THE PROBLEMATIC MORAL ARGUMENTS IN THE *SUE RODRIGUEZ* CASE

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IN THE *SUE RODRIGUEZ* CASE, the Supreme Court of Canada, in a 5-4 split judgment, upheld the prohibition on assisting a person to commit suicide. For those opposed to the legalization of assisting a suicide, this was a welcome victory, even if a little too close for comfort. The level of discomfort increases with a careful analysis of the arguments presented in the majority opinion. At least some of the arguments, in the form in which they were presented, are vulnerable to compelling rebuttals. It is safe to assume that this will not be the last time that the court visits this issue. While a Supreme Court Judgment is binding on all lower courts (whether its arguments are compelling or not), it is not binding on future sessions of the Supreme Court itself. It is true that for the sake of stability in the law, the court is reluctant to reverse even what it comes to view as a wrong-headed judgment. This reluctance, however, can and, on several occasions, has been overcome. What, at the end of the day, binds the Supreme Court is the force of the arguments presented in their earlier judgments. The composition of the court has already changed. The next time the court adjudicates a contest between life and freedom, it is far from certain that the same formulation of these arguments will persuade a majority of the court. If the prohibition on assisting suicide is to be upheld, problems with the arguments in the *Rodriguez* judgment will have to be identified and addressed. This paper will attempt to do both.

One does not have to be a lawyer to concur *intelligently* with or to dissent *intelligently* from the court's judgment in this case. A modest familiarity with some basics of Canadian constitutional law, readily acquirable, is an adequate legal foundation to join the debate. As I hope to show, a developed facility in parsing moral arguments is a far more significant prerequisite. The objectives for this paper are two: first, to

provide a background in regard to the steps for arguing a challenge to a law based on the *Charter of Rights and Freedoms*. As a non-lawyer myself, I have no doubt that this background is accessible without extensive legal training. Secondly, this paper will set out the major arguments that were decisive in the *Rodriguez* case, identify where certain problems exist, and propose alternatives that are less vulnerable to rebuttal.

I. LEGAL BACKGROUND USEFUL IN ANALYZING THIS CASE

A brief statement of the factual basis of the case was set out by Chief Justice Anton Lamer at the beginning of his dissenting judgment:

> Sue Rodriguez is a 42-year-old woman living in British Columbia. She is married and the mother of an 8½-year-old son. Ms. Rodriguez suffers from amyotrophic lateral sclerosis (ALS), which is widely known as Lou Gehrig's disease; her life expectancy is between 2 and 14 months but her condition is rapidly deteriorating. Very soon she will lose the ability to swallow, speak, walk, and move her body without assistance. Thereafter she will lose the capacity to breathe without a respirator, to eat without a gastrotomy and will eventually become confined to a bed. Ms. Rodriguez knows of her condition, the trajectory of her illness, and the inevitability of how her life will end; her wish is to control the circumstances, timing, and manner of her death. She does not wish to die so long as she still has the capacity to enjoy life. However, by the time she no longer is able to enjoy life, she will be physically unable to terminate her life without assistance. Ms. Rodriguez seeks an order which will allow a qualified medical practitioner to set up technological means by which she might, by her own hand, at the time of her choosing, end her life. [paragraphs 109-110][i]

The question before the court was: Is s. 214(b) of the Criminal Code, which states: *241. Every one who (a) counsels a person to commit suicide, or (b) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years*, in contravention of the *Canadian Charter of Rights and Freedoms*, Sections, 7, 12, or 15? And if so, is it "saved" by Section 1 of the *Charter*? I will return to this notion of being "saved" by Section 1 in a moment. First, a brief comment on each of the sections appealed to. Section 7, where most of

the arguments are focused, states: *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice*. As indicated by the conjunction, this is a two-part section. The argument will focus on the second part, namely, whether the infringement on the liberty and security of the person is entailed by the prohibition of assistance in suicide in accordance with, or contrary to the "principles of fundamental justice."

The argument from Section 12, which prohibits cruel and unusual treatment by the state, never got off the ground, for its proponents were unable to persuade any of the justices that the legislation constitutes "treatment." We will forgo any discussion of it. Section 15 is the section which prohibits discrimination by the state on a number of grounds, including physical handicap. This is the argument which persuaded Chief Justice Anton Lamer to side with Rodriguez. Justice Cory also endorsed this line of argument. Now, back to the notion of a law which contravenes another section of the *Charter* being "saved" by Section 1, which states: *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*. For a Canadian law to be struck down as "unconstitutional" because it violates the *Charter*, two things are necessary.

1) INFRINGEMENT ON A *CHARTER* RIGHT

It must limit the exercise of a right or freedom protected by the *Charter*, *e.g.,* the right not to suffer discrimination as specified by Section 15, or not to suffer cruel and unusual treatment, the right to a fair trial, *etc*. In the case of Section 7, the law must: (a) be shown to infringe on or endanger our life, or to limit our freedom, or to endanger the security of our person. Virtually any law will meet this latter test. After all, limiting our freedom is what most laws do for a living. Laws requiring us to pay taxes, to serve in the military in wartime, to keep our hands off others and their property, not to put heroin in our veins, and so on, all limit our freedom and may endanger our life. All of the justices agree, for

example, that the law prohibiting assistance in suicide infringe upon people's freedom to control what happens to their own bodies (something included in the notion of "security of the person.") This is why Section 7 has a "b" sub-part to it, for it allows these limitations on our life, liberty, and security of the person so long as they are: (b) done in accordance with the "principles of fundamental justice." So what Section 7 really guarantees is "fundamental justice" in the infringements on our life, or liberty, or the security of our person. The majority contends that the infringement on a person's liberty and the control of his/her body, which the prohibition of assistance in suicide admittedly entails, is in accordance with the principles of fundamental justice. At least three of the dissenting justices argue that it is not.

Articulating the meaning of "fundamental justice" is clearly a "work in progress." The process of determining, in the context of Section 7, what constitutes the principles of "fundamental justice" is (Sopinka says) "not an easy task." He seems to have had a penchant for understatement. Let me briefly make four points:

First, it includes the procedural requirements of "due process" and "natural justice." If our life and liberties are to be curtailed, the processes by which this is done must accord with our perceptions of fairness. In *Morgentaler*, for example, the statute regulating abortion was struck down because the procedures it imposed were viewed as unfair because unnecessary in terms of what they identified as the objective of the statute (making abortion available to every woman whose health was endangered by her pregnancy). Secondly, beyond procedural fairness, principles of fundamental justice will include other basic principles within our legal system. Lamer had earlier stated:

> Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.... The proper approach to the determination of the principles of fundamental justice is quite simply one in which, as Professor L. Tremblay has written, "future growth will be based on historical roots".... Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale,* and essential role of that principle within the judicial process

and in our legal system, as it evolves. [Cited by Sopinka, paragraph 22]

In short, without ruling out the possibility that a long-established principle should be abandoned, a principle of fundamental justice is likely to be rooted in our historical legal traditions.

Thirdly, a curtailing of our freedoms will only be fundamentally just if by so doing an interest of the state is served and a reasonable balance is struck between the two. On this point, Sopinka cites Justice McLachlin, who a few months earlier, in a different case, stated:

> The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 502-03, *per* Lamer J.; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 212, *per* Wilson J.; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 882, *per* Iacobucci J.). [As cited by Sopinka, emphasis added by Sopinka, paragraph 27]

And finally, an indication (albeit not an infallible one) that a limitation on our freedom is consistent with fundamental justice is a persisting and wide-spread consensus by the populace that it is reasonable and necessary for the sake of justice. Here, not only Canadian experience but that of other democratic countries is relevant.

2) REASONABLE LIMITS ON *CHARTER* RIGHTS

The second major requirement to establish that a law is unconstitutional, by virtue of being inconsistent with the *Charter*, is imposed by Section 1 of the *Charter*. To be unconstitutional, a law which infringes on a protected right or freedom (and in the case of s.7, does so in a way inconsistent with "fundamental justice") must be an "unreasonable" limitation on the exercise of that right or freedom. The *Canadian Charter of Rights and Freedoms* recognizes no "absolute rights." All rights, including the rights to life, liberty, security of the person, even the right to fundamental justice, or the right not to be discriminated against on prohibited grounds (such a physical disability), all these rights are

possessed, subject to "reasonable limits." Laws which do not constitute "reasonable limits" contravene the *Charter* and are therefore "of no force or effect." In this, the *Charter* can be seen as having adopted the tenet of the natural law tradition that laws contrary to reason and thereby "unjust laws" are not to be treated as laws at all. In response to the discrimination argument made by Lamer, the majority judgment argues that even if the prohibition on assisting suicide infringed on the non-discrimination right (maybe it does, maybe it doesn't—we don't have to decide) it would be justifiable as a reasonable limit on the right to equality without discrimination.

II. THE DECISIVE ARGUMENTS IN *R. V. RODRIGUEZ*

What then are the arguments that persuaded the majority of the court to uphold the ban on assisting suicide? More precisely, what persuaded a majority that this ban was in accordance with "fundamental justice"?

The late Justice John Sopinka, author of the majority judgment, begins his defense with a rejection of what is a foundational position not only of the dissenting justices but much of modern, liberal thought, namely, that among the many values to be affirmed, freedom is to be given priority. The importance of rejecting this automatic priority of freedom cannot be over-estimated. He states near the beginning of his treatment of the Section 7 argument:

> The appellant [Rodriguez] seeks a remedy which would assure her some control over the time and manner of her death. While she supports her claim on the ground that her liberty and security of the person interests are engaged, a consideration of these interests cannot be divorced from the sanctity of life, which is one of the three *Charter* values protected by s.7.
>
> None of these values prevail *a priori* over the others. All must be taken into account in determining the content of the principles of fundamental justice and there is no basis for imposing a greater burden on the propounder of one value as against that imposed on another. [Paragraph 7]

What Sopinka is saying here, I believe, is that a reciprocal limitation of life, liberty, and the security of the person, each by the other two values, is part of the meaning of fundamental justice, part of the basis for our society. Although neither life, nor liberty, nor the security of the person

are absolute values, it is a part of fundamental justice to support each, sometimes inescapably at the cost of diminishing the others. In one context, the promotion of one value would take priority; in another context, the priority may be reversed. Consider several examples. In the context of national defense, the priority can be given to the protection of liberty even at the loss of life. In the (Canadian) rejection of capital punishment, the priority is given to the protection of life, even if this comes at some loss of security. In the context of deciding what to do to preserve or restore our health, the priority is given to freedom–the common law requirement for consent to treatment. In the context of assisted suicide, the priority is given to protecting life, even when that entails a serious restraint on our freedom. In the context of providing physical pain-relief, the priority is given to the freedom to choose comfort over a possible extension of life–medications needed to relieve pain cannot be withheld because they may also depress vital functions and thereby hasten death.

The issue before the court is whether these various examples, which reflect reversal of priorities in differing contexts, are random or arbitrary? If there are no coherent principles to account for why life is given a priority in one context but not another or why freedom prevails in one context but not another, then this particular set of positions can hardly be regarded as an embodiment of fundamental justice nor, for that matter, a "reasonable" limit.

1) THE INTRINSIC VALUE OF HUMAN LIFE

Sopinka's first line of argument is the priority given to life in the contexts of assisting suicide and, more recently, abolishing capital punishment:

> [this priority reflects] the generally held and deeply rooted belief in our society that human life is sacred or inviolable (which terms I use in the non-religious sense described by Dworkin [*Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (1993)] to mean that human life is seen to have a deep intrinsic value of its own). As members of a society based upon respect for the intrinsic value of human life and on the inherent dignity of every human being, can we incorporate within the Constitution which embodies our most fundamental values a right to terminate one's own life in any circumstances? [Paragraph 10]

Although not spelled out in the judgment itself, Dworkin's secular understanding of the sanctity of life is based on the analogy of "investment." Two kinds of "investment" are made in a person: first, an investment by "nature," anthropomorphically speaking, which is the same for every person. Nature has labored long and hard, through evolutionary processes, going back to the big bang if you will, to produce a life-form possessing self-consciousness. For all we know, this may be relatively uncommon or even unique in the universe. In any event, it is the "crowning achievement" of nature. This "investment" by nature gives every human life a "deep intrinsic value." Dworkin's secular understanding of this first type of investment is not antithetical to a religious worldview, but it simply does not require one. Within a religious worldview, one would simply see this first type of investment as an investment by a personal God, which (like the investment by our anthropomorphized "nature") is the same for every person.

The second type of investment is the "personal" investment made by others and the persons themselves in their own development. This investment is variable with the age and the extent of the involvement of others in the development of the person in question. The investment in an eight-year-old child is far greater than the investment in an eight-week-old fetus. Dworkin suggests that the fundamental difference between the pro-life and the pro-choice forces is best understood in terms of the relative importance given to the two types of investment.

Although Sopinka's judgment does not address any of this explicitly, it seems reasonable to infer that he gives relatively greater importance to the investment by nature (or Nature's God). His successors on the court may not. Indeed, they may follow Dworkin himself, who concludes against an exceptionless ban on assisting suicide.

Dworkin's analysis of the "sacredness" or inviolability of life as a function of the investment made in it, and the desire not to waste prospective returns on that investment, may prove a greater liability than an asset in resisting the legalization of assisted suicide. This ironic prospect is demonstrated in an extended, carefully-reasoned analysis of Dworkin's idea by Richard Stith.[ii] Stith focuses on Dworkin's

observation that respect for the inviolability of life (not wasting the investment made) may create not just a permission, but a duty to kill human beings. When, due to age, disability, or other affliction, it appears to the individual or to others that virtually all of the significant returns to be realized on the investments made in that individual have already been realized, not wasting the investment made in the care-givers burdened with the needed support may require that the individual be killed. At the very least, it would mitigate against resisting any such return-already-realized person's inclination to commit suicide, or resisting those who would provide the assistance necessary to do so.

Stith proposes a respect-based notion of intrinsic value as an alternative to Dworkin's investment-based notion. A respect-based understanding of intrinsic value does not lose sight of the individual in the same way as Dworkin's theory, which focuses on what is put into the individual rather than what the end result of this process is. Unlike Dworkin's theory, Stith's accounts for why individual are not substitutable. Unless a more adequate theory of intrinsic value, perhaps along the lines suggested by Stith, is advanced to the court, this argument is going to be of little effect in resisting assisted suicide.

2) INTRINSIC WRONGFULNESS OF "ACTIVE" KILLING

The second major line of argument presented by Sopinka is that the prohibition on assisting suicide is an application (or a further specification) of the meaning of the "sanctity of life," namely, the "intrinsic moral and legal wrongfulness of active participation in the death of another" [paragraph 43].

The first thing that must be said about this argument is that it is badly stated. The problem is with the use of the qualifier "active." Sopinka obviously uses this term because it is used by Lord Goff in the House of Lords judgment (*Airedale N.H.S. Trust v. Bland*, [1993]) and in paragraph 43, Sopinka is referring to Goff's views. In allowing the withdrawal of treatment, Lord Goff draws explicitly on the distinction between "active" and "passive" euthanasia.

Why is it problematic to refer to the prohibited killing as that which involved the "active participation" of a person? The problem is that it

misidentifies the relevant consideration as the "activeness" of the behavior. What has been prohibited in a centuries-old moral-legal principle is not "active" killing, but rather the "direct" or "intentional" killing of the "innocent." What it means *directly* to cause a harm, including death, acquired a precise technical meaning within the tradition that used this terminology. "Direct" killing may be and often is "active" killing, but it is not its activeness that makes it "direct." As we shall see, it is possible to kill "directly" by omission, or indirectly by action. It is the "direct killing of the innocent" that has been judged to be "intrinsically morally and legally wrong," not "active participation in the death of another." The problem here is not some persnickety concern about historical accuracy. The problem is that in this *misstated* form the principle is indefensible, as the dissenting judgment by Madam Justice McLachlin is quick to point out. After citing Sopinka's formulation, McLachlin replies in paragraph 90:

> The answer to this is that Parliament has not exhibited a consistent intention to criminalize acts which cause the death of another. Individuals are not subject to criminal penalty when their omissions cause the death of another. Those who are under a legal duty to provide the "necessaries of life" are not subject to criminal penalty where a breach of this duty causes death, if a lawful excuse is made out, for instance, the consent of the party who dies, or incapacity to provide: see Criminal Code, s.215. Again, killing in self-defense is not culpable. Thus there is no absolute rule that causing or assisting in the death of another is criminally wrong. Criminal culpability depends on the circumstances in which the death is brought about or assisted. The law has long recognized that if there is a valid justification for bringing about someone's death, the person who does so will not be held criminally responsible.

If this reply constitutes a valid rebuttal of the argument regarding the "intrinsic wrongfulness" of assisting suicide, then it seriously weakens the majority's overall position. A careful, line-by-line analysis is necessary to determine its validity. McLachlin's reply does point out the error of Sopinka's misstatement of the principle regarding what has been judged to be "intrinsically morally and legally wrong." It can be shown, however, that McLachlin's reply is not a valid rebuttal of the principle when it is accurately stated. Accurately stated, the principle identifies

two morally significant variables in determining the justifiability of the killing: (1) the "innocence" or "guilt" of the person killed and (2) the "directness" of the killing. "Innocence" here is taken as referring either to moral culpability or to material aggression. Capital punishment was justifiable because the person executed was judged to be morally culpable for the crime and thus appropriately punished by an action intended to kill him. Capital punishment, while "direct," is not a violation of the prohibition on the "direct killing of the *innocent."* The argument was applied to the morally culpable aggressor killed in self-defense or defense of another in hopes of preventing the killing of the apparent victim. Active participation in the killing of the innocent could also be justified, but only where that killing was not "direct."

THE DIFFERENCE BETWEEN "ACTIVE" KILLING AND "DIRECT" KILLING

In the context of moral discourse, "direct" has a technical meaning not synonymous with "active." "Directness" refers to the object or end pursued by the employment of the deadly means, and this is the purpose for which the means are used. A killing is therefore "direct" if the means employed have as their immediate objective the death of the person killed. When death is the objective, the means are chosen precisely because of their capacity to cause death. In capital punishment, for example, an injection or electric charge foreseen to be capable of rendering the prisoner paralyzed or comatose or catatonic (but not dead) would not be chosen, except by mistake. If such a mistake were made, the injection or voltage would be increased until it was capable of producing death. The action is not "completed" until death has occurred. Thus the form of the old death sentence: "You shall be hung by your neck *until dead*." Certainly in most actions where death is the objective, the only means able to produce this result will require some *overt action* for the simple reason that we are rarely in a vulnerable situation where the *omission* of an action by another has the capacity to cause our death. If such a situation did arise, however, a person who chose not to act *in order to* bring about a person's death would have *directly* killed that person by omission. By altering the facts of an actual case we can see an example of this. Several people out on a yacht drowned when they all

decided one hot summer night in the middle of a lake to jump overboard for a swim. After the last person had jumped in the water, they realized that no one had remembered to throw the rope ladder over the side of the boat so that they could climb back on board. Suppose that we alter the facts slightly so that one person remained on board, realized the situation, but chose to ignore their pleas to throw the ladder over the side although he could easily have done so. The only intended end which could make sense of the choice not to act would be the death by drowning of the people in the water. If in fact this is the intention, we can expect that he will persist in this omission until all have drowned. This person would be no less guilty of murder than if he had caused their deaths by an overt action, say, pulling the ladder that had been thrown overboard back onto the boat while the others were still in the water. Where the objective of employing the means (be it an overt action or an omission) is death, the act is one of direct killing.

The kinds of killing that Justice McLachlin cites to challenge this argument are either the direct killing of the *guilty*, or the *indirect* killing of the innocent. As we have seen, the decisive element in determining the prohibited killing is the intention. McLachlin's critique also entails an indefensible notion of "causality" in which people are said to have caused effects by not doing something they did not have either the ability to do or the right to do.

What would be the application of the properly stated principle to the issue at hand, *viz.*, assisting another to commit suicide. The would-be suicide is neither morally culpable, deserving of punishment, nor an immediate physical threat to anyone, and is therefore "innocent." As innocent, the only killing which could possibly be justified would be *indirect*. However, an act intended to assist in the suicide would be intended to bring about the death of the person (and would not be completed until the person was dead), that is to say, it would be *direct* killing. Thus the principle as Justice Sopinka *should* have cited it *does* support the prohibition on assisting in suicide. It would be prohibited, not because the killing involves "active participation" but rather because it would constitute the direct (intended) killing of the innocent.

Terminology such as "active euthanasia" and "passive euthanasia," like

the hand of a magician, misdirects our attention away from where it should be focused, which in this case is the intention. It is as if one were to refer to throwing a non-swimmer into a river so that he would die as "active drowning" and not jumping into the river to rescue the non-swimmer as "passive drowning." At first this may seem like plausible terminology, until we realize that the intention for not jumping in may not have been "so that they would die." If I did not jump in because I am a very weak swimmer and would be very likely to die myself before even reaching the non-swimmer, it is a serious misrepresentation to call my "not jumping in" a case of "passive drowning" of the non-swimmer. On the other hand, if we change the location of our example from a swift flowing river to a wading pool where the non-swimmer is a toddler, throwing the child in and not stepping in to lift the child out may indeed be characterized as "active" and "passive" forms of drowning. The equivalence is based on the fact that, at the side of the wading pool, only an *intention* to have the child drown would make sense of a decision either to throw the child in or not to lift the child out. The concept of directness is also important in relation to the court's next argument regarding morally analogous practices to which we now turn.

3) NON-EQUIVALENCE OF ASSISTING SUICIDE AND EITHER REFUSING TREATMENT OR ADMINISTERING PAIN-KILLING DRUGS

The third major argument (used by Sopinka in response to the charge of reversing priorities on the basis of arbitrary and meaningless distinctions) is that there is a real difference between what is permitted, namely, refusing potentially life-extending treatment and using potentially death-inducing pain-killers, and what is not permitted, namely, assisting in suicide. The charge that there is no rational basis for permitting the former while prohibiting the latter is made both by McLachlin [paragraph 90] and Justice Cory [paragraph 234], who is the fourth justice in dissent.

In regards to accepting a mentally-competent patient's refusal of life-extending treatment, Sopinka notes that the doctor is given no choice by the common law rule that makes treatment that has not been consented to into an offense of "battery." While this argument shows why refusing treatment should be permitted, it does not show why assisted suicide

should not also be permitted. To do this Sopinka needs to apply the argument from "intention" that he does make regarding the other alleged analog, namely, the use of pain-killers. With regard to the use of pain-killing drugs, Sopinka points out that the intention is not to accelerate the time of death, although this may be foreseen. Because relieving the pain is the objective, no more pain-killer may be used than is warranted by that purpose. Even when the point is reached that the dosage required to alleviate the pain is foreseen to be lethal, this does not make the death the objective of the action. Sopinka notes that "intention" is often a defining element in the criminal law. Not all foreseeable effects of an action are the intended objective of that action. The intended objective in assisting suicide is, by definition, to bring about the death of such people. One is not simply trying to bring them to a state where they are comfortable–one is acting to cause their death.

The same line of argument could and should have been applied to the issue of refusing treatment. It is assumed by McLachlin and Cory that the objective of refusing treatment is to bring about or to hasten death. If this is the objective, then I agree that there is no morally significant distinction between refusing treatment and assisting suicide. The point is, however, that there are other objectives which can quite reasonably be sought by the refusal of treatment. When the prospective benefits of a treatment do not outweigh the prospective costs, it could be considered unreasonable not to refuse. As both cost and benefits may go beyond the medical realm, the patient is the one given the right to make this assessment. Treatment which it would be quite reasonable to refuse on these grounds is what was traditionally meant by the category of "extraordinary means." The law permits second parties to assist in doing what could reasonably be done for purposes *other than* hastening death. Once this is recognized, it can be seen that it is not arbitrary to permit refusing treatment or the use of drugs required for pain-relief while prohibiting assistance in suicide, which can only be done for the purpose of hastening death. As was the case with "direct" rather than "active" killing, focusing on the differences in the intention (rather than the offense of "battery") would provide a more coherent line of argument.

4) A REASONABLE LIMIT, IF DISCRIMINATION ON THE BASIS OF PHYSICAL HANDICAP

The final line of argument addressed is the one articulated by Chief Justice Lamer. His line of argument can be summarized as follows. In 1972 the decriminalization of attempted suicide created a new right, an extension of the freedom of self-determination. This was a benefit to Canadians in that it legally permitted them a choice as to the time and manner of their death (assuming that their death does not occur unexpectedly). The retention of the prohibition on assisting suicide was done in order to protect that freedom by insuring that free choice of the vulnerable was not compromised by manipulation or coercion. Protecting the real free choice of the vulnerable is certainly an important objective. What was overlooked at the time was that this mechanism for protecting the vulnerable, namely, prohibiting assistance, would effectively deprive some physically disabled of the benefit of the choice, the new right, intended for all Canadians by the decriminalization of attempted suicide. Canadians so disabled as to be incapable of committing suicide without assistance are thus denied equal benefit of the law due to their physical disability. (This will eventually include virtually everyone who does not die a sudden death.) This is contrary to Section 15 of the *Charter*. Lamer concludes that a ban without an exception for the physically disabled is "unreasonable" because it is "overkill" or, as they say, "over-broad." The important objective of protecting the physically disabled could be adequately realized by a set of safeguards which would assure by multiple independent witnesses that the person was mentally competent and persisted in their choice to commit suicide.

The major premise of this argument is Lamer's interpretation of what Parliament had intended to do by decriminalization of attempted suicide. He reads this as a struggle, in the context of suicide, over whether the priority traditionally given to the preservation of life over the promotion of the personal freedom of self-determination. In this struggle, as he sees it, freedom prevails and the traditional priority of life over freedom in this context is reversed. After a passing acknowledgment that the threat of criminal sanctions was likely to provide minimal deterrence to someone contemplating suicide, he states:

> I also take the repeal of the offence of attempted suicide to indicate Parliament's unwillingness to enforce the protection of a group containing many vulnerable people (*i.e.*, those contemplating suicide) over and against the freely determined will of an individual set on terminating his or her life. Self-determination was now considered the paramount factor in the state regulation of suicide. [Paragraph 182]

The problem, as Lamer sees it, is that due to an oversight, some of the physically disabled will not be able to enjoy the benefit of this new victory of freedom. What we can see here is the importance of what is done in a particular justice's retrospective (or even revisionist) reading of legislative intent. The all-important (s.1) question of "reason-ableness" of the provision of a law (or other laws left in place) is decided in reference to what is seen as the objective of the legislation.

Sopinka's response, in paragraph 69, to Lamer is two-fold. The first goes to the heart of argument. The intent of Parliament was remove the mechanism of criminal law from the state's endeavors to prevent suicide because it was not only, as Lamer notes, ineffective; it was also likely to be counter-productive. Adding the burdens of facing criminal prosecutions to the problems of a despondent person who has unsuccessfully attempted suicide is not likely to make the person's prospects look any brighter. The intention of Parliament was not to create an extension of self-determination, but rather to prevent suicide more effectively. This is precisely why it did not decriminalize assisting suicide when it decriminalized attempting suicide. The fact that physical disability prevents someone from doing something the state is trying to prevent anyway (through its medical and social, rather than criminal institutions) does not frustrate the intent of Parliament.

Secondly, even if the intent of Parliament was to create a new freedom, Sopinka is not convinced that Lamer's or any other proposed set of safeguards would provide adequate protection for the vulnerable. He also notes that an exception based on physical disability could not be logically denied to the non-terminally ill physically disabled.

CONCLUSION

By way of conclusion rather than summary, let me say that unless the arguments presented in this case are improved, perhaps along the lines I have indicated, I am not at all confident that this ruling will not at some future point be reversed. It is true that, in addition to these sometimes flawed arguments, the court now has the inertia of a settled case to overcome if it is to reverse itself in a future decision. We live, however, in a culture of liberalism and axiological agnosticism where asserting that anything is a value (other than freedom) is likely to be met with the response that "If you choose to see it as a value, then it is, for you." Is it really a value? Is it something I ought to value? Like true agnostics, our culture increasing responds: "We can't say!" The justices in dissent in this case express the growing consensus that the value which we can insist on people accepting and respecting is the value of freedom. Where the only acknowledged limitation on freedom of choice is the freedom of others, the prospects for limiting freedom to protect an unchosen life are not heartening. If a future reversal of *Rodriguez* is to be prevented, the arguments must be advanced in their most compelling form. Even that may not be enough, but nothing less is likely to succeed.

NOTES

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i. The Supreme Court has started making its judgments widely available electronically *via* the Internet (http://www.droit.umontreal.ca./cgi-bin/CSC_list?vol3+1993+EN). This is done through the Faculty of Law at the University of Montreal. To facilitate referencing of downloaded documents, paragraph numbering is now used. I will indicate these numbers with each citation.

ii. Richard Stith, "On Death and Dworkin: A Critique of His Theory of Inviolability," *Maryland Law Review* 56/ 2 (1997) 289-383.