A Dworkinian puzzle

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Ladies and gentlemen, professor Dworkin,

On march 21 1998, former senator Edward Brongersma wrote a letter to his general practitioner, Philip Sutorius. Senator Brongersma had always been single, he had no children, and at age 86, he did not have many other living relatives either. Before his retirement he had been a busy man, he had practiced as a lawyer, he had been a criminologist at the university of Utrecht, and he had been a member of the Dutch senate. But these days were long gone. Now he was old, he no longer enjoyed his life, he wanted to die and he felt like death had forgotten him. He begged Sutorius to give him something to end his life.
Sutorius had several long conversations with Brongersma, consulted another doctor and finally decided to cooperate and to provide the lethal potion that Brongersma had asked for. On april 22 Brongersma took his own life, in the presence of his physician.

Sutorius reported this physician-assisted suicide to the proper authorities. The district attorney decided to prosecute him. The Haarlem court of law concluded that Brongersma had suffered unbearably and without prospect of improvement. That is the most important substantive condition for lawful euthanasia in the Netherlands. Sutorius had also followed all procedural guidelines. Thus, the Haarlem court of law decided to acquit him.
The prosecutor wasn't satisfied. In his opinion Brongersma had not really been ill, neither physically, nor psychologically. According to the prosecutor euthanasia and physician-assisted suicide are implicitly meant for patients, that is, for people with one or another pathological condition. The Amsterdam appeals court agreed with the prosecution. The appeals court consulted two expert witnesses, a professor in health law and a well-known professor of medicine. Both argued that most doctors would hesitate to step outside their allotted field of expertise and to provide dying aid to people who are not patients properly speaking. Hence, it seemed reprehensable or at least questionable that Sutorius had followed a different course of action.The Amsterdam court of appeals found Sutorius guilty, although it did not punish him, because Sutorius had acted very conscientiously and had reported his actions to the authorities.
Doctor Sutorius has asked the Dutch supreme court to reconsider the guilty verdict.

The supreme court will have to render a verdict some time in the near future. In my opinion this will be terribly difficult, because the supreme court finds itself stuck in a nightmare-like Dworkinian puzzle. In this talk I will try to describe this puzzle, and I hope that professor Dworkin will be able to find a way out of it.

The central message of Dworkin's *Life's Dominion* seems to be that right's talk isn't always right. In fact rights's talk can prevent us from understanding each other, it can make us focus on our differences instead of our shared understandings, it can prevent us from ever reaching consensus, it can lead to polarisation, it can trigger the violence that we can witness in the American debate about abortion between pro lifers and pro choicers. Instead of concentrating on rights we should try to find out what values we cherish and why, we should talk about the good life, good parenting, a good death and so on. That way we would be able to understand each other and to find compromise solutions that could do justice to several cherished values at the same time.

Well, I think we can say that the Dutch public debate on euthanasia has been close to the ideal propagated in *Life's Dominion*. The long debate about abortion in the Netherlands was much more clouded by rights talk and polarisation, although it never became as fierce as the abortion controversy in the US, possibly because we ended up with legislation that embodied some sort of compromise. Dutch pro lifers apparently found it easier to put up with the Dutch law on pregnancy termination than their American counterparts, who had to live with the Supreme Court verdict in Roe vs Wade.
But the debate on euthanasia which started in the sixties did not focus on rights. Recently the Dutch-American historian James Kennedy published a fascinating book on the history of euthanasia in the Netherlands. Kennedy found a few dominant characteristics in the Dutch euthanasia debate.

1. The debate focused on breaking taboos. Proponents of euthanasia argued that death should not be put away in hospitals, it should be part of life, we should be able to discuss it, and to organize it as far as possible according to our own preferences. We should be able to die at home, amidst our relatives, we should think about our funeral arrangements etcetera.
2. Euthanasia was discussed in context. Euthanasia was seen as a possible answer to the ever increasing possibilities of medical technology, it was to be an antidote for the power that physicians were widely believed to possess. During the first years of the euthanasia debate it was even discussed against a background of overpopulation, environmental problems, and the threat of a third world war. The much respected Health Council discussed the possibility of storage yards with medication for massive suicide in case of a nuclear attack.
3. Everybody seemed to value openness. The Dutch were unhappy with a medical practice that would take place in the dark. They intended to find out what was happening between doctors and patients and they wanted to establish some sort of control.
4. And last but not least, the Dutch debate on euthanasia was only partly about people's individual right to self-determination in matters of life and death. People had to ask for euthanasia, sure, although many participants in the Dutch euthanasia debate felt that we should not rule out that patients who could not utter a request (such as comatose patients, or severely handicapped newborns) could still be eligible for medical aid in dying. Self-determination was not a necessary condition, nor was it ever a sufficient condition. A doctor who commits euthanasia has to be convinced that his patient suffers unbearably, without prospect of improvement, and if this is not the case in the doctor's opinion, the doctor should not perform euthanasia, no matter how serious and well-considered the patient's request. The Dutch society for voluntary euthanasia has considered the possibility to have a selfhelp line, for determined suicidal people, like the Swiss have adopted. This would have been much more in line with a firm commitment to self-determination. But the Dutch society for voluntary euthanasia decided against it. Instead they went along with the medical regime, which relied heavily on doctors' discretion and doctors' compassion.

A critical observer with a legal background might find the Dutch euthanasia debate extremely fussy. There were altogether too much values at stake, concepts were not made clear and not put in practice consistently. But an observer who had just finished reading *Life's Dominion* might find the Dutch debate quite appealing, because of its comprehensive, multidimensional, multifaceted, multiprinciple approach.

Recently this debate culminated in the Law on euthanasia and physician-assisted suicide. During the parliamentary debates about this law, the Haarlem court of law issued its verdict in the Brongersma case. Hence a large part of the parliamentary debate was devoted to the question whether people like senator Brongersma would be eligible for physician-assisted suicide under the new legal regime. The government's position was clear: the new law was not meant to cover cases like the late senator's death. In order to qualify for euthanasia patients should suffer unbearable and without prospect of improvement. This condition would have to be evaluated by a doctor, and a doctor was not qualified to judge on matters outside his field of expertise. The criterion of unbearable suffering would lose its distinguishing potential if it were to be applied outside the medical domain.
My colleague Van Holsteyn and I did extensive public opinion research on various forms of euthanasia. We found that the government was quite in touch with public opinion on this issue. The average Dutch citizen does not agree with doctors who decide to provide aid in dying to people like senator Brongersma.

So, if the Supreme Court would want to do justice to the comprehensive and beautiful public debate which ended with the adoption of the euthanasia law, a law that seems to enjoy a lot of public support in its current interpretation, the court would have to side with the Amsterdam appeals court. It would then have to find doctor Sutorius guilty as charged.
However, the Supreme Court has its own history with regard to euthanasia and it never seemed to have much sympathy for the medical domain criterion that the government and the Dutch citizens have embraced. In 1984 the Supreme Court rendered its verdict in the Schoonheim case. The patient in this case was a 93 year old woman, who suffered from the deterioration of her physical condition. She had broken her hip, her eyesight, hearing and power of speech had deteriorated, hence she was a patient in the proper medical sense However, according to many commentators present here, in its judgement the Supreme court concentrated on the woman's personal suffering, not on her medical condition. The patient, after all, was not suffering from cancer or some other terminal disease. Her suffering mostly consisted in old age problems and she simply did not want to face further deterioration.

In 1994 the Supreme Court ruled in the Chabot case. The patient in this case, mrs. B, was a middle aged woman, who had lost both her children and who could not and did not want to recover from her grief. According to her psychiatrist it was dubious whether one could call mrs B a patient. Her condition was in fact a quite natural reaction of despair to her severe loss. However, one could argue that she suffered from some minor psychiatric disorder (troubled mourning process or something similar). The Supreme Court accepted this psychiatric diagnosis. The court argued that a patient's suffering need not necessarily be somatic. Psychological suffering can be just as terrible and can also be a ground for a doctor to provide aid in dying. The psychiatrist in this case was found guilty all the same, because according to the Supreme Court, he should have asked a colleague to examine his mrs. B. However, many Dutch commentators feel that the Supreme Court has basically decided that all kinds of suffering may be serious enough to warrant aid in dying. One might even say that the Supreme Court has gone a lot further in acknowledging a right to self-determination than the Dutch government.

So what should the Supreme Court do? Evidently, it could find some technical legal way out (the court might put a lot of weight on the fact that senator Brongersma died before the euthanasia law was accepted in parliament). But let us not take that easy way out, and try to decide the matter on principle. As a strong believer in parliamentary democracy, I would say that the Supreme court ought to find Sutorius guilty, thus respecting the government's

interpretation of the new law, siding with a majority of Dutch citizens, and probably also siding with many doctors. But I am not the author of *Taking Rights Seriously*, and I can imagine that people who adhere a rights based jurisprudence would prefer to see the court acknowledge a right to self-determination for people like senator Brongersma. So I am very curious to know what professor Dworkin would decide if he were a member of the Dutch supreme court.