CASE COMMENTS
CHRONIQUES DE JURISPRUDENCE

Preface

"Death Talk" in Canada: The *Rodriguez* Case

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Synopsis

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Introduction

In both a literal and metaphorical sense euthanasia is an end-of-a-millennium issue. Some of the most complex and serious decisions we will face as individuals, families, communities and a society will be determined by how we approach, structure, analyze and resolve the euthanasia debate. This

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debate can be regarded as the tip of an iceberg, an image that brings to mind both the fact that the vast majority of the matters affected by the debate are submerged and hidden,[1] and the possibility that legalization of euthanasia could prove to be an icy (slippery) slope. Legalizing euthanasia can also be seen as a stone thrown in a pond, where the stone represents euthanasia and the pond represents society. It is not sufficient to examine only the stone itself; there is also much work that needs to be done in identifying the resulting ripples and their impact.[2]

In order to do this we must establish a "questioning framework" built on a transdisciplinary, transcultural and transsectoral base that can accommodate input from members of the community and persons with relevant expertise; formal and experiential learning; thinking and feeling; secular and religious beliefs; and qualitative and quantitative perspectives, to name just some of the diverse contributions that are needed. We must also recognize that this is a debate that goes to the very heart of what it means to be human, and to the basis and nature of human community and society.

In entering into this momentous debate, we need to strive for honesty and integrity in ourselves and to accept that our "opponents" are also operating from such a basis. In short, our disagreements must be focused on the issue of euthanasia and other issues raised by this, not on a lack of respect for those with whom we do not agree. It is within such a broad and deep context that the judgment of the Supreme Court of Canada in *Rodriguez* v. *Canada (A.G.)*[3] must be considered. It is also within such a context that political action concerning euthanasia must be viewed.

Acceptance of the approach outlined above means recognizing that, while it is true that the death of each of us is an intensely personal and individual event, we are not dealing with just the death of any given individual — for instance, Sue Rodriguez — in the euthanasia debate. In deciding whether euthanasia (physician-assisted suicide[4]) is or should be legal, as Sue Rodriguez was arguing, we are reflecting, and reflecting on, matters basic to the "world view" that influences the life of each of us and gives it meaning. Seeing euthanasia in such a context raises many questions:

- Do we believe that we are nothing more than highly complex thinking, feeling, living machines, or do we believe that human life transcends the purely mechanistic realm, and that there is a mystery beyond ourselves that we can-

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[1]See the list of questions, below, for examples of what these issues are.

[2]Together, these two images can also be regarded as representing the two types of analysis we must undertake regarding issues raised in the euthanasia debate. Vertical analysis (the iceberg) requires that we examine not only the factual reality or conscious level of an issue, but also its unconscious — its broad and deep origins — and its super ego — the values and symbolism it carries or affects. Horizontal analysis (the pond) involves examining the connections of an issue, at any of the three vertical levels described, to other issues at the same level.

[3][1993] 3 S.C.R. 519, (*sub nom. Rodriguez* v. *British Columbia (A.G.)*) 107 D.L.R. (4th) 342 [hereinafter *Rodriguez* cited to S.C.R.].

[4]The terms euthanasia and physician-assisted suicide are used interchangeably in this text. For a detailed discussion of the importance and difficulty of defining euthanasia, see M.A. Somerville. "The Song of Death: The Lyrics of Euthanasia" (1993) 9 J. Contemp. Health L. & Pol'y 1.

not even start to contemplate — "the mystery of the unknown" (and perhaps unknowable) — that we should respect, if not revere?

- Why are we engaged in the euthanasia debate now, when the basic conditions giving rise to the circumstances that elicit calls for euthanasia — pain, suffering and terminal illness — have always been part of the human condition and we have always been able to kill each other?
- What impact would legalizing euthanasia have on persons who are sick, old or unable to "control the use of their bodies"[5] — including the impact on their perceptions of themselves and our perceptions of them?
- Are there reasons, other than the obvious ones of expertise, why we "medicalize" euthanasia?
- Why do we call many instances of euthanasia physician-assisted suicide and neither euthanasia nor homicide?[6]
- What is the rhetoric used in the euthanasia debate, and are we being manipulated by it?
- Who should have the burden of proof to show that legalizing euthanasia will not be seriously harmful to society?[7]
- Can we justifiably distinguish withholding or withdrawal of treatment that results in death, from euthanasia?

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[5]*Supra* note 3 at 565, Lamer C.J.

[6]Clearly, the Chief Justice in his judgment in the *Rodriguez* case anticipates that physician-assisted suicide could involve assistance beyond actions that would normally be characterized as suicide, in that the act causing death would not be the act of the person himself or herself, but the act of another person (*ibid.* at 578). It is very difficult to distinguish such an act from one that would constitute homicide, in particular, culpable homicide in the form of murder or manslaughter. This raises the question of whether, in the *Rodriguez* case, what we are really discussing is justification for what would otherwise be culpable homicide, namely: that the motive is compassion; that the person is competent and consenting and desires euthanasia; and that the circumstances are judged to be such that killing the person is justified. It is important to make the distinction between homicide and suicide, because it allows us to see how legalizing physician-assisted suicide or physician-inflicted homicide would fit in with and affect both the broader context of our criminal law and some important principles on which our society is based. If what we are doing is justifying homicide, we need to be clear about that, and not to confuse it with another situation, namely suicide. Whether homicide can be justified and whether suicide is justified are both questions that can be regarded as open to argument. The important point is that the answer to each of these questions will not be identical, and therefore, we need to be clear that we know which one we are discussing.

[7]See the remarks of Chief Justice Lamer (*ibid.* at 567), who implied that the burden could be on those opposing physician-assisted suicide. In addressing the argument that legalizing this could place vulnerable persons at risk of being subject to "subtle and overt pressures" (*ibid.* at 566), he concluded that these are "speculative grounds ... The truth is that we simply do not and cannot know the range of implications that allowing some form of assisted-suicide will have for persons with physical disabilities" (*ibid.*). Consequently, the Chief Justice's position of allowing physician-assisted suicide means that he must have regarded the burden of proof as being on those who oppose legalization of euthanasia to show that it would harm society, in particular, vulnerable members of society. This approach can be compared with one based on a position that those arguing for a change in the "status quo" of prohibition of euthanasia have the burden of proving that this change is justified. This means that they must show that the benefits of such a change would clearly outweigh its risks and harms. See *supra* note 4 at 63-67.

- Is the moral divide in determining what is acceptable with respect to infliction of death between, on the one hand, voluntary choices of competent persons and surrogate decision-making for euthanasia, or, on the other hand, between killing (euthanasia) and allowing to die (withholding or withdrawal of treatment)? Should the legal divide be the same as the moral divide?
- In legalizing euthanasia, would we be in danger of "deforming" fundamental concepts important to the operation of the criminal law in general, such as: the concept of intention; the non-relevance, in general, of motive to culpability; the doctrine of causation; the distinction between homicide and suicide; or the role of consent of the victim (or, more accurately, the absence of such a role) in criminal liability for homicide?
- Should the euthanasia debate be conducted primarily through the courts and the lens of the *Canadian Charter of Rights and Freedoms*,[8] as in the *Rodriguez* case?
- Is "rights talk" the most appropriate framework within which to contextualize the euthanasia debate?
- How should a post-modern democracy deal with issues such as euthanasia when they come to be addressed in Parliament; that is, on what basis should members of Parliament determine how to vote — for instance, by consulting their electorate, or on the basis of their own conscience?
- What balance should be struck in the euthanasia debate between individual rights and societal claims when these conflict?
- Is euthanasia liberalism in the form of intense individualism gone wild, or is it a rational response of caring individuals and á caring community?
- How can we represent the interests of society in a public debate carried out largely through the media, when seeing the courage and tragedy of persons like Sue Rodriguez rightly elicits our deepest compassion and empathy and there can be no comparable image of society?
- Is the euthanasia debate a reflection of the fact that we are a death-denying but also death-obsessed society that has lost its main forum — namely, organized religion — for "death talk"?
- Could the euthanasia debate be a reflection of a society that is suicidal and homicidal and very fearful as a result? Is legalizing euthanasia an expression that allows us to feel that we have both individual and societal death under control — tamed and civilized?
- Is euthanasia yet another expression of late twentieth century nihilism, in the sense that we define ourselves as a society by what we are not — for example, post-modern, post-patriarchal, even post-antibiotic — not by what we are? In particular, does euthanasia reflect that we are a post-sacred society — one that has lost all sense of the sacred (which is different from and not necessarily connected with either the presence or loss of organized religion)?

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[8]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

- Is the manner in which we die primarily a socially or culturally structured event, like marriage? Just as we have institutionalized divorce, should we likewise institutionalize euthanasia so that we can divorce life?
- Is euthanasia a response to an almost total loss of death rituals in secular, post-modern western societies? Does it function as such a ritual or as a substitute for these?
- How will we affect our global community in terms of precedent setting if we legalize euthanasia,[9] especially as Canada is often regarded, and sometimes promotes itself, as a model for other societies in terms of showing respect for persons, human rights and human ethics and seeks to be emulated in this regard?[10] Would legitimating euthanasia open the door to serious and frequent abuse of the right to life of persons in some societies, especially those with a history of such abuse, which could seek to legitimate their conduct on the basis of following a Canadian example?
- How do we want our children and grandchildren to die?[11]
- What type of society do we want to pass on to future generations? What effect would legalizing euthanasia have on the values and symbolism of the Canadian society of the future — its memes, that is, the units of cultural information that we pass on from generation to generation, which can be regarded as the inherited cultural norms of our society?

These are some of the questions we are dealing with when we engage in the euthanasia debate. Notice that often they are incommensurable, for euthanasia is as much a matter of health and illness as it is religion, of law as it is literature, of ethics as it is aesthetics.[12] Assuming that there is a "privilege of the preface writer", along the lines of the "privilege of the chair", I would like to comment briefly, with reference to the *Rodriguez* case, on three matters that relate to some of the questions outlined above.

I. Emotion, Cognition and the Euthanasia Debate

In the euthanasia debate, what should be the respective roles of cognitively based and of emotionally based judgment?

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[9]I am indebted to my colleague, Professor Katherine Young, for raising this question. See also Dr. Gifford-Jones, "We Need Society to Prevent Cruelty to Dying Patients" *The [Montreal] Gazette* (10 July 1994) C5, who was "asked to appear before a committee of Canadian senators to give [his] opinion on euthanasia." Speaking in strong support of euthanasia, he asks, rhetorically, "How could I convince them that there is a point in history when no army can withstand the strength of an idea whose time has come? How they had a unique opportunity to make history. *And how other countries might listen to their decision*" [emphasis added].

[10]M.A. Somerville, "The Right to Health: A Human Rights Perspective" in J. Mann & C. Dupuy, eds., *SIDA, santé, droits de l'homme / AIDS, Health and Human Rights* (Veyrier-du-Lac (Annecy), France: Fondation Marcel Mérieux, Institut des Sciences du Vivant, 1993) 75.

[11]See the first chapter of the novel by P.D. James, *The Children of Men* (New York: A.A. Knopf, 1993) for a description of death by euthanasia in the year 2025.

[12]I am indebted to my colleague, Professor Roderick Macdonald, for articulating this insight.

One has a peculiar sensation — possibly of cognitive dissonance[13] — in reading the Supreme Court of Canada's judgment in *Rodriguez*. The reason is that this intensely personal and emotional, and yet, in the context of euthanasia, societally enormously important issue of when and how each of us dies, is of necessity handled entirely through the lens of classic legal analysis, in particular, *Charter* analysis. The limitations imposed by a predominantly legal approach to euthanasia can result in both benefits and risks or harms.

A benefit of using legal analysis is that it can allow us to identify those parts of our arguments that are ostensibly based on cognition, reason and rationality, and those parts that are emotionally based. To deal with the issue of euthanasia, we need to have and to explore both types of reactions and to be aware of when we are using one and when the other. This might seem to imply that cognitive and emotional processes can be clearly divided. They cannot, but it is true that the emphasis can be more on one than the other in addressing an issue. Moreover, the starting point of analysis of an issue, on a continuum from "pure" reason to "pure" emotion, can alter the end point of that analysis and, therefore, a decision regarding that issue. Despite this continuity between cognitive and emotional processes, in practice we often purport to separate them. One weakness of doing this appears if we act on the basis of this separation in fashioning our response to an issue with respect to which these processes have been used. Another weakness occurs when we examine only the dominantly emotional or dominantly cognitive aspect of each side of an issue (especially if we do not examine the same aspect with respect to each side). There are important cognitive and emotional aspects on both sides of the euthanasia debate, all of which need to be taken into account.[14]

This is not to ignore that there are dangers in taking into account our emotional and intuitive responses (including, on occasion, those based on moral intuition) to euthanasia. It is, rather, to recognize that there are at least equal dangers in not doing so. This means that while these responses must be allowed to play a role in the euthanasia debate, safeguards are needed. For instance, the intense compassion and empathy that Sue Rodriguez elicited through her public statements and appearances, particularly on television,[15] need to be balanced by cognitively based argument, in particular, with respect to the impact that legalizing euthanasia would have on society itself — on what can be called "the ethical and legal tone" of society. The old saying that hard cases make bad law sums up the danger of reliance on emotional responses to an issue, including emotional responses to euthanasia, to the exclusion of cognitive ones.

Most often in law, we tend to be concerned, usually with good cause, about the cognitive overwhelming the emotional. Judges rarely, if ever, talk in their

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[13]Cognitive dissonance is the phenomenon experienced when one receives two sets of conflicting information, both of which appear to be true and correct.

[14]*Supra* note 4 at 74-75.

[15]Sue Rodriguez's impact in this regard has not ceased with her death. Documentary programs about her and the litigation which culminated in the Supreme Court case are being made and shown on television; for example, the Canadian Broadcasting Corporation screened a one-hour documentary on its program, "Witness", on Tuesday, 2 August 1994.

judgments about exercising moral intuition, and yet we expect them to do so and more or less assume that it is present. Could it be, however, that a highly rational, cognitive approach to an issue such as euthanasia might indicate the absence of an exercise of moral intuition? As is probably true of justice,[16] we might only notice the absence of the exercise of moral intuition, not its presence. We need to keep in mind that we ignore our feelings, particularly when these involve moral intuition and are related to an issue such as euthanasia, at our peril.

In this respect, it is interesting to note that a recent study has shown that although a group of physicians surveyed *knew* that there was no ethical or legal difference between justified withholding and withdrawal of life-support treatment, they *felt* that there was a major difference and had much greater difficulty with withdrawing treatment as compared with withholding it.[17] It has been suggested that these feelings may be providing a valid warning. In general, withholding of treatment cases are much more ethically clear-cut than withdrawal ones. It may be a safeguard, of both the persons affected by our actions and ourselves, that we find more difficulty in acting in the latter case than the former.[18] Arguably, our long-standing approach of prohibition of euthanasia, but acceptance of refusals of treatment, indicates that probably most people feel that there is a difference between giving a person a lethal injection and accepting that person's decision to refuse life-support treatment. It is a strong feature of all of the dissenting judgments in the *Rodriguez* case (and one essential to each dissenting judge's recognition of Sue Rodriguez's right to have assistance in ending her life) that there are no morally significant reasons to distinguish between acceptance of a person's refusal of life-support treatment and euthanasia, and that there should be no difference in the way in which the law deals with each of these situations. We need to ask whether this is an example of a cognitive approach displacing necessary emotional responses to which we should pay heed.

With respect, perhaps the most surprising statement in the *Rodriguez* case, that of the Chief Justice to the effect that there is a "right to *choose* suicide,"[19] might reflect yet another variation of the relationship between cognitive and emotional responses in dealing with legal issues. In this instance, a cognitive approach may be masking a primarily emotional response. One assumes that "a right to *choose* suicide" means there is a right to commit suicide, as there is little point in having a right to choose a course of action which one has no right to undertake.[20] The wider implications of recognizing such a right cannot be dis-

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[16]See M.A. Somerville, "Justice across the Generations" (1989) 29 Social Science & Med. 385.

[17]M. Solomon, "Health Care Professionals and Treatment at the End of Life" (Address to the American Society of Law, Medicine and Ethics Annual Meeting, Cambridge, Mass., 30-31 October 1992) [unpublished].

[18]*Ibid.*

[19]*Supra* note 3 at 552, 562.

[20]One can speculate that the Chief Justice might have characterized the right in question in this way in order to place emphasis on the mental element of the person who desires to commit suicide and on his or her act of choosing, and to de-emphasize the importance of the act of the person who assists in the suicide. In short, this approach could be seen as making the choosing of suicide the

cussed here.[21] Rather, it is important to understand why the Chief Justice recognized this right, for which there does not appear to be any precedent — not that the Supreme Court needs this. The Chief Justice addressed the issue of access to euthanasia through the lens of discrimination, under section15 of the *Charter*. He held that the law, in prohibiting Sue Rodriguez from being given assistance to commit suicide, was unlawfully discriminating against her, as a handicapped person unable to commit suicide without such assistance, with regard to her right to choose suicide. This particular use of the discrimination provisions in the *Charter*, with respect, seems unusual, and it could be asked whether it reflects a reality in which the Chief Justice was acting on feelings of compassion and mercy towards Sue Rodriguez and was using sophisticated, technical legal argumentation and reasoning to fashion a holding that would allow these to be implemented in practice. In short, there is a sense of use of the coguitive tools of the *Charter* to articulate and act on a deeply felt emotional response.

If we consider that in our post-modern, secular Canadian society, the courts, especially the Supreme Court of Canada, and Parliament have become our highest cathedrals, it is not surprising that non-coguitive factors could be strongly influencing the approach taken by the judges to the issue of euthanasia.

II. Balancing Individual and Societal Interests

In the euthanasia debate, what weight should be given to societal interests, in particular, in upholding the concept of sanctity of life, when these are in conflict with individual interests?

Probably the most important difference between the majority and the judges in dissent in the *Rodriguez* case is the weight each gives to the interests of society in deciding whether or not euthanasia should be regarded as legal. The judges in dissent clearly did not consider that any interest of society outweighs the interests of terminally ill, competent persons with respect to autonomy, self-determination, dignity, control and choice in relation to determining for themselves the manner, time and place of their death. In contrast, the majority held that the interests of society (or possibly the interests of vulnerable persons in society who might be persuaded to commit suicide and societal interests in protecting them[22]) outweigh these interests of the individual.

The majority stated that, in deciding on the constitutionality of the prohibition on assisted suicide in subsection 241(*b*) of the *Criminal Code*,[23] while the

> 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 section 7.

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overwhelmingly dominant relevant fact, and not its commission, which, in turn, could lead to a position that assistance with the latter is not in itself of major importance. It also has the effect of *emphasizing* that the situation is one of suicide and *deemphasizing* that it could be one that involves homicide.

[21]For instance, would it mean that there is a duty *not* to treat a person admitted to an emergency room who has attempted suicide and refuses treatment?

[22]*Supra* note 3 at 595, Sopinka J.

[23]R.S.C. 1985, c. C-46.

> None of these values prevail a priori over the others. All must be taken into account ...[24]

The majority recognized that "security of the person is intrinsically concerned with the well-being of the living person."[25] It referred to human life as being "sacred or inviolable (which terms ... [are used] in the non-religious sense ...);"[26] that is, human life has "a deep, intrinsic value of its own."[27] And it articulates one of the questions of fundamental importance as being "the degree to which our conception of the sanctity of life includes notions of quality of life as well."[28] This is an interesting statement, because, almost invariably, the concepts of sanctity of life and quality of life are seen as being in opposition to each other. Certainly, the former is not usually regarded as including the latter; rather, sanctity of life is used as a counter-argument to propositions that a given person's quality of life is so low as to be not worth preserving, especially if this requires the use of scarce or expensive health care resources.

It merits considering whether a concept of sanctity of life differs from one of respect for life and, if so, in which ways. As noted above, and on other occasions in its judgment, the majority expressly or impliedly referred to the value of sanctity of life.[29] In comparison, Justice McLachlin in dissent, with Justice L'Heureux-Dubé concurring, referred to "the state interest in protecting life,"[30] and Justice Cory, likewise in dissent, to the "basic position ... that human life is fundamentally important to our democratic society."[31] Whether the judge was indicating that respect for human life depends on democracy, or vice versa, or both, is not clear. In any case, we need to ask whether the content of all or any of these or similar terms used by the various justices of the Supreme Court in the *Rodriguez* case is the same, and if not, whether these terms might represent a continuum from greater to lesser degrees of protection of life. For instance, while a concept of respect for life could have identical content to one of sanctity of life, it may not and is of much less certain content than the latter. It also merits considering where the cut-off point on the continuum would be with respect to decisions based on the law's fundamental presumption in favour of life, that is, how broad the range of decisions that are regarded as legally acceptable would be on the continuum described,[32] and how flexible this point is or should be.

The majority in the *Rodriguez* case linked protection of vulnerable persons with protection of life:

> Section 241(*b*) has as its purpose the protection of the vulnerable who might be induced in moments of weakness to commit suicide. This purpose is grounded in the state interest in protecting life and reflects the policy of the state that human

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[24]*Supra* note 3 at 584.
[25]*Ibid.* at 585.
[26]*Ibid.*
[27]*Ibid.*
[28]*Ibid.*
[29]*Ibid.* at 584, 598.
[30]*Ibid.* at 620.
[31]*Ibid.* at 629.
[32]See *supra* note 4 at 63-64.

> life should not be depreciated by allowing life to be taken. This policy finds expression not only in the provisions of our *Criminal Code* which prohibit murder and other violent acts against others *notwithstanding the consent of the victim*, but also in the policy against capital punishment and, until its repeal, attempted suicide. This is not only a policy of the state, however, but is part of our fundamental conception of the sanctity of human life.[33]

This raises another contrast between the majority decision and those of the dissenting judges. The majority recognized that a person's consent to being killed neither alters the legality of the act, nor ought it do so, even when the killing is in the context of euthanasia. The judges in dissent, in holding that physician-assisted suicide should be allowed, placed heavy emphasis on the consent of competent persons who wish to have assistance in order to die, as the necessary safeguard to prevent any abuse of such assistance.

The majority also spoke of the sanctity of human life in relation to its preservation. It recognized, however, that the principle of sanctity of life can "be subject to certain limitations and qualifications reflective of personal autonomy and dignity."[34] In this regard, it recognized that life-sustaining medical treatment may be refused by competent persons or where there is "compelling evidence that withdrawal of treatment was in fact what the patient would have requested had she been competent."[35] This, in turn, is to recognize that it can be consistent to espouse a principle of sanctity of life and yet not seek to prolong life or to avoid death in certain circumstances. If the occurrence of death detracts from upholding a principle of sanctity of life, then the principle is meaningless because all of us die and, therefore, life could never be regarded as being sacred. Rather, it is *how* death occurs, not *if* it occurs, that has an impact on the sanctity of life principle. Sanctity of life does not mean preservation or prolongation of life at all costs; rather, it governs what we must not do to interfere with life, and do to protect it, because to do or not do, respectively, would detract from respect for its sanctity.

This raises an important and difficult question: Is acceptance of persons' refusals of life-support treatment or provision of pain relief treatment that could shorten life but is necessary to relieve pain, an exception to the sanctity of life principle, and if so, is it a serious threat to maintaining the principle? It can be argued that these interventions do not constitute such an exception, because they do not involve a primary purpose of shortening life and therefore are outside the scope of operation of the principle of sanctity of life. If, however, this is incorrect, then it is proposed that these interventions are justified exceptions, and moreover, that while by definition they derogate from the principle, they do not threaten or harm it.[36] Just because this is true of some exceptions, however, does

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[33]*Supra* note 3 at 595 [emphasis added].

[34]*Ibid.* at 595-96.

[35]*Ibid.* at 598.

[36]A statement of the majority referring to the House of Lords case, *Airedale N.H.S. Trust* v. *Bland*, [1993] 1 All E.R. 821, [1993] 2 W.L.R. 316, is interesting in this respect as arguably it adopts both positions: "[T]he principle of sanctity of life, which was *not absolute*, was therefore found *not to be violated* by the withdrawal of treatment" (*Rodriguez*, *ibid.* at 598 [emphasis added]).

not mean that it is true of all; indeed, if all or even just some particular kinds of exceptions could be justified, no principle would remain. In my view, euthanasia would be this kind of exception; to regard it as justified would, in fact, have the effect of eliminating the principle of sanctity of life.

All threats to important societal values are not of the same nature and, depending on their nature, the destructiveness of their impact can vary. Overt threats to maintaining important societal values like sanctity of life are much more destructive of them than are latent threats. Euthanasia presents an overt threat to such values. In contrast, the threat, if any, posed to the same values by respect for refusals of treatment or provision of necessary pain relief treatment that could shorten life, is latent. In other words, even if it were true that these interventions and euthanasia all constitute threats to the sanctity of life principle, euthanasia is a vastly more serious threat.

One consequence of the acceptance in our Canadian society of regarding some withdrawals or withholding of life-sustaining treatment as valid, or of providing pain relief treatment even if this could shorten life if it is necessary to relieve pain, is that it has been increasingly argued by persons who are pro-choice with respect to euthanasia, that this establishes a precedent for a "right to die" that persons should be allowed to exercise through euthanasia.[37] The argument is that to respect competent persons' refusals of life-support treatment that result in death is to recognize that the principle of sanctity of life is not absolute and, therefore, the question, "What exceptions to the principle of sanctity of life should be allowed; in particular, where should the line be drawn with respect to euthanasia?", is not one of principle, but only one of degree.

If this argument were correct, then the basis on which any such exception is recognized would be important in terms of the types of intervention that ought to or would, as a consequence, be authorized. If, on the one hand, refusals of treatment are respected on the basis of respecting persons' rights to autonomy, then, unless one limits the scope of exercise of this right (for instance, through a doctrine of "abuse of rights", or through legislation, as is presently the case with the prohibition on assisted suicide in the *Criminal Code*[38]), it is arguable that euthanasia is simply another exercise of personal autonomy and ought to be allowed, like refusals of life-sustaining treatment, as just one more autonomy-based exception to the principle of sanctity of life. If, on the other hand, the basis for respecting refusals of treatment is respect for a person's right to inviolability — the right not be touched without one's consent — which is a more limited version or sub-category of the right to autonomy,[39] this would set no precedent that could be used to validate euthanasia.

It is true that a value judgment is involved in arguing that persons' refusals of treatment should be respected and pain relief treatment, even that which could shorten life, should be provided if necessary to relieve pain, but that

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[37]See *supra* note 4 at 10-12.

[38]*Supra* note 23, s. 241(*b*).

[39]M.A. Somerville, *Consent to Medical Care* (Study Paper prepared for the Law Reform Commission of Canada) (Hull, Que.: Supply & Services Canada, 1980).

euthanasia should be prohibited. But it is not an arbitrary judgment. There is a difference, even if one does not regard it as a morally significant difference, between not prolonging a person's life and giving the person a lethal injection. The nature of the act of giving a lethal injection is and feels different from the act(s) involved in not prolonging a person's life; and having a primary intention to kill is different from a situation in which such an intention is not present, even though in the latter case it is recognized that death could or will ensue as a consequence of the intervention or non-intervention.

One question raised by consideration of a concept of sanctity of life in the context of euthanasia is whether this is a concept that is fundamental to the paradigm that governs a secular society, as compared with a "religious" one. We need to be very careful that concepts that have traditionally been associated with religion, as arguably is true of "sanctity of life", are not thrown out simply on the basis of this connection. While it can be true that we saw such concepts as fundamental values in society on the basis that they were religious norms or requirements, they can also be essential in establishing the foundations of a secular society. In other words, when we did not need to look beyond religion for authority for such concepts, we could use religion. This does not necessarily mean that the same concepts cannot be used and are not needed if religion is unavailable as a means of authenticating them. There are good reasons, other than religious ones, for a society to uphold a value of sanctity of life. In the same vein, we need to be careful that concepts such as sanctity of life that may have become associated with certain ideological or political stances which we do not personally support, are not rejected by us simply on the basis of such connections.

The majority impliedly referred to the concept of sanctity of life in articulating the grounds on which both the House of Lords[40] and the Law Reform Commission of Canada,[41] to paraphrase the majority's holding, have not been prepared to recognize the legality of providing active assistance to a person in carrying out the desire to end his or her life:

> [F]irst, the active participation by one individual in the death of another is intrinsically morally and legally wrong, and secondly, there is no certainty that abuses can be prevented by anything less than a complete prohibition. Creating an exception for the terminally ill might therefore frustrate the purpose of the legislation of protecting the vulnerable because adequate guidelines to control abuse are difficult or impossible to develop.[42]

This passage raises two issues: first, whether or not the majority of the Court is adopting the principle that euthanasia is intrinsically morally and legally wrong, or simply saying that the House of Lords and the Law Reform Commission of Canada have adopted this principle; and second, a related issue, whether exceptions allowing euthanasia for terminally ill persons would be acceptable if they could be safeguarded.

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[40]*Supra* note 36.

[41]*Euthanasia, Aiding Suicide and Cessation of Treatment* (Report No. 20) (Hull, Que.: Supply & Services Canada, 1983).

[42]*Supra* note 3 at 601.

On reading the judgment of the majority as a whole, one is left with the strong impression that while it relied on both of the bases described, either one or the other would have been sufficient for its holding that physician-assisted suicide should not be legalized, at least pursuant to a *Charter* challenge.[43] It is noteworthy, however, that Justice McLachlin in dissent, who spent considerable time in her judgment dealing with the judgment of the majority, mentioned only the danger of abuse as the reason on which the majority based its holding. Moreover, she would further limit the basis of the majority's holding by limiting the type of abuse that she considered the majority was concerned with if physician-assisted suicide were to be legalized. She stated that the majority saw the limitation on persons' rights to security of the person, constituted by the prohibition on assisted suicide, as being "necessary to prevent deaths which *may not truly be consented to.*"[44] This interpretation of the majority's judgment would mean that if consent to physician-assisted suicide could be safeguarded, it would be allowed by the majority (or more precisely, it would hold that it would be unconstitutional to interfere with a person's obtaining such assistance). With respect, the majority's fears of abuse appear to be much more broadly based than this and clearly include not just the impact on individuals of allowing euthanasia, but also that on society itself:

> Overall, then, it appears that a blanket prohibition on assisted suicide similar to that in s. 241 is the norm among Western democracies, and such a prohibition has never been adjudged to be unconstitutional or contrary to fundamental human rights. ... [S]ocietal concern with preserving life and protecting the vulnerable rendered the blanket prohibition preferable to a law which might not adequately prevent abuse.[45]

Finally, one of the major differences between the majority and dissents in relation to balancing conflicting societal and individual interests appears to be in the choice of basic presumption from which each starts the analysis. The majority speaks of "balancing ... the interest of the state and the individual"[46] and, although it is not explicit, appears to analyze from a basic presumption of sanctity of life:

> Sanctity of life, as we will see, has been understood historically as excluding freedom of choice in the self-infliction of death and certainly in the involvement of others in carrying out that choice. At the very least, no new consensus has emerged in society opposing the right of the state to regulate the involvement of others in exercising power over individuals ending their lives.[47]

In contrast, the justices in dissent appear to commence from a basic presumption of an individual's right to autonomy.[48] This difference can be captured by comparing the statements in each of the judgments concerning which principles are not absolute. Somewhat paradoxically, such statements, in identifying a principle as not being absolute, impliedly indicate that it is fundamental. The major-

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[43]See, in particular, *ibid.* at 605-606.
[44]*Ibid.* at 617 [emphasis added].
[45]*Ibid.* at 605.
[46]*Ibid.* at 593.
[47]*Ibid.* at 585.
[48]See *e.g. ibid.* at 554, 560-61, Lamer C.J.

ity recognized that the principle of sanctity of life is "not absolute"[49] and the dissenting judges, for instance the Chief Justice, that the scope of an individual's right to autonomy and self-determination "is never absolute."[50] Basic presumptions are not neutral; they determine the outcome in cases of equal doubt as to whether or not a burden of proof has been fulfilled, because in such circumstances they govern.[51] In the context of the present discussion, this means that if the basic presumption is a principle of sanctity of life, this will govern unless it is displaced by proof, at least on the balance of probabilities, that it should not apply. The same reasoning is true with respect to a basic presumption favouring the principle of an individual's right to autonomy, in particular to choose death by euthanasia. The outcome in a given situation in which the former presumption is regarded as fundamental will be the polar opposite to that resulting if the latter presumption is regarded as fundamental, although, to state the obvious, each analysis deals with the same degree of doubt about the same matters. While I do not suggest that the majority and dissents reached their decisions principally as a result of such a procedural effect, we always need to be aware in using the law that form is never a mere formality.

III. Concepts and Language

In the euthanasia debate, how does our choice of concepts, in particular the language in which we choose to express these, influence the debate?

First, it merits noting that the case we are discussing has been largely referred to as the "*Sue Rodriguez* case" and not the "*Rodriguez* case" as would be the more common legal shorthand. The use of the plaintiff's first name undoubtedly reflects many factors which are at play, including our emotional reaction to Sue Rodriguez personally, our personal identification with her and her plight (we all inevitably face death), and the nature of the issue being litigated, namely, our rights to claim relief from suffering, or at least not to be inhibited in seeking this in whatever ways we as individuals find acceptable.

Words which appear with unusual frequency in the judgments of both the majority and the dissents — even for a case that raises important issues concerning the breadth of individual freedom protected by the right to security of the person under section 7 of the *Charter* — are autonomy, self-determination, dignity, choice and control. There is much that needs to be explored with regard to the Supreme Court's use, in the *Rodriguez* case, of these concepts. We need to consider matters ranging from the impact of our choice of language in formulating such concepts[52] (language is not neutral, especially when used in relation to matters such as euthanasia and by our highest court); to the scope of possible definitions of each of these concepts;[53] to what they reflect about our attitudes,

[49]*Ibid.* at 598.

[50]*Ibid.* at 560. See also *ibid.* at 554.

[51]*Supra* note 4 at 63-67.

[52]*Ibid.* at 44-56.

[53]See, for example, with regard to possible definitions of autonomy and self-determination, M.A. Somerville, "Labels versus Contents: Variance between Philosophy, Psychiatry and Law in Con-

values and beliefs as individuals and a society; and to the impact exclusive emphasis on them will have on important societal symbolism, including that which supports or detracts from seeing ourselves as a community and the responsibilities and privileges this entails.

Likewise, we need to recognize the two-edged sword that concepts such as euthanasia can provide, that is, depending on the content which is attributed to them (which in part depends on the language in which they are formulated) and the way in which they are used, their impact and effects can be radically different in given circumstances. Quoting Professor Lawrence Tribe, the majority recognized this in stating that "legalizing euthanasia rather than respecting people, may endanger personhood."[54] In the same vein, the majority noted that "[t]he principles of fundamental justice leave a great deal of scope for personal judgment, and the Court must be careful that they do not become principles which are of fundamental justice in the eye of the beholder *only*."[55] The latter part of this statement resonates with one possible meaning of the concept of dignity. This is that dignity is an extrinsic characteristic, that is, other persons are dignified according to whether or not we attribute dignity to them. In other words, dignity exists only in the eye of the beholder. In contrast, if dignity is an intrinsic characteristic, persons are dignified whether or not others regard them as such.[56] In view of the emphasis placed on dignity in all of the judgments of the Supreme Court in the *Rodriguez* case, it will be very important to explore this concept, in particular, to determine whether an intrinsic or extrinsic definition of dignity is being or should be used in relation to euthanasia. One problem with an extrinsic definition is that it opens up the possibility that persons would need to have additional characteristics other than simply being persons in order to be respected on the basis of having dignity. It is much safer to require only the presence of a universally shared intrinsic characteristic in order to be owed respect on the basis of having dignity, namely, that we respect persons because they are persons, or, even more protectively, simply because they are human. We need to recognize, to cite the majority in the *Rodriguez* case, "the *intrinsic* value of human life and ... the *inherent* dignity of every human being ..."[57]

Conclusion

We are in a period of intense activity with respect to moulding a new societal paradigm — the story which informs us as a society and necessarily has impact on us as individuals. Euthanasia itself is already an important part of our story — its prohibition makes it so. Should we re-write the story? Should we legalize euthanasia? Should we change arguably the most fundamental principle on which our society is based — that we do not kill each other — to one that

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cepts Governing Decision-Making" (1994) 39 McGill L.J. 179; and with respect to dignity, choice and control, "The Song of Death: The Lyrics of Euthanasia", *ibid.*

[54]*Supra* note 3 at 589, quoting L. Tribe, *American Constitutional Law*, 2d ed. (Mineola, N.Y.: Foundation Press, 1988) at 1371.

[55]*Ibid.*

[56]*Supra* note 4 at 27-29.

[57]*Supra* note 3 at 585 [emphasis added].

allows us to kill in certain circumstances for reasons of mercy and compassion? These are the questions faced and answered in various ways by the Supreme Court of Canada in the *Rodriguez* case. They are also the questions to which the commentaries on that case in this issue of the *McGill Law Journal* will contribute. These contributions will, it is hoped, elicit further contributions in what must be a lengthy and complex debate involving all levels of society and its institutions. This is essential because the search for a new paradigm is a crucial element in our search for meaning both as individuals and as members of society. We need, therefore, to ask yet another question: Would legalizing euthanasia help or hinder us in finding such meaning?