John B. Mitchell

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MY FATHER, JOHN LOCKE, AND ASSISTED SUICIDE: THE REAL CONSTITUTIONAL RIGHT

John B. Mitchell*

My father was diagnosed with pancreatic cancer in early summer of 1995. With the help of a hospice,[1] we brought him home for the last several weeks of his life. Six weeks later, he was dead. He was seventy-nine years old.

Dad had been in incredible pain, even with the morphine drip which the hospice had to increase at least once a day. During this time, my father asked my sister and me to help him die. Just take him to the garage, rig a hose from the exhaust, and run the car. Let it end. We wouldn't do it; probably out of a mix of some sense that it would be wrong, concern that we would bumble it, and fear of getting caught.

The next year, two federal appellate courts—the Ninth Circuit, relying on a fundamental rights analysis,[2] and the Second Circuit,[3] invoking equal protection—would find it unconstitutional to deny a terminally ill, suffering patient access to assisted suicide.[4] It would only be another year before the United States Supreme Court would reverse both appellate decisions in nine-zero opinions; the Ninth Circuit Court's opinion, in *Washington v. Glucksberg*,[5] and the Second Circuit's Opinion in *Vacco v. Quill*.[6] An outpouring of scholarship followed the appellate,[7] and then the Supreme Court

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* Professor of Law, Seattle University School of Law, J.D., Stanford Law School. The author wishes to thank Annette Clark for her knowledge, penetrating questions and insights, Bob Menanteaux, librarian extraordinaire, for all his help, and Phyllis Brazier who was left to struggle with endless misnumbered footnotes and yet never lost her sense of humor. I also want to thank Dean Kellye Testy and Seattle University School of Law for a grant supporting my research.

1. Hospice provides "comfort care" or "palliative care"; *i.e.*, it is treatment focused on relieving physical, emotional and spiritual pain rather than achieving a cure. *See, e.g.*, Cicely M. Saunders, *The Philosophy of Terminal Care, in* THE MANAGEMENT OF TERMINAL DISEASE 193 (Cicely M. Saunders ed., 1978). In fact, Medicare only pays for hospice if the patient stops all curative treatments. *See* Public Health, 42 C.F.R. § 418.24 (2005).

2. Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) (en banc), rev'd remanded, Washington v. Glucksberg, 521 U.S. 702 (1997).

3. Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996), rev'd, Vacco v. Quill, 521 U.S. 793 (1997).

4. *See Glucksberg*, 521 U.S. at 708-709 (asserting right claimed was for "mentally competent, terminally ill adults").

5. *Id.*

6. Vacco v. Quill, 521 U.S. 793 (1997).

7. *See, e.g.*, Martin Flumenbaum & Brad S. Karp, *The Right to Die*, 2 N.Y.L.J. 3 (1996) (discussing *Vacco v. Quill*); Susan R. Martyn & Henry J. Bourguignon, *Physician Assisted Suicide: The Fatal Flaws in the Ninth and Second Circuit Decisions*, 85 CAL. L. REV. 371 (1997); Margaret P. Miller, *Boot-Strapping Down a Slippery Slope in the Second and Ninth Circuits: Compassion in Dying is Neither Compassionate Nor Constitutional*, 30 CREIGHTON

opinions.[8] Some commentators applauded the Supreme Court

L. REV. 833 (1997); Michael S. Popkin, Symposium, *Physician-Assisted Suicide: Legal Rights in Life and Death*, 12 ST. JOHN'S J. LEGAL COMMENT 701 (1997) (predicting how Supreme Court will rule on Second and Ninth Circuit decisions).

8. *See* Kim C. Arestad, Vacco v. Quill *and the Debate over Physician Assisted Suicide: Is the Right to Die Protected by the Fourteenth Amendment?*, 15 N.Y.L. SCH. J.HUM. RTS. 511 (1999); Howard Brody, *Physician-Assisted Suicide in the Courts: Moral Equivalence, Double Effect, and Clinical Practice*, 82 MINN. L. REV. 939 (1998); Reginal Bussey, *Physician-Assisted Suicide: The Hippocratic Dilemma*, 22 T. MARSHALL L. REV. 253 (1997); Erwin Chemerinsky, *A Right to Physician Assisted Suicide?*, 33 TRIAL 68 (1997); Steven B. Datlof, *Beyond* Washington v. Glucksberg: *Oregon's Death with Dignity Act Analyzed from Medical and Constitutional Perspectives*, 14 J.L. & HEALTH 23 (1999-2000) (predicting how Supreme Court will rule on Second Circuit and Ninth Circuit decisions); Ezekiel J. Emanuel, *The Future of Euthanasia and Physician-Assisted Suicide: Beyond Rights Talk to Informed Public Policy*, 82 MINN. L. REV. 983 (1998); David M. English, *Supreme Court Upholds State Statutes Barring Physician-Assisted Suicide*, 24 EST. PLAN. 392 (1997) (May 1998); Brett Feinberg, *The Court Upholds a State Law Prohibiting Physician-Assisted Suicide*, 88 J. CRIM. L. & CRIMONOLOGY 847 (1998); Scott FitzGibbon, *The Failure of Freedom-Based and Utilitarian Arguments For Assisted Suicide*, 42 AM. J. JURIS. 211 (1997); Clarke D. Forsythe, *The Incentives and Disincentives Created by Legalizing Physician-Assisted Suicide*, 12 ST. JOHN'S J. LEGAL COMMENT 680 (1997); Leon Friedman, *Physician-Assisted Suicide*, 14 TOURO L. REV. 415 (1998); Lawrence O. Gostin, *Liberty Interest in Aided Suicide Rejected: Court Finds No Constitutionally Protected Interest, Distinguishing the Withdrawal of Life Support*, 19 NAT'L L.J., Aug. 8, 1997 at B9; Robert M. Hardaway, Miranda K. Peterson & Cassandra Mann, *The Right to Die and the Ninth Amendment: Compassion and Dying After* Glucksberg *and* Vacco, 7 GEO. MASON L. REV. 313 (1999); Michael B. Hickey, *Reading the Mystery Passage Narrowly: A Legal, Ethical and Practical Argument Against Physician-Assisted Suicide*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 567 (1998); Yale Kamisar, *On the Meaning and Impact of the Physician-Assisted Suicide Cases*, 82 MINN. L. REV. 895 (1998) [hereinafter Kamisar, *Meaning and Impact*]; Yale Kamisar, *The Future of Physician-Assisted Suicide*, 34 TRIAL 48 (1998) [hereinafter Kamisar, *Future of Physician-Assisted Suicide*]; Patricia A. King & Leslie E. Wolf, *Empowering and Protecting Patients: Lessons for Physician-Assisted Suicide from the African-American Experience*, 82 MINN. L. REV. 1015 (1998); Rachel D. Kleinberg & Toshiro M. Mochizuki, *Recent Developments: The Final Freedom: Maintaining Autonomy and Valuing Life in Physician-Assisted Suicide Cases*, 32 HARV.C.R. - C.L. L. REV. 197 (1997); Russell Korobkin, *Physician-Assisted Suicide Legislation: Issues and Preliminary Responses*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 449 (1998); Seth F. Kreimer, *The Second Time as Tragedy: The Assisted Suicide Cases and the Heritage of* Roe v. Wade, 24 HASTINGS CONST. L. Q. 863 (1998); Sylvia A. Law, *Birth and Death: Doctor Control v. Patient Choice*, 82 MINN. L. REV. 1045 (1998); Nelson Lund, *Two Precipices, One Chasm: The Economics of Physician-Assisted Suicide and Euthanasia*, 24 HASTINGS CONST. L.Q. 903 (1997); Frederick R. Parker, Jr., Washington v. Glucksberg *and* Vacco v. Quill: *An Analysis of the Amicus Curiae Briefs and the Supreme Court's Majority and Concurring Opinions*, 43 ST. LOUIS U. L.J. 469 (1999); Jennifer Cole Popick, *A Time to Die?: Deciding the Legality of Physician-Assisted Suicide*, 24 PEPP. L. REV. 1325 (1997); Popkin, *supra*, note 7; John H. Robinson, *Physician-Assisted Suicide: A Constitutional Crisis Resolved*, 12 NOTRE DAME J. L. ETHICS & PUB. POL'Y 369 (1998); John P. Safranek & Steven J. Safranek, *Can the Right to Autonomy be Resuscitated after* Glucksburg?, 69 U. COLO. L. REV. 731 (1998); Vincent J. Samar, *Is the the Right to Die Dead?*, 50 DEPAUL L. REV. 221 (2000); Louis Shepherd, *Dignity and Autonomy after* Washington v. Glucksberg: *An Essay About Abortion, Death, and Crime*, 7 CORNELL J. LAW & PUB. POL'Y 431 (1998); Kathryn L. Tucker, *The Death with Dignity Movement: Protecting Rights and Expanding Options after* Glucksberg *and* Quill, 82 MINN. L. REV. 923 (1998); Melvin I. Urofsky, *Leaving the Door Ajar: The Supreme Court and Assisted Suicide*, 32 U. RICH. L. REV. 313 (1998); Susan M. Wolf, *Pragmatism in the Face of Death: The Role of Facts in the Assisted*

decisions,[9] for what they interpreted as reining in what they saw as a trend toward fundamental rights creation.[10] Some criticized the opinions.[11] Some approved the legislative path onto which the Court had steered the assisted suicide debate,[12] while others expressed great concern over a legislative resolution.[13] There were also those who believed that the cases ended any realistic possibility of locating a right to assisted suicide in the Constitution because, in their view, the Court had explicitly rejected all the arguments

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Suicide Debate, 82 MINN. L. REV. 1063 (1998); *see also*, Jennifer Bradford, Vacco v. Quill *and* Washington v. Glucksberg: *Thou Shall Not Kill, Unless Your State Permits Physician-Assisted Suicide*, 26 PEPP. L. REV. 121 (1998); Katherine C. Glynn, *Turning to State Legislatures to Legalize Physician-Assisted Suicide for Seriously Ill, Non-Terminal Patients After* Vacco v. Quill *and* Washington v. Glucksberg, 6 J. LAW & POL'Y. 329 (1997); Philip King, Washington v. Glucksberg: *Influence of the Court in the Care of the Terminally Ill and Physician-Assisted Suicide*, 15 J. L. & HEALTH 271 (2000-2001); David Lavalle, Note, *Physician-Assisted Suicide: Is There a Right to Die?*, 31 SUFFOLK U. L. REV. 945 (1998); Miller, *supra* note 7; Larry I. Palmer, Essay, *Institutional Analysis and Physician's Rights After* Vacco v. Quill, 7 CORNELL J. L. & PUB. POL'Y 415 (1998); Gina D. Patterson, *The Supreme Court Passes the Torch on Physician Assisted Suicide*: Washington v. Glucksberg *and* Vacco v. Quill, 35 HOUS. L. REV. 851 (1998); Ursula A. Petrozzi, Note, *The Forgotten Lessons in* Quill v. Vacco: *A Perspective On the Modern Judicial Role As the Calabresian Remedy to The Problem of Statutory Obsolescence*, 44 WAYNE L. REV. 343 (1998); Nicole Testa, *Sentenced to Life? An Analysis of the United States Supreme Court's Decision in* Washington v. Glucksberg, 22 NOVA L. REV. 821 (1998); *see also* Martin Flumenbaum & Brad S. Karp, *Second Circuit Review—Reversals in 1996 Supreme Court Term*, 215 N.Y.L.J. 3 (Oct. 3, 1997); Daniel Wise, *An Attempt to Make Death Meaningful*, 215 N.Y.L.J. 1 (Apr. 4, 1996).

9. *See* John H. Garvey, *Control Freaks*, 47 DRAKE L. REV. 1 (1998); Kamisar, *Future of Physician-Assisted Suicide*, *supra* note 8, at 975; John Keown, *No Constitutional Right to Physician-Assisted Suicide?*, 56 CAMBRIDGE L.J. 506 (1997); Lavalle, *supra* note 8, at 975; Jill A. Melchoir, *The Quiet Battle for the Heart of Liberty – A Victory for the Cautious*: Washington v. Glucksberg, 117 S.Ct. 2258 (1997), 66 U. CIN. L. REV. 1359 (1998); Eunice Park, *Physician-Assisted Suicide: State Legislation Teetering at the Pinnacle of a Slippery Slope*, 7 WM. & MARY BILL RTS. J. 227, 303 (1998); Robinson, *supra* note 8; Wolf, *supra* note 8.

10. *See* James Bopp, Jr. & Richard E. Coleson, *Three Strikes: Is an Assisted Suicide Right Out?*, 15 ISSUES IN L. & MED. 1, 9-10 (1999); Lund, *supra* note 8, at 903; Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 681 (1997); Melchoir, *supra* note 9, at 1359; Robinson, *supra* note 8, at 369.

11. *See* Feinberg, *supra* note 8, at 847 ("[T]he Supreme Court incorrectly concluded that the right to die with assistance is a not a fundamental right." (footnote omitted)); Gostin, *supra* note 8, at 869; Kreimer, *supra* note 8, at 869, 871; Patterson, *supra* note 8, at 880; Safranek & Safranek, *supra* note 8, at 756 ("If hermeneutic inquiries into the constitutional limits of autonomy and liberty are actually governed by moral theory — rather than legal principle — then the judiciary imposes a view of the good whenever it mediates important personal rights' disputes."); Steven Staihar, *The State's Unqualified Interest in Preserving Life: A Critique of the Formulation of Life's Sanctity in* Washington v. Glucksberg, 34 IDAHO L.REV. 401, 421 (1998); Testa, *supra* note 8, at 852 (noting that certain state interests are inadequate to prevail over liberty interest).

12. *See* Emanuel, *supra* note 8, at 983; Glynn, *supra* note 8, at 338; Park, *supra* note 9, at 277. For discussion of issues to be faced by state legislatures considering physician-assisted suicide, *see* Korobkin, *supra* note 8.

13. *See* Kelly Lyn Mitchell, *Physician-Assisted Suicide: A survey of the Issues Surrounding Legalization*, 74 NOTRE DAME L. Rev. 341, 374-375; Park, *supra* note 9, at 277.

supporting a right to assisted suicide.[14] On the other hand, there were others who saw the constitutional door as still open.[15] And then within a couple of years, the articles ceased and legal scholars and law review editors turned to new academic pastures.

I did not stop pondering the issue. My father's death and my refusal to help him die continued to haunt me. The more I thought, the more I felt that

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14. *See* Kamisar, *Meaning and Impact*, *supra* note 8, at 901 (recognizing that the Supreme Court rejected all the arguments underlying the claim for a right to assisted suicide); Kamisar, *Future of Physician-Assisted Suicide*, *supra* note 8; Of some note is the fact that following *Glucksberg*, the Florida Supreme Court rejected an analogous claim under the privacy section of the Florida state constitution in Kirkscher v. McIver, 697 So. 2d 97, 104 (Fla. 1997). Thus, the Florida Court rejected the claim based on independent state constitutional grounds. Regarding independent state grounds; *see generally*, Michigan v. Long, 463 U.S. 1032, 1059 (1983); LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 164-166 (2d ed. 1988).

15. *See* Chemerinsky, *supra* note 8, at 69 (arguing that there may be constitutional right in specific case); Samar, *supra* note 8, at 221 (contending that the right to die still a viable constitutional argument because of the "level of abstraction" relied upon by the Court); Tucker, *supra* note 8, at 935.

Some of the basis for contentions that *Glucksberg* and *Vacco* did not foreclose future constitutional claims is based on the fact that the cases involved "facial challenges" to the statutes, rather than an "as applied" challenge which would focus on the poignant facts of a particular case. *See* Samar, *supra* note 8, at 309; Urofsky, *supra* note 8, at 398. Additionally, five Justices in *Glucksberg* intimated that at some point a patient would possess a fundamental constitutional right to be allowed access to the means to control excruciating pain. *Glucksberg*, 521 U.S. at 737 (O'Connor, J.), 742 (Stevens, J.), 789 (Ginsberg, J.), 790 (Breyer, J.), 791 (Souter, J.); *see* Chemerinsky, *supra* note 8, at 69 ("Five justices, in concurring opinions and opinions concurring in the judgment, left open the possibility that laws prohibiting physician-assisted suicide might be declared unconstitutional in specific cases.").

While the source of possible rights hinted at within these five opinions was substantive due process, another author has suggested that a similar route could be accessed through the Eighth Amendment:

> There may be some novelty in suggesting that the state is constitutionally barred not only from directly imposing severe pain, but also from preventing the alleviation of physical suffering caused by other forces. But *Estelle*, two decades ago, concluded that deliberate indifference to serious medical needs of prisoners can impose constitutionally impermissible "wanton and unnecessary pain." Indeed, one of the examples cited by the Court in *Estelle* as "cruel and unusual punishment" was refusal to administer a prescribed pain killer to prisoners after surgery.

Kreimer, *supra* note 8, at 893 (citation omitted).

Whatever the source of the constitutional underpinning, the five Justices did not seem to be considering an individual terminal patient whose suffering is so great that they should be permitted to end his life rather than be forced to continue suffering. In fact, any such suffering, terminally ill patient—like all the plaintiffs in *Glucksberg* and *Vacco*—likely would be dead by the time the court heard their case. McConnell, *supra* note 10, at 674. Rather, the Justices' thoughts were upon state legislation that precluded access to adequate pain control, *e.g.*, by making actions conducted under the principle of double effect (where a doctor gives pain medication with the intent of relieving pain, but with knowledge of a risk that the pain medication could kill the patient) illegal. *See* Chemerinsky, *supra* note 8, at 69; Kreimer, *supra* note 8, at 898 (finding that "[t]he opinions clearly contemplate potential judicial review where legislation or regulations to prohibit physicians from administering doses of pain medication necessary to avoid terminal suffering. But it is far from clear that such legislation or regulations in fact exist" (citation omitted)).

the law had no right to tell my seventy-nine-year-old father that he must lie in bed, suffering in the face of certain and imminent death. I do not think my feelings had anything to do with the sense that my father was being treated unfairly in comparison to other suffering, dying patients who, unlike him, just happened to be on life support machines which they could request to be turned off. Nor did I think in terms of some fundamental right to end one's life. My feelings could have been grounded in some right to be free from uncontrollable pain; but what I felt was even more basic and fundamental. My father had done enough. He did not owe anymore to this country. He had a right to be left alone and end his life if he wished.

That feeling guided me to a right which is not derived from anything explicit or implied in any textual provision of the Constitution. It is a right derived from the two underlying political philosophies[16] which form the basis of the entire U.S. Constitutional enterprise: John Locke's Social Contract[17] and Civic Republicanism.[18]

In Part I, this article discusses *Glucksberg's* fundamental rights analysis. So much has been written about this case that this article will limit comments to briefly adding thoughts as to why, given the combination of the Court's motivation, both institutional and pragmatic, in approaching this case, and its methodology for analyzing fundamental rights, a nine to zero decision was fairly predictable, even in this difficult, emotionally compelling case.

Part II gives more consideration to the equal protection claim. Those entering the debate in *Vacco v. Quill* regarding whether there is an equivalence between terminating life support (which the law permits) and assisted suicide (which the law forbids), have done so in a rather conclusory fashion, whether contending for[19] or against[20] equivalence. Many entering the debate also have

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16. *But see* Neomi Rao, *A Backdoor to Policy Making: The Use of Philosophers in the Supreme Court*, 65 U. CHI. L. REV. 1371, 1371 (1998) (maintaining that courts should not consider philosophy in making their decision, since that is a backdoor method for infusing legislative type policy analysis into their decisions; rather, courts should limit themselves to "history, precedent, and a recognition of the limits of judicial aurhority"). While I believe Ms. Rao makes a good point, it is not one that applies to the position asserted in this article. I have not trolled the philosophical landscape for my philosophical theories: They are embedded in the very structure of our government.

17. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. McPherson ed., 1980) (1690). Locke's "social contract" theory formed the basis of our constitutional structure. *See, e.g.*, James A. Gardener, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 82 U. PITT. L. REV. 189, 197-198 (1990). *See also infra* Part III.A.

18. *See, e.g.*, Frank Michelman, *Laws Republic*, 97 YALE L. REV. 1493 (1988). *See also infra* Part III.C.

19. In support of the Respondents in *Glucksberg* and *Vacco*, a group of respected political philosophers filed "The Philosophers' Brief." Brief for Ronald Dworkin et al. as Amici Curiae Supporting Respondents, Washington v. Gluckberg, 521 U.S. 702 (1997) (No. 96-110) *reprinted in* PHYSICIAN-ASSISTED SUICIDE: EXPANDING THE DEBATE, app. c, at 435 (Margaret P. Pattin et al. eds., 1998) [hereinafter EXPANDING THE DEBATE]; Brief for Ronald Dworkin et al. as Amici Curiae Supporting Respondents, Vacco v. Quill, 521 U.S. 793 (1997) (No. 1858) *reprinted in* EXPANDING THE DEBATE, *supra*, app. c., at 435. Addressing the equal protection

failed to explicitly question whether, even if what we condone in end-of-life care cannot be morally distinguished from assisted suicide, there may be meaningful distinctions in policy of which the law may properly take into account.[21] A detailed equal protection analysis of legally accepted medical

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claim, that there was no rational difference between assisted suicide and terminating life support, the philosophers stated:

> Th[is] argument [that there is a meaningful distinction] is based on a misunderstanding of the pertinent moral principles . . . .
>
> When a competent patient does want to die, the moral situation is obviously different, because then it makes no sense to appeal to the patient's right not to be killed as a reason why an act designed to cause his death is impermissible. From the patient's point of view, there is no morally pertinent difference between a doctor's terminating treatment that keeps him alive, if that is what he wishes, and a doctor's helping him to end his own life by providing lethal pills he may take himself, when ready, if that is what he wishes – except that the latter may be quicker and more humane. Nor is that a pertinent difference from the doctor's point of view. If and when it is permissible for him to act with death in view, it does not matter which of those two means he and his patient choose. If it is permissible for a doctor deliberately to withdraw medical treatment in order to allow death to result from a natural process, then it is equally permissible for him to help his patient hasten his own death more actively, if that is the patient's express wish.

EXPANDING THE DEBATE, *supra*, app. c., at 435.

Whatever one may think about the correctness of the Philosophers' claims regarding moral philosophy, these claims can hardly carry the day when assessing the product of legislation in which policy and pragmatics can justify treating morally equivalent actions differently (*e.g.*, driving 54.5 mph versus driving 55.5 mph when setting a 55 mph speed limit). At best, questions concerning moral equivalence is a starting point in the analysis. In fact, some philosophers disagree with the authors of the Philosophers' Brief regarding their stance on moral equivalence. *See, e.g.*, Brody, *supra* note 8.

20. The *Vacco* court rejected the claim that there is no rational distinction between assisted suicide and pulling the plug by relying more on conclusory pronouncements than careful analysis:

> [W]e think the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational . . . .
>
> The distinction comports with fundamental legal principles of causation and intent.

Vacco, 521 U.S. 793, at 800-01 (citation omitted).

While, as the analysis in Part II.C will demonstrate, the *Vacco* Court probably came to the right conclusion, the issue in front of it was far more sophisticated and complex than the Court acknowledged in its boilerplate-type analysis. *See, e.g.*, Brody, *supra* note 8, at 943 ("[T]he degree to which one intends and causes death varies along a spectrum; there is no bright line that separates allowing to die and killings.").

21. Law is concerned with social policy and not, necessarily, morality. *See, e.g.*, Yale Kamisar, *The Reasons So Many People Support Physician-Assisted Suicide – And Why These Reasons Are Not Convincing*, 12 ISSUES IN LAW & MED.113, 133-114 (1996) [hereinafter Kamisar, *Reasons*]. *See* LARRY I. PALMER, ENDINGS AND BEGINNINGS: LAW, MEDICINE, AND SOCIETY IN ASSISTED LIFE AND DEATH (2000) (arguing phyisican-assisted suicide an issue for the legislature, too complex for courts, as it is a product of institutional arrangements between law, medicine, and such).

Thus, even if one concludes that physician-assisted suicide is not always immoral, there

practices in end-of-life care—pulling the plug,[22] refusing treatment,[23] the principle of double effect,[24] and terminal sedation[25]—is, therefore, appropriate.

In Part III, this article discusses the Social Contract theory and Civil Republicanism. I explain why the combination of these political philosophies underlying the Constitution provide people like my father, both past the age of Social Security retirement and incapable of ever again participating in the political process, with a right to end their lives.

I. THE FUNDAMENTAL RIGHTS ARGUMENT AS A FOREGONE CONCLUSION

Given the Court's motivation and methodology, it is hardly surprising that *Glucksberg* was a nine to zero decision. In fact, it is hard to imagine that certiorari would have even been considered if two federal appellate courts had not found a constitutional right to assisted suicide, thereby forcing the issue. Once granted, the Court had a variety of motivations, both in terms of institutional legitimacy and pragmatism, not to find a fundamental constitutional right in this case.

First, it would only be natural for the Court to hesitate entering into an arena so charged with moral content and divided social beliefs.[26] While the sides might not be as polarized as those of women claiming the right to choose and those characterizing abortion as baby murder, the lines in assisted suicide are, in part, formed from the same characteristics—most notably, the moral consequences of intentionally taking human life. Granted, polls show significant numbers of people supporting assisted suicide for terminally ill,

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nevertheless may be reasons of social policy to make it illegal. *See*, Yale Kamisar, *The Rise and Fall of the 'Right' to Assisted Suicide*, *in* THE CASE AGAINST ASSISTED-SUICIDE: FOR THE RIGHT TO END-OF-LIFE CARE 87 (Kathleen Foley & Herbert Hendon eds., 2002) [hereinafter THE CASE AGAINST ASSISTED-SUICIDE]; Lance K. Still, *Physician-Assisted Suicide: To Decriminalize or to Legalize, That is the Question*, *in* EXPANDING THE DEBATE, *supra* note 19, at 245; Sue Rodriguez v. Attorney Gen. Can. & Attorney Gen. B.C., [1993] S.C.R. 579.

While morality and values can certainly drive social policy, and social policy can be achieved by attaching moral labels to certain behaviors, the author believes that a dichotomy between "morality" and "social policy" is useful for this conversation (even if deconstructable and philosophically oversimplified).

22. *See infra* Part II.C.2.

23. *See infra* Part II.C.3.

24. *See infra* Part II.C.1.

25. *See infra* Part II.C.4.

26. *Compare* PETER SINGER, RETHINKING LIFE AND DEATH—THE COLLAPSE OF OUR TRADITIONAL ETHICS (1994), *with* WESLEY J. SMITH, FORCED EXIT—THE SLIPPERY SLOPE FROM ASSISTED SUICIDE TO LEGALIZED MURDER (1997). *See also* Kamisar, *Future of Physician-Assisted Suicide*, *supra* note 8, at 52 ("*Roe v. Wade* ignited what has aptly been called a 'domestic war,' one that, after a quarter-century of tumult, seems finally to have come to an end in the courts. The Court that decided the assisted suicide cases in 1997 was not eager to set off a new domestic war." (citation omitted)).

suffering patients.[27] However, those numbers may be a bit misleading. When faced with a specific plan for physician-assisted suicide ("PAS"), voters are far less comfortable with the reality than the concept of PAS.[28] Considering all the state initiatives on PAS, only Oregon's initiative has passed.[29] The Supreme Court would, therefore, have reasonably foreseen *Roe redux*. They no doubt could imagine case after case returning to the Court[30] challenging

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27. Lauren Neergaard, *How People Meet Death—A Major Study*, SEATTLE POST INTELLIGENCER, Nov. 15, 2000, at 1. ("[B]etween 60%-70% of Americans believe terminally ill people in pain should be able to end their lives."). Annette E. Clark, *Autonomy and Death*, 71 TULANE L. REV. 45, 54-55 (1996); Paul J. Zwier, *Looking for a Non-Legal Process: Physician-Assisted Suicide and the Care Perspective*, 30 U. RICH. L. REV. 199 (1996); Lynn Tracy Nerland, *A Cry for Help: A Comparison of Voluntary Active Euthanasia Law*, 13 HASTINGS INT'L & COMP. L. REV.115 (stating 58% favor euthanasia in 1988); Robert T. Hall, *Final Act: Sorting Out the Ethics of Physician-Assisted Suicide*, 54 THE HUMANIST 13 (1994); (citing 1993 Harris Poll: 73% favor some form of Oregon-like physician-assisted suicide); Sarah Horsfall et al., *Views of Euthanasia from an East Texas University*, 38 SOC. SCI. J.617 (2001) (stating roughly 75% of the students at an east Texas University are in favor of euthanasia – similar to general public.); *Knowledge, Altitudes, and Behavior: Survey Finds Majority Support Right to Euthanasia and Doctor-Assisted Suicide*, AIDS WEEKLY, Jan. 28, 2002, at 13 (stating 61% favor physician-assisted suicide law). *See also* Linda Ganzini et al., *Attitudes of Patients with Amyotrophic Lateral Sclerosis and Their Caregivers Toward Assisted Suicide*, 339 NEW ENG. J. MED. 967, 967 (1998) (citing majority of patients in a study in Washington and Oregon with ALS would consider assisted suicide).

28. Felicia Cohn & Joanne Lynn, *Vulnerable People: Practical Rejoinders to Claims in Favor of Assisted Suicide*, *in* THE CASE AGAINST ASSISTED SUICIDE, *supra* note 21; LIEZL VAN ZYL, DEATH AND COMPASSION—A VIRTUE BASED APPROACH TO EUTHANASIA 124-125 (2000). *See also* IAN DOWBIGGIN, A MERCIFUL END—THE EUTHANASIA MOVEMENT IN MODERN AMERICA 175 (2003) (noting consistently, in the polls one-third support PAS, one-third support PAS in isolated cases but oppose it in general, and one-third oppose PAS in all circumstances. While there is a general endorsement in the abstract right to PAS, people balk when considering the right in specific situations).

29. *See Glucksberg*, 521 U.S. at 717-718 (noting Washington and California rejected ballot measures to legalize PAS. "Since the Oregon vote, many proposals to legalize assisted-suicide have been and continue to be introduced in the States' legislatures, but none has been enacted. And just last year, Iowa and Rhode Island joined the overwhelming majority of states explicitly prohibiting assisted suicide." (citation omitted)).

30. Another factor at work in the assisted suicide cases, and one that will operate as well the next time the Court confronts the issue, is the Justices' realization that if they were to establish a right to assisted suicide, however limited, the need to enact legislation implementing and regulating any such right would generate many problems. These inevitably would find their way back to the Court.

> In Short, in many respects the legislative response to a Supreme Court decision establishing right to assisted suicide is likely to be a replay of the response to *Roe v. Wade*, a specter that did not escape the attention of the justices last year.
> At one point in the oral arguments, Rehnquist told the lead lawyer for the *Glucksberg* plaintiffs:
> "You're not asking that [this Court engage in legislation] now. But surely that's what the next couple of generations are going to have to deal with, what regulations are admissible and what not if we uphold your position here.
> [Y]ou're going to find the same thing . . . that perhaps has happened with the abortion cases, there are people who are just totally opposed and people who are totally in favor of them. So you're going to have those factions fighting it out in every session of the legislature—how far can we go in regulating this. And that

particular state legislation as allegedly interfering with the right to PAS, or even attacking the legislation as jeopardizing the health and safety of vulnerable populations of citizens[31] who might be coerced into PAS.[32]

Second, the Court was being asked to find yet another Constitutional right which was not articulated in the text of the Constitution. On the one hand, the Court has not been unwilling to find such substantive rights within the Due Process Clause of the Fourteenth Amendment. After all, it has been a long time since *Lochner* and the economic due process debacle,[33] and approaching forty years since *Griswold*.[34] On the other hand, the Court has justifiable concerns with its legitimacy as a non-elected branch of a democratic government when declaring such unenumerated rights,[35] and, thereby, binding

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will be a constitutional decision in every case."

Kamisar, *Future of Physician-Assisted Suicide*, *supra* note 8, at 50-51, 51-52 (citation omitted).

31. *See, e.g.*, Kathleen Foley & Herbert Hendin, *Introduction: A Medical Legal Psychosocial Perspective*, *in* THE CASE AGAINST ASSISTED SUICIDE, *supra* note 21, at 13; Diane Coleman, *Not Dead Yet*, *in* THE CASE AGAINST ASSISTED SUICIDE, *supra* note 21, at 213; John Finnis, *Misunderstanding the Case Against Euthanasia: Response to Harris's First Reply*, *in* EUTHANASIA EXAMINED – ETHICAL, CLINICAL AND LEGAL PERSPECTIVES 64 (John Keourd ed., 1995) [hereinafter EUTHANASIA EXAMINED]; SINGER, *supra* note 26, at 49, 199 (1995). This concern is said to be particularly acute for the disabled given how society tends to already undervalue them and limit their lifestyle choices. Jerome E. Bickenbach, *Disability and Life-Ending Decisions*, *in* EXPANDING THE DEBATE, *supra* note 19; Darrel W. Amundson, *The Significance of Inaccurate History in Legal Consideration of Physician-Assisted Suicide*, *in* PHYSICIAN-ASSISTED SUICIDE, 16 (Robert Weir ed., 1997) [hereinafter PHYSICIAN-ASSISTED SUICIDE]; SINGER *supra* note 26, at 181.

32. In fact, the Oregon "Death with Dignity Act," which was passed in 1994, was enjoined by the Federal Courts until 1997. *Lee v. Oregon*, 107 F.3d 1382, 1386 (9th Cir. 1997), cert. den., 522 U.S. 927 (1997); Clark, *supra* note 27, at 61; SMITH, *supra* note 26, at 126; Simon M. Canick, *Constitutional Aspects of Physician-Assisted Suicide after* Lee v. Oregon, 23 AM. J. LAW & MED. 69 (1997). The injunction by the federal district court was underlain by an equal protection theory that the lives of certain vulnerable citizens (*e.g.*, those who are terminally ill and suicidal) will be less protected by the State because under the Act they will tend to be directed towards PAS rather than psychiatric treatment. This claim eventually was rejected by the Ninth Circuit for lack of "standing" *supra*, 107 F.3d at 1390, but that does not mean that a similar claim with more compelling facts could not be raised in some future action.

33. *See* Lochner v. New York, 198 U.S. 45, 64 (1905) (holding substantive due process in the form of the "right to contract" formed basis for finding progressive wage and hour regulations unconstitutional). Lochner was overruled in the middle of the depression by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

For a critique of *Lochner*, *see, e.g.*, RONALD DWORKIN, LIFE'S DOMINION—AN ARGUMENT ABOUT ABORTION, EUTHANASIA AND INDIVIDUAL FREEDOM 121 (1994) ("*Lochner* has long since been overruled, and lawyers cite it today only as a paradigm example of Supreme Court lunacy."); TRIBE, *supra* note 14, at 567-586. *But see* Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 9-10 (1955) (stating even if Lochner was wrongly decided, courts have been incorrect in bifurcating substantive due process into "economic" (*e.g.*, occupational liberty) and "other liberties").

34. Griswold v. Connecticut, 381 U.S. 379, 479 (1965).

35. As Judges are appointed for life and not elected, the Justices of the Supreme Court are understandably cautious when reviewing the work of the democratically elected branch of government, the legislature. *See generally* JOHN H. ELY, DEMOCRACY AND DISTRUST: A

all federal and state governmental actions. The Justices of the Court hardly wish to be seen as using their positions merely to enforce their own political preferences.[36] Within this understandable reluctance of declaring so-called unenumerated rights, the assisted suicide claim was additionally problematic both for (1) the legal theory relied upon to generate the right and (2) the nature of the right itself.

A. The Legal Theory

In support of its position, the proponents of the right to assisted suicide cited a passage from the last abortion case decided by the Supreme Court, *Planned Parenthood v. Casey*: "At the heart of liberty is the right to define one's own sense of existence, of meanings, of the universe, and of the mystery of human life."[37]

THEORY OF JUDICIAL REVIEW 206 (1980) ("[T]here can be no doubt that the judicial branch, at least at the federal level, is significantly less democratic than the legislative and executive."). Ely's concern was reflected in *Glucksberg*:

> But the court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. *Collins*, 503 U.S., at 125. [Collins v. Harker Heights, 503 U.S. 115, 125 (1992) (citing to Regents of Univ. of Mich. V. Ewing, 474 U.S. 214, 225-26 (1985).] By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the area of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," *Id.*, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court, *Moore* [v. East Cleveland], 431 U.S. 494, 502 (1977), 431 U.S. at 502 (plurality opinion).

Glucksberg, 5211 U.S. at 787.

Because of this concern, Ely proposed that the Court should only delve deeply into legislative motives and alternatives when the legislation impacts groups that have been systematically excluded form participation in the political process which crafted the legislation; *i.e.*, when the excluded group constitutes a "discrete and insular minority." ELY, *supra*. For an article applying Ely's views to morally-charged issues such as assisted-suicide *see* Ryan E. Mick, *Justification for a Constitutional Jurisprudence of Deference to the State's 'Moral Judgments,'* 12 KAN. J. LAW. & PUB. POL'Y 379, 381-382 (2003).

36. Permitting the Supreme Court to find unenumerated rights in the Constitution of course carries certain risks of Justices lending a constitutional mandate to their own personal political-value preferences. DWORKIN, *supra* note 33, at 121. That, in fact, is precisely the charge Justice Scalia leveled against the majority in Lawrence v. Texas: "To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of *stare decisis* set forth in *Casey*. It has thereby exposed *Casey's* extraordinary deference to precedent for the result-oriented expedient that it is." Lawrence v. Texas, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting). "It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed." *Id.* at 602 (Scalia, J., dissenting).

37. This language from the opinion in Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992), set the focus for the arguments throughout the federal courts. *See* discussion in *Glucksberg*, 521 U.S. at 726-27.

Let me leave this portion of the analysis with a general caution about using the abortion line of cases in a legal battle over assisted suicide. Those cases can readily be confined to the

While earlier non-economic substantive due process cases from the 1920s involved the intersection of rights to direct the raising of one's children

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abortion arena, so as to have little precedential value in the assisted suicide arena. Suicide and assisted suicide involve actual taking of life. Central to the *Roe* decision was the Court's finding that a fetus was not a viable life in being with independent rights. Roe v. Wade, 410 U.S. 113, 158 (1973); DWORKIN, *supra* note 33, at 36, 110; SMITH, *supra* note 26, at 211 (1997); Susan M. Wolf, *Physician-Assisted Suicide, Abortion, and Treatment Refusal—Using Gender to Analyze the Difference, in* PHYSICIAN-ASSISTED SUICIDE 167, 180-81. This finding avoided all homicide arguments, leaving only the state's admitted interests in a potential life. Alternatively, the Court could have found that the fetus was a viable life with rights equal to any other life in the world, except the mother. It could have held that when those rights conflict with those of the mother, the rights of the fetus must give way. The law does recognize that children have lesser rights than adults in a variety of areas, such as the rights to vote, drive, marry, buy liquor, and "expectation of privacy rights." *See*, e.g., T.L.O. v. New Jersey, 469 U.S. 325 (1985) (involving searching of student lockers). But the *Roe* Court did not choose to take that route.

Also, the abortion line of cases is deeply entwined with the notion of a woman's right to have control over her own body. Wolf, *supra* at 170, 173 (stating abortion, life refusing treatment, involves keeping something out of her body, avoiding "invasion"); Planned Parenthood v. Casey, 505 U. S. 833, 857 (1992). The cases could have been based on precluding any governmental action which substantially fetters women's choices about how to live their lives (*e.g.*, having a child now keeps her from going to college). *See, e.g.*, DWORKIN, *supra* note 33, at 57; *Casey*, 505 U. S. at 927 (Steven, J., discussing life choices abortion can make possible for a woman). That might have given some support to a position incorporating quality of life notions and ideas about controlling the final stages of life when they become unbearable. But the notion of general control over her life, as contrasted with rights involving control over her body, does not seem to be at the core of those cases. SMITH, *supra* note 26, at 211; Yale Kamisar, *The Rise and Fall of the "Right" to Assisted Suicide, in* THE CASE AGAINST ASSISTED SUICIDE, *supra* note 21; Wolf, *supra* note 8, at 71; Susan Frelich Appleton, *Assisted Suicide and Reproductive Freedom: Exploring Some Corrections*, 76 WASH. U.L.Q. 15, 17 (1988) (distinguishing assisted suicide from reproductive rights); *Casey*, 505 U.S. at 869 (1992). You could say that by denying my father SASE ("suicide, assisted suicide, and euthanasia") the state has totally taken away his control over his own body and is forcing him to suffer for its primarily symbolic interests. It is a plausible analogy, but not completely persuasive. The state is not really interfering with my father's control of his body in the same sense as denying an abortion to a pregnant woman. The state is not making him let the cancer grow in his body except to the extent they can be said to be making him stay alive, which in turn is a logical precondition of any bodily experience.

Moreover, one could plausibly interpret the *Roe* line of cases so that, rather than incorporating some notion of "general control" over women's bodies, these cases can be seen as being concerned with providing women control over "invasions" of their bodies. That would be consistent with the statement in *Casey* that abortion rights exist constitutionally at the intersection of rights to privacy and rights to refuse unwanted medical treatment (*i.e.*, unwanted medical invasion of the woman's body). While the cancer surely was invading my father's body, no law precluded him from repelling the invasion (e.g., through surgery, chemotherapy, radiation, and such). SASE, on the other hand, is more akin to repelling an invader by destroying the invader along with your entire society.

Finally, unlike pregnancy and women, cancer is not unique to, or part of, any species survival role related to either gender specific. Only women's bodies bear children. That is their burden and joy. It is such a constant part of who they are or who they could become that control over this aspect of their existence is a significant part of having control over themselves throughout much of their lives. *Casey*, 505 U. S. at 869 (1992). In contrast, the current narrative of suicide and assisted suicide takes place in illness, at the very end of life, without any connection to gender.

with First Amendment religious[38] and/or associational rights,[39] all modern substantive due process cases—*Griswold*,[40] *Eisenstadt*,[41] *Roe*,[42] *Planned Parenthood v. Casey*,[43] *Lawrence v. Texas*[44]—have basically revolved around a single aspect of human life: sexual relationships.[45] *Glucksberg* thrust the unenumerated rights question into the sphere of life and death. Entering this realm of realms, where would the search for unarticulated fundamental rights now lead?

This question became poignant given that the guide for developing unenumerated rights was to be the passage from *Casey* extolling autonomy[46] as the source of these rights. This is the same autonomy which has been variously characterized as defining one's self through one's choices,[47] maintaining a coherent life story,[48] and making significant decisions in one's life.[49]

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38. Pierce v. Society of the Sisters, 268 U.S. 510, 530-32 (1925).

39. Meyer v. Nebraska, 262 U.S. 390, 400-402 (1923).

40. *Griswold*, 381 U.S. at 479 (1965).

41. Eisenstadt v. Baird, 405 U.S. 438, 443 (1972).

42. *Roe*, 410 U.S. at 113 (1973). *See also* City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (holding Akron abortion ordinance unconstitutional because it violated a woman's right to privacy); Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (holding the state statute prohibiting the use of public employees or facilities for the use of nontherapeutic abortions and prohibiting the use of public funds to encourage women to have nontherapeutic abortions were constitutional and moot respectively); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U. S. 747 (1986) (holding several provisions of Pennsylvania Abortion Control Act unconstitutional); *Casey*, 505 U.S. at 833 (standing generally for the concept that government cannot place an undue burden on a woman's ability to have an abortion by placing a substantial obstacle in her way).

43. *Casey*, 505.U.S. at 833.

44. *Lawrence*, 539 U.S. at 558.

45. Even substantive due process claims rejected by the Court tended to have a sexual flavor. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (holding father of a child from adulterous relationship has no fundamental right in maintaining parental relationship with child); Bowers v. Hardwick, 478 U.S. 186 (1986) (holding no fundamental right for gay men to have sex in the privacy of their home). *See Casey*, 505 U.S. at 851.

46. Autonomy has become the dominant principle in medical ethics. *See* Paul J. Zwier, *Looking for a Nonlegal Process: Physician-Assisted Suicide and the Care Perspective*, 30 U. RICH. L. REV. 199, 228 (1996). "Autonomy" is also the sense in which the right to "privacy" has evolved in American constitutional jurisprudence. *See* M.T. Meulders-Klein, *The Right Over One's Own Body: Its Scope and Limits in Comparative Law*, 4 B. C. INT'L & COMP. L. REV. 29, 61-74 (1983).

47. John Harris, *Euthanasia and the Value of Life*, *in* EUTHANASIA EXAMINED, *supra* note 31, at 11 ("Our own choices, decisions, and preferences help make us what we are . . .").

48. *See* DWORKIN, *supra* note 33, at 27, 199-200, 205 (controlling one's narrative maintains an "integrity" to that life); Harris, *Euthanasia and the Value of Life*, *in* EUTHANASIA EXAMINED, *supra* note 31 at 14.

49. *See* Harris, *Euthansia and the Value of Life*, *in* EUTHANASIA EXAMINED, *supra* note 31 ("[w]hile someone might have strong, and for them important, preferences about the manner and timing of their own death, these should be respected because they are just that, strong and important preferences . . ."); Dan W. Brock, *Physician-Assisted Suicide is Sometimes Morally Justified*, *in* PHYSICIAN-ASSISTED SUICIDE, *supra* note 31, at 89-90; *But see* Richard A.

Given the uncertainty of the limits on rights-creation, if this notion of autonomy was held to be coextensive with the definition of individual conduct protected by the Constitution, it is little wonder that Justice Rehnquist muttered, mumbled and backtracked when he responded to this claim: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, *San Antonio Independent School Dist. v. Rodriquez*, 411 U. S. 1, 33-35 (1973), and *Casey* did not suggest otherwise."[50]

B. The Right Claimed in Glucksberg

The Court further realized that the right it was being asked to constitutionalize could not be confined within bright, or even dim, lines. Much of the questioning by the Court of the Respondent focused on the inability to confine any right to PAS to terminally ill patients.[51] Given the

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McMormick, *Bioethics: A Moral Vacuum*?, 180 AMERICA 8, 9 (May 1, 1999) ("Absolutizing autonomy represents a failure to wrestle with those dimensions of conduct that make choices right or wrong—in brief, a moral vacuum.").

50. *Glucksberg*, 521 U. S. at 727-28. In refusing to apply the *Casey* language, the *Glucksberg* Court thus merely noted that the fact that many of the substantive or due process rights the Court has declared have sounded in personal autonomy does not mean that any and all important intimate personal decisions are protected as fundamental rights. But the Court failed to say why not, let alone provide any criteria for determining when an autonomy-based right is fundamental, and when it is not. The answer is obvious, you might say. We do not want to sanction parents having sex with their children; brothers marrying their sisters; or a 30-year old marrying his 12-year old cousin. But none of that necessarily follows from a strong adherence to the *Casey* language. In the first place, in at least two of these examples children are involved, and these can hardly be considered a matter of personal choice in which the state has no interest. In the second place, even if we afford sexual privacy the status of a fundamental right, the state would still be able to counter any strict scrutiny challenge involving these scenarios with a knockout blow: The state's interests in prohibiting incest and sexual abuse of children are plainly substantial.

51. *See* Kamisar, *The Future of Physician Suicide*, *supra* note 8 (citing Transcript of Oral Argument at 41, Washington v. Glucksberg, 1997 WL 13671 (Jan. 8, 1997) (No. 96-110); *see also Glucksberg*, 521 U.S. at 733. Thus, Rehnquist noted Washington state's insistence that the impact of the Ninth Circuit's decision—invalidating the state's assisted suicide ban "only 'as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors'"—"will not and cannot be so limited." Then, he observed:

> the [Ninth Circuit's] decision, and its expansive reasoning provide ample support for the State's concerns. The court noted, for example, that the "decision of a duly appointed surrogate decision maker is for all legal purposes the decision of the patient himself" that "in some instances, the patient may be unable to self-administer the drugs and . . . administration by the physician may be the only way the patient may be able to receive them," and that not only physicians, but also family members and loved ones, will inevitably participate in assisting suicide. Thus, it turns out that what is couched as a limited right to "physician-assisted suicide" is likely, in effect, a much broader license, which could prove extremely difficult to police and contain (quoting Compassion in Dying v.

nature of the right asserted, the Justices' concern was understandable. The right alleged said to sound in autonomy, had been described alternately as the right to die,[52] the right to "die in the time and manner of one's choosing,"[53] and the right to "death with dignity."[54] Yet, if one looks carefully at each of these

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Washington, 79 F.3d 790, 831-832, 838 nn. 120, 140 (9th Cir. 1996)). *Glucksberg*, 521 U.S. at 733.

52. *See, e.g.*, ALAN MEISEL, THE RIGHT TO DIE 3-12 (1989); Kamisar, *Reasons*, *supra* note 21, at 116 ("The 'right to die' is a catchy rallying cry . . ."). Some focusing on a "right to live" have even approached the issue as one of waiver. The "right to waive the right to live" is an interesting argument because its first premise is the same as the first premise of the anti-suicide position (*i.e.*, that the primary function of society is to protect life). I have a "right to live." If I have a right to live, that right is for my protection, and is *my* right. Frances M. Kamm, *Physician-Assisted Suicide, Euthanasia, and Intending Death*, *in* EXPANDING THE DEBATE, *supra* note 31, at 36; Rosamond Rhodes, *Physicians-Assisted Suicide, and the Right to Live or Die*, *in* EXPANDING THE DEBATE, *supra* note 31, at 167. *But cf.* THE LINACRE CTR. FOR HEALTH CARE ETHICS, EUTHANASIA CLINICAL PRACTICE & THE LAW 40 (Luke Gormally ed., 1994) [Hereinafter CLINICAL PRACTICE] (stating the right involved is really the right "not to be murdered"). As such, I can waive the right, just like I can waive my right against self-incrimination and confess to a crime, or waive my right against illegal search and seizure and consent to police looking through my house. To be sure, we sometimes require a waiver ceremony or ritual where the person waiving must appear before some formal body or tribunal to make sure they fully understand the right(s) they are giving up and that this is their unfettered choice. *See* FED. R. CRIM. P. 11; Boykin v. Alabama, 395 U.S. 238 (1969) (specifying the required content of the plea ritual). And maybe that would be a good idea in this case, given the irreparable nature of the decision, the concern about coercion, and even the risk of disguised homicide. But in the end, I should be able to give up my right to live and end my life however I choose. This argument has a nice rhetorical ring to it, but ultimately is unconvincing.

Initially, what can it mean to say one has a right to live when people *always* die, and die all around us from a variety of causes? I do not think that the idea would resonate well with most if I refused to serve my country in a war claiming that the particular action is too dangerous and thereby unduly burdens my right to live. I do have a fundamental right that my life not be taken without due process, *i.e.*, that I not be killed unjustly. But that is not the same as a right to live.

Moreover, even if I had such a right as the "right to live," the state may have sufficient interests in my well-being and its effect on others as to deny me the right to waive it. Meulders-Klein, *supra* note 46, at 38 (prohibiting consent to a battery unless battery is part of a violent sport such as boxing or football); Witmore v. Arkansas, 495 U.S. 149, 175 n.1 (1990) (Marshall, J., dissenting) (citing thirteen states prohibiting waiver by defendant of direct appeal in death penalty conviction); Finally, while I am protected by the Thirteenth Amendment against being sold into slavery, that institution is so offensive to a modern society that I cannot waive the protection of the Thirteenth Amendment and voluntarily sell myself into slavery. DANIEL CALLAHAN, THE TROUBLED DREAM OF LIFE: IN SEARCH OF PEACEFUL DEATH 105 (1993). So, even if I have a right to live (which is questionable), the state does not necessarily have to let me waive that right.

53. MARGARET SOMERVILLE, DEATH TALK: THE CASE AGAINST EUTHANASIA AND PHYSICIAN-ASSISTED SUICIDE 31 (2001) [hereinafter DEATH TALK]. *See also Glucksberg*, 521 U.S. at 722 ("[P]roperly analyzed, the first issue to be resolved is whether there is a liberty interest in determining the time and manner of one's death . . ."). *But see* CALLAHAN, *supra* note 52, at 36-37 (controling everything in life is impossible, and there is a richness from not doing so).

54. Daniel Callahan & Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 U. RICH. L. REV. 1, 20 (1996); Martin Funderson & David J. Mayo, *Altruism and Physician Assisted Death*, 18 J. MED. & PHIL. 281, 284-87

attempts at articulating the fundamental right that was the subject of *Glucksberg*, one is hardly left with clear guidance as to the right's contours.

First, there is no need to embody a right to die in the Constitution because we all die. Second, the time and manner of one's death is a function of chance and circumstance and, absent distributing cyanide capsules, few will ever control it. Third, the label death with dignity is a misnomer. Death is merely a state of being and is neither dignified nor undignified.[55] The term dying with dignity is a more suitable moniker to the right to control one's passing. However, even when applied to dying, there is no consensus on the meaning of dignity. Some find dignity in the very fact of being human.[56] Some locate dignity in our capacity for moral reasoning.[57] Still some see it as a social construction, relating to how the individual carries himself,[58] while others conceptualize dignity as some force of grace in the face of the degrading and unjust.[59]

Rather than attempt a definition of dignity, it would probably be fairer to the proponents of PAS in the *Glucksberg* Court to equate the phrase *dying with dignity* with a rejection of bad death. By that I mean that what is meant is not so much a picture of a good death,[60] but rather rejection of a *bad death*.

(1993) (noting we want loved ones to remember us as vital).

55. In fact, death in our culture has many faces. In Christian thought, death is "the enemy." *See* Paul Ramsey, *The Indignity of "Death with Dignity," in* DEATH, DYING, AND EUTHANASIA, 310, 321 (Dennis J. Horan & David Mall eds., 1997) [hereinafter EUTHANASIA] (Death is oblivion, which is a frightening concept).

But, death can be seen in many other ways: Wim J.M. Dekkers, *Images of Death and Dying, in* BIOETHICS IN A EUROPEAN PERSPECTIVE 411 (H.A. Ten Have & Bert Gordijn eds., 2002) (describing death as tragic or evil); CALLAHAN, *supra* note 52, at 180 (describing death as a separate epoch unconnected to our lives); Ramsey, *supra* note 55, at 309 (describing death as that which makes us value our days); ABRAHAM JOSHUA HESCHEL, I ASKED FOR WONDER, A SPIRITUAL ANTHOLOGY 72 (Samual H. Dressner ed., 1984) (describing death as a giving away which is "reciprocity on man's part for God's gift of life").

56. Germain Grisez, *Suicide and Euthanasia, in* EUTHANASIA *supra* note 55, at 782; Finnis, *supra* note 31, at 69; Luke Gormally, *Walton Davis, Boyd and the Legalization of Euthanasia, in* EUTHANASIA EXAMINED 113, 115 (John Keown ed., 1995); Fr. Robert Barry, O.P., *The Development of the Roman Catholic Teachings on Suicide*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 449, 498 (1995); Sylvia D. Stolberg, *Human Dignity and Disease, Disability, Suffering: A Philosophical Contribution to the Euthanasia and Assisted Suicide Debate, in* DEATH TALK: THE CASE AGAINST EUTHANASIA AND PHYSICIAN-ASSISTED SUICIDE 255, 255 (Margaret Sommerville ed., 2001); *Id.* at 267 (noting that historically, dignity dealt with honor, inequality of attributes; only in the modern view do all persons have equal dignity).

57. *See* ALAN DONAGAN, THE THEORY OF MORALITY 237 (1977). *But see* ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD 29, 35 (1985) (arguing that intense pain destroys the person's self and world).

58. *See* CALLAHAN, *supra* note 52, at 147; Ramsey, *supra* note 55, at 307; Stolberg, *supra* note 56, at 257 (reasoning that this notion of dignity should be thought of as "social dignity").

59. Thus, I believe that a person can be totally dependant and ill, and yet retain his dignity; a view which others share. *See, e.g.*, CALLAHAN, *supra* note 52, at 12-21; Stolberg, *supra* note 56, at 258-59.

60. This notion reflects the Greek ideal of "good death." *See* John M. Cooper, *Greek Philosophers on Euthanasia and Suicide, in* SUICIDE AND EUTHANASIA: HISTORICAL AND CONTEMPORARY THEMES 9 (Baruch A. Brody ed., 1989). As such, the term euthanasia "is

It is this latter narrative, this *dying without dignity*, which the proponents of PAS sought to prevent. In this bad death narrative, the person is in pain and soiling himself, with tubes and machines humming away (although, if these are life-supporting tubes and machines, the patient can request that they be removed and shut off).[61] Why must a patient endure this? Why can the patient not exercise his autonomy and choose to end this mockery of his existence with the assistance of a physician through PAS? To permit less denies them the right to die with dignity.[62]

But for the *Glucksberg* Court, there was more than this sympathetic narrative to behold. There was the next case and the next case. Initially, if you give the patient the right to PAS, how can one limit that right so as to exclude euthanasia?[63] One might answer that as an administrative/policy matter, the distinction is clear: with PAS, the physician provides the lethal pills. It is the patient's choice alone whether or not to take the pills. This gives a chance for the patient to choose not to take the pills, and gives some assurance that, if the patient does choose to take the pills, his actions reflect a voluntary choice. It also keeps members of the medical profession from directly killing their patient (e.g., with a lethal injection).[64] But justified as this distinction may be in the halls of policy, it will lose cultural legitimacy when the public sees cases of sick, suffering people who are incapable of picking up the pills and/or swallowing the pills themselves. If they have a fundamental right to dying with dignity, how can they be denied the only means available to them to exercise that right?

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derived from the Greek word *eu*, meaning 'well', and *thanatos* meaning 'death', and early on signified 'good' or 'easy' death." Steve Zankas & Wendy Coduti, *Eugenics, Euthanasia, and Physician Assisted Suicide*, 72 J. REHAB. 27, 28 (2006).

61. *See* Cruzan v. Missouri Department of Health, 497 U.S. 261, 310-11 (Brennan, J., dissenting) (1984). *See also infra* notes 100-105 and accompanying text.

62. As some have noted, however, dying with dignity and autonomy can conflict:

> If dignity refers to the way one lives as a sick or dying patient—the extent to which one retains dignity during the trials of illness and decline—and also to the way one dies—*i.e.*, quietly, peacefully, as a competent individual rather than sedated and incompetent or violently through a "makeshift" suicide—then dignity does not refer simply to autonomy. Instead, dignity refers to a specific valuation of the quality of one human being's existence and his dying process. Thus, respecting someone's dignity in the "death with dignity" context presupposes making a value judgment about an individual's quality of life, while respecting that same person's autonomy would require us to avoid making such value judgments.

Shepherd, *supra* note 8, at 453.

63. *See* Len Doyl, *Why Active Euthanasia and Physician Assisted Suicide Should Be Legalized*, 323 BMJ 1079, 1080 (2001) (stating logically, it will be difficult to hold the line between PAS and Voluntary, Active Euthanasia).

64. *See Glucksberg*, 521 U.S. at 731 (concerning the state's interest "in protecting the integrity and ethics of the medical profession" and the AMA's conclusion that "[p]hysician-assisted suicide is fundamentally incompatible with the physician's role as healer."). *See also Vacco*, 521 U.S. at 800-01 (relying on the fact that the distinction between assisted suicide and withdrawing life-sustaining treatment was "widely recognized and endorsed in the medical profession").

To suggest that all competent adults have the right to physician assisted suicide would be startling to most. The fact is that over time, it may be difficult to limit PAS's use to those we now envision as terminally ill and suffering. First, assuming we can even define who is and who is not terminally ill,[65] it will not be reasonable to confine the right to only the terminally ill.[66] Non-terminal patients suffering as the result of massive injuries or those inflicted with a wasting disease can, in some ways, be in a far worse position than those with a terminal illness, e.g. six months or a year to live. The suffering of non-terminal patients can go on and on, while, for the terminally ill, the end is in sight.

Also, it would be difficult to limit suffering to pure physical pain.[67] Suffering is far more complex. It is a mix of the physical, emotional, existential, and psychological. Even suffering from physical pain has

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65. For example, under the Oregon "Death with Dignity Act" the definition of "terminal" is unclear whether the definition is meant to be with or without treatment. JOHN KEOWN, EUTHANASIA, ETHICS, AND PUBLIC POLICY: AN ARGUMENT AGAINST LEGISLATION 171 (2002); Callahan & White, *supra* note 54, at 44. Further, 50% of Oregon doctors say they cannot predict whether a patient will die within six months. *See* KEOWN, *supra* at 172. *Cf.* Yale Kamisar, *The "Right to Die": On Drawing (And Erasing) Lines*, 35 DUQ. L. REV. 481, 504 (1996) ("Deciding what should count as 'terminally ill' will pose such severe difficulties that it seems untenable as a criterion for permitting physician assisted suicide." (citation omitted)).

66. *See generally* JULIET CASSUTO ROTHMAN, SAYING GOODBYE TO DANIEL – WHEN DEATH IS THE BEST CHOICE (1995). *See also* Glynn, *supra* note 8 (suggesting that any legislative distinction between seriously ill terminal patients and seriously ill, chronic non-terminal patients, would violate equal protection). *Cf. also* BRIAN CLARK, WHOSE LIFE IS IT ANYWAY? (1978).

See also, Linda Ganzini et al., *Attitudes of Patients with Amyotrophic Lateral Sclerosis and Their Care Givers Towards Assisted Suicide*, 339 NEW ENG. J. MED. 967, 967-73 (1998) (stating majority of patients in Washington and Oregon with ALS would consider assisted suicide). In fact, most who allowed PAS under the Oregon Act have cancer or ALS. *See* KEOWN, *supra* note 65, at 177. *But see* MITCH ALBOM, TUESDAYS WITH MORRIE: AN OLD MAN, A YOUNG MAN, AND LIFE'S GREATEST LESSON (1997) (story of man with ALS who lived life fully and passionately until the very end).

67. *See* E. Emanuel, K. Hedberg & T. Quill, *Evaluating Requests for Assisted Suicide*, *in* EUTHANASIA: CONTEMPORARY ISSUES COMPANION 49, 50-51 (Lisa Yount ed., 2002) [hereinafter CONTEMPORARY ISSUES] ("Loss of control, fear of abandonment or burdening others, financial hardships, physical and psychological symptoms, and personal beliefs are all potential causes of suffering."); Harvey M. Chochinov & Leonard Schwartz, *Depression and the Will to Live in the Psychological Landscape of Terminally Ill Patients*, *in* THE CASE AGAINST ASSISTED SUICIDE *supra* note 21, at 298-302; CALLAHAN, *supra* note 52, at 100-102; Nathan I. Cherney & Russell K. Portenoy, *Sedation in the Management of Refractory Symptoms: The Complexities of Assisted Suicide*, 10 J. PALLIATIVE CARE 31, 34 (1994) ("The approach suggested in the evaluation of unrelieved physical symptoms becomes more difficult if symptoms are psychological or suffering is perceived to relate to existential or spiritual concerns."); Stacy DiLoreto, *The Complexities of Assisted Suicide*, 34 PATIENT CARE 65, 69 (2000); Zbigniew Zylicz, *Ethical Considerations in the Treatment of Pain in a Hospice Environment*, 41 PATIENT EDUC. & COUNSELING 47, 47-53 (2000); Herbert Hendin, *Suicide, Assisted Suicide, and Medical Illness*, 16 HARVARD MENTAL HEALTH LETTER (Harvard Medical School) Jan. 2000, at 4-7.

emotional and psychological elements.[68] In fact, most terminal patients who seek assisted suicide do not do so because of physical pain.[69] They are worn down from the breakdown of their bodily functions, their inability to care for themselves, inability to be part of a social community, the emotional and financial burden they feel they are to their loved ones, and their general sense of hopelessness.[70] Of course, once law cuts the mooring from physical pain, how can it ignore unremitting psychological suffering? Does a broken leg cause as much physical (let alone emotional) pain as having a spouse suddenly announce that she is leaving and wants a divorce?

Once law severs the right to assisted suicide from a condition of a terminal illness, as it inevitably will, it will then be left with mixed standards of suffering and dignity. As a result, legal advocates might coin the phrase living with dignity. That metaphor, however, could exceed the context of misery and suffering and lead to arguments that there exists a basic list of rights that are preconditions for living with dignity. However, this path is one on which the Court has already indicated its unwillingness to trod, having already refused to find fundamental rights to minimum levels of education, housing, healthcare, and employment or welfare.[71]

The Court's motivation was clear and reasonable: for reasons of both institutional legitimacy and pragmatism, it simply could not recognize this right to assisted suicide. The Court's methodology for locating substantive fundamental rights within the due process clause of the Fourteenth Amendment, in turn, assured that it would not have to recognize this right.

C. Fundamental Rights Methodology and PAS

The *Glucksberg* Court used a three-prong test to determine whether the asserted right to die was a fundamental right.[72] First, the right claimed to be

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68. *See* Edmund P. Pellegrino, *The False Promise of Beneficent Killing*, *in* REGULATING HOW WE DIE: THE ETHICAL, MEDICAL AND LEGAL ISSUES SURROUNDING PHYSICIAN-ASSISTED SUICIDE 74 (Linda Emanuel ed., 1998) [hereinafter REGULATING HOW WE DIE]; Van Zyl, *supra* note 28, at 218; Don Marquis, *The Weakness of the Case for Legalizing Physician-Assisted Suicide*, *in* EXPANDING THE DEBATE, *supra* note 19, at 271; Anne Lanceley *Wider Issues in Pain Management*, 4 EUROPEAN J. CANCER CARE 153 (1995). *Cf.* Elaine Scarry, *supra* note 57, at 4-6 (noting one cannot experience another's pain).

69. E. Emanuel et al., *Evaluating Requests for Assisted Suicide*, *in* CONTEMPORARY ISSUES, *supra* note 67, at 79; Diloreto, *supra* note 67, at 49, 51.

70. *Id. See also* James V. Lavery et al., *Origins of the Desire for Euthanasia and Assisted Suicide in People with HIV-1 or AIDS: A Qualitative Study*, 358 THE LANCET, Aug. 4, 2001, at 362 (stating principle sources of suffering includes loss of community, loss of self, existential misery).

71. This is hardly an enterprise into which the Court would wish to be drawn since the Court has already refused to find fundamental constitutional rights to education in Plyler v. Doe, 457 U.S. 202, 223 (1982) (and in San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973)), to housing in Lindsey v. Normet, 405 U.S. 56, 74 (1972); and to welfare in Dandridge v. Williams, 397 U.S. 471, 485 (1970).

72. *Glucksberg*, 521 U.S. at 720-721.

fundamental had to be "carefully describ[ed]."[73] Second, it had to be "deeply-rooted in this nation's history and traditions."[74] Third, the claimed right had to be "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed."[75] Without going any further, it should be clear that with indeterminate, subjective modifying terms like "deeply" and "implicit" at the center of the analysis, there is going to be little predictive dependability to the analysis. This analysis can result in opposite conclusions that both sound reasonable.

The *Glucksberg* case was over the instant that the Court defined the right at stake in its most concrete form as being "a right to commit suicide which itself includes a right to assistance in doing so."[76] The analysis which followed was predictable. Far from being deeply-rooted in history and tradition, suicide and assisted suicide has long been punished or otherwise disapproved of at common law.[77] Thus, assisted suicide cannot be a fundamental right.

The Court, of course, could have seen the history and tradition of this nation as tied to its roots in Western Civilization and chosen as its tradition one which goes back at least to the ancient Greeks, "relieving suffering at the end of life."[78] Additional consideration of the recent advent of life-prolonging medical technology not available in the past (during which time period people

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73. *Id.* at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

74. *Id.* at 721 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

75. *Id.* at 721 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

76. The Court explained its decision to define the right in terms of the concrete features of the *actus* as follows:

> [W]e have a tradition of carefully formulating the interest at stake in substantive-due-process cases. For example, although *Cruzan* is often described as a "right to die" case, *see* [Compassion in Dying v. Washington, 79 F.3d 790, 799 (9th 1996)] *post*, at 745 (Stevens J., concurring in judgment) (*Cruzan* recognized "the more specific interest in making decisions about how to confront an imminent death"), we were, in fact, more precise: we assumed that the Constitution granted competent persons a "constitutionally protected right to refuse life-saving hydration and nutrition." *Cruzan*, 497 U.S. at 279; *id.* at 287 (O'CONNOR, J., concurring) ("[A] liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions"). The Washington statute at issue in this case prohibits "aiding another person to attempt suicide," Wash. Rev. Code §9A.36.060(1) (1994), *"and, thus, the question before use is whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so."*

Id. at 722-23 (emphasis added) (citation omitted).

77. *Id.* at 711. ("More specifically, for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisted suicide.").

78. In early Greece, physicians could provide poison without negative connotations. *See* ROBERT I. MISBIN, EUTHANASIA: THE GOOD OF THE PATIENT, THE GOOD OF SOCIETY 47 (1992). While not condoning administering poison, the School of Hippocrates believed in trying to do away with suffering. *See* Rein Jassen & Zbigniew Zylicz, *Articulating the Concept of Palliative Care: Philosophical and Theological Perspectives*, 15 J. PALLIATIVE CARE 38, 39 (1999); MICHAEL HYDE, THE CALL OF CONSCIENCE: HEIDEGGER AND LEVINAS AND THE EUTHANASIA DEBATE 166 (2000).

with diseases generally died quickly)[79] also could have played a role in the Court's perception of this nation's tradition.[80] These just were not rhetorical moves the Court was motivated to employ.

II. TAKING A CLOSER LOOK AT THE EQUAL PROTECTION ARGUMENT

The Equal Protection argument presented to the Court was straightforward. Those who have lifesaving treatments which can be refused, or are in need of pain medications that can be given in a fatal dose, or are willing to be terminally sedated, can end their lives. Those equally sick and suffering who do not happen to need a respirator or pain medication are forbidden to end

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79. In the past, people died at all ages, and quickly. *See* CALLAHAN, *supra* note 52, at 96.

> Decisions about medical treatment and the end of life are more complicated now than they have ever been . . . Perhaps the single most important reason for this is the advances in medicine in recent years, and particularly the application of medical technology. As a result, patients live longer, where in the past they would have died at an earlier stage of their illnesses.

Extracts from the Report of the House of Lords Select Committee on Medical Ethics, *in* EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES 96 (John Keown ed., 1995); Sheryl A. Russ, *Care of the Older Person: The Ethical Challenge of American Medicine*, 4 ISSUES L. & MED. 87, 88 (1988).

Now it takes time to die, and most deaths are of the chronically ill, elderly. *See* CALLAHAN, *supra* note 52, at 32-33, 47; MARY CLEMENT & DEREK HUMPHREY, THE UNSPOKEN ARGUMENT: EUTHANASIA AND THE HIGH COST OF DYING 15 (ERGO 2002); Joyce Ann Schofield, *Care of the Older Person: The Ethical Challenge to American Medicine*, 4 ISSUES L. & MED. 53, 53 (1989); Russ, *supra* at 88; *Cruzan*, 497 U.S. at 328-329. Similar demographics appear in Britain. David Field, *Palliative Medicine and the Medicalization of Death*, 3 EUR. J. CANCER CARE 58, 59 (1994).

80. If one seeks tradition to support claimed fundamental rights, while casting those rights in terms of their concrete *actus*, then making contraceptives available to unmarried lovers, Eisenstadt v. Baird, 405 U.S. 438 (1972), protecting gay male sex, Lawrence v. Texas, 539 U.S. 558 (2003), and protecting the right to abortion, Roe v. Wade, 410 U.S. 113 (1973), would all fail the test. Kreimer, *supra* note 8, at 871-72.

The same would hold true with protecting marriage between white men and black women, Loving v. Virginia, 388 U.S. 1, 7, 11-12 (1967), and forbidding the forced separation of black and white school children, Brown v. Bd. of Educ., 347 U.S. 483 (1954). While the latter two cases fell under the Fourteenth Amendment Equal Protection clause rather than Substantive Due Process, both required a change in the definition of the right at stake in order to escape tradition. The legality of school segregation was assumed at the time the Fourteenth Amendment was ratified. *See, e.g.*, JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 92 (1997) (In Louisiana "[t]hough the debate over public education was a lively one, no one who participated in that debate appears to have argued that integrated schools would be required by the Equal Protection Clause of the Fourteenth Amendment . . ."). In fact, only when the respective "rights" in *Brown* and *Loving* were described by the Courts as the rights of school children not to suffer unnecessary psychological harm and for adults to freely choose their life partner, did all this "tradition" cease: *Brown*, 347 U.S. at 493-94; *Loving*, 388 U.S. at 12. *But see Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting) (turning the tradition argument on its head by positing that *Glucksberg's* reliance on the concept of "deeply rooted in the Nation's history and tradition" for fundamental rights analysis has "eroded" *Roe* and *Casey*).

their lives.[81] Proponents of PAS claim that distinction in the law violates Equal Protection.

A. Constructing The Class

The first step in any Equal Protection analysis is to specify the class of people who are unfairly discriminated against. This first step is not so simple in the assisted suicide context. A class based on race or gender is easily constructed, but what are the parameters of this class?

One may think that I am making this far too difficult. The structure of an Equal Protection argument itself requires considering a class definition which corresponds to the relevant set of characteristics which people in the offended class have in common with those considering life-ending options such as withdrawing or refusing treatment. After all, that is the group to which the protected class of people will be compared under an Equal Protection analysis. But all is not so easy. Those people are not necessarily dying; paralysis may require a ventilator. They are not necessarily in pain; someone may refuse some form of heart surgery without which they will peacefully die. For the sake of argument, however, imagine the class has been established and protected. The class has members like my elderly father who are dying and suffering extreme pain. The determinative issue will be the level of scrutiny the court employs in reviewing the legislation. The Court in *Vacco v. Quill* correctly chose minimum scrutiny.[82]

B. People Like My Father and the Appropriate Standard of Scrutiny

Even if the class is defined to contour with my father's circumstances, it does not result in a class entitled to the highest level of scrutiny (i.e., strict scrutiny).[83] The elderly-dying were neither the subject of the Fourteenth Amendment nor, as far as I know, historical objects of discrimination.[84] In

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81. The *Vacco* court characterized the Equal Protection argument before it as follows: "[B]ecause New York permits a competent person to refuse life-sustaining medical treatment, and because the refusal of such treatment is 'essentially the same thing' as physician-assisted suicide, New York's assisted-suicide ban violates the Equal Protection Clause." Vacco v. Quill, 521 U.S. 793, 798 (1997) (citing Quill v. Koppell, 870 F. Supp. 78, 84-85 (S.D.N.Y. 1994).

82. *Vacco*, 521 U.S. at 799. It should be noted that the Second Circuit also made its equal protection decision employing a "rational basis" test. *See* Quill v. Vacco, 80 F.3d at 731 (2d Cir. 1996). *See also* Flumenbaum & Karp, *supra* note 7, at 4.

83. The strict scrutiny standard of review is articulated as "narrowly tailored" to meet a compelling need. Wygant v. Jackson Bd. Of Educ., 476 U.S. 267, 280 n.6 (1986).

84. As Professors Allan Ides and Christopher N. May explained in CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS 205 (2d ed. 2001), strict scrutiny appropriately applies to laws making classifications involving "disadvantaged racial minorities":

> All of these suggested rationales for heightened scrutiny apply with respect to laws that disadvantage racial minorities. In terms of first-degree prejudice, this nation's history of black slavery and racial discrimination leaves no doubt that racial minorities have been and are often still the objects of hatred and

fact, before the medicalization of death, they were cared for by family in their homes.

While the elderly-dying may not be able to participate in the political process in their current condition (even given absentee ballots and e-mail), they hardly represent anything akin to an "insular racial minority" [85] because they cover the full spectrum of race, gender and wealth. When younger and healthier, those elderly and dying citizens had the opportunity to influence the democratic, political process. In fact, they may have been former Congress persons, or even President. In their current states, many have influential family networks and the support of organizations like the American Association of Retired Persons ("AARP"). And their interests are likely protected by the active, middle-aged who (unlike youth) know that their time with old age and illness is on the horizon. In short, they are not without influence in the political process.

Nor is there anything about the elderly-dying class that is comparable to gender such that legislation treating class members differently must be reviewed through the lens of intermediate scrutiny.[86] With gender, there were many harmful stereotypes.[87] There are certainly such stereotypes about older people. My grandmother told me how furious she would become because "people either talk to you like you're some kind of little child . . . or they think you can't hear, and they have to scream at you." But it is not clear that there

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> vilification. Second-degree prejudice is likewise present in the form of widespread and exaggerated negative stereotypes about the intelligence, morality, industry, and honesty of racial minority groups. Next, race is an immutable characteristic; and since most legislatures are white, there is a danger that laws singling out racial minorities for adverse treatment may have been adopted because of the legislature's inability to empathize with those targeted by the measure. In addition, race is generally, if not always, irrelevant to a person's abilities. Finally, racial minorities have historically been excluded from the political process, initially by outright denial of the right to vote and later through such devices as literacy tests, poll taxes, and physical intimidation.

85. "Dying people are clearly not a discrete and insular minority in the same, sure way as are black people subject to race discrimination laws [or] women subject to abortion restrictions." Robert Burt, *Constititutionalizing Physician-Assisted Suicide: Will Lightening Strike Thrice?*, 35 DUQ. L. REV. 159, 179 (1996); Kamisar, *Meaning and Impact*, *supra* note 8, at 915-16 (quoting Burt, *supra*);City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 445-46 (1985):

> [I]t would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.

Cleburne, 473 U.S. at 445-46 (1985); *Accord* Ides & May, *supra* note 84, at 246.

86. *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1973); Michael M. v. Sonoma County, 450 U.S. 464, 468-69 (1981) (noting the standard of review requires that the law reflects no gender "stereotypes," that it serve as important governmental objectives, and that the objectives be genuine).

87. *Frontiero*, 411 U.S. at 688; *Michael M.*, 450 U.S. at 468-69.

even exists a set of stereotypes about the elderly-dying; in any event any such stereotypes would not be so comparable to the destructive stereotypes about gender that courts would be required to carefully screen legislation that may affect them. Therefore, the *Vacco* Court was correct when it chose minimum rationality.

C. There Is a "Rational" Basis for Distinguishing PAS From Withdrawing Treatment, Refusing Treatment, Principle of Double-Effect ("PDE"), and Terminal Sedation

1. The Principle of Double-Effect

A painkiller such as morphine can, in sufficient doses, stop the patient's breathing. When dealing with terminal patients who are in great pain, such as my father, it is not uncommon for health care providers to risk high doses of a drug such as morphine to control pain even though it is foreseeable that there is a reasonable likelihood the dosage will kill the patient. This is the principle of double-effect. The intention and motive is to control pain, although resulting death is foreseeable.

Those in favor of a right to suicide and assisted suicide would take the position that action with the foreseeable result of death and action with the intention of death is the same thing. To attempt to distinguish among the two is arbitrary and hypocritical. Those opposed to suicide and assisted suicide would argue that they are different because the motive of double-effect is to stop the pain, and death is but the unfortunate side effect. As such, the doctor is like a general who sends his troops onto a beachhead knowing fifty percent will die; his motive is to defeat the enemy, his men's death an unfortunate side-effect of that heroic effort. In some sense, I think the positions of both sides of the debate are off target.[88]

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88. Joseph M. Boyle, Jr., *Toward Understanding the Principle of Double Effect*, 90 ETHICS 527, 535 (1980). There are differences between intention and foreseeability. *Id.* We can avoid what we intend to do by not doing it. *Id.* But not all consequences and side effects, foreseen and unforeseen, can be avoided. *Id.* Also, intention is "voluntary" in a different way than are the foreseeable results of our intentional actions. *Id.* Foreseeable consequences go into our decisions (*i.e.*, do we act in spite of the foreseeable consequences?), but they are not our intentions. *Id.*

Van Zyl, *supra* note 28, at 129. Yet, at times we hold people responsible for some things that are foreseeable consequences of their intentions. To make such decisions, "motive" is a poor analytic tool. Imagine a healthy twenty-year-old who suffered severe pain after being in an accident. He would suffer for several hours of such pain without morphine, but it was foreseeable that the required dose would kill him. If a doctor whose "motive" was pain relief administered the lethal dose although he foresaw the risk, I believe he would be facing some serious criminal charge. On the other hand, my father's doctor clearly would not.

a. A general look at risk and responsibility

The criminal law analyzes culpability differently for death from intentional killing than it does for death resulting from risk-taking activities. We have several analytic tools to assess responsibility for foreseeable risk. American law employs different sets of tools for analyzing culpability as the result of intentional killing and for analyzing death as the result of risk-taking (foreseeability). When dealing with intentional killings, sanctity of life will presumptively trump all other considerations, except for a few narrowly defined exceptions (e.g., self defense). Intentional killings are never subject to a case-by-case, situational balancing of factors or competing interests. Intentional killing is intentional killing. The defendant's state of mind (mens rea) will determine the degree of homicide (murder one, murder two, manslaughter), and motive may provide mitigation for punishment; but outside of the narrow categorical exceptions, an intentional killing will always be a homicide.

Death resulting from risk taking (foreseeability), in contrast, will always be a function of a balancing of values within the specific context. Broadly, the analysis will require an assessment of the magnitude of the risk balanced against the perceived social utility of the action. This balancing approach explains the scenario of the general sending fifty percent of his soldiers to die on a beach.[89] Successfully conducting a war has high perceived social utility which justifies extremely high magnitudes of risk that life will be lost. If this was a training exercise rather than actual warfare in which it was foreseeable that fifty percent of the soldiers would die, the general's motive would not matter to us. These unfortunate side-effects would likely result in some form of homicide charge due to the lower social utility of the training exercise as compared to actual war.

In the same way, we permit driving although it is a foreseeably deadly enterprise. We even agree to raise the speed limit, knowing that it will correlate to a statistical increase in real lives lost, because of the perceived social utility of driving.[90] In contrast, we do not care if you play Russian roulette with one or five bullets, or even if one attempts to make the game safe by trying to palm the bullets at the last moment.[91] Because this game has absolutely no social utility, any foreseeable risk of death is too much. If someone dies, one is guilty of some level of homicide.

This balancing between risk and utility accounts for the seemingly special status of the hospital operating room. We regularly accept surgery

89. *See supra* Part II.C.1.a.

90. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., FED. HIGHWAY ADMIN. & U.S. DEPT. OF TRANSPORT. REPORT TO CONGRESS: THE EFFECT OF INCREASED SPEED LIMITS IN THE POST-NMSL ERA iii (1998).

91. *See, e.g.*, Commonwealth v. Atencio,189 N.E.2d 323 (1963).

with a high risk of death.[92] But, the context of this medical gamble is that there is a higher risk of death, or comparably awful fate, without the surgery. If a doctor conducted a procedure with a forty percent risk of death for an elective cosmetic face lift, even with the patient's consent, that doctor would probably need a criminal defense attorney.

Finally, though the risk taking and intentionality analyses differ, under the appropriate circumstances, they can result in the same magnitude of culpability.[93] If a person is in such a hurry that he cuts across a crowded school lot driving eighty miles per hour and kills a child, even though that was not his intention, the high magnitude of risk and low social utility will combine so that we will attribute malice to him, and treat him exactly the same as an intentional murderer.

b. Risk, PDE and Suicide

There are of course differences between PDE and assisted suicide. PDE involves risk of death. Assisted suicide is not a matter of risk, but certainty (at least if not botched). On the other hand, in a particular case that risk might approach certainty, yet still qualify at PDE. Therefore, the analysis must move from a risk analysis to a policy analysis.

Law is concerned with good social policy, including circumscribing the sweep of a law and its enforcement. In this regard, PDE is only permissible in very narrowly defined circumstances where risk and utility permit it while assisted suicide would have no such narrow boundaries.

This, however, is an argument out of context. Even those favoring assisted suicide do so within a very narrow narrative. No one thinks that it is a generally good idea for people to kill themselves. This article is not talking about heartbroken Romeo and Juliet wannabes. It is instead focused on the terminally ill who are suffering. It is in this context that the argument for equal opportunity to terminate life under these circumstances is compelling.

Even in this context, the state nevertheless can provide rational grounds for distinguishing between PDE and assisted suicide. PDE only happens when the person is in such extreme physical pain that a drug of the power of morphine is indicated in doses substantial enough to result in death. These are the very people who provide the purest narrative for terminating life, i.e., dying people in excruciating physical pain. They also offer a discrete, easily identifiable group. To go beyond them greatly expands the population of those for which termination of life will be condoned, and muddles the analytic waters by going beyond severe physical pain to all aspects of suffering. This is particularly so since all studies of terminally ill patients who express a wish

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92. GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 323 (Alfred A. Knopf ed., 1972) (1957).

93. Thus, at times, we treat extreme, unjustifiable risk-taking as the moral and legal equivalent of intentional action. CLINICAL PRACTICE, *supra* note 52, at 38.

to die indicate that they generally do so for emotional, psychological, and spiritual reasons, not to avoid actual physical pain.[94]

One can disagree with making a legal distinction between PDE and assisted suicide. I do not see, however, how one can maintain that the distinction is irrational or arbitrary.[95]

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94. *The Legalization of Physician Assisted Suicide: A Very Modest Revolution*, 38 B.C.L. REV. 443, 453-54 (1997).

95. *Vacco*, 521 U.S. at 801. The *Vacco* Court's reference to the notion that "when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication" can reasonably lead to the conclusion that the Court implicitly valued the "act-omission" dichotomy. Appleton, *supra* note 37, at 21.

The argument employing this distinction posits that the doctor is not acting when pulling the plug, or failing to resuscitate, or not treating a patient when they have the flu. Robert T. Hall, *Final Act: Sorting Out the Ethics of Physician-Assisted Suicide*, 54 THE HUMANIST, Nov.-Dec. 1994, at 10-11. She rather is omitting to act, and leaving the patient where he or she would have been if the doctor were not in the picture initially, there is a sense of possible wordplay in this argument to the extent that some have contended that this purported distinction makes no sense. *Id.* Physically shutting off a respirator seems to be an intentional act. A decision not to put someone on a respirator, however, could also be characterized as an intentional act, perhaps involving review of patient records, consultation with staff and family, and such. In fact, it is because our society now makes no distinction between the two situations (turning on the respirator and turning it off), that doctors are not deterred from starting a patient on the support of a machine for fear that, once started, they cannot act and turn it off. *Extracts from the Report of the House of Lords Select Committee on Medical Ethics*, *in* EUTHANASIA EXAMINED, *supra* note 79. *See, e.g.*, *In re Conroy*, 486 A.2d 1209 (1985). *Cf.* Kamisar, *Reasons*, *supra* note 21.

On the other hand, there surely are distinctions between the consequences of acting and failure to act (omissions). In the first place, I cannot avoid all consequences of my actions. Joseph Boyle, *Sanctity of Life and Suicide: Tensions and Developments Within Common Morality*, *in* SUICIDE AND EUTHANASIA-HISTORICAL AND CONTEMPORARY THEMES 221-231 (Baruch A. Brody ed., 1989) [hereinafter HISTORICAL & CONTEMPORARY THEMES]. I can, however, avoid acting. Also, if I give a dollar to a street person, I intend that they have the money; and, as a result of my action, they do. If I walk past without giving a dollar, it would seem rhetorical gameplaying to say that I just deprived that person of a dollar in the same way as if I reached into the basket in front of them and snatched it out. Unlike holding me responsible for my chosen actions, the moral consequences of my failure to act are are more diffuse. I am constantly not acting. I could always do more to help. I am not inviting homeless people into my house for shelter on cold nights. I am not sending money to Africa to combat malaria. Yet, few would hold me directly responsible for the plight of those homeless people on that cold night, or some child dying from malaria on the African continent.

That said, it is not always simple to assess responsibility for failing to act. Sometimes the factual circumstances between intentional action and omission can be very close. While the decision when to place moral responsibility on a failure to act can be comprised of a complex array of narratives, the determininative factor in the analysis is generally duty, and the issue of ethical responsibility is a function of whether or not one has a duty. Jeff McMahan, *Killing, Letting Die, and Withdrawing Aid*, 103 ETHICS 250, 264-65, 271 (Dworkin et al. eds., 1993) (discussing actions judged in "role based" capacity); John A. Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, *in* DEATH, DYING AND EUTHANASIA 153-154 (Dennis J. Horan & David Mall eds., 1980) [hereinafter DEATH-DYING] (discussing duty and correlative responsibility of parents and physicians for omissions); Lawrence O. Gostin, *Drawing a Line Between Killing and Letting Die: The Law and Law Reform on Medically Assisted Dying*, 21 J. L. MED. & ETHICS 94, 95 (1993) (discussing the distinction medical ethics and law have

2. *Terminating Life Sustaining Treatment (Pulling The Plug)*

The argument here is that we permit people to die this way,[96] and in fact most people who die in hospitals and nursing homes will die this way (or through related methods such as withdrawing artificially provided food and hydration, do not resuscitate ("DNR") orders, intentional decisions not to treat flu or pneumonia, and such).[97] Yet this is indistinguishable from intentional

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drawn between withdrawal of treatment and physician-assisted suicide); *Submission to the Select Committee of the House of Lords on Medical Ethics by the Linacre Centre for Health Care Ethics*, *in* CLINCAL PRACTICE, *supra* note 52. *See also* ALAN DONAGAN, THE THEORY OF MORALITY 48 (1977) (stating that to say a bank guard who leaves her post "allowed" robbery is understandable it would, however, be absurd to say the guard "caused" robbery); Marc Staunch, *Causal Authorship and the Equality Principle: A Defense of the Acts-Omissions Distinction in Euthanasia*, 26 J. MED. ETHICS 237 (2000) (stating we would not say that an ordinary passerby "caused" a street person's hunger). The question is whether under the norms of our society one is obligated to act. If one's five-year-old daughter is begging for food, and I walk by, under normal circumstances, one would not hold me, or any of the others who walk by, responsible for her hunger. There is something wrong that in this society a child would be hungry, but we would not generally blame the individual who walks by as if they snatched a sandwich from her hands. Her father is a different story. If he sits munching on a Big Mac while she suffers malnutrition, we do hold him responsible. By virtue of his familial relationship as her father, he has a *duty* to see her basic needs are met. We, therefore, make no distinction between whether he snatched her food or failed to provide food to her. Morally (and legally) it is the same.

This brings us back to turning off the respirator. My doctor has a special duty towards me. While passersbys can watch me go into convulsions and walk by without doing a thing, my doctor cannot. She has a duty to provide me with competent medical care. If she does not deal with the cause of my convulsions she will be treated as if she intended the consequences. When doctors turn off the respirator, they are doing so in a context where they are not abandoning their duty of professional care. They can do no more for the person. The patient will not get better with or without the machine, though they might live for quite awhile if they machine is left on.

Imagine, however, a different story. The patient is 20 years old. Due to lung damage from an accident, she needs a respirator. Yet, she has a life. She is enrolled in college, has many friends, and is a whiz at video games. If you were her doctor and unilaterally pulled the plug on her, you would be held responsible, likely for homicide. Pleading that you just "let nature take is course" would be unavailing. In short, a simplistic act-omission analysis does not help us gain clarity in the world of end-of-life care.

96. Common-law recognized the right to withdraw treatment under considered medical judgment. Dana Elizabeth Hirsch, *Euthanasia: Is it Murder or Mercy Killing? A Comparison of the Criminal Laws in the United States, the Netherlands, and Switzerland*, 12 LOY. L.A. INT'L & COMP. L. Rev. 821, 825 (1990) (compiling applicable cases). Interestingly, as of 1995, withdrawal of food and hydration was more accepted in acute care hospitals than nursing homes. Alan Meisel, *Barriers to Forgoing Nutrition and Hydration in Nursing Homes*, 21 AM. J.L. & MED 335 (1995).

97. The significance of refusal or withdrawl of life-sustaining treatment during end-of-life care in the day-to-day operations of our medical institutions cannot be understated. Eighty percent of us will die in hospitals or nursing homes. *See Cruzan*, 497 U.S. at 302. This is less surprising when one realizes that on average, eighty days out of the last year of one's life is spent in a hospital or nursing home. PETER G. FILENE, IN THE ARMS OF OTHERS: A CULTURAL HISTORY OF THE RIGHT TO DIE IN AMERICA 55 (1998). Most of these deaths will be the result

killing. Hence the equal protection claim. And when one reviews basic principles of the criminal law, this position surely has some merit.

As every student in first year criminal law knows, if I come upon my worst enemy lying on the ground in his death throws resulting from a mortal wound administered by another, and I put a bullet in his head, I am guilty of murder.[98] Every moment of life has equal value in the eyes of the criminal law. From this, one fairly might wonder why, if a doctor withdraws artificially provided food and hydration from a dying patient (who is not in the final phase of dying where withdrawal will not accelerate death), and this shortens his or her life, the doctor is not similarly considered liable for an intentional killing.

The fact that analytically there may be no difference under criminal law principles between delivering the coup de grace to my enemy and pulling the plug, and therefore *a fortiori* between intentional self-killing and pulling the plug, does not mean that these different situations cannot rationally justify different treatment. Analytic equivalence does not mean that the two situations cannot be distinguished on policy grounds. Thus, pulling the plug, taking place as it does within the narrative of the deathbed, is so different from the narrative of the intentional street killing that we can treat the two situations differently without any concern that how we deal with one will affect how we culturally view the other.

But I am not talking about condoning shooting people on the streets. Rather, I am talking about very sick people ending their own lives. Therefore, the question thus focuses on the rationality of treating pulling the plug differently from assisted self-killing. In the first place, most people currently do not equate pulling the plug with PAS. And in considering policy, how we talk and think about things is important.[99] Of course, just because the majority of people may think a certain way does not make it correct. On the other hand, taking as one's initial path an existing line which also happens to be the one of least resistance, certainly seems a reasonable approach for a policy maker. In fact, it has been posited that it is only through holding the line between pulling the plug on one hand, and assisted suicide on the other, that medicine has managed to keep the scrutiny of courts out of the former.[100]

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of treatment decisions. *See* Paul J. Zwier, *supra* note 27, at 224, seventy percent of these decisions will involve withdrawing treatment. George P. Smith, II, *Restructuring the Principles of Medical Futility*, 11 J. PALLIATIVE CARE 9, 9 (1995); Marcia Angell, *Helping Desperately Ill People to Die*, *in* REGULATING HOW WE DIE, *supra* note 68, at 12. A somewhat different estimate (though limited to hospitals) states that fifty percent of deaths in hospitals from non-emergency cases result from withdrawing life saving treatment. *Final Act*, *supra* note 95, at 10.

98. John A. Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, *in* DEATH-DYING, *supra* note 95, at 163; DANIEL MAGUIRE, DEATH BY CHOICE 31, 49 (1973); Hircsh, *supra* note 96, at 833, 834; *Cf.* GERALD DWORKIN, R.G. FREY & SISSELA BOK, EUTHANASIA AND PHYSICIAN-ASSISTED SUICIDE—FOR AND AGAINST 24, 29 (1998).

99. David Orentlicher, *The Legalization of Physician Assisted Suicide: A Very Modest Revolution*, 38 BOST. L. REV. 443, 445 (1997); *Cf.* DWORKIN, *supra* note 33.

100. Van Zyl, *supra* note 28, at 124-25; Yale Kasimar, *The Right to Die: On Drawing (and Erasing) Lines*, 35 DUQ. L. REV. 481, 495 (1996).

In the second place, pulling the plug takes place within a narrow range of time, place, and circumstances: a hospital, a dying patient (I am not concerned in this article with those in persistent vegetative states) dependent on a machine, with a few days or hours to live. Suicide, even for the terminally ill, can cover a far broader scenario of time, place and circumstances. And society, therefore, may reasonably hesitate before it expands the right to terminate innocent lives within this far less cabined area of assisted suicide.

Of course, one does not have to accept this analysis, and may well come up with reasonable counterarguments to my position. Saying that I am incorrect, however, is leaps and bounds from labeling my position as totally irrational. Categorizing pulling the plug differently than from SASE fulfills the very hands-off standard of minimum rationality.

3. Refusing Lifesaving Treatment

Assisted suicide advocates contend that there is no rational distinction between letting someone refuse lifesaving treatment, knowing that that decision will likely lead to death, and affirmatively ending his life through assisted suicide. But, is that correct? Imagine a person who is given the following choice: undergo painful surgery followed by painful therapy and lingering in pain afterwards, or die. If the person says no, has she committed suicide?

I could, of course, define suicide broadly so as to include any deliberate action which we know reasonable likely to lead to one's death—war hero rushing a bunker, heavy smoker, extreme sport enthusiast. In that case, both suicide and refusing lifesaving treatment would be the same. But I think it makes more sense to define suicide to coincide more with our narrative sense of the act, an intentional destruction of self. Thus, if the war hero who rushes the bunker miraculously lives and says "thank God," it is not a suicide attempt. If he finds himself still standing and is disappointed to be still alive, his rush on the bunker was a suicide attempt.

I suppose one could argue that psychologically there is a sense of self-destruction, for example, in the case of the heavy smoker who one can say is committing slow motion suicide. And again if they do not die and are disappointed, then it was in fact a suicide attempt. Yet, I hesitate to define suicide so broadly so as to include the average smoker. If self-destructiveness were the only criteria, then given the existence of wars, nuclear weapons, pollution, destruction of species, depletion of resources, the green house effect, and such, our whole human race could be characterized as suicidal. So, let us return to our patient who is facing an agonizing choice of painful surgery, painful recovery, and painful life, or likelihood of death from non-treatment. Her refusal of treatment would only fit my sense of suicide if she refused treatment, somehow lived (perhaps being misdiagnosed), and then was despondent that her life did not end.

That does not end the analysis of these grounds, however, but only really begins it. For even if refusing life-saving treatment is not invariably the equivalent of suicide (though in a particular case it may be), it still permits a patient to choose to end his or her life. The question then comes back to whether there are rational policy grounds[101] for letting patients refuse treatment, knowing that decision means death, while denying the ability to intentionally end their lives to those patients not dependent on lifesaving treatment.

One initially must recall the legal underpinnings of this so-called right to refuse treatment. It combines the notion that one has the right to be free of what the law calls a *battery* ("harmful and offensive" touching),[102] with the related notion, within the medical sphere, of informed consent.[103] Again, this latter concept is an attempt to ensure that patients have sufficient information to make good choices about their treatment, and is an aspect of a patient autonomy movement which, in part, reflected a loss of confidence and trust in the medical profession.

The law of battery, however, does not leave room for one to consent to a battery; i.e., I cannot give someone my permission to hit me. Obviously, we do have exceptions for certain sports (e.g., boxing, football and hockey). Yet even as to these, the violence must be circumscribed by the contours of the sport (hitting someone in the head with a hockey stick as they are entering the penalty box can result in criminal charges). The law of battery thus not only is intended to protect me individually, it attempts to define a non-violent society. Within this body of law, medical procedures such as surgery and shots may be consented to because, though often painful and unpleasant, they are not considered harmful and offensive. In fact, we want doctors to do that type of thing. To do it against our wishes, however, is quite a different matter. That is an offensive touching.

Now consider social policy. Imagine that there was no right to refuse treatment. First, there could be extraordinary invasions of the person of the

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101. Thus, even if we may not be able to distinguish refusing treatment from suicide morally, we can distinguish between the two as a matter of legal policy. Sanford H. Kadish, *Letting Patients Die: Legal and Moral Reflections*, 80 CAL. L. REV. 857, 867 (1992).

102. Schloendorff v. Soc'y of New York Hosp., 105 N.E. 92 (1914) (Cardozo, J.), *abrogated by* Bing v. Thunig, 143 N.E.2d 3 (1957); In re Conroy, 486 A.2d 1209 (N.J. 1985); Bouvia v. Superior Court, 255 Cal. Rptr. 297 (Cal. Ct. App. 1986). *See also* Hircsh, *supra* note 96, at 828. *Cf.* Joan M. Gilmour, *Withholding and Withdrawing Life Support from Adults at Common Law*, 31 OSGOODE HALL L. J. 473, 480 (1993) (providing analogous body of law in Canada).

103. Some have questioned the efficacy of informed consent; Steven Miles, Demetris M. Pappas, & Robert Keopp, *Considerations of Safeguards Proposed in Laws and Guidelines to Legalize Assisted Suicide*, *in* PHYSICIAN-ASSISTED SUICIDE, *supra* note 31, at 209; Gilmour, *supra* note 102, at 481-82 (stating in reality, "informed consent" will devolve to a matter of doctors convincing patient's to accept the doctors' recommendations).

individual.[104] The image of someone holding down and dragging a screaming patient to surgery to amputate his leg over his violent protests is not an attractive one in a society so sensitive to individual liberty and autonomy. Second, people would hesitate to go to hospitals (I know I would), even if they really needed to go, for fear of finding themselves held against their will as "prisoners of pain."[105]

On the other hand, to refuse to let someone intentionally kill herself is not similarly intrusive (I'm not imagining tackling someone and ripping a gun from her hand, but rather a more medical context). We are just denying the means of death to that person; we are not forcing anything on her.

The counter argument to this is that I am wrongly assuming that there is no harm in forcing someone to live under any circumstances. This assumption was at the base of the logic of the Supreme Court in *Cruzan*.[106] Underlying the Court's decision in that case, which involved pulling the plug on a young woman in a persistent vegetative state ("PVS"), was the Court's implicit assumption that ending her life mistakenly was a great harm, while mistakenly forcing her to exist was no harm. This is a logic which many say is misguided, even when dealing with a persistent vegetative state as in *Cruzan*. When we are dealing with someone like my father, the argument that there is plainly a great harm in making a very ill, suffering person continue to live is clearer.

While I agree with this argument, I, again, cannot say that the position that there are distinctions justified by social policy between assisted suicide and refusing lifesaving treatment is an irrational one. Further, it is not clear that even the right to refuse lifesaving treatment itself is legally inviolable when it comes to someone clearly attempting suicide.

Imagine a twenty-year old who is suffering from a strange enzyme deficiency. If he takes a pill once a month, he will live a healthy life with no

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104. Yale Kamisar, *Physician Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia*, *in* EUTHANASIA EXAMINED, *supra* note 31, at 248, 249; Frances M. Kamm, *Physician-Assisted Suicide, Euthanasia, and Intending Death*, *in* EXPANDING THE DEBATE, *supra* note 19, at 40; Yale Kamisar, *Reasons*, *supra* note 21; Yale Kamisar, *Drawing (And Erasing) Lines*, *supra* note 100, at 492.

In fact, some refuse treatment when the cure is worse than the disease. *See Submission to Select Committee of House of Lords on Medical Ethics by the Linacre Centre for Health Care Ethics*, *in* CLINICAL PRACTICE, *supra* note 52, at 63. *Cf.* Marcia Angell, *Helping Desperately Ill People to Die*, *in* REGULATING HOW WE DIE, *supra* note 68, at 12.

105. Several state courts have articulated a constitutional right to refuse treatment. *See, e.g.*, State v. McAfee, 385 S.E.2d 651 (Ga. 1989); In re Quinlan, 348 A.2d 801 (N.J. 1975); Gray v. Romero, 697 F. Supp. 580 (1988). *See also* Larry Gostin, *The Right to Choose Death: the Judicial Trilogy of Brophy, Bouvia, and Conroy*, 24 LAW MED. & HEALTH CARE 198, 199 (1986); Thomas A. Eaton & Edward J. Larson, *Experiments with the "Right to Die" in the Laboratory of the States*, 25 GA. L. REV. 1253 (1991).

106. Some have criticized the failure of the *Cruzan* majority to recognize that there may be harm in forcing a patient to continue to live. *See Cruzan*, 497 U.S. 261, 320 (1990) (Brennan, J., dissenting); JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF 367-68 (1986); Kadish, *supra* note 101, at 874.

side effects. If he goes six weeks without a pill, he will suddenly collapse and die. One day after breaking up with his girlfriend, he announces that he will no longer take his pills. I do not believe we would simply let him die ("Oh well, that is his legal right to refuse lifesaving medical treatment.") It is possible that a court might hesitate to pronounce that the right to refuse treatment cannot carry the day in this instance, fearing what to do when the next case comes and it is a weekly shot accompanied by flu-like symptoms, or amputation of several fingers on one hand, and so forth. But I believe the government will act to stop the young man from killing himself even though he is doing so under the banner of the right to refuse treatment. Likely the government would take the competence route, find psychiatrists to testify about the young man's depression from the loss of a loved one, perhaps seek to appoint a guardian, etc.

Further, even if a court addressed the right to refuse treatment directly head on in this scenario, and nevertheless, ordered the pills forcibly[107] administered, it is not clear to me that the judgment would subsequently be reversed on appeal. In a claim sounding in autonomy (i.e., that compulsory vaccination "violates the inherent right of every freeman to care for his own body and health in such a way as to him seems best"), the Supreme Court nevertheless held that adult citizens are not permitted to refuse to be vaccinated against a disease threatening the public, such as a small pox epidemic.[108] Similarly, Jehovah's Witnesses, whose First Amendment rights to religious freedom allow them to refuse blood transfusions even at the costs of their lives are not permitted to refuse similar transfusions on behalf of their minor children.[109] Public health and safety issues surpass religious freedom in that case. Additionally, prisoners who go on hunger strikes, even when done as a means of First Amendment expression, can be force-fed and hydrated.[110] Their right to refuse treatment is overbalanced by the state's paternalistic responsibility for their lives[111] and its interest in order and security in the prisons. Likewise, in a prison setting, a showing that an inmate has a mental illness which may cause him to hurt himself or others can justify forced administration of antipsychotic medication in spite of the prisoner's

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107. Courts have forced patients to undergo treatment. *See* Gilmour, *supra* note 102, at 484 (citing earlier cases where, *e.g.*, the patient had parental responsibilities); Meisel, *supra* note 96, at 365 n.183 (stating patient not competent to make the decision).

108. Jacobson v. Mass, 197 U.S. 11, 24-30 (1905).

109. *Id.* at 26; Orentlicher, *supra* note 99, at 458. *See, e.g.*, Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488 (W.D. Wash. 1967) aff'd, 390 U.S. 598, rehearing denied, 391 U.S. 598 (1968).

110. Joel K. Greenbert, *Hunger Striking Prisoners: The Constitutionality of Force-Feeding*, 51 FORDHAM L. REV. 747 (1983). *See also* D. Sneed & Harry W. Stonecipher, *Prisoners Fasting as Symbolic Speech: The Ultimate Speech Action*, 32 HOW. L.J. 549 (1989).

111. Prisoners thus cannot refuse life-saving treatment. Greenberg, *supra* note 109, at 11, 14 (noting prisoners can be forced to take insulin, undergo dialysis). *See also* Arlene McCarthy, Annotation, *Prisoner's Right to Die or Refuse Medical Treatment*, 66 A.L.R.5th 111 (1999).

fundamental liberty interest in avoiding forced administration of such drugs.[112] The point is that even given a right to refuse treatment, it appears that at times the interests of the state may weigh more heavily in the balance.[113]

Moreover, even the exact nature of the so-called constitutional right to refuse treatment is far from clear. The Supreme Court discussed the possible constitutional nature of the right to refuse treatment in the *Cruzan* case.[114] Nancy Cruzan was in a persistent vegetative state.[115] Her family wanted to pull the plug, however, the state refused to allow this, creating a case about substituted judgment.[116] The issue before the Supreme Court concerned the magnitude of the burden of proof the state was entitled to place on the parents to establish that Nancy would not want the treatment.[117] The Court initially acknowledged that there was an established common-law (case law, as opposed to statutory or constitutional) right to refuse medical treatment. A common law right, however, is not the same as a constitutional right, which thereby would bind the state and federal governments.[118]

The *Cruzan* court then discussed the possible constitutionality of the right to refuse treatment by stating that a "constitutionally protected liberty interest . . . may be inferred from our prior decisions."[119] But in support of this proposition, the Court cited the *Jacobson* case, the very case in which the state's interest in forcibly (if necessary) administering a smallpox vaccine trumped the right to refuse treatment by a citizen who was basing his claim on autonomy-resonating grounds. Right from the start, the Court implicitly stated that even if there is a constitutional right to refuse medical treatment in a particular situation, the state's interests in a particular situation may outweigh the individual's exercise of his right.

The Court went on to note that the logic of past cases would give one a constitutional right to refuse even lifesaving treatment.[120] The Court, however, then added that the "dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that

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112. Wash. v. Harper, 494 U.S. 210 (1990).

113. Society tends to display its paternalism when it comes to lifesaving. Robert M. Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, *in* DEATH-DYING, *supra* note 95, at 706; In re Conroy, 486 A.2d 1209 (N.J 1985); Bovia v. Superior Court, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986). And, as we all know, society does at times act paternalistically and forbid us "for our own good" from doing certain things. JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF 24 (1986) (distinguishing assisted suicide from reproductive rights).

114. *Cruzan*, 497 U.S. at 270, 277.

115. *Id.* at 266.

116. *Id.* at 267

117. *Id.* at 265, 280-281 (finding that a burden of "clear and convincing evidence" was constitutionally permissible).

118. *Id.* at 267, 277.

119. *Cruzan*, 497 U.S. at 278. But for this proposition, the Cruzan court cited Jacobson v. Mass., 197 U.S. 11 (1905) (finding the state's interest in public health and safety outweighed the citizen's interest to care for her body as she sees best).

120. *Cruzan*, 497 U.S. at 279.

interest is constitutionally permissible."[121] Again, even if we afford such a constitutional right, given the ultimately serious consequences, the state's interests in a particular case may justify "the deprivation of that interest."

Further, the Court always refers to this right as a "liberty interest," never as a "fundamental right."[122] Within the equal protection level of scrutiny game, this characterization could dictate the outcome in most cases in which the state seeks to oppose the exercise of such a right, since the term liberty interest may be taken to mean that a lesser state interest can overcome the right than if it were characterized as fundamental.[123] Justice Scalia, in a separate opinion, even said that the state could always forcibly prevent suicide (keep from slashing wrists, pump poison out of stomach), and that that included circumstances when refusing lifesaving treatment was the means to that end.[124]

On the other hand, the use of the phrase liberty interest does not necessarily mean rational basis scrutiny. In *Glucksberg*, where the Court upheld the constitutionality of a state statute barring assisted suicide, the Court said that due process requires heightened scrutiny for certain "fundamental rights and liberty interests."[125] Does this refusal of lifesaving treatment violate one of these certain liberty interests? This takes us back to square one. Supreme Court cases are filled with language which each side will pounce on and try to exploit to their advantage. This phrase in *Glucksberg* is just one more instance of such words.

All that this article has previously discussed regarding counter-balancing state interests with the constitutional right of the individual to refuse lifesaving treatment has assumed that there was such a constitutional right in the first place. This is just what the Court in *Cruzan* did, *assume*. "But for purposes of this case, we *assume* . . . the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."[126] The Court could make this rhetorical move because whether or not a conscious, competent Nancy Cruzan had a constitutional right to demand that her tubes be pulled and the machine silenced was not the issue. There was no such Nancy Cruzan. The only issue before the Court was what burden the state was entitled to put on her family to establish, in some form, what Nancy's wishes would have been. To say that

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121. *Id.*

122. *Id.* at 279 n.7; Yale Kamisar, *When is there a constitutional "Right to Die?" When Is There a Constitutional "Right to Live"?*, 25 GA. L. REV. 1203, 1229 (1991).

123. John A. Robertson, Cruzan *and the Constitutional Status of Nontreatment Decisions for Incompetent Patients*, 25 GA. L. REV. 1139, 1172-73, 1176-77 (1992).

124. *Cruzan*, 497 U.S. at 293. The state can forcibly prevent someone from committing suicide, even if in the guise of refusing treatment. *Id. See also* Annette E. Clark, *Autonomy and Death*, 71 TULANE. L. REV. 45, 72-73 (1996).

125. *Glucksberg*, 521 U.S. at 721.

126. *Cruzan*, 497 U.S. at 279. *Cruzan* indicated that a competent person has a liberty interest under the due process clause that must be balanced against state interests. *Id. Cruzan* was not about suicide or assisted suicide; again it was about the burden a state could use for a determination regarding substituted judgment. *Id.* at 280.

by making the task of proof very difficult, the state implicitly interfered with Nancy's exercise of her right, and therefore necessarily involved consideration of that right, confuses the question that the Court actually faced. Rather, the question in *Cruzan* concerned the legitimate way to determine (or perhaps more accurately, make up) when a person like Nancy could be said to exercise such a right *if* she had it.[127] It is true that five justices, counting the majority and dissent, wrote in favor of such a constitutional right.[128] Because a determination about the constitutional nature of the right to refuse treatment was not necessary to the Court's decision in favor of the state, however, under clearly established principles regarding the precedential import of statements in a case unnecessary to the decision (i.e., dicta), such statements are not law.[129] (Nancy's case was subsequently sent back to the state where friends came forward who recalled past conversations with Nancy, indicating she would wish to refuse treatment under her present circumstances. As a result, after more legal proceedings, Nancy was allowed to die).[130]

When the *Cruzan* case was discussed in *Glucksberg*, the Supreme Court noted that *Cruzan* had "assumed and strongly suggested" that the right to refuse lifesaving treatment had a constitutional underpinning.[131] It is also correct that the Court then went on to characterize *Cruzan* as based on the long-established right to refuse treatment.[132] Therefore, one might claim that *Glucksberg* at last established the constitutional nature of the right. While one could plainly make this argument, it is merely just an argument. Opponents to this argument will likely respond by saying that the refusal of medical treatment is a long-established right; the Court merely acknowledged the unquestioned common law application of the law of battery in the medical context. Also, this discussion in *Glucksberg* is total dicta and therefore of no precedential value. Deciding whether or not an individual has the right to refuse lifesaving medical treatment was not necessary for the Court to reach the decision in *Glucksberg* that the same patient does not have a constitutional right to have a third person help him commit suicide.

Again, we are faced with the same lesson. As has been previously stated, the law cannot be looked to for stable, predictable outcomes in an area such as this where there is such an intense underlying moral and social policy

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127. The *Cruzan* court focused upon whether the state could make Nancy Cruzan's family prove by "clear and convincing evidence" that their daughter would not have wanted to be kept alive in a persistent vegetative state through artificial feeding and hydration. *Cruzan*, 497 U.S. at 277. ("In this Court, the question is simply and starkly whether the United States Constitution prohibits Missouri from choosing the rule of decision [i.e., burden on parents of 'clear and convincing' evidence] which it did.").

128. *Cruzan*, 497 U.S. at 331.

129. Wolf, *Physician-Assisted Suicide*, *supra* note 31, at 170 ("Cruzan of course recognizes a liberty interest only in dicta.").

130. Filenes, *supra* note 97, at 181-82; Palmer, *supra* note 21, at 41-42.

131. *Glucksberg*, 521 U.S. at 720.

132. *Id.* at 720, 723. *But see* Lund, *supra* note 8, at 872 (questioning whether any of this is a part of a long-standing tradition in medical care).

debate. Admittedly, this was also the circumstance when the Supreme Court unanimously found racial segregation in public education unconstitutional in *Brown v. Board of Education*.[133] Surely, the Court faced a far more powerfully divisive issue than the assisted suicide debate, yet the Court was capable of stepping in and dismantling Jim Crow.[134] I agree; yet there are fundamental differences between the issues. While denying suicide or assisted suicide may be said by some to be wrong, its denial does not seem deeply, fundamentally immoral. Racial segregation was deeply, fundamentally immoral. That is, I believe, why the Court ruled as it did in *Brown*, not because of any imprimatur from the phrase equal protection. That same phrase, after all, with the same available tools of legal interpretation, had, up until then, resulted in a legacy of "separate but equal."[135]

4. *Terminal Sedation*

An awareness of a medical procedure called terminal sedation has only recently entered the national debate over suicide and assisted suicide.[136] Technically, terminal sedation involves rendering a patient unconscious with some drug (which itself could result in death, though justified by PDE). This sedation then is commonly accompanied by withdrawing food and hydration.[137] The latter aspect of the procedure is what makes it terminal.[138] Currently, terminal sedation is used as a last resort where other methods of pain control have proven ineffective.[139] Since a healthy person would die if rendered unconscious and then denied food and water, this procedure can

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133. *Brown*, 347 U.S. at 483.

134. So-called "Jim Crow" laws, which separated blacks and whites in all aspects of life, emerged in the Southern states following the Civil War. 6 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 13 (2d ed. 2004).

135. *See, e.g.*, Plessey v. Ferguson, 163 U.S. 537 (1896) (upholding Louisiana statute requiring railroads to provide equal, but separate accommodations for whites and blacks).

136. Bernard Gert, Charles M. Culver, & K. Danner Clouser, *An Alternative to Physician-Assisted Suicide*, *in* EXPANDING THE DEBATE, *supra* note 19, at 182; John D. Arras, *Tragic View*, in EXPANDING THE DEBATE, *supra* note 19, at 294; Balfour M. Mount & Pat Hamilton, *When Palliative Care Fails to Control Suffering*, 10 J. PALLIATIVE CARE 24, 25 (1994); Marion D. Cooper, Commentary, *When Palliative Care Fails to Control Suffering*, 10 J. PALLIATIVE CARE 27, 27 (1994); Gillian M. Craig, *On Withholding Nutrition and Hydration in the Terminally Ill: Has Palliative Medicine Gone Too Far?*, 20 J. MED. ETHICS 139, 140 (1994); Diloreto, *supra* note 67, at 69.

137. Diloreto, *supra* note 67, at 69-70; David Orentlicher, *The Supreme Court and Terminal Sedation: Rejecting Assisted Suicide, Embracing Euthansia*, 24 HAST. CONST. L.Q. 947, 955 (1997).

138. Raanan Gillon, *Palliative Care Ethics: Non-provisions of Artificial Nutrition and Hydration to Terminally Ill Sedated Patients*, 20 J. MED. ETHICS 131, 131 (1994).

139. Mount & Hamilton, *supra* note 136, at 26 (indicating sedation only to be used if other methods to relieve suffering have failed).

appear indistinguishable from assisted suicide.[140] However, part of this is a function of the narrative associated with the procedure. Using it on a dying patient whose pain is out of control, and during the last few days of his or her life, seems little different than other life terminating medical responses at the end of life that have been previously discussed.[141] On the other hand, the less the pain and/or the longer the life expectancy, the closer this technique inches towards, and eventually becomes, an intentional killing.

Unlike suicide, on the other hand, the sedated person can be revived before death. On a practical level, this means that the patient can be brought back to consciousness for, e.g., a half-hour a day, during which time he can talk to his family until the pain gets out of control and he must be sedated again. On a theoretical plane, the capacity to revive gives the opportunity to administer the mythological eleventh hour miracle cure. Also, death in effect comes from a refusal of lifesaving treatment (artificial feeding and hydration) which, as we have already discussed, can at least in rational basis be distinguished from suicide.

Within the world of the "death with dignity" and the "right to choose the time of one's death" movements, however, terminal sedation is a funny animal. Lying unconscious in what is the drug-induced equivalent of a coma would seem to represent the very type of image those in this movement find undignified (though here, while medical science has put one in that state, it is not bent on keeping one alive in it). Additionally, one does not really control the time of death as assisted suicide advocates desire because how long one continues living in this unconscious state will not be a function of conscious plans, but rather a function of how long the body and primitive brain will take to break down without food or water.

In any event, from the perspective of social policy, one can rationally place terminal sedation in a different category than intentional termination. When discussing PDE, it was recognized that this rationale for high risk taking with a patient's life, in contrast to assisted suicide, can only apply to a relatively narrow, circumscribed set of patients. That is even more so for the accepted narrative to which terminal sedation is considered. These are people who are not only in such great physical pain that they must be given drugs carrying the attendant risk of death such as morphine (as was the case with PDE). They are so far on the extreme side of the pain spectrum that no amount of medication can control their agony while they are conscious. This is indeed a small and identifiable group of patients. It is also the group that the vast majority of Americans would approve letting a doctor help to die in order

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140. Orentlicher, *Terminal Sedation*, *supra* note 137, at 953-958 (1997); *Id.* at 959 (stating sedation prevents saving patient who has been misdiagnosed, because will die anyway from starvation); Arras, *Tragic View*, *in* EXPANDING THE DEBATE, *supra* note 19, at 300 (stating that terminal sedation even worse than PAS); David Orentlicher, *The Supreme Court and Terminal Sedation: An Ethically Inferior Alternative to Physician-Assisted Suicide*, *in* EXPANDING THE DEBATE, *supra* note 19, at 301.

141. *See supra* Parts II.B.1-3.

to end the suffering. Again, the distinction is surely a rational one.

III. JOHN LOCKE, CIVIC REPUBLICANISM, AND THE REAL CONSTITUTIONAL RIGHT TO ASSISTED SUICIDE

"We the people, in order to form a more perfect union . . ." is a direct expression of the political theory provided in the *Social Contract* of John Locke.[142] While the social contract theory had appeared in writings on political philosophy for over a hundred years before the formation of this nation, only America took to heart Locke's theory, and its accompanying journey out of the mythical "state of nature," to actually structure the government of a new nation.[143] Our constitutional enterprise, thus, consciously based its nature and legitimacy on the social contract theory of that Seventeenth Century English philosopher.[144]

This theory sets the parameters of responsibility between the state and the individual: What does the state owe the citizen? What does the citizen owe the state? In the discussion which follows, the conclusion is reached that under the social contract theory, someone my father's age does not owe the state any duty which would permit the state the right to interfere with his decision to end his life. This is particularly so when an individual is too ill to ever again be capable of participating in political life; thus, rendering them not able to demonstrate the civic virtue that those constitutional founders espousing the philosophy of Civic Republicanism brought to the Constitution as a means aimed at modifying the extreme individualism of Locke.

A. The Social Contract Theory

According to the underlying narrative of the social contract theory, back in the mists of time, man lived in a state of nature.[145] In this world, each

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142. Gardner, *supra* note 17, at 207-08. *See also id.* at 193 ("[T]he United States government derives its legitimacy, in the Lockean sense, from the consent of the governed."); ROBERT PAUL WOLFF, ABOUT PHILOSOPHY 123, 127, 129 (1976) ("We call it our Constitution, but what the Founding Fathers actually wrote was the first operative social contract . . . [with] John Locke [thus being] the spiritual father of our Constitution . . ."). *Cf.* Daniel L. Morrissey, *Bringing the Messiah Through Law: Legal Education at the Jesuit Schools*, 48 ST. LOUIS U. L.J. 549, 559 (2004) (providing an analysis that attributes the development of the theory of social contract to Jesuit philosophers).

143. *See* THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE 123 (1988) [hereinafter SPIRIT OF MODERN REPUBLICANISM]; *See* Thomas L. Pangle, *The Philosophical Understanding of Human Nature in Forming the Constitution*, *in* CONFRONTING THE CONSTITUTION: THE CHALLENGE TO LOCKE, MONTESQUIEU, JEFFERSON, AND THE FEDERALISTS FROM UTILITARIANISM, HISTORICISM, MARXISM, FREUDIANISM, PRAGMATISM, EXISTENTIALISM 37 (Allan Bloom ed., 1990) [hereinafter CONFRONTING THE CONSTITUTION]; WOLFF, *supra* note 142 (stating Locke was the "Spiritual father of the Constitution").

144. *Id.*

145. LOCKE, *supra* note 17, at 8.

individual had natural rights revealed by our capacity for reason.[146] But each person was his own law with respect to asserting and protecting these rights, with force as the final arbiter.[147] In other words, people possessed a great deal of freedom, but not much security. To gain the security an organized society would provide for their lives and property, people were willing to leave the state of nature and with it, their unappeasable right to be the ultimate law[148] (although, in theory, those against whom they imposed "their law" could take a final appeal to the will of God).[149] In this bargain for security, one gave up the right to make the rules for day-to-day life, leaving that to a representative body which itself was subject to law.[150] All disputes, thus, were ultimately to be decided by the law, not by individual will. In the bargain, however, no person gave up his natural rights (life, liberty, property). As expressed in the Declaration of Independence, "[we] are endowed by the Creator with inalienable rights . . . ,"[151] rights which cannot be taken by government or bartered to it.

The Lockean and related natural law notions (as distinguished from the "Law of Nature," which is not normative but merely descriptive of how nature actually operates) directly guided the construction of our Constitution and our form of government.[152] These theories even played an explicit role in early Supreme Court decisions.[153] After all, several early Justices were present at the creation of this nation. They knew that they had embarked upon a great new political experiment in government. It was a nation simultaneously of the people, by the people, and for the people. Time has obscured this philosophical foundation of our government, or at least led us to think of only the trees of the constitutional text and not the underlying forest of political philosophy. Yet the theory of the social contract lies at the basis of the very legitimacy of our government.[154]

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146. LOCKE, *supra* note 17, at 9 ("The state of nature has a law of nature to govern it, which obliges everyone: and reason, which is the law, . . ."); SPIRIT OF MODERN REPUBLICANISM, *supra* note 14, at 149, 199; CONFRONTING THE CONSTITUTION, *supra* note 14, at 10.

147. LOCKE, *supra* note 17, at 11-12; Frank D. Balog, *The Scottish Enlightenment and the Liberal Political Tradition*, *in* CONFRONTING THE CONSTITUTION, *supra* note 143, at 202.

148. *See* LOCKE, *supra* note 17, at 16, 53, 66; *See also* Gardner, *supra* note 142, at 202.

149. LOCKE, *supra* note 17, at 16, 53, 66.

150. *See* LOCKE, *supra* note 17, at 70-71,111 (arguing that government is obligated to protect property, including one's life).

151. For a text reprinting the Declaration of Independence, see "Organic Laws," 1 U.S. Code, at XLIII (2001).

152. SPIRIT OF MODERN REPUBLICANISM, *supra* note 143, at 34; TRIBE, *supra* note 14, at 561; Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 52 (1985); Gardner, *supra* note 142, at 197-98; *See* LOCKE, *supra* note 17, at vii. *See generally* CONFRONTING THE CONSTITUTION, *supra* note 143.

153. Natural rights theory thus appears in early United States Supreme Court cases. *See*, TRIBE, *supra* note 14, at 561, 562; Gardner, *supra* note 17, at 210-11.

154. *See* Gardner, *supra* note 17, at 193 (acquiring legitimacy based on consent of governed); *See Casey*, 505 U.S. at 901 ("Our Constitution is a covenant running from the first generation of Americans to us and then to future generations."). *Cf. generally* LOCKE, *supra*

Our government was not founded on the Divine Right of Kings or conquest.[155] Its legitimacy was based on the belief (treated as fact) that the citizenry had entered into a contract.[156] Under the terms of that contract, the citizenry ceded its law-making power, transferring it to a representative government. That power which was transferred power, however, was limited by the people's inalienable natural rights and by the very purposes for which the institution of government was created (e.g., protection of life, liberty and property).

As any contract has reciprocal obligations, the question becomes: What do we owe our society? (Note that the question is not what we owe the government. Under Locke, one has no obligation to the government. The obligations are to the other contractors, the body politic, the society.)[157] The answer to this question will directly impact the rights of people like my father at the end of his life. Since, according to the theory of social contract, a primary motivation for entering into that contract was to obtain physical security not available in a world where the state of nature tended to degenerate into a "state of war,"[158] we reciprocally would seem to owe society our availability for protection against aggressors "to provide for the Common Defence."[159]

Consistent with this obligation is the fact that under our current law one must obtain permission to renounce citizenship in time of war.[160] In short, our society does not have to let a citizen out of the social contract if the nation needs his help in defense.[161] Of course, since children are not automatically bound to a contract to which they did not agree, they, like their parents before,

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note 17, at xxi ("The confluence of his [Locke's] main lines of argument about government and about property rights provide an eminently useable ideological underpinning for the modern liberal capitalist state.").

155. WOLFF, *supra* note 142, at 121. ("The unqualified claim of absolute kingly authority [based on the notion that the King was God's representative on earth] was unacceptable to the philosophers of the Enlightenment."); LOCKE, *supra* note 17, at 92 (founding nation by conquest).

156. Of course, a Marxist would call all this revisionist rubbish, claiming that this government was instituted to protect the property and debts owed to major landowners. *See* W. R. Newell, *Reflections on Marxism and America*, *in* CONFRONTING THE CONSTITUTION, *supra* note 143, at 334. *Cf.* WOLFF, *supra note* 142, at 140-41 (noting that for Marx the evolution of modern society begins when very early in human history, one group of people merely grabbed the means of production by force). And it is true that Locke does provide a philosophical justification for the accumulation and protection of private property and wealth. LOCKE, *supra* note 17, at 27-30; Pangle, *The Philosophical Understandings of Human Nature Informing the Constitution*, *in* CONFRONTING THE CONSTITUTION, *supra* note 143, at 43-46.

157. Doernberg, *supra* note 152, at 61.

158. LOCKE, *supra* note17, at 16 ("To avoid this state of war . . . is one great reason of men putting themselves into society, and quitting the state of nature . . . ").

159. U.S. Const. pmbl.

160. Formal Renunciation of Citizenship, 18B Fed. Prac. § 45-2166, 2166 n.39 (1999). *See also* 8 U.S.C. §§ 1481(5)(6) et seq. (West 2000).

161. In general, a person under Lockean theory can always leave society. WOLFF, *supra* note 142.

have the choice to reject its terms at the time they reach maturity. On the other hand, if they remain in the country after that age, and do not formally disavow the contract (i.e., renounce citizenship) they are bound by its terms.[162]

Society as part of the contract could also make an individual, or some "unit" that would agree to be responsible for the individual, to provide for the individual's material needs, and add to the productive capacity which is inseparable from a nation's capacity for defense. It is a fact that in our society (other than parents' obligation to serve as a unit supporting their children, whether married or divorced), people are not forced to assume this obligation. The government provides welfare and food stamps in certain instances. Our society, however, does not suffer from extreme scarcity. If things were otherwise, the government could legitimately demand a reciprocal obligation of self-sufficiency, though it may not be the type of society in which one would wish to live.

Finally, the contract requires that individuals obey the laws. A major part of the agreement is that citizens give up their position as the ultimate law, reposing that power in a representative government that is itself subject to law.[163] To ignore the law created by these representatives breaks the bargain, usurping the lawmaking function which was relinquished. These laws, however, must be such that they can be legitimately enforced against us. They cannot exceed the power which was bargained away to this limited government. They cannot usurp natural rights.

B. The Social Contract and Assisted Suicide

The obvious question concerns the content, criteria, measure or such that defines when one can be said to have fulfilled his end of the bargain. At what point is one no longer obligated under the social contract to provide personal resources to the society and thus is free to end his existence? The criteria obviously cannot be reduced to some list to be checked off like some school project. What would even be on the list? Nor could the criteria become quantum of contribution (i.e., so much wealth maximization, so much moral contribution in good deeds, so much service to the society such as in child rearing); hardly a clear guideline for conduct, in fact, an absurd enterprise.

Society, however, does have a proxy for that time when one has fulfilled her obligation to produce and protect. It is embodied in our concept of Social

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162. LOCKE, *supra* note 17, at 41, 62-64; WOLFF, *supra* note 142. ("To this, the social contract theorists answer that each of us, upon reaching the legal age of adulthood, *implicitly* signs his name to that original contract by remaining in the country, living under its laws, and entering actively into its legal arrangements.").

163. Thus, the rights an individual gives up as part of social contract do not revert so long as society lasts; rather, they remain in the community. LOCKE, *supra* note 17, at 123. *But see id.* at 107, 111, 123 ("Of the Dissolution of Government"; when government violates the social contract).

Security and the philosophy and history underlying that Act.[164] At a certain age, society permits a citizen to claim full social security benefits. This statement suggests that society believes one has done enough.

My selection of the retirement benefit section of the Social Security Act as a proxy for when the social contract no longer demands one's presence as a producer or a defender is neither arbitrary nor fanciful. It is justified by both the history and philosophy underlying the retirement portions of that legislation.

Retirement connotes voluntary cessation of work at a specific age, as opposed to stopping work because of disability. This idea that we can all *expect* to be able to retire, however, is a fairly recent phenomenon in history. The Social Security retirement system provided:

> [A] federal, mandatory, and public redistribution income base that made broad, voluntary middle-class retirement possible . . . The real distinction between Social Security and its predecessors was its role in institutionalizing retirement, along with the expectation of income support in old age, in order to meet the needs of an advanced industrial economy that was perceived to have more economic output than jobs.[165]

The moral justification for this entitlement to a guaranteed future retirement above the level of poverty, was that the individual had earned that retirement "on the grounds of age and prior service to the society and economy through work."[166]

> Entitlement to public benefits in the American tradition has always been based on a judgment of moral worth resulting from service to the country or other evidence of good character. The innovation of the Social Security system was to broaden the criteria for entitlement from military service to work in general. In this sense, the term "earned right" is an accurate description of the relationship between beneficiaries and benefits.[167]

Thus, at the requisite age, one is entitled to the means to voluntarily cease serving the nation. One does not have to produce anymore. One is no

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164. For the history of the creation of the Social Security Act, *see* ARTHUR J ALTMEYER, THE FORMATIVE YEARS OF SOCIAL SECURITY (1966); EDWIN E. WHITE, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT (1962); Patricia E. Dilley, *The Evolution of Entitlement: Retirement Income and the Problem of Integrating Private Pensions and Social Security*, 30 LOY. L.A. L. REV. 1063 (1997).

165. Dilley, *supra* note 164, at 1140, 1193.

166. Dilley, *supra* note 164, at 1080-1081, 1140.

167. *Id.* at 1080-81..

longer required to guard our shores (unless, in some situation so extraordinary that has never been seen before in our nation's history, that literally every single citizen is needed to save us from total destruction by some aggressor). Retirees are to relax and enjoy the benefits of their labor and loyalty. At that point, no more is owed under the contract; its terms have been fulfilled. One can even leave the society without any right of the government to interfere.

A person should also be free to leave through terminating his or her life.[168] To require a seventy-or eighty-year-old go to some remote island or ice flow (since these are the only locales where they can be confident that they will certainly not be subject to another society's rules that are not based on the social contract) to end his life, makes a mockery of the contract. Even in a less extreme scenario, such as forcing an individual to leave his home and the nation he has served in order to travel to a country where he can legally end his life (e.g., The Netherlands), and then requiring that he work his way through the red tape and medical establishment of a foreign nation, violates any good faith interpretation of the social contract. At the point when a citizen has held up his end of the agreement by a lifetime of labor, he owes no more.

One concern regarding this particular invocation of the social contract that might be raised is that it devalues older citizens and puts them in the category of being disposable. However, the social contract theory is not saying that people over the age of retirement have some lesser value—quite the contrary. The ranks of the older and elderly are to be filled with wise, capable individuals with much to offer (although admittedly all may not share this view). In a culture so obsessed with momentary flash and image, the wisdom of age and experience is desperately needed to guide us through the media drenched morass in which we currently exist. Increasingly, greater numbers of these older and elderly citizens (who will constitute a larger and increasingly larger portion of our population) will live beyond one hundred, and contribute much to family, friends, and society. The social contract analysis should be interpreted as saying no more than that which one owes

168. Some might point out that, depending on when people are born, they will be eligible for full Social Security benefits at different ages. Are some, therefore, only bound by the Lockean contract until 65, while others must wait until 67 or 67-1/2? No. Again, the concept of an age of retirement under Social Security is just circumstantial evidence, a rough measure of our national attitude towards those who have done their share. The precise difference among different retirement dates, on the other hand, reflects demographics and budget constraints rather than a metaphorical line for fulfilling one's side of the social contract. Therefore, I feel it reasonable for constitutional purposes to select the earliest age any group of citizens are eligible for full retirement as the age when the social contract no long binds our lives to the state. To the extent that Social Security benefits are given to children who have lost parents and those too mentally or physically disabled to work, these are more in the realm of social service payments, than the recognition that one has come to the time when they may cease to labor. Of course, if our society totally eliminated Social Security, that would not mark the demise of my Lockean theory. I would just have to search for an alternative bright-line proxy for when a person has fulfilled his or her obligations.

society is limited, and preserving one's life after the age of retirement is not one of those things owed.

Of course, one may question whether this line of reasoning can really be limited to those over the age of retirement under the Social Security system. Could not a thirty-year-old take this argument and say, "look, I could renounce my citizenship and emigrate if I felt like it—except in the time of war—so what's the big deal if I kill myself? It all comes out the same as far as this country is concerned." The answer, according to this theory, is that even if there is a legal path (i.e., renouncing citizenship) to remove one's self from the nation's human resources prior to the official age of retirement, it does not mean that society wants an individual to leave. Renouncing citizenship and emigrating is a time consuming, complex process, which most people are not likely to do. Committing suicide, on the other hand, is fast and easy. If one is a person under the age of retirement, few resources are risked if we permit the former, but not the latter. We do not want to make suicide easy. Therefore, the line is drawn at age of retirement.

There are, however, implications of this analysis over which I admit feeling a certain amount of discomfort. If one is over the age of retirement, one can kill one's self whether or not the individual is sick or healthy, clinically depressed or merely bored, in severe pain or just acting on a whim, and the government can do nothing about it. The older and elderly are the very population which is most likely to encounter coercion, abandonment in public institutions without access to any palliative care, and all the other concerns which lie along what in the public debate over assisted suicide has been termed the slippery slope. The answer to this dilemma can be found in the second philosophical underpinning of our government—Civic Republicanism.

C. Enter Civic Republicanism

Though the social contract was the primary philosophical foundation for the new government and Constitution, it was not the sole theory in the mix relied on by the Founders. A second theory, *Civic Republicanism*,[169] was needed to counterbalance Lockean individualism.[170] This theory significantly restricts the pool of those contemplating suicide with whom the government cannot constitutionally interfere.

The philosophy of Civic Republicanism revolved around the notion of civic virtue.[171] Citizens, all of whom participated in the governance of the

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169. Frank Michelman, *Laws Republic*, 97 YALE L. J. 1493 (1988); SPIRIT OF MODERN REPUBLICANISM, *supra* note 143, at 29.

170. Frank D. Balog, *The Scottish Enlightenment and the Liberal Political Tradition, in* CONFRONTING THE CONSTITUTION, *supra* note 147, at 192; Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539, 1548-49 (1988).

171. Sunstein, *supra* note 170, at 1548.

state, were to act out of commitment to what was best for the society, keeping in check an exclusive concern with their self-interest.[172] Thus, the point of government was not merely the accommodation of pre-political preferences (e.g., to hold on to what I had before entering the social contract), but to work towards the "good."[173] The philosophy favored true deliberation versus the pluralistic deals and trade-offs which so characterize modern American politics.[174] It sought the right social policy.[175] That was pure civic virtue.

On the other hand, the golden age of Civic Republicanism as it existed in the Greek city-states[176] and the Italian city-states[177] was not necessarily something one would consider ideal. Those citizens participating in governance were an elite group which excluded women and minorities.[178] Also, commitment to the polis tended to translate into supporting a rigid party line in which individual deviation was not tolerated.[179]

Moreover, the notion of what constituted virtue evolved and changed over time. At times it referred to the duty of political participation.[180] At others, it was not really political; but rather envisioned liberty as a means used to develop higher virtue,[181] as opposed to the employment of civic virtue to maintain liberty.[182] In the hands of Machiavelli, it was the art of amoral manipulation to keep the peace. For many of the Founders, virtue encompassed qualities directly from the pages of Ben Franklin's *Poor Richard's Almanac*: moderation and industry. This latter conception constituted a comfortable meld with Locke. The commercial republic[183] naturally

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172. *Id.* at 1544.

173. Michelman, *supra* note 169, at 1503; Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512, 1533-35 (1992).

174. Sunstein, *supra* note 170, at 1549.

175. Sunstein, *supra* note 170, at 1550.

176. Pangle, *The Philosophical Understandings of Human Nature Informing the Constitution*, *in* CONFRONTING THE CONSTITUTION, *supra* note 143, at 14.

177. Richard A. Epstein, *Modern Republicanism-or the Flight from Substance*, 97 YALE L. J. 1633, 1634 (1988).

178. Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L. J. 1663, 1667-70 (1988); Jonathan R. Macey, *The Missing Element in the Republican Revival*, 97 YALE L. J. 1673, 1675 (1988) (noting features of early American republic that smacked of elitism; *e.g.*, state senate elected Congressional representatives, electoral college, poll taxes and property qualifications, denial of vote to women); Epstein, *supra* note 177, at 1635; Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L. J. 1609, 1609 (1988).

179. Pangle, *The Philosophical Understandings of Human Nature Informing the Constitution*, *in* CONFRONTING THE CONSTITUTION, *supra* note 143, at 14-15; Michelman, *supra* note 18, at 1495.

180. Pangle, *The Philosophical Understandings of Human Nature Informing the Constitution*, *in* CONFRONTING THE CONSTITUTION, *supra* note 143, at 56.

181. *Id.* at 55, 56.

182. *Id.* at 64.

183. *Id.* at 69; W. R. Newell, *Reflections on Marxism and American*, *in* CONFRONTING THE CONSTITUTION, *supra* note 143, at 343.

accompanied Locke's conception of the liberal democracy, since commerce was to bring with it strength, contentment, and accordingly, less war.[184]

Regardless of its historical reality, civic virtue, at least philosophically, provided a brake on the runaway individualism of a purely Lockean view. For Lockeans, society was only supposed to protect man's pre-political interests, and then let him go and prosper. The Founders wanted more than that from those chosen to be leaders.[185] After all, the consent of the governed to be led by representative leaders was the basis for the government's legitimacy. The quality of leaders thus was central to the success of the enterprise. The Founders wanted civic virtue[186] and they considered the psychological nature of man, as well as the political and philosophical,[187] when forming their notion of virtue.[188] Particularly concerned about the motives of their leaders (e.g., virtuous commitment to the polis verses self-aggrandizement),[189] they attempted to encourage the former commitment by the electoral system and prevent the latter self-aggrandizement through the set of institutional checks which run throughout the Constitution (e.g., the Senate can impeach the President, the President can veto legislation, and such). The Founders also did not see man as a totally self-contained Lockean individual, functioning independently of other similarly situated Lockean individuals. Rather, man's obsession with his self-interest was tempered by the fact that he existed, not in isolation, but within private institutions such as churches, families, and work groups where qualities akin to civic virtue were developed and valued.[190]

Since the flowering of Civic Republicanism took place in small city-states such as Athens and Venice where all the eligible population could participate in governance, such an arrangement was obviously not possible with a nation covering the entire Eastern seaboard. In its place, the Founders matched a representative democracy with a deliberative democracy where, under the First Amendment, citizens could express their civic virtue by freely speaking, having access to information, and being guaranteed the right to associate with others and to petition their government for grievances.

Consequently, Civic Republicanism provides modification to extreme reliance upon the social contract theory by adding an obligation in addition to producing and protecting. It requires political participation. Voting, grumbling, or deliberately not voting are all variants on making one's civic

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184. PANGLE, SPIRIT OF MODERN REPUBLICANISM, *supra* note 143, at 96-97.

185. David F. Epstein, *Political Theory of the Constitution*, *in* CONFRONTING THE CONSTITUTION, *supra* note 143, at 102.

186. *Id.* at 93-98.

187. *Id.*

188. *Id.*

189. *Id.* at 102.

190. James H. Nickols, Jr., *Pragmatism and the U.S. Constitution*, *in* CONFRONTING THE CONSTITUTION, *supra* note 143, at 380. For an extensive socio-anthropological analysis of the role of informal institutions in promoting civic participation, *see* ROBERT D. PUTNAM, BOWLING ALONE (2000).

voice heard. Thus, while everyone over the age of retirement has met the Lockean obligations of production and protection, their duty within the underlying Civic Republicanism aspect of the Constitution remains. They are not free to leave, whether by boat or lethal injection.

But when they are also ill, and ill in a way such that it is not likely that they will ever again be able to participate politically—even with absentee ballots, e-mail and the like—continuing to maintain the obligation of civic participation is a hollow charade. Now they can leave. My father was certainly one of those who had fulfilled his obligations under the social contract (he was seventy-nine), and would never again be capable of civic participation.

D. Can the Line Hold?

But what about a forty-two-year-old who has exactly the same disease as my father had and is in exactly the same stage? Does age alone disqualify her from claiming a right to kill herself under the social contract theory? Then again, there are young people with such severe disabilities that they will never be involved in the military, commercial, or political life of the nation. Why are they made to continue living?

I could be accused of tailoring an argument to meet my father's case and no more. But that is not what I have done. Rather, I have looked at the social contract as involving mutual obligations. That is a different issue than whether one is capable of fulfilling his or her obligations. A contract may obligate one to deliver certain goods to another from her factory. A tornado may destroy the factory so that it is impossible for her to fulfill the contract. That impossibility may well be a defense to a claim that one did not meet the obligation; but the fact that one may have this legal defense of impossibility does not mean that the obligation ceases to exist. If, suddenly, a Good Samaritan industrialist came forth and said, "Hey, why don't you use my factory," one would be obligated to provide the promised goods. Similarly, if a forty-two-year-old with pancreatic cancer suddenly went into remission, she would be obligated to be available for the nation's defense and security. If my father was miraculously healed, he would have no such obligation. He had already given the country what was owed under the social contract.

That does not mean that my father then would be free to end his own life. Having regained his health, he would now be capable of participating in the political community once again. As such, society could forbid his suicide. But it would not be the social contract which would oblige him to maintain his life. It would be the Civic Republicanism strain in our Constitution's construction; for, again, he would have no further obligation under the social contract.

One may, nonetheless, find this unfair to the forty-two-year-old, and a bit cold, as well. But all I am talking about is a constitutional line where the government no longer possesses the power to interfere with the decision of

someone in my father's circumstances to end his or her life. The legislature still can choose to give the same relief to the forty-two-year-old.

E. Arguments Opposing My Theory

As with any such sweeping argument as I have just proposed, accompanied by sweeping implications, there will be reasonable counter arguments. I will address each of those I can envision as honestly as I am able.

1. Legitimacy of My Source

Initially, one might question the legitimacy of deriving American Constitutional rights from philosophy, and the philosophy of Seventeenth Century Englishmen and ancient Greeks. To me, these philosophies provide an entirely appropriate frame of interpretation. These are not philosophies which I just happen to find pleasing. They were consciously considered and specifically implemented when constructing our government and constitution. If anyone cares anymore about the Framer's intent, here is the blueprint of our national edifice. Resorting to these sources seems to me to be at least as legitimate as the types of inquiries into "deeply rooted traditions" and what is "implicit in ordered liberty," which are conducted under a substantive due process analysis.[191]

2. Locke Opposed Suicide

Conceding the reliance of the Founder's on Locke and the social contract, readers of Locke will point out one small problem with my reliance on his theory: In his work, John Locke specifically said that we have no right to commit suicide.[192] In doing so, Locke had both a theological and a conceptual ground.

The basis of this theological argument was a form of Thomas Aquinas' classic argument against suicide:[193] Our lives are not ours, but are God's

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191. *See* Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L. J. 1685, 1688 (1988). (discussing the view that the norms and structure of the constitution, in addition to specific provisions, provide appropriate grounds for interpretation).

192. LOCKE, *supra* note 17, at 19 ("though man in that state [of nature] have an uncontroulable [sic] liberty to dispose of his person or possessions, yet he has not liberty to destroy himself. . .").

193. *See* Barry, *supra* note 56, at 476 (1995); Darrel W. Amundsen, *Suicide and Early Christian Values*, *in* SUICIDE AND EUTHANASIA—HISTORICAL AND CONTEMPORARY THEMES 142, 190, 191-92 (Baruch A. Brady ed., 1989) [hereinafter HISTORICAL AND CONTEMPORARY THEMES]; Thomas L. Beauchamp, *Suicide in the Age of Reason*, *in* HISTORICAL AND CONTEMPORARY THEMES *supra*; MICHAEL MANNING, EUTHANASIA AND PHYSICIAN-ASSISTED SUICIDE—KILLING OR CARING 17 (1958). Williams, *supra* note 92, at 264.

property.[194] However convincing one may find this argument, a faith-based argument can have no purchase in a legal decision of our pluralistic society.[195]

Locke's conceptual concern, on the other hand, comes out of the nature of the social contract as a mechanism to protect property.[196] The protection of property, which the state insures in the bargain, includes the individual person as well as land and possessions.[197] What Locke wanted to prevent was affording any theoretical basis upon which it could be claimed that individuals had ceded to the state the right to arbitrarily kill them as part of the contract.[198] Certainly such rights had historically been claimed by absolute despots, and Locke wanted no part in creating a philosophical system which could legitimate such appalling governance.[199] So, if one's life ultimately belongs to God, and thus, is not one's own, one cannot give it to the state as part of the bargain for the social contract.[200] Again, it is a theological argument (an

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194. *See* James F. Childress, *Religious Viewpoints*, *in* REGULATING HOW WE DIE, *supra* note 68, at 26 (discussing Aquinas' "Metaphors," *i.e.*, gift, loan, and such); Barry, *supra* note 56, at 476; BETH SPRING & ED LARON, EUTHANASIA: SPIRITUAL, MEDICAL AND LEGAL LESSONS IN TERMINAL CARE 122 (1988). *See also* DWORKIN, *supra* note 33, at 195.

195. *See* Samar, *supra* note 8, at 257-58 ("[I]t would be difficult to justify using religion as a basis for decisions in a pluralistic society that subscribes to a doctrine of separation of church and state."). A sense of this is reflected in the majority opinion in *Lawrence*, 539 U.S. at 570:

> It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code."

Citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992).

196. LOCKE, *supra* note 17, at xvi-xix (providing introduction regarding Locke's notion of property); 66 ("The greatest and chief end, therefore, of men uniting into common-wealths, and putting themselves under government is the preservation of their property.").

197. *Id.* at 19 ("Though the earth, and all inferior creations, be common to all men, yet every man has a *property* in his own *person* . . ."); 66 ("for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.").

198. LOCKE, *supra* note 17, at 9 ("[Y]et he has not the liberty to destroy himself . . .").

199. LOCKE, *supra* note 17, at 89 ("[F]or man not having such an arbitrary power over his own life [i.e., to kill himself], can not give another man such power over it."); 90 ("[*A*]*bsolute domination*, however inconsistent with it, as slavery is from property.").

200. *Thirdly, Despotical power* is an absolute, arbitrary power one man has over another, to take away his life, whenever he pleases. This is a power, which neither nature gives, for it has made no such distinction between one man and another; nor compact can convey: *for man not having such an arbitrary power over his own life, cannot give another man such a power over it.*

LOCKE, *supra* note 17, at 89 (emphasis added).

individual's life is God's), an argument which has no legitimate place in our legal arena, that Locke employs to deal with this conceptual concern.

Yet, even if he had created some policy-based argument for why our lives are not our own, and, therefore, cannot be made part of the bargain, I do not know why Locke thought this was necessary. Why would I leave the state of nature and enter into this deal if granting the state this absolute and arbitrary power to kill me was part of the bargain? This would seem to make my life at least as uncertain as living in a condition of a state of war. I may, in fact, have a better chance preserving myself against other individuals in nature than against the organized power of the entire state bent on my destruction. Even if my life is considered mine, it is hard to see any logic in making such a deal (unless that is the only offer on the table, and I judge it worth the risk calculating that it will never happen to me). In any event, this belief about suicide is hardly central to Locke's theory of social contract which the Founder's adopted.

3. *Civic Republicanism was an Aspiration, not an Obligation Which Could Limit the Sweep of My Position*

Another attack on my theory would posit that my attempt to limit the sweep of my social contract argument by the insertion of Civic Republicanism fails. While the Founders did consider aspects of Civic Republicanism, their principle concern was with having virtuous leaders. The size of the nation required a representational system, not the great gathering of citizens as in Athens. Surely they desired participation from the citizenry, and the First Amendment and the electoral process created mechanisms to make that feasible. But these devices were more in the sense of giving people opportunities, not creating obligation. While the very idea of a (social) contract implies reciprocal obligations, civic virtue extols an aspiration. If you are relying on Civic Republicanism as the basis for some *obligation* not to leave, it is just not there.[201]

I think this is a fair argument, but I do not agree. The system depends on participation to function, and the more enlightened and numerous those who participate, the better. I believe one does have a civic obligation to participate, although because we are unable to tell whether or not failure to participate is a First Amendment statement, we will not enforce that obligation. We can demand, however, that one at least be available to participate, not leave.

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201. Admittedly, it appears that Civic Republicanism was far less significant in the formation of our Constitution than Lockean theory. *See* Gardner, *supra* note 17, at 197-98, 213; SPIRIT OF MODERN REPUBLICANISM, *supra* note 143, at 2-3 (presenting "a new interpretation of the moral, political, and religious teachings of Locke's corpus" in which the "Founder's moral vision" is revealed).

4. There's Virtue in Just Hanging On

Other arguments against my position assume a more idealistic tone. Even if one is no longer obligated to provide support and protection, willingness to suffer to the end gives an inspiring and heroic example to others.[202] I am not sure how inspiring or heroic all this is, but assuming so, that is the individual's choice. We do not require that heroism be a cultural norm. If it were the expected behavior, it would not be heroic.

In the same vein is the argument that by shortcutting the dying process, one forfeits the opportunity for end of life enlightenment, lessons, reconciliation with others, and such.[203] However, this does not seem like something we want (or even have any right) to impose as a social obligation on every individual. What is society's interest in this? It is difficult to imagine anything more private (unless one makes the hopelessly speculative argument that those left behind and not reconciled with will suffer as a result, and that suffering will take a form harmful to society). This position envisions one view of the good death. In a free society, in which citizens are imbued with First Amendment protections, a government-imposed litany of the *correct* way to die is, to say the least, unsupportable. Even if we were all to agree that this reflects a desirable way to employ the last chapter of our lives, individuals may be too sick and confused to participate, or may not have others available with whom to finish business.

5. Weakening Respect for Life

Other counterarguments are of a more consequentialist nature. Letting older people kill themselves will weaken respect for life, and this is something which society still has a legitimate interest in preventing. As such, one may still be held responsible to society under the social contract.

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202. SMITH, *supra* note 26, at xix (using Michael Landon as an example); Daniel Callahan, *Reason, Self-Determination, and Physician-Assisted Suicide*, *in* THE CASE AGAINST ASSISTED SUICIDE, *supra* note 21, at 67; JONI E. TADA, WHEN IS IT RIGHT TO DIE? 149 (John D. Sloan ed., 1992) (offering the example of choosing not to die is important).

For some, suffering is morally important. *See* PAUL I. MISHBIN, EUTHANASIA: THE GOOD OF THE PATIENT, THE GOOD OF SOCIETY 31 (1992) ("Miguel de Unamuno may not have been entirely wrong when he wrote: 'suffering is the substance of life and the root of personality. Only suffering makes us persons.'"); Michael Manning, *supra* note 193, at 24; Spring & Laron, *supra* note 194, at 130; Hyde, *supra* note 79, at 166; Kevin D. O'Rourke, O.P., *Pain Relief: Ethical Issues and Catholic Teachings*, *in* BIRTH, SUFERING, AND DEATH 158 (Kevin Wm. Wildes, Francesc Abel & John C. Harvey eds., 1992). Thus, some see suicide as cowardice. *See* Barry, note 56, at 478-79; Karen Lebacqz & H. Tristram Engelhardt, Jr., *Suicide*, *in* EUTHANASIA, *supra* note 55, at 682; KAREN REDFIELD JAMISON, NIGHT FALLS FAST—UNDERSTANDING SUICIDE 227 (1991) (stating this prevalent view in part accounts for why people could not believe that Meriwether Lewis killed himself). *See also* Garvey, *supra* note 9, at 15, 17 (stating the willingness to suffer requires courage).

203. John Finnis, *A Philosophical Case Against Euthanasia*, *in* EUTHANASIA EXAMINED, *supra* note 31, at 32.

This position suggests that the people like my father are to suffer again as figurative soldiers (a soldier who is being used solely as a means—and a symbolic one at that—to achieve some abstract societal end). The great Nineteenth Century utilitarian, John Stuart Mill, while considering the idea of a social contract to be a work of fiction,[204] did believe that citizens had reciprocal obligations with the state.[205] However, it is hard to imagine that Mill's utilitarian calculus would demand great suffering for tenuous social benefits.[206]

Also, it is difficult to comprehend how life would be perceived as less valued if someone in my father's situation killed himself. No one will confuse a decision by someone like my father to end his life with a similar decision by a heartbroken teenager, or a depressed forty-something. Let me be clear. Every day of an older and elderly person's life is as precious as a day in a younger life. An older life can be filled with as much joy, wisdom, generosity, and even passion as that of her juniors. Yet at the same time, we feel that they have gotten their "fair innings."[207] When she was ninety-two, my maternal grandmother told me that she had lived a good, full life, but now she could no longer see well enough to read or watch television, could not hear most of what was said around her, had difficulty moving about, and most of her friends were dead. She did not long for death but was ready to welcome it when it came. She died of natural causes at age ninety-three.

Even if a very sick person in his late sixties chose to end his life, it is difficult to imagine anyone saying, "This sixty-seven-year-old ended her life, so it just seems natural that teen suicide is acceptable." These two worlds simply do not connect. Prohibiting the government from interfering with older and elderly people who are very ill will not create a pneumatic pressure weakening the value of life in our culture from age group to age group.

Furthermore, I cannot imagine that this will lead to massive or even dramatically increased suicides among even older and elderly persons. Most older people want to live on and on. This is the dessert phase of life (if you have a minimum quantum of money and health). One is free like a child, but with the knowledge, resources, and autonomy of an adult. Only very, very

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204. JOHN STUART MILL, UTILITARIANISM 55 (George Sher ed., Hackett Publ'g Inc. 1988) (1861) ("a favorite contrivance has been the fiction of a contract, whereby at some unknown period all members of society engaged to obey the laws, and consented to be punished for any disobedience to them . . .").

205. JOHN STUART Mill, ON LIBERTY 73 (Elizabeth Rapaport ed., Hackett Publ'g Inc. 1972) (1855) ("everyone who receives the protection of society owes a return for the benefit . . .").

206. *Cf.* Carl Wellman, *A Moral Right to Physician-Assisted Suicide*, 38 AMER. PHILO. Q. 271, 274-75 (2001) ("Therefore, there are at least two much more limited moral liberties to commit suicide, when killing oneself is the only way to avoid violating a more stringent moral duty *or when to refrain from doing so would demand excessive sacrifice*" (emphasis added)).

207. CALLAHAN, *supra* note 52, at 181; Somerville, *supra* note 53, at 17; *cf.* DWORKIN, *supra* note 33, at 88 (contending that at some point, one's "investment" in life has been substantially fulfilled).

sick people wish this golden age of life to end. And even as to these persons, the vast majority will be able to achieve that desire by availing themselves of already accepted means—withdrawing life-sustaining treatment, PDE, refusing lifesaving treatment, or terminal sedation. Those to whom my social contract/civic republicanism theory really matter are very few. My father, however, was one of those few.

E. Putting Theory to Practice

1. Governmental Access to Lethal Drugs

Under the social contract/civic republicanism theory, the state could not prevent someone like my father from ending his life. One might ask, however, whether such a person has a legal right to have the government allow him access to lethal drugs. The government could say "go ahead, you're free to jump off a bridge, but we don't have to participate." As in the case of abortion, the government could take the position that it is not obligated to utilize tax dollars to support your choice.[208]

One might respond that tax dollars are not involved if the person seeking the drugs is willing to pay a reasonable price. After all, women can obtain a private abortion; they just cannot ask the government to pay for it. Furthermore, we are not even talking about utilizing some government resource or facility. The drugs do not belong to the government, nor are they kept in a government warehouse. The government merely regulates their distribution. In the case of one entitled to suicide under the Lockean contract, denying access to the most reasonable means available to a sick, older person to end their life would seem to constitute an unconstitutional burden as applied to such person.

Whatever the resolution of the legal issue, assuming the Lockean-based right, the government *should* provide the drugs. Otherwise, the alternative for many will be a violent death (e.g., gun, car, razor), an end which is a perversion of the very notion of *Thanatus*. Also, obtaining the pills is not the same as using them. For some, just knowing that they had an available out from suffering is sufficient.[209] They can relax, let go of the fear of suffering without end, and in fact never use the pills.

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208. *See* Harris v. McRae, 448 U.S. 297, 316 (1980) (finding that "it simply does not follow that a woman's freedom of choice carriers with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices").

209. William J. Winslade, *Physician-Assisted Suicide: Evolving Policies*, *in* PHYSICIAN-ASSISTED SUICIDE, *supra* note 31, at 229 (describing how patients are comforted by knowing that they have the power to end their life if they wish, and never take the lethal pills). *Cf.* Linda Ganzini et al., *Physicians' Experiences with the Oregon Death with Dignity Act*, 342 NEW ENG. J. MED. 557, 583 (2000) (reporting that physicians give lethal pills to one out of six patients who request, but only one out of ten of those patients actually take the pills).

2. Placing a Third Person into the Equation

Assuming one agrees that the state cannot constitutionally interfere with the decision of someone like my father to intentionally end his life, that does not mean that some third person automatically is entitled to enter into the equation. With the entrance of this third person the suicide is no longer a private matter.[210] Added now are the concerns that suicide is now made easier, the possibility of disguised homicide, the risk of coercion[211] and, with the addition of the doctor, the risk of the feared slippery slope from voluntary assisted suicide to involuntary euthanasia.[212] How does this all play out under the Lockean/civic republicanism analysis?

There are two basic paths the analysis can take. One takes the position that, while the state may not interfere with the individual, it does not mean that the state has to make the act easier (or even possible) in any individual case. Suicide still is not something that the state looks at as a positive good.[213] If very sick, old people want to poison themselves that is their business. But the entrance of a third-party into the act is something quite different. That is the state's business, and it can choose to prohibit the involvement of third parties if it wishes.

The other path focuses on the meaningfulness of the choice an individual like my father is now entitled to make under the philosophical commitment reflected in the Lockean contract. The relevant category, which people like

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210. *See* CALLAHAN, *supra* note 52, at 110; *see* Van Zyl, *supra* note 28, at 103.; *Cf.*, Margaret P. Battin, *Is a Physician Ever Obligated to Help a Patient Die?*, *in* REGULATING HOW WE DIE, *supra* note 68; THE ETHICAL, MEDICAL, AND LEGAL ISSUES SURROUNDING PHYSICIAN-ASSISTED SUICIDE 21 (Linda L. Emanuel ed., 1998) (noting that most sick people cannot kill themselves without help).

211. Surrounding any discussion of assisted suicide is the concern that people will be coerced into choosing assisted suicide. *See* Leon R. Kass, *I Will Give No Deadly Drug*, *in* THE CASE AGAINST ASSISTED SUICIDE, *supra* note 21, at 25-26. This is particularly a concern since the very ill tend to be vulnerable and dependant. *Id.*

212. The concept of the slippery slope is often at the center of non-religious arguments in the euthanasia, assisted suicide debate. *See* ROBERT I. MISHBIN, EUTHANASIA: THE GOOD OF THE PATIENT—THE GOOD OF SOCIETY 17 (1992); GERALD DWORKIN, R.G. FREY, & SISSELA BOK, *supra* note 98, at 44-45; Thomas St. Martin, *Euthanasia: The Three-In-One Issue*, *in* EUTHANASIA, *supra* note 55, at 600.

213. It has been contended that society, through law-legitimated control, attempts to maintain the illusion that it controls life and death. *See* Patrick Hanafin, *Surviving Law: Death Community Culture*, 28 STUDIES IN LAW POL. & SOC. 97 (2003):

> Law attempts to govern life and death through the appropriation of images which give a fantasy of control over death. The functioning of the thanatopolitical state is underpinned by a perceived control over death and it representation. This means of controlling death is challenged when someone wishes to die in an untimely fashion. Death may be timely when the State engages in the officially sanctioned killing of the death penalty but not when the individual assumes such a power to decide. When an individual goes before the law to obtain a right to die, instead of confronting death, legal institutions evade the issue and instead talk about life, and its sacred and inviolable nature. *Id.* at 97.

my father occupy, are those over retirement age who are so ill that they are likely never to be even minimally capable of participating in the political process. To categorically deny such people assistance, should they choose to end their lives, makes that choice illusory, since most in that condition simply could not kill themselves without assistance.[214]

I believe this second path is the correct one. Admittedly, we are not dealing with a constitutional right in the traditional sense. My father's freedom from government interference was derived from the primary philosophies underlying the Constitution, not any explicit textual provision or any unenumerated right wafting from the text. Yet, I believe this freedom to be of the same pedigree as that of so-called fundamental rights, because at base, what makes all these rights fundamental is that they reside in that imaginative realm, comprising life, liberty, and the pursuit of happiness, which was never ceded to the state under the social contract. In a government of, by, and for the people, these are the aspects that define the contours of the individual.

State regulation, which touches upon aspects of our lives which are so central to defining the boundaries between the realm of the state and the individual (whether derived from fundamental rights or Lockean analysis), would seem to justify the same method of strict judicial scrutiny. Such regulation is unconstitutional unless it satisfies a strict scrutiny-type showing of compelling and necessary. Denying assistance to those over retirement age who are so ill that they likely will never be able to meaningfully participate in the political process is more than an undue burden;[215] it is a *de facto* prohibition. Whatever concerns the state retains when dealing with assisting the suicide of a person in my father's circumstances must be expressed through less burdensome means (e.g., regulation) than a total ban on assistance.

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214. Once we accept such a theory, administrative challenges inevitably will follow. What if my father got his pills, but gave them to someone else? There would be reasons not to do this. A computer could keep track so one could only get one set of pills. If one lost them, they are stolen, or such, one would have to go to court to get another set. But what if someone like my father took this risk and still got them for someone who was not entitled to them (*e.g.* 35 year old)? Then I would hold my father (and anyone who knowingly aided him) subject to criminal charges.

Now one might say, "Your father is dying; he's not going to care about some criminal prosecution which will never happen. He's too sick to even be taken out of his bed, let alone to court." You are correct. The deterrence comes from the risk to anyone knowingly aiding my father. It would be extremely difficult (though not impossible) for my father to negotiate something like this without the aid of at least one other person who either knew what was going on, or acted in deliberate ignorance ("I don't want to know. Don't tell me why I'm mailing these . . . ").

215. For a discussion of the concept of undue burden within the context of fundamental constitutional rights *see* Clark, *supra* note 27, at 79; *Casey*, 505 U.S. at 874 (1992). *Cf.* MILL, ON LIBERTY, *supra* note 205, at 97 (stating that if one has the right to do some act, they must be afforded the assistance to do it).

IV. CONCLUSION

Basing a constitutional right on the two philosophies that formed the conceptual structure of our constitution comports with my own sense of why my father was entitled to die.[216] At the same time, it offers a constitutional principle which can be cabined and controlled. Under the Lockean/Civic Republicanism theory, one does not face the problem of the inevitable breakdown in line drawing which would accompany adoption of the due process and equal protection theories. Post-retirement age is a clear line. While all lines like this are somewhat arbitrary, this line at least corresponds to a cultural conception of when the society assumes one will retire from societal obligations.

My father suffered, suffered terribly. He suffered long after we had talked over our lives together, and came to some closure. He suffered long

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216. I should note for the reader's edification, that two other constitutional theories have been proposed to support a right to PAS: the Ninth Amendment "natural rights" and First Amendment Religious Freedom. For the reasons I discuss below, I do not find either theory sufficiently persuasive.

Natural Rights and the Constitution

The locus of the self evident truths extolled in the Declaration of Independence that all men are endowed by their creator with "*certain inalienable rights*," is not precisely indicated in the Constitution. For a time, they were thought to reside in Article IV section 2 of the U.S. Constitution, the privileges and immunities clause. *See* Corfield v. Coryell, 6 Fed. Cas. 546, 551-52 (Cir. Ct. C.E.D. Pa. 1823); TRIBE, *supra* note 14, at 529. However, that possibility was laid to rest in the Slaughter House Cases, 83. U.S. 36 (1872). *See also* TRIBE, supra note 14, at 531 (stating that "[t]he natural rights theory of *Corfield* had been abandoned by the mid-1870's"). Nearly one hundred years later, these unalienable rights arguably resurfaced in Justice Goldberg's concurrence in Griswold v. Connecticut, 381 U.S. 479, 486 (1965) in the guise of the Ninth Amendment:

> The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

Id. at 488. *See also* Hardaway, Peterson, & Mann, *supra* note 8, at 348-53 (positing that the right to assisted suicide could reside in the Ninth Amendment).

It is difficult to perceive, however, what this adds to the due process, fundamental rights analysis already rejected by the *Glucksberg* Court.

First Amendment

Professor Dworkin has argued that the free exercise of religion clause in the First Amendment acts as a bar on a total ban of PAS. DWORKIN, *supra* note 33, at 157, 164-65. There seem to be two problems with this position. First, there are those who oppose PAS on totally non-religious grounds. *See* Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy Killing" Legislation*, *in* EUTHANASIA, *supra* note 55, at 411; Kamisar, *Reasons*, *supra* note 21; Phillip Berry, *Euthanasia-a dialogue*, 26 J. MED. ETHICS 370 (2000) (positing dialogue between patient who desires euthanasia and an atheist physician who refuses). Second, the Court distinguishes religious belief (which is constitutionally protected as an absolute) and religious activity (which can be regulated). *See, e.g.*, Employment Division v. Smith, 494 U.S. 872 (1990) (permiting application of drug laws to Native American Peyote ceremony); Reynolds v. United States, 98 U.S. 145 (1878) (stating that even though polygamy is a part of Mormon religious tradition, it may be prohibited under general law prohibiting polygamy).

after he had fulfilled all his worldly obligations, including making all provisions necessary for the care of my mother (who at the time had Parkinson's disease). He suffered long beyond the bounds of courage. Yet after *Glucksberg* and *Vacco*, most would say, that absent state legislation, the Constitution will not permit someone in his place to stop the suffering. I cannot accept that our society can locate meaning in meaningless suffering.