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## WHAT KIND OF A RIGHT IS THE ‘RIGHT TO DIE’?

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Those who argue in favor of a putative right to die rarely look carefully at what kind of a right such a right might be. Yet deciding whether we have a particular right requires understanding what it means to have a right in the first place as well as what kinds of rights in fact exist. In this paper, I use philosopher Judith Jarvis Thomson’s discussion of the concept of a moral right and her analysis of rights as a basis for exploring a crucial question in doctor–patient relations when end-of-life care is at issue: If there is a right to die, what kind of a right is it? Thomson applies to the realm of *moral* rights the distinctions Wesley Newcomb Hohfeld made regarding *legal* rights. Briefly put, it turns out there are four different kinds of rights: *claims*, *privileges*, *powers*, and *immunities*. The task I have set myself is to see what emerges from using the Hohfeld–Thomson analysis of rights to evaluate common arguments put forward by those who support the idea of a ‘right to die’. I will consider three such arguments: the *Argument from Law*, the *Argument from Autonomy*, and the *Argument for Assistance*. Each of these arguments yields what Thomson calls a ‘cluster-right’. A right to die seems best supported by the Argument from Autonomy. Yet the Argument for Assistance is the one most people seem implicitly to rely on when they talk about having a right to die; I therefore focus my primary attention primarily on it. This argument remains unpromising, however, as a consequence of which it turns out that even if a right to die exists, it may be a fairly limited right after all. I conclude with a reminder that whether for a physician to give assistance in dying to a patient who invokes a right to die is the *right thing to do* can in any case not be deduced from a dying patient’s right to die.

**Keywords:** right to die, kinds of rights, kinds of arguments, assisted dying, euthanasia

**Um was für ein Recht handelt es sich bei dem Recht auf den Tod?:** Diejenigen, die für ein vermeintliches Recht auf den Tod plädieren, untersuchen selten näher, um was für eine Art von Recht es sich dabei handeln könnte. Die Entscheidung darüber, ob wir über ein bestimmtes

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Recht verfügen, setzt aber voraus, dass wir uns darüber im Klaren sind, was es bedeutet, über ein Recht zu verfügen bzw. was für Arten von Recht es überhaupt gibt. Die Verfasserin untersucht auf der Grundlage der Analysen der Philosophin Judith Jarvis Thomson, die diese zum Begriff des moralischen Rechtes und zu den verschiedenen Rechten durchgeführt hat, eine grundlegende Frage der Arzt-Patienten-Beziehung bezüglich der Sterbebegleitung: Wenn es ein Recht auf den Tod gibt, was für eine Art von Recht ist das? Thomson verwendet für die Sphäre des *moralischen* Rechtes die gleichen Kategorien, wie sie Wesley Newcomb Hohfeld für *gesetzliche* Rechte benutzte. Kurz gesagt: Es scheint vier verschiedene Modalitäten von Recht zu geben: Ansprüche (*claim-right*), Privilegien (*privilege*), Befugnis (*power*) und Freiheit von Verpflichtungen (*immunity*). Die Verfasserin hat sich zum Ziel gesetzt, festzustellen, welche Konsequenzen es hat, wenn man die analytische Rechtstheorie von Hohfeld–Thomson bei der Bewertung jener Argumente verwendet, die von den Verfechtern der These vom „Recht auf den Tod“ am häufigsten vorgebracht werden. Drei solcher Argumente werden untersucht: das Argument des Rechtes, das Argument der Autonomie sowie das Argument der Hilfeleistung. Jedes dieser Argumente führt in der Terminologie von Thomson zu einem „Mehrfach-Recht“. Man könnte annehmen, dass das Recht auf den Tod am ehesten durch das Argument der Autonomie zu begründen sei. Dennoch ist es das Argument der Hilfeleistung, auf das sich offenbar die meisten Menschen indirekt stützen, wenn sie über das Recht auf den Tod sprechen, so dass man vor allem diesem Aufmerksamkeit schenken sollte. Gleichzeitig stellt sich heraus, dass dieses Argument nicht allzu überzeugend ist, und so wird deutlich, dass, auch wenn es ein Recht auf den Tod geben sollte, dieses ein recht begrenztes Recht ist. Die Verfasserin erinnert daran, dass die Antwort auf die Frage, ob der Arzt *richtig handelt*, wenn er einem, sein Recht auf den Tod in Anspruch nehmenden Patienten zum Tod verhilft, in keinster Weise aus dem Recht des sterbenden Patienten auf den Tod resultiert.

**Schlüsselbegriffe:** Recht auf den Tod, Rechtsmodalitäten, Argumentationstypen, Sterbehilfe, Euthanasie

## 1. Introduction

What it means to have a ‘right to die’ is a complicated as well as an important issue (PUTNAM 2002). Consequently, I cannot in a single article do justice to all facets of the topic. Rather, I hope to clarify some of the most fundamental features involved by examining the arguments that purport to establish such a right.

I must confess at the outset that I believe there is a problem already with the very locution at the center of my discussion: a ‘right to die’ is, in a very real sense, a curious concept. To have a ‘right’ to something that will inevitably take place regardless of circumstances or actions – like dying, for each of us – seems odd. I can think of no other right that any one of us might have to anything so universally (and absolutely predictably) inevitable. So what is it that supporters of a putative ‘right to die’ actually mean when they claim that we have such a right? Considerable evidence exists that speaking of a ‘right to die’ is a kind of short-hand for something more like ‘a right to die in a manner and at a time of one’s own choosing’ or ‘a right to die with the maximum degree of self-control’ or ‘a right to die in a way that allows a person to maintain the greatest possible degree of dignity’. These more detailed and explicit locutions at

least make more sense. They are, however, also a little unwieldy, which is no doubt why they so frequently appear in the elliptical form of 'right to die'. I will, accordingly, use the abbreviated form, with the hope that we can all keep in mind that one or another of the more extended expressions is what is actually under discussion.

## 2. What does it mean to have a right?

### 2.1. Kinds of rights

Those who argue in favor of a 'right to die' (whatever its form) rarely look carefully at what kind of a right such a right might be. Yet, surely, before we can decide whether we have any particular right, we must first figure out what it means to have a right in the first place. The single most thorough and thoughtful exploration of the concept of a moral right is by philosopher Judith Jarvis Thomson. Though she is not primarily interested in health care or in doctor–patient relations, her book-length analysis of rights is an excellent place to begin. In what follows, I therefore rely on her discussion of the concept of a moral right and her analysis of rights (THOMSON 1990). This will then serve as a basis for exploring a crucial question for each of us, which has implications for the conduct of doctors toward their dying patients: If there is a right to die, what kind of a right is it? Thomson applies the classic distinctions Wesley Newcomb Hohfeld made regarding legal rights (HOHFELD 1913) to the realm of moral rights. Briefly put, it turns out there are four different kinds of rights: claims, privileges, powers, and immunities.

#### 2.1.1. Claims

Among these four kinds of rights, only *claims* have the feature we tend to think of first when we think about having rights, namely that one person's rights are equivalent to someone else's duties.<sup>1</sup> If I have a right of this sort, I have a claim against someone who then (as a result) has a duty. This is what we mean when we say that rights imply or are correlated with duties. Such rights, claim-rights, are – according to the Hohfeld–Thomson theory – the only strict rights we have (THOMSON 1990, 39–43).

#### 2.1.2. Privileges

We have other kinds of rights, however, which are not correlative with duties. Often superficially confused with strict claim-rights, because of the way we bandy the word 'rights' about, are *privileges*. Life presents us with many situations in which we have

<sup>1</sup> Thus J.D. CHARLES (1995, 272) is wrong when he asserts that '[e]very right imposes some obligations – i.e., moral demands – on others'.

a right to do X, or to have some Y, but where – crucially – no one is duty-bound to provide us with X, or Y. We may have a right to X or Y without ever getting X or Y; no one has violated our rights if we fail to get X or Y. Additionally, we are under no obligation to anyone either to try or not to try to get X or Y. I have such a privilege-right (but no duty), for instance, to buy a ticket to a dramatic performance. I am under no obligation to do so, and no one has a duty to provide me with a ticket unless or until I undertake to buy it. Because my right to buy a ticket is a mere privilege-right, it may turn out that I do not get what I want.

### 2.1.3. Powers

Some rights take the form of *powers*, often connected with ownership, or with position or status. Powers are the kinds of rights that enable the persons who hold them to bring about change in the moral status of another. The United States Congress has the (political) power-right to declare war, for instance. As the holder of that right, Congress is able to change the relationship between this country and another previously non-hostile nation into a nation with which we are at war – whether that nation wishes it or not.

A power-right may also put the right-holder in a position to alter the rights of others or even to alter his or her own rights. If I have a museum pass, and if I give you the right to use it, I have altered not only your right with respect to it but my own right as well; I cannot use it while you are doing so. (We will leave aside the fact that such passes are typically non-transferable, in which case I would not have the power to give you the right to use my pass.)

### 2.1.4. Immunities

The fourth category of rights is *immunities*. To return to the example of a museum pass: In addition to having a power-right to loan you my pass (assuming that it is transferable), I also (crucially) have an immunity-right against your using it without my permission. Immunities are protections against interference and thus against the exercise of powers by others in the domain where I have the immunity. In other words, if I have an immunity that protects me from you with respect to X, that means you do not have a power-right over me with respect to X. You simply lack the power to do X. This is less burdensome for you than if I had a claim-right against you; in that case, you would have an actual duty not to do X.

### 2.1.5. Cluster-rights

This four-part taxonomy of rights does not, however, tell the whole story. We also have *cluster-rights*, where more than one kind of right comes into play simultaneously.

Thomson points out that 'some, perhaps even most, of what we commonly call rights are cluster-rights' (THOMSON 1990, 55).

A prime example, according to Thomson, is what we mean when we say we are 'at liberty' to do X. I am at liberty to do X if, but only if (a) I am under obligation not to do X, – which means I have a *privilege* in this regard, and (b) I have a *claim* against everyone to non-interference – which means in turn that others are duty-bound not to interfere and that I therefore have an *immunity* with respect to the action I am at liberty to take. Here we have two different kinds of rights in one; hence liberty is a cluster-right. This rich example of a cluster-right happens to contain no power-right, but cluster-rights may in fact consist of any combination of privileges, claims, immunities, and powers.

### 2.1.6. Summary

We have claim-rights that impose corresponding duties on others, privilege-rights that give us opportunities but guarantee no results, power-rights that enable us to change the world around us, and immunity-rights that protect us against the power- and claim-rights of others, and – additionally – frequently occurring cluster-rights. One consequence of the prevalence of cluster rights is that figuring out what kind of right some alleged right is often turns out to be a far more complicated matter than we might initially have expected. Certainly this is part of why talk about an unexplained 'right to die' is so often more bewildering than helpful.<sup>2</sup>

Before continuing, I want to dispose of a seemingly minor linguistic matter that frequently emerges in rights discussions, simply because the word 'right' is used in different ways. 'Right' is one of many English words that can be either a noun or an adjective; if we are not careful, the fundamental and critical distinction between having a right and doing the right thing will get blurred or worse. All too often, we fall into the trap of thinking that if we have a right to do X, then the right thing to do is X – or vice versa. For example, I have a right to dispose of my income as I see fit (so long as I am not interfering with anyone else's rights by what I do). Now let us imagine, for instance, that I like to bet on horses. Simply because I have a right to do so, it does not follow that using all my excess income to place bets (even assuming for the sake of argument that I have fulfilled my financial obligations all around) is the right thing to do. The fact that my gambling may do no obvious or measurable harm does not make it right to gamble in this fashion. This failure to distinguish between having a right to do (or not to do) something (where 'right' is a noun) and doing something that

<sup>2</sup> One example of a bald statement of a right to die, no explanation proffered and therefore no real elucidation of what was meant, can be found in one of the concurring opinions in *Bouvia*, an important right-to-die case from the mid-1980s. Saying that Elizabeth Bouvia had made 'a conscious and informed choice that she prefers death' and that she 'has an absolute right to effectuate that decision', Associate Justice Compton then went on to state that the 'right to die is an integral part of our right to control our own destinies . . .' (*Bouvia v. Superior Court*, 225 Cal. Rptr. 297 (Cal. App. 2d), (1986), at 307).

is right (where ‘right’ is an adjective) almost always leads to further confusion and misunderstanding. Unfortunately, and quite unnecessarily, this adds to the difficulty of ascertaining what a particular right is or might be.

## 2.2. Arguments for a ‘right to die’

### 2.2.1. Kinds of arguments

Now let us turn to examine what emerges when we use the Hohfeld–Thomson analysis of rights to evaluate common arguments put forward by those who support the idea of a ‘right to die’. I want to consider three of the most common arguments used in an effort to demonstrate the existence of this right. These are, of course, not the only arguments that have been (or could be) put forward in favor of a right to die, nor will I be able to provide a fully adequate account of even these three. I intend to dispose briskly of the first argument, give some shape to the second (which I believe is actually the strongest of the three, though still flawed), and then to show why the third, the boldest, goes too far. In the process, I hope to demonstrate what is entailed in judging the nature of a right to die – if there is such a right.

The three arguments – which I call respectively the Argument from Law, the Argument from Autonomy, and the Argument for Assistance – have much in common. Each consists of what Thomson calls a ‘cluster-right’. Each also invites comment *vis à vis* its status under the law: The first relies explicitly on a settled legal point; the second is reflected in the law; the third depends on a position that is clearly not (currently) accepted in the law. Similarly, each of the three can also be reviewed from the moral point of view, as an attempt to establish a moral right to die. The first invites the question whether what is legally settled is, also, morally acceptable; the second explicitly invokes personal autonomy, a generally accepted principle of morality. The third, finally, brings into sharp focus the distinction I mentioned above (and to which I shall return) between having a right to (do) something and that something being the right thing to do, just as it also raises questions about who might have the right and under what circumstances. Whereas in the first argument a legal principle is the chief concern, in the second a moral principle is central. In the third – on which I will concentrate here – another moral principle, viz., non-discrimination – lies at the heart of the matter. Let us turn then to a very brief explication of the three arguments.

The first argument, the Argument from Law – the premises of which are acknowledged even by those who oppose any ‘right to die’ (though they are likely to stop short of accepting the conclusion) – is primarily a legal one and is as follows:

Settled law establishes that I have a right to refuse treatment(s) I do not want.

The treatment(s) I have a right to refuse include even those that might save or prolong my life.

Refusing such treatment(s) could be a means of bringing about my death.

Therefore I have a right to die.

The second argument, the Argument from Autonomy, goes like this:

My body and my life are my own.

I have the right to do as I please with my body and my life as long as I do not harm or interfere with the rights of others.

Given that right, I have a further right to take actions that could lead to my death as long as those actions do not harm or interfere with the rights of others.

Actions I take deliberately leading to my death do not harm or interfere with the rights of others.

Therefore I have a right to die.

The third argument, the Argument for Assistance – sufficiently extreme that not even all more-or-less enthusiastic supporters of some 'right to die' accept it – begins like the second. More complicated and more problematic, it comes in two parts:

My body and my life are my own.

I have the right to do as I please with my body and my life so long as I do not harm or interfere with the rights of others.

Given that right, I have a further right to take actions that could lead to my death so long as those actions do not harm or interfere with the rights of others.

Actions I take deliberately leading to my death do not harm or interfere with the rights of others.

Therefore I have a right to die.

However, in certain cases the actions I want to take to end my life I might not be able to take on my own (for example, if terminal illness or paralysis has rendered me incapable of taking pills that would end my life).

Since I have the right to take those actions and persons not similarly handicapped would be able to take them, and since I may not be discriminated against on a morally irrelevant basis (such as my being incapacitated by terminal illness or paralysis from taking pills that would end my life), I have the right to help in exercising my right to die.<sup>3</sup>

Therefore I have a right to (physician) assistance with my death.

Let us examine these three arguments.

### 2.2.2. Argument from Law

The Argument from Law, though a valid argument with legally correct premises, is weak. At best it is a roundabout way of arguing in favor of a right to die, as we shall see, because it starts by talking about the right to refuse treatment. Also, although (as

<sup>3</sup> This is roughly the argument in *Bouvia* (1986) – see supra n.2 – since the whole point of the case was that she did not have the physical capacity to avoid or stop the 'treatment' (being fed) on her own.

I indicated earlier) this is by no means the only possible kind of argument from the law that could be made, it fits what some people seem to mean when they talk about a right to die. We need therefore to examine it on its own merits.

If I had a power-right to refuse treatment, then my exercise of that right would somehow affect the status of the doctor (and others) to render such treatment. But since the physician has the authority to treat me not because of some right held as a function of being a doctor, but rather from my having invited the treatment (my having engaged the doctor), then my refusal of treatment is simply my refusal to consent to the doctor's intervention, and not an alteration of any pre-existing rights of the doctor's.

I do, however, have a privilege-right regarding any treatment in the first place. I have no duty to seek (let alone accept) treatment, and also no duty not to seek (or accept) it; thus I have a privilege of refusing at any time any treatment I no longer want. I also have an immunity-right, that is, protection against others forcing treatment on me. Those who might wish to treat me may not do so until or unless I grant permission; I am protected by my immunity.

As for the strongest kind of right – a claim-right – it appears I have that, too. For my claim to non-treatment (which can include refusing to have some treatment started as well as requiring a treatment that has already been initiated to be stopped) does, indeed, impose a duty on all others. That duty is to not force either the initiation or the continuance of such treatment on me. One rationale for the right to refuse treatment is that each of us has both a right to privacy that allows us to do as we will with our own bodies and a right to freedom from 'unwanted touching' (which is what medical treatments and procedures amount to in the law if they are given without the informed consent of the patient).

Thomson makes the point vivid in her discussion of trespass, which she defines as 'claim-infringing bodily intrusion or invasion'. Claims infringed by trespass are fundamental, she says; a person's 'moral status is very thin if he lacks claims against bodily intrusion' (THOMSON 1990, 205, 211). The United States Supreme Court, in deciding the right-to-assisted-suicide cases before it in 1997, along the way dealt explicitly with the right to refuse unwanted medical treatment.<sup>4</sup> The issue as seen by the Court was first whether the liberty interest an individual has – protected by the due process clause of the Constitution – includes a right to commit suicide and second whether that right – if it exists – includes a right to assistance in committing suicide. The Court decided in the negative.

It appears that we do have a right, in fact a cluster-right comprising a privilege, an immunity, and a claim. But these are all rights that have to do with the refusal of treatment, not rights that have to do with dying per se. Dying (we assume for the sake of the argument) is something that may come to pass as a consequence of refusing treatment, but dying is not what the right is about. Thus, according to this argument, the right to refuse treatment is strong and firm – but it is not the same as, nor does it

<sup>4</sup> See *Washington v. Glucksberg*, 521 U.S. 702 (1997) and *Vacco v. Quill*, 521 U.S. 793 (1997).



entail, a right to die in any further sense. Those who use an argument like this for a right to die are confusing two different rights, only one of which is sustained by the argument.

### 2.2.3. Argument from Autonomy

A stronger position emerges in the Argument from Autonomy. It is, however, difficult to see how I can have a power-right to die. Only if we can imagine that someone, by dying, can (and does) alter the rights of others can we think of the right to die as a power. Perhaps, legally speaking, your relationship to me is such that your right to, for instance, some portion of an inheritance (from a third party) is altered by my having pre-deceased you. Then, too, your relationship to me might be such that, morally speaking, you acquire as a result of my death some duty to care for my orphaned children; thus your right to dispose of your time and money, for example, could be directly affected by my death. Still, it seems odd in the extreme to think that by exercising my right to die I am exercising a power-right, as if the point of my dying were to alter your rights and as if my dying alone brought about the change in your rights. From the fact that your rights (and duties) might be changed by my death it does not follow that my choosing to die constitutes the exercise of a power-right with respect to you.

As for an immunity-right, there is an important qualifier in the second and third premises: I may do as I please so long as I do not harm or interfere with the rights of others. One can imagine legitimate disagreement over whether I have harmed or interfered with anyone, either in anticipation of or as a result of my exercising my right to die. But it is crucial to distinguish between actual bodily harm or physical interference, on the one hand, and what Thomson calls 'belief-mediated distress'<sup>5</sup> on the other. The latter, however unfortunate it may be, is not the harm that we are morally prohibited from causing when we exercise our own rights. (We could not be either legally or morally prohibited from ever causing distress or offence, without crippling self-expression, when the distress or offence in question depends on the beliefs someone else holds.) Assuming, again for the sake of the argument, that I have not violated this premise, then I do indeed have an immunity against other persons stopping me from or interfering with my taking actions that will lead to my death. This begins to look like the basis for the decriminalisation of suicide, an acknowledgment that persons may (legally) take their own lives.

This reasoning is wholly independent of moral arguments supporting a right to commit suicide, which many believe are so strong that they should in any case override the provisions of any law prohibiting suicide. But long tradition in both law and religion inspires vigorous efforts, in most circumstances, to dissuade persons from taking their own lives. More positively, think of police officers trained to persuade would-be suicides to come down safely, of their own accord, from bridges or high

<sup>5</sup> THOMSON (1990) 264, and generally 262–69.

buildings – to say nothing of the way we rush anyone who has apparently overdosed on drugs to the nearest emergency room, even when it is legal (or not illegal) for them to commit suicide in these and other ways. We must also be sure not to forget that committing suicide may still not be doing the right thing even if one has the right to do it.

Likewise, a privilege-right seems to exist. I have the privilege of taking what actions I wish, even if they will lead to my death (once again assuming I have not violated the no-harm-or-interference-with-others'-rights qualifier), because I have no duty not to take such actions – any more than I have a duty to take such actions. There are those who will argue that we do not have a privilege, or any other kind of right, to take deliberate actions aimed at causing our own death. They will say, for example, that as a 'child of God' one has a duty not to cause one's own death, a duty not to commit suicide. But this is a sectarian moral-religious argument from those who do not accept the premises of the argument under discussion.<sup>6</sup> For those who do accept the premises, the privilege exists – though it appears to be a weak privilege-right. All it yields is that I have no duty not to cause my own death (although there may also be reasons I ought not to do so).

We come then to the question of whether the Argument from Autonomy gives us the right to die that we have been looking for. If the premise that 'my body and my life are my own' is correct, it follows that I am an autonomous person. If I take the idea of personal autonomy seriously, I have a claim-right to act autonomously; there is a correlative duty of non-interference (in the absence of my consent) on all others. Hence it certainly seems that a person must have a claim-right to act in ways that might lead to his or her own death. (To be sure, we know that those who do not take the idea of autonomy seriously do not accept this.) Autonomy gives rise to a moral (not merely legal) right to commit suicide; autonomy likewise gives rise to the moral (not merely legal) right to refuse treatment. The Argument from Autonomy yields not only a right to cause one's own death without interference from others, but also a right to let the dying process unfold without interference. Thus, the Argument from Autonomy yields a claim-right to die, because others are under a duty not to interfere.

Much the same can be said about an immunity-right to die. Under the Argument from Autonomy, I have an immunity against anyone's interfering if I choose to cause my own death (whether by refusing treatment or by other means). Although a power-right to die based on my autonomy makes no sense – there is no one whose rights or status I can alter by exercising this right – it appears that I am nonetheless left, under the Argument from Autonomy, with a three-part cluster-right to die.

Yet as powerful as this cluster-right to die might first seem to be, it takes the right-holder only so far. Having this right means no one has any business interfering

<sup>6</sup> Joseph FLETCHER (1954) in his early and influential essay, 'Euthanasia: Our Right to Die', went so far as to claim that voluntary euthanasia 'is a form of suicide'. He is not alone in arguing the equivalency of voluntary euthanasia and suicide. More recently, for example, Colin BREWER, proclaiming a principle he believed was 'self-evident', said that the 'moral issues involved in most cases of voluntary euthanasia are virtually identical to the moral issues involved in suicide' (1993, 22).

with what I might do or omit doing with respect to bringing about my own death. But what if I am unable to exercise this right, unable to take the actions I want to take? What if I cannot (for whatever reason) achieve what I want? (Remember that neither having a privilege nor being protected by an immunity guarantees I will get what I might very well have a right to get.)

Although a 'right to die' might thus seem well supported by the Argument from Autonomy, it is, in my view, the third of my three arguments – the Argument for Assistance – on which most people implicitly rely when they talk about having a right to die. Concluding that there is indeed a right to die based on the Argument from Autonomy, they seem ready to accept the more extended, two-part version of that argument, which I have called the Argument for Assistance. But even if we grant a right to die on the basis of the Argument from Autonomy, is that argument so powerful that it leads inexorably to a right to assistance in dying?

#### 2.2.4. Argument for Assistance

The Argument for Assistance is certainly the boldest of the three arguments I have put forward. As frequent news accounts and guest column articles in the United States – to say nothing of letters to the editor – illustrate, any use of this argument has controversial legal (and political) overtones. (A particularly dramatic example came in the autumn of 2001 when United States Attorney General John Ashcroft attempted to nullify Oregon's Death With Dignity Act.)<sup>7</sup>

Even leaving aside that aspect of the argument, and despite it being a more complicated argument than the other two we have examined, this one may still be the most easily disposed of, precisely because it is too extreme. In the first place, if the alleged right to assistance with my death is a mere privilege-right, it quite likely will garner me nothing. A privilege grants me (in principle) only an opportunity. I have no duty to avail myself of it, and even if I do or try to, no one has violated my rights by failing to come forward as I desire. A privilege-right of mine to assistance from you with my dying does not impose a duty on you to provide me with your assistance; I have to find 'a willing provider' of the requisite assistance. If I do, however, it seems to follow from my privilege-right that both suicide and assisting with suicide are permissible. Yet as things currently stand in the United States, at least, both moral precepts (for some persons) and legal precepts (the latter in thirty-five states (HUMPHRY & CLEMENT 1998, 117) combine to deny most of us such a privilege-right. And even if my circumstances are such that I do have a privilege-right of this sort, as we just saw, having a privilege-right does not mean I will necessarily obtain what I have (in principle) the privilege of obtaining. In any case, willing providers are few and far between. Today it is still true that willing providers also have to be willing law-breakers. (This is of

<sup>7</sup> See, e.g., VERHOVEK (2001), 'Ashcroft's Meddling' (2001), ROLLIN et al. (2001).

course strictly irrelevant if we are considering only the possibility of a moral privilege-right.)

If the right to assistance with my death is an immunity-right, that may be a greater benefit. An immunity in effect shores up a privilege, stopping third parties from interfering and thus increasing the likelihood that I can avail myself of the privilege. If I do manage to get an offer of help, I have an immunity against others interfering with the help. In other words, if I can find someone to assist with my death (a willing provider) so that my opportunity to exercise my privilege exists, others lack the power to interfere with the help I have arranged.

Do I have a power-right? If we can conceive of ‘assistance with death’ as medical treatment, would my right to assistance be such that I could alter any doctor’s right to refuse to render what he or she regarded as inappropriate or futile treatment? No. Even when doctors have a duty to treat (which it can be argued they sometimes do, under very special circumstances),<sup>8</sup> they do not have a duty to render every treatment a patient wants or demands. Clearly I am not in a position to alter a doctor’s rights in this regard, even when the treatment in question is far less controversial than any assistance-with-dying ‘treatment’. If I cannot alter a doctor’s rights, then I do not have a power-right.<sup>9</sup>

The issue came up indirectly during the first-degree murder trial, in April 1999, of the maverick, self-appointed advocate of a right to die, Jack Kevorkian, following the assistance he gave in the death of Thomas Youk. Most observers seem to have believed Kevorkian had no right to end Youk’s life. But then these questions emerged: Did Youk have a right to die? Was his supposed right to die a power-right that enabled him to alter Kevorkian’s rights, making it acceptable for Kevorkian to end Youk’s life for him – since Youk himself was too disabled to do so? Only if the answer to this latter question is affirmative did Youk have a power-right to die. In the law the answer is negative. My giving you permission to kill me does not give you the (legal) right to do so.

Finally, what about the possibility that the right to (physician) assistance with death is the strongest of all possible rights, a right in the strict sense, a claim-right? This will not work, either. What exactly would be the correlative duty in the case of a right to (physician) assistance with death, and who would have it? If I have a claim-right to assistance, is the correlative duty the duty to do something or is it a duty of non-interference? The latter is no more than what was already available to me by virtue of my having a privilege-right and an immunity-right. Besides, it is a little odd to talk about a duty to assist when the assistance takes the form of doing nothing. So let us

<sup>8</sup> For a discussion of the ‘duty to treat’ in the context of AIDS, see DANIELS (1995, 13–38).

<sup>9</sup> Thomson mentions more or less in passing that ‘the right to life is nowadays often said to include powers . . . as where a terminally ill patient asks to have the life-support machinery disconnected and is thought to have thereby made himself or herself no longer have a claim to not be killed’ (THOMSON 1990, 285). By no means clear is whether this analysis of the right to life can withstand scrutiny, whether what is at issue in such a case really is a power-right, and whether – if it is one – such a power-right is a right to life rather than a right to die. Thomson does not help us out. Furthermore, I am not alone in believing that having life-saving machinery disconnected at one’s request is not a case of being killed.

assume the correlative duty would have to be one of taking some action to bring about my death. But who among the theoretically available candidates – health-care workers in general, physicians in particular, family, friends, neighbors, citizens of the world – could plausibly be said to have a duty to bring about my death as a consequence of my claim-right to die? Would it mean having a duty to assist me in my dying once I start to die? And how is that point to be determined? A duty to supply me with the means of causing my own death, given that I want to die and regardless of whether I am already actively dying? A duty to bring about my death by depriving me of food and water? These are quite different possibilities; none is particularly plausible or attractive.

What about the possibility that the correlative duty falls on a 'willing provider'? If you are a willing provider of assistance in this matter of my wanting help in dying, and I have persuaded you to assist me with my dying, then perhaps it could be argued that I have this very particular claim-right to die with the very particular assistance that you, my willing provider, can provide – on the strength of your agreement to do so. Once you have agreed, I do of course have a claim against you that you assist, and – barring extraordinary circumstances – you have a duty to assist. Your duty arises out of the fact that you made a promise, however; it is not a duty to assist that is correlative with a claim-right of mine.

Look at it this way: Suppose Fred promised Ted that Fred would help Ted die. Then Fred would have a duty to do so – but it would be a promise-keeping duty, and the issue has suddenly become whether Fred has a duty to keep his promise to help Ted die rather than whether he has a duty to help Ted die. Even if we want to argue that Fred does indeed have a duty to keep his promise, this is still a long way from Fred having a duty to assist in Ted's death because of any right to die that Ted has. Perhaps it would be a very good thing if Fred were to assist Ted. Perhaps it would even be the right thing for Fred to do. Even so, it does not follow that Ted has a claim-right to Fred's assistance. Thus, this strongest of rights does not appear to be available to us, and the other kinds of rights – with respect to a supposed right to assistance in dying – also proved to be empty shells.

Even in the state of Oregon, the one U.S. jurisdiction in which doctors are currently permitted to write prescriptions for lethal doses of controlled substances knowing their patients intend to take them as a means of committing suicide and where patients therefore have a legal right to such a prescription, no doctor opposed to the practice has the legal duty to provide one. The patient's right is not a claim-right. The prescribing physician must be a willing provider; no doctor is under a duty to be one. Further, even if the legal situation (for instance, in Oregon) were to change in such a way as to make providers subject to a duty to assist someone to die, the patient's claim-right would not be a natural claim-right – a right that is devolved on persons simply by virtue of their being human beings ('such as the claim to not be caused harm') (THOMSON 1990, 359). Rather, such a claim would be what Thomson calls a 'pure social claim', one entirely contingent on the legal provisions of a given society or that exists because of 'private commitments' (THOMSON 1990, 273).

### 3. Conclusion

The lack of a claim-right notwithstanding, most of us can probably think of circumstances in which it indeed seems that the right thing for a doctor to do is to assist in someone's dying. If a doctor ought to assist in those circumstances, this could well be what some people mean by saying (misleadingly) that we have a 'right to die'. But notice how a right to die of this sort has been severely limited to particular circumstances where it could be shown and agreed upon that it is right for the doctors to assist. It is not a claim-right; it is at most a privilege or an immunity. That brings us full circle, back to the much more restrictive right to commit suicide. Neither a privilege-right nor an immunity-right to assistance gives us a claim-right to assistance with dying, because neither a privilege nor an immunity imposes on anyone the burden of a duty to assist.

Even when 'a right to die' means only 'a right to die in a manner and at a time of one's own choosing' or 'with the maximum degree of control' or 'in a way that permits the greatest possible degree of dignity to be maintained', there is still no claim-right involved (and there is certainly still no power-right). True enough, we have a right to make these choices: We have (for instance) a right to seek control, we have (for instance) a right to do what we can to maintain our dignity. We have privileges and immunities, in other words, and perhaps some few and very particular claims along the way. But no one has a general correlative duty to provide others with the kind of death they seek. Neither are we in a position to alter anyone else's rights in this regard in the process of exercising our own. Consequently, it is unlikely that anyone has violated our rights simply because we do not die in the manner and at the time we prefer, or with the maximum degree of control, or in a way that permits the greatest possible dignity to be maintained.

If we were deprived of medical remedies and procedures that were promised, or if we were deprived of the kinds of care that everyone agrees human decency requires and that is available, or if we needlessly suffered from unremitting pain because someone insisted on following the rule book rather than paying attention to our needs as patients – then we might have complaints, and very legitimate ones at that. But a right to die would not have been violated, even if we have not been treated in the way that would have been right, that is, in the way we ought to have been treated.

Take an example: If a doctor resuscitates me despite a valid 'do not resuscitate' order, certainly my right to refuse treatment has been violated. It does not follow from that, however, that a right to die of mine has been violated, even if it is the case that I would have died in the absence of the resuscitation and that I ought to have been allowed to die. Nor does it follow that the unfortunate (in my view) position the resuscitation has placed me in (say I am now on a ventilator) gives me any new rights with respect to dying, let alone a claim-right to die that would impose a duty on the doctor to end my life for me. What I do have, still, is a (moral and legal) right to refuse treatment, however, and a (moral, at least) right to end my life. Thus I have a right to be taken off the ventilator (and allowed, presumably, to die) if that is what I want.<sup>10</sup>

<sup>10</sup> I am indebted to law professor Charles Baron of Boston College for this example.

So how does the scorecard read? If there is a right to die as spelled out in any of the three bare-bones arguments above, it is never a power-right. In each of the three arguments, we found what looked like an immunity and a privilege, and in two of the three arguments a claim as well (thus in each argument we found a cluster-right, though the content of the clusters varied). The problem, however, is that in most instances, these rights turned out to be something other than or merely ancillary to the supposed right to die that inspired the arguments in the first place. The exception is the cluster-right we found using the Argument from Autonomy, though even that left us without having gained all of what those who argue for a right to die are generally seeking.

Each of the arguments we examined has its weaknesses, though I did not deliberately set up straw arguments to be blown down. Arguments very much like the ones I have presented are exactly the kinds of weapons wielded by many proponents of a putative right to die. My aim here was to expose some of the flaws of such arguments and to show what the limits of a right to die have to be. That there is work still to be done should also be clear.<sup>11</sup> The issue is not merely 'What kind of a right is this right that I think I have?' but rather a matter of asking 'What is the right thing for me to do?' and 'What is the right thing for my doctor to do?'

Indeed, in none of this have I done more than touch on the possibility that even if there is no right to assistance with dying, it might nonetheless be the right thing for doctors (willing providers) to assist, especially to assist a dying person who literally cannot bring about his or her own death. That such 'mercy killings' (carried out perhaps even more frequently by family members or friends than by physicians) are already tolerated by society to some extent we know from the way some such cases have been decided in court.<sup>12</sup> Whether there is a right to such assistance is a separate issue.

For now, I believe, this discussion shows that the much-invoked right to die is best supported by the Argument from Autonomy, but that any right to die is still a fairly limited right because the Argument for Assistance is so unpromising. Whether there might be some – perhaps even many – cases in which the right thing to do would be to assist a dying patient who seeks to die painlessly, whether this is what doctors ought to do under certain conditions, are matters that can not be deduced from a dying patient's right to die. Thus this discussion must stand as a cautionary tale whose end has

<sup>11</sup> Philosopher Norman DANIELS (1995), formerly at Tufts University and now at the Harvard University School of Public Health, for example, has made it clear in more than one conversation with me that he believes the Hohfeld–Thomson analysis is not by itself adequate to show that we do not (let alone cannot) have a claim-right to assistance with our dying.

<sup>12</sup> One such example that received considerable media attention is the case of George Delury, who helped his wife – Myrna Lebov – end her life by giving her 'a deadly dose of an antidepressant mixed with water and honey' and then pled guilty to attempted manslaughter. Delury was sentenced to six months in prison, clear evidence that his act was not deemed murder. See PIERRE-PIERRE (1996).

not yet been told – and from which, therefore, no conclusive moral for all cases can yet be drawn.<sup>13</sup>

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<sup>13</sup> An excellent discussion of this complex issue can be found in an essay by J. FEINBERG (1992, 260–82), in which – among other things – he criticizes the position taken by Y. KAMISAR (1958, 969–1042) that there is a moral right to die but that it should not be made legal.