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BOOK REVIEW

LIFE, DEATH, AND PUBLIC POLICY

Larry I. Palmert†

IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY. By *Neil K. Komesar*.‡ Chicago: University of Chicago Press. 1994. 287 pp. \$34.95.

In the public's mind, "legal scholarship," like "legal advice," is perhaps an oxymoron. In the latter, the listener often hears predictions about the possible outcomes of an arcane adjudicative process far removed from the personal decisions that led to the need for professional advice. In the former, most legal scholars assume prominent roles for judges and adjudicative processes. In reality, the courts are, at best, distant influences on the lives of most individuals. Legal scholars quickly embrace the mantle of interdisciplinary (or more accurately, multidisciplinary) approaches when discussing particular public policy issues. Nonetheless, most interdisciplinary legal scholars start with adjudicative processes (after all, that is what we teach in law schools) as the core of their analyses. As a result, scholars assume that courts are the central decision makers in diverse public policy debates, such as how new reproductive technology should be used,¹ or whether medical technology should be used to end the lives of certain patients.²

Komesar offers a conceptual framework for resolving public policy dilemmas—"comparative institutional analysis."³ Forget simplistic notions of public policy making that assume political processes are always better than adjudicative processes in resolving policy dilemmas.

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‡ Komesar is the James E. and Ruth B. Doyle-Bascom Professor of Law at the University of Wisconsin, Madison.

¹ See generally JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* (1994) (citing codes and statutes throughout the book).

² See RONALD DWORIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 179-217 (1993).

³ NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 3-13 (1994).

Do not expect to find that market forces are always superior simply because Komesar is trained as both an economist and a lawyer. Rather, Komesar proposes that deciding whether the market, the political process, or the adjudicative process should resolve a question is the very essence of public policy making. His conceptual framework assumes that the choice is often opting for the least harmful institution, rather than aspiring for the best process to address the question.⁴ As a result, Neil Komesar's book is refreshingly different from most legal scholarship.

I suggest that Komesar's framework is especially important to those who see legal scholarship at its best as informed by the tensions between the practical and the theoretical. When we speak about issues of public policy, we must remember we are simply citizen-scholars, not experts or high priests of law, economics, philosophy, medicine, or science.⁵ Komesar's work reminds us that the views of those who type our manuscripts or check out our groceries, as well as those who sit in offices in federal court houses, are participants in the formulation of public policy.

In Part I, I will summarize Komesar's mandate for institutional analysis with a discussion of his views on market forces, legislation, and the court system. Part II applies Komesar's framework to the problem of physician-assisted suicide. Part III applies Komesar's principles to *in vitro* fertilization decisions. With these examples, I conclude that Komesar has provided scholars and institutional players with a profound method for approaching such difficult questions of public policy.

I

SCHOLARS, PUBLIC POLICY, AND CONSTITUTIONAL INTERPRETATION: KOMESAR'S FRAMEWORK

Komesar structures his book in a manner that helps the reader understand his conceptualization of the scholarship on public policy and law. Proposition One, for instance, which is argued throughout the book, states "[t]he choice of social goals or values is insufficient to

⁴ A trio of scholars working in the area of family law have proposed that the legislative goal should be "the least detrimental alternative." JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 53 (1979). While this approach was developed in a field seemingly far removed from the major focus of Komesar's book, it is generally applicable. I will demonstrate how the Komesar framework can be used to frame the question for reproductive technology. See *infra* notes 73-93 and accompanying text.

⁵ See generally Larry I. Palmer, *The High Priests Questioned or at Least Cross-Examined*, 5 RUT.-CAM. L.J. 237 (1974) (commenting on JAY KATZ ET AL., *EXPERIMENTATION WITH HUMAN BEINGS: THE AUTHORITY OF THE INVESTIGATOR, SUBJECT, PROFESSIONS, AND STATE IN THE HUMAN EXPERIMENTATION PROCESS* (1972)); Joseph Goldstein, *Psychoanalysis and Jurisprudence*, 77 YALE L.J. 1053, 1060 (1968) (emphasizing the limited contribution psychoanalysis can make to jurisprudence).

tell us anything about law and public policy either descriptively or prescriptively. One must seriously consider institutional choice in order to understand or reform law and public policy."⁶ Proposition Two urges that institutional analysis should be a methodology of comparing alternative institutions, not simply a critique of the imperfections of courts, the markets, or the political processes.⁷ And finally, Proposition Three urges that institutional analysis "should be participation-centered,"⁸ a modification of the interest group theory of politics widely embraced in many disciplines, including constitutional theory.⁹ These themes are pervasive throughout the text.

In his second chapter, Komesar introduces the reader to the most persistent problem in public policy analysis: the confusion of social goals such as efficiency of resource allocation or protection of "fundamental rights" with public policy analysis.¹⁰ There is abundant discourse in modern legal scholarship about "rights" as the central idea of legal theory,¹¹ but as Komesar points out, "[c]alling something a 'right' is an institutional statement."¹²

For Komesar, the essence of public policy analysis is "institutional choice": deciding which of several institutional processes within law—adjudicative, administrative, or legislative—should be given the authority to decide a particular issue. But "the market," namely the reality of what people do, is also an institutional process to be considered within any analysis of public policy. Thus, considering the limitations of law in any of its forms to change particular kinds of human behavior is an aspect of comparative institutional analysis.

The work of Nobel Prize-winning economist Ronald Coase provides the conceptual foundation for Komesar's book. Komesar argues, however, that most economic analyses of law have misinterpreted the meaning of the famous Coase Theorem—that it does not matter which rule of property rights is chosen by law in terms of efficient allocation of resources, if one assumes no transaction costs.¹³ Ironically, in Komesar's view, for a world with imperfect institutions,

⁶ KOMESAR, *supra* note 3, at 271.

⁷ *Id.*

⁸ *Id.* at 272.

⁹ Komesar cites a number of leading constitutional scholars who rely upon interest-group analysis, e.g., Epstein and Cherminsky. *Id.* at 216 n.38.

¹⁰ *Id.* at 14-50.

¹¹ Komesar centers his attack on the Rawlsian conception of justice that secures basic liberties for each person and provides for social and economic equality. For a complete treatment of this theory, see JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

¹² KOMESAR, *supra* note 3, at 43.

¹³ *Id.* at 29. Komesar makes the point about property rule, but I believe the implications of the Coase Theorem apply to liability rules as well. See LARRY I. PALMER, *LAW, MEDICINE, AND SOCIAL JUSTICE* 14-15 (1989). Komesar develops this linkage to Coase, initially discussed in Part I of the book, in later portions of his text. See KOMESAR, *supra* note 3, at 61-62, 109-12.

Coase's work, when properly understood, makes the institutional arrangements within law very important for public policy.

Komesar thus criticizes the scholarship of law-and-economics types, public choice theorists, philosophers, and constitutional theorists for either assuming that institutional arrangements in a society are irrelevant, or for confining their analyses to only one institution.¹⁴ He demonstrates convincingly that comparative institutional analysis is a powerful tool for understanding a wide range of public policy issues—pollution, tort reform, and First Amendment jurisprudence. His methodology is a participant-centered approach to the political process, the market, and the courts. Komesar begins his participant-centered analysis with the political process, that messy and supposedly irrational process that annoys many legal policy scholars.¹⁵ He describes the economic based "interest group theory of politics" ("IGTP") and IGTP's critics. The latter view the assumption that public officials are motivated solely by narrow self-interest as simply a variation on "the proverbial economic person,"¹⁶ where the incentives are campaign contributions and maintaining oneself in office.

Komesar details the shortcomings of both IGTP scholars and critics and proposes a two-force model of IGTP. He recognizes that special interest groups with high stakes in a particular outcome are participants in legislative decisions, but so are indifferent voters, legislators, their staff members, and committees.¹⁷ He uses Coase's work to demonstrate that these institutional actors have various degrees of access to information that could lead to either majoritarian or minoritarian biases in legislation.¹⁸ To explain this aspect of the real world, Komesar proposes that we analyze legislation with regard to particular issues—in other words, treat the political process as an institutional process.¹⁹

In his detailed arguments, Komesar urges courts, particularly the United States Supreme Court, to engage in careful analysis of problems legislatures have addressed before declaring themselves to be the appropriate institutions to correct minoritarian bias in political and market processes.²⁰ An economic analysis of law is important, not

¹⁴ At one level, the list of scholars appears to be a "Who's Who" of modern legal and public policy scholarship—John Rawls, Ronald Dworkin, Richard Posner, John Ely, Guido Calabresi, and James Buchanan. In addition to the usual index, there is a very helpful author index in the book. KOMESAR, *supra* note 3, at 277-79. Komesar focuses his critical analysis on the most prominent authors listed above.

¹⁵ *Id.* at 53-97.

¹⁶ *Id.* at 53.

¹⁷ *Id.* at 65-75.

¹⁸ *Id.* at 61-62.

¹⁹ *Id.* at 53-97.

²⁰ When a court is asked to consider, for instance, if legislation that purports to protect the public from "false" or "misleading" advertising by pharmacies is constitutional, it is

for the purpose of ignoring the political or adjudicative processes, but for the purpose of choosing market processes when they are the least harmful alternative.²¹

But when Komesar turns his analysis to courts, the darlings of legal scholars, it is apparent that comparative institutional analysis yields some surprising results. While he agrees that judges in this country have more independence than legislators, he points out that there is a cost: judges have less direct information from the numerous participants about great social concerns.²² Furthermore, he points out that the high barriers to entry into the court system, including jurisdictional requirements and the expense of litigation, make courts less certain about the effects of their decisions on the masses.²³ Moreover, even if claimants succeed in having their day in court, there is a "skewed distribution of stakes," particularly in class actions, where majority interests are often undercompensated.²⁴ There is no single litmus test of the soundness of legislation that courts can use, according to Komesar, because judges and juries are "aloof."²⁵ According to Komesar, this aloofness is the product of a judicial system which isolates the judge and jury from public opinion and elections, and which provides information through the distorting lens of the adversary system.²⁶

Komesar suggests that courts may be performing the correct institutional role in declaring unconstitutional recent tort reform legislation such as damage caps on awards in malpractice cases.²⁷ If the public policy issue is conceived of as promoting the optimal or appropriate level of health and safety, much of the current tort reform movement is a case of severe political malfunction.²⁸ In other words, a court can rightly decide that it has the institutional capacity to declare that individual adjudication of claims after the fact is the appropriate public policy, particularly when the costs of prevention cannot

appropriate for courts to recognize that this particular attempt at regulation of the market for goods and services imposes numerous transaction costs on consumers. This protection of "commercial speech," for Komesar, is best understood as an instance where courts are the corrective for the political process' restrictions on the information flow in this particular market for goods and services. *Id.* at 120 & n.30.

²¹ *Id.* at 98-122.

²² *Id.* at 123.

²³ *Id.* at 125-28.

²⁴ *Id.* at 130-34.

²⁵ *Id.* at 141.

²⁶ *Id.* at 141.

²⁷ *Id.* at 193-95. While Komesar specifically states he does not decide this issue, *id.* at 195, his discussion of how judges can serve to correct political malfunction leads one to believe he implies that the courts' role is proper.

²⁸ *Id.* at 193-94.

be distributed in a fair and efficient manner through a combination of market and political processes.²⁹

Komesar further sees the drafting of constitutions as a problem of choosing the deeper institutional design of a given society.³⁰ He criticizes many current theorists, including John Ely,³¹ for ignoring the complexity of the political process as an institutional process. For Komesar, the corrective for a political malfunction—or any other institutional malfunction—is not simply a matter of whether one trusts or distrusts the current, past, or future political process: “In the complex world of institutional choice, foxes might be assigned to guard the chicken coop where the alternatives (bears, weasels, and so forth) are worse.”³²

Komesar’s critique of the scholarship on the appropriate role of judicial review of legislation is deft. He points out that the expansive notion of the role of the judiciary in protecting property rights under a new substantive economic due process theory is an institutional illusion.³³ He takes both the fundamental rights theorists and their opponents (the proponents of strict adherence to the original intent of the framers) to task for their non-institutional view of constitutional adjudication.³⁴ Through this analysis, he places Ronald Dworkin, a “fundamental rights” scholar,³⁵ and Supreme Court Justice Scalia, an “original intent” theorist,³⁶ in the same non-institutional camp.³⁷ Komesar argues against any such overarching theory of judicial review, since the role of the judiciary is determined *after* a comparative institutional analysis, not *before* such analysis is undertaken.³⁸

²⁹ I was particularly impressed with how Komesar takes on the media and political perception that there is “too much” litigation and carefully analyzes the claims of various participants and the available data. *Id.* at 153-95.

³⁰ *Id.* at 196-231.

³¹ *Id.* at 204-05.

³² *Id.* at 204.

³³ *Id.* at 233-50. Komesar critiques Richard Epstein’s neo-Lockean libertarian views as expressed in his book, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). KOMESAR, *supra* note 3, at 238-56.

³⁴ Constitutional theorists who use public choice theories to describe the process of the making of our own constitution come into Komesar’s critique for assuming that the making of the Constitution was simply a way to overcome special interest groups in the legislative process. These theorists ignore the possibility of majoritarian bias in the political process. KOMESAR, *supra* note 3, at 216-21.

³⁵ *Id.* at 261 n.40. See generally RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978) (applying Dworkin’s theory of rights to judicial decision-making).

³⁶ KOMESAR, *supra* note 3, at 265 n.46.

³⁷ *Id.* at 256 (“Each of these approaches seems to offer a way to short-circuit all the messiness and ambiguity of institutional choice.”); see also *id.* at 255-65 (discussion of the two non-institutional approaches).

³⁸ *Id.* at 270.

II

CREATING ONE'S OWN DEATH: KOMESAR'S INSTITUTIONAL
APPROACH V. DWORKIN'S FUNDAMENTAL RIGHTS

Komesar is critiquing and attempting to change non-institutional analyses of public policy, and he suggests that the reader do the same. I accept this invitation by examining the approach taken to physician-assisted suicide. I will analyze the issue using the process suggested by Komesar—one which requires a great deal more than an analysis of the Court's opinions.

Ronald Dworkin's recent book, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom*,³⁹ presents several analyses of the adjudicative principles of courts. Dworkin poses the question, "Do Americans have a constitutional right to die?"⁴⁰ and answers it in the affirmative. Dworkin's non-institutional analysis of public policy is exactly what Komesar wants us to question. My own institutional analysis leads me to ask an alternative question: Is the United States Supreme Court, rather than the market or political processes, the appropriate institution for handling the range of issues surrounding the termination of medical care?

If we think about the market process and the political process surrounding terminating care, Dworkin's analysis is defective. His failure is manifest by the way he discusses the public referendum in Washington and California in 1991 and 1992 over physician-assisted suicide.⁴¹ Dworkin argues that in both situations, a small minority, an interest group with what Komesar would call "minoritarian bias" or high stakes⁴² in the outcome, overwhelmed the apparent will of an otherwise indifferent or uninformed majority.⁴³ Dworkin's concern about the supposed misuse of the political process by special interest groups, such as the Catholic church, is an argument that the political process has malfunctioned in terms of failing to act in accordance with the polity's deepest principles.⁴⁴

³⁹ DWORKIN, *supra* note 2.

⁴⁰ *Id.* at 181.

⁴¹ *Id.* at 179-217.

⁴² See *supra* notes 10-12 and accompanying text; KOMESAR, *supra* note 3, at 54-58.

⁴³ Dworkin notes at the beginning of his book:

In 1991, the voters of Washington State narrowly defeated a referendum bill that would have legalized euthanasia there, and in 1992 similar legislation was defeated in California. In both cases it was expected, well before the election, that the bill would pass, but groups opposing euthanasia, including the Catholic church, waged bitter and effective campaigns, spending far more than the groups supporting it.

DWORKIN, *supra* note 2, at 4. Komesar does not deal explicitly with the institution of medicine directly in his book. I believe, however, that the institutional analysis is implicit in his discussion of malpractice. See KOMESAR, *supra* note 3, at 158-61.

⁴⁴ In the literature on law and economics this is often referred to as "rent-seeking." See KOMESAR, *supra* note 3, at 55 n.3.

Dworkin deals with the Catholic church and other interest groups by creating the "rational person" whose principles about abortion and euthanasia can be connected to what Dworkin sees as the public policy issue. He concludes that: "[s]ome of the political groups that opposed the euthanasia initiatives in Washington and California sensed a connection between permissiveness about euthanasia and a liberal attitude toward abortion."⁴⁵ Any reading of a current newspaper will indicate that the political rhetoric of our day combines issues in this way, but Dworkin does not explain why a body engaging in serious public policy making, such as the United States Supreme Court, should see the two issues as connected.

To make his argument in favor of a constitutional right to physician-assisted suicide, Dworkin provides a non-institutional interpretation of the major United States Supreme Court case on terminating care. In *Cruzan v. Director, Missouri Department of Health*,⁴⁶ the Court upheld the constitutionality of the Missouri statutory scheme for removing food and nutrients from an unconscious patient in a persistent vegetative state. For Dworkin, the important part about *Cruzan* was that the "Court seemed to recognize, at least in principle, that states must honor living wills."⁴⁷ For Dworkin, this created the necessary connection to the value of "autonomy" and the Court's decisions on abortion. For an institutionalist, however, *Cruzan* contains three different institutional questions posed by the three opinions of the Justices in the majority.

Justice Rehnquist, whose position Dworkin criticizes as "conservative,"⁴⁸ is explicit in *Cruzan* about what the question involved: "Whether Cruzan has a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment under these circumstances."⁴⁹ He specifically stated that the attempt by Cruzan's guardians to state the question in terms of her alleged constitutional right of privacy or autonomy was inappropriate: "The difficulty with petitioners' claim is that in a sense it begs the question: An incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right."⁵⁰

Justice Scalia, whose opinion Dworkin also criticizes,⁵¹ asked a different question: Whether the Constitution forbids a state from adopting legislation that seeks to prevent an individual from killing him or

⁴⁵ DWORKIN, *supra* note 2, at 194.

⁴⁶ 497 U.S. 261, 281 (1990).

⁴⁷ DWORKIN, *supra* note 2, at 181.

⁴⁸ *Id.* at 214.

⁴⁹ *Cruzan*, 497 U.S. at 269.

⁵⁰ *Id.* at 280.

⁵¹ DWORKIN, *supra* note 2, at 194-95, 198.

herself.⁵² His question, and thus his opinion, that the statutory scheme was constitutional, is a declaration of the Court's institutional incompetence to deal with the so-called "right to die" issue.⁵³

Justice O'Connor, ignored by Dworkin, wrote a separate opinion "to emphasize that the Court does not today decide the issue whether a State must also give effect to the decisions of a surrogate decision maker."⁵⁴ Although she is not nearly as explicit as Rehnquist as to the precise question for her in the case, one might wonder if her concurrence indicates a difficulty with Rehnquist's formulation of the question or his particular answer to the question.

It would be heresy for Dworkin or his followers to suggest that Justice Rehnquist in *Cruzan* addresses an institutional question involving a decision about how the Court should use its resources. Despite the similarity in values at stake in abortion and terminating care, analyzing the problems institutionally might lead the Court to treat these two public policy problems distinctly. The Court might treat the two issues differently because the various Justices might see dissimilar institutional choices presented.

Physician-assisted suicide would come to the Court in the context of its prior decision in *Cruzan*. A piece of legislation like the one at issue in *Cruzan* would be viewed as an attempt to regulate an important social institution, medicine, along with the many actors in that process. The Court might view the political process and the market process as adequate to protect physicians from the legal risks stemming from difficult ethical questions. These processes could help discriminate the circumstances under which a doctor could terminate a patient's care or could take active steps to end a "patient's" life from those under which a doctor could not do so.⁵⁵ On the other hand, legislation aimed at abortion control seeks to regulate the formation

⁵² Although his opinion in *Cruzan* makes many references to his view that the lack of mention of a right to suicide in the text of the Due Process Clause of the Fourteenth Amendment of the Constitution decided for him the issue presented, his question, along with his underlying judicial philosophy, allows him to suggest that he and his eight colleagues are no more competent to rule on the issue than "nine people picked at random from the Kansas City telephone directory." *Cruzan*, 497 U.S. at 293 (Scalia, J., concurring).

⁵³ This is not to deny that there is a connection between Scalia's theory about the Court's role in abortion and in terminating care, as he has consistently stated that the Court should remove itself from the abortion issue by overruling *Roe v. Wade*, 410 U.S. 113 (1973).

⁵⁴ *Cruzan*, 497 U.S. at 289.

⁵⁵ One could argue that courts have interpreted the criminal law to make its use difficult in ethically complex situations. In *Barber v. Superior Court*, 195 Cal. Rptr. 484 (Ct. App. 1983), the California court established a very difficult standard for even indicting physicians for murder when there was some evidence that the doctors may have ended life support too soon. The Court reasoned that the action of removing life support was an "omission," and therefore, there was no violation of the physician's duty to the patient as a matter of law. *Id.* at 493. See PALMER, *supra* note 13, at 100-05.

of families, an area in which fundamental societal choices are made. The Court's conflicting abortion opinions are better read as conflicting views of the Court's institutional role in making public policy on family formation rather than merely as decisions reflecting individual Justices' "political decisions" or views on the propriety and morality of abortion.

Justice O'Connor's recent opinion in *Casey v. Planned Parenthood*,⁵⁶ for instance, rejected a legislative requirement that a woman notify her husband prior to an abortion.⁵⁷ The Court, however, upheld the legislative provisions requiring a twenty-four hour waiting period,⁵⁸ as well as provisions requiring physicians to give the woman information about fetal development as part of the consent process.⁵⁹ In so doing, Justice O'Connor centered her analysis of abortion not on medicine as an institution, but rather on the degree to which the political process could restrict the decision-making authority of individual women. As to the Pennsylvania legislature's requirement that the physician provide information about the fetus to a woman, she stated:

Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position. The doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy. On its own, the doctor-patient relation here is entitled to the same solicitude it receives in other contexts. Thus, a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.⁶⁰

Justice O'Connor's views on the political process in regard to abortion are better illustrated by her concurrence in *Webster v. Reproductive Health Services*,⁶¹ where she joined the Court's decision upholding a state statute declaring that fetal life begins at conception. As an institutional actor, Justice O'Connor is subject to many influences when she attempts to resolve a legal dispute, but the most important are her institutional choices reflected in her own opinions. It is a mis-

⁵⁶ 112 S. Ct. 2791 (1992).

⁵⁷ *Id.* at 2830.

⁵⁸ *Id.* at 2823.

⁵⁹ *Id.* at 2791.

⁶⁰ *Id.* at 2824. O'Connor's opinion makes it clear that the provision for spousal notification is unconstitutional because it was not a regulation of the obligation between a woman and her husband regarding children, but rather of the decision to terminate her pregnancy. *Id.* at 2829-30.

⁶¹ 492 U.S. 490, 522 (1989) (O'Connor, J., concurring).

take, in my view, to assume, as Dworkin does, that how Justice O'Connor decides cases is determined solely by her values or her search for an overarching definition of "liberty."⁶² How she decides a constitutional question involving physician-assisted suicide may be framed by her views of the Court's role in the difficult public policy issue of abortion.⁶³

Dworkin's views on physician-assisted suicide are driven by his views on abortion. To make the link between his analysis and doctrines within constitutional theory, he concludes that there is a "right of procreative autonomy" which is grounded in the First Amendment's prohibition against the establishment of religion and guarantee of the free exercise of religion.⁶⁴ For Dworkin, the timing of our individual deaths is a question of the ultimate meaning or sacredness of life in some religious sense. He endorses the theory of Justice Stevens that statutes restricting abortion violate the First Amendment.⁶⁵ Thus, the doctrines developed in abortion cases should influence the doctrines developed for physician-assisted suicide.

Dworkin does not, however, acknowledge that shifting the doctrinal basis for the right to an abortion or the "right to die" from "liberty" or "privacy" to the First Amendment would require another more complex type of institutional analysis: the state's relation to religion as an institution.⁶⁶ This area is murky because the Court and its scholarly critics have not fully recognized school prayer, financial support for religious schools, or moments of silence as attempts to find the appropriate institutional balance between the state and religion.⁶⁷

⁶² DWORKIN, *supra* note 2, at 126.

⁶³ Predicting how she would decide a constitutional case involving physician-assisted suicide is risky without attention to more of her opinions in related cases. Dworkin is critical of the twenty-four hour waiting period, based on his views of the impact on the autonomy of some women. DWORKIN, *supra* note 2, at 153, 173-74. He does not consider that this decision is part of a theory of the legislative/adjudicative interaction that Justice O'Connor and her colleagues are attempting to develop having decided not to overrule *Roe*. In my view, the Court, notwithstanding Professor Dworkin's contrary opinion, no longer relies upon the theory that the fetus is not a person to justify its opinion.

⁶⁴ DWORKIN, *supra* note 2, at 160. Dworkin also notes that the right of procreative autonomy "follows from any competent interpretation of the due process clause. . . ." *Id.* However, he chooses to focus on the First Amendment arguments.

⁶⁵ *Id.*

⁶⁶ *Id.* at 160-61.

⁶⁷ My own evolving analysis of institutions, admittedly confined to the "law and medicine" field has been to suggest that different modes of analysis should be applied to public and private institutions. Religion and the family are private institutions, where the institutional job for courts is to try to protect those institutions from the majoritarian political decisions. I suggest that an appeal to "values" does not increase our capacity to think about the hard institutional choices we face in a religiously diverse society in which much of the public discourse in scholarship is informed by secularism and the media discourse by television evangelism. We should, therefore, acknowledge the power of both kinds of participants in the development of the public policy that will eventually affect people's lives.

In contrast, Dworkin apparently believes that the Court could resolve its Establishment Clause controversy by delineating what features make a conviction a "religious belief rather than a nonreligious moral principle or a personal preference."⁶⁸ Dworkin, like many modern scholars, fails to appreciate that at its core, religion is a matter of practice and experience, not simply a matter of cognitive belief.

Unlike Dworkin, I believe the Justices of the Court develop theories of institutions which assume that *all* institutions are imperfect. The lack of clarity found in the Court's decisions on the death penalty, for instance, should be seen as hesitant first steps toward establishing the Court's role vis-à-vis the criminal law process. The Justices might have different theories about how discretion ought to be structured and about the legislative role in that process.⁶⁹ Not surprisingly, in my view, the various Justices might also have different theories about the Court's role in shaping public policy toward abortion.

I address Dworkin in detail here, in part because his analysis of the abortion opinions and of the issues of physician-assisted suicide have already had enormous influence. A federal district court in the State of Washington implicitly accepted Dworkin's reasoning in declaring the state's criminal statute prohibiting assisted suicide unconstitutional as applied to physicians of competent terminally ill patients.⁷⁰ A New York physician, Dr. Timothy Quill,⁷¹ with the assistance of the Washington-based non-profit group involved in filing the Washington lawsuit, has filed suit in federal court seeking to have New York's law against assisting suicide declared unconstitutional.⁷² Dr. Jack Kevorkian⁷³ has filed suit in California to force that state to restore his license to practice medicine on the ground that its law against assisting suicide is unconstitutional.⁷⁴ To date, no non-profit

⁶⁸ DWORKIN, *supra* note 2, at 161-62.

⁶⁹ I must confess that I abandoned an earlier attempt to analyze the Justices' opinions over a wide variety of cases as a way of getting us away from the liberal-conservative thinking about the Court. See Larry I. Palmer, *Two Perspectives on Structuring Discretion: Justices Stewart and White on the Death Penalty*, 70 J. CRIM. L. & CRIMINOLOGY 194 (1979).

⁷⁰ *Compassion in Dying v. State of Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994) (relying on similarity between reproductive rights and physician-assisted suicide), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *rev'd*, No. 94-35534, 1996 WL 94848 (Mar. 6, 1996).

⁷¹ See TIMOTHY E. QUILL, *DEATH AND DIGNITY: MAKING CHOICES AND TAKING CHARGE* (1993); Timothy E. Quill, *Risk Taking by Physicians in Legally Gray Areas*, 57 ALBANY L. REV. 693 (1994).

⁷² *Quill v. Koppel*, 870 F. Supp. 78 (S.D.N.Y. 1994) (upholding New York's law against assisting suicide).

⁷³ Although well known in the media as "Dr. Death," Kevorkian considers himself a scholar on medical ethics. His early work, *Capital Punishment or Capital Gain*, 50 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 50 (1959), involved experimentation on prisoners and provides the conceptual foundation for his book, *PRESCRIPTION MEDICINE: THE GOODNESS OF PLANNED DEATH* (1991), in which he presents an argument about ethics.

⁷⁴ A motion to dismiss by the State was argued in January 1995, but there has as yet been no decision in the case. See *Kevorkian Wants State's Suspension Order Lifted, He Also*

public interest groups have joined with Dr. Kevorkian's assertion of freedom.

For Dworkin and the so-called medical ethicists like Dr. Quill, medicine is not a complex institution, but only a forum for discussing the physician-patient power dyad in relationship to constitutional principles. Dworkin purports to write a book for use in public policy resolutions, and expresses surprise in the preface to the paperback edition of his book that he did not provide enough guidance for a legislative committee in Great Britain considering modification of its law regarding terminating care.⁷⁵ Perhaps the legislative process cannot hear Dworkin's voice because he does not speak a variety of institutional languages. Dworkin assumes that the political process malfunctions whenever a fundamental right is implicated or legislators fail to seriously consider the value of liberty. It does not occur to Dworkin that perhaps the manner in which present laws on living wills are drafted might actually reflect *physician* interest. His argument reduces itself to the following question: If a woman has a constitutional right to an abortion, does the Constitution provide a patient with a terminal illness a constitutional right to physician-assisted suicide?⁷⁶ Professor Dworkin answers "yes" and suggests that there should be a mechanism by which we can end our lives by agreement. However, Dworkin's approach is based on a non-institutional analysis of medicine and is grounded in his premise that the "good life" must be an autonomous life.

III

CREATING LIFE: A CASE OF INSTITUTIONAL INCOMPETENCE

Yet another series of antitheses to Komesar's book is presented in the "rights" view of regulating reproductive technologies. These theorists find an easily identifiable way of regulating reproductive technologies: resolve the value conflicts. Professor John A. Robertson, who builds on Dworkin's work⁷⁷ in his recently published, *Children of Choice: Freedom and the New Reproductive Technologies*⁷⁸ states:

Challenged California Assisted Suicide Ban, SACRAMENTO BEE, Sept. 9, 1994, at B9 (appealing suspension of medical license on state law and constitutional grounds); *State Asks Judge to Throw Out Kevorkian Lawsuit*, SACRAMENTO BEE, Jan. 11, 1995, at B4 (Motion to Dismiss argued and taken under consideration).

⁷⁵ DWORKIN, *supra* note 2, at xiii.

⁷⁶ Oregon has become the first state to accept physician-assisted suicide in a statewide referendum. Immediately after the statute went into effect, it was challenged as a violation of constitutional notions of equal protection. A preliminary injunction against enforcement was issued in *Lee v. State*, 869 F. Supp. 1491 (D. Or. 1994).

⁷⁷ See Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381 (1992).

⁷⁸ ROBERTSON, *supra* note 1.

The goal of this book is to show the importance of procreative liberty, the freedom to decide whether or not to have offspring, in devising the framework for resolving the controversies that reproductive technology creates. It views the issues presented by reproductive technology as first and foremost a question of the scope and limits of procreative freedom, and assesses reproductive technologies in that light.⁷⁹

The organizational structure of his discussion of *in vitro* fertilization illustrates that his overall perspective of value analysis generates very different questions from those an institutionalist would ask. After presenting his readers with the "facts" of infertility and the technological process of *in vitro* fertilization, Robertson asks a normative question: "Should it be done at all?"⁸⁰ Robertson's answer is negative. After describing the biological and moral status of embryos,⁸¹ Robertson turns to the legal issues and asks: "Do embryos have legal rights?"⁸² Once again, his answer is no. This allows him to deal with other issues of control and disposition of embryos, concluding with praise for the Tennessee Supreme Court's decision in a divorce action declaring that an ex-wife had no right to donate frozen embryos over the objection of her ex-husband.⁸³ Although Robertson goes on to discuss what he calls "consumer protection issues,"⁸⁴ my focus is on demonstrating how different his questions and methods of analyses are from an institutional analysis of the legal and public policy questions surrounding *in vitro* fertilization.

An institutionalist would first look at the market process of *in vitro* fertilization. The market might be defined as those individuals who choose to have children with the assistance of medical professionals through the use of *in vitro* fertilization. An institutionalist with legal training might resist his or her instincts to assume the "facts" of how these persons and professionals found each other and deal with institutional facts that are readily available.

The institutionalist would hypothesize that individuals who engage in "family formation" activities with the assistance of infertility "experts" have managed to work out arrangements that make the so-

⁷⁹ *Id.* at 3-4.

⁸⁰ *Id.* at 99.

⁸¹ *Id.* at 100-03.

⁸² *Id.* at 103.

⁸³ *Id.* at 113-14. Robertson's praise is directed at *Davis v. Davis*, 842 S.W.2d 588, 602-03 (Tenn. 1992) where the court suggested that there ought to be an agreement about what happens to embryos in case of divorce. Whether the court is correct that there should be a pre-implantation agreement about embryo disposition in the event of divorce is a highly debatable proposition, not to be dealt with here. See Larry I. Palmer, *Who Are the Parents of Biotechnological Children?*, 35 JURIMETRICS J. 17 (1994).

⁸⁴ ROBERTSON, *supra* note 1, at 114 ("questions of safety, efficacy, and access raise . . . important policy issues").

cial, economic, moral, and legal risks worth taking for them personally—but not, perhaps, for the entire society. An institutionalist would consider that using technology to overcome infertility has occurred before with the use of artificial insemination.⁸⁵ There were some legal disputes that arose from the use of this technology and eventually some legislation in the 1970s. Before deciding if courts or legislatures are the primary policy makers, the institutionalist would ask a more general initial question: From the perspective of law, are artificial insemination and *in vitro* fertilization similar processes?⁸⁶

In institutional analysis, following Komesar's lead, we ask the policy questions from the perspective of the institution that is the least harmful alternative for answering the question. My question, for instance, assumes that people are using *in vitro* fertilization. The question further assumes that without Professor Robertson's erudite analysis, some of the participants in the assisted-reproduction process are aware of differing ethical views of the appropriateness of using *in vitro* fertilization. Most important, the question assumes that a complete legal prohibition of the use of *in vitro* fertilization in our complex society is simply not possible.

In my view, both courts and the political process are relatively incompetent at preventing wealthy individuals with sufficient interest in gaining access to physicians and reproductive technologies from doing so.⁸⁷ This would argue for a minimalist role for *both* courts and legislatures as compared to what I rather loosely will call "market forces."⁸⁸

⁸⁵ Robertson mentions artificial insemination in his introduction, but does not draw any institutional lessons from this experience. Interestingly, he does mention that "due to discriminatory access to the medicalized system of sperm procurement, an unknown amount of AI occurs outside doctors offices with privately procured sperm and self-administration via turkey basters and syringes." ROBERTSON, *supra* note 1, at 8 (citing Daniel J. Wikler & Norma J. Wikler, *Turkey Baster Babies: The Demedicalization of Artificial Insemination*, 69 MILBANK Q. 5 (1991)).

⁸⁶ See Palmer, *supra* note 83.

⁸⁷ Robertson indicates in his preface that his attention was drawn to the subject of *in vitro* fertilization in 1984, when he saw a newspaper headline that read: "Test Tube Orphans: Frozen Embryos Might Inherit \$8 Million Fortune." "The story was about a wealthy American couple who had died in a plane crash with frozen embryos in storage in Australia." ROBERTSON, *supra* note 1, preface ix.

⁸⁸ At least one court agrees with my statement:

We do not underestimate the difficulties of legislating on this subject. In addition to the inevitable confrontation with the ethical and moral issues involved, there is the question of the wisdom and effectiveness of regulating a matter so private, yet of such public interest. Legislative consideration of surrogacy may also provide the opportunity to begin to focus on the overall implications of the new reproductive biotechnology—in vitro fertilization, preservation of sperms and eggs, embryo implantation and the like. The problem is how to enjoy the benefits of the technology—especially for infertile couples—while minimizing the risk of abuse. The problem can be

The analytical process involved in drafting legislation to deal with *in vitro* fertilization, for instance, would have to take seriously the claims of special interest groups, such as those with religious objections to the use of new reproductive technologies. These deeply felt values cannot be supplanted by an appeal to the values held by a heuristic reasonable woman or man, as suggested by Professor Dworkin's approach to physician-assisted suicide. In this process, court cases are institutional lessons rather than clear directives about whose "rights" are superior.

Believers in "procreative liberty," like Professor Robertson, are uneasy with an institutional unwillingness to define rights, since for Robertson defining rights answers the public policy questions. Thus, Robertson believes it is unconstitutional for a court to refuse to enforce an agreement to relinquish all claims to parental status pursuant to a surrogate parent agreement.⁸⁹ The institutionalist might look at some practices, such as "gestational surrogacy," and generate questions for legislatures rather than for courts. An institutionalist uses answers to previous institutional questions when analyzing new situations such as the practice of couples attempting to hire another woman to carry their embryo to term. If the legislature were to make the institutional decision to treat artificial insemination and *in vitro* fertilization in a similar fashion, the practice of gestational surrogacy generates a new question.

"Is gestation legally significant?" This institutional question arises because separating gestation from fertilization for women is now clearly possible. If the legislature were to answer the question in the affirmative and also decide that the genetic contribution of a woman arguably made her a parent, the possibility of two mothers would arise in the eyes of the law.⁹⁰ A legislature attempting to resolve whether genetic mothers or gestational mothers should be the mother for legal purposes might not come up with a definitive answer.

The New York legislature recently passed the Surrogate Parenting Contract Act which established a "public policy" and an institutional mechanism for carrying out that policy. The second section of the law declares surrogate parenting contracts, as later defined, void and un-

addressed only when society decides what its values and objectives are in this troubling, yet promising, area.

In the Matter of Baby M, 537 A.2d 1227, 1264 (1988).

⁸⁹ He states: "The procreative liberty of both infertile couples and surrogates would be advanced by upholding preconception agreements for surrogate services. If the parties have a constitutional right to use non-coital means of forming families, that right should include enforcement of preconception surrogate contracts." ROBERTSON, *supra* note 1, at 131.

⁹⁰ See, e.g., Johnson v. Calvert, 851 P.2d 776 (Cal. 1993). Elsewhere, I have suggested that the *Calvert* opinion is an insufficient analysis of the alternatives the legislature is actually faced with by the use of this technology. See Palmer, *supra* note 83, at 24-26.

enforceable because they are "against public policy."⁹¹ When it came to delineating how courts should resolve disputes, the legislature was less than definitive. It only told courts not to "consider the birth mother's participating in the surrogate parenting contract as adverse to her parental rights, status, or obligations."⁹² As to the genetic mother, the statute is silent as to her possible claims, although she is recognized as a potential disputant.⁹³ This possible compromise in the political process does not demonstrate the incompetence of the legislature, but perhaps its sensitivity to the depth of claims before it.⁹⁴ As a declaration of public policy, the New York Surrogate Parenting Contract Act is only a structure for decision-making by lawyers, physicians, and private persons.⁹⁵

The refusal to deal with Robertson's normative question of considering a total ban on the use of *in vitro* fertilization highlights the difference between an institutionalist's and a rights analyst's approach to public policy issues of new reproductive technology. The institution of the family in all of its forms—single teenage mothers, married couples with their biological children, single men or women with their adopted or biological children, couples with children born with the assistance of reproductive technologies—is an important aspect of maintaining democratic values over the longhaul. As such, the most important function of law, in relationship to the family as a private institution, is to protect it from the state.⁹⁶ This simply means that both courts and legislatures should carefully analyze their institutional incompetence in the face of basic human desires before enacting statutes or deciding cases. In particular, the answer from either courts or

91 N.Y. DOM. REL. LAW § 122 (Consol. Supp. 1994).

92 *Id.* § 124(1).

93 *Id.* § 124.

94 As I stated in another connection:

All claims—of those who contribute genetic materials (men and women) to creating children as well as of those who provide gestational birth—are equally powerful and entitled to respect in the legislative process. Put more bluntly, when it comes to deeply intimate matters such as the meaning of our lives and our connection to the future through those we call 'children,' I believe the legislature can provide only a structure, and perhaps some incentives or disincentives. . . .

Larry I. Palmer, *A Rejoinder*, 35 JURIMETRICS J. 51, 53 (1994).

95 It is worth noting that the only persons subject to a criminal penalty under the New York Statute are those who take fees for their services in connection with surrogate arrangements more than once. Brokers who are found to have violated the specific prohibitions of offering brokerage services for a fee are guilty of a felony if previously convicted of violating the prohibitions. N.Y. DOM. REL. LAW § 123(2)(b) (Consol. Supp. 1994). On the other hand, the private parties—including the birth mother and genetic mother—are only subject to a civil penalty of up to \$500 for violating the statute. *Id.* § 123(2)(a).

96 Komesar agrees with the broad proposition that law in the form of legislation or judicial pronouncements is used to protect people from the will of the majority. KOMESAR, *supra* note 3, at 227-31.

legislatures, after careful analysis of market behavior, might be "I don't know." This institutional analysis ironically leads to the result that the legislative process contributes to the public policy process by clarifying the nature of our uncertainty.

CONCLUSION

The foregoing institutional analyses were prompted by a committed reading of Komesar's book. His thesis makes us more aware of the possibility that what passes for social analysis of a problem, particularly when the issue is something like "protecting the value of autonomy," is based on the premise that some institutional process is faulty. Komesar instructs us, as scholars looking at social issues, to be careful to define them in terms of institutions, for example, family formation, rather than in terms of a particular social goal, such as procreative liberty. He further urges us to consider law as an institutional process with limitations, so that we can refine and sharpen its use for the ultimate social good. From the perspective of comparative institutional analysis, Komesar cautions us that even for problems as complex as how children should be born and how and when individuals should die, "we need to assess the efficacy of alternative strategies for protection against minoritarian or majoritarian bias."⁹⁷

Let me suggest that Komesar's analysis should make us question not only the implicit choice of courts as an institution in Professor Robertson's analysis, but perhaps also lead us towards the question of whether *any* legal regulation is desirable. I maintain that Komesar's approach makes it possible to seriously consider doing nothing, or at least doing very little. Issues of how children should be "formed" and when life should end include issues about individual spiritual meaning, issues often ignored in most forms of modern legal scholarship.

My analysis of Komesar's book suggests that legal scholars should take existing institutions seriously, not for the purpose of maintaining the same institutional structures, but for the purpose of providing analyses of those institutional arrangements that will help policy makers resolve dilemmas in a marginally better way. My criticism of Dworkin's and Robertson's approaches to public policy demonstrates how much legal scholarship focuses on courts, while ignoring other institutional alternatives.

If we consider our comparative advantages, legal scholarship has a considerable contribution to make to the larger knowledge enterprise that is under both internal and external examination. If we look at what we do in providing professional training for future practitioners, government officials, judges, legislators, and even business manag-

⁹⁷ KOMESAR, *supra* note 3, at 226-27.

ers, we have the opportunity of being scholars who live within the intricacies and uncertainties of the practical and the theoretical. Not only in our teaching do we need to make the conflicts between the two more visible, but also in our scholarship. We must deal more explicitly with the questions institutional participants, such as Supreme Court Justices, ask and the questions we ask ourselves.

Komesar makes one weary of the economists' self-serving person,⁹⁸ the public values of Dworkin's rational person,⁹⁹ and Robertson's bioethical person as primary modes of analysis of any public policy problem.¹⁰⁰ Komesar's scholarship does not treat the motivation of individual actors as determinative. He focuses on the complexities of human institutions.

Until we start a meaningful dialogue among ourselves about how our teaching, scholarship, and public service fit into some type of whole, our thinking will be lacking in systematic approaches to the complex institutional concerns faced by our society. The legal scholar purporting to deal with a public policy issue must confront the fact that law is a complex institution interacting with other equally complex institutional arrangements in society.

By engaging us in comparative institutional analysis, Komesar forces us to deal with the dynamic complexity of institutions in mass societies. He does a masterful job of comparing the market, the political process, and the adjudicative process within the framework of particular problems. I have analyzed the institutions of medicine and family. I suggest that we need to pay more attention to *analysis* of the legislative process in legal scholarship and teaching. When I criticize the manner in which Professor Dworkin fails to deal with the doctrinal analysis of "liberty" in the various opinions in *Cruzan*,¹⁰¹ I am suggesting that we must deal with the detailed analysis of particular institutions, such as our United States Supreme Court, *before* presenting policy makers with guidance for complex policy processes.

Such a careful, detailed analysis by legal scholars is important because those we teach are in the process of developing their own frames of reference for professional practice. When our students become law clerks, judges, partners in law firms, and mothers and fathers asking school officials about their children's education, they will be speaking from a frame of reference about the world that we can marginally influence by the ways in which we teach and practice our craft of scholarship.

98 See *supra* notes 13-21 and accompanying text.

99 See *supra* notes 34-37 and accompanying text.

100 See *supra* notes 78-96 and accompanying text.

101 See *supra* notes 66-76 and accompanying text.

Neil Komesar is both a good scholar and a good writer, and his message is clear: think hard about the institutional arrangements already in place by analyzing those institutions. Articulate the social goals, and distinguish them from public policy issues which are, in Komesar's view, institutional choices. If we engage in the careful analysis Komesar suggests, we will be privileged to be participants in the process of trying to be of service to the larger global society by careful analysis of its many complex and fragile institutions. Remember that the quality of our individual lives depends upon the humaneness of the institutional arrangements in which we live.¹⁰² This is, in essence, the real purpose of legal scholarship.

¹⁰² Komesar describes the complexities of modern life in the opening paragraph of his book. KOMESAR, *supra* note 3, at 3. See also Larry I. Palmer, Good People, Bad Institutions (1991) (unpublished manuscript, on file with author).