Legislating Privilege

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Serious concerns about pervasive, persistent, and unjustified social inequalities have prompted a small — but growing — number of academic commentators to raise some hard and troubling questions for those who would like to legalize physician-assisted suicide. In various ways, these commentators have asked: In light of existing social inequalities — inequalities that operate, for example, along sometimes intersecting lines of race, class, age, sex (including sexual orientation), and disability — how persuasive are autonomy-based arguments in favor of legalization of assisted suicide when those arguments depend (as they typically do) on a conception of autonomy that either presupposes social equality or does not expressly account for its absence? How compelling are arguments that we ought to legalize assisted suicide out of feelings of mercy for the sick and dying, when such affective expressions may actually be the socially acceptable manifestation of private ambivalence that includes merciless discrimination? How can we be confident, these commentators have wondered, that talk of "autonomy" or "mercy" in the assisted suicide debate gets us anywhere — unless and until such talk squarely confronts discriminatory cultural ideologies and the material forms of discrimination they produce, and expressly objects to the ways discrimination may condition how decisions about life and death are made?

These and other related questions (some of which we will have occasion to consider later on) have been heard: among other places, in congressional hearings, state-level policy debates, federal and state court litigation, and sometimes in the media. But they remain unanswered. The response by advocates of assisted suicide to the equality-based concerns with legalization of the practice, to the extent there has been one, has mainly been in the register of derision or some other form of dismissal.[1] More commonly, advocates of assisted suicide have ignored the equality-based concerns with legalization altogether.[2]

It is against this backdrop that one must read Ronald A. Lindsay's "Should We Impose Quotas? Evaluating the "Disparate Impact" Argument Against Legalization of Assisted Suicide,"[3] which sets out to engage equality-based critiques of the arguments for legalizing assisted suicide in a new set of ways. No doubt, some may hail this work as an important — even signal — contribution to the ongoing debate over assisted suicide. Unfortunately, however, Lindsay fails to achieve his substantive goal of beating back equality-based opposition to legalization. In the pages that follow, I begin to explain why, and why we ought to be happy that he does.

Lindsay takes aim at a "[p]rominent … contention" in the assisted suicide literature: "that legalization will have a disproportionately adverse, or 'disparate,' impact on various vulnerable groups."[4] "[T]he various versions" of this contention, Lindsay maintains, "share a common core: One reason assisted suicide should not be legalized is that members of certain vulnerable groups are more likely to be pressured into requesting it, whether directly by those hostile or indifferent to their interests, or indirectly by social circumstances, such as inability to pursue other health care choices."[5]

The initial description of the "disparate impact" argument that Lindsay provides is more gestural than it is precise. But he begins to zero in on his target when he proposes the standards by which we should determine whether that "disparate impact" claim is "sound."[6] "One *must*," he writes, "believe that it somehow makes a difference for the wisdom of legalizing assisted suicide whether *proportionally* more blacks than whites, more women than men, more elderly than young, and so on would likely be pressured into choosing assisted suicide."[7] A little later, he brings his target into sharper focus still:

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> [A]dvocates of the disparate impact argument … maintain that *how* the risks of legalized assisted suicide are *distributed among various allegedly vulnerable groups* affects the calculus of individual versus common good. Although intuitively a society in which all benefits and burdens are *distributed proportionally* among members of the society's different racial, ethnic, age, and other groups seems more just, we do not insist on such a *proportional distribution* in all contexts, or even in all contexts analogous to the context of assisted suicide.… [I]t is dubious whether a *proportional distribution* of deaths through assisted suicide would or should satisfy its opponents.[8]

In these (and other) ways, Lindsay treats the equality-based opposition to legalizing assisted suicide that he claims is "unsound and misdirected,"[9] as a "disparate impact" argument that emerges from, or reduces to, a predictive, proportionality claim.[10]

Equality-based concerns with efforts to legalize assisted suicide, as they are presented in Lindsay's discussion, follow from the view that, in a regime in which the practice is legal, its incidence will be differentially — hence, unjustly — distributed among "allegedly"[11] dominant and subordinated social groups.[12] This "differential distribution" claim, we are told, is not only one that is "hitherto lacking in empirical support,"[13] but also easily routed on a conceptual plane. "Quotas," it is said, "would eliminate"[14] any differential distribution problem, because they would equalize the numbers. Quotas, "therefore, appear to provide the solution to those concerned about equalization of risk."[15]

Having made this point, Lindsay can record his doubt that those who have advanced the differential distribution claim would be satisfied with quotas as a solution, even though, he believes, it should allay their distributivist concerns.[16] "Why then would quotas be rejected?"[17] It "would presumably not be due to concern over the surreal bureaucratic regulations necessary to enforce such quotas … nor the express limitation on autonomy that results…."[18] No. Rather, it would be rejected by those who venture the differential distribution argument, because they "have not heretofore thought through the implications of their argument."[19] They can thus be expected to dismiss "the quotas solution … because consideration of the quotas solution serves to reveal the flaws in their disparate impact argument."[20]

Others, he continues, would reject the "quotas solution" "because the disparate impact of assisted suicide [has] never [been] their primary concern."[21] "[D]isingenuously,"[22] "[p]eople in this group are simply adamant opponents of lawful assisted suicide under any circumstances."[23] For them, "the disparate impact argument functions as a make-weight[,]… just another member of the sanctity-of-life family of arguments against assisted suicide disguised in politically fashionable dress."[24] Quotas, accordingly, "would not address their real, underlying concern, which is to prevent anyone … from seeking assisted suicide."[25]

Whether they are too slow to have realized its implications or too cunning to have acknowledged them, Lindsay suggests, proponents of the differential distribution argument against legalization of assisted suicide have made a move whose obvious shortcomings are insurmountable: "If numbers are a concern, then quotas are a solution to that concern."[26] The differential distribution argument is "fatally flawed."[27] *Q.E.D.*

Or almost. Lindsay exposes a deep flaw in his text when he acknowledges the possibility that he has "misread the intent"[28] of equality-based opposition to legalizing assisted suicide. Sharpening the knife that threatens his own brief against the equality-based concerns with legalization, Lindsay wonders aloud:

> Could these advocates be interpreted as saying that lawful assisted suicide should be resisted because of the *reasons* women as opposed to men, blacks opposed to whites would choose assisted suicide and *not* because proportionally more women than men, more blacks than whites would actually choose assisted suicide? In other words, should their arguments be interpreted as being concerned with "differential influence" rather than a "differential distribution" of deaths through assisted suicide?[29]

It is telling that Lindsay never flatly says "no" by way of reply. In failing to do so, he virtually begs us to consider the accuracy of his suggestion that a differential distribution claim is "[p]rominent among the arguments against the legalization of assisted suicide."[30] As importantly, it also gives us cause to think that the argument from quotas that he develops and deploys, achieves no major victory — or at least none worth celebrating — against equality-minded critiques of assisted suicide proposals.

To test these possibilities, let us briefly examine the sources on which Lindsay builds his case, and ask whether he has given us any persuasive reasons for believing that those texts, individually or collectively, are primarily or exclusively playing a numbers game.

We begin where Lindsay does, with what he calls "the most influential statement"[31] of the differential distribution argument: language from the much-quoted report issued by the New York State Task Force on Life and the Law, which, he says, "counseled against legalization of assisted suicide, in part, because those 'most vulnerable to abuse, error, or indifference are the poor [and] minorities.'"[32] What can be squeezed out of these few words? Is there some claim about proportionality (implicit) in the suggestion that those "most vulnerable to abuse, error, or indifference are the poor [and] minorities"? Is the worry that the poor and others who are

socially subordinated will be "most vulnerable to abuse, error, or indifference" under a law permitting assisted suicide the equivalent of an argument that they will be *disproportionately* represented among those who take advantage of such a law? Perhaps.

But before deciding one way or the other, one should have the full argument from which Lindsay selectively quotes.[33] According to the Task Force report:

> [I]t must be recognized that assisted suicide and euthanasia will be practiced through the prism of social inequality and prejudice that characterizes the delivery of services in all segments of society, including health care. Those who will be most vulnerable to abuse, error, or indifference, are the poor, minorities, and those who are least educated or empowered. This risk does not reflect a judgment that physicians are more prejudiced or influenced by race and class than the rest of society — only that they are not exempt from the prejudices manifest in other areas of our collective life.
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> While our society aspires to eradicate discrimination and the most punishing effects of poverty in employment practices, housing, education, and law enforcement, we consistently fall short of our goals. The costs of this failure with assisted suicide and euthanasia would be extreme. Nor is there any reason to believe that the practices, whatever safeguards are erected, will be unaffected by the broader social and medical context in which they will be operating. This assumption is naïve and unsupportable.
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> Even our system for administering the death penalty, which includes the stringent safeguards of due process and years of judicial scrutiny, has not been free of error or prejudice. For example, blacks who kill whites are sentenced to death at nearly 22 times the rate of blacks who kill blacks and more than seven times the rate of whites who kill blacks. Euthanasia is not a death sentence — it is not imposed on an individual by the state but administered with consent. The process for obtaining consent, however, will be blanketed in the privacy of the doctor-patient relationship. In that relationship, blatant prejudice may not be prevalent, but the more subtle biases that operate in our health-care system will shape the consent process and the decisions made by patients.[34]

In light of the Task Force's central argument here — that "assisted suicide and euthanasia will be practiced through the prism of social inequality and prejudice that characterizes the delivery of services in all segments of society, including health care"[35] — why should we (indeed, how, properly, can we) simply assume as Lindsay does (and, apparently, would have us do), that the Task Force was moved to oppose legalization of assisted suicide, in part, out of concern with the proportional distribution of deaths along inequality lines?[36] Why should we interpret the Task Force's report as significantly, much less primarily or exclusively, advancing an equality-based proportionality claim? Lindsay provides no explanation.

A similar point can, and should, be made, about Lindsay's reading of Professor George Annas's remarks — remarks that Lindsay describes as "perhaps best captur[ing]"[37] "[b]oth the claims and the perceived strengths of this [proportionality] argument."[38] As Annas writes:

> The most powerful argument against the legislative expansion of the power of physicians to assist patients in suicide is the danger that this greater latitude will result in abuses that disproportionately affect especially vulnerable populations — the poor, the elderly, women, and minorities. In a country that treats the dying as "freaks," already marginalized members of society could be deprived of their human rights by making them appear somehow less than fully human. This is especially true in the context of cost containment and economic constraints.[39]

Lindsay's reading of this passage, presumably, places a great deal of weight on the word "disproportionately" and the language immediately following it: "disproportionately affect especially vulnerable populations — the poor, the elderly, women, and minorities." But is this the best or most plausible reading of what Annas writes? Why should we not, for instance, read Annas's reference to "abuses that disproportionately affect vulnerable populations" as directing our attention to what is arguably a more fundamental concern: that "[i]n a country that treats the dying as 'freaks,' already marginalized members of society could be deprived of their human rights by making them appear somehow less than fully human"? Could it be that Lindsay, or we, should interpret this passage "as being concerned with [a] 'differential influence' rather than a 'differential distribution' [claim]"? Especially since Lindsay recognizes the possibility that he has misread the sources on which he relies, including this one, it is important for him to say. And a big lacuna in what he writes that he chooses not to do so.

To put the general point somewhat differently, what is missing from Lindsay's analysis is any sound interpretive argument that would tell us why he reads the texts he does as advocating a differential distribution claim, and why alternative readings, which would emphasize the differential influence claim that they might be interpreted to make,[40] are wrong.[41]

The closest we may have to such an argument arrives fairly late in Lindsay's analysis, where he implies that he has

not been unfaithful to "the intent of those who appear to advocate the 'equalization of risk' version of the disparate impact argument,"[42] without ever expressly saying so. He defends his position this way:

> I would say that these arguments cannot be read as being solely concerned with differential influence…. [T]aking [Professor Susan M.] Wolf as an example, she emphasizes repeatedly that she is concerned with the *number* of women who would be pressured into assisted suicide. Thus, she states that there are "numerous reasons to expect that women would request assisted suicide at higher rates than men and that their requests would be differentially granted," and that "there is ample reason to expect that women may more often seek assisted suicide and that physicians may more frequently acquiesce." Understandably, because different death rates may indicate an increased susceptibility to manipulation or subtle pressure, Wolf does couple concern over the numbers with concern over the reasons women might disproportionately seek assisted suicide: "These facts raise the question of whether women would more often seek assistance or do so for different reasons and would die in greater numbers than men if assisted suicide were legitimated." However, the fact that Wolf expresses this other concern [with differential influence] does not eliminate her concern about the 'number' of women who would seek assisted suicide. If numbers are a concern, then quotas are a solution to that concern.[43]

There is something to this point. It is correct that, in the article on which he relies, Wolf does repeatedly express a concern about the number of women, compared to the number of men, who might commit assisted suicide were the practice to become legal.[44] And it is likewise fair to propose that Wolf's concern with differential influence does not, without more, negate (or to use Lindsay's term, "eliminate"[45]) her worry about "the *number* of women who would be pressured into assisted suicide."[46] She expresses an interest in both.

But this is emphatically not to say — and Lindsay never does — that Wolf's equality analysis of arguments for legalization of assisted suicide is *driven by concern over the numbers*. This is a good thing, too, because Wolf tells us expressly that it is not. After making the observation, quoted by Lindsay, that "there is ample reason to expect that women may more often seek assisted suicide and that physicians may more frequently acquiesce,"[47] Wolf immediately goes on to add (in language that Lindsay does not mention) that: "[A]side from the sheer frequency issues, women's requests for assistance and physicians' acquiescence may often be a product of background gender disparities and sexism."[48] And in the very next sentence (also not provided): "*Thus even if the numbers were no different, there would be cause for concern*."[49] As this language unambiguously reveals, Wolf's comments about the possibility of some differential distribution of deaths in a system of legalized assisted suicide along group-based lines *derives* from a deeper, equality-based concern: that background social inequalities could shape the decisions that patients and physicians would make under facially neutral "death with dignity" laws.[50] Not, as Lindsay's text can be read to hint, the opposite way around.

How quoting Wolf "as an example" thus can (or does) help Lindsay show that he has not distorted equality-based opposition to legalization of assisted suicide is difficult to discern. Equally puzzling is how Wolf's text proves that equality-based opposition to legalizing assisted suicide is properly "interpreted as being ["primarily"[51] or largely or chiefly] concerned with … 'differential distribution.'"[52]

All this positions us to see the bigger point toward which we have been heading: Without giving persuasive reasons for his interpretation of the texts on which he relies, or any at all, and explaining why his interpretation of those texts is better than available alternatives, Lindsay has some serious problems of his own. At a minimum, we have no reason — certainly, no very good reason — to agree that the differential distribution argument on which Lindsay repeatedly focuses is, in fact, "prominent" within the assisted suicide literature.

Unraveling Equality Guarantees

But the problems run deeper than that. Even if the proportionality argument were "prominent," once it is understood that defenders of equality have developed more basic critiques of assisted suicide proposals from which concerns about proportionality (when they do) flow, the rejoinder Lindsay offers (remember that alarmist word "quotas"?) is nothing like the profound disturbance of the equality-based opposition to legalized assisted suicide Lindsay supposes. Quotas do not show that the equality-based arguments, generally, are either "unsound [or] misdirected." Quotas have nothing to say, for instance, about the equality-based differential influence concerns equality-minded critics of legalization have ventured. Not a thing at all.

To explain, consider an example that Lindsay himself provides.[53] Assuming *arguendo* that legalization of assisted suicide would not cause women to take their lives with another's help more often than men, it could still well be the case (and this is a differential influence argument, just to be clear) that women who did so might engage in assisted suicide for reasons different from men — reasons relating (to borrow Wolf's expression) "to background gender disparities and sexism."[54] To be sure, sex inequality may not only affect the decisions that women make whether to commit assisted suicide, but men's, or at least some men's, as well. As I have argued elsewhere, HIV-infected gay men and gay men with

AIDS may also be influenced by discriminatory sexual norms to take their lives with another's help because death is what those norms dictate gay men, as such, should want.[55]

These illustrations help shed light on why equality-minded critics of legalization have argued that social inequalities, including sex-based inequalities, may condition the reasons patients choose to commit assisted suicide, the reasons physicians (or others) choose to assist, as well as public attitudes toward decriminalization of the practice.[56] There is much more to say, but enough already has been said to bear out the observation: One can successfully propound the equality-based critique of the case for legalizing assisted suicide without ever once mentioning proportionality, the cornerstone of Lindsay's confident, critical analysis.

Lindsay effectively concedes as much — that quotas in no way address the "differential influence" arguments against legalizing assisted suicide — when he supplements his argument from quotas with an independent account that aims to demonstrate that those arguments, like their differential distribution cousin, do "not provide a tenable basis for opposing legalization."[57] In language worth repeating at some length, he writes:

> [A]n argument that assisted suicide should not be legalized unless and until women (blacks, the disabled, and other vulnerable groups) choose assisted suicide for the "right" reason rests on theoretical foundations that may be shakier than a disparate impact argument that focuses primarily on death rates. Some of the issues that would need to be addressed and resolved before this argument would acquire any persuasive power would include the following: Which reasons count as the "wrong" reasons for choosing assisted suicide? … [Is it] morally questionable for a person who is terminally ill to take the interests of others into consideration when deciding whether to choose assisted suicide[?] … Is it somehow better if a person is motivated exclusively by a desire to relieve her own pain and suffering instead of having dual or multiple motives, some of which may be described as either self-sacrificing or altruistic?
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> This points to another issue, namely the difficulty of determining — except in the most blatant cases of duress — that a person was choosing assisted suicide for the "wrong" reasons. Critical decisions in one's life are often made for mixed motives, which usually resist analysis into discrete and quantifiable components. Other than the words out of the mouth of a competent person requesting assisted suicide, which I suspect most advocates of the disparate impact argument would not wholly trust, what metric could we possibly devise for measuring the influence of "right" as opposed to "wrong" reasons? Ultimately, we would be forced to look at the "numbers" anyway to see if there was a suspicious pattern developing.
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> Furthermore, would not an argument that assisted suicide remain unlawful until the vulnerable are as unconstrained in their decision-making as the more fortunate be the equivalent of an argument that the ban on assisted suicide continue indefinitely? Certainly, if we believe the vulnerable may be differentially influenced as long as there is racism, sexism, and ageism, there does not appear any likelihood that these pernicious patterns of behavior will be substantially eradicated for generations. Perhaps delaying indefinitely the legalization of assisted suicide is the goal. However, while there is nothing inherently improper about supporting an indefinite ban on assisted suicide, it would be more helpful to the public policy debate if this position were openly adopted rather than hidden behind the argument that assisted suicide should be conditioned on circumstances that are exceedingly unlikely to obtain in the foreseeable future.[58]

For the time being, let us put aside how these comments undermine claims that other proponents of assisted suicide have previously made, about the reliability of safeguards and regulations designed to ensure that only "truly voluntar[y]"[59] and informed choices to commit assisted suicide will be honored in an assisted suicide-permissive regime — safeguards and regulations that have not been limited to detecting "the most blatant cases of duress"[60] — or not, perhaps, until now.[61] More to the issue at hand, the weaknesses Lindsay sees in the differential influence arguments against legalization exposes the depth of the resistance within his analysis to the challenge that equality-based opposition to legalized assisted suicide poses.[62] According to Lindsay, that opposition has not "acquire[d] any persuasive power."

This is, of course, a normative claim, and as such, requires justification to do any serious work. Lindsay, evidently, would (or does) reject the view, offered by some equality-minded opponents of legalization, that it makes no sense to talk about autonomy abstractly, divorced from the pervasive social reality of inequality, which shapes and conditions the capacities that individuals have "freely" and "voluntarily" to "choose."[63] Viewed from that perspective, however, Lindsay's text does not only (often) miss the point, it also makes little sense. How, for example, are we properly to appeal to a moral conception of autonomy — like Lindsay's — that suppresses or excludes consideration of existing forms of social inequality or otherwise disparages the notion that there is any relationship between social inequality and the practice of assisted suicide — either now or in the future?[64] As a claim about current social reality, what is the justification for this version of "autonomy," hence the claims to which it

gives rise?[65] We are not told — which only heightens the suspicion that there is none to be offered.

Having come this far, we are positioned to see some of the questions that the differential influence arguments against legalization raise, which Lindsay's text glosses over, even though they are readily found in the literature he engages: Why, for example, are individuals' decisions to commit assisted suicide, to help someone do it, or to vote for a law that allows it morally acceptable reasons commanding respect as "autonomous" choices when they reflect or reinforce discrimination? Why are such decisions — like, say, discriminatory employment decisions — not, at least presumptively, irrational or illegitimate as a matter of morality or law?[66] Is it a moral concern, say, if a (homophobic) physician helps a gay man with AIDS to commit physician-assisted suicide *as a practice of discrimination*? Should it be regarded as a legal concern? I have begun to articulate reasons here and elsewhere for thinking that it is both.[67] And that that is a justification for not supporting legalization of the practice. If Lindsay disagrees,[68] he has to explain why, and then how he is going to limit the principle animating his disagreement to the context of assisted suicide. Otherwise, that disagreement risks unraveling equality guarantees across the moral and legal board.[69]

One can, of course, maintain that it is of no moral or legal moment whether decisions about assisted suicide are produced by inequality or otherwise perpetuate it. Some, no doubt, do (or would) find this position intensely appealing. But from it, it is a small step to denying that what happened at Tuskegee happened to poor African-American men, as such, and was racist and classist in cause and in effect.[70]

Empty Promises of Equality

Perhaps I have been too quick to suggest that Lindsay has missed the point of the equality-based critiques of the argument for legalizing assisted suicide. After all, he *does* propose that: "if we believe the vulnerable may be differentially influenced as long as there is racism, sexism, and ageism, there does not appear any likelihood that these pernicious patterns of behavior will be substantially eradicated for generations."[71] Equality-based objections to legalization (notice: not inequality or injustice), Lindsay also writes, "erect[] a barrier to the exercise of [the] rational, moral choice [of assisted suicide] by anyone, including members of disadvantaged groups."[72] Elsewhere, he asks: "[W]ould not an argument that assisted suicide remain unlawful until the vulnerable are as unconstrained in their decision-making as the more fortunate be the equivalent of an argument that the ban on assisted suicide continue indefinitely?"[73] Why, he wishes (and wishes us) to consider, should we hold individual autonomy "hostage"[74] to inequality when "[c]ontinuing to prohibit assisted suicide may not advance us one step toward an equitable distribution of effective medical care"?[75] Why, indeed?[76] Then again, one might also ask: Why fuss about inequality at all?[77]

The answer must be, at least in part, one that Lindsay himself provides: "We should not be dismissive of concerns about prejudice or social injustice."[78] Equality is a moral and legal requirement, and not (despite suggestions sometimes to the contrary) just some worthy, but anemic, moral or legal "ideal." With what reason, then, are we to say that Lindsay's text is adequately responsive to prejudice and social injustice,[79] when he flatly declares that "continuing the ban on assisted suicide will do nothing to solve these problems,"[80] and then implies that there is, therefore, "no morally persuasive reason legalization of assisted suicide should be conditioned on equalizing the risk faced by the vulnerable and the less vulnerable"?[81] Especially when a few sentences later, he writes: "If … the risks [of assisted suicide] are acceptably low, it is not clear why we must wait until these risks are shared equally by members of all groups before making this option available."[82]

Is it not "dismissive of concerns about prejudice or social injustice" — even in the least — to propose that we can properly legalize assisted suicide notwithstanding existing forms of social inequality *because* it "does not appear … that these pernicious patterns of behavior will be substantially eradicated for generations"? If meaningful social equality were closer on the horizon, could a principle of equality *then* properly condition legalization on "the vulnerable [being] as unconstrained … as the more fortunate" are?[83] Without denying that determinations of political expedience can be — or are — moral determinations, are we to believe that equality (or justice, more generally) should depend on what "the more fortunate" are politically willing to give up — or do?

I think not. And, to some extent, I think Lindsay would agree. In the last analysis, his argument is not utterly dismissive of equality concerns. Lindsay's text advocates attending to those concerns, for instance, *once we have legalized assisted suicide*. Here is what it says:

> [A] modified version of this sort of analysis (that is, one that does not focus exclusively on so-called vulnerable groups) should be used in monitoring the consequences of assisted suicide *post*-legalization. Potential disparate impact may not by itself counsel against legalization, but because gross discrepancies in the rates at which members of various groups request assisted suicide can be evidence of patterns of coercion or other significant problems in the procedures through which assisted suicide is requested and administered, it is worth keeping track of the rates at which blacks as opposed to whites, women as opposed to men, and so on are requesting assisted suicide.[84]

This proposal is not entirely unappealing. But it is not immediately obvious why equality should count as a moral or legal principle that can be used to evaluate a law permit-

ting assisted suicide only after such a law has been enacted and operationalized, but not before. Without an adequate argument to that effect (an argument that we do not now have), the professed commitment to equality is little more than a pretty and "politically fashionable"[85] move wandering in search of solid normative ground. And with it? The claimed sensitivity to equality would be no more than a simulacrum of the commitment to equality that Lindsay's text otherwise staunchly opposes. If so, why should we believe the promise Lindsay's text offers — that equality will serve as a real check on "autonomous" decision-making *post*-legalization — is (or will be) a meaningful one? In light of his decision not to burrow deeply into the data from the "Oregon experience" with assisted suicide, why should we not suspect that it is (or will be) hollow?[86]

And so we must ask: Who can afford the vision of equality offered as a fig leaf by Lindsay's text?[87] The privileged may be in a position to do so. But those who are most in need of equality — meaning those whose choices about life and death are most constrained by their lack of social privilege, by their social subordination — assuredly cannot. They do not have the luxury to sacrifice equality to autonomy so that they can kill themselves before they die.[88] Their lives are lives that are already devalued by inequality, their deaths, often already deaths that inequality — not some idealized concept of autonomy — causes. How, for them, will the legalization of assisted suicide help? How, in Oregon, has it? If, as Lindsay's text can be interpreted to admit, it will not and has not, how is legalizing assisted suicide an answer — especially when, as others have repeatedly explained, it may only make matters worse?[89]

Privilege and Policy

With these thoughts in mind, we come to the reasons we can and should be happy that Lindsay's attempt to vanquish equality-based opposition to legalizing assisted suicide fails to achieve its goal. To put it bluntly: Without incorporating a critique of existing social inequalities into his conception of autonomy, his argument against egalitarian objections to legalization of assisted suicide functions as a defense of privilege.

This problem is his, but not his alone. We cannot overlook the ways in which Lindsay's argument derives much of whatever force it has from the privilege and power that, to a considerable but still considerably unnoticed extent, have defined the modern bioethics project. As with Lindsay's text, both within the assisted suicide debate and beyond it, equality-based concerns have been, and are, easily and quickly dismissed, shuttled to the end of the bioethics agenda, to be taken up, if at all, only within the confines of the agenda that privilege, with all its power, has controlled.

Without denying the many merits of the endeavors one might mention, it is about time someone asked: Were the establishment of the genome project, developments in stem cell research, or current efforts to devise gene therapies, to mention a few well-known examples, projects that were called for by members of socially subordinated groups? If those groups had had the power to decide, would they have placed these presumably worthwhile projects in the place they currently occupy at or near the top of the scientific agenda? Maybe yes and maybe no. I myself strongly suspect that there were — and are — more pressing health-related projects that they would have identified instead, projects that remain undervalued, under-attended, and under-funded — when that.[90]

Privilege has not managed to set national policy in favor of legalized assisted suicide — in the name of some vision of "autonomy" that fails to account for the lived social realities of the socially subordinated, or anything else — *yet*. But unlike Lindsay, I see this as reason for hope and not concern. Certainly, it is no cause for righteous indignation.

The continued success of the equality-based opposition to legalizing assisted suicide, both before Lindsay's report and after, provides an important counterpoint to the lesson modern bioethics has taught us time and again: As a principle of ethics, to be followed in bioethics and law, legislating privilege will not always suffice. Understood as an expression of a commitment to equality, the current ban on assisted suicide can be interpreted to say: Equality sets limits that privilege must respect. At least for those who favor the ideal of equality, continuing to prohibit assisted suicide should be seen as the right thing to do.

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References

1. Judge Stephen Reinhardt, for example, chooses to ridicule rather than fully engage the equality concerns with legalization of assisted suicide in his *en banc* opinion in *Compassion in Dying v. Washington*. Judge Reinhardt characterizes them (or perhaps more exactly, some of them) as "disingenuous," "fallacious," "meretricious," "discredited," and "ludicrous on [their]

face." *Compassion in Dying v. Washington*, 79 F.3d 790, 825 (9th Cir. 1996) (en banc), *rev'd sub nom. Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258 (1997). For thoughts on such heated judicial remarks, see M.S. Spindelman, "Reorienting *Bowers v. Hardwick*," North Carolina Law Review, 79 (2001): 359–491, at 392–93 & nn.103–104. For an argument that can be described not inaccurately as "dismissing" the sex equality concerns with legalizing the practice, at least to the extent that it suggests such concerns may cut the other way, see J.A. Parks, "Why Gender Matters to the Euthanasia Debate," *Hastings Center Report*, 30, no. 1 (2000): 30–36. For a related discussion, see Y. Kamisar, "Physician-Assisted Suicide: The Problem Presented by the Compelling, Heartwrenching Case," *Journal of Criminal Law and Criminology*, 88 (1998), 1121–46, at 1127–33.

2. Literally dozens and dozens of articles have appeared in the last several years — years in which the equality-based arguments against legalization of assisted suicide were simply too widely known to have been "missed" — that do not mention the equality arguments *at all*.

3. R.A. Lindsay, "Should We Impose Quotas? Evaluating the "Disparate Impact" Argument Against Legalization of Assisted Suicide," *Journal of Law, Medicine & Ethics*, 30, no. 1 (2002): 6–16.

4. *Id.* at 6.

5. *Id.*

6. *Id.*

7. *Id.* (emphasis added) (footnote omitted).

8. *Id.* at 7 (emphasis added).

9. *Id.* at 14.

10. See also, e.g., *id.* at 7 ("[O]pponents of assisted suicide who use the disparate impact argument move unhesitatingly from the prediction that legalization will have a disparate impact on one group or another to the claim that this disparate impact, by itself, counsels against legalization."); *id.* at 9 ("[P]roponents merely assume that if legalized assisted suicide would have a disparate impact, this must constitute a substantial reason against legalization. This assumption is unwarranted, unless, at a minimum, denying persons the option of assisted suicide can be analogized to denying employers, landlords, or educational organizations the option of using selection practices and procedures that disproportionately deny opportunities to members of statutorily protected groups without any legitimate countervailing purpose."); *id.* at 10 ("That is, one could not argue that even if proportionately more women, blacks, disabled persons, and other protected groups are manipulated or pressured into choosing assisted suicide, this imbalance can be justified by the importance of providing to those who want (and arguably need) assistance in dying the option of assisted suicide."); *id.* at 11–13. *See also infra* note 40.

11. *Id.* at 7. See also *id.* at 11 ("so-called vulnerable groups").

12. *Id.* at 7 ("Thus, opponents of assisted suicide who use the disparate impact argument move unhesitatingly from the prediction that legalization will have a disparate impact on one group or another to the claim that this disparate impact, by itself, counsels against legalization.").

13. *Id.* at 6 (footnote omitted).

14. *Id.* at 11.

15. *Id.* See also *infra* note 41.

16. *Cf.* I.M. Young, *Justice and the Politics of Difference* (Princeton, New Jersey: Princeton University Press, 1990): at 15–38.

17. Lindsay, *supra* note 3, at 11.

18. *Id.*

19. *Id.*

20. *Id.* at 12.

21. *Id.*

22. *Id.* at 7. See also *id.* at 11 ("[I]t is largely because of suggestions such as these that the disparate impact argument sometimes appears disingenuous.").

23. *Id.* at 12.

24. *Id.* at 7.

25. *Id.* at 12.

26. *Id.* at 12.

27. *Id.* at 6.

28. *Id.* at 12.

29. *Id.* I previously suggested this distinction to Lindsay. Though I think it helps roughly to capture a difference between two equality-based arguments that Lindsay deals with, I remain wary of the way the distinction potentially collects and compresses a complex and developing set of analyses under the sign of "differential influence arguments."

30. *Id.* at 6.

31. *Id.* at 15 n.2.

32. *Id.* at 6 (citation omitted).

33. Later in his analysis, Lindsay does give us some of the additional language from the Task Force's report, see *id.* at 13, which I set forth in the text. *See infra* text accompanying note 34. Nevertheless, he does not do so in order to make the argument that he has not "misread" the Task Force's argument.

34. New York State Task Force on Life and the Law, *When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context* (New York: New York State Task Force on Life and the Law, 1994), at 125–26. See also *id.* at vii–viii, ix, xiii.

35. *Id.* at 125.

36. Accord C.H. Coleman, "The 'Disparate Impact' Argument Reconsidered: Making Room for Justice in the Assisted Suicide Debate," *Journal of Law, Medicine and Ethics*, 30, no. 1 (2002): 17–23, at 19 ("In fact, the New York State Task Force on Life and the Law … did not even make a disparate impact argument, at least not as that term is generally used in Title VII litigation.").

37. Lindsay, *supra* note 3, at 6.

38. *Id.* at 6.

39. G.J. Annas, "Physician-Assisted Suicide — Michigan's Temporary Solution," *N. Engl. J. Med.*, 328 (1993): 1573–76, at 1575.

40. Lindsay recognizes that a number of equality-minded critics of legalization of assisted suicide have developed such "differential influence" arguments, and shows he is well aware of those arguments. See, e.g., Lindsay, *supra* note 3, at 11–13. But this only underscores how important it is for the success of his project to provide an interpretive argument justifying his belief that differential influence claims do not ground proportionality claims. Had Lindsay produced such an interpretive argument, he might not have needed to "[a]dmit[]," *id.* at 13, that "many advocates of the disparate impact argument do not consider equalization of pressured choices across groups the point of using disparate impact analysis." *Id.* at 13. See also *infra* note 41 (wondering whether anyone does). It might also have helped to clarify other interpretive moves he makes without providing reasoned interpretive arguments for them. At one point, for example, Lindsay seems to suggest that some equality-based arguments against legalizing assisted suicide seek only to "rais[e] the standard of medical care to such a high level that scarcely anyone from any group would be in danger of being pressured into assisted suicide." *Id.* at 13. See also *id.* at 7 ("[I]f our underlying concern is the lack of equal access to effective medical care (and this appears to be the concern of many advocates of the disparate impact argument against assisted suicide), then it is unclear how prohibiting assisted suicide will get us any closer to the goal of

effective medical care for all."). But do they? Or are they pressing, more broadly, for social equality, including equality of medical care? See *id*. at 13–14. To put the point somewhat differently: What would "raising the standard of medical care to such a high level that scarcely anyone from any group would be in danger of being pressured into assisted suicide" actually or effectively require in terms of equality outside of the medical context (however that is defined)? Could we enable individuals to make choices in the medical context that are not constrained by social inequality without also making equality a meaningful social reality in the rest of the social world? If not, does Lindsay give adequate credit to those whose arguments he describes as offering an "'affordable and accessible health care for all' version of the disparate impact argument"? *Id.* at 13.

41. The same holds true for the sources he cites in his footnotes, see, e.g., *id.* at 14–15 nn.2–6, and his proposal that the concern of the "proponents of this [disparate impact] argument is that abuses in [a regime of legalized] assisted suicide will disproportionately affect especially vulnerable populations." *Id.* at 11. According to Lindsay, this argument can be understood to advocate the "equalization of the risk of an improperly hastened death among our nation's various racial, ethnic, and other groups[.]" *Id.* "[A]cceptance of that goal," he writes, "implies that pressure to 'choose' assisted suicide is acceptable as long as, for example, white males are coerced as often as black females." *Id.* "[W]ould it make a difference in our conclusion," he later asks, "if somehow we were able to ensure that no more than half of those pressured to choose assisted suicide were women?" *Id.* "Intuitively, these propositions seem morally dubious," he continues, adding: "and, in any event, nowhere in the literature can we find any reasoned argument in support of such propositions." *Id.* Lindsay does not discuss the possibility that the reason he can find no "reasoned argument" to this effect in the literature is that no equality argument in favor of *equalizing abuse* exists. Indeed, so far as I am aware it does not — except in what Lindsay writes. To assess Lindsay's suggestion to the contrary, then, we need some interpretive analysis of the texts where he implies that he finds this argument being made. But he gives us none. Not even a single citation to a source he reads as advancing such a claim.

As an aside, I must note my agreement with Carl Coleman's insightful explanation why the answer to Lindsay's question — "Is [equalization of abuse] the real concern of those who advocate disparate impact analysis?," *id.* at 11 — is an emphatic "no." As Coleman writes: "Lindsay misses the point when he suggests that those concerned about the distribution of risks associated with legalization simply want to equalize the number of people from various groups who 'seek assisted suicide.'… It would be ridiculous to impose a quota on the number of cases that are provided in unethical circumstances. If we could identify those cases in advance, the appropriate response would be to intervene to stop them, not to tally them up until we are confident that members of all social groups are subject to equivalent levels of abuse." Coleman, *supra* note 36, at 19 (footnote omitted).

42. Lindsay, *supra* note 3, at 12. See also *supra* note 41.

43. Lindsay, *supra* note 3, at 12 (footnotes omitted). Why, one might wonder, is "solely" the standard? It would be enough to show that Lindsay has "misread" (his word) the sources on which he relies if the concern with numbers he sees is motivated by a deeper concern with "differential influence." See *id.* at 12.

44. See, e.g., S.M. Wolf, "Physician-Assisted Suicide, Abortion, and Treatment Refusal," in R.F. Weir, ed., *Physician-Assisted Suicide* (Bloomington, Indiana: Indiana University Press, 1997): 167–201, at 167, 168, 179. See also, generally, S.M. Wolf, "Gender, Feminism, and Death," in S.M. Wolf, ed., *Feminism and Bioethics: Beyond Reproduction* (New York: Oxford University Press, 1996), 282–317, at 283.

45. Lindsay, *supra* note 3, at 12.

46. *Id.*

47. Wolf, "Physician-Assisted Suicide, Abortion, and Treatment Refusal," *supra* note 44, at 180.

48. *Id.*

49. *Id.* (emphasis added). See also, e.g., *id.* at 168 ("These facts raise the question of whether women would more often seek assistance or do so for different reasons *and* would die in greater numbers than men if assisted suicide were legitimated.") (emphasis added).

50. In this sense, one might say that the "disparate impact" arguments under Title VII that Lindsay deals with could, and maybe should, be cited exactly in support of the equality-based opposition to legalized assisted suicide, even if nobody has yet prominently claimed they should be. See, e.g., Coleman, *supra* note 36, at 19 ("No one ever claimed that it did.").

51. Lindsay, *supra* note 3, at 12.

52. *Id.* See also *supra* note 27. Unfairly, I think, Lindsay takes aim at Susan Wolf's observation that: "The demand for assisted suicide is a demand for a third party's involvement in purposefully ending a woman's life. That is something women already have in abundance and most people decry. Women are differentially the victims of fatal domestic violence." Lindsay, *supra* note 3, at 11 (footnote omitted). After quoting this language, Lindsay writes: "Thus, Wolf implies that, for her, assisted suicide is morally equivalent to a husband murdering his wife." *Id.* This does not follow, certainly not the way Lindsay presumes. Wolf's point in making this comparison, I take it, is that sexual violence, including sexualized murder, is sexual violence, no matter that the victim can be said to have "asked for it," or that it is perpetuated by a spouse or partner or a physician. Neither the sex nor the social role of the perpetrator of such violence renders it not sexualized or sex-based. Recognizing this may help give women, to quote Wolf herself, "the freedom [they need] to fend off unwanted invasions of all sorts, sexual, violent, and medical." Wolf, "Physician-Assisted Suicide, Abortion, and Treatment Refusal," *supra* note 44, at 177. See also Wolf, "Gender, Feminism, and Death," *supra* note 44, at 292–94, for further discussion of this point. See also *infra* text accompanying note 55. Nothing Wolf writes here, or at least nothing Lindsay gives us, justifies his interpretation of Wolf's point. Indeed, given Wolf's equality-based arguments against assisted suicide, which do not entirely foreclose the possibility of legalizing the practice at some point down the road (see, e.g., Wolf, "Gender, Feminism, and Death," *supra* note 44, at 306–08), it is "tendentious" for Lindsay to say: "given her view of its morality, Wolf's extended consideration of the sociological impact of assisted suicide becomes extraneous." Lindsay, *supra* note 3, at 11. Likewise his command that "Wolf should just assert that assisted suicide is as morally as objectionable as murder and be done with it." *Id.*

53. *See id*., at 11.

54. Wolf, "Physician-Assisted Suicide, Abortion, and Treatment Refusal," *supra* note 44, at 180.

55. M.S. Spindelman, "Some Initial Thoughts on Sexuality and Gay Men with AIDS in Relation to Physician-Assisted Suicide," *Georgetown Journal of Gender and the Law* 2 (2000): 91–105, at 102 ("[L]esbians and gay men may be afforded a right to an autonomous death because dominant cultural norms suggest that death is what they do or should desire.").

56. See generally *id*.; Wolf, "Gender, Feminism, and Death," *supra* note 44.

57. Lindsay, *supra* note 3, at 12.

58. *Id.* at 12.

59. *Id.* at 6.

60. *Id.* at 12.

61. But see, e.g., *id.*, at 10 ("manipulated or pressured into choosing assisted suicide").

62. See also *supra* note 11.

63. Wolf, "Gender, Feminism, and Death," *supra* note 44, at 300 & n.77 ("Martha Minow, too, presents a vision of autonomy that resists the isolation of the self, and instead tries to support the relational context in which the rights bearer is embedded.") (citing M. Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca, New York: Cornell University Press, 1990); *id.* at 315 n.78 and sources cited therein. See also, e.g., M. Minow and E.V. Spelman, "In Context," *California Law Review*, 63 (1990): 1597–652.

64. See, e.g., Lindsay, *supra* note 3, at 7, 12, 13–14.

65. Perhaps more troubling still is the suggestion Lindsay seems to make that "any disparate impact [following from legalization] is [or would be] the unfortunate, but necessary price that must be paid for respecting a critical autonomy interest." *Id.* at 10.

66. *Cf.* C.E. Schneider, *The Practice of Autonomy: Patients, Doctors, and Medical Decisions* (New York: Oxford University Press, 1998), at 149–50; R. Walker, "Two Concepts of Autonomy" (draft manuscript on file with author) (arguing for rationality within the concept of "autonomy").

67. See Spindelman, *supra* note 55, at 102.

68. Honestly, I cannot say with any certainty whether he does or would. *Compare* Lindsay, *supra* note 3, at 9 ("I am making what I hope is the uncontroversial assumption that discrimination based on categories such as race and sex is morally unjustified."), *with id.* at 10 ("[T]he impact of a practice on protected groups must be balanced against competing concerns."), *and id.* (According to equality objections to legalized assisted suicide, "one could not argue that even if proportionately more women, blacks, disabled persons, and other protected groups are manipulated or pressured into choosing assisted suicide, this imbalance can be justified by the importance of providing to those who want (and arguably need) assistance in dying the option of assisted suicide. In other words, one could not argue that any disparate impact is the unfortunate, but necessary price that must be paid for respecting a critical autonomy interest.").

69. If Lindsay is correct, for instance, in claiming that health-care inequalities do "not entail that we must hold the autonomy of middle-class white males … hostage to these unfortunate inequities," why stop there? Lindsay, *supra* note 3, at 14. What is special about health-care inequalities? See *supra* note 40. He does not say. He does, of course, include "poor, disabled, black women" in the formulation of his idea, which thus might also be read also to say: Health-care inequalities do "not entail that we must hold the autonomy of … poor, disabled, black women … hostage to these unfortunate inequities." Lindsay, *supra* note 3, at 14. What does not seem to register in this analysis, though, is that talking about autonomy this way is an empty formality, impervious to substantive inequality. Are we, for instance, to believe that "middle class white males" and "poor, disabled, black women," though treated as formally equal, and surely normatively are, are equally free to escape (or not to be held "hostage to") the unfortunate, but material inequalities that exist in our own society and institutions? Are we to believe that they would be free to do so if only we legalized assisted suicide, notwithstanding existing social inequalities? *Cf.* Y. Kamisar, "Against Assisted Suicide — Even a Very Limited Form," *University of Detroit Mercy Law Review*, 72 (1995): 735–69, at 739 n.17.

70. See Coleman, *supra* note 36, at 21. In order to avoid any unnecessary confusion or misunderstanding about the point I am making in the text, I wish to underscore that what I mean to say here is this: "Autonomy talk" within bioethics, including Lindsay's text, often suppresses or elides, sometimes both, the ways in which equality and autonomy interact; thinking about the problems of Tuskegee solely in autonomy-based terms, as is often done, leaves out *huge* parts of what the moral wrongs committed there were (and are).

71. Lindsay, *supra* note 3, at 12.

72. *Id.* at 7 (emphasis removed).

73. *Id.* at 12.

74. *Id.* at 14.

75. *Id.* at 7.

76. See *supra* note 69.

77. See *id.*

78. Lindsay, *supra* note 3, at 12.

79. *Id.*

80. *Id.*

81. *Id.* at 12–13.

82. *Id.* at 13.

83. Thanks to my colleague Sharon Davies for helping me to see this point more clearly.

84. Lindsay, *supra* note 3, at 14.

85. *Id.* at 7.

86. In a footnote, Lindsay simply asserts, without more, that the data from the Oregon experiment "indicate that at least as far as race and sex are concerned there is (as yet) no correlation between death through assisted suicide (or euthanasia) and being a member of a vulnerable group." *Id.* at 15 n.8. If by this he means that women and blacks are not overrepresented among those who have committed assisted suicide under Oregon's assisted suicide law, he may or may not be correct. For now, I take no position on that matter. But *cf.* M. Spindelman, "The Year of Assisting Death: Report on Oregon's Assisted-Suicide Law Paints Too Rosy a Picture," *Legal Times*, Mar. 1, 1999, at 22. He does seem to suggest, however, without necessarily meaning to do so, that the Oregon law may be operating through the prism of privilege when he writes that, "[i]n fact, the empirical information can be interpreted as suggesting a different type of problem, namely that requests for assistance in dying made by women are less likely to be heeded than those made by men." Lindsay, *supra* note 3, at 15 n.8.

87. *Cf.*, e.g., *id.* at 14 ("[I]t may be premature to conclude that disparate impact analysis can never be relevant in the debate over legalized assisted suicide. It is possible, for example, that the argument could be strengthened by a compelling case for the premise that in the context of assisted suicide the difficulty of the choice for some does mandate elimination of the choice for all"). See also, e.g., *id.* at 10 (seeming to imply that "even if proportionately more women, blacks, disabled persons, and other protected groups are manipulated or pressured into choosing assisted suicide, this imbalance can be justified by the importance of providing to those who want (and arguably need) assistance in dying the option of assisted suicide"); *id.* (similarly seeming to propose that "any disparate impact is the unfortunate, but necessary price that must be paid for respecting a critical autonomy interest"); *id.* at 14 (discussing incorporation of equality concerns into evaluation of assisted suicide law post-legalization).

88. See *supra* note 69.

89. See Coleman, *supra* note 36, at 20.

90. This is part of the point that commentators make when discussing what Lindsay calls the "affordable and accessible health care for all" version of the disparate impact argument. See Lindsay, *supra* note 3, at 13–14. But this "version" of the disparate impact argument may be — and in some number of cases, surely is — part of a much larger social equality project. See *supra* note 40.