

DE-MORALIZED: GLUCKSBERG IN THE MALAISE

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Ten years down the road, what is the enduring significance of the “assisted suicide” cases, Washington v. Glucksberg and Vacco v. Quill? The cases reflect an unusually earnest, but nonetheless unsuccessful, attempt by the Supreme Court to grapple with a profound moral issue. So, why was the Court unable to provide a more satisfying justification for its conclusions? This Article, written for a symposium on the tenth anniversary of Glucksberg, discusses that question. Part I examines some of the flaws in reasoning in the Glucksberg and Quill opinions and suggests that these flaws stem from the opinion writers’ inability to recognize and articulate their underlying normative assumptions. More specifically, both the Justices and the lower court judges, on both sides of the issue, evidently attributed normative significance to something like a “natural course of life” (even when they denied doing so), but none were willing or able to make this attribution explicit. Part II discusses the modern separation of moral reasoning from the metaphysical or theological perspectives that might once have endowed “nature” with normative significance, and it suggests that the deficiencies in Glucksberg-Quill are evidence of how that separation renders moral reasoning problematic. The Conclusion wonders whether in this situation, a renewed emphasis on formalism or tradition might make legal reasoning less unacceptable.

TABLE OF CONTENTS

INTRODUCTION	1572
I. HIDING THE BALL? THE COURT’S CONCEALED CASUISTRY ..	1575
A. “Killing” vs. “Letting Die”?	1575
B. <i>The Intrinsic Normativity of Nature’s Course?</i>	1579
II. THE SEPARATION OF NORMATIVITY AND NATURE: EMANCIPATION OR COLLAPSE?	1582
CONCLUSION	1589

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INTRODUCTION

Among the scores of cases decided by the Supreme Court each term, only a few achieve more than passing attention in the news media and the scholarly literature. As this tenth-anniversary symposium reflects, *Washington v. Glucksberg*¹ and its companion case, *Vacco v. Quill*,² are among these select few. But is continuing attention warranted? Ten years out, what are *Glucksberg*'s status and significance?

On the level of constitutional doctrine, these questions elicit modestly confident answers. With respect to the specific legal issue presented in the case, *Glucksberg* remains, as we say, good law: states may if they choose prohibit physician-assisted suicide. Conversely, insofar as *Glucksberg* announced a more general framework to constrain the unruly enterprise of substantive due process, the decision's status is precarious. *Glucksberg* declared that in order to be elevated into the elite circle of unenumerated constitutional rights, a candidate right must meet the demanding dual requirements of being "deeply rooted in this Nation's history and tradition" and susceptible of "careful description."³ But that framework did not accurately describe substantive-due-process decisions preceding *Glucksberg*,⁴ and the dual requirements seem to have been tacitly repudiated just six years later in *Lawrence v. Texas*.⁵ Nelson Lund and John McGinnis observe that "[t]he rejection of the *Glucksberg* test [in *Lawrence*] is not only unacknowledged and unexplained, but it is a total rejection."⁶

1. 521 U.S. 702 (1997).

2. 521 U.S. 793 (1997).

3. *Glucksberg*, 521 U.S. at 721.

4. For example, far from being "deeply rooted in this Nation's history and tradition," the abortion right announced in *Roe v. Wade*, 410 U.S. 113 (1973), was inconsistent with the law of most states at the time of the decision. See Lucinda M. Finley, *The Story of Roe v. Wade*, in CONSTITUTIONAL LAW STORIES 359, 361–74 (Michael C. Dorf ed., 2004); see also Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1489 (2008) ("There is much that is unclear about the *Glucksberg* version of this formulation."); Erwin Chemerinsky, *Washington v. Glucksberg Was Tragically Wrong*, 106 MICH. L. REV. 1501, 1505 (2008) ("[T]his assumption that a fundamental right exists only if there is a tradition of protecting it is wrong both descriptively and normatively. Descriptively, the Court has been willing to protect rights even though there has not been a tradition of protection."). And far from being amenable to "careful description," the right of privacy animating *Roe* and successor decisions has defied efforts by judges and scholars to say just what it is—or what it encompasses. The right's refractory character is amusingly reflected in a subchapter heading in a leading casebook:

What Shall We Call This Segment—The Right to Engage in Homosexual Sodomy? Adult, Consensual Sexual Conduct in the Home? The Autonomy of Private Sexual Choices? Sexual Expression and Control of One's Body? Unconventional Sexual Lifestyles? The Right to Control One's Intimate Associations? The Right to Make Choices About the Most Intimate Aspects of One's Life? The Right to Be Let Alone?

JESSE H. CHOPER, RICHARD H. FALLON, JR., YALE KAMISAR & STEVEN H. SHIFFRIN, CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 489 (10th ed. 2006).

5. 539 U.S. 558 (2003).

6. Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1579 (2004). Robert Post's judgment, though more celebratory and leaning to the grandiloquent, is similar in substance: *Lawrence* "simply shatters, with all the heartfelt urgency of

To be sure, either of these verdicts could be overturned at any time. The Court might revisit the issue and decide that prohibitions on assisted suicide are unconstitutional after all. Several of the Justices carefully left themselves ample room to reach a different result in future cases.⁷ Conversely (and with the addition of Chief Justice Roberts and Justice Alito this is perhaps more likely), the Court could breathe new life into *Glucksberg*'s constraining framework for substantive due process.⁸ Indeed, one study indicates that lower courts continue to give more deference to *Glucksberg* than to *Lawrence*, not so much out of conviction or defiance, but rather because *Lawrence* provides almost no practical guidance about how to extract meaning from the Due Process Clause.⁹ So the situation is far from stable, but for the moment, it appears that *Glucksberg*'s specific ruling retains its vitality while its more ambitious pronouncements languish in a sort of legal limbo.

Considering the decision merely in terms of constitutional doctrine, however, may miss the deeper questions. *Glucksberg* ought to have some larger significance for questions concerning the normative authority of morality (whatever that is)¹⁰ in law. Euthanasia, with its corollary issues, is one of the standard cases presenting the controversy about what is sometimes called legal moralism.¹¹ In addressing a subset of those issues, the *Glucksberg* and *Quill* cases produced majority opinions that were unusually earnest in their reasoning (at least by contrast to other cases in the substantive-due-process

deep conviction, the paralyzing carapace in which *Glucksberg* had sought to encase substantive due process." Robert C. Post, Foreword, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 96 (2003).

7. Yale Kamisar, Foreword, *Can Glucksberg Survive Lawrence? Another Look at the End of Life and Personal Autonomy*, 106 MICH. L. REV. 1453, 1460 (2008) ("After rereading *Glucksberg* many times, especially in light of what other commentators have had to say about it, I have come to the unhappy conclusion that it is possible to read the physician-assisted suicide cases as having decided 'virtually nothing.' Indeed, the more I reread the various opinions in *Glucksberg*, the more I get the feeling that this may be the most confusing and the most fragile 9-0 decision in Supreme Court history.").

8. Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1519 (2008) ("Would the substitution of Roberts and Alito for William Rehnquist and Sandra Day O'Connor change the balance of the Court on matters of finding new constitutional rights unmoored in text and history? The opinion in *Gonzales* offers only cryptic hints on these questions, but the hints all point to *Glucksberg*.").

9. Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409, 435-36, 442-43 (2006). The Note concludes that "[t]he lower courts almost certainly understand the social and political message *Lawrence* intended to convey, but as a matter of law, the decision provides almost no guidance." *Id.* at 443.

10. Although legal scholars and others often talk about law's relation to morality as if there were some accepted understanding about what sort of thing the word refers to, an excursion into metaethics might prompt a bleaker conclusion. A leading metaethicist notes that "if one thing becomes clear by reading what philosophers writing in meta-ethics today have to say, it is surely that enormous gulfs exist between them, gulfs so wide that we must wonder whether they are talking about a common subject matter." MICHAEL SMITH, *THE MORAL PROBLEM* 3 (1994). For my own attempt to think about what morality might be, see Steven D. Smith, *The "Secular," the "Religious," and the "Moral": What Are We Talking About?*, 36 WAKE FOREST L. REV. 487 (2001).

11. For a helpful overview of the debate, see Larry Alexander, *The Legal Enforcement of Morality*, in *A COMPANION TO APPLIED ETHICS* 128 (R.G. Frey & Christopher Heath Wellman eds., 2003).

line such as *Bowers v. Hardwick*¹² or *Roe v. Wade*¹³), as well as a diverse array of concurring opinions¹⁴—not to mention the much-trumpeted “Philosophers’ Brief” authored by John Rawls, Ronald Dworkin, and a company of like-minded luminaries.¹⁵ So doesn’t the *Glucksberg-Quill* tandem have something of significance to teach us about the role of morality in law—as a basis for legal restrictions, perhaps, or as a guide to interpreting the Constitution?

Yes and no. Or, rather, no and maybe. In fact, *Glucksberg* says nothing very clear either about whether law may regulate morality or about the role of moral reasoning in constitutional interpretation. Indeed, although the interests offered to support the Washington prohibition may well have a moral (or even theological) character,¹⁶ the majority studiously avoided describing these interests in such terms. The majority opinion in *Quill*, by contrast, featured an exercise in moral casuistry that was impressive (for a judicial opinion) in its subtlety—but not in its cogency. So no clear instruction about the relation of law and morality emerges from *Glucksberg-Quill*.

But this unexciting conclusion—or nonconclusion—may itself be instructive. The earnest futility of the Court’s performance is characteristic of the difficulties that plague efforts to engage in serious moral reasoning today, at least in a public context. In this Article, I will discuss those difficulties and try to show how they are poignantly manifest in *Glucksberg* and *Quill*. Part I examines some of the flaws in reasoning in the *Glucksberg* and *Quill* opinions and suggests that these flaws stem largely from the opinion writers’ inability to recognize and grapple with their normative assumptions. Part II reviews the debate over the separation of moral reasoning from metaphysical or theological support and suggests that the inadequacy of *Glucksberg-Quill* is evidence that such a separation renders moral reasoning intractable. I conclude that an added reliance on formalism and traditionalism conceivably might improve the Court’s jurisprudence but that the Court will not likely embrace such approaches, in any thoroughgoing way at least, in the foreseeable future.

12. 478 U.S. 186 (1986). For an argument that both the majority opinion and the dissents in *Bowers* are analytically deficient, see Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 747–50 (1989).

13. 410 U.S. 113 (1973). Mark Tushnet has described “Justice Blackmun’s opinion in *Roe* as an innovation It is the totally unreasoned judicial opinion.” MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 54 (1988).

14. Cf. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 465 (2000) (“The opinions of the six justices make up the fullest and most candid debate between the historicist and the integrity understandings of the due process clause for many decades.”).

15. Brief for Ronald Dworkin et al. as Amici Curiae in Support of Respondents, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (Nos. 95-1858, 96-110), 1996 WL 708956. The brief was reprinted with additional commentary by Dworkin in the *New York Review of Books*. Ronald Dworkin et al., *Assisted Suicide: The Philosophers’ Brief*, N.Y. REV. BOOKS, Mar. 27, 1997, at 41 [hereinafter Dworkin, *Philosophers’ Brief*].

16. See *infra* notes 18, 56 and accompanying text.

I. HIDING THE BALL? THE COURT'S CONCEALED CASUISTRY

In justifying its reversal of the appellate decisions that had invalidated Washington and New York's prohibitions on physician-assisted suicide, the Court faced two basic challenges. Primarily, the Court needed to show that a state can have a legitimate reason for prohibiting a terminally ill patient from receiving assistance in ending her life. In addressing this challenge, the *Glucksberg* majority offered a list of interests served by such a prohibition, including preserving life, preventing suicide, "protecting the integrity and ethics of the medical profession," "protecting vulnerable groups" against "the real risk of subtle coercion and undue influence in end-of-life situations," and avoiding the slippery slope "down the path to voluntary and perhaps even involuntary euthanasia."¹⁷ Although the character and sufficiency of these interests are contestable,¹⁸ one or more of them was sufficiently attractive to gain the vote of each of the Justices.¹⁹

The Court also faced a secondary but more difficult challenge. Washington and New York permitted patients to refuse or terminate treatment, even when the predictable consequence would be death.²⁰ Patients making this choice might require and receive a physician's assistance—in removing food and hydration tubes, for instance. Consequently, proponents of these regimes needed to explain why one method of bringing about a patient's voluntary death should be legally protected while a different (arguably more efficient and humane) method remained subject to criminal sanctions.

A. "Killing" vs. "Letting Die"?

A familiar response asserts that there is a crucial difference between administering a lethal drug, which is a form of "killing," and refusing treatment, which merely amounts to "letting die." Though widely em-

17. *Washington v. Glucksberg*, 521 U.S. 702, 728–32 (1997).

18. For example, the asserted interest in protecting life may seem wholly unobjectionable when we are thinking about protecting the lives of people who desire to remain alive, as with a homicide law. But does the state have a legitimate interest in compelling individuals to remain alive if they do not wish to do so? Justice Stevens has argued that the claimed interest in preserving life for those who do not desire it is impermissibly "theological." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 345–51 (1990) (Stevens, J., dissenting). Justice Souter, though concurring in the judgment in *Glucksberg*, declined to embrace the preserving-life rationale because he believed it reflected a "moral judgment contrary to [the patients']" *See Glucksberg*, 521 U.S. at 782 (Souter, J., concurring).

19. In particular, the interest in preventing undue influence seemed persuasive even to Justices like Souter who were dubious about the state's more general interest in preserving life. *See Glucksberg*, 521 U.S. at 782–88 (Souter, J., concurring). This interest has been powerfully presented both in academic literature and in fiction. *See, e.g.*, Yale Kamisar, *Physician-Assisted Suicide: The Problems Presented by the Compelling, Heartwrenching Case*, 88 J. CRIM. L. & CRIMINOLOGY 1121 (1998). For a gripping fictional presentation of this concern, see P.D. JAMES, *THE CHILDREN OF MEN* 92–99 (Alfred A. Knopf 1993) (1992). (Like most of the engaging features of the novel, this scene was not presented in the movie of the same name.)

20. This permissive policy may be constitutionally required. *See Cruzan*, 497 U.S. at 278–79.

braced,²¹ this distinction is elusive. “[W]hen we try to become clear” about it, Judith Jarvis Thomson observes, “we find ourselves in a philosophical mess and tangle.”²²

A majority of the lower-court judges found the proffered distinction untenable. “To us,” Judge Reinhardt wrote for the Ninth Circuit sitting en banc, “what matters most is that the death of the patient is the intended result as surely in one case as in the other.”²³ The Philosophers’ Brief agreed:

[T]here is no morally pertinent difference between a doctor’s terminating treatment that keeps [the patient] alive, if that is what he wishes, and a doctor’s helping him to end his own life by providing lethal pills he may take himself, when ready, if that is what he wishes—except that the latter may be quicker and more humane. . . . If it is permissible for a doctor deliberately to withdraw medical treatment in order to allow death to result from a natural process, then it is equally permissible for him to help his patient hasten his own death more actively, if that is the patient’s express wish.²⁴

In *Quill*, the Court offered two rationales to defend the distinction between killing and letting die. But neither rationale stands up well under inspection.

1. *The causation rationale.* The first rationale suggests that when a patient refuses—or, perhaps with a doctor’s help, removes—life-sustaining treatment such as feeding or hydration tubes, this human action does not *cause* the patient’s death. Instead, some underlying “natural” cause—starvation, perhaps, or dehydration—causes the death. The patient and physician’s actions amount to nothing more than a refusal to intervene in this natural process. Conversely, if a doctor assists a patient to inject a fatal drug, the patient and physician’s actions actually cause the death. “[W]hen a patient refuses life-sustaining medical treatment,” the *Quill* majority maintained, “he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication.”²⁵

The argument from causation wilts under examination.²⁶ Compare the two characteristic situations: at a patient’s request, a doctor removes an intravenous tube supplying food and water, thus allowing the patient to die; and at a patient’s request, a doctor prescribes a lethal drug and helps the

21. David P.T. Price, *Assisted Suicide and Refusing Medical Treatment: Linguistics, Morals, and Legal Contortions*, 4 MED. L. REV. 270, 272–73 (1996) (“Jurisdictions throughout the world have almost invariably declined to view refusals by competent patients of medical treatment which could prolong life as (physician-assisted) suicide.”).

22. Judith Jarvis Thomson, *Killing and Letting Die*, in INTENDING DEATH: THE ETHICS OF ASSISTED SUICIDE AND EUTHANASIA 104, 107 (Tom L. Beauchamp ed., 1995).

23. *Compassion in Dying v. Washington*, 79 F.3d 790, 824 (9th Cir. 1996), *rev’d sub nom. Glucksberg*, 521 U.S. 702.

24. Dworkin, *Philosophers’ Brief*, *supra* note 15, at 45.

25. *Vacco v. Quill*, 521 U.S. 793, 801 (1997).

26. For a careful, critical assessment of the causation rationale, see Price, *supra* note 21, at 283–89.

patient to inject it. In each case, the most *immediate* cause of death is in a sense biological and “natural”—the heart stops beating, the brain stops functioning—while human decision and deliberate action figure conspicuously in the more extended causal sequence that leads to death.²⁷ In other words, the patient’s decision and the doctor’s cooperative action are but-for causes of death in both cases: but for those actions, death would not have occurred when it did.

In many situations, moreover, we surely would say that removal of a feeding tube is a legal cause of death as well as a but-for cause and that the person who removed the tube thereby *killed* the patient. We would draw this conclusion, for example, if a doctor removed a feeding tube without the patient’s consent, and we would regard as frivolous the doctor’s contention that “*I didn’t kill the patient; starvation did.*” Judith Jarvis Thomson illustrates the problem:

If somebody is attached to a life-support system in a hospital, and I wander in and for my own purposes pull the plug, surely I do kill my victim. If a deep-sea diver is attached by a pipe to a breathing apparatus on board ship, and I’m a passenger and cut the pipe, surely I do kill the diver. . . . It seems to me counter-intuitive in the extreme to deny these things.²⁸

So if we decline to call the removal of the tube a cause of death, we must be expressing a conclusion based on something other than merely empirical or conventional observations about the causal sequence.

2. *The intent rationale.* The inadequacy of a purely causal account of the killing–letting die distinction might suggest that the real difference lies in the intentions that animate the patient and physician’s actions. In the refusal-of-treatment situation, the patient and physician may *foresee* that the result of their choices and actions will be death, but they do not *intend* to produce death. Death is merely a foreseeable consequence, or side effect, of what is directly intended—that is, avoidance or elimination of treatment. In the assisted-suicide situation, by contrast, the patient and physician consciously *intend* to produce the patient’s death. The *Quill* majority endorsed this rationale as well:

[A] physician who withdraws . . . life-sustaining medical treatment purposefully intends, or may so intend, only to respect his patient’s wishes and “to cease doing useless and futile or degrading things to the patient when [the patient] no longer stands to benefit from them.” . . . The same is

27. Cf. Raymond G. Frey, *Intention, Foresight, and Killing*, in *INTENDING DEATH: THE ETHICS OF ASSISTED SUICIDE AND EUTHANASIA*, *supra* note 22, at 66, 77 (“The doctor cannot . . . pass the buck to nature, to claim that the maladies of the patient were what killed the person; for the decision not to intervene is a part cause of the person’s death.”).

28. Thomson, *supra* note 22, at 106. As these examples suggest, the difference between killing and letting die cannot be satisfactorily explained by reference to the legal distinction between acts and omissions any more than it can be explained by familiar notions of causation. Often the elimination of life-sustaining treatment will involve a conscious decision and affirmative steps by patient or doctor—actions, not mere omissions. Thomson’s example of the malicious interloper who sneaks into a hospital room and deactivates a patient’s life support demonstrates the point: we would surely say that the interloper acted to cause the patient’s death. *See id.*

true when a doctor provides aggressive palliative care; in some cases, painkilling drugs may hasten a patient's death, but the physician's purpose and intent is, or may be, only to ease his patient's pain. A doctor who assists a suicide, however, "must, necessarily and indubitably, intend primarily that the patient be made dead." . . . Similarly, a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life²⁹

The intent rationale typically provokes discussions of the doctrine of double effect.³⁰ Though it can become highly refined, the basic distinction animating the doctrine is between consequences of an act that are actually *intended*—that provide, in other words, the reason for acting—and other consequences that are *foreseen* but not actually intended. Proponents of the double-effect doctrine typically maintain that it is morally impermissible to act with the intent to produce a bad effect either as an end in itself or as a means to a good end—good ends do not justify evil means—but it is sometimes permissible to act with the intent to produce a good end even though the act will have a foreseeable bad side effect. Death in itself is an evil, so by this reasoning, it is impermissible to act with the intent of producing death, even as a means of relieving suffering. Conversely, it is permissible to refuse treatment, or to administer heavy doses of pain medication, even when these measures will foreseeably hasten the patient's death—so long as the intent or reason for acting is not to produce death but rather to avoid objectionable treatment or to eliminate pain.

The doctrine of double effect has been debated at length in academic literature. Critics doubt that the distinction between *intended* and merely *foreseen* consequences can bear the moral weight that the doctrine places on it;³¹ proponents answer that we all intuitively resort to some such distinction in sorting out our moral judgments.³² Whatever the merits of the doctrine of double effect, the problem in the *Glucksberg-Quill* context is that it does not appear to vindicate the legal distinction in question—the distinction between committing suicide and refusing life-sustaining treatment.

The distinction that the doctrine of double effect makes crucial is between acts *intended* to produce death and acts undertaken without this intention. However, it cannot be assumed that a refusal of life-sustaining treatment is not intended to produce death. The most that can be inferred, as the Court's language in *Quill* coyly acknowledges, is that the refusal of treatment *might not* be intended to produce death.

In some cases, such as that of the person of faith who refuses treatment for religious reasons, it may be plausible to characterize death as a foresee-

29. *Quill*, 521 U.S. at 801–02 (citations omitted).

30. For a helpful presentation of the doctrine, see Alison McIntyre, *Doctrine of Double Effect*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2006), <http://plato.stanford.edu/archives/sum2006/entries/double-effect> (last visited Sept. 15, 2007).

31. See, e.g., JONATHAN BENNETT, THE ACT ITSELF 194–225 (1995).

32. Cf. McIntyre, *supra* note 30, § 2 ("Many morally reflective people have been persuaded that something along the lines of double effect must be correct.").

able but unintended consequence. But in the broad run of cases in which a patient has decided to terminate life-sustaining treatment, it seems possible and even likely that the patient acts with an intent to bring about death—not as an end in itself, perhaps, but as a means of relieving suffering. Indeed, most patients would likely have difficulty even grasping the central distinction. “Is your intention to end your pain or to bring about death?” asks the double-effect theorist. And the typical response would likely be, “Well . . . umm . . . yes.”

Under the double-effect doctrine, such cases are morally indistinguishable: the intent—namely, to produce death—is the same in both. Thus the Court’s attempt to explain the distinction in terms of different intentions was unpersuasive.

B. *The Intrinsic Normativity of Nature’s Course?*

The failure of the Court’s efforts to justify the distinction between killing and letting die in Washington and New York’s laws might tempt us to conclude that these laws were unconstitutional on equal-protection or substantive-due-process grounds. This was precisely what the appellate courts had concluded.³³

Still, it is, or should be, no light matter to dismiss as irrational a distinction that has been so long and so widely embraced.³⁴ So perhaps a second look is in order. Might there be more to the killing–letting die distinction than meets the eye?

We might begin by noticing a slightly different formulation that continually pops up in this context: proponents of the traditional distinction suggest that administering a lethal drug is killing while refusing life-sustaining treatment is merely “letting nature take its course.” In this vein, Chief Judge Griesa of the Southern District of New York observed in *Quill* that “it is hardly unreasonable or irrational for the State to recognize a difference between *allowing nature to take its course*, even in the most severe situations, and intentionally using an artificial death-producing device.”³⁵ The locution implies that there is a normative dimension intrinsic to something like a “natural course of life” and that actions are distinguishable by whether they

33. The Second Circuit ruled that by prohibiting assisted suicide while permitting assistance in the refusal of life-sustaining treatment, New York irrationally discriminated among similarly situated persons, thus offending equal protection. *Quill v. Vacco*, 80 F.3d 716, 727–31 (2d Cir. 1996), *rev’d* 521 U.S. 793 (1996). The Ninth Circuit, sitting en banc, spoke in substantive-due-process terms, ruling that Washington’s prohibition on assisted suicide restricted liberty without any rational basis. *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev’d sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997). The court discounted the interests asserted by the state—although these interests would apply equally to situations in which a patient chose to refuse life-sustaining treatment, the state did not attempt to vindicate its interests in those situations, and thus these interests could not in fact be very important. *Id.* at 822–24.

34. See *supra* note 21 and accompanying text.

35. *Quill v. Koppell*, 870 F. Supp. 78, 84 (S.D.N.Y. 1994), *rev’d sub nom.* *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996), *rev’d*, 521 U.S. 793 (1996) (emphasis added).

artificially interfere with that natural course or instead respect and defer to it.

This again is an elusive notion. But we may get some help from a surprising source—Ronald Dworkin. “We believe,” Dworkin asserts, “that a successful human life has a certain *natural course*. It starts in mere biological development—conception, fetal development, and infancy—but it then extends into childhood, adolescence, and adult life It ends, after a *normal life span*, in a *natural death*.”³⁶ These stages combine to form a “natural course of human life.”³⁷ And the termination of life at any stage before “natural death” is regrettable as “a kind of cosmic shame.”³⁸

This last phrase is quietly and perhaps inadvertently portentous. It transforms what might otherwise be taken as a purely descriptive statement—as a matter of empirical fact, human lives often follow a pattern of conception, infancy, adolescence, and so forth—into a deeply normative claim. But that transformation would provoke strenuous objections. The view outlined by Dworkin seems to commit the classic fallacy of deriving an *ought* from an *is*. Human lives often *do* in fact follow a typical course; therefore, Dworkin seems to say, human lives *should* follow that course, and it is a “cosmic shame” if they do not. At least since Hume, we know that such inferences of moral *ought* norms from natural *is* facts reflect a fundamental error in reasoning. Don’t we?

Indeed, the attempt to draw normative conclusions from biological facts seems a particularly egregious form of this error. Isn’t this much like the kind of pre-Kitty Hawk thinking that insisted, “If humans had been meant to fly, we’d have been given wings”? Isn’t it the same type of thinking that leads some people to draw dubious inferences about the proper role of women—or the “natural” form of sexuality, or the impermissibility of some kinds of genetic research or technology—from mere biological facts?

Perhaps. Surely one plausible response to Dworkin’s assertion is that even if his statement is accurate as a description of widely held opinions, those opinions are transparently fallacious—and hence incapable of providing a normative justification for a law restricting liberty.

Before peremptorily dismissing the appeal to nature’s course as a basis for normative judgments, however, we might pause to notice that even the judges in *Glucksberg* and *Quill* who rejected the states’ reasoning and who most insisted on personal autonomy as the decisive criterion quietly betrayed a lingering commitment to the same kind of logic. These judges tacitly agreed that there is a vital and normatively significant difference between some self-chosen deaths that are natural and others that are not. Although favoring a right to physician-assisted suicide, they carefully lim-

36. RONALD DWORKIN, *LIFE’S DOMINION* 88 (1993) (emphasis added).

37. *Id.* at 89.

38. *See id.* at 13, 88. However, Dworkin argues that the harm is “less if it occurs after any investment [in life] has been substantially fulfilled, or as substantially fulfilled as is anyway likely.” *Id.* at 88.

ited that right to terminally ill patients.³⁹ And their explanations for this limit were terse but suggestive.

Judge Rothstein, the district judge in *Glucksberg*, ruled against the state but explained that the right to assistance in dying should be limited to the terminally ill because “[o]bviously, the State has a strong, legitimate interest in deterring suicide by young people and others with a significant *natural life span* ahead of them.”⁴⁰ Judge Wright, dissenting from the Ninth Circuit’s panel decision reversing Judge Rothstein, conceded the state’s interest in preserving life and preventing suicide but argued that this interest diminishes “as *natural death* approaches.”⁴¹ Judge Reinhardt, writing for the en banc Ninth Circuit majority, declared the Washington prohibition an unconstitutional infringement on the liberty of terminally ill patients. But he also emphasized that the state has a valid interest in discouraging suicide by those who are not terminally ill because in these instances, suicide would amount to “the senseless loss of a life *ended prematurely*.”⁴² Conversely, suicide in the case of a terminally ill person is not tragic or “senseless,” Judge Reinhardt opined, because “death does not come *too early*.”⁴³

These pronouncements were in tension with these judges’ heavy emphasis on individual autonomy as the decisive consideration and their dismissal of the states’ own natural-course logic. Nonetheless, the assumption running through these comments is discernible: human beings enjoy a natural life span, and even a competent person’s self-chosen death that occurs before the fulfillment of that natural span is normatively to be regretted. Such a death is “senseless”—perhaps even a “cosmic shame”?—because it is “premature” or “too early,” and the state is accordingly entitled to discourage or prevent such unnatural deaths.

In the end—and contrary to initial appearances—it seems that the deeper disagreement in the cases was not so much over whether there is normative significance in nature’s course but rather over the proper interpretation of nature in this context.⁴⁴ For the *Glucksberg-Quill* majority, it seems

39. Compare Chemerinsky, *supra* note 4, at 1513 (“To recognize a right to assisted dying for competent, terminally ill patients does not as a matter of necessity lead to a right to physician-assisted suicide for others. Lines can be drawn. For instance, the right can be limited to terminally ill patients.”), with Kamisar, *supra* note 7, at 1471 (“Though proponents claim a new right may be limited to [physician-assisted suicide] for terminally ill patients, the limits they impose appear difficult to defend both in principle and in practice.”).

40. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1464 (W.D. Wash. 1994) (emphasis added), *aff’d*, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev’d sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

41. *Compassion in Dying v. Washington*, 49 F.3d 586, 594 n.2 (9th Cir. 1995) (Wright, J., dissenting) (emphasis added), *rev’d en banc*, 79 F.3d 790, *rev’d sub nom.* *Glucksberg*, 521 U.S. 702. The Second Circuit decision agreed that “[s]urely, the state’s interest [in preserving life] lessens as the potential for life diminishes.” *Quill*, 80 F.3d at 729.

42. *Compassion in Dying*, 79 F.3d at 820 (emphasis added).

43. *Id.* at 821 (emphasis added).

44. A similar disagreement runs through the larger public debate. One familiar position holds that so long as a person’s body can continue functioning—without extraordinary artificial support, perhaps?—then nature has not yet signaled that this person’s part is over. But it is also possible to

any death intentionally brought about by the patient and doctor through lethal medication is not proper or natural—or at least a state is permitted to make that judgment. By contrast, for judges like Reinhardt, this kind of self-chosen death is proper so long as it occurs during the terminal stage of life, but a self-chosen death that occurs earlier in life is “premature” or “too early,” and thus not a “natural death.”

It is hard to assess these competing views—or even to confidently articulate them—because none of the judges gave any explicit account of how nature could have the normative significance they subtly ascribed to it. Their moral intuitions can be cautiously extrapolated, but their overall normative frameworks remain mostly hidden—from us and perhaps from the judges themselves. Thus the *Quill* majority attempted to explicate its moral intuitions in the terms of causation and intent, but as we have seen, that vocabulary is inadequate to convey or support what is evidently a more elusive understanding of nature’s course. And the deeper normative assumptions of judges like Reinhardt, Wright, and Rothstein are even harder to fathom: these judges stressed individual autonomy as the key moral criterion but rejected a death consciously chosen by a competent young person as “too early,” a conclusion that cannot be supported by the *autonomy* criterion.⁴⁵

But why should it be so difficult for seasoned judges to explain their fundamental normative premises, to us and perhaps to themselves? To think about that question, we need to step back and look at *Glucksberg* from a more historical perspective.

II. THE SEPARATION OF NORMATIVITY AND NATURE: EMANCIPATION OR COLLAPSE?

Moral reflection or argumentation—about euthanasia, about countless other more mundane matters—is something that as humans, we necessarily engage in. How should I live? It is the quintessential Socratic question, and none of us can escape it. Rarely do we pause to notice or articulate the larger intellectual frameworks within which our moral musings operate. And yet inadequacies in these larger frameworks may in turn manifest themselves in moral reasoning that is unsound or unsatisfying. I will suggest in this Part that the shortcomings in *Glucksberg* are a manifestation of just this sort of moral malaise.

interpret terminal illness—combined with extreme suffering, perhaps?—as a person’s cue to exit: someone who insists on clinging to life under those conditions is like an actor who won’t get off the stage even though his role is finished. To shift the metaphor, people disagree about whether particular death-hastening actions—removing a food or hydration tube, injecting a lethal dose of morphine—are more like running out the clock, as the rules of the game permit, or more like running off the field before the game is over.

45. Cf. Albert R. Jonsen, *Criteria that Make Intentional Killing Unjustified*, in *INTENDING DEATH: THE ETHICS OF ASSISTED SUICIDE AND EUTHANASIA*, *supra* note 22, at 42, 50–52 (arguing that although most proponents of a “right to die” would limit the right to terminally ill persons, this limit cannot be squared with the professed commitment to self-determination as the decisive value).

We might begin by noticing that allusions to “letting nature take its course” in controversies like *Glucksberg* are vestiges of thinking on subjects like suicide and euthanasia that has appeared frequently over the centuries but that often has been more forthright about its assumptions with respect to the normative dimension of nature. Indeed, from classical until at least early modern times, the sort of thinking that we classify as moral typically proceeded unapologetically on the assumption that the cosmos itself—or nature, or human nature—contains or reflects some sort of intrinsic normative order.⁴⁶ This assumption might have a theistic character, as in medieval scholastic thought, or it might not, as in the thought of Aristotle. Leon Kass observes that the classical, teleological conception of nature appeared in a variety of versions:

Perhaps the two grandest and most influential alternatives are these: The biblical view of a teleological and created world with its various forms specially created after God’s plan, and the Aristotelian view of a teleological but eternal nature with its various forms kept in being, generation after generation, by the immanent workings of eternal species (*eidē*).⁴⁷

In this view, the function of moral reasoning is to determine what kinds of actions, or what sort of life, conform to a normative order inherent in nature itself.

Thinking on issues like suicide often reflected some such normative assumption. Michael Seidler explains that “to answer the general question of legitimation facing the potential suicide, some Stoics turned occasionally to the idea of a divine calling which Socrates had already used as a justification[:] . . . it is wrong to leave life, to forsake our post in the world, unless God calls us.”⁴⁸ In a similar vein, John Locke maintained that “men being all the workmanship of one omnipotent, and infinitely wise maker; . . . they are his property, whose workmanship they are, made to last during his, not one another’s pleasure.”⁴⁹ From this premise, Locke inferred, it followed that

46. For a very helpful study of this view, see RÉMI BRAGUE, *THE WISDOM OF THE WORLD: THE HUMAN EXPERIENCE OF THE UNIVERSE IN WESTERN THOUGHT* (Teresa Lavender Fagan trans., Univ. of Chi. Press 2003) (1999). Louis Dupré explains the classical assumption that nature reflects an ontotheological synthesis:

Nature teleologically directs organic processes to their destined perfection. It establishes the norms that things developing in time must follow if they are to attain their projected end. The more comprehensive term *kosmos* constitutes the ordered totality of being that coordinates those processes as well as the laws that rule them. *Kosmos* includes, next to the *physis* of organic being, the *ethos* of personal conduct and social structures, the *nomos* of normative custom and law, and the *logos*, the rational foundation that normatively rules all aspects of the cosmic development.

LOUIS DUPRÉ, *PASSAGE TO MODERNITY* 17–18 (1993).

47. LEON R. KASS, *TOWARD A MORE NATURAL SCIENCE: BIOLOGY AND HUMAN AFFAIRS* 259 (1985).

48. Michael J. Seidler, *Kant and the Stoics on Suicide*, 44 *J. HIST. IDEAS* 429, 432 (1983).

49. JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* 9 (C.B. Macpherson ed., Hackett Publ’g 1980) (1690).

“[e]very one . . . is bound to preserve himself, and not to quit his station wilfully.”⁵⁰

A good deal of thinking about suicide, and about moral questions generally, still operates on some such premise.⁵¹ In academic and especially legal contexts, however, explicit appeals to a normative dimension in nature are typically deemed inadmissible: moral reasoning is supposed to operate autonomously, without reliance on religious or metaphysical premises. In part, this modern approach reflects the conclusion that the older view of nature as an ontotheological synthesis, or as harboring some indwelling telos, is ruled out by the findings of modern science. The observation of Steven Weinberg, a Nobel Prize-winning physicist, is typical: “The more the universe seems comprehensible, the more it also seems pointless.”⁵² Bertrand Russell waxed rhapsodic on the theme of ultimate cosmic meaninglessness:

That man is the product of causes which had no prevision of the end they were achieving; that his origin, his growth, his hopes and fears, his loves and his beliefs, are but the outcome of accidental collocations of atoms; that no fire, no heroism, no intensity of thought and feeling, can preserve an individual life beyond the grave; that all the labors of the ages, all the devotion, all the inspiration, all the noonday brightness of human genius, are destined to extinction in the vast death of the solar system, and that the whole temple of man’s achievement must inevitably be buried beneath the debris of a universe in ruins—all these things, if not quite beyond dispute, are yet so nearly certain that no philosophy which rejects them can hope to stand. Only within the scaffolding of these truths, only on the firm foundation of unyielding despair, can the soul’s habitation henceforth be safely built.⁵³

In some (especially academic) quarters, some such view is virtually axiomatic—at the core of “what we know now.”

In legal contexts, the classical approach may seem ruled out by a different kind of consideration as well. The classical view of nature, even in its less overtly theistic versions, strikes the modern eye as suspiciously religious. By contrast, public and especially legal discourse are supposed to be secular.⁵⁴ And it has become axiomatic in modern constitutional law that

50. *Id.*

51. For a particularly salient example, see JOHN PAUL II, *THE GOSPEL OF LIFE (Evangelium Vitae)* 115–24 (1995).

52. STEVEN WEINBERG, *THE FIRST THREE MINUTES: A MODERN VIEW OF THE ORIGIN OF THE UNIVERSE* 154 (1977). Remi Brague explains that in a modern scientific perspective, “[n]ature appears indifferent to human activities.” BRAGUE, *supra* note 46, at 195.

53. BERTRAND RUSSELL, *A Free Man’s Worship*, in *WHY I AM NOT A CHRISTIAN* 104, 107 (Paul Edwards ed., 1957).

54. For discussion, see STEVEN D. SMITH, *LAW’S QUANDARY* 33–37 (2004). Though widely accepted today, this restriction is in fact of comparatively recent vintage. Stuart Banner explains that during the nineteenth century, “[f]rom the United States Supreme Court to scattered local courts, from Kent and Story to dozens of writers no one remembers today, Christianity was generally accepted to be part of the common law.” Stuart Banner, *When Christianity Was Part of the Common Law*, 16 *LAW & HIST. REV.* 27, 43 (1998). Charles Reid shows that courts regularly invoked beliefs

government can act only for “secular,” not “religious” purposes.⁵⁵ Such thinking is apparent in Justice Stevens’s rejection, in abortion and “right to die” cases, of a state’s asserted interest in protecting “life” on the ground that the interest is “theological.”⁵⁶

So what are the consequences of cutting off normative or moral reasoning from its classical foundation in nature? Opinions differ—antithetically.⁵⁷ One view, understandably common in academic contexts, is that moral reasoning is thereby liberated from influences and impediments that served mainly to obstruct its functioning. Just as science could develop more freely when unencumbered by older, animistic assumptions or superstitions, so moral theorizing can operate more rationally when released from religious or metaphysical shackles. In this vein, Martha Nussbaum asserts as follows:

[I]f we really think of the hope of a transcendent ground for value as uninteresting or irrelevant to human ethics, as we should, then the news of its collapse will not change the way we think and act. It will just let us get on with the business of reasoning in which we were already engaged.⁵⁸

But the analogy to science might also support a diametrically different conclusion. How would science fare, one might wonder, if cut off from its connections to the natural world? And the answer, it seems, would be that science would not continue at all. The natural world is science’s essential subject matter. Consequently, if appeals to the natural world were deemed inadmissible, then science would no longer be possible: whatever might go on under the label of science would not in fact be science. In a similar way, if moral reasoning is—or was—reasoning about the normative order intrinsic in nature, then if appeals to that order come to be forbidden (either because we no longer believe any such order exists or because such appeals offend cultural or constitutional constraints against religious or theological reasons), moral reasoning will no longer be possible. Anything that goes on under that label will be something quite different—and if it fails to recognize this revolutionary change, probably something profoundly confused.

This more critical assessment may be endorsed by thinkers of different stripes. One sort of thinker happily accepts the modern verdict that there is

about the divinely ordained status of marriage in domestic-relations cases until well into the twentieth century. Charles J. Reid, Jr., *Marriage: Its Relationship to Religion, Law, and the State*, 68 *JURIST* (forthcoming 2008), available at <http://papers.ssrn.com/abstract=1008992>.

55. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

56. See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 345–51 (1990) (Stevens, J., dissenting); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 565–72 (1989) (Stevens, J., concurring in part and dissenting in part).

57. A revealing sample of such opinions is provided in Richard Posner’s Holmes lectures of a few years ago and the various passionate responses. See Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 *HARV. L. REV.* 1637 (1998); Ronald Dworkin, *Darwin’s New Bulldog*, 111 *HARV. L. REV.* 1718 (1998); Charles Fried, *Philosophy Matters*, 111 *HARV. L. REV.* 1739 (1998); Anthony T. Kronman, *The Value of Moral Philosophy*, 111 *HARV. L. REV.* 1751 (1998); John T. Noonan, Jr., *Posner’s Problematics*, 111 *HARV. L. REV.* 1768 (1998); Martha C. Nussbaum, *Still Worth of Praise*, 111 *HARV. L. REV.* 1776 (1998).

58. Martha C. Nussbaum, *Skepticism about Practical Reason in Literature and the Law*, 107 *HARV. L. REV.* 714, 740 (1994).

no normative order intrinsic in nature, shares in the sort of optimism expressed by Nussbaum, but concludes that the only sensible kind of evaluative talk is consequentialist. How can we achieve the most of the things that we in fact want—pleasure, happiness, preference satisfaction? To this sort of thinker, that is the kind of discussion worth having. Misty talk about duties, rights, and obligations that haunt us from some spooky deontological domain seems obscurantist and nonsensical, or almost literally incomprehensible⁵⁹—unless, perhaps, it is understood as an obfuscating translation of more consequentialist considerations. In this vein, Mill argued that Kantian morality must be understood in consequentialist terms, Kant’s own protestations notwithstanding: “To give any meaning to Kant’s [categorical imperative], the sense put upon it must be, that we ought to shape our conduct by a rule which all rational beings might adopt *with benefit to their collective interest*.”⁶⁰ “Otherwise he uses words without a meaning”⁶¹

Of a different view and temperament are thinkers who are not prepared to relinquish the belief in an intrinsically normative nature, or who acquiesce in the more modern view but with a profound sense of real and perhaps irreparable loss. In this vein, Alasdair MacIntyre has famously argued that modern moral discourse consists of the now incoherent fragments of a kind of reasoning that made sense on older metaphysical assumptions.⁶² Raimond Gaita, the Australian philosopher, observes that “[t]he secular philosophical tradition speaks of inalienable rights, inalienable dignity and of persons as ends in themselves. These are, I believe, ways of whistling in the dark, ways of trying to make secure to reason what reason cannot finally underwrite.”⁶³ A similar verdict was expressed a generation earlier in a classic and despairing essay by Arthur Leff, a Yale law professor.⁶⁴ John Rist maintains that there are ultimately only two coherent metaethical positions—a robust metaphysical moral realism and nihilism—and suggests that “all other pos-

59. See, e.g., RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 3–90 (1999).

60. John Stuart Mill, *Utilitarianism*, in *UTILITARIANISM AND OTHER ESSAYS* 272, 326 (Alan Ryan ed., 1987).

61. *Id.* at 325–26.

62. ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1984). MacIntyre’s diagnosis elaborated on a view more succinctly expressed in a classic essay by Elizabeth Anscombe. See G.E.M. Anscombe, *Modern Moral Philosophy*, in *ANALYTIC PHILOSOPHY: AN ANTHOLOGY* 381 (A.P. Martinich & David Sosa eds., 2001). In a similar vein, see W.T. STACE, *MAN AGAINST DARKNESS AND OTHER ESSAYS* 10 (1967).

63. RAIMOND GAITA, *A COMMON HUMANITY: THINKING ABOUT LOVE AND TRUTH AND JUSTICE* 5 (Routledge 2000) (1998). I encountered this quotation in Michael J. Perry, *Morality and Normativity* (Emory Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 07-18, 2007), available at <http://ssrn.com/abstract=1009604>. Perry quotes and discusses a number of other philosophers who make similar claims. *Id.* at 32–39.

64. Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 *DUKE L.J.* 1229; see also Perry, *supra* note 63. I have developed similar criticisms at greater length elsewhere. See, e.g., STEVEN D. SMITH, *THE CONSTITUTION & THE PRIDE OF REASON* 15–30, 84–91 (1998); Smith, *supra* note 10.

sibilities [are] good-natured muddles to be collapsed by the clear-headed into Thrasmacheanism.”⁶⁵ Positions that purport to be neither objectivist nor nihilist (that is, many of the positions commonly defended by contemporary philosophers) are maintained only through “deception and self-deception (including outright lying)”; consequently, “if transcendental realism is abandoned, ignoble, self-serving lying, deception and self-deception will be ubiquitous in both public and private life. They may even seem required as preconditions of social stability.”⁶⁶

Between these extremes, there is of course a series of gradations in views. Thinkers like Richard Joyce and John Mackie maintain that normative considerations are in fact pragmatic or consequentialist in nature and that although morality may be a “myth” or “fiction,” contrary to the cruder consequentialist view, it is a useful fiction we should not be in a hurry to abandon.⁶⁷

From any of these more critical perspectives, the sort of distinctively moral discourse practiced in academic and legal contexts is almost predestined to produce an unedifying spectacle. Unmoored from its traditional subject matter, necessarily trading on suppressed premises and commitments, such discourse is incapable of providing any real satisfaction. And its deficiencies routinely manifest themselves in the performances of moral reasoning that we regularly observe—performances that in addition to being unpersuasive are also distinctly peculiar.

Typically, contemporary moral theorizing attempts to reflect and impose some sort of order on—or draw inferences from—the moral intuitions people have about various problems. Often the inference-generating problems are fictional and fanciful.⁶⁸ Thus we encounter polemical meditations about violinists biologically hooked up to sleeping strangers⁶⁹ or endless variations on the hypothetical case of the trolley car that will kill several people unless it is diverted onto a different track where it will kill only one person.⁷⁰ Such reasoning can be impressive in its intricacy⁷¹ but rarely convinces anyone not already well-disposed to its conclusion.

65. JOHN M. RIST, *REAL ETHICS: RETHINKING THE FOUNDATIONS OF MORALITY* 44 (2002).

66. *Id.* at 37–38.

67. RICHARD JOYCE, *THE MYTH OF MORALITY* (2001); J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* (1977).

68. *See, e.g.*, 1 F.M. KAMM, *MORALITY, MORTALITY* 7 (1993) (“We present hypothetical cases for consideration and seek judgments about what may and may not be done in them. The fact that these cases are hypothetical and often fantastic distinguishes this enterprise from straight-forward applied ethics . . .”).

69. Judith Jarvis Thomson, *A Defense of Abortion*, 1 *PHIL. & PUB. AFF.* 47, 59–61 (1971).

70. The problem, by now discussed in countless articles and books, is said to have been introduced by Philippa Foot. *See* PHILIPPA FOOT, *The Problem of Abortion and the Doctrine of the Double Effect*, in *VIRTUES AND VICES* 19, 23–24 (1978).

71. *See, e.g.*, KAMM, *supra* note 68.

More importantly, there is no apparent reason why anyone *should* be convinced. After all, what credentials can these intuitions claim?⁷² What exactly are the intuitions *about*? Suppose I *do* have a moral⁷³ intuition that, say, same-sex relationships are wrong. So what? I may also harbor an obsessive fear of traveling on airplanes or an abiding premonition that something horrible will happen if I leave the house on Friday the thirteenth. Unless these feelings, intimations, or intuitions are grounded in something rational and objectively real, the proper response, it seems, would be therapeutic in nature—a response calculated to help me and others subject to such influences to “get over it!” Conversely, insofar as contemporary deontological thinkers shun the therapeutic response and instead treat such intuitions with utmost respect, it is hard to resist the suspicion that they are acting on lingering assumptions about an intrinsic normative order—either their own assumptions or those of the people whose intuitions provide them with their material.

This is not the place, of course, to try to resolve metaethical debates between those who believe that moral reasoning can get along just fine, thank you, without any metaphysical or theological support and those who believe that such reasoning is an exercise in futility and self-delusion. But we can perhaps say this much: *if* the critical diagnosis is correct, then we would expect moral arguments on controversial subjects to leave us with the suspicion that the considerations that are in fact leading the various advocates to their preferred conclusions are not being candidly presented but instead lurk somewhere beneath the surface of the discourse. We would expect, in other words, to see performances such as those in *Glucksberg* and *Quill*—not just the majority opinions, but the concurring and lower court opinions as well.

Glucksberg would not be unique as a manifestation of the moral malaise. In his classic critical treatment of modern moral reasoning, Alasdair MacIntyre picked the then-recent case of *Regents of the University of California v. Bakke*⁷⁴ as an example. MacIntyre thought that the various opinions in *Bakke* revealed how an issue such as affirmative action can exceed the resources modern moral discourse has to resolve it.⁷⁵ Certainly

72. For a helpful presentation of some of these questions as they arise in adjudication, see R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381, 1391–98 (2006). For a careful attempt to defend ethical intuitionism by attaching it to Kant’s moral imperatives, see ROBERT AUDI, *THE GOOD IN THE RIGHT: A THEORY OF INTUITION AND INTRINSIC VALUE* (2004). Even if an account such as Audi’s is persuasive, however, that account would not necessarily provide a good justification for the way intuitions are used in much moral philosophizing today. Thus Audi notes that “[a]ppeals to intuitions in resolving moral questions are a pervasive strategy in contemporary ethical discourse” but that “only a small proportion of the many who appeal to intuitions . . . as evidence in ethical theorizing would espouse ethical intuitionism.” *Id.* at 24.

73. For a discussion of the difficulty of saying what a moral judgment, feeling, or intuition is, see ALEXANDER MILLER, *AN INTRODUCTION TO CONTEMPORARY METAETHICS* 43–46 (2003).

74. 438 U.S. 265 (1978).

75. See MACINTYRE, *supra* note 62, at 253.

nothing in the Court's affirmative-action jurisprudence since *Bakke* has shown this judgment to be mistaken.⁷⁶

Though they are hardly unique, the assisted-suicide cases stand as a distinctively powerful manifestation of our condition. In part this may be because, as is often observed, life-and-death decisions pose moral questions in their starkest form. And perhaps for that reason, the question of terminating life forced judges on all sides of the issue to fall back on assumptions about an intrinsic normative order implicit in the "natural course of life"—assumptions that the judges could neither openly avow nor entirely conceal. Thus the earnest inefficacy of *Glucksberg* and *Quill* pays eloquent if oblique witness to the predicament of modern moral reasoning.

CONCLUSION

This is, to be sure, a demoralizing (and, perhaps, de-moralizing) conclusion, and it is unlikely to be cheerfully received in legal contexts. MacIntyre's critical analysis of modern moral thought concluded with the less-than-gladsome comment that "the new dark ages . . . are already upon us" and we may have no choice but to wait—to wait "not for a Godot, but for another—doubtless very different—St. Benedict."⁷⁷ Perhaps philosophers, who principally aspire (or at least may aspire to aspire) to true understanding, can be content with this sort of deferred illumination. (Though most are not so content, which may help to explain why MacIntyre's analysis, for all the attention it has received, is generally ignored in academic moral philosophizing.) But law is an inescapably practical enterprise: it involves decisions that must be made *today* and that will not wait for someone to devise a more sensible approach to the questions. So if somebody—a MacIntyre, a Nietzsche, an Arthur Leff—tells us that our normative reasoning is simply not cogent on modern assumptions, then no matter how powerfully persuasive the indictment may be, we are likely to spurn it. "Your assessment may or may not be correct," we may respond, "but either way, it is not *helpful*. If you are right, we would not be able to continue doing what we do—what we *must* do. So we have no choice but to reject your assessment. Come back when you have something constructive to offer."

Still, this response to the critical assessment can hardly leave us feeling wholly satisfied. "I *have* to get to New York," someone says, "and this train is the only mode of transportation out of here today, so even though all indications are that the train isn't going anywhere in the direction of New York, I'm taking it anyway." How much wisdom is there in such a course?

So are there any alternatives? Perhaps. If moral reasoning is ineffectual under current conditions, courts might try to forego such reasoning and adhere to a course of legal formalism that eschews moral judgments (or at least leaves them for someone else to make). It is not surprising that formal-

76. For a critical discussion, see Larry Alexander & Maimon Schwarzschild, *Grutter or Otherwise: Racial Preferences and Higher Education*, 21 CONST. COMMENT. 3 (2004).

77. MACINTYRE, *supra* note 62, at 263.

ism, once an epithet, has enjoyed a sort of renaissance in recent years.⁷⁸ In a roundabout way, *Glucksberg* may instruct us in some of the reasons for that resurgence.

Or if (as I suspect) formalism is not enough, courts might self-consciously give more deference to tradition and convention—and to the moral notions embedded in those sources.⁷⁹ In debates over law and morality, academicians instinctively side with what is sometimes styled critical morality over the sort of traditional or conventional morality favored by advocates such as Patrick Devlin.⁸⁰ It is understandable that academic theorists would prefer the sort of morality that claims to be an active manifestation of what they are ostensibly good at—reasoning. But if the assessment of contemporary moral discourse suggested above is correct, reasoning as practiced in academic contexts today will be constitutionally unable to fathom the deeper normative assumptions that animate our moral judgments. Conversely, tradition or convention may be slightly more faithful (if often confusing or confused) carriers of our genuine moral convictions than academic reasoning.⁸¹ And so it might turn out that an unprepossessing, tradition-oriented decision like *Bowers v. Hardwick* is less deserving of the contempt it received than, say, more grandiloquent decisions like *Lawrence v. Texas*, which overruled it.⁸²

Realistically, though, neither legal formalism nor legal traditionalism is likely to achieve a dominant position in constitutional jurisprudence. The pretensions of reason—and of judges and legal scholars to be the proponents and practitioners of reason—are too strong for that. The effective overruling of *Glucksberg*'s broader pronouncements in *Lawrence* suggests as much: *Glucksberg*'s dual requirements for substantive due process—that a right be “deeply rooted in this Nation’s history and tradition” and susceptible of

78. For a description of this reversal in fortunes and a defense of formalism in law, see Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 166–84 (2006).

79. For a modest and pragmatic proposal in this vein, see Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 355 (2006). For my own defense of a traditionalist approach in Establishment Clause jurisprudence, see Steven D. Smith, *Separation as a Tradition*, 18 J.L. & POL. 215 (2002).

80. For Devlin’s position, see PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965). For one among many arguments criticizing Devlin for giving too much weight to convention and too little to reasoning in determining morality, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 240–55 (1977).

81. This would be a somewhat different rationale for the use of tradition in constitutional law than the ones discussed and criticized in Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543 (2008).

82. For a thoroughgoing criticism, see Lund & McGinnis, *supra* note 6, at 1557 (“The *Lawrence* opinion is a tissue of sophistries embordered with a bit of sophomoric philosophizing.”); see also Gregory Kalscheur, *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INTERDISC. L.J. 1, 3 (2006) (“The opinions produced by the Justices . . . in *Lawrence* provide compelling evidence that the persistent American confusion about the proper relationship between law and morality has now borne fruit in doctrinal incoherence.”).

“careful description”—resonated respectively in tradition and formalism.⁸³ But *Lawrence* had no use for this “paralyzing carapace,” as Professor Post puts it.⁸⁴ Nor is it likely that the constraints discouraging any forthright appeal to an intrinsically normative nature will be relaxed—or that any full-bodied version of natural law will flourish in the contemporary American jurisprudential environment⁸⁵ any time soon.

And so for the foreseeable future, we can expect to see, in the academic literature and quite likely in Supreme Court opinions as well, arguments like those variously deployed in *Glucksberg* and *Quill*. We can expect to see arguments ostentatiously offering what purports to be reasoning. But hardly anyone will feel entirely sure exactly what the normative claims contained in such arguments are claims *about*—or whether these arguments and claims are in any case the real bases of the various advocates’ opinions. And so no one will be—or will actually be expected to be—persuaded.

83. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *see also supra* note 3 and accompanying text.

84. *See supra* note 6.

85. For a lengthy assessment of that environment, *see* SMITH, *supra* note 54, chs. 3, 4, 7.

