# "Love Them to Death": Dutch and Italian Experiences of (Assisted) Suicide, and the Urgent Need for Human Solidarity

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ABSTRACT: Legal cases involving "assisted suicide" and euthanasia have dramatically increased over the past decades. European news is filled with hard cases involving people whose experiences of pain and suffering are used to advance the cause of further decriminalization. Another kind of case, however, is gaining public attention and revealing the fallacious narrative of death as a human right. These are cases of people who live where such practices are already legal, but who may have preferred life over death were the practice criminally sanctioned. A suicide case from the Netherlands will be the starting point for a broader reflection on the existence of a "right to die," and on the soundness of an alternative "duty to care."

Creating a parallel between a Dutch case of "death by starvation" and a recent Italian constitutional judgment (which led to a partial decriminalization—or exemption from punishment—of some forms of assisted suicide) the author aims to show that: a) there is inevitably an international dimension to the problem, b) laws shape human behavior, and they do so internationally. What once was prohibited, and later decriminalized, has gradually

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**become tolerated, welcomed, and is now entertained as a human right. A right to die, however, contradicts the very basis of our common living.**

**After presenting the facts of a suicide recently committed by a Dutch teenager, the author will focus on Netherland's norms regarding assisted suicide and euthanasia, and the specific medical guidelines that apply to the so-called "choice to stop eating and drinking so as to hasten the end of life (SED)." In the third chapter, the author will underscore the importance of intent, and address the radical difference that exists between an act of suicide and the choice to refuse treatment. The author then analyzes the relevant criminal provisions in Italian legislation, which prohibit euthanasia and assisted suicide, with a particular focus on the recent decision n. 242/2019, issued by the Italian Constitutional Court. This judgment relaxed the existing ban on assisted suicide and thereby compromised Italy's absolute protection of life by adopting an overly broad understanding of individual autonomy. In the final chapter, the author defends the idea that only where *autonomy* is combined with *solidarity* individual liberties are justly ordered, and human rights effectively protected. This solidarity, implicit in norms such as "Bad Samaritan Laws" that impose legal duties to rescue, is not mere altruism, but a form of self-love, as it creates the beneficial conditions of harmony and friendliness among citizens.**

## Introduction

In 2002, the Netherlands was the first European country that explicitly decriminalized physician assisted suicide and voluntary euthanasia,[1] practices that are still criminally sanctioned in most of Europe and the American states. Several scholars dedicated very detailed and interdisciplinary studies to the Dutch law, as well as to similar regulations more recently enacted in the U.S. and elsewhere in Europe.[2] In addition to the shortcomings of some specific provisions, these authors have analyzed their philo-

[1] No. 194 Act of 12 April 2001, containing review procedures for the termination of life on request and assisted suicide and amending the Criminal Code and the Burial and Cremation Act (Termination of Life on Request and Assisted Suicide (Review Procedures) Act). English translation available at: *https://english.euthanasiecommissie.nl/the-committees/documents/publications/euthanasia-code/euthanasia-code-2018/euthanasia-code-2018/euthanasia-code-2018*. As later illustrated, while the law came into force in 2002, the performance of these practices was already admitted by Dutch jurisprudence since the seventies, and with a history of progressive decriminalization.

[2] Among others, see: J. Griffiths, A. Bood, H. Weyers, *Euthanasia and the Law in the Netherlands*, Amsterdam University Press,1998; N. Gorsuch, *The Future of Assisted Suicide and Euthanasia*, Princeton University Press, 2006; J. Keown, *Euthanasia, Ethics and Public Policy, An argument Against Legalization*, Cambridge University Press, 2018; M. Ronco, *Il Diritto di Essere Uccisi: Verso la Morte del Diritto?*, Giappichelli Editore, 2019.

sophical and ideological grounds, as well as the long-term and collateral consequences of such liberalizations. According to these studies, the new laws on euthanasia and assisted suicide do not and cannot offer real safeguards.[3] Though drafted with the aim of preventing any form of abuse or mistake, they do not seem to accomplish that result, nor do they seem to best express that individual "autonomy" they profess to be their fundamental inspiration. This became evident recently, after an elderly Dutch woman affected by dementia was forced to respect her own previous request for euthanasia and therefore killed—possibly against her present will—by her doctor.[4]

The principles underlying such reforms imply that human dignity is a relative value, where life is by nature disposable, and an agent may exert omnipotent powers of self-determination. Within less than twenty years, practices intended to "help" the miserably and terminally ill—who had consciously decided to terminate their life "with dignity"—have been adopted in cases where victims are neither terminally ill nor fully conscious about their irrevocable and last decision. Furthermore, assisted suicide and euthanasia have been extended to minors and depressed individuals, and administered beyond the clear boundaries of the law.[5]

Notwithstanding the striking evidence that something is deeply awry with these laws and the principles they embody, voluntary euthanasia and assisted suicide have been decriminalized in other European countries, and in a few U.S. States, since 2002.[6] Moreover, arguments in favor of these reforms led the Supreme Court of Canada,[7] and

[3] With reference to the authors mentioned above, this is certainly the opinion of N. Gorsuch, J. Keown, and M. Ronco.

[4] The case found wide media coverage. It not only involved a patient who had possibly changed her mind, but it was also the first prosecution of a doctor since the enactment of the 2002 law. An account can be found on the New York Times' website: *https://www.nytimes.com/2019/09/11/world/europe/netherlands-euthanasia-doctor.html*. For a more detailed analysis see, Miller, Dresser, Kim, Advance euthanasia directives: a controversial case and its ethical implications, Journal of Medical Ethics 2019;45:84-89. The geriatrician, respecting the patient's previous will, decided to euthanize her, but before doing so he placed a sedative in the woman's coffee—without telling her—to avoid struggle during the procedure. After the doctor started to inject the anesthetic, however, the later victim tried to get up, but was held down by family members, so that the doctor could complete the treatment.

[5] Criticism also comes from former advocates, as in the case of Theo Boer, a professor of theology and ethics, who had served on review committees. He underscored how the law shifted the paradigm of care: from an emphasis on the doctor's duty of beneficence to the patient's right to self-determination. See J. Keown, *Euthanasia, Ethics and Public Policy, An Argument Against Legalization,* Cambridge University Press, 2018, pp. 228-237.

[6] As of today, physician assisted suicide and voluntary euthanasia have also been decriminalized in Belgium and Luxemburg. Switzerland has only decriminalized the former, and Italy's Constitutional Court has decriminalized some forms of assisted suicide. In the U.S., physician assisted suicide has been decriminalized by statute in Colorado, District of Columbia, Hawaii, Maine, New Jersey, Oregon, Vermont, and Washington; in California and Montana by courts' decisions.

[7] *Carter v Canada* (AG), 2015 SCC. The Canadian Supreme Court found that the Criminal Code provision of s. 241(b), which prohibited assisted suicide, and of s. 14, which provides that no person can consent to his own death, violated section 7 of the Canadian Charter of Rights and Freedoms, unduly limiting the rights to life, liberty and security of the person. The norms were void, the Supreme Court held, *"insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to*

most recently the Constitutional Court of Italy, to decriminalize some forms of assisted suicide,[8] with the effect that participation in suicide is no longer absolutely prohibited. Though arguments framed in terms of an actual "right to die" have been rejected by the U.S. Supreme Court[9] in the past, they may be heard again by the U.S. Justices and their European counterparts both at the national level and at the European Court of Human Rights.[10] The results of such judgments are by no means predictable and it is thus imperative to continue addressing these topics. The recognition of a "right to die" would not only nullify existing criminal bans on euthanasia and assisted suicide but would also violate the most basic principles of our common living.

The corollary of an individual's "right to die" is a third party's duty to kill.[11] Such a command, however, contradicts the sanctity of each life, to be protected as the expression of the intrinsic equality and innate dignity of every human person.[12] Such a

*the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition."* In general, the criminal ban was not arbitrary, but overbroad, as it would apply to both vulnerable and non-vulnerable individuals. For an extensive analysis of Canada's recent judgment, see S. Murphy, *Legalization of Assisted Suicide and Euthanasia: Foundational Issues and Implications*, 31 BYU J. Pub. L. 333 (2017).

[8] Constitutional Court of Italy, Judgment n. 242/2019, November 22, 2019 (ECLI:IT:COST:2019:242), available at: *https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2019&numero=242*. English translation available at: *https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza_n_242_del_2019_Modugno_en.pdf*.

[9] Washington v. Glucksberg 521 US 702 (1997). On that occasion, six highly influential moral philosophers filed an amicus curiae defending the idea that the right to be assisted in one's suicide is already implied in the individual right to make the "most intimate and personal choices central to personal dignity and autonomy," which was recognized in Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992). Assisted Suicide: The Philosophers Brief, R. Dworkin, T. Nagel, R. Nozick, J. Rawls, J.J. Thomson, et al., available at: *https://cyber.harvard.edu/bridge/Philosophy/philbrf.htm*.

[10] According to J. Keown, the possibility of the U.S. Supreme Court taking a different stance on the issue would be the result of its own holdings in *Washington v. Glucksberg* and *Vacco v. Quill*, of 1997, for at least three reasons. The first is that concurring opinions filed by Justice O'Connor, and by Justices Stevens and Douglas, which rejected a challenge of "facial unconstitutionality" (i.e., unconstitutionality in all possible applications), left a door open to a constitutional right to physician assisted suicide under certain circumstances. Second, the lack of legal history of the right to die, which justified the 1997 holdings, did not prevent the same Supreme Court from upholding a "novel" right to same-sex marriage in subsequent *Obergefell v. Hodges*, in 2015. Finally, the attitude of courts in the international arena is no longer united as in 1997 in rejecting the existence of a right to die. See, J. Keown. *Euthanasia, Ethics and Public Policy*, pp. 391-394.

[11] This is not the view of the *philosopher's brief, supra* note 9, which however contains a puzzling statement: "Since patients have a right not to have life-support machinery attached to their bodies, they have, in principle, a right to compel its removal. But that is not true in the case of assisted suicide: patients in certain circumstances have a right that the state not forbid doctors to assist their deaths, but they have no right to compel a doctor to assist them. The right in question, that is, is only a right to the help of a willing doctor." *The Philosophers' Brief*, sec. II, last par. If this is true, however, we are talking about a *doctor*'s new right. It is the "willing doctor" who has a right not to be punished if he kills a requesting patient. The patient, on the other hand, is only more vulnerable.

[12] For a secular recovery of the idea of s*anctity of life,* as the foundation of human dignity, see L. Gormally (ed.), *Euthanasia, Clinical Practice and the Law,* 1994, pp. 118 ff. With reference to the European Human Rights' jurisprudence, see also, G. Puppinck, *Abortion and the European Convention on Human Rights*, Irish Journal of Legal Studies, 2013, Vol 3(2), in part. p.147: "The 'principle of sanctity of life' is

duty contradicts the intuitive moral obligation of the Golden Rule: "*do to others what you would have them do to you."* In fact, we all have at least a moral, if not a legal obligation to save each other's life, whenever possible. Predicament of a "right to die" contradicts morality itself.[13]

## A Teenager's "Legitimate" Suicide

When she made her final and irrevocable decision to die, Noa Pothoven was a teenager. Last June, the Dutch seventeen-year-old girl died of starvation in a hospital bed, in front of her parents. As far as we know, her death did not involve a regulated procedure of "physician assisted euthanasia," which she had been denied.[14] It was nonetheless a legitimate suicide, performed by a minor and by no means uncommon or illegal in Dutch end-of-life scenarios, as will be discussed.

Based on media reports, Ms. Pothoven had long suffered depression and post-traumatic stress disorder prior to the fatal event, which were the results of sexual abuse she had experienced as a child.[15] In the autobiographical book "*Winning or Learning*," published in 2016, the young author reported being sexually assaulted once at a school party when she was eleven years old, and then again a year later. She was also the victim of a rape by two men when she was fourteen, a fact that she had never reported to the police, out of shame. She also described her battle with anorexia and self-harm, and she spoke openly about her mental disorders. She who would later fall victim to her own will had endured a long history of hospitalizations, mostly due to suicide attempts. Before last June, she had tried to end her life in accordance with Dutch laws: in the Netherlands, minors as young as twelve can request euthanasia. When the patient is between twelve and sixteen years old, parental consent is required and in the case of older minors, parents must be consulted.[16] Based on a 2018 interview, she explains that she had been deemed immature for the choice and therefore been denied euthanasia.[17]

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'protected under the Convention' and recognized by the European Court, which affirms that 'the right to life is an inalienable attribute of the human beings and forms the supreme value in the hierarchy of human rights'" (with references to *Reeve v. The United Kingdom,* no. 24844/94, and to *Pretty v. The United Kingdom,* no. 2346/02, footnotes 12,13).

[13] On the impossibility of predicating a "right to do wrong" as the reason why there could be no "right to die" see, in particular, H. Arkes, *Once More unto the Breach: The Right to Die – Again,* 8 Issues L. & Med. 317 (1992).

[14] In response to initial media misrepresentation, a statement was issued by the Royal Dutch Medical Association on June 5, 2019, available at: *https://www.knmg.nl/actualiteit-opinie/nieuws/nieuwsbericht/international-media-misrepresent-tragic-death-of-dutch-17-year-old-as-euthanasia.htm*.

[15] See, among others: *Dutch Teenager's Death Sets Off Debate, and Media Corrections,* New York Times, June 6, 2019, available at: *https://www.nytimes.com/2019/06/06/world/europe/noa-pothoven-instagram-euthanasia.html*; *Her death made headlines. We should learn from her life, instead,* The Washington Post, June 11, 2019, available at: *https://www.washingtonpost.com/opinions/2019/06/12/her-story-isnt-about-euthanasia-its-about-failing-mental-health-systems/*.

[16] Termination of Life on Request and Assisted Suicide, Chapter II, Art. 2, par. 3, 4,

[17] As she said, "they think I am too young to die. They think I should complete the trauma treatment and that my brain must be first fully grown. That lasts until you are 21. I'm devastated, because I can't wait that long anymore," Noa (16) uit Arnhem is nu al klaar met haar verwoeste leven," December 1, 2018, De

The autobiographical account of what Ms. Pothoven suffered makes it at least reasonable to wonder whether she had truly been mature and free when she irrevocably opted for death, or rather a patient in need of appropriate treatment. The teenager's suicidal decision came after a long series of betrayed hopes, of painful or long-awaited treatments. Her book rapidly became a public and powerful charge against the Dutch healthcare system and its shortcomings. Along with tragic memories of months spent in an isolation cell, of suffering a complete lack of privacy, and of feeling treated like a criminal, the later suicidal teenager denounced the long waiting lists for young psychiatric patients, which prevented her from receiving timely treatment.[18] She said that the goal of publishing her book was to "*break through stigmas, especially with people who want to get help*," suggesting it was literally *help*, and not *death,* that she was seeking.[19] She also said that she was giving trauma therapy *one more chance*, and that she *hoped for a miracle*, again suggesting that she might have enjoyed a good life much more than a good death.[20] On a similar note, her parents said that she "*does not want to die at all. She only longs for peace.*"[21]

The victim's own words, moreover, seem to prove that she was incapable of making decisions aimed at her own good and of acting upon those decisions accordingly. The girl who legitimately "chose" to die, and acted accordingly, could not realize her dream of eating a white chocolate bar, her favorite candy: "*I don't dare to eat it yet. That is because of the fear of getting fat.*"[22]

Finally, Noa Pothoven's last Instagram post—a "sad" one, she wrote—may sound like a cry for help.[23] A message shared on social media in itself generates the doubt that she still dreamt of somebody coming to her rescue in her final days.[24]

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Gelderlander, available online at: https://www.gelderlander.nl/home/noa-16-uit-arnhem-is-nu-al-klaar-met-haar-verwoeste-leven~a01a7bd1/ (informal translation).

[18] As she said, "If you have a serious heart disease, you can undergo surgery within a few weeks. But if you become acutely mentally ill, then they say casually: unfortunately, we are full, just go on the waiting list. And you have to know that one in ten anorexia patients in the Netherlands dies from the consequences of the eating disorder." Ibid.

[19] "Noa Pothoven is klaar met het leven, maar weet toch anderen te inspireren," March 21, 2019, Vice, available online at: https://www.vice.com/nl/article/zma9xa/noa-pothoven-inspireren-boek-depressie-suicide (informal translation).

[20] Ibid, *supra* note 17.

[21] Ibid.

[22] Ibid.

[23] The final post is no longer available online. Respecting that, the author decided not to reproduce it here.

[24] Studies have shown that suicide attempts are rarely expression of the unequivocal and irreversible determination to die. On the contrary, psychiatrists maintain that the manifest wish to die of suicidal individuals rest upon an actual desire to be rescued: a desire which often explains the tendency to give warnings, so that others might intervene. On this point, see T. J. Marzen; M. K. O'Dowd: D. Crone; T.J. Balch, *Suicide: A Constitutional Right,* 24 Duq. L. Rev. 1 (1985), pp. 108-111.

These are the personal impressions and speculations of a lawyer who read media accounts of the case, who is neither a psychiatrist nor a psychologist. Nonetheless, as a psychiatrist recently stated about Ms. Pothoven's case,

> In the end, one does not need to be a psychiatrist to appreciate how psychiatric disorders, especially when severe enough to lead to euthanasia requests, could interfere with a patient's ability to make "voluntary and well considered" decisions—especially when that patient is a minor. The basis for concluding that any teenager with a psychiatric disorder has "no prospect of improvement" and "no alternatives" is likely to be uncertain at best.[25]

Lay reflections on Noa Pothoven's death and its moral legitimacy are validated by the fact that they originate in our common and shared experience as human beings, by the fact that we understand each other's actions as if they were our own. We have all been teenagers. Many of us have experienced depression—either ourselves or among friends and relatives. While positive law may presently allow a teenager to choose death by starvation, the moral and legal questions remain wide open. "*Is the will of a mentally impaired individual sufficient for legitimizing a deadly choice—whether practiced within the hospital or elsewhere? Is the same true in the case of a minor?*"; and, "*Is it a legal duty to respect his or her deadly wish or is it legitimate to intervene in order to prevent the execution of that deadly plan?*" Finally, "*may a system that legitimizes voluntary euthanasia credibly claim to defend the lives of the most vulnerable?*"

As a provisional answer to all these questions, one must recall how the European Court of Human Rights affirmed that criminal bans on assisted suicide do not violate any individual right, but are proportionate and legitimate measures, as states have the right and the duty to regulate and control actions that are prejudicial for life, which is the most basic of all human rights.[26]

With reference to the Dutch law, which was about to come into effect, in 2001 the United Nations Human Rights Committee explicitly said:

> The Committee is concerned lest such a system may fail to detect and prevent situations where undue pressure could lead to these criteria being circumvented. The Committee is also concerned that, with the passage of time, such a practice may lead to routinization and insensitivity to the strict application of the requirements in a way not anticipated.[27]

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[25] S. Kim, How Dutch law Got a Little Too Comfortable with Euthanasia, June 8, 2019, The Atlantic. Available online at: https://www.theatlantic.com/ideas/archive/2019/06/noa-pothoven-and-dutch-euthanasia-system/591262/.

[26] ECHR, Case of Pretty v. UK, 2346/02. In the Court's view, moreover, any amendment or elimination of this criminal provision must take into serious considerations the very high risks of abuse that would follow.

[27] UN Human Rights Committee, 72 Session, *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Netherlands,* C. Para 5(a). CCPR/CO/72/NET 27 August 2001.

With reference to minors, the same U.N. body added: "In view of the irreversibility of euthanasia and assisted suicide, the Committee wishes to underline its convictions that minors are in particular need of protection."[28]

Immediately after Noa Pothoven's death, online sources inaccurately reported the shocking news that a mentally impaired minor had been legally euthanized in the Netherlands. This was false, as evidenced by the fact that she was refused euthanasia and died of starvation.[29] It is true, however, that *the Dutch law does not rule out euthanasia for minors, including for mental illness.* Furthermore, none of the major newspapers noted any *significant moral difference* between *an assisted suicide performed in accordance with the Dutch norms* and *the one committed by Noa Pothoven.* Nobody wondered whether her parents *could* or *should have stopped* her from accomplishing her own death. Alarmist voices, in other words, were wrong in terms of case specifics, but perhaps less so in a general sense. Journalists also failed to address that death by starvation is increasingly common in the Netherlands and it is regulated quite in detail.

## Dutch Law and Guidelines on: "Caring for People Who Consciously Choose Not to Eat and Drink so as to Hasten the End of Life."[30]

The Netherlands' liberal views on assisted suicide and euthanasia trace back to the 1970s,[31] when courts in the country already showed some acceptance of practices defined as "indirect euthanasia" and "passive euthanasia."[32] That tendency continued in the following decade: "*it became established in a series of Court decisions that, when a patient*

[28] Ibid., para 5(c).

[29] See, for instance, *Misinformation swirling around Dutch teenager's death ignites debate over euthanasia*, June 8, 2019, CNN, available at: *https://www.cnn.com/2019/06/08/europe/noa-pothoven-euthanasia-debate-intl/index.html*.

[30] The document, titled "Caring for people who consciously choose not to eat and drink so as to hasten the end of life," is a guideline issued by the Royal Dutch Medical Association (KNMG), available at: https://www.knmg.nl/advies-richtlijnen/knmg-publicaties/publications-in-english.htm. The document says that it "is not intended as guidance for hunger or thirst-strikers or to assist patients suffering from anorexia nervosa." The guidelines' principles, however, inevitably affect borderline cases, such as that of Noa Pothoven.

[31] J. Griffiths, et al., Euthanasia and the Law in the Netherlands, pp 43-88. The authors provide an extensive analysis of how euthanasia and assisted suicide came to be accepted both legally and by the general public not via immediate legislation, but through the interaction of judicial decisions, Medical Association policies, interest group actions, Health Council reports, etc.

[32] Respectively, these terms indicated the administration of pain killers that had the effect of accelerating the patient's death, and death caused by the patient's underlying disease and his refusal/the withdrawal of life-saving treatments. These terms, however, are not accurate definitions of the practices under scrutiny. While suicide and euthanasia consist, by definition, in actions or omissions that are intended at causing death, neither the administration of palliative care nor treatment refusal necessarily imply the same intention. Palliative care and treatment refusal, indeed, although equally possible "causes"—naturally speaking—of death, are performed with the most diverse intentions, such as to spare the patient useless treatments, or burdensome medical costs, or with the exclusive intention of relieving him from unbearable suffering. In such cases, death might be foreseen as a side-effect, but not intended.

*who is suffering unbearably and hopelessly makes a voluntary and well-considered request, a doctor who accedes to the request, if he conforms to the 'requirements of careful practice' and makes his controllable by not filing a certificate of natural death, is not guilty of a crime.*"[33] Following the first law to codify jurisprudential developments in 1993,[34] more detailed liberalization came with the 2002 law.

While articles 293 and 294 of the Dutch Penal Code currently punish euthanasia and assisted suicide (which therefore cannot be considered expressions of a "fundamental right to die"), the same practices are "*not punishable*" if performed by a physician and with "due care," i.e., in accordance with the new specific regulation.[35] The necessary joint requirements of "due care," whose recurrence legitimizes otherwise criminal intentional killings, are defined by the 2002 Act as follows:

> 1. In order to comply with the due care criteria referred to in article 293, paragraph 2 of the Criminal Code, the physician must: a. be satisfied that the patient's request is voluntary and well considered; b. be satisfied that the patient's suffering is unbearable, with no prospect of improvement; c. have informed the patient about his situation and his prognosis; d. have come to the conclusion, together with the patient, that there is no reasonable alternative in the light of the patient's situation; e. have consulted at least one other, independent physician, who must see the patient and give a written opinion on whether the due care criteria set out in (a) to (d) have been fulfilled; f. have exercised due medical care and attention in terminating the patient's life or assisting in the patient's suicide. [36]

Notwithstanding their apparent clarity, these requirements are not easy to assess. Patient autonomy, as well as the voluntary and free nature of the request, are but the tip of the iceberg.[37]

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[33] J. Griffiths, et. al., p. 73. Some of these judicial cases—*Postma*, 1973; *Wertheim*, 1981; *Schoonheim*, 1984; *Admiraal,* 1985—are illustrated in detail (ibid, pp. 51-67), with bibliographical references.

[34] The 1993 law consisted in an amendment to the Law on the Disposal of Corpses. For the English text of the Law see, Griffiths *et al*., *Euthanasia and Law in the Netherlands*, pp. 309, 310.

[35] Criminal Code of the Kingdom of the Netherlands (1881, amended 2012), Section 293: "1. Any person who terminates the life of another person at that other person's express and earnest request, shall be liable to a term of imprisonment not exceeding twelve years or a fine of the fifth category. 2. *The offence referred to in subsection (1) shall not be punishable, if it is committed by a medical doctor who meets the requirements of due care* referred to in section 2 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act [Wet Toetsing Levensbeëindiging op Verzoek en Hulp bij Zelfdoding] and who informs the municipal forensic pathologist in accordance with section 7(2) of the Burial and Cremation Act [Wet op de Lijkbezorging];" Section 294: "1. Any person who intentionally incites another person to commit suicide shall, if suicide follows, be liable to a term of imprisonment not exceeding three years or a fine of the fourth category. 2. Any person who intentionally assists in the suicide of person or provides him with the means thereto shall, if suicide follows, be liable to a term of imprisonment not exceeding three years or a fine of the fourth category. Section 293(2) shall apply mutatis mutandis." Text available online at: https://www.legislationline.org/documents/section/criminal-codes/country/12/Netherlands/show. Emphasis added.

[36] Termination of Life on Request and Assisted Suicide, Chapter II, Art. 2, par. 1.

[37] Comprehensive and detailed analysis of all criteria, and of their respective limits, and problems, can be found in J. Keown, Euthanasia, Ethics and Public Policy, pp. 157-179. The difficulties of assessing

First, since the physician can himself suggest euthanasia, the influence that such an opinion can have on the mind of a patient, whose life and wellbeing fully depend on his doctor, can hardly be overestimated. It is also hard to overestimate the impact of the fact that death has itself *become* a choice. According to the 2018 report, the number of notifications of euthanasia in the Netherlands was 6,126. This is 4% of the total number of people who died (153,328).[38] According to the European Institute of Bioethics, assisted deaths increased by 317% between 2006 and 2016.[39] The fact that laws shape human behaviors is indeed no news.[40] According to a recent article that appeared on *The Guardian*,

> . . . in 2017, some 1,900 Dutch people killed themselves, while the number of people who died under palliative sedation – in theory, succumbing to their illness while cocooned from physical discomfort, but in practice often dying of dehydration

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the presence of all due-care requirements are acknowledged in the Euthanasia Code 2018, Review Procedures in Practice, published by the regional Euthanasia Review Committees, available online at: *https://english.euthanasiecommissie.nl/the-committees/code-of-practice*.

[38] English texts of the annual reports by the review committees are available at: https://english.euthanasiecommissie.nl/the-committees/documents/publications/annual-reports/2002/annual-reports/annual-reports.

[39] See: https://www.ieb-eib.org/en/report/end-of-life/unclassified/report-2016-euthanasia-in-netherlands-488.html. Signaling a halt in the trend, the 2018 report notes, "This is the first time in years that there has been a decline in the number of notifications, both in absolute terms and in relation to the total number of deaths in the Netherlands." *Supra*, note 38. This decrease, however, could find several explanations, including an increasing acceptance of death by stopping to eat and drink, *infra* in the text.

[40] "Like any form of discipline, law inevitably has an effect on moral character (…) We may object that we do not wish law to make men good: "Law should not enforce morality." But what else does law enforce, if not some kind of morality? Its whole point is to induce citizens to perform certain kinds of acts and avoid others. Rather than complaining that it does so, we ought to make sure that it is inducing them to perform good acts rather than bad ones, and to avoid bad acts rather than good ones. We may further object that laws influence only outward conduct, not inward character. But these two things are inseparable, because conduct shapes character. Citizens do not merely perform certain acts; they become habituated to performing them. To become habituated to performing them is to acquire an inward disposition to their performance." J. Budziszewski, Companion to the Commentary, Cambridge University Press, 2014, Question 92, Art. I, p. 111. As phrased by Professor R.P. George, "the central pre-liberal tradition of thought about morality, politics, and the law, has maintained that laws have a legitimate subsidiary role to play in helping people make themselves moral. According to this tradition, laws forbidding certain powerfully seductive and corrupting vices (some sexual, some not) can help people to establish and preserve a virtuous character by 1) preventing the (further) self-corruption which follows from acting out a choice to indulge in immoral conduct; 2) preventing the bad example by which others are induced to emulate such behavior; 3) helping to preserve the moral ecology in which people make their morally self-constituting choices; and 4) educating people about moral right and wrong," R.P. George, Making Men Moral, Oxford, Clarendon, 1993, p 1, emphasis added. See also, S. Gregg, On Ordered Liberty, Lexington Books, 2003, in particular at ch. 4, pp. 54,55: "Law is in part an expression and a shaper of human culture. It thus influences the choices we make (….). Of course, law is not sufficient (…). At the same time, we should not underestimate law's potential to mold a community moral's ecology. Legal prohibitions can, for example, discourage us from making choices that contribute to our inner disintegration. They can also deflect us from being bad examples to others. This is not to suggest that law should have the primary role in shaping the moral culture. It is merely to state that the law has a role and, at a minimum, should not directly promote any activity that damages this moral ecology."

> while unconscious – hit an astonishing 32,000. Altogether, well over a quarter of all deaths in 2017 in the Netherlands were induced.[41]

Further problems come from the fact that the law might not to take into proper consideration the impact of serious and dramatic emotions (and passions, and values) on the patient's capacity.[42] In addition, neither of the two physicians who visit the patient need to be experts in either palliative care, or in the patient's specific illness, meaning that the required "comprehensive information" provided to the patient could be a chimera. Comprehensive information, moreover, is not *per se* the best way to act in the patient's interest. Some patients may need more time to understand and accept their new condition or require prior establishment of a relationship of trust; some might even need to be overly optimistic in order to survive.[43]

Some due care criteria are also extremely subjective, such as the *unbearable* nature of suffering, or the absence of *reasonable alternatives*, which largely depends upon the patient's personal idea of what constitutes a dignified future. "Reasonableness" is also inevitably influenced by societal views and expectations, as well as by healthcare costs. Another troubling aspect of the law is that it does not prevent a patient who is denied access to euthanasia or assisted suicide from directing his request to another doctor, including to those who work for "End-of-life-clinic."[44]

It is thus hard to maintain that the law's requirements prevent or substantially eliminate any risk of abuse and mistake. Since 2002 not one doctor was found guilty of violating the Dutch law, and only one was ever prosecuted.

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[41] The Guardian, Death on demand: has euthanasia gone too far?, C. de Bellaigue, Jan 18, 2019. Available online at: https://www.theguardian.com/news/2019/jan/18/death-on-demand-has-euthanasia-gone-too-far-netherlands-assisted-dying. Official numbers of voluntary euthanasia and assisted suicide, moreover, do not take into account other forms of induced deaths, such as palliative sedation, or even the "choice to stop drinking and eating so as to hasten the end of life," *infra*.

[42] J. Keown, Euthanasia, Ethics and Public Policy, p. 74, referring to the studies of Louis Charland et al., and arguing that contemporary laws do not really address nor adequately assess mental capacity to choose ant to consent to euthanasia and assisted suicide. L. C. Charland et al. "Decision-Making Capacity to Consent to Medical Assistance in Dying for Persons with Mental Disorders," 2016, J. Ethics Mental Health 1, pp. 1-14. The already cited essay by T. J. Marzen; M. K. O'Dowd: D. Crone; T.J. Balch, Suicide: A Constitutional Right, is still a clear and rather complete summary of the several factors affecting the alleged "autonomy" of any suicidal individual.

[43] G. Rocchi, *Licenza di Uccidere, La Legalizzazione dell'Eutanasia in Italia*, ESD, 2019, pp. 60, 61. Commenting on the recent Italian law on advance directives (law n. 219/2017), the author points out how the patient's "informed" consent can be interpreted either: "as consequence of a *human relationship* between doctor and patient, where the former will shape his explanations based on the patient's understanding abilities, on his psychological state, on his family condition (…); or as a *mandatory legal requirement*, which needs certified record: in this second instance the human and professional relationship becomes *irrelevant*, as all that matters is the patient's signature on a form, which does not necessarily correspond to actual information." Informal translation, emphasis in the original.

[44] According to C. De Bellaigue, in 2017 around 750 people received euthanasia by End-of-life-clinic doctors. See: Death on Demand: Has Euthanasia Gone Too Far?, supra note 41. As evidenced by Keown, no minimum frequency or duration is required for this last patient-doctor relationship in order to legally perform euthanasia or assisted suicide, J. Keown, Euthanasia, Ethics and Public Policy, p. 168.

Clearly, there is an even higher risk of abuse and mistake for minors,[45] especially when the requesting patient suffers from psychiatric disorders.[46] Psychiatrists have admitted that, in such cases, most of the diagnosis is based on the patient's own report and therefore determined without objectivity.[47] As Scott Kim, Senior Investigator in the Department of Bioethics at the Clinical Center NIH, recently pointed out, "most Dutch psychiatrists—like most other doctors and the Dutch public—disapprove of psychiatric euthanasia." [48] In his opinion, "it is not easy to distinguish between a patient who is suicidal and a patient who qualifies for psychiatric euthanasia, because they share many key traits. *In some cases, psychiatric euthanasia is simply a highly effective means of suicide, as in the case of a man who attempted suicide, was hospitalized, and then received psychiatric euthanasia."*[49]

Doctor Kim conducted a study on euthanasia and assisted suicide of patients with psychiatric disorders in the Netherlands, reviewing 66 cases between 2011 and 2014. Based on its results, most patients,

> . . . had chronic, severe conditions, with histories of attempted suicides and psychiatric hospitalizations. Most had personality disorders and were described as socially isolated or lonely. Depressive disorders were the primary psychiatric issue in 55% (n = 36) of cases (…). Twenty-seven percent (n=18) of patients received the procedure from physicians new to them., 14 of whom were physicians from the End-of-Life Clinic…."[50]

In 2017, even Dr. Boudewijn Chabot, one of the first advocates of euthanasia for psychiatric disorders, expressed his own concerns:

> About twenty years ago, I was sitting on the bench for the accused in the High Court. This was ten years before the adoption of the Euthanasia Act, after I had given a fatal drink to a 50-year-old, physically healthy social worker. Judgment: 'guilty without punishment'. I fought–and fight– for self-determination. However, *I am now worried about the rate at which euthanasia is performed on demented and chronic psychiatric patients*.[51]

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[45] It is worth noting that "the Act does not require a minor requesting euthanasia to be examined by a child psychiatrist or psychologist," J. Keown, Euthanasia, Ethics and Public Policy, p. 175.

[46] In this case, the Dutch law requires that a third doctor, a psychiatrist, make further assessment. Euthanasia Code of Practice, 2018, para 4.3.

[47] This was plainly admitted by physicians who advocate for access to euthanasia and assisted suicide for mental suffering. J. Keown, Euthanasia, Ethics, and Public Policy, pp. 175,176.

[48] See S. Kim, How Dutch Law Got a Little Too Comfortable with Euthanasia, June 8, 2019, The Atlantic (emphasis added). Available online at: *https://www.theatlantic.com/ideas/archive/2019/06/noa-pothoven-and-dutch-euthanasia-system/591262/*.

[49] Ibid.

[50] S. Kim, et al., Euthanasia and Assisted Suicide of Patients with Psychiatric Disorders in the Netherlands 2011 to 2014, JAMA Psychiatric, 2016; 73 (4), 362-368.

[51] B. Chabot, *Worrisome Culture Shift in the Context of Self-Selected Death*, NRC Handelsblad June 16, 2017, translation by Trudo Lemmens, available at: *https://trudolemmens.wordpress.com/2017/06/19/the-euthanasia-genie-is-out-of-the-bottle-by-boudewijn-chabot-translation/*. Emphasis added. Dr. Chabot's *shifting* views are reported widely in J. Keown, *Euthanasia, Ethics and Public Policy*, pp. 237-241. Besides the rise in general numbers, Chabot worried about the increased number of cases concerning patients with dementia

These data, and concerns, are particularly troubling at times when the rates of suicide continue to increase[52] and are dramatically high among teenagers.[53] When suicide is legally permissible, suicide prevention programs and efforts become at least contradictory—if not illegal; and it becomes difficult, if not unreasonable and immensely paternalistic, to decide who "truly wants" to die and who does not.[54]

Noa Pothoven did not qualify under the Dutch law for physician assisted suicide or euthanasia. Her choice to stop eating and drinking, however, might become—if it is not already—a common pathway to death in the Netherlands.

In 2011, the Royal Dutch Medical Association (KNMG) published a position paper which somehow already legitimized this form of suicide. On that occasion, the KNMG affirmed:

> If a patient with a strong wish to die is refused euthanasia by his physician or does not meet the requirements of due care, *the patient may decide for himself to deny food and drink. The physician must have due regard* for the care provided by a good care provider, *even if he does not agree with the patient's decision to deny food and drink.* This means that *the physician is obligated, in such cases, to supervise the patient and to alleviate the suffering by arranging effective palliative care.*[55]

As Professor Keown summarized, this means that patient who is refused euthanasia by the doctor can insist and say, *"Well, if you won't assist me to kill myself by giving me lethal drugs, you must help me to kill myself by giving me palliative drugs after I stop eating and drinking*."[56] At that point, the doctor has no choice. The position paper was followed by some detailed guidelines in 2014, which were titled, "*Caring for people who consciously*

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(12 in 2009 and 141 in 2016) and chronic psychiatric patients (from 0 to 60). Although the numbers were small, more than one hundred thousand people were in those conditions and he could not rule out further increase: "*Particularly in these groups, the financial dismantling of care has affected patients' quality of life. One can easily predict that all of this could cause a skyrocketing increase in the number of euthanasia cases*." Ibid.

[52] With reference to the U.S. data see, for instance, the suicide statistics by the American Foundation for Suicide Prevention, available online at: https://afsp.org/about-suicide/suicide-statistics/.

[53] As per U.S. data on suicide by teenagers, see: Suicide Rates Among Adolescents and Young Adults in the United States, 2000-2017, O. Miron; K.-H. Yu, R. Wilf-Miron, et al, Journal of American Medical Association, June18, 2019 Volume 321, Number 23, pp. 2362-2364.

[54] Already, in 1995, Professor of Psychiatry at New York Medical College Herbert Hendin wrote, "The acceptance of euthanasia for psychiatric patients who are suicidal is simply bad psychiatry. It seems the inevitable consequence of allowing such criteria as "competence" and "intolerable suffering" to determine the outcome rather than sound clinical judgment. The idea that a depressed patient can make a decision for suicide uninfluenced by his pathology only demonstrates how limited "competence" is as a criterion for evaluating those who are suicidal. In these cases, the psychiatrist is in the position of working to prevent suicide until the patient asks for his assistance in committing suicide; then, the rules of the game change and the psychiatrist negotiates with the patient as to whose approach is best." H. Hendin, *Assisted Suicide and Euthanasia: the Dutch Experience,* reprinted in M. Uhlmann (ed.), *Last Rights: Assisted Suicide and Euthanasia Debated*, 1998, p. 382.

[55] KNMG, The Role of the Physician in the Voluntary Termination of Life, 2011. Emphasis added. Available online: *https://www.knmg.nl/advies-richtlijnen/knmg-publicaties/publications-in-english.htm*.

[56] J. Keown, Euthanasia, Ethics and Public Policy, pp. 245, 246; chapter 16 of the book (pp. 243-260) is entirely dedicated to SED.

*choose not to eat and drink so as to hasten the end of life*."[57] What the document addresses is *the way* in which a patient who decides to refuse food and drink should be accompanied in his decision, taking it for granted that the choice is legitimate: "In principle, this guide concerns adults with the capacity to decide who wish to hasten the end of their life. This guide does not address the issue of whether to stop eating and drinking is the appropriate pathway."[58]

The document states that doctors have the actual *duty to "care"* for the individual who has so decided, and to do so by a) providing information on the matter, and b) demonstrating compassion for the patient's choice. Doctors have a right of conscientious objection—according to the guidelines—but in that case they *must* refer the patient to another doctor who is willing to comply with the patient's deadly wish.[59] As per the patient's capacity to decide for death, the guide says it need not to be proven.[60] The guidelines go as far as to demand that caregivers resist eventual requests of fluids or food by the dying patient who previously chose to die by stopping eating and drinking (SED), to fully respect his dying will. Literally: "if a patient has lost capacity to decide, the care provider must continue to respect the prohibition of treatment";[61] and if the patient, "in the course of the process (due to delirium, for instance) and asks for something to drink. In this case the representative is deemed to take decisions in line with the patient's conscious decision not to eat and drink."[62]

This is the duty that would also fall on people like Noa Pothoven's parents, who should not interfere with their daughter's choice: "It is imperative for care providers (…) not to suddenly interfere with the agreements previously made with patients and offer them something to drink. If patients are offered fluid, they will fail to reach their desired goal."[63]

The document explicitly affirms that, *"The guide is not intended as guidance for hunger or thirst-strikers or to assist patients suffering from anorexia nervosa,"* but it is hard to imagine that its core understanding of "care" would not affect the treatment of all kinds of patients.

Furthermore, confirming the soundness of all warnings about how liberalizing laws, regardless of how narrowly drafted and tailored, will not affect exclusively the lives and choices of the "terminally ill," but society as a whole, the KNMG affirms that

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[57] KNMG, "Caring for people who consciously choose not to eat and drink so as to hasten the end of life," 2014. Available at: *https://www.knmg.nl/advies-richtlijnen/knmg-publicaties/publications-in-english.htm*.

[58] Ibid, p. 8.

[59] "A care provider who invokes conscientious objections should, as befits a good care provider, provide care until such time as a colleague takes over this duty." Ibid, p. 24.

[60] "When dealing with patients who have indicated that they no longer wish to eat and drink to hasten the end of life, care providers may doubt the patient's capacity to decide. Patients, however, do not need to prove that they do have capacity to decide." Ibid, p. 21.

[61] Ibid, p. 19.

[62] Ibid, p. 20.

[63] Ibid, p. 37.

the document "*relates to people who are not suffering from an illness.*"[64] According to the guidelines, any patient has a right to decide not only against treatment, but also against nursing and care. Having lost the definition of what constitutes "illness," anybody qualifies as a "patient." Anyone, therefore, is fully entitled to SED. According to KNMG, in particular, "Consciously choosing not to eat and drink to hasten the end of life is a choice each and every one can and may make for themselves. This decision does not require the individual to consult with a physician, a nurse, carer or any other party."[65] Suicide, in other terms, is not only a freedom, it becomes a right. As per the (high) chances that a patient chooses SED due to depression, the guide further explains that this is a possibility, but the patient still has a right both to decline a diagnosis as well as to refuse depression treatment, and still choose SED.[66]

The current number of deaths caused by SED is unclear, as they are not reported as suicides nor as assisted dying, but as natural deaths.[67] According to data reported by the same KNMG document, deaths by SED were around 2,800 per year, 2.1% of all deaths in the Netherlands. Half of these cases involved patients who had their request for euthanasia turned down. In his comprehensive analysis of the practice, Professor Keown noted that:

> The ethical and legal questions raised by palliating patients who opt for SED (or who refuse life-saving treatment) are not unique to the Netherlands. Palliating patients who choose SED has been approved by the International Association for Hospice and Palliative Care (…). A danger with such a policy is that it risks blurring the crucial line between intending to palliate the patient's (self-inflicted) suffering and intending to assist the patient's suicide, a line the medical profession and the courts should be assiduous to maintain if PAS [*Physician Assisted Suicide*] is not to be carelessly legalized by the back door.[68]

Being of a medical nature, the guidelines provide some explicit details of what the victim will suffer—urinary disorders, restlessness, delirium, etc. Experts say that most suffering disappears with the appropriate pain relief.[69] This, however, says noth-

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[64] Ibid., p. 10.

[65] Ibid, p. 19.

[66] Ibid, p. 20. Somehow arbitrarily, the document also states that, "Patients over the age of 60 need not be dissuaded from consciously choosing not to eat and drink on account of the fact that they are not suffering from a life-threatening illness or that they are still in a good state of health." Ibid, pp. 20,21.

[67] Ibid, p. 40: "The death of a patient who has consciously stopped eating and drinking is deemed a natural death. The death documents are completed in the usual manner and will state that the deceased 'chose not to eat and drink' as the immediate cause of death. There is no duty to notify the authorities of such cases, nor is a municipal forensic pathologist required to examine the corpse."

[68] J. Keown, Euthanasia, Ethics and Public Policy, p. 260. It shall be evidenced, however, that in its approval of palliation for SED, the International Association for Hospice and Palliative Care specified that "only *if such a patient is facing the end of life* should a palliative care team respect and honor such a wish while continuing to provide appropriate care, including control of symptoms and distress." See IAHPC Response Regarding Voluntary Cessation of Food and Water, R. Radbruch, L. De Lima, J Palliat Med. 2017 Jun;20(6):578-579, emphasis added.

[69] See, *IAHPC Response Regarding Voluntary Cessation of Food and Water.*

ing about the legitimacy of the act. Indeed, it is precisely due to their medical—and not legal character—that these guidelines cannot unilaterally establish that: "*consciously choosing not to eat and drink and suicide cannot be deemed equivalent because there may be relevant differences between the two.*"[70] To justify such a strong statement, the document continues:

> Suicide is associated with an active, violent, lonely, and often impulsive act. In consciously choosing not to eat and drink the patient is attempting to hasten the end of life. While it is a choice for death, it differs essentially from suicide, also from a legal point of view. *Consciously choosing not to eat and drink is comparable to refusing antibiotics, artificial respiration or palliative chemotherapy,* which refusal will result in death. This is not regarded as suicide but rather as the patient exercising his right to self-determination, particularly the right to refuse care. While it may result in the end of life, or hastening it, it cannot be considered the equivalent of suicide.[71]

The legal authority of this statement is weak. Its reasoning is flawed.[72]

## Legitimate and Illegitimate "Causes" of Death: The Importance of "Intent"

The logical—and then moral, and legal—flaw of this statement consists in the fact that it does not draw the correct line between *refusal of treatment* and an *act of suicide* (by SED or by other means). In certain instances, in fact, refusal of treatment *does* amount to suicide, as Justice Scalia of the US Supreme Court clearly illustrated in his opinion in *Cruzan v. Director, Missouri Department of Health*:

> It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing. Even as a legislative matter, in other words, the intelligent line does not fall between action and inaction, but between those forms of inaction that consist of abstaining from "ordinary" care and those that consist of abstaining from "excessive" or "heroic" measures. (…) *Starving oneself to death is no different from putting a gun to one's temple as far as the common law definition of suicide is concerned; the cause of death in both cases is the suicide's conscious decision to "pu[t] an end to his own existence.*[73]

Indeed, what Justice Scalia here summarized, upon rejecting the argument that one could not commit suicide by refusing treatment, is that the difference between the two conducts cannot lie in the action-omission distinction. In distinguishing the

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[70] KNMG, Caring for people who consciously choose, p. 23.

[71] Ibid.

[72] "Dr. Chabot describes death by SED as 'auto-euthanasia' and another Dutch euthanasia advocate, Ton Vink, refers to it as 'self-euthanasia'. These labels are much closer to the mark than the KNMG's view that death by SED is not suicide and is a natural death. (…) Professor Buijsen has written that Dutch legal scholars agree that suicide may indeed be committed by omission as it is the intention and the hastening of death that are essential, not its being carried out by an act," J. Keown, Euthanasia, Ethics and Public Policy, pp. 256, 257.

[73] Cruzan v. Director, Missouri Department of Health 497 US 261 (1990), 296,297, emphasis added.

different causes of a lethal event, and deciding over their lawfulness, what matters is not even the ordinary or extraordinary nature of the treatment. What matters is the *intention* of the underlying conduct—be it an action or an omission.

Most of contemporary confusion between *legitimate refusal of treatment* and *illegitimate acts of intentional killing* (including by omission) seems in fact to derive from the more general and false belief that human actions can be judged without reference to the author's intent, and of his free choice to act.[74] Modern criminal science wishes to look at human actions and omissions as if they were bare facts, from an exterior and allegedly "objective," impersonal perspective. Our everyday experience, however, proves that "*human actions and societies cannot be adequately described, explained, justified, or criticized unless they are understood as also, and centrally, the carrying out of free choices.*"[75]

The reason why human actions are, and can be, the object of moral and legal judgment, indeed, is precisely the understanding that they originate in human freedom, and, therefore, express a human choice, a human *intent.* "To find out and helpfully describe *what* someone is doing, the strategic question to ask and answer is always the question *why*: "Why are you behaving like that?"[76] Accidental facts, as much as coerced ones, are instead free from judgment, or praise, or blame, precisely because no choice, nor freedom lies behind them. Natural facts can be described, but not judged. Similarly, there is no blame for an individual who caused injuries to a third party while he was himself the victim of an epileptic crisis; nor is there praise for a doctor who saves a patient's life under threat of being killed. In neither case are these actions the result of a free choice: the doctor did not *intend* the saving treatment, nor did the epileptic *intend* causing injuries. The *intent* behind the action, in other words, is the expression of the agent's free choice towards a particular end, or a particular good. Intent is not *desire*, nor a motive for action. It is the free human will that is embodied in the chosen behavior; it is, therefore, the relevant element for legal and moral speculations.

In criminal law, intent is the essence of human conduct and thus the object of blame. As Justice Gorsuch wrote:

> . . . we live as human beings in a world where we must make choices and take actions that, even when entirely legitimate and good, necessarily harm or damage or impinge upon other goods. And this happens at both the individual and the societal level (…). Because we can always choose to refrain from doing intentional harm to others—because our purposeful actions are within our control—our intentional choices necessarily reveal more about our character and individuality than any unintended side effect ever can.[77]

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[74] "Today, indeed, almost all who write or teach political or social theory are in like case [*and the same is true for law*] refusing or failing to acknowledge the reality of free choice," John Finnis, *Aquinas, Moral, Political and Legal Theory*, Oxford University Press, 2004, p. 22.

[75] Ibid.

[76] Ibid., p. 31

[77] N. Gorsuch, The Future of Assisted Suicide and Euthanasia, p. 56.

He then concluded:

> To disregard whether or not an act is intended would be, thus, in a very real way to disregard the role of free will in the world—leaving, for example, those who fail to assist charities that feed the hungry open to the same censure and penalties as those who would starve such persons.[78]

By applying these principles to end-of-life scenarios, the profound and radical distinction between refusal of treatment and suicide becomes evident. The distinction does not depend on the material consequences of the agent's conduct: what matters is what moved and then rationally determined his free choice, the intention informing his behavior.[79] Furthermore:

> The distinction between what one intends to use as a means or to pursue as an end (the choice of means to destroy life and the end of its destruction) and, on the other hand, what the agent accepts as a side-effect, does not depend on the fact that the side-effects are or are not desired, accepted with favor or reluctantly. Even if the side-effects were accepted as good ones, inasmuch as they were not the object of the intention, there is no suicidal will.[80]

The underlying intention of a patient refusing treatment can indeed be death itself (thus constituting suicide), but it can also be the mere desire of spending one's last days free from heavy medications, or out of the hospital, surrounded by his family. It could be the intention of sparing relatives and dear ones the costs and pains of expensive treatments, which perhaps have uncertain or meager results; it could be the choice of allowing other/younger patients the possible benefits of an organ transplant. In all such instances, death will be a side-effect of the chosen action, perhaps foreseen, but not intended. And the action will be legitimate.[81]

The choice to destroy human life, on the contrary, can never be legitimate. As Professor Robert P. George writes:

> . . . the choice to destroy human life is contrary to respecting human life [which is a fundamental human good]. And so we ought never to choose precisely to destroy a human life, whether of another person or our own. To do so is implicitly (and sometimes explicitly as well) to adopt the attitude that this human life is not objectively good, but is good only if I desire it. To choose to destroy one instance of a basic good for the sake of other instances of goods is to adopt the attitude that human goods, including human lives, are only conditionally good. (…) Thus, the choice to kill an innocent human life, whether one's own or another's, even for the sake of avoiding terrible suffering, is intrinsically immoral.[82]

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[78] Ibid.

[79] This is not the position of the *Philosophers' Brief,* supra, note 9. According to Dworkin, Nagel, Nozick, Rawls, Thomson et al., there is no moral difference that depends on the doctor's intent, as it all depends on the patients' will to die: "From the patient's point of view, there is no morally pertinent difference between a doctor's terminating treatment that keeps him 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." *Philosophers' brief,* Section II, B, par. 4.

[80] M. Ronco, Il "Diritto di Essere Uccisi: Verso la Morte del Diritto?, pp. 220, 221. Informal translation.

[81] N. Gorsuch, The Future of Assisted Suicide and Euthanasia, pp. 65-69.

[82] In P. Lee, R.P. George, *Body-Self Dualism in Contemporary Ethics and Politics*, 2009, p. 156.

Medical treatments can be refused because they are futile or too burdensome. In the case of SED, and in the absence of an underlying and terminal disease, however, food and water are not refused because they are futile or burdensome, but with the precise intent of hastening death. As Professor John Finnis wrote a few years ago, and with reference to end-of-life scenarios:

> . . . in common sense, and law alike, there is a straightforward, non-artificial, substantive distinction between choosing to kill someone with drugs (administered over, say, three days in order not to arouse suspicion) in order to relieve them of their pain or suffering, and choosing to relieve someone of their pain by giving drugs, in a dosage determined by the drugs' capacity for pain relief, foreseeing that the drugs in that dosage will cause death in say three days."[83]

This non-artificial, substantive distinction, however, risks being forgotten by the criminal law, which, disregarding or misunderstanding *intent*, inevitably disregards also the radical difference between what is intended and what is *merely foreseen*. Indeed, while criminal responsibility may also derive from consequences of actions that we could have or that we should have foreseen, and prevented, this is not always the case. Under certain conditions, in fact, the agent's intent is all that matters and the so-called "double effect doctrine" would apply.[84]

According to this doctrine, in particular, an individual may not be held responsible for a particular (bad/illicit) consequence of his action/omission, though foreseeable or foreseen, when: 1) the act/omission necessarily causes two effects, one bad and one good; 2) the agent does not intend the bad effect; 3) the agent cannot attain the good effect without causing the bad one; 4) the good effect is as immediate as the bad one (it is not the product of the bad effect, but of the agent's action). Clearly, while ruling out any action that is *intended at causing a bad effect (intending death)*, the double effect doctrine *does not prohibit actions that bring about such effects "unintentionally,"* even if and when they are fully foreseen, provided that the intended good effect is proportional to the unintended and bad one. The double effect doctrine, in other words, and with specific reference to this article's topic, would not rule out palliative care treatments whose side effect is to accelerate the patient's death; nor does it rule out refusal of a surgical operation that could prolong life. *But a refusal of food and drink that is intended precisely at causing death has nothing to do with it and remains an act of suicide: not punishable, but not a human right*.[85] Prevention of such an act, moreover, if not mandatory, is certainly permissible.

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[83] J. Finnis, A Philosophical Case Against Euthanasia, in J. Keown, ed., Euthanasia Examined, Cambridge University Press, 1995, p. 27.

[84] See L. Gormally (ed.), *Euthanasia, Clinical Practice and the Law,* 1994, in part. pp. 48 ff, on "*The morality of killing as a side-effect of other action.*" See also, A. McIntyre, *Doctrine of Double Effect*, The Stanford Encyclopedia of Philosophy (Spring 2019 Edition), Edward N. Zalta (ed.), https://plato.stanford.edu/archives/spr2019/entries/double-effect/.

[85] The intention animating an action, moreover, is what defines the action itself. When death is the foreseen but unintended and inevitable result of an action aimed at a good end, no actual "killing" is involved, as by definition killing requires the intention to destroy a human life. Similarly, a C-section is not a bodily "injury" (unless, of course, unrelated to childbirth).

In addition to the necessary and fundamental distinction between foreseen and intended effects, a final confusion that should be avoided is the one between free human *will* and *desire*:

> Desire is indeed the background upon which human will is to be grounded. But the latter takes substantial form only with the development of intention, and is then completed by judgment, choice of means, and final resolution. The moment in which rationality and freedom, as active dimension of human will, specifically intervene, starts with the formation of intention.[86]

## Italy's Recent (Partial) Decriminalization of Assisted Suicide: Constitutional Court Decision n. 242/2019, and the Broader Legal Framework

Following the Netherlands' lead, other European countries are progressively moving in the direction of relaxing their laws and accepting the idea that human autonomy can legitimately *put an end to life itself*.[87] Until a few months ago, the Italian legal system clearly and absolutely prohibited euthanasia and assisted suicide. A recent constitutional judgment, however, eroded the criminal ban on the latter, and the future of the whole legislation on the matter is now rather uncertain.[88] Before addressing that specific case, and that specific judgment, it is appropriate to look at the pre-existing legal framework.[89]

The first relevant provision is article 579 of the criminal code, *"omicidio del consenziente"*[90] ("consensual homicide"). The norm punishes with a sentence of six to fifteen years imprisonment whoever causes the death of a man with the victim's own consent.[91]

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[86] M. Ronco, Il Diritto di Essere Uccisi, p. 220. Informal translation.

[87] As of February 2020, a new bill that would allow both euthanasia and assisted suicide has been approved in Portugal, and could only be vetoed by the President (*https://www.nbcnews.com/news/world/portugal-lawmakers-vote-allow-euthanasia-terminally-ill-n1139971*). A similar bill is to be debated by the Spanish Parliament.

[88] Constitutional Court of Italy, Judgment n. 242/2019, Nov. 22, 2019, *supra* note 8.

[89] For the analysis of article 579, article 580, and article 593 of the Italian criminal code, the author largely relies on: M. Ronco, B. Romano, *Codice Penale Ipertestuale Commentato,* Utet Giuridica, 2012.

[90] Article 579, Italian Penal Code, full original text: "1. Chiunque cagiona la morte di un uomo, col consenso di lui, è punito con la reclusione da sei a quindici anni. 2. Non si applicano le aggravanti indicate nell'articolo 61. 3. Si applicano le disposizioni relative all'omicidio se il fatto è commesso: 1) contro una persona minore degli anni diciotto;2) contro una persona inferma di mente, o che si trova in condizioni di deficienza psichica, per un'altra infermità o per l'abuso di sostanze alcooliche o stupefacenti; 3) contro una persona il cui consenso sia stato dal colpevole estorto con violenza minaccia o suggestione, ovvero carpito con inganno."

[91] Many legal systems do not contemplate this specific crime and punish consensual homicide as a form of murder (possibly mitigated). An exception is article 216 of the German criminal code, which punishes homicide "at the victim's request" with a milder sentence, but provided that the author was "induced to kill by the earnest and express request of the victim." The Spanish penal code contemplates a form of "compassionate" consensual homicide, which must be performed "at the specific, serious, unequivocal request of that person," and "in the event of the victim suffering a serious disease that would unavoidably lead to death, or that causes permanent suffering that is hard to bear" (article 143, par. 4). Switzerland, which does not ban assisted suicide—unless performed for "selfish reasons"—provides that "Any person

The same article states that the provision on murder shall apply (art. 575, 21 year imprisonment as the minimum sentence) if the victim: 1) is below 18 years of age; 2) is affected by a mental illness or by a psychiatric deficiency caused by a different illness, or by alcohol or drug abuse; 3) consent was extorted by means of violence, threat or influence, or obtained by intentional deception. In all such cases, there is no "free and informed" consent capable of diminishing the guilt of the perpetrator.

This provision is the first explicit affirmation of the non-disposable nature of life. Based on its text, life does not truly belong to the individual, as he cannot validly consent to its destruction. Nobody can legitimately decide to have his/her own life taken away by a third party whose intention is to provoke the victim's death: in other words, there is no room for voluntary euthanasia under existing Italian law.

In its textual formulation, article 579 does not explicitly contemplate "compassionate murder," at least not directly. It is the presence of *consent*, the Italian legislator held, that diminishes the gravity of the intentional and unjust aggression of the basic good that the norm protects, not the *motive*.[92] Should *compassionate reasons* recur in the specific case, the sentence might be further mitigated by virtue of article 62, par.1, the killer having acted for "*moral or social reasons of peculiar value.*"[93] Failing consent, on the other hand, while the same mitigating circumstance may still apply, the conviction would be murder (art. 575). In other words, *nonvoluntary euthanasia always equates to murder* in Italian law, including when performed for compassionate reasons. It is worth

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who for commendable motives, and in particular out of compassion for the victim, causes the death of a person at that person's own genuine and insistent request is liable to a custodial sentence not exceeding three years or to a monetary penalty" (article 114 of the Penal Code). The Netherlands, Belgium and Luxemburg explicitly allow physician assisted euthanasia: i.e., homicide by doctors, justified by patient's request.

[92] "In tal guisa, come espressamente dichiara la *Relazione* del Ministro al codice, il legislatore, volendo dare rilievo giuridico a tutti «i casi meritevoli di benigna considerazione», ha elaborato una fattispecie più ampia rispetto alla «troppo angusta categoria delle uccisioni pietose» (*Lav. prep.*, V, 2, Roma, 1929, 374). Nell'ottica del legislatore, ove sussistano, oltre al consenso, ragioni di pietà come moventi del delitto, dovrebbe trovare applicazione la circostanza attenuante dell'aver l'autore agito per motivi di particolare valore morale e sociale." Ibid., sub art. 579, *Profili generali.*

[93] Italian courts have nonetheless rejected the idea that the above-mentioned mitigating circumstance could apply to compassionate killing, holding that to diminish the guilt of the author the moral and social values should embody beliefs and principles that society unconditionally approves and shares —something which could not and still cannot be said about euthanasia – and the agent's conduct should be motivated by altruistic reasons (see, Cassazione Penale, Sez. I, 7.4.1989). Ibid. Most recently, see: Cassazione Penale sez. I, 12.11.2015 (dep. 31.3.2016), n.12928. Here the highest litigation court held that the mitigating motives must be "principles that are generally approved by the whole society where the agent's conduct takes place and in that particular historical moment (...) so as to reduce the anti-social nature of the criminal act; *the still-ongoing debates on the acceptability of euthanasia are symptoms that there is no positive public judgment of the practice, which on the contrary is rejected by large portions of the contemporary Italian people; therefore, there is no general and positive judgment from an ethical and moral perspective ...*" (informal translation, emphasis added). Available in Italian at: https://www.penalecontemporaneo.it/upload/1462025307Sentenza%20eutanasia.pdf. The latest Constitutional Court judgment, however, could have undermined the validity of this rationale.

noting, moreover, that the mitigated sentence of article 579 would not automatically nor necessarily apply to "mercy killings." The criminal norm's requirement of the victim's consent, in fact, is interpreted as requiring the presence of a *free, informed,* and *well-considered* consent. As evidenced above, however, these features are hard to prove in end-of-life contexts. The mere fact of predicting that somebody will have a future filled with painful treatments, increasing distress and loneliness, may in fact constitute a form of "threat" that corrupts the spontaneity/autonomy of the victim's consent; similarly, repeated invitations and allusive discourses on euthanasic solutions can influence the victim's choices, depriving consent of its constitutive value. In all such cases, murder provision should apply.

Furthermore, while "euthanasia," which is the intentional causing of the termination of a life– may be performed both by means of action ("active euthanasia") as well as by omission ("passive euthanasia"),[94] this crime is not integrated when a physician abstains from performing (omits) a legitimately refused treatment. The reason why an omission of treatment—which will eventually cause the patient's death—is legitimate, *although and while* the Italian legal system prohibits all forms of euthanasia, including by omission, derives from the fact that the doctor's legal duty to interfere with the patient's body, including to prevent his death, finds its own source, as well as its limit, in the patient's own consent. As provided by article 32, paragraph 2, of the Italian Constitution: "No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person."[95]

A recent problem with this norm, however, read in conjunction with article 579, comes from the ever-expanding notion of what constitutes *medical treatment*. As seen, contemporary legal systems define even the most basic forms of "care," such as nutrition and hydration, as "treatments" that a patient can legitimately refuse. This new and all-encompassing notion of "treatment" is a consequence of the equally new and all-encompassing definition of "health," defined as a "*state of complete physical, mental and social well-being and not merely the absence of disease or infirmity*."[96] Today, as Italian Court-of-Cassation judge Giacomo Rocchi recently wrote, the individual determines on his own *what* constitutes a *disease*, transforming it into an "*impalpable concept*," whose contours depend on absolute self-determination. As a result, the doctor loses his role as the one who can recognize a disease and cure it, while the patient has a *right* to decide his own therapies, for what *he* holds to be a disease. By the same narrative, the patient can transform any form of *disability into a disease.*[97]

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[94] The concept of "passive euthanasia" is often mistakenly equated to refusing treatment. In order to constitute euthanasia, the omission needs to be an intentional violation of a legal duty to act.

[95] Art. 32, full text: "The Republic safeguards health as a fundamental right of the individual and as a collective interest and guarantees free medical care to the indigent. No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person."

[96] World Health Organization Constitution, 1946.

[97] G. Rocchi, *Licenza di Uccidere, La Legalizzazione dell'Eutanasia in Italia*, ESD, 2019, pp. 34-35.

This is true in the Netherlands, as evidenced by Noa Pothoven's story; and it is now true in Italy where, by means of law 219/2017, article 1, par. 5:

> Every legally competent individual has a right to refuse, in full or in part, and in the same terms described at paragraph 4, any diagnostic test or medical treatment indicated by the physician for his pathology, or single portions of that same treatment. The same individual has, furthermore, the right to revoke at any time, in the same terms described at paragraph 4, his prior consent, including when such revocation determines the interruption of treatment. *For the purposes of this law, medical treatments include artificial nutrition and artificial hydration, as forms of administration of nutrients under medical prescriptions and by medical devices.*[98]

Such a refusal of "treatment" (food and water), moreover, is hardly considered in its "intent," so that the line between suicide and refusal of treatment can now easily be blurred. It is apparent, however, that it is one thing to be 99 years old, and to slowly stop eating and drinking out of mere exhaustion, *dying of an underlying disease*, and to be nineteen and depressed and to refuse food and water *in order to die*. In other words, the newly enacted provision of article 1, par. 5, law 219/2017, already compromised Italy's absolute protection of life.[99]

Following the ban on consensual homicide, the Italian penal code prohibits so-called assisted suicide by article 580, which was the recent object of constitutional review.

In its present formulation, the criminal norm punishes the 1) determination of a suicidal purpose, 2) strengthening of a suicidal purpose, or 2) any form of assistance in suicide execution; provided that a) the suicide occurs, or b) the attempt results in serious or very serious personal injuries. If the suicide takes place, the sentence is from five to twelve years imprisonment; in case of serious injuries, it is one to five years. The criminal sentence is aggravated whenever the victim is: a) below 18 years, b) affected by

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[98] Law. 219/2017, art.1.5, informal translation. Original italian text: "Ogni persona capace di agire ha il diritto di rifiutare, in tutto o in parte, con le stesse forme di cui al comma 4, qualsiasi accertamento diagnostico o trattamento sanitario indicato dal medico per la sua patologia o singoli atti del trattamento stesso. Ha, inoltre, il diritto di revocare in qualsiasi momento, con le stesse forme di cui al comma 4, il consenso prestato, anche quando la revoca comporti l'interruzione del trattamento. Ai fini della presente legge, sono considerati trattamenti sanitari la nutrizione artificiale e l'idratazione artificiale, in quanto somministrazione, su prescrizione medica, di nutrienti mediante dispositivi medici." Available at: https://www.gazzettaufficiale.it/eli/id/2018/1/16/18G00006/sg.

[99] Before the law's enactment, this problem had been voiced by several experts, including Italian neurosurgeon and psychiatrist Massimo Gandolfini. Addressing the provision on refusal of food and water, Gandolfini repeatedly pointed out how food and water cannot become *medical treatment* ("terapia") just because they are being artificially administered, precisely as they are not *treatment* in the case of a healthy newborn who is being bottle-fed (*https://www.vanthuanobservatory.org/ita/disegno-di-legge-sul-fine-vita-ideologico-contraddittorio-inutile-il-convegno-di-rovereto-del-29-settembre-scorso/*). Similar concerns were voiced by Professor A. Morresi, member of the Italian Committee for Bioethics. See, for instance: A. Morresi, *La morte come diritto frutto amaro delle «dat»*, Avvenire, Jan. 3, 2018, available online at: *https://www.avvenire.it/opinioni/pagine/la-morte-come-diritto-frutto-amaro-delle-dat* ("La rivoluzione introdotta sta nel fatto di aver definito idratazione e alimentazione artificiali come trattamenti sanitari, per i quali d'ora in poi è necessario il consenso," "*The revolution consists in having defined artificial hydration and nutrition as medical treatments, which from now on require consent,"* informal translation).

a mental illness, or by a psychic deficiency caused by a different illness, or by alcohol or drug abuse. Furthermore, whenever the victim is younger than 14, or lacks competence, homicide provision shall apply.[100]

Based on the recent constitutional decision n. 242/2019, however, an act of "material assistance" will be "*not punishable*" (exempt from punishment) if performed in accordance with the provisions of articles 1 and 2, Law 219/2107 on Informed Consent and Advanced Directives, and provided that assistance: a) *"facilitates the fulfilment of"* the person's *"autonomous and freely formed intent to commit suicide,"* b) the person is *"fully capable of making free and informed decisions,"* c) the person is *"kept alive by life-support treatments,"* and is d) *"suffering from an incurable illness which is the a source of physical or psychological sufferings that he or she considers intolerable."*[101] Furthermore, as specified by the same Court, such assistance will be exempt from punishment only and exclusively where: e) all *"these conditions and the method of implementation have been verified by a public national health service facility"* ("*Servizio Sanitario Nazionale*"), and d) *"after consulting the territorially competent ethic committee."*[102]

Setting (momentarily) aside this judgment, it cannot be doubted that article 580 was and remains another clear expression of life's absolute protection. The legislator's choice to criminalize *not only an undue influence on the victim's will*, but *also any material aid* offered to a suicidal person, reveals the negative moral judgment cast on suicide, and the law's effort to affirm and protect the absolute and permanent value of human life. Suicide itself is not a crime, but this norm proves that it is no right either. Suicide and suicidal attempts can be understood and forgiven, and their punishment would not serve any just purpose; but assistance in suicide offends and endangers an inviolable

[100] Article 580, Italian Penal Code, full text: "1. Chiunque determina altri al suicidio o rafforza l'altrui proposito di suicidio, ovvero ne agevola in qualsiasi modo l'esecuzione, è punito, se il suicidio avviene, con la reclusione da cinque a dodici anni. Se il suicidio non avviene, è punito con la reclusione da uno a cinque anni sempre che dal tentativo di suicidio derivi una lesione personale grave o gravissima. 2. Le pene sono aumentate se la persona istigata o eccitata o aiutata si trova in una delle condizioni indicate nei numeri 1 e 2 dell'articolo precedente. Nondimeno, se la persona suddetta è minore degli anni quattordici o comunque è priva della capacità d'intendere o di volere, si applicano le disposizioni relative all'omicidio."

[101] Constitutional Court of Italy, Judgment n. 242/2019, *supra* note 8. Official translation. Original text: "La Corte Costituzionale dichiara l'illegittimità costituzionale dell'art. 580 del codice penale, nella parte in cui non esclude la punibilità di chi, con le modalità previste dagli artt. 1 e 2 della legge 22 dicembre 2017, n. 219 (Norme in materia di consenso informato e di disposizioni anticipate di trattamento) – ovvero, quanto ai fatti anteriori alla pubblicazione della presente sentenza nella Gazzetta Ufficiale della Repubblica, con modalità equivalenti nei sensi di cui in motivazione –, agevola l'esecuzione del proposito di suicidio, autonomamente e liberamente formatosi, di una persona tenuta in vita da trattamenti di sostegno vitale e affetta da una patologia irreversibile, fonte di sofferenze fisiche o psicologiche che ella reputa intollerabili, ma pienamente capace di prendere decisioni libere e consapevoli, sempre che tali condizioni e le modalità di esecuzione siano state verificate da una struttura pubblica del servizio sanitario nazionale, previo parere del comitato etico territorialmente competente." English text available at: *https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza_n_242_del_2019_Modugno_en.pdf*.

[102] Ibid.

basic good that is already in peril, weakened by the disordered will of its bearer. It thus deserves being (retributively) punished and prevented.

Along with Italy, most European and U.S. legal systems still punish assistance in suicide, including by a physician.[103] Criminal answers vary, but they are all connected with the idea and legally justified by the fact that, far from being a right, suicide is an act to be prevented. Across the forty-two Member States of the Council of Europe, more than thirty strictly prohibit assisted suicide by means of criminal law.[104] Such prohibitions, moreover, constitute a necessary safeguard for the same suicidal "victims."[105] It is in fact an intuitive reality—nowadays corroborated by scientific studies[106]—that suicidal purposes and attempts are often the results of mental disorders. And it is hard to doubt that for a mentally healthy person suicide is often the result of loneliness and despair.

Suicide was itself a crime in the past and it is at the very least doubtful that its recent "decriminalization" entails recognition of a *de facto* right to commit suicide. As now Supreme Court Justice Neil Gorsuch wrote,

> . . . to be sure, dragging the suicide's body around town, driving stakes through it, and leaving grieving families penniless had lost whatever appeal they once held in human imagination, but it is a large leap from that merciful fact to the conclusion

[103] For a comprehensive list of U.S. laws on the matter, see: N Gorsuch, *The Future of Assisted Suicide,* Appendix A, *Certain American Statutory Laws Banning or Disapproving of Assisted Suicide,* pp. 227,228.

[104] "Comparative research in respect of forty-two Council of Europe Member States shows that in thirty-six countries (Albania, Andorra, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Georgia, Greece, Hungary, Ireland, Latvia, Lithuania, the Former Yugoslav Republic of Macedonia, Malta, Moldova, Monaco, Montenegro, Norway, Poland, Portugal, Romania, Russia, San Marino, Spain, Serbia, Slovakia, Slovenia, Turkey, Ukraine and the United Kingdom) any form of assistance to suicide is strictly prohibited and criminalized by law. In Sweden and Estonia, assistance to suicide is not a criminal offence; however, Estonian medical practitioners are not entitled to prescribe a drug in order to facilitate suicide. Conversely, only four member States (Switzerland, Belgium, the Netherlands and Luxembourg) allow medical practitioners to prescribe lethal drugs, subject to specific safeguards," ECHR, case of Koch v. Germany, 497/09, par. 26.

[105] The European Court of Human Rights, judging on the conventionality of UK ban on Assisted suicide, explicitly affirmed that such prohibition "was designed to safeguard life by protecting the weak and vulnerable and especially those who are not in a condition to take informed decisions against acts intended to end life or to assist in ending life. Doubtless the condition of terminally ill individuals will vary. But many will be vulnerable and it is the vulnerability of the class which provides the rationale for the law in question. It is primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created. Clear risks of abuse do exist, notwithstanding arguments as to the possibility of safeguards and protective procedures," ECHR, Case of Pretty v. UK, 2346/02, par. 74.

[106] "The early generation of psychological autopsies established that more than 90% of completed suicides have suffered from usually co-morbid mental disorders, most of them mood disorders and/or substance use disorders. Furthermore, they revealed the remarkable undertreatment of these mental disorders, often despite contact with psychiatric or other health care services." Psychological Autopsy Studies—a Review, Mood Disorders & Suicide Research Unit, Department of Mental Health and Alcohol Research, National Public Health Institute, Finland.

> that suicide had become normalized at law, let alone a matter of legal right. Indeed, even after repealing penalties for suicide, many states continued to describe in their case law and statute books as 'unlawful and criminal' and 'malum in se'.[107]

Most likely, the legal change came from the growing understanding of the act as expression of a limited freedom, and of the criminal punishment as personal retribution.[108] The most recent move towards recognition of suicide as an individual right, instead, is rooted in the idea that human life is disposable. This is what recently led to Italy's partial decriminalization of assisted suicide.

As for the facts of the case, the constitutional judgment originated from the criminal trial against Marco Cappato, a prominent politician and advocate for the *right to die,* who *assisted the suicide* of Fabiano Antoniani (DJ Fabo). The victim was an Italian artist who had found himself quadriplegic and irreversibly blind following a car accident in 2014. After that tragic event, Antoniani was no longer able to breathe independently (requiring the intermittent assistance of a respirator inserted via a hole in the trachea), nor to eat or excrete autonomously. Frequent muscular spasms caused him grave and repeated suffering, while his intellect was perfectly functional. He had tried several remedies, but already in 2016, he decided that he did not want to continue living. Notwithstanding his family's attempts to persuade him, and to convince him to live, with the help of his fiancée he contacted some Swiss organizations that *offer services* of assisted suicide (the practice is not criminal in Switzerland).[109] He thus met Mr. Marco Cappato, who informed him that Italian law allowed for "deep continuous patient-requested sedation" until death. Cappato also informed Antoniani about the Swiss option, where death would have been quicker. He chose that second path, so as to die with dignity, and with the expressed intention of sparing his family unnecessary suffering. Mr. Cappato found the right clinic, helped by providing the necessary documentation for the appointment, and finally drove the victim—along with Antoniani's mother, and fiancée—to Switzerland, accepting the risk of undergoing criminal prosecution. On

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[107] N. Gorsuch, The Future of Assisted Suicide, p. 31.

[108] Interestingly, at a time when liberalization advocacy keeps mounting all over the world, the country where the word "euthanasia" echoes the most tragic memories decided to introduce a specific provision. In 2015, Germany enacted a new paragraph 217 in its criminal code, titled, "*Geschäftsmäßige Förderung der Selbsttötung*." The provision punishes "professional assistance" in suicide, preventing economic interests and pressures on the victims' decision. The sentence is up to three years imprisonment for whoever, intending the victim's suicide, professionally grants, procures or conveys the victim the opportunity to perform it. [(1) *Wer in der Absicht, die Selbsttötung eines anderen zu fördern, diesem hierzu geschäftsmäßig die Gelegenheit gewährt, verschafft oder vermittelt, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft.* (2) *Als Teilnehmer bleibt straffrei, wer selbst nicht geschäftsmäßig handelt und entweder Angehöriger des in Absatz 1 genannten anderen ist oder diesem nahesteht.*]

[109] The Swiss Criminal Code only punishes assisted suicide performed for "selfish motives." Art. 115: "Any person who for selfish motives incites or assists another to commit or attempt to commit suicide is, if that other person thereafter commits or attempts to commit suicide, liable to a custodial sentence not exceeding five years or to a monetary penalty." The cost of assisted suicide at the clinic *Dignitas* is estimated around $10,000 (with funeral and administrative service), see: *What you need to know about assisted suicide in Switzerland*, The Local CH, May 3, 2018, available at: *https://www.thelocal.ch/20180503/what-you-need-to-know-about-assisted-death-in-switzerland*.

February 25, 2017, they arrived at the clinic *Dignitas*. There, the victim committed suicide on February 27, by biting a device which enacted the lethal injection. As soon as he returned to Italy, Marco Cappato reported his own actions to the local authorities.[110]

Based on article 580, the Milan public prosecutor immediately opened the criminal file, but soon demanded dismissal of the case. Notwithstanding the very clear letter of the law, and the uncontested facts, the prosecutor claimed that Cappato's conduct did not constitute a form of punishable assistance under the existing criminal provision (driving him to the clinic was not enough).[111] Subordinately, he challenged the constitutionality of the norm. Among other things, the public prosecutor held that article's 580 protection of life should be balanced with "*other fundamental interests,*" and that in some cases an absolute prohibition of suicide amounts to an actual obligation to live in conditions that "*offend human dignity*." In other words, the prosecutor argued, "human dignity" should not only entail a right to be left alone, but an actual "*right to commit suicide (…) directly, by means of a therapy intended at the suicidal goal.*"[112]

The pre-trial judge rejected both the dismissal request, and the constitutional challenge. He ordered that the criminal prosecution of Marco Cappato proceed with respect to the charges of having both materially assisted the execution, as well as strengthened the suicidal purpose of the victim.[113]

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[110] Even before his death—and before Marco Cappato's trial—the story of DJ Fabo became widely known and discussed. The victim decided to publicize both his desire to die, and the difficulties he was encountering, becoming himself a symbol of the "right to die." A one-hour interview was broadcasted on national television in November 2017. Unsurprisingly, the trial was equally at the center of mediatic and political attention. It was labeled a "strategic litigation" by P. Faraguna, "*Constitutional Paternalism" and the Inability to Legislate The Italian Constitutional Court's Decision on Assisted Suicide," VerfBlog, 2019/9/26, https://verfassungsblog.de/constitutional-paternalism-and-the-inability-to-legislate/.*

[111] In doing so, the prosecutor offered a narrow interpretation of prohibited "assistance," and assumed that the intervention of a leading advocate of the "right to die" did not strengthen the suicidal decision of the victim. An opinion rejected by the pre-trial judge, but then accepted by the trial court.

[112] The passages from the dismissal request are taken from its later rejection, by means of decree issued by the Pre-Trial Judge of Milan, July 10, 2017, published in L-JUS, October 2018, pp.5-48. In part. p. 38. Available at: https://l-jus.it/wp-content/uploads/2018/10/L-JUS-fascicolo-speciale-ottobre-2018.pdf. Informal translation.

[113] "*L'intervento di CAPPATO nella vicenda di ANTONIANI è determinante: egli stesso è stato contattato in ragione della ampia conoscenza che aveva delle modalità con cui il proposito suicidarlo poteva essere concretizzato. Se si sottrae, nel quadro della vicenda, la condotta di CAPPATO, l'esito finale non sarebbe certo stato quello occorso lo scorso 27 febbraio: egli ha rafforzato il proposito suicidario e agevolato l'esecuzione dell'intento auto-soppressivo di ANTONIANI in primo luogo suggerendo la struttura dove ciò poteva accadere (in sostanza, egli ha permesso di trovare il mezzo tramite cui realizzare il suicidio), poi trasportandovi in concreto ANTONIANI stesso.*" [informal translation: "The participation of Cappato in Antoniani's case is decisive: he himself was contacted by reason of his broad knowledge regarding the ways in which the suicidal purpose could be realized. If one were to set aside, in the whole event, the conduct of Cappato, the final result would not be that which took place last February 27: he strengthened the suicidal purpose and assisted the execution of Antoniani's self-terminating intent first of all by suggesting the facility where that could take place (as a matter of fact, he made it possible to find the means for committing the suicide), then by actually transporting Antoniani there."] Ibid., p. 17.

The trial court, however, was again of a different mind. On the one hand, it preemptively excluded that the case involved a strengthening of the suicidal purpose. On the other, it found the challenge of constitutionality admissible and deferred judgment to the Constitutional Court.[114] According to the trial court, the defendant acted precisely in the way prohibited by article 580, which sanctions any form of assistance, regardless of its actual impact on the deliberative process of the victim. Such an absolute prohibition, however, was a violation of the constitution, as it implied that assistance in suicide is condemnable *even if the victim's intention had developed autonomously, and free from any external influence*. Such a broad prohibition, grounded on the principles that life is always sacred and inviolable, constituted a violation of articles 2, 13, par. 1, and 117 of the constitution, and of articles 2 and 8 of the European Convention on Human rights. In particular, according to the trial court, the central value of the person (article 2 of the constitution), along with the right to individual liberty (article 13), impose an understanding of the right to life which cannot but mean that the individual is free to make decisions over his life, *including when such decisions lead to his own death*.[115] In addition, the prohibition of a "merely material" assistance (which does not affect the victim's intent) would violate articles 2 (right to life), and 8 (private life) of the European Convention on Human Rights (whose provisions have constitutional value by means of article 117 of the Italian constitution). Finally, the recent enactment of law 219/2017—having entitled all citizens the *right to refuse* all sorts of treatment, including life-sustaining ones, and to even to opt for continuous deep sedation so as to hasten death in case of uncurable sufferings—could not deny the individual freedom to decide for death.[116] The trial court arguments, which quickly assumed the patient's autonomous suicidal "intent," were substantially accepted, although with relevant variations, by the Constitutional Court.[117]

As a first step, on October 24, 2018, Italy's Constitutional Court pronounced an unexpected and for many reasons unprecedented order.[118] On the one hand, it rejected the idea that the criminal ban violated the constitution: *no actual "right to die" could be inferred by Italian constitutional provisions and precedents, nor by European norms and*

[114] Corte d'Assise di Milano, sez. I, February 14, 2018. The full text of the constitutionality challenge can be accessed online at: *https://www.penalecontemporaneo.it/upload/7531-ordinanzacappatoqlc.pdf*.

[115] "Da questi stessi principi costituzionali deriva la libertá per l'individuo di decidere sulla propria vita ancorché da ció dipenda la sua morte." Ibid. p. 6.

[116] The trial court admitted that the law did not introduce a right to suicide, but held such freedom to be fundamental, and punishment unjustified when aid consists in mere execution of a free and autonomous request. Ibid., pp. 13,14.

[117] Alternatively, the trial court challenged the constitutionality of the criminal provision insofar as it equally punishes material assistance and incitement/determination. The Constitutional Court considered the second challenge subordinate to the first one.

[118] Constitutional Court of Italy, Order n. 207/2018, 24/10/2018 – 16/11-2018. Available online at: *https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2018&numero=207*. English text: *https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_207_2018_EN.pdf*.

*jurisprudence*, the constitutional justices held.[119] On the other, it still upheld the ban's partial unconstitutionality.

In the Court's opinion, since refusal of medical treatment is always legitimate, including when such refusal leads to the patient's death, article 580 violated the "freedom of self-determination of sick persons in *choosing treatments,* including those intended to free them from suffering, *which flows from the articles 2, 13, and 32, par. 2 of the Constitution*."[120] Some patients would in fact survive longer than others. The criminal ban, in other words, would limit the "choices of death" of certain patients, who were forced to die by means of a refusal of treatment that could be lengthy and more painful (for others).[121] The prohibited active help of a physician, instead, would make the patient die in a more *dignified* (quicker) way:

> If, indeed, the primary importance of the value of life does not rule out the duty to respect the patient's decision to end his or her life by means of suspending healthcare treatments – even when this requires action by third parties, at least on the naturalistic plane (i.e. to detach or power off machines, and to submit the patient to heavy and constant sedation and pain medication)—there is no reason for the same value to become an absolute obstacle, supported by criminal liability, to accepting the patient's request for assistance in avoiding the slower decline—perceived as running contrary to their idea of a dignified death – which results from the suspension of life support devices.[122]

On that occasion the Constitutional Court also acknowledged that an unconstitutionality judgment would lead to a legislative vacuum, where the protection of the weakest and most vulnerable would not be granted. The Court acknowledged, moreover, that it lacked the power to draw specific limits and a full regulation of the matter, which solely the Parliament could legitimately (and democratically) enact, limiting access to assisted suicide to specific categories and under narrowly determined condi-

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[119] "Article 2 of the Constitution—not unlike article 2 of the ECHR—gives rise to the duty of the State to protect the life of every individual, and not the diametrically opposed right to ensure that each individual may obtain assistance to die, from the State or from third parties. The European Court of Human Rights has long since affirmed that the right to life, guaranteed by Article 2 of the ECHR, cannot give rise to a right to refuse to live and, therefore, a true right to die, precisely in relation to assisted suicide (…)." Ibid., *conclusions on points of law*, par. 5(2,3).

[120] Ibid., *conclusions on points of law,* par. 9.7.

[121] Ibid., *conclusions on points of law,* par. 9.3: "since the patient does not depend totally on a respirator, death would occur only after a considerable amount of time, quantifiable in days. In the view of the patient, this would be an undignified way to end his life and his loved ones would have to share in it on the emotional level." The reference to the greater pain *of others* was explicit in the subsequent judgment: "On the other hand, the legislation in force today does not allow a physician to make available direct treatment intended not to eliminate the suffering of patients in the above-described circumstances but to cause their death. In order to take leave of life, therefore, *patients are forced to undergo processes that are* slower and *more painful for the people close to them*." Italian Constitutional Court, judgment 242/2019, *conclusions on points of law,* par. 2.3. emphasis added, available at: *https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza_n_242_del_2019_Modugno_en.pdf*.

[122] Constitutional Court of Italy, Order n. 207/2018, conclusions on points of law, par. 9.5.

tions.[123] The Court consequently refused to proceed in that direction. Nonetheless, it did not issue an inadmissibility decision, but decided to adjourn the case to September 24, 2019, while suspending the current trial.[124]

By means of this "order," the Constitutional Court commanded Parliament to act within a predetermined deadline and in quite a specific way.[125] It suggested the adoption of preventative measures, designed to counteract the risk that the newly enacted "chance" of administering lethal drugs became an excuse for premature abandonment of treatment—and of patients; and to ensure that patients would be offered the most adequate forms of palliative care.[126]

On September 25, 2019, however, as Parliament did not enact any new law in the *interim,* the Court announced its definitive decision, basically confirming its previous order. On November 22, 2019, it issued its full opinion, *legitimizing* some forms of assistance in suicide.[127] Article 580 of the Criminal Code, in particular, was found "*un-*

[123] "This Court holds that it cannot remedy the aforementioned violation of the principles mentioned above, under the status quo, by merely removing scenarios in which help is provided to individuals in the circumstances just described from the scope of application of the criminal provision. Indeed, such a solution would leave the area of materially assisting patients in such conditions to commit suicide entirely unregulated, in an ethical and social area that is highly sensitive and in which any potential forms of abuse must be firmly prevented." Ibid., *conclusions on points of law,* 10.1.

[124] On the *originality* of this decision see A. Ruggeri, *Fraintendimenti Concettuali e Utilizzo Improprio delle tecniche Decisorie nel Corso di una Spinosa, Inquietante e ad Oggi non Conclusa Vicenda (A Margine di C. Cost. N. 207/2018),* in M. Ronco, *Il Diritto di Essere Uccisi*, pp. 1-31, (in part. 25 and ff.).

[125] The constitutional judges suggested that the patient's right to be assisted in his/her suicide should find its appropriate collocation within the context of the recently enacted law on advanced directives (l. 219/2017), rather than as an amendment of article 580: "Then again, the legislator could introduce provisions regulating the conditions for carrying out the decisions of such patients to free themselves from their sufferings not only through heavy and constant sedation and concomitant rejection of life-sustaining treatment, but also through the administration of drugs that quickly bring about death, not through the mere modification of the challenged criminal provision under Article 580 of the Criminal Code, which is under review here, but by inserting the regulatory provisions into the context of Law no. 219 of 2017 and its spirit, such that this becomes an option under the framework of the "relationship of care and of trust between patient and physician," duly recognized by Article 1 of the same law." Ibid., conclusions on points of law, par. 10.6.

[126] "A final factor that must be evaluated is the need to adopt suitable precautions (including in the practical application of the future regulatory scheme) so that the option of administering drugs capable of swiftly bringing about the death of a patient does not carry the risk of any premature renunciation, on the part of the healthcare facilities, to always offer patients the concrete possibility to receive forms of palliative care other than heavy and constant sedation, where they are appropriate for alleviating the patients' pain –in keeping with the duty taken on by the State with Law no. 38 of 2010 –in order to place the patient in the circumstances to live out the remainder of his or her life intensely and with dignity. Indeed, engagement in a course of palliative care should be a pre-condition for a patient to subsequently choose any alternative course." Ibid., *conclusions on points of law,* par. 10.8. On the difficult coexistence of a right to commit suicide with a right to effective and comprehensive access to palliative care see, G. Razzano, *La dignita' nell'ultima fase della vita,* in M. Ronco, *Il Diritto di Essere Uccisi*, pp. 81-102, in part. pp. 96 and ff.

[127] "Given the absence of any determination on the part of Parliament, the Court cannot further refrain from ruling on the merit of the questions in order to remove the constitutional violation already

*constitutional, as it violates Articles 2, 13 and 32(2) of the Constitution, insofar as it does not exclude punishment"*[128] for the "assistant" under the following conditions:

1. The victim's autonomous and free decision to commit suicide was formed and documented in accordance with provisions of articles 1 and 2 of Law n. 219/2017. Based on these provisions, along with comprehensive information and written evidence of his consent, the competent patient must always be guaranteed access to free, appropriate, and comprehensive palliative care services.
2. The victim was *"kept alive by means of life-sustaining treatments."*
3. The victim was *"affected by an irreversible disease, which causes her physical or psychological sufferings which she deems unbearable."*
4. Such assistance was provided by public entities belonging to the national healthcare system.
5. The physician's assistance was preceded by the favorable opinion of an ethics committee.

Determination and strengthening of a suicidal purpose, instead, remain criminally sanctioned.

Of course, to be exempt from punishment *the final act must be performed by the patient*—least it became an act of euthanasia, which is still absolutely prohibited. As the Court explicitly stated, in particular:

> The expression of intent must therefore be obtained 'in the manner and by the means best suited to the patient's state' and documented 'in written form or through video recordings or, in the case of disabled persons, using devices that allow him or her to communicate' and will then be added to the medical record. This 'should also leave intact the possibility that the patient may modify his or her desire at any time,' which, moreover, *in the case of assisted suicide,* is inherent in the very fact that *the person concerned retains, by definition, control over the final act that triggers the process leading to death*.[129]

The need for the victim to maintain control over the final act is also consistent with the European Court of Human Rights' jurisprudence, according to which, "an individual's right to decide by what means and at what point his or her life will end" is an aspect of the private life protected by Article 8 of the Convention, "*provided he or she is capable of* freely reaching a decision on this question and *acting in consequence*."[130]

Compliance with the aforementioned requirements, moreover, does not automatically entail exemption from criminal prosecution. Since the act of assistance remains a crime, the exemption from punishment would only follow a judicial assessment of com-

noted in order 207 of 2018." Italian Constitutional Court, judgment 242/2019, *Conclusions on points of law* par. 4.1., available at: *https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza_n_242_del_2019_Modugno_en.pdf*.

[128] Ibid., *conclusions on points of law,* par. 8.

[129] Ibid., *conclusions on points of law,* par. 5.7.

[130] ECHR, *Case of Haas v. Switzerland*, 31322/07, par. 51, emphasis added.

pliance with the above conditions.[131] The assisting doctor, therefore, could still undergo criminal prosecution, and possibly need to stand trial.

It must be evidenced, moreover, that the Court did not affirm an actual *right to die*, as it never expressed a doctor's actual *duty* to kill. The constitutional judges left it up to the doctor's conscience to decide whether and how to proceed and the physician is by no means expected, nor compelled to obey to the patient's will:

> Lastly, with regard to the question of conscientious objection on the part of medical personnel, it should be noted that this pronouncement of unconstitutionality *is limited to excluding* the punishment of assisting suicide in the cases considered here, *without creating any obligation for physicians to provide such assistance. It therefore remains a matter of conscience for individual physicians to choose whether or not to grant a patient's request.*[132]

These statements reveal a still uncertain attitude of the Constitutional Court (and perhaps a safer status of both patients' and doctors' rights); but having at least recognized the *possibility* to be assisted in choosing death, the Court has missed the chance to reaffirm the value of each human life, and its non-disposable nature.[133] As for the previous cases, the Court decided that

> . . . exemption from punishment of assistance to suicide will depend, specifically, on whether the assistance was provided in ways that, albeit differing from those mentioned, offered substantially equivalent guarantees.
>
> It will therefore be necessary for the conditions of the applicant which make the provision of assistance lawful, namely incurable illness, serious physical or psychological suffering, dependence on life-support treatment, and the ability to make free and informed decisions, to have been medically assessed; that the will of the person concerned has been clearly and unambiguously expressed in a manner compatible with his or her condition; that the patient has been adequately informed of both his/her condition and possible alternative solutions, especially access to palliative care and, where appropriate, constant heavy sedation. All of these requirements must be verified by a court on a case-by-case basis."[134]

On December 23, 2019, Marco Cappato was acquitted by the Criminal Court of Milan.

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[131] This is the opinion of Court-of-Cassation judge A. Mantovano, *Aiuto al suicidio: conseguenze e prospettive dopo la sentenza della Corte costituzionale,* Jan. 30, 2020, available at: *https://l-jus.it/disposizioni-anticipate-di-trattamento-e-obiezione-di-coscienza-per-medici-e-notai-profili-interpretativi-della-legge-22-dicembre-2017-n-219/.*

[132] Italian Constitutional Court, n. 242/2019, *conclusions on points of law,* par. 6, emphasis added.

[133] As it was true with reference to its first order, the Constitutional Court "seems to have unnaturally turned the *factual freedom* of a person who is capable to autonomously terminate his own existence (a freedom which does not derive from any constitutionally protected status) into the *constitutional right* of a non-autonomous person to demand others to perform actions fit to obtain that goal," A. Ruggeri, *Fraintendimenti Concettuali,* p. 9, informal translation.

[134] Italian Constitutional Court, n. 242/2019, *conclusions on points of law*, par. 7.4.

Fears of a "slippery slope" are already proving correct. On February 6, 2020, the National Association of Doctors (FNOMCeO) issued new guidelines regarding the enforcement of article 17 of its deontological code, which states: "*The doctor, including when requested by the patient, shall not perform nor facilitate treatments aimed at causing his death.*"[135] Based on the new guidelines, doctors will not undergo any disciplinary sanction if acting in conformity with the Court's latest holding.[136] It could at least be argued that while the Court did not create a *right to die,* doctors are now entitled, under certain conditions, a *right to kill* (by cooperation). This judgment inevitably and irrevocably impaired Italy's absolute protection of life.

In failing to recognize the difference between refusing treatment and committing suicide, this decision replicates and intensifies (and perhaps *constitutionalized*) the error implied in Law 219/2017, discussed above: health is treated as a subjective concept rather than an objective reality.

This judgment paved the way for future constitutional challenges, which will seek the recognition of an actual *right to die*, to be extended to all.[137] Meanwhile, the patient's right to access effective and comprehensive palliative care, and the corresponding duty of the state to provide it, risk being blurred, obscured by the readily available, lethal (and inexpensive) alternative.[138]

It is however from a substantial perspective—and not only because of its *unintended consequences*—that this judgment is flawed. The fundamental right to life cannot be interpreted as if it included a specular "right to die," nor to be assisted in committing suicide. Every fundamental right entitles its bearer the freedom to act or not to act in pursuance of the basic human good it protects (life, health, freedom, etc.,). Such freedom, however, does not protect a specular right, aimed at its own destruction. Re-

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[135] "Codice di Deontologia Medica," Article 17, informal transalation ("*Atti finalizzati a provocare la morte*. Il medico, anche su richiesta del paziente, non deve effettuare né favorire atti finalizzati a provocarne la morte.") Available at: *https://portale.fnomceo.it/wp-content/uploads/2018/03/CODICE-DEONTOLOGIA-MEDICA-2014.pdf*.

[136] On the new guidelines see FNOMCeO press release, Feb. 6, 2020, available at: *https://portale.fnomceo.it/suicidio-assistito-la-fnomceo-aggiorna-il-codice-deontologico/*. Expressing criticism on the "paradoxical" nature of the new guidelines, F. Ognibene, *Non era necessario adeguarsi alla sentenza costituzionale,* Avvenire, Feb. 25, 2020, available at: *https://www.centrostudilivatino.it/non-era-necessario-adeguarsi-alla-sentenza-costituzionale/*.

[137] This is happening in Canada, where in 2015 the Supreme Court issued a judgment very similar to the one under scrutiny, *supra* note 7. That judgment led to a later law, "An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)," SC 2016 c3. The Canadian Parliament aimed at creating a narrow hypothesis for access to assistance in dying, but the limits imposed by the Act have already been challenged in court. See, for instance: *Truchon c. Procureur général du Canada*, 2019 QCCS 3792, where "reasonable foreseeability" of death was found unconstitutional. Available online at *https://www.canlii.org/en/qc/qccs/doc/2019/2019qccs3792/2019qccs3792.html#_Toc29282852*.

[138] A further and more practical problem lies in having involved some existing "ethics committee" in the process: committees whose nature, functions, and future are rather unclear. On this specific topic see: C. Petrini, After the Italian Constitutional Court's ruling on the absence of criminal liability for assisted suicide: the role of ethics committees and clinical ethics, Ann Ist Super Sanità 2019 | Vol. 55, No. 4: 311-313.

gardless of the individual decision to pursue it, the human good protected by the law remains one and the same. The right to "health" leaves the person "free" to smoke, or drink, or to eat unhealthy food; but it does not imply a fundamental, specular right "to get sick." "Illness" is not a basic human good, and the law does not protect it. With reference to "personal freedom," it is even more evident that this right does not entail a specular right to be enslaved ("slavery" is not a human good that deserves legal protection). Life is the most supreme and basic of all human goods; death is not.

As Italian criminal law Professor Mauro Ronco recently wrote:

> To admit that a request to die can be the object of a right means reducing the right to life to the variable object of an uncertain and ever-changeable convention. The law would no more be grounded on the granitic authority of rational judgment, common to all men, but rather on the mutable order issued by the law of the State, or by the judicial pronouncement, which will respectively depend on the trade-off between wills that conflict which each other, or on the will of the judge called to decide the single case. The legal validation in terms of "right" of a request for death, by means of euthanasia or assisted suicide, annihilates the legal system's intrinsic nature, which is that of ordinating criterion of liberties of men amongst men, to be exercised within common spaces that are taken away from the anomic liberty of the individual.[139]

## Suicide, Duty-to-Rescue, and Human Solidarity

While the Dutch law and guidelines, and the recent Italian judgment, may identify *self-determination* as the grounding principle of human rights' protection, contemporary legal systems still provide evidence of, and need for another grounding and guiding principle: *human solidarity*.

A first evidence of this principle's vitality is that prevention of suicidal attempts goes usually and *internationally* free from punishment, including when the intervening third party causes injuries to the suicidal person. In this sense, the common law tradition developed an exception to battery, *"providing both states and private individuals with a legal privilege to detain persons attempting suicide, including by force if need be*."[140] This exception is now codified law in most U.S. States.[141] Similarly, article 610 of the Italian penal code, "*violenza privata*," which is a form of coercion, does not apply to the action of the person acting to prevent a suicide.[142] In Italy, furthermore, a doctor performing a life-saving treatment on a patient who validly refused it could successfully invoke the criminal law justification of legitimate defense, which applies also to the de-

[139] M. Ronco, Il "Diritto" di Essere Uccisi: Verso la Morte del Diritto?, p. 288. Informal translation.

[140] N. Gorsuch, The Future of Assisted Suicide and Euthanasia, p. 32.

[141] "Most American States have now codified such an exception to common law battery doctrine; New York's statute is typical, allowing the civil detention of one 'who appears to be mentally ill and is conducting himself in a manner which poses substantial risk of physical harm to himself as manifested by threats or attempts at suicide'." Ibid.

[142] Article 610, Italian Criminal Code: "Whoever, by means of violence or threat, forces another to do, tolerate, or omit something is punished with imprisonment for up to four years. The sentence is aggravated if the conditions set out in article 339 are met," informal translation.

fense of a third party.[143] In all these instances, in other words, human *solidarity* justifies life-preserving actions that are clearly contrary to individual *self-determination*; *solidarity* contradicts their wrongfulness, and implicitly acknowledges their morality.

With reference to life's inviolable value, moreover, the role of solidarity as a limit to self-determination is revealed also by article 593 of the Italian criminal code, which contains an actual "duty to rescue" any life found in peril. This norm punishes whoever fails to provide assistance to a human body that is or that appears to be lifeless, as well as to any injured or otherwise endangered person.[144] Omission to provide assistance, or to alert the authorities, is sanctioned with a maximum of one-year imprisonment, or with a fine. The sentence is doubled if the omission results in the victim's death. The duty, however, exists insofar as the third party is able to assist, or to alert the authorities, without incurring personal risks. Such a duty, moreover, does not entail that the rescuer would be responsible for eventually failing to save the victim.

Article 593, whose mere existence contradicts the rational of the latest Constitutional Court judgment, could indeed help answering the questions raised in the first pages, regarding the duties one has when facing a third party's request to die. This criminal law provision—which holds that not only friends and relatives, but even total strangers have an obligation to save the life of a fellow citizen—is in fact not at all unique to the Italian legal system, but quite common throughout Europe.[145] The widespread

[143] "Even in presence of a full will to commit suicide, anybody acting to prevent the suicidal act can undoubtedly invoke the justification of legitimate defense of a third party, as per article 52 of the penal code. Anyone who successfully keeps a suicidal person from jumping down a bridge is not guilty of coercion, as per article 610 of the penal code. Anyone who, with violence, takes away a pistol from the man who is about to shoot himself in the mouth, causing him injuries, is not liable of personal injuries, as per article 582 of the penal code. The reason is that these "destructive" acts, being objectively unjust, justify the third party's protection of the right to life and to health, which are threatened by the destructive act." M. Ronco, *L'istigazione e l'aiuto al suicidio,* Sept. 4, 2017, par. 6, informal translation. Italian text available at: *https://www.centrostudilivatino.it/listigazione-e-laiuto-al-suicidio*.

[144] The criminal norm also punishes omitting assistance to an abandoned or lost child. Italian Criminal Code, Article 593, Failure to Provide Assistance: "1. Chiunque, trovando abbandonato o smarrito un fanciullo minore degli anni dieci, o un'altra persona incapace di provvedere a se stessa, per malattia di mente o di corpo, per vecchiaia o per altra causa, omette di darne immediato avviso all'autorità è punito con la reclusione fino a un anno o con la multa fino a 2.500 euro. 2. Alla stessa pena soggiace chi, trovando un corpo umano che sia o sembri inanimato, ovvero una persona ferita o altrimenti in pericolo, omette di prestare l'assistenza occorrente o di darne immediato avviso all'autorità. Se da siffatta condotta del colpevole deriva una lesione personale, la pena è aumentata; se ne deriva la morte, la pena è raddoppiata."

[145] According to Yaeger, such laws exist in sixteen European states (Belgium, Czechoslovakia, Denmark, France, Germany, Holland, Hungary, Italy, the Netherlands, Norway, Poland, Portugal, Romania, Spain, Switzerland, and Turkey) and the states of Rhode Island, Vermont, and Wisconsin have criminal statutes that impose an affirmative duty to help those in grave danger. Minnesota opted for civil liability. See, D.B. Yaeger, Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers, 71 Wash. U. L. Q. 1(1993). Available at: https://openscholarship.wustl.edu/law_lawreview/vol71/iss1/1. It should be noted that, in enacting the possibility of assisted suicide, Vermont also introduced a new § 5284, "No duty to aid": "A patient with a terminal condition who self-administers a lethal dose of medication shall not be considered to be a person exposed to grave physical harm under 12 V.S.A. § 519, and no person shall be subject to civil or criminal liability solely for being present when a

existence of these laws seems then good evidence that solidarity duties are perfectly predicable within liberal and democratic states.

Generally, these laws establish that the third party's duty—and thus his criminal liability in case of omission—derives from the joint existence of the following circumstances: 1) an individual is in grave danger of suffering death or serious physical injury; 2) a third party is nearby and the emergency is clearly immediate; 3) the third party can directly attempt a rescue or call for help without incurring grave danger; 4) nobody else is helping/could intervene in the same manner.[146] Sentences are also usually very mild: these laws do not demand heroism but expect citizens to perform what is appropriate in a just and equal community.

In the United States they are usually known as "Bad Samaritan laws." In contrast with the parable of the Gospel, the Bad Samaritan is the stranger who, finding a wounded man on his way, does not stop to assist him. Although Bad Samaritan laws are quite alien to the American legal culture, this absence has been convincingly described as being rooted in history, rather than as being the product of an extreme American individualism.[147]

As Professor Glendon writes, "affirmative legal duties to come to the aid of another were unknown not only in early English law, but to most other primitive legal systems," where "encouragement of affirmative acts of good behavior, and sanctions for their omission, are left to other social norms—custom, convention, and religion." [148]

European criminal codes, enacted at later times, were probably readier to see the progressive destruction of society's natural and pre-political communities, and thus to enact appropriate legislation. European states, moreover, are mostly structured as welfare states, where both citizens' and states' duties are quite commonly spelled out. The U.S., on the other hand, is anchored to a "rights' narrative" that generally struggles to incorporate language about duties and responsibilities in its statutes and in its broader legal discourse.[149] In the U.S., rescue cases have historically been treated as a matter

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patient with a terminal condition self-administers a lethal dose of medication or for not acting to prevent the patient from self-administering a lethal dose of medication. (Added 2013, No. 39, § 1, eff. May 20, 2013.)," 18 V.S.A. § 5284.

[146] K. Levy, Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism, 44 Ga. L. Rev. 607 (2010), p. 617. The author excludes that his general considerations on Bad Samaritan laws apply to euthanasia.

[147] See, Mary Ann Glendon, Rights Talk. The Impoverishment of Political Discourse, New York, 1991, p. 82.

[148] Ibid. For interesting historical accounts of "duty to rescue" in the common law tradition see SJ Heyman, Foundations of the Duty to Rescue, 47 Vand. L. Rev., 673 (1994).

[149] M. A Glendon, *Rights Talk*, in particular ch. 4, 5. "*Buried deep in our rights dialect is an unexpressed premise that we roam at large in a land of strangers, where we presumptively have no obligations toward others except to avoid the active infliction of harm. This legalistic assumption is one that fits poorly with the American tradition of generosity toward the stranger. As well as with the trend in our history to expand the concept of the community for which we accept common responsibility*," M. A. Glendon, *Rights Talk*, p. 77.

of tort law, while European legislatures opted for the *public* enforcement of the duty to rescue. In the European legal tradition, there is in fact a wider acceptance of the *criminal law as an instrument by which the values of the community are expressed and reaffirmed.*[150] Further historical changes, however, which resulted in the current *atomization* of our metropolitan lives, render now the absence of *duty-to-rescue* laws from U.S. codes quite troubling.[151]

As Professor Glendon writes, every single law student in America suffers a shock upon learning that there is usually no liability, neither in tort nor in criminal law, for the Olympic swimmer who sees a baby drowning next to him and decides to watch the tragedy instead of saving the child's innocent life.[152] Such a shock is indeed the typical human answer to norms that clearly contradict what our common and shared morality expects and demands.

Whether or not it would be effective, reasonable, or prudent for the U.S. to adopt a European-like system of Bad Samaritan laws it is not object of present considerations.[153] What matters here is rather that the *moral* soundness of Bad Samaritan laws remains apparent and intuitive (as law students' reactions make manifest). Indeed, although American legal education trains lawyers to separate law and morality, any norm touching on life issues is the inevitable expression of moral norms and principles. The existence of these laws in many legal systems, as mentioned, proves how absolute self-determination was never the one and only grounding principle of liberal and democratic states.

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[150] Ibid., p. 84. As per the appropriateness of the criminal sanction, and favoring its introduction in US law, see also A. D'Amato, Bad Samaritan Paradigm, 70 Nw. U. L. Rev. 798 (1975-1976), in particular p. 806: "Since antisocial behavior constitutes a "public wrong," it can appropriately be made the subject of a criminal statute. American law has too easily and automatically equated criminal wrongs with civil harms, "violation of statute" as a standard for negligence being one example. Yet there is an important difference even in respect to strictly personal crimes. A murderer harms society as well as his victim. The distinction is recognized by the fact that the victim's consent does not justify the homicide from the criminal law standpoint. Furthermore, the decision whether to go ahead with the prosecution for any crime is the state's."

[151] The problematic absence of duty-to-rescue laws is the object of the last episode of the tv series Seinfeld, where, "America's favorite New York misanthropes were sent to jail for callously watching a crime unfold, adding insult to injury by mocking the overweight victim. (...) as their slick lawyer Jackie Chiles said, 'You don't have to help anyone. That's what this country is all about.'" J. Labrecque, Remember the doomed yet wonderful 'Seinfeld' finale, June 26, 2015, available at: *https://ew.com/article/2015/06/26/seinfeld-finale-revisited/*.

[152] Ibid., p. 78.

[153] Several American scholars dedicated their studies to defending the opportunity of adopting such laws, criminalizing failure to provide assistance. In addition to Professor M.A. Glendon, see: A. D'Amato, Bad Samaritan Paradigm, 70 Nw. U. L. Rev. 798 (1975-1976), K. Levy, Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism, 44 Ga. L. Rev. 607 (2010), S. J. Heyman, Foundations of the Duty to Rescue, 47 Vand. L. Rev., 673 (1994); N. Levit, The Kindness of Strangers: Interdisciplinary Foundations of a Duty to Act, 40 Washburn L.J., 463 (2001); L. Murphy, Beneficence, Law, and Liberty: The Case of Required Rescue, 89 Geo. L.J. 605 (2001); and D. B. Yeager, A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers, 71 Wash. U. L.Q., 1 (1993).

In Italy, the duty-to rescue imposed by article 593 of the criminal code is also direct and practical enforcement of article 2 of the Italian Constitution, which not only entitles individuals to the fundamental rights of the person, but also demands that they fulfill fundamental duties: "The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. *The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled*."

According to the Italian constitution, in fact, *fundamental rights exist along with "fundamental duties."* Since no human right is as fundamental and as sacred as life, it is then quite reasonable to affirm that no duty is more fundamental than preventing the death of a fellow citizen: be he our friend, our relative, or a mere stranger.

Again, Italy is not unique. The Universal Declaration of Human Rights explicitly states: "*Everyone has duties to the community in which alone the free and full development of his personality is possible*."[154] This last provision, moreover, is not just a recent product of the modern welfare state but has a rather long and noble past. As noted by Professor Yaeger,

> Adherents of the view that good citizenship entails communal obligations include Cicero, Plato, Mill, Bentham, Darwin, and Kant. Together they intimate that Jesus' admonition in the Good Samaritan parable, to go and do as the Samaritan did, should be perceived as duty, not charity. Because community membership inevitably involves dependency and vulnerability, these exceptional voices suggest that 'the claim of each of us on the resources of the others is equal,' even if we are not equally dependent in matters of strength, wealth or usefulness.[155]

It is only today, in a world dominated by the language of "autonomy" and self-centeredness, that this kind of duties are either minimized or misinterpreted.[156] In particular, the currently common idea that solidarity and autonomy are antagonistic or irreconcilable principles is not only novel but is also wrong. First, autonomy is not a limitless, arbitrary, or self-defined concept:

> *Autonomy itself as a capacity is to be valued precisely in so far as its exercise makes for the well-being and flourishing of the human beings who possess it.* But it is plain that many exercises of the capacity, that is, many self-determining choices, are destructive of human well-being—both in the life of the chooser and in the lives of others affected by his or her choices. The mere fact that someone has chosen to act or to be treated in a certain way establishes no title to moral respect for what has been chosen. The

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[154] UN Universal Declaration of Human Rights, Article 29, sec.1.

[155] D.B. Yaeger, A Radical Community of Aid, pp. 3,4.

[156] Notwithstanding his favor for the sovereign power of the individual over himself, J.S. Mill writes: "There are also many positive acts for the benefit of others, which he may rightfully be compelled to perform; such as, to give evidence in a court of justice; to bear his fair share in the common defence, or in any other joint work necessary to the interest of the society of which he enjoys the protection; and to perform certain acts of individual beneficence, *such as saving a fellow creature's life*, or interposing to protect the defenceless against ill-usage, things which whenever it is obviously a man's duty to do, he may rightfully be made responsible to society for not doing." J.S. Mill, On Liberty and other Essays, J. Gray (ed.), Oxford University Press, p. 15, emphasis added.

> character of the choice must satisfy certain criteria in order to warrant our respect. The most basic criterion is that a *choice should be consistent with respect for fundamental dignity of both the chooser and of others.*[157]

Furthermore, as pointed out by criminal law scholar Ivo Coca-Vila, *solidarity* and *autonomy jointly* constitute the principles that lie at the bases of criminal law, whose mission is to bring about a fair reconciliation of "*spheres of freedom in permanent conflict.*"[158]

> As its primary mission, the legal system guarantees every person a space in which they can organize themselves freely, establishing a clear and unbreakable separation of legal spheres based on the principle of autonomy. The fundamental condition needed to ensure a separation of spheres of freedom of this type is for each person to be responsible for their sphere so that it does not violate the legally guaranteed interests of the other citizens (*neminem laede*).[159]

As the author notes, for this abstract autonomy to become an objective possibility there needs to be social institutions that enable individuals to enjoy and exercise their freedom. Within such institutions, not only are people:

> . . . obliged not to interfere in the spheres of others, but also (…) bound to improve the status of the legal position associated with the role they hold. What matters now is that the principle of solidarity gives rise to positive duties to guarantee basic social institutions, especially the family and the state. Thus, for example, mothers are not only obliged not to harm their children, but also to feed them, in the same way as a police officer is obliged not only not to steal, but also to prevent the public from stealing. *Following on from the same reasoning is the general duty to actively rescue that is endorsed by most continental penal codes*….[160]

It is therefore based on the interrelation of autonomy and solidarity, regardless of any pre-existing relationship, that all are *morally* bound to prevent, whenever reasonable and possible, the death of another human being. As a logical consequence, we are all called to prevent, whenever reasonable and possible, a third party's suicide: be it by starvation, or by a lethal injection in a Swiss clinic.[161]

Protecting the life of a stranger, moreover, is to perform an act of self-love. As explained by Professor John Finnis, and based on Aquinas' philosophy,

> . . . every such response, in which one is moved by the intelligible good one can instantiate or protect in the existence of another person, also creates or reaffirms a

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[157] J. Keown, L. Gormally, *Human Dignity, Autonomy and Mentally Incapacitated Patients: A Critique of Who Decides?,* 1999, 4 Web J Curr Legal Issues, part II. Available at: h*ttp://www.bailii.org/uk/other/journals/WebJCLI/1999/issue4/keown4.html*. See also, L. Gormally (ed.), *Euthanasia, Clinical Practice and the Law,* The Linacre Centre for Health Care Ethics, 1994, in part. pp. 131-133: "it should be clear that the claims of autonomy cannot properly extend to choices which are inconsistent with recognising the basic worth and dignity of every human being," (p. 132).

[158] Ivo Coca-Vila, Conflicting Duties in Criminal Law, 22 New Crim. L. Rev. 34 (2019).

[159] Ibid, p. 48.

[160] Ibid, p. 49. Emphasis added.

[161] As S.J. Heyman concludes: "The crucial point, I have suggested, is to recognize that rescuer and victim are not mere strangers, but members of a broader community. This insight derives from the common-law and natural right traditions, the same traditions that are often invoked to oppose a duty to rescue," S. J. Heyman, Foundations of the Duty to Rescue, p. 755.

> relationship between us, additional to the relationship which consists simply in our both being human. This willed relationship Aquinas calls *societas*, and it is itself a basic human good: harmony among human persons—friendship, whether in its central or in one of its secondary forms, neighbourliness, fraternity.[162]

The choice to save a friend's, or a stranger's life is not a form of altruism, but an act conducive to a state of harmony from which the same rescuer benefits. Solidarity, moreover, creates the conditions for a more efficient society, where the state is not excessively burdened. [163] While each man may still choose to act egotistically, that choice cannot deny that harmony and friendship are basic human goods, nor that egoism prevents their subsistence. That choice, moreover, might even be *legitimate*, but it is hardly *just.*

## Conclusion

Individual self-determination is necessarily shaped by our human relationships, by the social and economic conditions in which one lives, and by the existing—national and international—laws.[164] In end-of-life scenarios, self-determination is thus inevitably influenced by the fact that death is itself becoming a legitimate choice, while human solidarity is perceived as an imprudent intrusion in another person's privacy. Without solidarity, however, self-determination is a powerful and silent weapon directed against the most vulnerable ones.

As the rapidly changing laws and the increasing numbers of *deaths on request* show, contemporary societies need human solidarity, and need it urgently. We need it first and foremost for depressed minors and for terminally ill patients; but we need it also for the young and the healthy: to preserve the conditions that are conducive to their fullest human flourishing. The future developments of Italian laws and jurisprudence will indeed prove whether citizens are safer where death is a *legitimate choice,* or where it is and remains the inevitable final passage of our human existence.

From a solidarity perspective, when death comes, and nothing—no rescue—can be done or attempted, the duty is to overcome one's own pain, and to suffer *with* the dying person.[165] "Care" for the dying is well represented by that cloak that St. Martin

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[162] J. Finnis, Aquinas, Moral, Political, and Legal Theory, Oxford University Press, 2004, pp. 111, 112.

[163] "A society, therefore, should actually have laws which command men to aid one another in their necessities both in order that friendships may arise from such natural aid, and in order that society will not have to burden itself with an excessive amount of works which in this life would be much better provided for by human beings in their own small circle of life." J.V. Schall, *The Totality of Society: From Justice to Friendship,* TSQR, 20 (1957), p.20.

[164] "Let us never succumb to the temptation of believing that legislation and judicial decrees play only minor roles (…) The habits, if not the hearts, of the people have been and are being altered every day by legislative acts, judicial decisions, and executive orders." M.L. King, Jr., *Strength to Love*, Pocket Books, NY, 1968, p. 28.

[165] "Thus, when the advocates for euthanasia press us with the most heartrending cases, we should be sympathetic but firm. Our response should be neither "Yes, for mercy's sake" nor "Murder" Unthinkable! But "Sorry. No." Above all we must not allow ourselves to become self-deceived: we must never seek to relieve our own frustrations and bitterness over the lingering deaths of others by pretending that we can

offered for comfort against the cold to a beggar—a stranger—on the street. That cloak (*pallium*) is the meaning and the justification of all forms of palliative care: of the just way of loving our fellow human beings "to death."

## Addendum. February 28, 2020

As this paper was being submitted for final review, on February 26, 2020, the Constitutional Court of Germany declared that the recently enacted ban on professional assisted suicide (§ 217, *supra* at note 108) is unconstitutional.[166] This decision goes beyond the recent Italian judgment. First, the German court found an individual fundamental *right to commit suicide* ("*Rechts auf Selbsttötung*"), grounded in human dignity and in individual self-determination. In addition, the Court held that this right to suicide prohibits linking its permissibility to certain substantive criteria.[167] No diagnosis of terminal illness should be required. The Court also recognized a corresponding right of third parties, who must be legally allowed to act in accordance with their willingness to render suicide assistance, including for professional purposes. This judgment deserves much more careful analysis, but having been issued by one of the Constitutional Courts most protective and deeply respectful of human dignity, there is no more doubt that our *right to life* needs *urgent* protection.

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kill them to sustain their dignity.," L. Kass, *Life Liberty and the Defense of Dignity: The Challenge for Bioethics,* Encounter Broadsides, Kindle edition, p. 255. Saint John Paul II called euthanasia a "false mercy" and "indeed a disturbing perversion of mercy," J.P.II, *Evangelium Vitae,* March 25, 1995, section 66. The text continues: "Moreover, the act of euthanasia appears all the more perverse if it is carried out by those, like relatives, who are supposed to treat a family member with patience and love, or by those, such as doctors, who by virtue of their specific profession are supposed to care for the sick person even in the most painful terminal stages."

[166] BVerfG, Urteil des Zweiten Senats vom 26. Februar 2020, BvR 2347/15 -, Rn. (1-343). Full German text available at: *https://www.bundesverfassungsgericht.de/e/rs20200226_2bvr234715.html*. For the English press release see: *https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-012.html*.

[167] Ibid. par. 340, "*Aufgrund der verfassungsrechtlichen Anerkennung des Rechts auf Selbsttötung, welche die einem individuellen Suizidentschluss zugrundeliegenden Motive einschließt und diese damit einer Beurteilung nach Maßstäben objektiver Vernünftigkeit entzieht (vgl. Rn. 210), verbietet es sich aber, die Zulässigkeit einer Hilfe zur Selbsttötung materiellen Kriterien zu unterwerfen, sie etwa vom Vorliegen einer unheilbaren oder tödlich verlaufenden Krankheit abhängig zu machen*."