 S.W. 529 (1902) and Sanders v. State, 54 Tex. Crim. 101, 112 S.W. 68 (1908) evinced an explicit state policy legitimizing assisting suicide).

effort in legal thought to treat persons who had threatened or attempted suicide as both needing and requesting help from others. This call for help required use of the civil commitment laws rather than the criminal law. However, the criminal law has been used to the present to discourage and punish others from aiding a suicide. There was simply a recognition that assistance to persons threatening to commit suicide was better effectuated outside of the criminal law.

In *Grace v. State*,[56] the Texas Court of Criminal Appeals reversed a conviction for murder. The defendant, Dr. Grace, a married man, was engaged in an affair with Mollie Lane. In order to protect himself from Lane's family, he carried a loaded pistol, which he placed on a dresser.[57] While the Graces and Mollie Lane discussed the problems between Lane's family and Dr. Grace, Lane grabbed the pistol from the dresser and shot and killed herself.[58] It is clear from the language of the opinion that the court believed the jury was punishing Grace for having an affair with Mollie Lane, rather than for murder.[59] Instead of reversing on grounds which might be viewed as interfering with the fact-finding function of the jury,[60] it declared, "[s]o far as the law is concerned, the suicide is innocent; therefore the party who furnishes the means to the suicide must also be innocent of violating the law."[61] This declaration was simply legitimating through law that which could not be done in fact. The court used its power to review questions of law to amend a jury's decision concerning a question of fact. The decision was not a statement about the case before it.[62] The court did not implicitly or explicitly affirm or pronounce a state policy legitimating suicide or assisting suicide.[63] At most, it simply refused to condemn Mollie Lane.

---

56. 44 Tex. Crim. 193, 69 S.W. 529.

57. *Id.* at 196, 69 S.W. at 530-31.

58. *Id.* at 196, 69 S.W. at 532.

59. *Id.* at 195, 69 S.W. at 530 ("Again, we do not believe the facts justify the charge. It was an assumption of facts not shown by the record."); *id.* at 196, 69 S.W. at 531 ("As we understand the record, there is no evidence showing, or tending to show, that appellant placed the pistol on the dresser for the purpose or with the intent that deceased should use it in inflicting the fatal wound.").

60. *See* Marzen, O'Dowd, Crone & Balch, *supra* note 27, at 83 n.559 (suggesting that the court may have believed it had no authority to review questions of fact).

61. *Grace*, 44 Tex. Crim. at 195, 69 S.W. at 530.

62. A remarkably similar case was decided the next year in Illinois. In Burnett v. People, 204 Ill. 208, 68 N.E. 505 (1903), the Illinois Supreme Court reversed Burnett's murder conviction on the explicit ground that the evidence did not show he had induced his lover, Mrs. Nichol, to commit suicide. The court bolstered its decision by stating "we have never regarded the English law as to suicide as applicable to the spirit of our institutions." *Id.* at 222, 68 N.E. at 510. There is no citation in *Burnett* to *Grace*.

63. *Grace*, 44 Tex. Crim. at 195, 69 S.W. at 530 ("On the day of the fearful

Six years later, in *Sanders v. State*,[64] the same court reversed another murder conviction, again using a legal construction to avoid reversing based on insufficient evidence.[65] This construction criminalized only those actions taken by the defendant which it deemed active rather than passive.[66] However, the evidence introduced at trial did not indicate that Sanders had passively or "indirectly" assisted the victim's suicide. His defense was a complete defense; he had not given the deceased the vials of poison and had neither encouraged nor induced her to take the poison.[67]

In another case, *Aven v. State*,[68] the Texas Court of Criminal Appeals was actually faced with evidence that the defendant had administered arsenic to his wife and his murder conviction was upheld.[69] The court considered the fact that the victim requested her husband to administer the poison to her inconsequential.[70] Further, the fact that she had swallowed the poison, arguably indicative of her volition, did not mean Aven's actions were passive.

The active/passive distinction is not meaningful in legal thought.[71] This judicially-constructed boundary has usually collapsed once there is reason to believe that the defendant assisted the commission of the suicide in any way. This distinction is simply a legal fiction designed in an attempt to limit the reverberating consequences of a suicide.[72]

There is no other criminal case which purports to legitimize suicide or

---

tragedy. . . ."); *id.* at 196, 69 S.W. at 531 ("this unfortunate tragedy. . ."). Had the court intended to legitimate acts of suicide or assisting suicide, there was some authority to use as support. *See* Campbell v. Supreme Conclave Improved Order of Heptasophs, 66 N.J.L. 274, 283, 49 A. 550, 553 (1901) ("As to the abstract immorality of suicide, opinions may differ, but all will admit that in some cases is it ethically defensible."); *see also* 58 ALBANY L.J. 102-03 (1898) (reporting on an article, *The Right to Commit Suicide*, MEDICO-LEGAL J. (Aug. 1898) in which the author argues in support of this right from the Mill paradigm).

64. 54 Tex. Crim. 101, 112 S.W. 68 (1908).

65. The court remanded the case, advising:

> Upon another trial we would suggest, as we understand the case, the theories pro and con, much of which is pure speculation and theory, that there are and can be but two issues, if the case should develop again as it did upon this trial, calling for a disposition *at the hands of the jury*.

Id. at 109, 112 S.W. at 79 (emphasis added).

66. *Id.* at 103-05, 112 S.W. at 69-70.

67. *Id.* at 105-06, 112 S.W. at 70-71.

68. 102 Tex. Crim. 478, 277 S.W. 1080 (1925).

69. *Id.*

70. *Id.* at 483, 277 S.W. at 1083.

71. *See supra* note 55.

72. In writing about euthanasia, Richard Sherlock has forcefully exposed the false, formalistic distinctions made between concepts like active and passive, voluntary and involuntary. Sherlock, *For Everything There is a Season: The Right to Die in the United States*, 1982 B.Y.U. L. REV. 545, 548-61 (1982).

assisting suicide. While a few cases have concluded differently on the issue of whether attempted suicide is a crime,[73] no court has determined that the act was conduct condoned or permitted as a matter of public policy. Beginning in the early part of the twentieth century, there was recognition that the criminal law was an inadequate means to express a public policy concerning suicide:

> Calling suicide self-murder is a curt way of justifying an indictment and trial of an unfortunate person who has not the fortitude to bear any more of the ills of this life. His act may be a sin, but it is not a crime; it is the result of disease. He should be taken to a hospital and not sent to a prison.[74]

This was the position taken shortly thereafter by a Harvard Law School professor: "One who attempts suicide should be classed not as a criminal, but as an unfortunate person amenable to temporary deprivation of liberty. He should be made subject to restraint in the discretion of a magistrate not exceeding a brief, definite period."[75]

This view has succeeded in replacing the view that attempts at suicide should be criminalized. Most states permit civil commitment of persons who threaten to harm themselves, or who have harmed themselves. Some states explicitly note suicidal behavior as justification for civil commitment.[76] Use of the criminal law to discourage assisting suicide is still a part

---

73. Wallace v. State, 232 Ind. 700, 116 N.E.2d 100 (1953) (attempted suicide is not criminal, but is unlawful); State v. Campbell, 217 Iowa 848, 251 N.W. 717 (1933) (dictum that attempted suicide not a crime); State v. Carney, 69 N.J.L. 478, 55 A. 44 (1903) (attempted suicide a misdemeanor under New Jersey law); State v. LaFayette, 15 N.J. Misc. 115, 188 A. 918 (C.P. Camden County Ct. 1937); State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961) (attempted suicide is an indictable misdemeanor); Commonwealth v. Wright, 26 Pa. C. 666, 11 Pa. D. 144 (Quarter Sess., Philadelphia County Ct. 1902) (holding attempted suicide is not a crime). There are no reported cases since 1961 concerning whether attempted suicide is criminal or unlawful. *Accord* Note, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 350 n.22 (1986). It appears that attempted suicide is not a crime in any state.

74. *Wright*, 26 Pa. C. at 669, 11 Pa. D. at 146.

75. Larremore, *Suicide and the Law*, 17 HARV. L. REV. 331, 340-41 (1904).

76. *See* Marzen, O'Dowd, Crone & Balch, *supra* note 27, at Appendix (listing states whose civil commitment statutes permit civil confinement of one who intends to or does physical harm to oneself); Note, *The Punishment of Suicide — A Need for Change*, 14 VILL. L. REV. 463, 483 (1969) ("The basic proposition in this Comment is that suicide is a medical rather than a legal problem."); *see also* Schulman, *Suicide and Suicide Prevention: A Legal Analysis*, 54 A.B.A. J. 855 (1968). Questioning the validity of this view is Greenberg, *Involuntary Psychiatric Commitments to Prevent Suicide*, 49 N.Y.U. L. REV. 227 (1974). *See* Note, *The Role of Law in Suicide Prevention: Beyond Civil Commitment — Bystander Duty to Report Suicide Threats*, 39 STAN. L. REV. 929, 940-42 (1987) (reporting failure of civil commitment laws to prevent suicide); Hohler, *N.H. Suicide Renews Concern About Law*, Boston Globe, July 24, 1987, at 57, cols. 1-3 (police had failed in attempt to involuntarily commit woman who, one day later, killed herself).

of an indirect enforcement of a policy to prevent suicides.[77] A more positive public vision concerning suicide is gleaned mainly in other areas of law.[78]

There is no evidence in the criminal law that the individual is recognized as having a private, autonomous sphere in which he can make a decision free from community constraints or ideals. These criminal cases indicate a halting, but continuous, attempt to enforce a moral vision held by the community. The criminal law is understood to be limited in scope, but available to condemn acts of assisting suicide,[79] and available to encourage one to prevent another from committing suicide.[80] These legal responses are awkward statements which, while condemning suicide, offer the possibility of hope and reconciliation and insist that the acts of one who attempts or commits suicide affect and concern the entire community.

---

77. Recent cases discussing the criminality of assisting suicide include *In re* Joseph G., 34 Cal. 3d 429, 667 P.2d 1176, 194 Cal. Rptr. 163 (1983); People v. Campbell, 124 Mich. App. 33, 335 N.W.2d 27 (1983), *appeal denied*, 418 Mich. 905, 342 N.W.2d 519 (1984); State v. Mays, 307 S.E.2d 655 (W. Va. 1983); State v. Fuller, 203 Neb. 233, 278 N.W.2d 756, *modified*, 204 Neb. 196, 281 N.W.2d 749 (1979); State v. Sage, 31 Ohio St. 3d 174, 510 N.E.2d 343 (1987).

78. I believe that the vision that a suicide is not simply an act solely of an individual is firmly grounded in criminal law. Laws forbidding assistance of suicide form some support for that proposition. *See* Note, *supra* note 73, at 350-54 & nn.22-42 (*citing* state laws criminalizing assisting suicide); *see also* Marzan, O'Dowd, Crone & Balch, *supra* note 27, at Appendix (also noting laws criminalizing suicide assistance). *See* MODEL PENAL CODE § 210.5 (Proposed Official Draft 1962) (1985 ed.) (Causing or Aiding Suicide). Further, several states have enacted statutes making certain acts (like assault), which are otherwise criminal, privileged if the actor is attempting to prevent a person from committing suicide. *See, e.g.*, N.Y. PENAL LAW § 35.10(4) (McKinney 1987): "A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious physical injury upon himself, may use physical force upon such person to the extent that he reasonably believes it necessary to thwart such result." *See also* MODEL PENAL CODE § 3.07(5) (Proposed Official Draft 1962) (1985 ed.) (authorizing the use of force to prevent a suicide).

In Florida, a woman was convicted of child abuse for causing the suicide of her 17 year-old daughter. *See* Nat'l L.J., Nov. 16, 1987, at 10, col. 1; Newsweek, Nov. 9, 1987, at 86, col. 4. This is indicative of an attempt, through the criminal law, to effectuate an ideal of reconciling the community and the self. I am well aware that imposing these ideals through the framework of the criminal law may defeat its purpose, for it is a single person, a mother about whom we know little, and not the community, who is punished for causing her daughter's suicide.

79. Commonwealth v. Bowen, 13 Mass. 356 (1816); Commonwealth v. Pratt (Pa. 1862), *unreported case cited in* Commonwealth v. Mink, 123 Mass. 422, 429 (1877). *See* Marzan, O'Dowd, Crone & Balch, *supra* note 27, at 75-78 (listing statutes criminalizing assisting suicide).

80. Commonwealth v. Mink, 123 Mass. 422 (1877). *See supra* note 76.

B. *Insurance*

1. Life and Accident Insurance

A study of life insurance cases in which the insured committed suicide provides another view of the community's ideal of hope or reconciliation expressed in law.[81] Beginning in the 1870s, the United States Supreme Court decided a number of cases concerning the legal construction of a life insurance policy containing an exclusion if the insured "shall die by his own hand,"[82] or as a result of "suicide, sane or insane."[83]

In *Life Insurance Co. v. Terry*,[84] the Supreme Court was faced with two lines of opinions construing the former exclusion quite differently. Justice Hunt structured the issue in the following manner:

> The request for instructions made by the counsel of the insurance company, proceeds on the theory that if the deceased had sufficient mental capacity to understand the nature and consequences of his act, that is, that he was about to take poison, and that his death would be the result, he was responsible for his conduct, and the defendant is not liable; and the fact that his sense of moral responsibility was impaired by insanity, does not affect the case.[85]

This theory, which denied recovery to the beneficiary of the contract even if the insured was insane when he died, was based on the English case of *Borradaile v. Hunter*.[86] *Borradaile* had been adopted in at least four

---

81. An interesting criminological study of what I call an ideal of hope or reconciliation is found in Hoffman & Webb, *Suicide as Murder at Common Law*, 19 CRIMINOLOGY 372 (1981). The authors studied the administration of suicide laws by coroners' juries in England in the fourteenth through the eighteenth centuries. During that time, a person found to have committed suicide would forfeit his chattels and be denied a Christian burial. *Id.* at 377-78. A finding of insanity absolved the person and his family of these criminal punishments.

> Suicide because of "temporary insanity" was the verdict most commonly returned by coroners' juries. The type of verdict appears to have fluctuated somewhat over time, with the proportion of suicide cases where a verdict of insanity [as opposed to felo-de-se] was returned increasing from the mid-fourteenth century to the nineteenth century. By the end of the eighteenth century, a suicide was rarely pronounced sane. The coroners of the county of Kent, for example, turned in a verdict of felo-de-se in only 15 out of 580 suicide cases between 1770 and 1788.

Id. at 379 (citations omitted) (footnote omitted). *See also* C. DICKENS, BLEAK HOUSE 158-63 (Signet Classic ed. 1964) (describing a coroner's inquest in nineteenth century England in much the same way).

82. Life Ins. Co. v. Terry, 82 U.S. (15 Wall.) 580 (1872).

83. Bigelow v. Berkshire Life Ins., Inc., 93 U.S. 284 (1876).

84. 82 U.S. (15 Wall.) at 580.

85. *Id.* at 581.

86. 5 Manning & Granger 639 (1843).

American courts, according to Justice Hunt.[87] The latter theory, which excluded from the category of "suicide" all self-inflicted deaths occurring while the insured was insane, had been stated first in the New York case of *Breasted v. The Farmers' Loan & Trust Company*.[88] This theory of construction had been adopted by two courts and a treatise writer.[89]

The Court acknowledged that "[t]here is a conflict in the authorities which cannot be reconciled."[90] The Court affirmed the circuit court's[91] instructions to the jury, and thus also affirmed the jury's verdict in favor of the beneficiary, Mrs. Terry. In doing so, it adopted a *Breasted*-like approach.

This approach is important for several reasons: First, it is an attempt to use a subjective test, that is, it tests whether the insured understood the moral nature of his act, or understood right from wrong. Second, in utilizing a subjective test, the Court was choosing to use a test embraced as a matter of public policy, rather than permitting "private" parties to define the exclusionary clause in a different and more limited fashion with court approval.[92] Third, this construction permitted cases to go to juries for a decision in accordance with their beliefs and ideals.

In 1876, the Supreme Court severely limited the scope of the *Terry* decision in *Bigelow v. Berkshire Life Insurance Company*.[93] The insurer had inserted a clause excluding itself from liability when the insured's death was a result of "suicide, sane or insane."[94] The Court did not construe the exclusion in accordance with the public understanding of suicide. The exclusionary phrase would be self-contradictory. Instead, it interpreted it more formally and narrowly as an expression "understood"

---

87. *Terry*, 82 U.S. (15 Wall.) at 586. Justice Hunt listed Hartman v. Keystone Ins. Co., 21 Pa. 466 (1853); Dean v. Mutual Life Ins. Co., 86 Mass. 96 (4 Allen) (1862); St. Louis Life Ins. Co. v. Graves, 69 Ky. 268 (6 Bush) (1869); and Nimick v. Mutual Life Ins. Co., 10 A.L. Reg. 101 (W.D. Pa. 1871).

88. 4 Hill 73 (N.Y. Sup. Ct. 1843), *aff'd*, 8 N.Y. 299 (1853).

89. *Terry*, 82 U.S. (15 Wall.), at 587-88 (quoting PHILLIPS ON INSURANCE § 894). The other cases were Eastabrook v. Union Mut. Life Ins. Co., 54 Me. 224 (1866) and Gay v. Union Mut. Life Ins. Co., 9 Blatchford C.C. 142 (2d Cir. 1871).

90. *Terry*, 82 U.S. (15 Wall.) at 588.

91. The circuit court panel had consisted of Justice Dillon of the Eighth Circuit and Supreme Court Associate Justice Samuel Miller, who had charged the jury. Terry v. Insurance Co., 1 Dillon 403, 404-05 (8th Cir. 1871).

92. The contractualization of American law in the nineteenth and early twentieth centuries is depicted and analyzed in G. GILMORE, THE DEATH OF CONTRACT (1974). *See generally* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 275-79 (1985); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 160-210 (1977).

93. *Bigelow*, 93 U.S. at 284.

94. *Id.* at 286.

by the parties.[95] This permitted the Court to affirm the validity of the insurer's demurrer to plaintiff's replication that the insured "was of unsound mind, and wholly unconscious of the act,"[96] even though this was the same replication approved in *Breasted*.[97]

The *Terry* theory or construction was revived a year later in *Insurance Company v. Rodel*.[98] Plaintiff, the widow of Emil Rodel, who killed himself by swallowing poison, introduced evidence that Rodel was insane at the time of his death. The insurance policy under examination in *Rodel*, as in *Terry*, contained an exclusion where the insured died "by his own hand."[99] The jury found for the plaintiff. On appeal, the Supreme Court affirmed, holding:

> It is hardly necessary to say, that, if there was any evidence tending to prove that the deceased was insane when he took the poison which caused his death, the judge was not bound to, and indeed could not properly, take the evidence from the jury. The weight of the evidence is for them, and not for the judge, to pass upon.[100]

The Court also reaffirmed the jury instructions approved in *Terry*.[101] *Bigelow* was not cited by the Court. *Terry* became the rule, and *Bigelow* the exception.

Subsequent to *Terry* and *Rodel*, the Court began to develop its jurisprudence on the issue of insurance and suicide. In doing so, the Court permitted a plaintiff to sue and recover the policy amount in federal court after being nonsuited in state court;[102] it permitted a case to go to a jury based on the opinion of a nonprofessional witness that the decedent was insane;[103] found that a policy of accident insurance applied to a case of suicide while insane;[104] held that the law presumes that an act is not suicide unless overcome by competent evidence;[105] concluded that plaintiff's proof

---

95. *Id.* at 286-87. This was an "objectified" construction. The Court was not looking at the parties' actual intent, but rather at an intent two "reasonable" parties would have meant in agreeing to this clause.

96. *Id.* at 288.

97. *Id.*

98. 95 U.S. 232 (1877).

99. *Id.* at 233.

100. *Id.* at 238.

101. *Id.* at 241.

102. Manhattan Life Ins. Co. v. Broughton, 109 U.S. 121 (1883).

103. Connecticut Mut. Life Ins. Co. v. Lathrop, 111 U.S. 612 (1884).

104. Accident Ins. Co. v. Crandal, 120 U.S. 527 (1877).

105. Travellers' Ins. Co. v. McConkey, 127 U.S. 661 (1888). In *McConkey*, the Court did reverse a judgment for the plaintiff because the instructions implied that if the decedent's death was a result of murder, the plaintiff should recover. The Court limited recovery to cases of accidental death.

of the decedent's insanity can be made at trial, without stating it in a preliminary proof of death form;[106] upheld as constitutional a statute prohibiting insurance companies from using a defense of suicide;[107] partially reversed *Bigelow* in holding that a private agreement by the parties to limit recovery in cases of suicide could be constitutionally abrogated as a matter of state policy;[108] and held that policies which do not contain exclusionary clauses in cases of suicide are not inconsistent with public policy,[109] thus reversing the one case[110] inconsistent with the cases noted in this paragraph. This line of decisions was generally followed by state courts.[111]

It was the unusual *Ritter*[112] case mentioned above which gave rise to a remarkable opinion by the Supreme Court of New Jersey.[113] The issue in *Ritter* was whether life insurance benefits must be paid to the beneficiary when the insured committed suicide and the policy did not contain a suicide exclusion clause. In speaking to this issue, Justice Harlan wrote for the court:

> A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality,

---

106. Connecticut Mut. Life Ins. Co. v. Akens, 150 U.S. 468 (1893).

107. Knights Templars' and Masons' Life Indem. Co. v. Jarman, 187 U.S. 197 (1902). The Missouri statute upheld in *Jarman*, MO. REV. STATS. § 5982 (1879), was enacted shortly after the Supreme Court decided Insurance Co. v. Rodel, 95 U.S. 232 (1877), a case which arose in Missouri. This 1879 statute is still in effect in Missouri. It is codified as MO. ANN. STAT. § 376.620 (Vernon 1986).

108. Whitfield v. Aetna Life Ins. Co., 205 U.S. 489 (1907).

109. Northwestern Mut. Life Ins. Co. v. Johnson, 254 U.S. 96 (1920).

110. Ritter v. Mutual Life Ins. Co., 169 U.S. 139 (1898). Justice Harlan held that even when the policy contained no exclusion for an act of suicide while sane, an implied condition of the contract, required by public policy, is that the insured not commit an act of self-destruction. Ten years later, Justice Harlan repudiated this view and held Missouri's statute prohibiting the insurer the defense of suicide constitutional in Whitfield v. Aetna Life Ins. Co., 205 U.S. 489, 495 (1907).

111. Royal Circle v. Achterrath, 204 Ill. 549, 68 N.E. 492 (1903); Grand Lodge Indep. Order of Mut. Aid v. Wieting, 168 Ill. 408, 48 N.E. 59 (1897); Blackstone v. Standard Life & Accident Ins. Co., 74 Mich. 592, 42 N.W. 156 (1889); Kerr v. Minnesota Mut. Benefit Ass'n, 39 Minn. 174, 39 N.W. 312 (1888); Lange v. Royal Highlanders, 75 Neb. 188, 106 N.W. 224 (1905), *adhered to*, 75 Neb. 196, 110 N.W. 1110 (1907).

See also Darrow v. Family Fund Soc'y, 116 N.Y. 537, 22 N.E. 1093 (1889), *overruled by* Shipman v. Protected Home Circle, 174 N.Y. 398, 67 N.E. 83 (1903). *Contra* Shipman v. Protected Home Circle, 174 N.Y. 398, 67 N.E. 83 (1903) (adopting *Ritter* rationale). *See also* Plunkett v. Supreme Conclave, Improved Order of Heptasophs, 105 Va. 643, 55 S.E. 9 (1906); Patterson v. Natural Premium Mut. Life Ins. Co., 100 Wis. 118, 75 N.W. 980 (1898).

112. Ritter v. Mutual Life Ins. Co., 169 U.S. 139 (1898).

113. Campbell v. Supreme Conclave Improved Order of Heptasophs, 66 N.J.L. 274, 49 A. 550 (1901).

> ought never to receive the sanction of a court of justice or be made the foundation of its judgment. If, therefore, a policy — taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators or assigns — expressly provided for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted.[114]

Justice Harlan's language was limited to cases of suicide while sane. This was simply a restatement of *Terry* which limited the culpability of the "insane" person who had committed suicide, that person's family and the larger community. It seems clear that Justice Harlan attempted to express an ideal of hope or reconciliation for both the community and persons contemplating suicide. His error was in using law to deny the existence of suicide, in attempting to remedy suicides by use of formalist reasoning, and in attacking something one giant step removed from the issue of suicide, the life insurance contract. He was not worried about preventing "frauds" upon the insurance companies. His opinion is similar to opinions which criminalized attempted suicide. In both cases, there was an attempt to utilize the power and moral force of law to remedy a problem outside the control of law.

Justice Collins, speaking for a majority of the highest New Jersey court in a case decided not long after the *Ritter* decision, attacked *Ritter* by attacking the legal condemnation of suicide: "In New Jersey neither suicide nor attempt to commit suicide has, since 1796 at least, been criminal."[115] He then bolstered his decision to permit recovery of the policy amount by appealing to a different view of the ethics of suicide and his understanding of the nature of American government:

> As to the abstract immorality of suicide generally, opinions may differ; but all will admit that in some cases it is ethically defensible. Else how could a man "lay down his life for his friend?" Suicide may be self-sacrifice, as when a woman slays herself to save her honor. Sometimes self-destruction, humanly speaking, is excusable, as when a man curtails by weeks or months the agony of an incurable disease. . . .

---

114. 169 U.S. at 154.

115. *Campbell*, 60 N.J.L. at 283, 49 A. at 553. This view was rejected two years later by a lower court of appeal in State v. Carney, 69 N.J.L. 478, 55 A. 44 (1903) (holding attempted suicide a misdemeanor in New Jersey and specifically rejecting the *Campbell* opinion). It was also criticized in Potts v. Barrett Div., Allied Chem. & Dye Corp., 48 N.J. Super. 554, 138 A.2d 574 (N.J. Sup. Ct. App. Div. 1958) and Penny v. Municipal Court, 312 F. Supp. 938 (D.N.J. 1970).

> As to the public good requiring the discouragement of suicide, there may be also two opinions. The paternal theory of government does not here prevail. The common law condemned suicide, according to Hale and Blackstone, not only for religious reasons, but for the temporal one that the king has an interest in the preservation of all his subjects, and doubtless the same is true of an organized commonwealth and its citizens; but I cannot see that the public good is more concerned to prolong a life that may be worthless to the public than to secure to creditors their just demands, or to afford a maintenance to wife and children. Insurers may guard their interests in their contracts. I know no public policy more useful than that which holds contractors to performance.[116]

The difference may indicate a philosophical split between the two courts. If this is the case, it is clear that the view of Justice Harlan has predominated. The divergence between *Ritter* and *Campbell* may also, however, be slight. It is likely that the majority in *Campbell* simply did not want to afford insurers another way to avoid liability, especially when the insurer, which drafted the contract, had failed to protect its interests. Since its decision appears contrary to federal common law,[117] the court may have thought it wise to appeal to ethical and political thought. In order to avoid the *Ritter* decision, it may have believed it necessary to appeal to the philosophy of utilitarianism.[118] While this statement is troublesome, it simply may be a rhetorical flourish, and not an evaluation of the merits of the insured's death.

2. Presumptions and Burdens of Proof

A number of consequences resulted from these court decisions which permitted a beneficiary of a life insurance contract to collect the policy amount when an insured committed suicide while insane.

When an insurer raised the defense of suicide exclusion, the courts held the insurer to have the burden of proving the suicide.[119] While some courts held that the insurer's burden was to prove suicide by a preponder-

---

116. *Campbell*, 66 N.J.L. at 283-84, 49 A. at 553.

117. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), *overruled*, Erie v. Tompkins, 304 U.S. 64 (1938).

118. This suggests the present argument concerning the quality of life as against the sanctity of life. *See* Destro, *Quality-of-life Ethics and Constitutional Jurisprudence: The Demise of Natural Rights and Equal Protection for the Disabled and Incompetent*, 2 J. CONT. HEALTH L. & POL. 71, 86-122 (1986). *See also* Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986) (approving and accepting Bouvia's decision that her life had no meaning).

119. *See* 19 COUCH ON INSURANCE 2D § 79:458, at 405-09 & n.18 (Rhodes rev. ed. 1983) (listing cases from most American jurisdictions).

ance of the evidence,[120] other courts went further, requiring proof by clear and convincing evidence[121] or proof excluding every reasonable possibility other than suicide.[122] In addition, a number of courts have simply stated that the insurer's proof must be sufficient to satisfy a jury.[123]

Courts also fashioned a rebuttable presumption that a death was not a suicide.[124] If conflicting evidence was introduced showing the possibility of either suicide or accident, the death was presumed an accident.[125] This legal presumption even extended to a self-inflicted death.[126] This presumption was often given evidentiary value.[127]

Additionally, evidence of a verdict of suicide by a coroner is usually admissible at a suicide exclusion trial, but is not conclusive evidence of suicide.[128] Opinion testimony by lay witnesses is seemingly limited to instances which indicate that the deceased was insane at the time of death.[129]

These uses of law are explicitly premised on the belief that it is unnatural for a person to commit suicide, and that an act of suicide is an act of moral turpitude. There is an unwillingness to believe that this act could be intended by a person of free will. In order to avoid condemning the person who committed suicide, legal constructs are created which place the person's death outside the category of suicide. A death is presumed accidental; a jury is permitted to conclude that the person did not know

---

120. *Id.* § 79:459, at 409-10 n.8 (listing cases).

121. *Id.* at 410 n.10 (listing cases).

122. *Id.* at 411 n.12 (listing cases). *See also* Jones v. Prudential Ins. Co. of Am., 388 A.2d 476 (D.C. 1978) (jury verdict for plaintiff affirmed in part because evidence introduced made possibility of murder more probable than not).

123. *Id.* at 410-11 n.11 (listing cases).

124. *Id.* § 79:521, at 474. *See* Dick v. New York Life Ins. Co., 359 U.S. 437 (1959) (error for Eighth Circuit to hold that jury could not conclude death was accidental when state law applicable to case retained presumption of accidental death after evidence of suicide admitted).

125. *Id.* at 474-77 & nn.18-20.

126. *Id.* at 477 n.1.

127. For an extensive discussion of the varying views concerning the legal treatment of a presumption against suicide, *see* Wyckoff v. Mutual Life Ins. Co., 173 Or. 592, 147 P.2d 227 (1944), in which the majority reversed a verdict, over a strong dissent, for the insurer on the ground that it was reversible error for the trial court to refuse to instruct the jury that there is a legal presumption against suicide.

128. COUCH, *supra* note 119, § 79:254, at 198-99; *see also id.* § 79:556, at 513 ("Whether death was by accident or suicide cannot be shown by the declaration of a physician that the deceased committed suicide, since suicide is the material fact in issue.").

129. *See* Connecticut Mut. Life Ins. Co. v. Lathrop, 111 U.S. 612 (1884); COUCH, *supra* note 119, § 79:556, at 513 nn.6-7. *Cf.* Prink v. Rockefeller Center, Inc., 48 N.Y.2d 309, 398 N.E.2d 517, 422 N.Y.S.2d 911 (1979) (in wrongful death action where defendant alleges suicide, physician-patient privilege held inapplicable).

what he or she was doing in a moral sense, and thus can exculpate the person whose death might otherwise be socially and culturally condemned. This permits the community to continue to believe in right and wrong, in good and evil, and to continue to view the individual as a fellow member of the community. It also permits the community to avoid condemning itself.

C. Civil Liability and Suicide

1. Introduction

The discussions of suicide in criminal law and in insurance law were intended to show the devices used by a community both to condemn suicide and to offer the possibility of hope and reconciliation to those who had committed and attempted suicide. This possibility of reconciliation was also afforded the community. The ideal was used by the community to continue to believe in and rely upon a moral vision.

The following section develops the legal response to cases of suicide when a family member or spouse alleged a civil wrong. My argument is that the Mill paradigm was developed by courts in civil cases, not coincidentally during the same time period as the rise of legal formalism. This model fell apart because it failed to treat the person who committed suicide as a human being, and because it refused to recognize a community vision. The Millian archetype alienated the individual from the community to an intolerable level, which required its rejection in civil cases. Ironically, the destruction of the Mill paradigm in civil liability cases occurred at approximately the same time as it arose in the individual constitutional rights area.[130]

2. History of Civil Liability for Suicide

Charles Scheffer suffered injuries to his head and other parts of his body during a collision between two trains caused by the negligence of employees of the train in which Scheffer was riding. His head injury caused "phantasms, illusions, and foreboding of unendurable evils to come upon him."[131] Eight months after the accident he killed himself.[132]

For the Court, the decision was easy. "The proximate cause of the death of Scheffer was his own act of self-destruction."[133] A suicide could not be foreseen as a natural and probable consequence of Scheffer's injury.

---

130. This transformation occurred in the late 1950's and early 1960's.
131. Scheffer v. Railroad Co., 105 U.S. 249, 250 (1882).
132. *Id.*
133. *Id.* at 252.

Further, Scheffer's insanity "was as little the natural or probable result of the negligence of the railway officials as his suicide. . . ."[134]

Scheffer, an 1882 Supreme Court decision, comported with the emerging late nineteenth century view of legal causation, which emphasized individuality. "The man may have committed suicide; we say he himself was the cause of his death."[135] Hence, a person's actions could be separated from the actions of other persons and the actions of the community through neatly described legal categories.[136]

Eight years after the *Scheffer* decision, Samuel D. Warren and Louis D. Brandeis wrote *The Right to Privacy*.[137] The authors took a number of seemingly unrelated cases and organized them so as to create a new tort action for invasion of a common right to privacy, a right to be let alone.[138] This vision of separateness was reinforced when the influential New York Court of Appeals, in an opinion written by Judge Cardozo, fostered a common law right of bodily self-determination: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body."[139] State courts deciding tort cases in which the plaintiff argued that the defendant's negligence caused the suicide of another

---

134. *Id.*

135. Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201 212 (1870). The irony is that Green was emphasizing the policy nature of this kind of statement. His view generally went unheeded in cases. Later, Oliver Wendell Holmes, Jr. took up Green's attack on the "nature" of causation. *See generally* O. HOLMES, THE PATH OF THE LAW (1897).

136. *See* Horwitz, *The Doctrine of Objective Causation, reprinted in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 201 (D. Kairys ed. 1982):

> The idea of vindication of individual rights was intimately connected with the notion of objective causation. Only if it was possible to say objectively that A caused B's injury would courts be able to take money from A and give damages to B without being charged for redistribution. Without objective causation a court might be free to choose among a variety of possible defendants in order to vindicate the plaintiff's claim.

Id. at 202.

137. Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

138. For Brandeis, this right had evolved from a private right against individuals to a constitutional right against the government:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *Accord* Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

139. Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914). *Accord* Mohr v. Williams, 95 Minn. 261, 268, 104 N.W. 12, 16 (1905).

adopted this vision.[140] Suicide was an efficient, intervening act which was the cause of death and the negligence of another could not legally cause the suicide of another.

The courts were certainly not compelled to travel in this direction. There was ample authority to view causation very differently. A number of cases decided from about the turn of the century until the 1910s held providers of intoxicating liquors liable for the suicides of those to whom liquor was furnished, if the suicide was "caused" by the intoxication.[141] These Civil Damage Acts (or dramshop acts) were usually construed to require some chain of causation between the sale of the intoxicating liquor and the suicide. This construction emphasizes the choice and policy nature of "linking" the causes; it does not attempt to ascertain a "natural" proximate cause.[142]

These cases had only minimal influence on civil actions for suicide, most likely because dramshop acts were part of the temperance movement,[143] and were not considered part of a change in legal thought.

Two widely followed decisions advocated and adopted an objective, formal view of causation. *In re Sponatski*[144] involved the suicide of a man who had been splashed in the eye with molten lead at work.[145] While hospitalized, he jumped to his death. The injury to Sponatski's eye was compensable under the worker's compensation act which had recently been passed in Massachusetts.[146] The court affirmed an award to the

---

140. Brown v. American Steel & Wire Co., 43 Ind. App. 560, 88 N.E. 80 (1909); Daniels v. New York, N.H. & H. R.R. Co., 183 Mass. 393, 67 N.E. 424 (1903); Koch v. Fox, 71 A.D. 288, 75 N.Y.S. 913 (1902), *approved in*, Koch v. Zimmerman, 85 A.D. 370, 83 N.Y.S. 339 (1903). *See also* Stevens v. Steadman, 140 Ga. 680, 79 S.E. 564 (1913) (sustaining a demurrer to a complaint alleging an intention of defendant to cause suicide of plaintiff's husband on grounds that facts alleged were insufficient to show that suicide was a known and natural result of the acts of the defendant).

141. Hammers v. Knight, 168 Ill. App. 203 (1912); Poffinbarger v. Smith, 27 Neb. 788, 43 N.W. 1150 (1889); Lawson v. Eggleston, 28 A.D. 52, 52 N.Y.S. 181 (1898), *aff'd without opinion*, 164 N.Y. 600, 59 N.E. 1124 (1900); Garrigan v. Kennedy, 19 S.D. 11, 101 N.W. 1081 (1904).

142. *See, e.g.*, Lawson v. Eggleston, 28 A.D. 52, 52 N.Y.S. 181 (1898), *aff'd without opinion*, 164 N.Y. 600, 59 N.E. 1124 (1900). *See also* Greenacre v. Filby, 276 Ill. 294, 114 N.E. 536 (1916) (in wrongful death action against liquor dealers, allegation by dealers of decedent's intent to commit suicide held irrelevant and judgment in favor of decedent's widow affirmed).

143. *See generally* J. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (1963); *see also* M. MARTY, PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA 374-78 (1984) (discussing the religious roots of the temperance movement).

144. 220 Mass. 526, 108 N.E. 466 (1915).

145. *Id.* at 527, 108 N.E. at 466.

146. *Id.*

Sponatski estate on the ground that he committed suicide as a result of an uncontrollable impulse and used the tort language of proximate cause as a limitation of future awards.[147] This introduction into the new field of worker's compensation of proximate causation as "objective" causation had a much greater effect than the decision to affirm the claim.[148]

In *Salsedo v. Palmer*,[149] the plaintiff accused A. Mitchell Palmer, in his capacity as Attorney General of the United States, of deliberately inflicting physical and mental harm on her husband causing him to lose control of his mind and commit suicide.[150] The Second Circuit relied on *Scheffer* and treatise writers[151] in holding that Salsedo's death resulted from his intervening act of suicide:

> We may say in conclusion that we concede that a course of either mental or physical torture, or of both combined, may cause a death. And we also concede that the same course or courses of torture may produce a frame of mind that desires death as a means of relief. It is conceivable, therefore, that a tortured man may kill himself. But, if he so kills himself deliberately, we hold that there is an intervening act of his own will for which the New York [wrongful death] act affords no remedy. If, on the other hand, it is contended that his self-killing is not his own act, but is the result of suicidal mania, we hold that suicidal mania is not a natural or reasonable result of either mental or physical torture. It is a most reasonable inference, it seems to us, to say that suicidal mania can be regarded as the natural and probable consequence of either mental or physical torture. So that, if the man does not kill himself deliberately, but his death is due to suicidal mania, which results from torture, we hold that the act of suicide cannot be regarded as the natural and reasonable result of

---

147. *Id.* at 530-32, 108 N.E. at 467-68 (adopting the rationale of the tort case of Daniels v. New York, N.H. & H. R.R. Co., 183 Mass. 393, 67 N.E. 424 (1903)).

148. *Sponatski* has only recently come under sustained attack for its use of objective causation. *See* Director v. Cooper Assocs., Inc., 607 F.2d 1385 (D.C. Cir. 1979); Delaware Tire Center v. Fox, 411 A.2d 606 (Del. 1980); *In re* Fitzgibbons' Case, 374 Mass. 633, 373 N.E.2d 1174 (1978); Kahle v. Plochman, Inc., 85 N.J. 539, 428 A.2d 913 (1981). *See also* Batt & Bastien, *Suicide as a Compensation Claim Under Workers' Compensation Statutes: A Guide for the Lawyer and the Psychiatrist*, 86 W. VA. L. REV. 369 (1984); Note, *Worker's Compensation — Evolving Standards for Compensability of Suicide*, 55 TEMP. L.Q. 194 (1982); 1 A. LARSON, WORKMEN'S COMPENSATION § 36, at 6-54 (1985) (noting that 41 states statutorily permit the use of the specific defense of suicide, as does the Longshoremen's and United States Employees' Compensation Acts).

149. 278 F. 92 (2d Cir. 1921).

150. *Id.* at 93 n.1. It appears that as a result of the Red Scare of 1919, Salsedo, a citizen of Italy, was imprisoned by Palmer for more than two months, and subjected to beatings and threats of being killed. While Salsedo was held in confinement, he killed himself. There is no reference by the Second Circuit to these "extra-legal" circumstances.

151. *Id.* The Court cited Addison, Pollock and Cooley, as well as English judges Lord Bacon and Lord Ellenborough concerning proximate cause. *Id.* at 94-96.

the torture of misconduct alleged, and that the New York act affords no remedy.[152]

The majority opinion was widely accepted.[153] A compelling dissent arguing that the cause of Salsedo's death by suicide was his "loss of mind," attributable not to Salsedo but to Palmer was lost. Thus, the dissent argued, the complaint sufficiently stated a cause of action.[154]

The individual was now set apart from the community and other individuals. Proximate cause neatly limited a person's responsibility for his or her actions on others, and, of course, left the individual without recourse to aid from the community. This view of causation also eliminated a community's ability both to disapprove of certain actions and to offer hope of reconciliation to a person whose death was by suicide, and, as importantly, to that person's family and friends. This rationale of proximate cause was used for about the next forty years.[155] Although it began to disintegrate around 1960, the rationale used in *Salsedo* was the source for the Tennessee Supreme Court's amazing decision in *Lancaster v. Montesi*.[156]

Margaret Lancaster had been living with Louis Montesi, and was alleged to have been dominated and controlled by him, and sadistically beaten by him.[157] The night before she killed herself, she had apparently tried to leave Montesi.[158] Shortly before she killed herself, she called a friend, and in Montesi's presence, said she was going to "end it all."[159] Montesi rejected a plea by this friend that he do something for Lancaster, and left the apartment.[160] She then wrote a note saying, "Ma Ma, I'm

152. *Id.* at 99.

153. *See, e.g.*, Lancaster v. Montesi, 216 Tenn. 50, 390 S.W.2d 217 (1965).

154. *Salsedo*, 278 F. at 100 (Mayer, J., dissenting).

155. The relaxed use of cause in the dramshop cases, *supra* notes 141-43 and accompanying text, was not utilized in cases arising in the 1930s and 1940s, which alleged violation of laws regulating sales of drugs. The courts instead relied on a *Salsedo*-like objective causation and dismissed suits against druggists charged with causing suicide by negligently selling a dangerous drug to one who committed suicide. *See* Riesbeck Drug Co. v. Wray, 111 Ind. App. 467, 39 N.E.2d 776 (1942); Scott v. Greenville Pharmacy, Inc., 212 S.C. 485, 48 S.E.2d 324 (1948); Eckerd's, Inc. v. McGhee, 19 Tenn. App. 277, 86 S.W.2d 570 (1935). *Contra* Trumbaturi v. Katz & Besthoff, 180 La. 915, 158 So. 16 (1934) (holding that the Louisiana Civil Code required the druggist to inquire as to the purpose of the purchase of the drug and failure to do so was a breach of duty owed the woman who died as a result of swallowing it).

156. 216 Tenn. 50, 390 S.W.2d 217 (1965).

157. *Id.* at 53, 390 S.W.2d at 219.

158. *Id.* at 53-54, 390 S.W.2d at 219.

159. *Id.* at 54, 390 S.W.2d at 219.

160. *Id.*

sorry. Louis has beat me enough," and jumped to her death from a bridge.[161]

Her family sued Montesi for causing her suicide. In affirming dismissal of the case for failure to state a cause of action, the court said:

> We think that the facts alleged here establish an efficient, intervening, and unforeseeable cause. Thus, the proximate, or legal, cause of the harm complained of was the voluntary and free act of the deceased in taking her own life. Her voluntary act was an abnormal thing, which supersedes defendant's liability.[162]

The disintegration of the rationale supporting *Sponatski* and *Salsedo* occurred for two reasons: Legal realists constantly attacked the notion of an objective cause which could be used to assess legal (and moral) culpability.[163] This attack began to succeed in courts throughout the country in the late 1950s and early 1960s.[164] Causation became an issue of policy, in which the community attached liability based on its sense of what was right, rather than on a sense of an objective legal cause. This different understanding of cause also led to a reconciliation of the differing legal responses to suicide in insurance cases and civil cases. In adopting a rule permitting recovery if the person was insane at the time of the suicide, the courts reconciled variations in insurance law and worker's compensation law, and created an avenue in which an individual's actions were more integrated into a community. It permitted the community to make

---

161. *Id.*

162. *Id.* at 61, 390 S.W.2d at 222.

163. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211 (1924); L. GREEN, RATIONALE OF PROXIMATE CAUSE (1927). *See* M. Horwitz, *The Doctrine of Objective Causation, reprinted in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 201 (D. Kairys ed. 1982). *See also* Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

164. *See* G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980). In 1963, Justice Roger Traynor wrote the important opinion in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Dean Prosser had led the attack specifically on the issue of causation of suicide:

> Some difficulty has arisen in cases where the injured person becomes insane and commits suicide. Although there are cases to the contrary, it seems the better view that when his insanity prevents him from realizing the nature of his act or controlling his conduct, his suicide is to be regarded either as a direct result and no intervening force at all, or as a normal incident of the risk, for which the defendant will be liable. The situation is the same as if he should hurt himself during unconsciousness or delirium brought on by the injury. But if the suicide is during a lucid interval, when he is in full command of his faculties but his life has become unendurable to him, it is agreed that his voluntary choice is an abnormal thing, which supersedes the defendant's liability.

W. PROSSER, PROSSER ON TORTS § 49, at 273-74 (1955). Of course, the decision to attribute the actions of one who committed suicide a result of delirium rather than a result of lucid, voluntary choice is also an issue of policy.

distinctions concerning the blameworthiness of the act of the person committing suicide, and concerning the acts of other individuals and the community itself.

Three cases decided between 1959 and 1961 opened the door for a general rule for civil actions arising from suicide.[165] The cases cited the previously ignored Restatement of Torts[166] and Dean Prosser[167] in support of the decisions. The courts also quickly bridged the chasm between different theories of causation and between intentional and negligent acts of the defendant.

In *Cauverien v. DeMetz*,[168] the New York court stated, "Upon this complaint the wrong is alleged to be intentional, and therefore the wrongdoer is responsible for the injuries directly caused even though they may be beyond the limits of foreseeability."[169] Suicide did not bar a cause of action based on intentional tort. In *Tate v. Canonica*,[170] the California Court of Appeal held that "a cause of action for wrongful death results, whether the suicide was committed in a state of insanity, or in response to an irresistible impulse, or not," so long as an injury was intended.[171] In

---

165. Tate v. Canonica, 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960); Cauverien v. De Metz, 20 Misc. 2d 144, 188 N.Y.S. 2d 627 (N.Y. Sup. Ct. 1959); Orcutt v. Spokane County, 58 Wash. 2d 846, 364 P.2d 1102 (1961). *Cf.* Bogust v. Iverson, 10 Wis. 2d 129, 102 N.W. 2d 228 (1960) (holding that school guidance counselor could not have known sufficient facts to impose a duty on him to prevent suicide).

166. RESTATEMENT OF TORTS § 455 (1934).

> Acts Done During Insanity Caused by Negligent Conduct
>
> If the actor's negligent conduct so brings about the delirium or insanity of another as to make the actor liable for it, the actor is also liable for harm done by the other to himself while delirious or insane, if his delirium or insanity
>
> (a) prevents him from realizing the nature of his act and the certainty or risk of harm involved therein, or
>
> (b) makes it impossible for him to resist an impulse caused by his insanity which deprives him of his capacity to govern his conduct in accordance with reason.

This section remained the same in the Second Restatement.

167. *See supra* note 164.

168. 20 Misc. 2d 144, 188 N.Y.S.2d 627 (N.Y. Sup. Ct. 1959).

169. *Id.* at 148-49, 188 N.Y.S.2d at 632.

170. 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960).

171. *Id.* at 908, 5 Cal. Rptr. at 36. Two months after deciding *Tate*, the same division of the same court decided Burnight v. Industrial Accident Comm'n, 181 Cal. App. 2d 816, 5 Cal. Rptr. 786 (1960), a workers' compensation case in which it stated:

> In most cases it is unrealistic to determine that suicide is an "independent" intervening cause. A conscious volition to produce death does not necessarily make the suicide a separate agency unconnected with the primary injury, nor an intentionally or wilfully inflicted self-injury. The force set in motion by the original injury may be, and in most cases is, the real cause of the act of suicide. Such forces are employment connected.

Id. at 825, 5 Cal. Rptr. at 792.

1961, the Supreme Court of Washington, in *Orcutt v. Spokane County*,[172] held that a cause of action alleging suicide and predicated on negligence was permitted.[173]

Since these cases, the legal response to civil actions concerning suicide has gone far beyond the Restatement's limitations.[174] While most courts have retained a concept of insanity, or uncontrollable impulse or mental illness of the deceased[175] as a way of limiting liability through causation, this limitation has been circumvented by expanding the affirmative duty of care to prevent suicide.

Initially, the autonomy of an independent actor's action was viewed as barring the imposition of an affirmative duty of care to prevent another's suicide. For example, in *Bogust v. Iverson*,[176] the Supreme Court of Wisconsin concluded, as a matter of law, that a school guidance counselor could not have foreseen the suicide of a student he was counseling, particularly since he was not trained in medicine or psychiatry.[177]

As a result, the focus shifted to those who were trained in medicine and

---

172. 58 Wash. 2d 846, 364 P.2d 1102 (1961).

173. *Id.* at 847, 364 P.2d at 1102.

174. Three articles documenting the changes are Schwartz, *Civil Liability for Causing Suicide: A Synthesis of Law and Psychiatry*, 25 VAND. L. REV. 217 (1971); Comment, *Civil Liability for Suicide: An Analysis of the Causation Issue*, 1978 ARIZ. ST. L.J. 573; Note, *Civil Liability for Causing or Failing to Prevent Suicide*, 12 LOY. L.A.L. REV. 967 (1979).

175. *See, e.g.*, Grant v. F.P. Lathrop Constr. Co., 81 Cal. App. 3d 790, 798, 146 Cal. Rptr. 45, 49 (1978) ("And no authority has come to our attention holding that one's death following a wrongful act causing a *mental condition proximately resulting in an uncontrollable impulse* to commit suicide, is not actionable." (emphasis added)); *see also* Jarvis v. Stone, 517 F. Supp. 1173 (N.D. Ill. 1981) (failure to allege decedent's insanity at time he committed suicide requires dismissal for failure to state a cause of action); Nat'l L.J., Feb. 16, 1987, at 39, col. 1., reporting on the settlement in Stephens v. New York City Transit Auth., No. 40246-84 (N.Y. Sup. Ct.), in which Stephens jumped onto a subway track in an attempt to commit suicide. Stephens' legs were severed, but he survived. He sued, alleging that the motorman negligently failed to stop the train in time to prevent the injuries. Note, however, that if the defendant's actions are deemed intentional, there is no requirement that the decedent commit suicide while insane. *Tate*, 180 Cal. App. 2d at 909, 5 Cal. Rptr. at 36 ("[W]e believe that, in a case where the defendant intended, by his conduct, to cause serious mental distress or serious physical suffering, and does so, and such mental distress is shown by the evidence to be 'a substantial factor in bringing about' the suicide, a cause of action for wrongful death results, whether the suicide was committed in a state of insanity, or in response to an irresistible impulse, or not." (citation omitted)). One writer has said, "It is submitted that these few decisions which disregard the rather artificial dichotomy between sanity and insanity-induced suicide are arguably more realistic and constitute, en masse, a powerful trendsetter." Annotation, *Liability of One Causing Physical Injuries as a Result of Which Injured Party Attempts or Commits Suicide*, 77 A.L.R.3d 311, 315 (1977).

176. 10 Wis. 2d 129, 102 N.W.2d 228 (1960).

177. *Id.* at 134, 102 N.W.2d at 230.

psychiatry. Courts began holding psychiatrists and hospitals liable for acting ineffectively in preventing hospitalized persons diagnosed as suicidal from committing suicide.[178] Commentators began pressing for the imposition of legal standards of reasonable care in preventing "foreseeable" suicides.[179] By the mid-1970s, one article stated, "suicide cases account[ed] for a significant percentage of all psychiatric malpractice litigation."[180]

This affirmative duty to prevent suicide was presented as follows:

> If those charged with the care and treatment of a mentally disturbed patient know of facts from which they could reasonably conclude that the patient would be likely to harm himself in the absence of preclusive measures, then they must use reasonable care under the circumstances to prevent such harm.[181]

The psychiatrist's duty to a suicidal patient was later expanded to include a duty to prevent the suicide of a nonhospitalized patient.[182] The limitations of foreseeability also became more limited as the duties of care were expanded to other defendants with a relationship with the person who had committed suicide.

Jailers were charged with an affirmative duty to prevent their prisoners from committing suicide.[183] In *Falkenstein v. City of Bis-*

---

178. Szostak v. State, 20 A.D.2d 828, 247 N.Y.S.2d 770 (N.Y. App. Div. 1964); Kent v. Whitaker, 58 Wash. 2d 569, 364 P.2d 556 (1961).

179. *See* Perr, *Suicide Responsibility of Hospital and Psychiatrist*, 9 CLEV.-MAR. L. REV. 427 (1960); Litman, *Medical-Legal Aspects of Suicide*, 6 WASHBURN L. REV. 395 (1967). *See also* Schwartz, *Civil Liability for Causing Suicide: A Synthesis of Law and Psychiatry*, 24 VAND. L. REV. 217, 245-51 (1971) and articles noted therein.

180. Klein & Glover, *Psychiatric Malpractice*, 6 INT'L J. L. & PSYCH. 131, 141 (1983); Swenson, *Legal Liability for a Patient's Suicide*, 14 J. PSYCH. & L. 409 (1986).

181. Meier v. Ross General Hosp., 69 Cal. 2d 420, 424, 445 P.2d 519, 522-23, 71 Cal. Rptr. 903, 906-07 (1968). *See* Vistica v. Presbyterian Hosp. & Medical Center, 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967) (holding prejudicial error to instruct jury that in order to find for plaintiffs, jury had to conclude that decedent's suicide not due to any voluntary action on her part); *see also* San Antonio Express-News, Oct. 12, 1987, at 12-A, col. 3 (reporting $1.3 million jury award to widow of patient who hanged himself while receiving treatment at drug rehabilitation center).

182. Bellah v. Greenson, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535 (1978).

183. Dezort v. Hinsdale, 35 Ill. App. 3d 703, 342 N.E.2d 468 (1976); McBride v. State, 52 Misc. 2d 880, 277 N.Y.S.2d 80 (Ct. Cl. 1967), *aff'd*, 30 A.D.2d 1025, 294 N.Y.S.2d 265 (1968); Washington Post, July 9, 1986, at C7, col. 1 (reporting on million dollar verdict against District of Columbia for suicide of prisoner); Boston Globe, July 12, 1987, at 51, col. 5 (Rhode Island Legislature voted to pay interest in judgment in case in which prison officials held liable for injuries suffered in failed suicide attempt); *see* 1 BNA CIVIL TRIAL MANUAL 302 (1986) (listing damage awards in recent jail suicide cases). *See generally* Note, *Custodial Suicide Cases: An Analytical Approach to Determine Liability for Wrongful Death*, 62 B.U.L. REV. 177 (1982) (listing cases).

marck,[184] the court concluded that the jury properly found a breach of duty in the City's failure to properly observe and supervise the prisoner, or in its use of "the Hole" as the cell in which the intoxicated Kevin Falkenstein was placed.[185] The absence of evidence that the City knew or should have known of Falkenstein's suicidal tendencies was irrelevant.

The problem of prisoner suicides also led to legislative solutions. In 1985, the Commonwealth of Massachusetts passed an act requiring "lockup facilities" to be constructed so as to prevent suicides, and requiring that "[e]ach occupied cell within such a lockup facility shall be physically and visibly checked by a police officer or other lockup personnel every fifteen minutes."[186]

Affirmative duties to prevent suicide were also extended to employers[187] and to religious counselors.[188] In *Bednar v. United States Lines, Inc.*,[189] the court used broad langauge in holding an employer liable for a seaman/employee's death by suicide:

> If the Master had any remaining doubt that Bednar was not in a condition to properly care for himself at sea, it should certainly have been resolved when the Chief Officer found Bednar nude, "vague," and writing a confusing note about his own suicide. Thus, the situation presented is both one in which a reasonable man *should* have realized that Bednar was suffering from psychiatric problems and that this condition was serious and also one in which the communications sent by the crew showed that the crew was *actually aware* of this condition.

---

184. 268 N.W.2d 787 (N.D. 1978).

185. *Id.* at 792.

186. 1985 Mass. Laws Acts ch. 207. *See also* Boston Globe, Dec. 8, 1986, at 21, col. 2 (reporting on request of police chiefs to delay implementation of bill and that $12 million had been appropriated to implement requirements).

187. Bednar v. United States Lines, Inc., 360 F. Supp. 1313 (N.D. Ohio 1973). In three other cases involving allegations that a person in a relation to another failed to prevent the other's suicide, courts have split on whether an affirmative duty exists. In State *ex rel.* Richardson v. Edgeworth, 214 So. 2d 579 (Miss. 1968), the court found actionable a suicide "caused" by the intentional abuse of process by two justices of the peace and their deputy sheriffs. In McLaughlin v. Sullivan, 123 N.H. 335, 461 A.2d 123 (1983), the New Hampshire Supreme Court held that an attorney owed no affirmative duty to prevent the suicide of her client. Most recently, in Kelson v. City of Springfield, 767 F.2d 651 (9th Cir. 1985), the court of appeals held that parents whose son had shot and killed himself at school had alleged a prima facie case against the school, several employees, the city and a police officer under section 1983 of the Civil Rights Act.

188. Nally v. Grace Community Church of the Valley, 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215 (1987), *review granted*, 747 P.2d 527, 243 Cal. Rptr. 86 (1988). *See* Note, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 PEPPERDINE L. REV. 137 (1986); Note, *Religious Counseling — Parents Allowed to Pursue Suit Against Church and Clergy for Son's Suicide*, 1985 ARIZ. ST. L.J. 213.

189. 360 F. Supp. 1313 (N.D. Ohio 1973).

> It is also clear from the facts presented that the crew was aware that a man in Bednar's condition should be placed under constant observation.[190]

The transformation of the affirmative duty to prevent another's suicide from a limited status-based duty to a generalized duty was completed in *Sneider v. Hyatt Corporation.*[191] Mrs. Sneider checked into a Hyatt hotel in Atlanta late in the evening on February 6, 1974. At approximately noon the next day she jumped from the twenty-first floor to her death.[192] The court refused to grant defendant's motion for summary judgment, holding that the hotel owed a duty of care to its guests to prevent their suicide.[193] It declined to utilize the general common law rule of no duty to rescue by asserting that a special relation existed between the hotel and its guests.[194] However, its language was broader in scope, and the court noted that pertinent facts which the jury would need to ascertain were the "decedent's inebriated condition when she arrived at the hotel, her lack of luggage, alleged telephone inquiries regarding decedent's whereabouts, and the alleged failure of defendants' employees to take any preventive action when they observed Mrs. Sneider wandering in a confused condition on the twenty-first floor. . . ."[195]

The decision attempted to limit its framework to depend on the relationship between plaintiff and defendant. Its recitation of the disputed and undisputed facts indicates that the legal test will be minimal. The true test of the affirmative duty to prevent suicide will be a factual determination by the jury.

Decisions concerning civil liability for causing or failing to prevent suicide first created a legally constructed vision of autonomous, depersonalized individuals whose actions were largely independent of each other and the community. This led to a restrictive understanding of duties owed to others, and a limited, objective view of causation. The attack on causation led to a reevaluation of notions of duty and personality. It also permitted courts to reinfuse notions of moral responsibility into the civil law. Sanity had long been used in criminal law and insurance law to assign culpability, and using insanity in civil liability cases permitted the courts to

---

190. *Id.* at 1316 (emphasis in original).

191. 390 F. Supp. 976 (N.D. Ga. 1975). *See also* Note, *The Role of Law in Suicide Prevention: Beyond Civil Commitment — A Bystander Duty to Report Suicide Threats*, 39 STAN. L. REV. 929, 945-53 (1987) (arguing in favor of a general civil duty to report all suicide threats).

192. 390 F. Supp. at 977.

193. *Id.* at 981.

194. *Id.* at 979.

195. *Id.* at 978.

view the person who had committed suicide less as a legal actor and more as a human being. An understanding of the interdependence of individuals and the community changed the direction of tort law and led to a rejection of the Mill paradigm in suicide cases.

III. SUICIDE AND CONSTITUTIONAL RIGHTS

The middle road is the only one that does not lead to Rome.[196]

As stated earlier, no court has explicitly created a constitutional right to commit suicide.[197] There is no need to so explicitly state. The same result can be achieved by working on descending levels of generality. Millian individualism is the foundation for the generalized right of privacy or autonomy. This right of privacy, in turn, is the source for the more concrete right to die. From the generalized right to die came the more specific right to refuse extraordinary medical treatment. From that right came the right to refuse any medical treatment, and from this right there was created a right to refuse food, water and other necessities. Finally, inexorably, there is a dimly recognized right to commit suicide, which is justified by resort to ascending levels of generality.

Rights discourse over the past twenty-five years has advanced a constitutional philosophy of autonomy, of choices unencumbered by community views, and of freedom from community (state) constraints. This constitutional philosophy has been advanced by not recognizing persons as individuals within a community, or as persons within history.[198]

---

196. A. SCHOENBERG, *Foreword* to THREE SATIRES FOR MIXED CHORUS 3 (Universal ed. 1953) (translated from German original).

197. *See supra* note 22 and accompanying text.

198. No better argument can be found than in Richards, *Constitutional Privacy, the Right to Die and the Meaning of Life: A Moral Analysis*, 22 WM. & MARY L. REV. 327 (1981), which emphasizes the natural autonomy-based right of rational agents to choose their own life plan without regard to the desires and wishes of other rational agents or the state.

A different view of what a person is can be found in O. SACKS, THE MAN WHO MISTOOK HIS WIFE FOR A HAT AND OTHER CLINICAL TALES 39 (1985). Sacks is a neurologist, and discusses the case history of an amnesiac named Jimmie. Jimmie's alcoholism destroyed some neuron in mammillary bodies in his brain, resulting in retrograde amnesia, known as Karsakov's Syndrome. As told by Sacks:

> I have known Jimmie now for nine years and neuropsychologically, he has not changed in the least. He still has the severest, most devastating Korsakov's, cannot remember isolated items for more than a few seconds, and has a dense amnesia going back to 1945. But humanly, spiritually, he is at times a different man altogether — no longer fluttering, restless, bored, and lost, but deeply attentive to the beauty and soul of the world, right in all the Kierkegaardian categories — the aesthetic, the moral, the religious, and the dramatic. I had wondered, when I first

By masking persons as "rights-holders," courts have avoided confronting the chasm between persons in a community created by autonomy-based rights. The court-created limits on these rights are disintegrating as the Mill paradigm is pushed to its logical limits. Courts must sooner or later acknowledge that such "rights talk" means an acceptance of a constitutional right to commit suicide.

Before *Griswold v. Connecticut*[199] and *Roe v. Wade*[200] arguments in support of a right to die, as a more specific aspect of a constitutional right to privacy or autonomy, were rarely advanced and, when advanced, not accepted. When a patient's life was in imminent danger, the argument that he or she had either a common law right of bodily self-determination or a constitutionally-based right to practice his or her religion was not accepted.[201] Similarly, the state could prevent acts of suicide or self-destruction:

> It is true that the successful suicide is no longer within the reach of the law, but it does not follow that self-destruction is a legally protected right of individuals. . . .
>
> There is in the law no sanction for self-destruction, and certainly there is no right on the part of anyone to use public highways for risking or courting or seeking such self-destruction.[202]

---

met him, if he were not condemned to a sort of "Humean" froth, a meaningless fluttering on the surface of life, and whether there was any way of transcending the incoherence of his Humean disease. Empirical science told me there was not — but empirical science, empiricism, takes no account of the soul, no account of what constitutes and determines personal being. Perhaps there is a philosophical as well as a clinical lesson here: that in Karsakov's, or dementia, or other such catastrophes, however great the organic damage and Humean dissolution, there remains the undiminished possibility of reintegration by art, by communion, by touching the human spirit: and this can be preserved in what seems at first a hopeless state of neurological devastation.

See also V. GROSSMAN, LIFE AND FATE 404-11 (1985) (what makes us human, what makes us continue to fight evil with good, is "a mad, senseless kindness").

199. 381 U.S. 479 (1965) (law prohibiting use or sale of contraceptives is unconstitutional).

200. 410 U.S. 113 (1973) (laws prohibiting or regulating abortion are unconstitutional).

201. Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971); Powell v. Columbian Presbyterian Medical Center, 49 Misc. 2d 215, 267 N.Y.S.2d 450 (1965). *Cf. In re* Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965) (patient not in imminent danger of losing life); Erickson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (1962) (same). *See generally* Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1 (1975).

202. Bisenius v. Karns, 42 Wis. 2d 42, 52, 165 N.W.2d 377, 382 (1969) (motorcyclist has no constitutional right to ride without wearing a helmet). To similar effect, *see* Mayock v. Martin, 157 Conn. 56, 245 A.2d 574 (1968), *cert. denied*, 393 U.S. 1111 (1969)

This kind of statement was made anachronistic after *In re Quinlan*.[203] The *Quinlan* case opened for consideration the kinds of deaths which might be judicially approved. It eliminated the importance of a communal vision, by making cases about death not cases different in kind from other cases, but only different in degree. While removing legal boundaries, it created new boundaries between the self and the community. This legal redistricting devalues a community's vision of itself and serves to segregate the individual from the community.[204] In conjunction with *Roe v. Wade*, the *Quinlan* case also altered the legal understanding of a person.[205]

In *Palko v. Connecticut*,[206] Justice Cardozo stated that the due process clause of the fourteenth amendment included rights "implicit in the concept of ordered liberty."[207] Justice Frankfurter used this concept of a communal understanding, and an understanding of history, in attempting to "balance" an individual's rights with a community's interests.[208] These constructions of constitutional decisionmaking relied on a view of a

---

(rejecting claim of right to physically harm self in response to command given by God); State v. Eitel, 227 So.2d 489 (Fla. 1969) (motorcyclist has no constitutional right to ride without wearing a helmet); State *ex rel.* Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976) (rejecting claim of constitutional right to handle poisonous snakes as part of a religious ceremony).

203. 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976). Karen Ann Quinlan was in a vegetative comatose state after mixing drugs and alcohol. Her parents requested that the artificial respirator be removed. Since Karen Ann was an adult and the hospital and doctor wanted to protect themselves from civil or criminal liability, the legal process was invoked to "solve" the perceived conflicts. This resulted in the recognition of a constitutional right to die as part of a more general right to privacy, or autonomy.

Quinlan is the seminal case exemplifying and delineating a constitutional "right to die" as an aspect of the right to privacy. The phrase "right to die" was first used in *In re* Yetter, 62 Pa. D. & C. 2d 619, 623 (1973).

204. The constitutional jurisprudence on death penalty cases is another battle between recognizing the death penalty as different in kind from other criminal punishments and considering it as different only in degree. This may be why some capital punishment litigators continue to litigate even when their client requests them to end litigation; the client requesting this is sometimes believed to be insane.

205. Roe v. Wade, 410 U.S. 113, 156-58 (1973) (acknowledging that a right to privacy or autonomy to choose abortion requires that a fetus not be deemed a legal "person"). *See supra* note 203. One scholar has said that Quinlan breaks down one of the last "vacuum-bounded" categories, that of life and death. Mensch, *The History of Mainstream Legal Thought, reprinted in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 183 (D. Kairys ed. 1982). In reflecting on this "jurisprudence of life and death," Professor George Fletcher has stated, "It is not entirely clear whether we should use the term 'person,' 'human being,' or 'live person' to state what it is to be one of us. . . . What is at stake is not life, but the acquisition of a legal personality." G. FLETCHER, RETHINKING CRIMINAL LAW 373 (1978).

206. 302 U.S. 319 (1937).

207. *Id.* at 325.

208. Dennis v. United States, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring).

known community which created historically-based normative standards for the community. *Roe* and *Quinlan* rejected community standards in favor of an individual's constitutionally-protected right to privacy, a right to create one's own normative standards. Community standards were trumped by individual standards given constitutional protection, regardless of the conflict between the two standards. A person lived in a community but was exempt from its norms which inhibited personal choice. The result is an empty, formulaic "balancing."

The Massachusetts Supreme Judicial Court attempted to limit the reach of the Mill paradigm by asserting state interests in *Quinlan*-like cases. It accepted as constitutionally protected an individual's autonomy-based right to privacy. It also attempted to limit the extent of this right by concluding that while these cases were not different in kind from other individual rights cases, there were clearly ways in which the state could object to methods and choices made by individuals when deciding to die. The issue was the degree to which the state could object to methods and choices made by individuals when deciding to die. In other words, the issue was the degree to which the state must acquiesce in an individual's choice of death. As stated in *Superintendent of Belchertown State School v. Saikewicz*,[209] these interests were:

> (1) the preservation of life;
> (2) the protection of the interests of innocent third parties;
> (3) the prevention of suicide; and
> (4) maintaining the ethical integrity of the medical profession.[210]

---

209. 373 Mass. 728, 370 N.E.2d 417 (1977).

210. *Id.* at 741, 370 N.E.2d at 425. Even in this case, the validity of the state interest in preventing suicide was questioned:

> The interest in protecting against suicide seems to require little if any discussion. In the case of the competent adult's refusing medical treatment such an act does not necessarily constitute suicide since (1) in refusing treatment the patient may not have the specific intent to die, and (2) even if he did, to the extent that the cause of death was from natural causes the patient did not set the death producing agent in motion with the intent of causing his own death. Furthermore, the underlying State interest in this area lies in the prevention of irrational self-destruction. What we consider here is a competent, rational decision to refuse treatment when death is inevitable and the treatment offers no hope of cure or preservation of life.

Id. at 743 n.11, 370 N.E.2d at 426 n.11. This, of course, conveniently sidesteps how a community chooses to define sanity. For example, a number of states permit a person to be involuntarily committed if the person is "suicidal." The term "suicidal" is defined as indicative of a mental illness. *See* Marzen, O'Dowd, Crone & Balch, *supra* note 27, at Appendix (listing statutes). This quote also indicates the remoteness of Joseph Saikewicz from the legal decision about his life. He is not a competent person making a "rational" decision. He is, however, still a person.

It concluded that these asserted interests, when "balanced" against Saikewicz's right to privacy, did not permit the court to order Saikewicz to undergo surgery.

Joseph Saikewicz was mentally retarded and had lived in state institutions for fifty years. His rights were not asserted by him, but by another, allegedly on "substituted judgment" or "subjective grounds." The court stated:

> [W]e realize that an inquiry into what a majority of people would do in circumstances that truly were similar assumes an objective viewpoint not far removed from a "reasonable person" inquiry. While we recognize the value of this kind of indirect evidence, we should make it plain that the primary test is subjective in nature—that is, the goal is to determine with as much accuracy as possible the wants and needs of the individual involved.[211]

The court then cited a commentator to support its argument that when the person's wishes are unknown, it must act as if it is obeying the wishes of a rational, reasonable and competent person.[212]

Notwithstanding the court's protestations, the test formulated does not consider Joseph Saikewicz's wishes. It considers his "needs," such as avoiding the pain surgery would cause, pain he could not understand because he was highly retarded and noncommunicative.[213]

The *Saikewicz* opinion is replete with myths about the mentally retarded. It attempts to make the "normal" person sanguine about its opinion by emphasizing the differentness of the retarded. This case is about "them," not about "us." These myths and soothing reassurances permit the "rest" of the community a chance to refuse to acknowledge Joseph Saikewicz as a member of the community, as a fellow human being. In pretending to defer to Joseph Saikewicz's right to choose his own life plan, as if that were the issue, we choose to implement a plan we think best suits him, but actually best suits us. Joseph Saikewicz is not like the rest of us, and is thus not a part of us.[214]

---

211. *Saikewicz*, 373 Mass. at 750, 370 N.E.2d at 430 (footnote omitted).

212. *Id.* at 750 n.11, 370 N.E.2d at 426 n.11.

213. In fact, the court itself had previously stated Saikewicz was only verbally noncommunicative. He communicated with others through gestures, grunts and physical contact. *Id.* at 731, 370 N.E.2d at 420.

214. *See* Burt, *The Ideal of Community in the Work of the President's Commission*, 6 CARDOZO L. REV. 267 (1984) wherein the author observed:

> But here is the central problem: There is no room for severely impaired children or adults in a society where it is permissible for others always to behave in a narrowly self-interested way, always to deny any moral imperative for self-sacrifice

The *Saikewicz* structure was universally adopted.[215] This structure permitted distinctions between letting persons die and condoning euthanasia. Three recent cases have claimed to rely on this structure to expand or alter the "right to die," with the consequence of showing the structure hollow.[216]

The New Jersey Supreme Court declared in *In re Conroy*,[217] that feeding Claire Conroy through a nasogastric tube was medical treatment, and removal of the tube would be guided by the same factors which guided the initial use of the tube.[218] Although Ms. Conroy had never stated whether she would have wanted the tube removed, and was unable to say now, the court began its discussion by saying, "The starting point in analyzing whether life-sustaining treatment may be withheld or with-

---

in the service of others, always to prefer self-serving actions at the expense of communal bonds.

Id. at 281. *See generally* Destro, *Quality-of-Life Ethics and Constitutional Jurisprudence: The Demise of Natural Rights and Equal Protection for the Disabled and Incompetent*, 2 J. CONT. HEALTH L. & POL'Y 71 (1986).

215. Bartling v. Superior Court, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984); *In re* Severns, 425 A.2d 156 (Del. 1980); Satz v. Perlmutter, 379 So. 2d 359 (Fla. 1980); Leach v. Akron General Medical Center, 68 Ohio Misc. 1, 426 N.E.2d 809 (1980); *In re* Colyer, 99 Wash. 2d 114, 660 P.2d 738 (1983). *See also infra* note 216.

One of many attempts to negotiate through these cases without noting the irony is found at Note, *Balancing the Right to Die with Competing Interests: A Socio-Legal Enigma*, 13 PEPPERDINE L. REV. 109 (1985). *See also* PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE SUSTAINING TREATMENT (1983).

216. Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986); Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 497 N.E.2d 626 (1986); *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985). *Brophy* is the most recent case, decided in September 1986. Like the New Jersey Supreme Court, the Massachusetts Supreme Judicial Court decided that nourishment of Paul Brophy through tubes could be halted in accordance with statements made by Brophy before he suffered an aneurysm. The court quoted Mill, and stated that its decision was based in part on the "recognition of these fundamental principles of individual autonomy. . . ." 398 Mass. at 430, 497 N.E.2d at 633. In *Brophy*, unlike *Conroy* or *Bouvia*, there was a dissent that explicitly confronted the paradox of the Mill paradigm. Justice Lynch said, under the majority's rationale, "the *Saikewicz* 'balancing' test is all but chimerical once it has been discerned what the individual's choice would be." *Id.* at 445, 497 N.E.2d at 642. He also urged the majority to choose between a constitutional right to die and the interest in preventing suicide. *Id.* at 446-47, 497 N.E.2d at 642-43 (Lynch, J., dissenting). Justice Lynch's dissent is important, for it requires a response. It will not do simply to cite Mill as support for a right to privacy, or a right to autonomy. Whether any court will respond directly to this challenge remains to be seen.

217. *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985).

218. *Id.* at 348-54, 486 A.2d at 1222-25. Claire Conroy died before the decision, but the court decided to structure a "solution" to this kind of case.

drawn from an incompetent patient is to determine what rights a competent patient has to accept or reject medical care."[219]

The normal, the valued, is the competent person. The "abnormal" person is devalued. As stated by one commentator:

> By invoking a competent person as its starting point, and insisting that Ms. Conroy be given "the same rights" as if she were competent, the court implicitly revealed its devaluation of, and its invidious discriminatory attitude toward, incompetent people. In effect, the court said that competent people are the norm in this society and incompetent people should be treated as if they could attain — or at least could approximate — this highly valued norm.[220]

In effect, the court is using the Mill paradigm to conceal its use of "norms" and standards contrary to standards expressed in other areas of law. It is the Mill paradigm with a normative kick.

This "devaluation" of the incompetent person is also found in the court's treatment of the way in which Ms. Conroy's decision is to be made. It advocates first applying a "subjective" standard: "The question is not what a reasonable or average person would have chosen to do under the circumstances but what the particular patient would have done if able to choose for himself."[221] If a patient's intent can not be ascertained,[222] nourishment may be withheld under either a "limited-objective" or "objective" standard. The former requires "some trustworthy evidence that the patient would have refused the treatment, and the decision-maker is satisfied that it is clear that the burdens of the patient's continued life with the treatment outweigh the benefit of that life for him."[223] The latter test requires "the net burdens of the patient's life with the treatment should clearly and markedly outweigh the benefits that the patient derives from life."[224]

---

219. *Id.* at 346, 486 A.2d at 1221.

220. *Withholding Nutrition and Mistrusting Nurturance: The Vocabulary of* In re Conroy, 2 ISSUES IN L. & MED. 317, 319 (1987).

It was the Tennessee Supreme Court's conclusion that Margaret Lancaster's suicide was "abnormal" which freed from civil liability a man who had tortured and beaten her. Lancaster v. Montesi, 216 Tenn. 50, 390 S.W.2d 217 (1965). *See supra* notes 156-62 and accompanying text.

221. *Conroy*, 98 N.J. at 360-61, 486 A.2d at 1229.

222. *See* Burt, *supra* note 220, at 319, for an examination of the court's use of subjective to include evaluation by others of Claire Conroy's "loss of dignity," her "dependence," and her "humiliation."

223. *Conroy*, 98 N.J. at 365, 486 A.2d at 1232. When the court says "for him" it appears clear that it is referring to Claire Conroy, which is a remarkably depersonalized way in which to speak about her.

224. *Id.* at 366, 486 A.2d at 1232. This is also a component of the limited objective test.

Both objective standards subsume the person of Claire Conroy. Her life depends on what others think they would like to have done to them without being in her position. A factor to be considered is the pain she would suffer if the treatment continued,[225] but it appears that the pain considered was that of others forced to see her as a person.

Gone too are the alleged countervailing state interests: "On balance, the right to self-determination ordinarily outweighs any countervailing state interests, and competent persons generally are permitted to refuse medical treatment, even at the risk of death."[226] Specifically, the interest in preventing suicide is rendered meaningless:

> It may be contended that in conjunction with its general interest in preserving life, this state has a particular legislative policy of preventing suicide. This state interest in protecting people from direct and purposeful self-destruction is motivated by, if not encompassed within, the state's more basic interest in preserving life. Thus, it is questionable whether it is a distinct state interest worthy of independent consideration.
>
> In any event, declining life-sustaining medical treatment may not properly be viewed as an attempt to commit suicide.[227]

This approach was heartily endorsed in *Bouvia v. Superior Court*.[228] Elizabeth Bouvia, declared mentally competent, requested that a hospital be ordered to remove a nasogastric tube. Ms. Bouvia was a quadriplegic and suffered from cerebral palsy. She was not mentally impaired.[229] The court declared the feeding tube medical treatment, which Ms. Bouvia had an *absolute* right to refuse.[230] It also refused to consider her actions suicide,

---

The court further noted that "the recurring, unavoidable and severe pain of the patient's life with the treatment" should be such that the treatment would be inhumane. *Id.*

225. *Id.* The problem is that Ms. Conroy's doctors disagreed whether she was feeling pain. *Id.* at 338, 486 A.2d at 1217. *See also* Burt, *supra* note 220, at 324 ("The standards of 'pain' or of 'individual privacy' and 'dignity' have no reliably objective content; they are virtual invitations to paste fictitious attributes on a 'person' who never existed as such.").

226. *Conroy*, 98 N.J. at 353, 486 A.2d at 1225. The constitutional right of self-determination replaced the privacy rationale of Quinlan. *Id.* at 348, 486 A.2d at 1223. This change, at best, is semantic. At worst, it is an excuse to extend the scope of a right to die, and in a number of these cases, it broadens the power of the guardian to choose death.

227. *Id.* at 350, 486 A.2d at 1224 (citations omitted).

228. 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986). *See* Note, *The Suicide Trap:* Bouvia v. Superior Court *and the Right to Refuse Medical Treatment*, 21 LOY. L.A. L. REV. 219 (1987); Comment, *Suicidal Competence and the Patient's Right to Refuse Lifesaving Treatment*, 75 CALIF. L. REV. 707 (1987) (discussing *Bouvia* not as a suicide case, but at a level of generality of refusing lifesaving treatment).

229. 179 Cal. App. 3d at 1135, 225 Cal. Rptr. at 299.

230. *Id.* ("Petitioner sought only to enforce a right which was exclusively hers and over which neither the medical profession nor the judiciary have any veto power.").

while alluding to the likelihood of a right to commit suicide.[231] After all, she had no "life" anyway:

> In Elizabeth Bouvia's view, the quality of her life has been diminished to the point of hopelessness, uselessness, unenjoyability and frustration. She, as the patient, lying helplessly in bed, unable to care for herself, may consider her existence meaningless. She cannot be faulted for so concluding. If her right to choose may not be exercised because there remains to her, in the opinion of a court, a physician or some committee, a certain arbitrary number of years, months, or days, her right will have lost its value and meaning.
>
> Who shall say what the minimum amount of available life must be? Does it matter if it be 15 to 20 years, 15 to 20 months, or 15 to 20 days, if such life has been physically destroyed and its quality, dignity and purpose gone? As in all matters lines must be drawn at some point, somewhere, but that decision must ultimately belong to the one whose life is in issue.[232]

The Mill paradigm was intended to give an individual a right of choice regarding self-determination. It is a delusion to think that such choices exist without others. Elizabeth Bouvia's family had disappeared, and in its stead is a court approving her decision that life is meaningless. The halting methods used in law to make her life meaningful by making all of us see her as a member of our community are swept away. Elizabeth Bouvia was

---

231. *Id.* at 1144, 225 Cal. Rptr. at 306 ("Overlooking the fact that a desire to terminate one's life is probably the ultimate exercise of one's right to privacy, we find no substantial evidence to support the court's conclusion [that she intended to commit suicide].").

232. *Id.* at 1142-43, 225 Cal. Rptr. at 304-05. To the same effect, though through the veil of substituted judgment, is Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 497 N.E.2d 626 (1986). Balancing in this context is demonstrated to be a meaningless incantation, a ritual without purpose or effect.

One attempt to make balancing work in an unusual situation is found in New York State Ethics Opinion 486 (June 19, 1978). A lawyer requested an answer to the question, "May a lawyer disclose his client's expressed intention to commit suicide?" In a tortured three page answer, the author concludes that one must balance the law's interest in the preservation of life with the preservation of client confidences and secrets. The author's answer to this question is a *qualified* yes. Suicide, or death, is no longer an issue that is different in kind, but a matter of degree, particularly the degree to which the lawyer "reasonably believes that such disclosure is necessary to prevent the client from taking his life." *Id.* We are no longer "[p]ersons speak[ing] to persons, heart unmasked to heart," J. NOONAN, PERSONS AND MASKS OF THE LAW 167 (1976), but reasonable lawyers speaking to unreasonable (?) clients. We are bound to legal concepts defining and limiting our status. We have lost ourselves in law. *Cf.* CALIF. CODE EVID. § 1024 (West Ann. 1966) ("There is no privilege [of psychotherapist-patient] if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself. . . .").

wrapped in a legal cocoon where no one could touch her and she could touch no one.

The particular claim of a right to commit suicide has only arisen in prisoner hunger strike cases.[233] In *Von Holden v. Chapman*,[234] *In re Caulk*,[235] and *State ex rel. White v. Narick*,[236] the courts concluded that hunger strikes were a method of committing suicide and permitted the state to prevent the prisoners' deaths. The courts did not adopt the Mill paradigm, implicitly recognizing that the decisions would be insupportable if the paradigm were adopted. That was precisely the rationale adopted by Justice Douglas' dissent in *In re Caulk*. Interestingly, he chose to quote from the same passage of Mill as quoted as the beginning of this article.[237]

In *Zant v. Prevatte*,[238] the Georgia Supreme Court followed a different path. While the court characterized Prevatte's right as one to refuse medical treatment, in effect it granted Prevatte his right to kill himself.[239] Three factors appear important to the court's decision. First, Prevatte had once been sentenced to die which seems to have vitiated any state interest in preserving his life.[240] Second, Prevatte had no "dependents who rely on him for their means of livelihood."[241] Third, Prevatte was deemed "sane and rational."[242] These assertions permitted the court to endorse Prevatte's request to starve himself to death.

The law protected Prevatte from receiving any hope from or reconciliation with the community. His death sentence, even though reversed, marked him forever as an outcast; there was no return from exile. The court, in noting that Prevatte was not a breadwinner, failed to answer more

---

233. Zant v. Prevatte, 248 Ga. 832, 286 S.E.2d 715 (1982); *In re* Caulk, 125 N.H. 226, 480 A.2d 93 (1984); Von Holden v. Chapman, 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982); State *ex rel.* White v. Narick, 292 S.E.2d 54 (W. Va. 1982). *See also* Note, *The Effect of Incarceration on the Right to Die*, 11 N.E. J. OF CRIM. & CIVIL CONFINEMENT 395 (1985); Note, *Should a Hunger-Striking Prisoner Be Allowed to Die*, 25 B.C.L. REV. 423, 431 n.126 (1984) (listing cases found through LEXIS search). *Cf.* San Antonio Light, Aug. 3, 1987, at 4, cols. 4-5 (reporting refusal by West Virginia prison officials to permit prisoner serving a life sentence without possibility of parole to die in order to donate organs).

234. 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982).

235. 125 N.H. 226, 480 A.2d 93 (1984).

236. 292 S.E.2d 54 (W. Va. 1982).

237. *In re* Caulk, 125 N.H. 226, 236, 480 A.2d 93, 100 (1984) (Douglas, J., dissenting).

238. 248 Ga. 832, 286 S.E.2d 715 (1982).

239. *Id.* at 834, 286 S.E.2d at 716-17.

240. *Id.* at 834, 286 S.E.2d at 716. Recall Commonwealth v. Bowen, 13 Mass. 356 (1816), in which Jewett's scheduled execution did not lessen the state's interest in criminally sanctioning Bowen for encouraging Jewett to hang himself.

241. *Zant*, 248 Ga. at 834, 286 S.E.2d at 717.

242. *Id.* at 833, 286 S.E.2d at 716. *See also* Podgers, *"Rational Suicide" Raises Patient Rights Issue*, 66 A.B.A. J. 1499 (1980).

important questions: Does Prevatte have a family, or friends or acquaintances? Is he a man without personal relationships? This does not matter to the court; Prevatte is alone.

In creating a right of autonomy, the state courts purport to dignify the individual. Instead, such a right cuts off the individual from other members of the community. It removes the individual and substitutes a "rights-holder," which the court can then use to justify its own prescriptions. We fail to see the lessons from other areas of law. A person is a person, not a legal personality.

IV. CONCLUSION

The Mill paradigm is becoming the prism through which suicides will be viewed. The separation of the self from others is becoming complete.[243] The vision of a community with substantive ideals and hopes is replaced with a collection of atomistic individuals who impose their goals, through law, upon the community. In this situation, an ideal of reconciliation or hope for and from the community can no longer exist.[244]

We become individuals tied to no one and to nothing. We shall become like Camus' Jean Baptiste Clamence:

> Then please tell me what happened to you one night on the quays of the Seine and how you managed never to risk your life. You yourself utter the words that for years have never ceased echoing through my nights and that I shall at last say through your mouth: "O young woman, throw yourself into the water again so that I may a second time have the chance of saving both of us!" A second time, eh, what a suggestion! Just suppose, *cher maitre*, that we should be taken literally? We'd have to go through with it.

---

243. *See* Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468 (1984) (attempting to give meaning to a "self" without invoking the self/other separation of classical liberal thought).

244. This ideal may have best been expressed in Stiles v. Clifton Springs Sanitarium Co., 74 F. Supp. 907 (W.D.N.Y. 1947), in which the issue was whether communications between the physician and the decedent were privileged. Communications which would have tended to disgrace the memory of the decedent could not be waived. The issue was whether testimony concerning Stiles' death by suicide would disgrace his memory:

> But since suicide is recognized by statute as a grave public wrong, death by his own hand, unexplained, would class the deceased as a grave public offender. The testimony sought to be elicited from the attending nurse and physician would tend to establish that the deceased, by reason of his mental condition, was not responsible for his act of self-destruction and would thus clear his memory of moral responsibility for a grievous wrong.

Id. at 909.

> Brr. . .! The water's so cold! But let's not worry. It's too late now. It will always be too late. Fortunately![245]

We may know something about ourselves, but we seem condemned not to do anything about it.

245. A. CAMUS, THE FALL 217 (Vintage ed. 1956).