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Euthanizing the Profoundly Mentally Incapacitated: A Simple Economic Analysis

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EUTHANIZING THE PROFOUNDLY MENTALLY
INCAPACITATED:
A SIMPLE ECONOMIC ANALYSIS

*Bernard A. Eskandari**

I. Introduction

Throughout history, the killing of those that society deems unfit has gone in and out of fashion. Typically, the targets of such programs are the mentally disabled, the physically disabled, and the insane. Sexual orientation, religious or political beliefs, and propensity for criminality may become part of the criteria as well, depending on society's commitment and fervor for such a program. The apparent reason for killing the unfit is to create a superior population—a citizenry that is both mentally and physically superior—while reducing the incidence of those in society that constitute a drain—those who ostensibly take more from society than they contribute. Underlying this bestial policy is a seductive economic argument— if a society's goal is to maximize wealth, it must be sensible policy to remove those from society who do not contribute any wealth and in fact only consume it. Certainly the wealth of society is increased if the net detractors are “removed.”

This comment will begin by discussing a few societies that have implemented programs to do away with those deemed undesirable. Part III contends that it is unnecessary for the purposes of this paper to draw a bright-line rule between what is considered a low quality life and what is not, but will use the profoundly mentally incapacitated as an example of what policy-makers might deem a low quality life. Part IV discusses several widely

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published rationales for euthanizing the profoundly mentally incapacitated. Part V argues that even if it is seemingly economically advantageous to euthanize the profoundly mentally incapacitated, there are both economic reasons as well as non-economic reasons for why it is not a beneficial practice for society to implement (i.e. the “Against Law and Economics” aspect).

II. A Few Different Historical Approaches to Dealing with Low Quality Lives

In the last hundred years, Nazi Germany implemented the most robust euthanasia program aimed at maintaining purity. Amid the turmoil of World War II, Hitler’s T-4 “euthanasia” program was implemented to eliminate “life unworthy of life.” Germany’s mentally disabled were the first to be deliberately exterminated; “defective” children were removed from their families and taken to hospitals where they were exterminated. The program was soon expanded to include adults in order to prevent any “deficient” member of the German “master race” from breeding and passing on their inferiority.¹ What the Third Reich first did to the defenseless mentally disabled would soon include other defenseless people who were labeled “subhuman” or “useless eaters.”² One rationale for the T-4 program—or at least one rationale given by the government to the German public—was largely economic. Nazi propaganda posters made the

¹ Wikipedia Encyclopedia, T-4 Euthanasia Program, http://en.wikipedia.org/wiki/T-4_Euthanasia_Program (last visited Dec. 21, 2004).

² Ellen Myers, *The Mentally Retarded The Least of our Brethren*, <http://www.creationism.org/csshs/v07n1p26.htm> (citing Robert H. Jackson, *The Hadamar Trial* p. ii. (1949)) (last visited Dec. 23, 2004).

German population aware that a person suffering from a hereditary defect costs the public 60,000 Reichmarks during his lifetime.³ The implicit meaning behind these posters was, of course, that the German people were better off without the “hereditary defective.”⁴

Unfortunately, the United States is not without its own embarrassing history. While the United States has not resorted to euthanizing those deemed worthless, it has participated in mass sterilization. The mentally disabled have been subjected to unnecessary institutionalization and, as a result of the eugenics movement, involuntary sterilization. The idea behind this initiative rested on the notion that sterilizing large numbers of “defective” people would prevent the perpetuation of targeted defects and genetic diseases.⁵ Although the mentally ill and disabled were the most frequent victims of this program, unwed mothers and boys in reformatories and orphanages were also included, especially if they were judged to be of low intelligence.⁶ In total, an estimated 60,000 to 100,000

³ See app. A.

⁴ Between 1933 and 1939, unemployment in Germany dropped from six million (50% of the German population) to three hundred thousand. The Nazis and the German Economy, http://www.historylearningsite.co.uk/nazis_and_the_german_economy.htm (last visited Dec. 19, 2004). Of course, this statistic is largely Nazi propaganda because women were not included in the unemployment statistics. The unemployed were forced to take whatever work they were given or be classified as “work shy” and placed in a concentration camp. *Id.* Jews lost citizenship, and 1.4 million men were conscripted. *Id.*

⁵ See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (concluding that “[t]hree generations of imbeciles are enough”).

⁶ *Breeding Better Citizens: Forced Sterilization in the U.S. A Hidden Chapter of American History* (ABC News television broadcast, Mar. 22, 2000). Race was also a factor, as a large number of Southern blacks were sterilized. *Id.* These sterilizations became known as the

people were sterilized in the United States.⁷

Sterilization aside, the mentally disabled are still not treated particularly well in the United States. Nightmarish accounts of staff beatings and sexual abuse of residents in institutions are not uncommon.⁸ Shockingly, it is reported that at one Washington, D.C. area institution, the dentist was actually a veterinarian.⁹ While the United States has come a long way since the days of forced sterilizations, no one can seriously argue it has come nearly far enough.

The Netherlands is not only a western trendsetter in legalizing drugs and prostitution, but also in allowing doctors to kill people who want to die. Since 2001, a medical practitioner in the Netherlands may euthanize a terminally ill patient who unequivocally expresses a well-

“Mississippi appendectomies.” *Id.*

⁷ *Id.* State governors have recently started apologizing for past eugenics laws that led to forced sterilizations. For example, Oregon Governor John Kitzhaber apologized for the more than 2,500 forced sterilizations from 1917 to 1983, which included girls in reform school, people in mental institutions, and poor women selected by welfare workers. See *Governor Apologizes for Forced Sterilizations*, THE SEATTLE POST-INTELLIGENCER, Dec. 3, 2002, at B2. One year later, Governor Gray Davis apologized for the more than 19,000 involuntary sterilizations that took place in California mostly before World War II. See *Davis Apologizes for Sterilizations*, THE SAN DIEGO UNION-TRIBUNE, Mar. 13, 2003, at A4.

⁸ Louie Estrada, *Advocate for Mentally Retarded Found Inspiration in Misfortune*, THE WASH. POST, May 30, 2004, at C10.

⁹ *Id.* Some experts believe institutional abuse is so permanent and unshakable that they have proposed euthanasia for the more severely retarded persons. *A Time to Take Sides*, Center on Human Policy, School of Education, Syracuse University, 1979, http://soeweb.syr.edu/thechp/TAKE_SIDES.htm (last visited Dec. 8, 2004) (citing HEIFETZ & MANGEL, *THE RIGHT TO DIE: A NEUROSURGEON SPEAKS OF DEATH WITH CANDOR* (Putnam 1975)).

informed desire to die and who is in unbearable pain, provided that there are no measures available to make the patient's suffering bearable.¹⁰ As a result, doctors in the Netherlands perform around 3,000 "mercy killings" a year.¹¹ Outrage over allowing doctors to engage in such activity was immediate. Opponents unsurprisingly put forward slippery slope arguments—voluntary euthanasia today, involuntary euthanasia tomorrow. It looks as though the opponents might not have been too far off; a hospital in the Netherlands recently proposed guidelines for mercy killings of terminally ill newborns and has already performed such procedures.¹²

Performing mercy killings on babies thus raises the question of whether it is ever appropriate to euthanize a person who is incapable of deciding for themselves whether he or she wants to end his or her life. Those in the Netherlands who support baby euthanasia say that the guidelines would mirror the guidelines used for adult patients suffering with great pain and no hope for relief and would provide that euthanasia of a newborn should be acceptable when the child's medical team and independent doctors agree that her pain cannot be eased and when there is no hope for improvement.¹³ Proponents in the Netherlands point to several examples of afflictions that may trigger newborn euthanasia: extremely premature births, brain damage, spina bifida, and epidermosis bullosa (a rare blistering illness).¹⁴ Dutch officials estimate that

¹⁰ PETER SINGER, *RETHINKING LIFE AND DEATH*, 146 (St. Martin's Press 1995).

¹¹ *Id.* at 143.

¹² Toby Sterling, *Netherlands Hospital Euthanizes Babies*, A.P. NEWS, Nov. 30, 2004, at A1.

¹³ *Id.*

¹⁴ *Id.*

involuntary euthanasia would be applicable in only about ten cases a year.¹⁵

III. What is a Low Quality Life?

This comment will not discuss real-world criteria for determining a low quality life. Exact line drawing is not the focus of this comment; the goal is not to make a policy determination of who falls below the threshold. Rather, for the purposes of this comment, a low quality life will be one that ostensibly appears in its totality to cost society more than it provides. The Nazis, twentieth century American policy makers, and Dutch officials all dealt with or are dealing with this issue and each has come to a different conclusion.¹⁶ Differentiating between a low quality life and one that is not low quality does not advance this comment's purpose, although I do wonder whether any life is low quality. The relevant question is whether it would be economically advantageous for society to terminate low quality lives, assuming we could determine which lives are low quality and which are not. If some infallible machine could do the calculations, is this something we would want to do? Purely for the purpose of discussion, the reader should consider the following as examples of lives possibly qualifying as low quality: someone who is in a permanent vegetative state ("PVS"),

¹⁵ *Id.*

¹⁶ Ultrasounds are routinely performed during pregnancy and can detect birth defects such as cleft palate. A study in Israel revealed that after detection for cleft palate, 95.8% of affected fetuses were aborted. Gregory Wolbring, *The Silenced Targets, Inside Human Genetics and Genomics*, available at <http://www.mindfully.org/GE/GE4/Silenced-Targets-Wolbring> (last visited Dec. 11, 2004).

someone born with most of his brain missing,¹⁷ or someone who is profoundly mentally disabled.¹⁸ All three afflictions refer to someone who effectively has no brain function. For the purposes of this comment, I will use the generic, non-scientific term “profoundly mentally incapacitated” to refer to all three and those similarly afflicted.

IV. Rationale for Terminating Low Quality Lives

Before we begin, I want to consider the factors that are likely to influence society’s treatment of low quality lives. While people seem to be genetically programmed to feel protective toward children, we do not seem to feel as protective towards the mentally disabled. This is evidenced by the number of mentally disabled patients in state and private institutions. Such “putting away” behavior is analogous to the institutionalization of the elderly—as it

¹⁷ This condition is known as anencephaly. Babies born with this condition only have a brain stem and are only capable of reflex actions. See SINGER, *supra* note 10, at 39. People who are in a PVS or who suffer from anencephaly are not conscious and have no hope of regaining consciousness because the conscious portion of the brain is either dead or completely missing. *Id.* PVS is a condition where patients are considered to have permanently lost the function of their cerebral cortex. All voluntary reactions or behavioral responses reflecting consciousness, volition, or emotion at the cerebral cortical level are absent. Although a PVS patient does not experience any observable pain or suffering, she remains permanently unaware. See Christian J. Borthwick, *The Permanent Vegetative State: Ethical Crux, Medical Fiction?* 12 ISSUES L. & MED. 167, 168-69 (1996).

¹⁸ Those that are profoundly mentally retarded have an IQ in the range of 0-24 and a mental age of 2 years or less. Such people are incapable of guarding themselves against common physical dangers. See Wikipedia Encyclopedia, Mental Retardation, <http://en.wikipedia.org/wiki/Retarded> (last visited Dec. 13, 2004).

seems our love for them diminishes as they get older.¹⁹ It makes biological sense that our instinctive feeling of protection towards children would not apply to the elderly or the profoundly mentally incapacitated. For “[i]nclusive fitness is unlikely to be promoted by the devotion of huge resources to the survival of persons who, by reason of [mental incapacitation or old age], are not reproductively or otherwise productive, either actually or (like children) potentially.”²⁰

If society’s goal is to maximize wealth, then it becomes rather straightforward why euthanizing lives that provide negative value to society makes sense. If we were to remove each negative valued life in society, there would be a net gain in wealth. For example, imagine we have a society of three people and we are able to determine that person A contributes 20 units of wealth to society, person B contributes 10 units of wealth to society, and person C contributes -5 units of wealth to society (consumes 5 units of wealth from society). With person C in this society, the total wealth is 25 units; whereas without person C, the total wealth is 30 units. So if our goal is to maximize society’s wealth, we are better off without person C. This logic is analogous to the Nazi propaganda poster discussed above.²¹ This simple model, however, fails to take into account the countless variables discussed below.

This is not a novel understanding of human value. For example, in extremely poor societies where food is scarce, the cost of feeding an elderly person may mean the starvation of a child. In such a society, it is unremarkable that the elderly will be left to starve or even be murdered.²²

¹⁹ RICHARD A. POSNER, *AGING AND OLD AGE*, 203 (1995).

²⁰ *Id.*

²¹ *See app. A.*

²² POSNER, *supra* note 19, at 205. “Some 20 percent of primitive

Moreover, it is not uncommon for the elderly in these societies to acquiesce to society's death-to-the-elderly norm and even go to their death merrily.²³ When resources are extremely scarce, the death of one person often means the continued life of another. Therefore, under dire circumstances, calculating the value of each person's life is inevitable.

A. Abortion as a Substitute

Empirical data tending to support or refute the policy of euthanizing low quality lives is hard to come by. Steven Levitt and John Donohue investigate the next best thing in a paper entitled "The Impact of Legalized Abortion on Crime."²⁴ According to their research, since 1991 homicide rates have dropped 40% with violent crime and property crime each dropping more than 30%.²⁵ Why? Levitt and Donahue contend that the drop in crime is not the result of more jails and better police,²⁶ but assert that it

societies" killed their old people. *Id.* at 203 n.4.

²³ *Id.* at 203 (citing LUCY MAIR, *AFRICAN SOCIETIES*, 197 (Cambridge Univ. Press 1974)). It has become popular understanding that Eskimos set adrift their elderly on ice floes to die, though there is some debate as to how widespread this practice was. See Straight Dope, Science Advisory Board, *Did Eskimos put their elderly on ice floes to die?*, May 4, 2004,

<http://www.straightdope.com/mailbag/meskimoicefloe.html> (last visited Dec. 14, 2004) (clarifying that it was really the Yuits and Inuits who engaged in this practice during times of famine).

²⁴ John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*. (Nat'l Bureau of Econ. Research, Working Paper No. W8004, Nov. 2000), available at <http://ssrn.com/abstract=249508> (last visited Sept. 10, 2005).

²⁵ *Id.* at 1.

²⁶ *Id.* at 2.

was the Supreme Court's 1973 decision in *Roe v. Wade*²⁷ legalizing abortion.²⁸

Levitt and Donahue argue that abortion helps lower crime for two reasons. First, women who have abortions are those most at risk to give birth to children who might commit crime.²⁹ Studies show that while teenagers, unmarried women, and the economically disadvantaged are all more likely to have abortions, they are also more likely to have children who are at higher risk for committing crimes during adolescence.³⁰ Second, legalized abortion allows mothers "to delay childbearing if the current conditions are suboptimal."³¹ This means children will be born into better environments, thereby reducing future criminality.³² Drawing on this premise, Levitt and Donahue conclude that crime in 1997 was 15-25% lower than it would have been had abortion been illegal.³³

Although Levitt and Donahue's paper has been criticized,³⁴ they provide an interesting argument for terminating potentially low quality lives.³⁵ It is one of the few empirical studies that supports the contention that

²⁷ 410 U.S. 113 (1973).

²⁸ See Donohue & Levitt, *supra* note 24, at 2.

²⁹ *Id.* at 3.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 34.

³⁴ Randall K. O'Bannon & Laura Antkowiak, *Abortion Link to Crime Decreased Debunked*,

<http://www.nrlc.org/news/2001/NRL06/randylaura.html> (last visited Dec. 23, 2004) (discussing John Lott and John Whitley's reservations about the statistical analysis in Levitt and Donahue's paper).

³⁵ For the purposes of this paper, abortion is no different than euthanizing a person outside the womb. The concept in the end is the same—there are people who are potentially bad for society and society would be better off if they were no longer around.

society can be made better, in at least one respect, if we prevent certain “high risk” lives from coming into being. Most people would agree that lower crime is a good thing.

It is not clear, however, whether society would truly be better off without these high-propensity-for-crime babies even if one accepts the notion that crime rates will certainly be lowered. It is highly probable that many of those who fall into the high-propensity-for-crime baby category will not commit crimes, but will become contributing members of society. It is not inconceivable that an aborted child might have one day discovered the cure for AIDS or cancer. To this end, Levitt and Donohue’s paper does nothing to prove that terminating low quality lives will make society better. If accurate, it only demonstrates that terminating low quality lives could make society better.

B. Cost to Care for the Profoundly Mentally Incapacitated

The cost to institutionalize the mentally disabled is high. The state of California alone spends \$600 million annually.³⁶ The annual cost to care for a resident in one California state development center is just over \$160,000.³⁷ In Washington, D.C., the cost of providing services to the

³⁶ Ed Pope, *Bill Would Phase Out Centers for Retarded*, SAN JOSE MERCURY NEWS, July 23, 2001, available at <http://www.psych-health.com/dd30.htm>.

³⁷ Association of Regional Center Agencies, *History of the Developmental Disabilities Service Delivery System in California*, <http://64.233.167.104/search?q=cache:9FphKCLIRg0J:www.arcnet.org/pdfs/HistoryOfSystem.pdf+History+of+the+Developmental+Disabilities+Service+Delivery+System+in+California&hl=en> (last visited Dec. 20, 2004).

mentally retarded and developmentally disabled averages approximately \$120,000 per year per resident.³⁸ Of the approximately six million mentally retarded individuals in the United States,³⁹ roughly 10% are in institutions.⁴⁰ Even assuming the average cost for the institutional care of one mentally disabled person in the United States is only \$50,000 per year, the total cost of institutionalization is an astounding \$30 billion per year. As for patients in a permanent vegetative state (PVS), the number is slightly less daunting. A survey of care costs for PVS patients in a nursing facility suggested a range from \$126,000 to \$180,000 per year per patient.⁴¹ Based on this, a rough approximation of the total costs in the United States for the care of adults and children in a permanent vegetative state is around \$4 billion.⁴²

³⁸ D.C. Auditor, *Cost of Care for the District's Mentally Retarded and Developmentally Disabled Exceeded \$300 Million Over a Three-Year Period*, (Dec. 18, 2000) <http://www.dcwatch.com/auditor/audit030.htm> (last visited Dec. 14, 2004). And remember, this is the same area that has been known to employ veterinarians instead of dentists. *See supra*, note 9 and accompanying text. One can only imagine the cost if patients were receiving proper care.

³⁹ Disability Statistics, http://codi.buffalo.edu/graph_based/demographics/.statistics (last visited Dec. 14, 2004).

⁴⁰ *See* Dr. Joseph F. Smith Medical Library, *Mental Retardation*, <http://www.chclibrary.org/micromed/00056550.html> (last visited Dec. 23, 2004).

⁴¹ Borthwick, *supra* note 17, at 170-171.

⁴² *Id.* It is important to note, however, that this figure is misleading. Typically, a patient enters PVS after a long bout with some other illness like dementia. The real cost is the difference between taking care of a PVS patient versus taking care of a dementia patient.

C. Some Philosophers in Favor of Euthanizing the Profoundly Mentally Incapacitated

There may be moral issues which must be overcome before society would be willing to start euthanizing those who are considered "low quality." Thankfully, philosophers and commentators have helped ease these moral reservations.

Bruce Ackerman puts forward a conception of the liberal theory of society.⁴³ In this liberal society, a fetus is not a citizen because it cannot participate in public debate—going through a third party proxy does not count. Ackerman's point focuses on political conversation and participation in public discourse in which only some human entities can participate. He states, "A liberal community does not ask what a creature looks like before admitting it to citizenship. Instead, it asks whether the creature can play a part in the dialogic and behavioral transactions that constitute a liberal policy. The fetus fails the dialogic test—more plainly than do grown-up dolphins."⁴⁴ According to James Murray in his review of Ackerman's book, "Ackerman's theory depends on the ability to assert one's rights—a literal forensic aspect."⁴⁵ Murray also argues that the "rights of the talking ape are more secure than those of the human vegetable."⁴⁶ According to Ackerman, citizenship has nothing to do with biology; it

⁴³ See generally, BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (Yale Univ. Press 1980).

⁴⁴ *Id.* at 127.

⁴⁵ James R. Murray, Book Note, 58 NOTRE DAME L. REV. 942, 955 (1983) (reviewing BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (Yale Univ. Press 1980)).

⁴⁶ ACKERMAN, *supra* note 43, at 80.

only has to do with politics.⁴⁷ Ackerman further contends that those who cannot participate in the political process are perhaps without protective rights. Thus, it relieves us of the moral predicament of aborting fetuses and possibly ending the lives of those that are profoundly mentally incapacitated.⁴⁸

Today's preeminent philosopher dealing with the ethics of euthanasia is Peter Singer. Singer contends that the quality of a living being's consciousness is what gives its life value. The fact that a being is part of the species *Homo sapiens* is not relevant to the wrongness of killing it; "rather, characteristics like rationality, autonomy, and self consciousness [make] the difference."⁴⁹ According to Singer, because infants, regardless of whether they are disabled, and the profoundly mentally incapacitated lack these characteristics, killing them cannot be equated with killing normal human beings or any other conscious being for that matter.⁵⁰ Singer explains that the difference between killing a disabled infant and a normal infant does not lie in the fact that the normal infant has the potential to be a self-conscious living being, but rather in the attitudes of the parent. The "reason why it is normally a terrible thing to kill an infant is the effect the killing will have on its parents."⁵¹ The most plausible reason for attributing a right to life to a being applies only if there is "some awareness of oneself as a being existing over time, or as a

⁴⁷ *Id.*

⁴⁸ Confessedly, I do not fully understand Ackerman's SOCIAL JUSTICE IN THE LIBERAL STATE. Its brief discussion is included because, from what little I can gather, it seems relevant.

⁴⁹ PETER SINGER, PRACTICAL ETHICS 182 (Cambridge Univ. Press 1993).

⁵⁰ *Id.*

⁵¹ *Id.*

continuing mental self.”⁵² Because the profoundly mentally incapacitated are by definition incapable of such complex awareness, Singer sees no problem euthanizing such individuals so long as there are no “extrinsic” reasons for keeping them alive. This would include the emotional anguish euthanasia would have on a PVS patient’s loved ones. Although it may still be wrong to kill a conscious being that is not capable of rationality, autonomy, and self consciousness if that being is likely to experience more pleasure than pain,⁵³ a PVS patient would likely not fall into that category.⁵⁴

Joseph Fletcher, a Protestant theologian and a pioneer in the field of bioethics, has compiled a list of what he calls “indicators of humanhood.” The list includes: self awareness, a sense of the future, a sense of the past, the capacity to relate to others, concern for others, communication, and curiosity.⁵⁵ Like Singer, Fletcher argues that refusal “to approve of positively ending a subhuman life”⁵⁶ is absurd and that “mercy killing could be

⁵² *Id.* at 183. Singer wonders why it is morally wrong to kill, say, a PVS patient but it is acceptable to kill a sentient animal. He says, “If we compare a severely defective human infant with a nonhuman animal, a dog or a pig, for example, we will often find the nonhuman to have superior capacities, both actual and potential, for rationality, self-consciousness, communication, and anything else that can plausibly be considered morally significant.” SINGER, *supra* note 10, at 201. Such comparisons have made Peter Singer the target of much hatred. See, e.g., Sylvia Nasar, *Princeton’s New Philosopher Draws a Stir*, THE N.Y. TIMES, Apr. 10, 1999, at A1.

⁵³ SINGER, *supra* note 49, at 101.

⁵⁴ Singer asks if you would prefer an instant death or falling into a coma for ten years followed by death. He suggests there is no reason to pick the latter. See *id.* at 192.

⁵⁵ Joseph Fletcher, *Indicators of Humanhood: A Tentative Profile of Man*, HASTINGS CENTER REPORT 1-3 (1972).

⁵⁶ Joseph Fletcher, *Ethics and Euthanasia*, in TO LIVE AND LET DIE:

the right thing to do" in some circumstances where the person to be killed is a "human vegetable, whether spontaneously functioning or artificially supported."⁵⁷ Included in the circumstances which would justify mercy killing is the instance where one is considered "progressively degraded while constantly eating up private or public financial resources."⁵⁸ Fletcher has also argued that if the life of a severely retarded baby can be ended while still in the mother's womb through abortion, why can it not be terminated just after birth? According to Fletcher,

The only difference between the fetus and the infant is that the infant breathes with its lungs. Does this make any significant difference morally or from the point of view of values? Surely not True guilt arises only from an offense against a person, and [an individual with Down's Syndrome] is not a person.⁵⁹

By describing profoundly mentally incapacitated individuals as subhuman, both Singer and Fletcher are able to avoid moral impediments that stand in the way of applying a strict utilitarian standard as to whether the mentally incapacitated should live or die. Once the moral hang-ups are out of the way, there is nothing stopping a cost-benefit analysis of the lives of such afflicted individuals. Because of this, it is not surprising that, for Singer and Fletcher, the solution of euthanizing the

WHEN, WHY, AND HOW 116 (Robert H. Williams, ed., Springer-Verlag 1973) (internal quotations omitted).

⁵⁷ *Id.* at 119.

⁵⁸ *Id.*

⁵⁹ Joseph Fletcher, *The Right to Die: A Theologian Comments*, THE ATLANTIC MONTHLY, Apr. 1968, at 62, 63-64.

profoundly mentally incapacitated is an easy one, so long as no one will miss them too much.

D. The “Life” and Death of Nancy Cruzan and Terri Schiavo

In 1983, at the age of twenty-five, Nancy Cruzan lost control of her car on a country road, was ejected, and landed face down in a ditch filled with water. By the time help arrived, she had been without oxygen for several minutes. As a result, Nancy entered a persistent vegetative state. Her brainstem remained sufficiently intact to keep her body breathing without a respirator, but she could not swallow. Food and water were fed to her through a tube inserted into her nose running down to her stomach. Nancy remained like this for eight years.

Nancy’s parents, as her guardians, requested that the hospital remove the feeding tube, which would lead to Nancy’s eventual death. The hospital refused, and litigation began. The Missouri Supreme Court refused to allow the removal of the feeding tube because Nancy was not competent to refuse life-sustaining treatment herself.⁶⁰ The court could only give permission for the withdrawal of life-sustaining treatment if there was clear and convincing evidence that Nancy, while competent, would have wanted life-sustaining treatment to be withdrawn.⁶¹ So long as the state was paying the tab for Nancy’s care and the feeding tube imposed no substantial burden, the legal presumption remained “preserve life.”⁶² The Supreme Court of the

⁶⁰ *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988).

⁶¹ *Id.*

⁶² *See id.* at 419 (“The state’s concern with the sanctity of life rests on the principle that life is precious and worthy of preservation without regard to its quality. This latter concern is especially important when

United States granted certiorari and affirmed the Missouri Supreme Court holding that each state can make its own decision as to what should happen when an incompetent person has not previously expressed her desire to refuse treatment.⁶³ In reaching its decision, the Court accepted the right of the state of Missouri to demand clear and convincing evidence that it was what Nancy would have wanted.

Nancy died a few months after the Supreme Court decision was handed down when her feeding tube was finally removed. In the end, it was removed after former friends came out of the woodwork to say they remembered Nancy had indicated to them that she wished to die if she was ever in such a situation. This time the state of Missouri allowed the feeding tube to be removed.⁶⁴

What is the point? For seven of the eight years, it was clear the Nancy would never emerge from her vegetative state. The state of Missouri was paying \$130,000 a year to keep Nancy's body breathing. Moreover, her parents were under extreme strain, as they believed their daughter had died the day of the car crash.⁶⁵ During the media frenzy that surrounded the case, Nancy's father said, "It isn't my daughter (at the hospital). My daughter's been gone for over 6 1/2 years and that is just what is left of her."⁶⁶ On a nationally televised news

considering a person who has lost the ability to direct her medical treatment.").

⁶³ *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261 (1990).

⁶⁴ For an excellent account of Cruzan's story, see RICHARD EPSTEIN, *MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE*, 347-49 (Addison-Wesley 1997); SINGER, *supra* note 10, at 60-63.

⁶⁵ On Nancy's tombstone, the family engraved: Nancy Beth Cruzan – Born July 20, 1957 – Departed Jan 11, 1983 – At Peace Dec 26, 1990. See SINGER, *supra* note 10, at 62.

⁶⁶ Robert Steinbrook, *High Court to Rule on Halting Treatment:*

program, he stated, "My daughter died six years ago and the state will not let us have a funeral."⁶⁷ No one wanted Nancy's body to continue breathing indefinitely in a permanent vegetative state except for the state of Missouri.

Just last year, the courts were called in again to settle the fate of another woman in a permanent vegetative state. This time the woman was Terri Schiavo and the facts of the case were strikingly similar to those of the Nancy Cruzan case. Terri was a young woman who, through an unsettled accident, had oxygen cut off to her brain for a prolonged period. Afterwards, the doctors rendered her profoundly mentally incapacitated—a shadow of her former self. Terri was somewhat more "alert" than Nancy. Terri, unlike Nancy, was capable of breathing and maintaining blood pressure, but still required a feeding tube connected to her stomach to sustain life. Yet, the similarities ended there.

No one but the state of Missouri wished to keep Nancy alive in such a state. In the case of Terri, however, her family fought to keep her alive, while her husband fought to have the feeding tube removed.⁶⁸ Because Terri did not have a living will,⁶⁹ the case centered on who should be able to decide Terri's fate: her husband, who was her legal guardian, or her family.

For the purposes of this comment, the normative

Family's Rights at Heart of 'Right to Die' Question, L.A. TIMES, July 29, 1989, at 1.

⁶⁷ *CNBC Live* (CNBC television broadcast, Mar. 31, 1989).

⁶⁸ *See, e.g., Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378 (M.D. Fla. 2005). Ultimately, Terri's parents petitioned the Supreme Court but were denied relief. *See Schiavo ex rel. Schindler v. Schiavo*, 125 S. Ct. 1692 (2005).

⁶⁹ The Schiavo case made people much more focused on the subject of advanced directives, living wills, and estate planning in general. *See Tom Mighell, Estate Planning On The Web*, 68 TEX. B.J. 384 (2005).

question of who should decide the fate of someone who is profoundly mentally incapacitated is irrelevant. The interesting aspect of the Schiavo case is that her family gained some utility from Terri's life, even though Terri no longer could. This provides a much different situation than Nancy's case where her family, friends, and husband collectively wished to end her life. Terri's case is much more difficult from an expected utility position. An argument can be made that it is possible that the negative utility experienced by her husband in having Terri hooked up to the feeding tube was outweighed by the positive utility experienced by her parents. Of course, no one will ever know.

According to Richard Epstein, sustaining the life of someone who is profoundly mentally incapacitated serves no purpose. "The maxim, preserve life, only makes sense when the expected utility of that life to the holder of that life is positive."⁷⁰ The rule of continued treatment could make sense when the powerful could take advantage of the helpless. An example of this is when children take care of their elderly parents. Epstein argues that the permanent vegetative state is so different from all other ailments and so irreversible, that it falls into a separate category of its own. "A rule that said 'allow death in a permanent vegetative state' could easily be adopted without sliding down some slippery slope, so close is the permanent vegetative state to clinical death."⁷¹ "Choose life" makes little sense when there is so little for which to live.

V. Rationale Against Terminating Low Quality Lives

⁷⁰ EPSTEIN, *supra* note 64, at 348-49 (emphasis in original).

⁷¹ *Id.*

A. A Law and Economics Rationale

Compelling law and economics arguments exist against allowing doctors to perform euthanasia—voluntary or not. The Hippocratic Oath, which all physicians accept, requires doctors to “neither give a deadly drug to anybody who asked for it, nor . . . make a suggestion to this effect.”⁷² The Hippocratic Oath makes economic sense, as it ostensibly guarantees that doctors will act as faithful agents of the patient’s interest. If a patient is willing to pay up to \$50 for an educated diagnosis, but is fearful the doctor may prescribe unnecessary surgery, a bargain may not be reached even if the doctor offers his services for less than \$50. This is where the Hippocratic Oath comes in. Physicians get more business because sick people will be less inclined to practice home remedies or seek out quacks. In turn, patients will receive better care because they will be treated by medical experts. “Both physicians and patients would be better off if patients could place a high degree of trust in their doctors because the absence of such trust will prevent many mutually beneficial bargains from being reached.”⁷³

Giving patients the well-informed option to accept euthanasia does not alleviate all the aforementioned problems. Patients will still need to take costly precautions against doctors. Patients will still require protection from family members who can pressure the sick and dying into an early demise so that economic costs, such as costly medicine, can be lowered and financial gains, such as

⁷² Ludwig Edelstein, *The Hippocratic Oath: Text, Translation, and Interpretation* 3 (Henry E. Sigerist ed., John Hopkins Press 1943).

⁷³ See Nelson Lund, *Two Precipices, One Chasm: The Economics Of Physician-Assisted Suicide And Euthanasia*, 24 HASTINGS CONST. L.Q. 903, 907-08 (1997).

insurance policies, realized. Even if it is solely the patient's choice, doctors are experts in framing options to guarantee certain outcomes. Imagine being confronted with the question of "agonizing death" versus "gentle quick release." Because of this, the argument goes, the practice of physician-assisted suicide erodes the trust that patients give doctors and, therefore, increases costs. Many argue that this is not simply "a moral nicety," but rather a valuable device for reducing agency costs by diminishing the need for patients to take costly steps to monitor their doctors to ensure they are acting in the patient's best interest.⁷⁴

While the above argument may apply to those that are still conscious or have a glimmer of hope of one day becoming conscious, it is not clear whether it extends to those in a permanent vegetative state or those that are profoundly mentally disabled. Nelson Lund argues that once physicians begin assisting in "mercy killings" of those competent to give consent, it will become unbearably tempting for physicians to euthanize the most "dehumanized."⁷⁵ Here Lund's argument goes awry because his leap from the practice of voluntary euthanasia to the practice of non-voluntary euthanasia is shaky. He appeals only to human nature by claiming that doctors simply will not be able to control themselves.

Epstein argues that "state intervention must be used to preserve lives known to be worth living," but that "when life is hopeless or inert, the guardian [should have] the right, to see that the life ends; and if active euthanasia is the best means to achieve that end, so be it."⁷⁶ When a patient's prognosis is unclear, imperfect utilitarian

⁷⁴ See *id.* at 935.

⁷⁵ *Id.* at 919.

⁷⁶ EPSTEIN, *supra* note 64, at 358.

judgments are inescapable and the patient must be protected. But when there is no hope of recovery, the lives of those “haunted by pain of doomed to eerie silence” should not be preserved so long as the patient’s guardian does not object.⁷⁷ Lund contends that the guardians should never have the right to pull the plug no matter how bleak the prognosis. Therefore, Lund takes issue with Epstein’s argument as well.

B. Accuracy of Assessment Problems

But why not euthanize the PVS patient who, by definition, has no hope of recovery? For one reason, there could to be an accuracy problem in the assessment of those who truly are in a permanent vegetative state, as people who have been diagnosed as PVS sometimes “come back to life.”

Carrie Coons, an eighty-six year-old woman entered a hospital after a massive stroke. Initially able to speak, she quickly deteriorated into what was diagnosed as PVS. Coons’s sister maintained that Coons would not wish to be kept in this condition and petitioned the court to remove the feeding tube. The court accepted this wish and allowed the hospital to remove the tube.⁷⁸ Before the tube was removed, however, Coons woke up and began eating and speaking. This case illustrates both the imprecision of medical judgment and the dangers inherent in allocating the choice of life or death to family members. Apparently people sometimes come out of a seemingly permanent

⁷⁷ *Id.* Ignoring the thorny issue of guardianship, this is in stark contrast to the Schiavo case where her parents emphatically wished to keep her alive.

⁷⁸ *In re Gannon*, No. 0189-017460 (N.Y. Sup. Ct. Feb. 14, 1989).

vegetative state.⁷⁹

Even more frightening is the possibility that PVS patients are actually awake on the inside even though they appear dead to the world. An accuracy problem would also arise in being able to assess what it is like to be in a permanent vegetative state. Some claim that patients in a permanent vegetative state often experience periods of wakefulness.⁸⁰ Evidence shows that some patients who appear to be unconscious for extended periods of time and unresponsive to external stimuli report, upon recovery, that they had in fact been conscious even though they were incapable of showing any signs of awareness.⁸¹ When the feeding tubes are removed from a PVS patient who is able to breathe on his own, he starves to death over a period of days—a terrifying thought if the patient is awake on the inside, but unable to scream for help.

Further, studies show that happiness is relative. From the perspective of being healthy and normal, it is easy to pity those with severe ailments and question why they would want to live. But it is clear that people with Down's syndrome, for example, are capable of experiencing more pleasure than pain.⁸² In a 1978 study of the happiness of severe accident victims and lottery winners, researchers

⁷⁹ See, e.g., Harvey S. Levin et al., *Vegetative State After Closed Head-Injury: A Traumatic Coma Data Bank Report*, 48 ARCHIVES OF NEUROLOGY 580 (1991) ("Of 84 patients in the vegetative state who provided follow-up data, 41% became conscious by 6 months, 52% regained consciousness by 1 year, and 58% recovered consciousness within the 3 year follow-up interval.") *Id.* at 584.

⁸⁰ Lund, *supra* note 73, at 940-41 (citing Marcia Angell, *After Quinlan: The Dilemma of the Persistent Vegetative State*, 330 NEW ENG. J. MED. 1524, 1525 (1994)).

⁸¹ *Id.*

⁸² SINGER, *supra* note 49, at 187 ("Down's Syndrome is [not] so crippling as to make life not worth living.") *Id.*

found that paraplegics adapt better than most would expect.⁸³ The immediate effect of becoming physically challenged was extreme unhappiness and the immediate effect of winning the lottery was extreme joy. After several years, however, the happiness rates leveled off to essentially the pre-accident and pre-winning-the-lottery happiness levels.⁸⁴ “Perhaps people, through coping mechanisms, are able to adapt to disease better than they anticipated in advance.”⁸⁵ Because of this, policy-makers will likely fail to predict the utility of those they deem to have a low quality life. Thus, line-drawing errors are inescapable.

C. Intuitions and Biological Reasons Behind the Sanctity Of Life

Judge Richard Posner argues that, for better or worse, we have unshakable intuitions about the sanctity of human life. Posner writes, “These intuitions precede and inform, rather than following and being informed by, philosophical analysis of personhood.”⁸⁶ For some reason, we have intuitions that infanticide, enforcing suicide contracts, and euthanizing the profoundly mentally disabled are wrong. Posner claims that these intuitions stand or fall on “whether a monkey or a computer should be deemed more of a person than a severely demented or profoundly

⁸³ Phillip Brickman et al., *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 917 (1978).

⁸⁴ *Id.*

⁸⁵ Christine Jolls, et al., *A Behavioral Approach to Law And Economics*, 50 STAN. L. REV. 1471, 1542 (1998).

⁸⁶ POSNER, *supra* note 19, at 257.

retarded human being.”⁸⁷ Accordingly, we will make no progress because of our immovable intuitions concerning the “priority of human beings over machines and animals.”⁸⁸ “At the bottom we test our theories by reference to our intuitions, the things we cannot help believing.”⁸⁹

One possible reason for valuing all human life is that humans gain pleasure from being part of a society that takes care of its disadvantaged people. During times of scarcity, primitive humans were forced to kill or let the weakest members of their community die.⁹⁰ Consequently, only the wealthiest communities were capable of ensuring that their sick and elderly survived the scarce times. The weakest members acted as a buffer. Surely the communities might have more food or resources without the sick, elderly, or disabled, but without them, the healthy would be the next to go. Evolutionarily, humans may gain pleasure from being part of a society that is able to maintain its sick and disabled. It is a survival instinct. This may explain our “objective moral view of our obligation to cherish, preserve, and protect even the most humble examples of [human life].”⁹¹ Intuition can be a powerful guide in answering ethical questions.

Further, euthanizing humans deemed to be of low quality may be a problem for the risk averse. A possible objection to this form of euthanasia is that it would lead to insecurity and fear among those who are not now, but

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 340 (1990).

⁹⁰ See *supra* notes 23-25 and accompanying text.

⁹¹ Scott Pruett, *Personhood: The Measure of Life*, available at http://www.lifeway.com/lwc/article_main_page/0,1703,A%253D156223%2526M%253D200166,00.html (discussing Singer's position).

might, come within its scope.⁹² As mentioned above, patients would become ever vigilant of their doctors as they became infirmed—always afraid that the next injection or pill would be the last.

D. Incommensurability and the Cost of Costing

Hidden within the rational economic choice to euthanize those individuals deemed low quality is the harm from the comparison of incommensurable goods, or what Calabresi and Bobbitt have called “the costs of costing.”⁹³ Incommensurability occurs when aligning goods along a single metric offends our judgment about how these goods should be characterized. The single metric is, of course, usually money. Using the market to determine the price of certain things causes an affront to our values, for example, “of market determinations that say or imply that the value of a life or of some precious activity integral to life is reducible to a money figure.”⁹⁴ Calabresi and Bobbitt use the example of slavery noting that “[t]he social costs of indentured labor . . . surely includes one’s outrage at inducing the poor to sell themselves, and this cost must be considered before the society allows peonage.”⁹⁵

So even if we are prepared to engage in the dialogue of whose life is worthless and begin the calculations to determine who should be euthanized, it seems that we will fail to arrive at the correct valuation. First, certain variables will be left out of the equation altogether because pricing incommensurable goods causes

⁹² SINGER, *supra* note 49, at 192.

⁹³ See GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 32 (Norton & Co. 1978).

⁹⁴ *Id.*

⁹⁵ *Id.* at 33.

immediate “violence to our considered judgments,” “affront to values,” and societal outrage.⁹⁶ Second, even if we attempt to measure these missing variables, some are incapable of sufficiently precise calculation. “Attempts to weigh precisely the social costs and benefits associated with different responses to a tragic choice result more often in the valuation of only what we can measure than in the measurement of all that we can value.”⁹⁷

When the decision to euthanize low quality lives is made, there is still another variable that must be calculated. “[O]ur lives and institutions depend on the notion that life is beyond price.”⁹⁸ A refusal to save lives or an affirmative choice to end lives is horribly costly. For example, life insurance policies are routinely taken out on coal miners for several hundred thousand dollars; but when the mine collapses, the authorities are willing to spend millions to save a single miner.⁹⁹ Being able to hold on to the ideal that all life is priceless, in itself, has value. Even if the decision to terminate a low quality life would be cost effective in the short run, it almost certainly will not be in the long run.

V. Conclusion

⁹⁶ *Id.* at 204 n.15 (“Costs which are difficult to measure, such as the affront to the value of human life entailed by a decision to authorize medical experimentation with the terminally ill, will often be left out of the accounting altogether, though the resulting narrowness of the premises will poison the conclusion.”). See also Laurence H. Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

⁹⁷ See CALABRESI & BOBBIT, *supra* note 93, at 204.

⁹⁸ *Id.* at 39.

⁹⁹ See *id.* (“A fortune may be spent to save a convict caught in a jailhouse fire.”)

On its face, the notion of euthanizing society's weakest and most unproductive individuals appears to make strict economic sense. Once other factors are introduced, however, not only does it become clear that such a policy does not make economic sense, but also that it is a notion we do not even want to entertain. As for those individuals in a permanent vegetative state, the rationale for not terminating their lives does not fit as nicely. As Peter Singer, Richard Epstein, and others have argued, there seems to be no difference between dying and being in a permanent vegetative state. Perhaps the issue lies with revamping the clinical definition of "death," which some doctors have proposed should encompass people who are in a permanent vegetative state.¹⁰⁰

¹⁰⁰ Dr. Marcia Angell, Executive Editor of the *New England Journal of Medicine*, has proposed that death should be redefined to include permanent vegetative states and that food should be withheld from the "dead" person until the heart and lungs stop. See Marcia Angell, *After Quinlan: The Dilemma of the Persistent Vegetative State*, 330 *NEW ENG. J. MED.* 1524 (1994).

Appendix A. Nazi Euthanasia Propaganda Poster¹⁰¹



Poster reads: "This person suffering from hereditary defects costs the people 60,000 Reichmarks during his lifetime. People, that is your money."

¹⁰¹ Wikipedia Encyclopedia, *T-4 Euthanasia Program*, available at <http://en.wikipedia.org/wiki/Image:EnthanasiePropaganda.jpg> (last visited Dec. 23, 2004).

