Letter to the Editor
Why the Slippery Slope Isn't Slippery: A Reply to Walter M. Weber on the Right to Die

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Walter M. Weber's remarks present a brief but revealing exposition of the right-to-life argument against legal recognition of the "right to die." I say "revealing" because while these remarks present the conservative view perhaps as clearly as it has been set forth so far, they exhibit particularly vividly its major flaw. While I do think that the right-to-life argument against recognition of the right to die is to be taken seriously, and that we can learn much from the concerns it attempts to express, the lengths to which it is carried here are dangerously alarmist.

First, however, a bit of attention to the background conceptual structure of this argument is necessary. Weber is quite correct in claiming that the "right to die" is an ambiguous term. It has two principal meanings: Sometimes it is used to refer to a (passive) right to refuse medical treatment in otherwise fatal conditions, while at other times it is used, variously, to refer to what Weber calls a "right to choose death" or a "true right to die," presumably including an (active) right to kill oneself, to undergo voluntary active euthanasia, or to receive physician assistance in suicide. The right to die in the former, limited sense is already protected by law; it is the latter practices also included under "the right to die" to which Weber is opposed.

Given this ambiguity, we must consider whether there is a difference between the passive and active senses of the "right to die" sufficient to warrant such a striking distinction in the law. Employing the traditional Catholic principle of double effect, Weber claims that the passive right to refuse treatment "involves a decision *how* to live one's life," while the active right to die "involves a decision *not* to live one's life."

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But this is the sort of semantic quibble that has given the casuistic applications of this principle such a bad name. The choice to refuse treatment in an otherwise fatal condition is not simply a choice about "how to live one's life," where death is a "foreseen but unintended outcome"; it is a choice to take certain steps that one knows and expects will result in one's own death. To refuse treatment in an otherwise fatal condition is to choose to die, even though one would not choose to die in the absence of the condition, and no amount of semantic obfuscation can conceal this fact. It is not like electing to drive on a freeway during rush hour, in Weber's simile, and thus, as he claims, different from electing to drive off a cliff. Refusing treatment in a medical condition that will otherwise be fatal is like driving on the freeway when one's brakes and steering mechanism are completely nonfunctional: The outcome, just as in driving off the cliff, is inevitable death. The point of the distinction Weber is trying to make is to "excuse" from any moral taint of "choosing to die" those who, in fatal conditions, refuse further treatment; however, they *do* choose to die, in conditions they regard as worse than continuing to live, and must be credited with responsibility for this choice.

Weber is also correct in claiming that at present, the law clearly recognizes only a passive right to die—that is, a right to refuse treatment. The status of suicide, among the components of an active right to die, is less clear; contrary to popular belief, suicide is *not* against the law, though it is also not against the law to prevent a suicide and it is against the law to assist in or abet one. The law does not recognize a right to die in the sense of a right to seek or receive active voluntary euthanasia (though it does recognize the right to passive voluntary euthanasia in the form of refusing life-prolonging medical treatment), nor does it permit physician-assisted suicide or aid in dying. Weber is furthermore correct in claiming that for the law to recognize these latter, active rights, as indeed it should, would involve a major transformation. But it is crucial to see that his account of what this transformation would involve is seriously misguided. If Weber's predictions of the legal changes that recognition of a true right to die would necessitate were correct, they would provide very strong reasons for not recognizing such a right; however, these predictions, as we shall see, are themselves quite erroneous.

This brings us to the central element of Weber's argument. It is a version of the "slippery-slope" argument characteristically employed by the right-to-life opposition in the euthanasia dispute; here, it appears in a legally cloaked version.[1] This slippery-slope argument warns that if an active right to die were recognized, this would force many changes in the law; these legal changes would in turn license additional, morally

indefensible deaths and would permit a wide range of killing. Hence, the argument concludes, recognition of a true right to die would lead to a legally permitted moral holocaust, and so cannot be allowed.

Weber provides details of how this legal slippery slope would work. If an active right to die, understood as a right to suicide or as a right to aid in dying, were recognized as a constitutional right,[2] he thinks, it would apply not only to terminally ill adults, as originally intended, because fundamental constitutional rights in general cannot be denied without strict scrutiny under the equal-protection clause, it would also apply to mature minors and to incompetent individuals, including infants, those with mental illness, retarded people, and confused or senile elderly individuals. The "young woman tragically disappointed in love, the middle-aged man who has lost his family and whose career has been destroyed, the depressed teen, and the . . . severely disabled [person]," he quotes another source as saying, would "share equally in the right to kill themselves." Once unleashed, he claims, the right to die would have to be extended to everyone, and there would be no way to protect persons from bringing death upon themselves. Any person would be quaranteed the right to choose between life and death as "two merely elective courses." Furthermore, Weber continues, this would impose new obligations upon professional counselors, including physicians, therapists, and perhaps attorneys, to provide their clients with information sufficient to make an informed choice between the options of life and death. It would expose police officers and firefighters to legal liability for preventing or rescuing suicides. It would make it impossible for mental health officials to commit mentally ill persons at risk of suicide to institutions to protect them. Finally, it would play havoc with the homicide laws: Consent of the victim would become a defense in homicide prosecutions, and this defense would be available even in cases where minors or incompetent persons were "assumed" on the basis of substituted judgment to have desired death. Suicide and homicide would become rampant, and there would be no legal line to draw to get the killing to stop.

While any attempt to foresee the legal and social consequences of coming to recognize an important new right is surely to be applauded, Weber's predictions are wholly without foundation in any realistic appraisal of the law. Central to his claim is the assumption that an active right to die (i.e., a right to suicide) could not be limited to dying, terminal patients. Weber correctly asserts that under the equal-protection clause of the Fourteenth Amendment to the U.S. Constitution, strict scrutiny must be applied to any legislative attempt to restrict fundamental constitutional rights, and will be struck down unless narrowly tailored to further a compelling government interest. But he also thinks

that there is no reason why any distinction between persons who are terminally ill and those who are not could survive such scrutiny, and hence that if the right to die is a right of terminally ill persons, it must be a right of all. In effect, the state would be obliged to allow or support anyone's suicide.

But there is a simple, direct answer available to this unfounded claim—an answer initially articulated in *Quinlan* and reiterated and developed in many later cases, including *Conroy* and the trio of cases decided by the New Jersey Supreme Court on June 24, 1987 (*Farrell, Peter*, and *Jobes*). *Quinlan* asserted that there is a compelling state interest in the preservation of life—and, thus, an interest that survives the strict scrutiny test required for the abridgment of fundamental constitutional rights—but that this interest wanes "as the prognosis dims." One's right to die is overridden by the state's compelling interest in the preservation of life (or, as in the later cases, the preservation of cognitive life), but the state's interest recedes as the medical likelihood of recovery becomes increasingly small, and one's right to die emerges from this eclipse. This is *not* to say that the state has no obligation to protect the terminally ill, nor that it may kill them. Rather, it is to say that these persons' right to choose an earlier, easier death if they wish outweighs the state's interest in preserving life or cognitive life where there is no longer any realistic hope of recovery. This is not just a right some people have; it is a right we all have, but one that comes into play only when we come to the end of our lives.

Thus Weber is right in seeing that such a criterion would not restrict the right to die to terminally ill adults only, though its spread would be much more limited than he thinks. For instance, the prognosis may be very dim for newborns with very severe deficits; in cases where the infants cannot survive, they would under this criterion have a right to active, humane assistance in death, rather than simply being "allowed to die." Similarly, the catastrophically disabled person for whom the prognosis for medical recovery is equally dim—Elizabeth Bouvia is the most celebrated example—also has (as Judge Compton argued in his concurring opinion) an active right to die, and to be supported by whatever assistance is necessary if he or she chooses to exercise this right. But the prognosis is by no means dim for the "young woman tragically disappointed in love," for whom the possibility of other, better experience is very real; for "the middle-aged man who has lost his family and whose career has been destroyed," for whom the social prognosis may be dim but for whom the medical prognosis is not; or for the "depressed teen." It is true that for some teens or mature minors the medical prognosis *is* dim: Teenagers sometimes suffer terminal illnesses too, and when they do the state's compelling interest in the

preservation of life would no longer override their right to die. But this is only very rarely the case, and the state's interest would uniformly override any right to die of ordinary lovesick teens.

Thus, it is clear what Weber's mistake consists in. This mistake is the central flaw of the right-to-life movement's use of the slippery-slope argument, and it is what leads to such outlandish claims. It is in conceiving of the right to die as an *absolute* right, overrideable in no way. Were this the case, it would indeed spread as he fears. But this is not the case. Like other fundamental constitutional rights, on the contrary, it would be overridden in the face of a compelling state interest—in this case, a compelling state interest in the preservation of life or cognitive life. The principal difference between this right and other fundamental constitutional rights is that this one is routinely overridden until the end of life, where the prognosis dims (though this may occur in adulthood or childhood), whereas others (e.g., free association, freedom of worship, freedom of speech) are typically not overridden throughout the course of adulthood. But this difference does not entail that an active, positive right to die cannot be considered a fundamental moral right, or, indeed, a constitutional one. Furthermore, there is no sound reason to suppose that recognition of a true right to die would have either the legal or the eventual social consequences Weber so fearsomely predicts, and thus there is no reason to suppress recognition of this right. The wild predictions he makes are not just alarmist, in that they have no basis in the law; they are dangerous, too, in that they would serve to support the suppression of an important, fundamental human right.

Notes

[1] A longer exposition of the same argument can be found in Marzen, O'Dowd, Crone, and Balch, *Suicide: A Constitutional Right?* 24 Duq. Law Rev. 1, 1–243 (1985).

[2] Weber does not make clear whether he has in mind a constitutional right or a fundamental constitutional right. Indeed, it remains an open question whether an active right to die could be shown to be a constitutional right at all, since although a passive right to die can clearly be derived from the penumbral constitutional right of privacy, an active right to die is more plausibly derived from the common-law right of individual self-determination. In any case, an active right to die is, in my view, a fundamental moral right that should be clearly recognized and protected by the law. I interpret Weber's assumption concerning an active constitutional right to die as the assumption that it would be a fundamental constitutional right, since this gives as much strength as possible to the argument he is pursuing.