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Assisted Suicide: Still A Wonderful Life?

Mark E. Chopko
Michael F. Moses*

I. INTRODUCTION

In the 1946 Frank Capra film *It's a Wonderful Life*, an angel saves the film's protagonist, George Bailey, from committing suicide. Still believing non-existence preferable to life, George wishes he had never been born. The angel grants his wish and shows George what the world would have been like without him. In the vision that unfolds, George learns that his younger brother, Harry, loses his life at the age of nine because George is not there to save him from drowning. If George had been around to save him, Harry would heroically have saved many lives during the war. The town druggist is no longer spared ignominy and imprisonment because George is not there to prevent him from accidentally poisoning a customer. George's wife, Mary, remains alone and her children are never born. Without his civic leadership, George's town sinks into moral depravity under the domination of one malevolent man. Given this privileged view of what the world would have been like without him, George discovers a previously undisclosed meaning that his life has for himself and others.

Things have changed since 1946. What was once an unquestioned good (the inestimable worth of each human life) is today not only questioned, but renounced. Official recognition and sanction for the oddly conceived "right" to renounce this inherent good is now demanded of legislatures, voters, and courts. Proponents have waged an aggressive campaign in recent years to make assisted suicide¹ both acceptable and legal. If they prevail, *It's a*

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1 Unless otherwise qualified, we use the terms "assisted suicide" and "euthanasia" to mean aiding or assisting another person to kill himself (assisted suicide in the strict sense) or killing another person at his request (often called active, voluntary euthanasia).

Wonderful Life and its happy ending will be drastically rewritten. In the revised version, one imagines the angel, in response to George's asserted right to kill himself, arguing what once seemed so self-evident: George has no "right" to end his life. Today one could envision George, his eyes unopened by the privileged glimpse of what life would be like without him, continuing to believe nonexistence preferable to life.²

Contemporary advocates of assisted suicide in the United States have concentrated much of their lobbying efforts on the West Coast. In the late 1980s, efforts to place euthanasia measures on the ballot in California and Oregon met with defeat.³ However, by the early 1990s, proponents had gathered enough signatures to place separate euthanasia initiatives before voters in Washington and California. In each state, the initiatives were defeated by the same narrow margin of fifty-four to forty-six percent.⁴

Finally, in November 1994, Oregon residents by a vote of fifty-one to forty-nine percent approved a ballot initiative that allows a competent terminally ill adult to obtain a doctor's prescription for medication for the patient's express use in ending his or her life.⁵ Within days of its passage, the Oregon initiative was challenged in federal court on the grounds that it violates several federal laws as well as the constitutional rights of the terminally ill.⁶ On December 7, 1994, one day before the initiative was to go into effect, a federal judge issued a temporary restraining order and, on December 27, a preliminary injunction, preventing the initiative from tak-

2 In a similar vein, readers of C.S. Lewis might imagine Screwtape (an angel too, but with different loyalties) advising his nephew Wormwood, a novice tempter: If you want to do great destruction to those insufferable humans, convince them that any attempt to discourage public ills or promote the common good is just a veil for intolerance or an abridgement of their rights. See C.S. LEWIS, *THE SCREWTAPE LETTERS* (1964).

3 Two Los Angeles attorneys were unable to gather enough signatures to place the "Humane and Dignified Death Act" on the November 1988 California ballot. See Allan Parachini, *Bringing Euthanasia to the Ballot Box*, L.A. TIMES, Apr. 10, 1987, § 5, at 1.

4 Sandi Dolbee, *Right-to-Die Measure Rejected By State Voters*, SAN DIEGO UNION-TRIBUNE, Nov. 4, 1992, at A-3; Jay Mathews, *Term Limits, Assisted Suicide, Abortion Rights Losing in Washington*, WASH. POST, Nov. 6, 1991, § 1, at A28.

5 The Oregon Death With Dignity Act, Oregon Ballot Measure 16 (approved Nov. 8, 1994) (not yet codified) [hereinafter Oregon Act] (enforcement enjoined by *Lee v. Oregon*, No. 94-6467, 1994 WL 728858 (D. Or. Dec. 27, 1994), *appeal docketed*, No. 95-35031 (9th Cir. Jan. 11, 1995)). See Spencer Heinz, *Assisted Suicide: Advocates Weigh In*, OREGONIAN, Dec. 9, 1994, at A1 ("voters—by a ratio of 51 to 49 percent on Measure 16—made Oregon the only place in the world to legalize doctor-assisted suicide").

6 *Lee v. Oregon*, No. 94-6467, 1994 WL 728858 (D. Or. Dec. 27, 1994), *appeal docketed*, No. 95-35031 (9th Cir. Jan. 11, 1995).

ing effect until the constitutional issues could be fully heard.⁷

On the judicial front, most courts continue to insist that states have an interest in preventing suicide. A few judges, however, have suggested or ruled outright that some persons have a right to assisted suicide. In 1986, a California appellate judge concluded in a concurring opinion that a twenty-eight-year-old woman with severe cerebral palsy had the right "to enlist assistance from others, including the medical profession, in making death as painless and quick as possible."⁸ In May 1993, a Michigan trial judge invalidated that state's law banning assisted suicide.⁹ For the sake of a complete appellate record, the judge went on to rule that at least two plaintiffs were likely to prevail on their claim that the ban violated their right to end their own lives.¹⁰ In a separate case, another Michigan trial judge ruled that the same law was unconstitutionally overbroad because in some cases it interfered with the right to commit a "rational" suicide.¹¹ This latest decision, until its reversal by a state appellate court, threatened to derail Michigan's attempt to enforce its own laws and thereby prevent retired pathologist Jack Kevorkian from continuing to help people in that state commit suicide.¹²

The medical and legal professions continue to oppose assisted suicide in their official pronouncements.¹³ Yet individuals like Kevorkian persist in testing the limits of both society's restraint and the law. In January 1988, an anonymous story entitled "It's Over, Debbie," appeared in the *Journal of the American Medical*

7 *Id.* (preliminary injunction).

8 *Bouvia v. Superior Court*, 225 Cal. Rptr. 297, 307 (Cal. Ct. App. 1986) (Compton, J., concurring).

9 *Hobbins v. Attorney Gen.*, No. 93-306-178 CZ, 1993 WL 276833 (Mich. Cir. Ct. May 20, 1993) (Stephens, J.), *aff'd in part and rev'd in part*, 518 N.W.2d 487 (Mich. Ct. App. 1994), *aff'd in part and rev'd in part*, *People v. Kevorkian*, Nos. 99591, 99674, 99752, 99758, 99759, 1994 WL 700448 (Mich. Dec. 13, 1994) (consolidated cases).

10 *Id.* at *7.

11 *People v. Kevorkian*, No. 93-11482, 1993 WL 603212 at *20 (Mich. Cir. Ct. Dec. 13, 1993) (Kaufman, J.), *rev'd sub nom. Hobbins v. Attorney Gen.*, 518 N.W.2d 487 (Mich. Ct. App. 1994), *aff'd in part and rev'd in part*, *People v. Kevorkian*, Nos. 99591, 99674, 99752, 99758, 99759, 1994 WL 700448 (Mich. Dec. 13, 1994) (consolidated cases).

12 State criminal charges were filed against Kevorkian after he helped seventeen people end their lives. Edward Walsh, *Kevorkian Charged in Assisted Suicide*, WASH. POST, Aug. 18, 1993, § 1, at A1, A16.

13 The American Medical Association has declared its "unqualified opposition to physician-assisted suicide." AMERICAN MED. NEWS, Dec. 20, 1993, at 7; see AMA COUNCIL OF ETHICAL AND JUDICIAL AFFAIRS, Rep. No. I-93-8. The American Bar Association has similarly rejected the invitation to recognize and advocate a "right" to assisted suicide. See *infra* notes 16-17 and accompanying text.

Association in which a young resident physician described how he killed a twenty-year-old cancer patient to alleviate her suffering.¹⁴ The story sparked a storm of protest, with many opposing the journal's decision to publish the story.¹⁵ Some lawyers have likewise advocated a right to assisted suicide. The Bar Association of Beverly Hills recommended that the American Bar Association adopt a resolution in favor of assisted suicide, a recommendation that the ABA rejected¹⁶ after the ABA's Commission on Legal Problems of the Elderly voiced its opposition.¹⁷

To reflect on the social changes that have made it possible even to conceive of such developments¹⁸ when only a generation ago the irrationality of suicide would have gone unquestioned is no mere exercise in nostalgia. It is safe to speculate that fear and misunderstanding are among the complex causes of this change in attitude. One fear is that today's sophisticated medical technology will injure those it was designed to help, prolonging human suffering instead of alleviating it.¹⁹ In addition, many still fail to appre-

14 *It's Over, Debbie*, 259 JAMA 272 (1988) (author's name withheld by request).

15 By the next issue, the journal had received over 150 letters in response to *It's Over, Debbie*, with writers expressing opposition to the resident's act by 4-to-1 and opposition to the journal's decision to publish the piece by 3-to-1. See, e.g., Gaylin et al., *Doctors Must Not Kill*, 259 JAMA 272 (1988) ("[N]ow is the time for the medical profession to rally in defense of its fundamental moral principles, to repudiate any and all acts of direct and intentional killing by physicians and their agents").

16 B.D. Colen, *Take Care: Beware of Rich Lawyers*, NEWSDAY, Feb. 11, 1992, at 65; *ABA Rejects Doctor-Assisted Suicide Proposal: Attorneys Say Laws Could be Abused*, HOUS. POST, Feb. 4, 1992, at A8; Tony Mauro, *Lawyers Say No to Assisted Suicide*, USA TODAY, Feb. 4, 1992 at 3A. One Beverly Hills lawyer had argued that "the poor are in desperate need of this aid." Colen, *supra*, at 65.

17 American Bar Association, Commission on Legal Problems of the Elderly, Memorandum of Jan. 17, 1992, reprinted in 8 ISSUES L. & MED. 117 (Summer 1992) [hereinafter ABA's Commission on Legal Problems of the Elderly].

18 Suicide has even begun to receive sympathetic treatment by writers of television programs and popular literature. NBC News correspondent Betty Rollin wrote a book about how she provided her terminally-ill mother with pills to take her own life, and the book became a made-for-television movie. See BETTY ROLLIN, *LAST WISH* (1985); David Mills, *'Last Wish': Going Gently*, WASH. POST, Jan. 11, 1992, at G1. The movie dismisses "the medical professionals who refuse to help Rollin . . . as heartless and priggish." *Id.* at G1. The television series *Picket Fences* (CBS Television Broadcast) aired an episode sympathetically depicting a nun who helps patients kill themselves while humming "Killing Me Softly." Peter Johnson, *When in Rome, Wis.: Life Turns Offbeat on 'Picket Fences,' Low-Rated Drama Draws Critical Raves*, USA TODAY, Jan. 22, 1993, at 1D (final ed.).

19 One doctor writes:

The public is scared of the health care system, scared of the intensive care unit, [and] scared of inadequately treated pain In a sense, assisted suicide becomes the ejector seat from what they perceive as an unacceptable health care system.

hend the important distinction between actually killing someone (which has never been permitted in our society) and declining to subject an incurable, dying person to aggressive medical treatment (which generally has been permitted).²⁰

This article comments on efforts to persuade the legislative and judicial branches to recognize and protect a right to assisted suicide. These efforts seek not only to transform the law, but also to transform society. For at the root of advocacy for assisted suicide is an invitation to accept as true a host of false assumptions that would radically alter the principles around which Americans have organized their society. Proponents of assisted suicide assume erroneously that the human problems and conditions that trigger a wish to take one's own life are appropriately addressed by abandoning the person to, and even facilitating, that wish. They wrongly assume that the community has no interest in preventing an individual from carrying out suicidal thoughts, and even presuppose an obligation to enable individuals to carry out such wishes. They wrongly assume that suicide is merely the consequence of cool, reasoned reflection, the expression of a free, informed, and rational choice. They wrongly assume that, for some, suicide is the only remaining option. Finally, they inescapably make the erroneous assumption that some people do not merit protection from self-destruction because for them death is preferable to life.

This article attempts to expose some of the errors in these presuppositions and to demonstrate why the efforts of assisted suicide proponents should be resisted. In Part II, we explain why assisted suicide is unsound public policy. In Part III, we demonstrate that the United States Constitution does not create, protect, or enshrine a right either to take one's own life or to have another person's "assistance" in taking one's life.

Don Colburn, *Debate on Assisted Suicide Gains Steam: Court Decisions and Public Polls Suggest Distrust of the Present System of End-of-Life Care*, WASH. POST, May 10, 1994, at 8 (Health Sect.). Fear of abandonment is also a significant factor:

[The medical director of Hospice of Washington] said she occasionally is asked by a distraught or fearful patient to help hasten death. But such patients almost never persist in their request, she said, once they are assured by a hospice nurse or doctor that they won't be abandoned and will be kept comfortable to the end.

Id.

²⁰ *Infra* notes 43-45 and accompanying text.

II. IS ASSISTED SUICIDE SOUND PUBLIC POLICY?

A. *The Arguments from Autonomy and Beneficence*

Many who favor a right to assisted suicide base their argument on personal autonomy. The argument is usually some variant of the claim that "it is my body, and I should be able to do with my body as I choose."²¹ Proponents of assisted suicide assert that "life and death are highly personal matters, and no authority should be permitted to make life and death choices for the individual."

The assertion that assisted suicide should be permitted because of individual autonomy cuts a wide swath. Pressed to its logical conclusion, it would eliminate many laws having a long and well-settled history that in one degree or another restrict individual choices, even those about one's own body. The law, for example, does not allow Russian roulette, a deadly duel with a willing adversary, sale of oneself into slavery, or use of certain drugs—even when these activities are entirely consensual and structured in a way to avoid any possibility of direct harm to another. That these prohibitions in some way limit choices affecting one's own body is not persuasive grounds for abolishing them. Similarly, the ban on assisted suicide should not be cast aside simply because it too limits personal choices.²²

21 One example of this philosophy may be found in Justice Blackmun's dissent in *Bowers v. Hardwick*: "[T]his case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'" *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

22 As the Supreme Court has observed, "[t]he statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing 'bare fist' prize fights, and duels, although these crimes may only directly involve 'consenting adults.'" *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 n.15 (1973). The Court has rejected the view that "one has an unlimited right to do with one's body as one pleases . . ." *Roe v. Wade*, 410 U.S. 113, 154 (1973); see also *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (state may require compulsory vaccination over an individual's objections).

In *Jacobson*, Justice Harlan remarked:

[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy.

Id. at 26. What the Court rejected was precisely "autonomy" in its root sense: each per-

Some would argue that laws like those cited above should be abolished because they are "paternalistic" and prohibit conduct that is "victimless." Like John Stuart Mill, they believe that "the only purpose for which power can be rightfully exercised over any member of civilized community, against his will, is to prevent harm to others."²³ The people of our nation have never so confined the role of government. Consider the act of dueling. Two willing duelers may believe their conduct is reasonable, but that does not alter our judgment as a community that dueling is an unreasonable way of dealing with personal conflict, even if people choose to resolve their differences that way.

The same can be said of selling oneself into slavery. An individual may believe it reasonable and advantageous to sell himself into lifelong servitude, believing perhaps that it is the only way to deliver himself and his family from a life of poverty. But our society recognizes that selling oneself into slavery is no answer to poverty, and it will not permit the parties to enforce such a transaction even if entered into voluntarily. The social and legal rules that prohibit dueling and enslavement even when these acts are entirely consensual are based on an *objective* value, one which is connected intrinsically to how we organize ourselves as a people and that may not be overridden or trumped by individual choice.²⁴ Individuals have a wide range of personal choices in structuring their personal relations, and this too is essential to the common good. But the individual liberty which our society zealously protects does not include the freedom to resolve personal disagreements through violence or to sell oneself into slavery. Such choices do not serve freedom, but undermine the freedom and the good of both the community and the individual.

son "a law unto himself" (from the Greek "auto" and "nomos").

23 JOHN S. MILL, *ON LIBERTY* 13 (C. Shields ed. 1956). In some of his other writings, Mill recognized that this was an overly simplistic view of the role of civil law. See GERTRUDE HIMMELFARB, *ON LOOKING INTO THE ABYSS* 101-02 (1994).

24 The word "choice" has become nearly talismanic in our society. A television ad for a telephone company features an actor who proclaims, "I need more choices." A beverage is touted as "the clear choice." A spokesman for a car company states "It's your choice, America." In the political arena, "choice" is the label used by those opposing government regulation or prohibition of abortion, or by those who favor personal selection of any school, public or private, for their children at government expense. Labels mask the reality that the end or object of a choice, not the mere freedom to choose, frames our judgment whether government should regulate that choice or not. No one, for example, would seriously contend that one had the freedom to choose to commit a homicide or engage in a duel.

The law, of course, has even more to say when the conduct of one person infringes directly on the rights of *another* person. All states, for example, impose criminal penalties for homicide. But other public policies, such as prohibiting Russian roulette, are no less insulated from the interests and rights of others even if, when violated, they infringe less directly on another's rights. Indeed, the conduct proscribed by so-called "victimless" crimes is, upon further reflection, not at all victimless. Many state laws, for example, require that one wear a seat belt when driving a car or a helmet when operating a motorcycle.²⁵ The injuries resulting from accidents in which a seat belt or motorcycle helmet is not worn are not limited to the immediate victim. The accident victim's injuries impose a burden on the entire community. Medical resources used to treat accidental injuries sustained by someone not wearing a seat belt or motorcycle helmet reduce the pool of resources available for treating others in need of medical care.²⁶ Likewise, it is erroneous to believe that the death of a person by dueling has no impact on anyone other than the duelers, or that the availability of a violent and state-sanctioned means of resolving personal conflicts would not lead to a general deterioration in how people within our society organize their relationships.

Laws which may first appear to limit personal choices actually serve a *positive* function for both the community *and* the individual. A society in which dueling was just another option for resolving personal differences would witness a gradual erosion in how its citizens regarded their own lives and the lives of others. Children in such a society would come to perceive dueling as just one more choice among an arsenal of personal choices. In short, the consciences of the younger generation would be sharply distorted by a public morality which looked upon a senseless and violent act

25 For a list of states with mandatory seatbelt and motorcycle helmet laws, see BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 623 (1993).

26 The National Highway Traffic Safety Administration ("NHTSA") of the U.S. Department of Transportation estimates that:

[I]n 1992, safety belt use prevented 5,226 fatalities and 136,100 moderate-to-critical injuries. The economic savings from these safety benefits totalled \$11 billion. This includes reductions in medical costs, lost productivity, insurance administration, legal costs, emergency services, vocational rehabilitation, workplace costs and other economic impacts.

Letter from NHTSA economist Lawrence J. Bincoe (June 24, 1994) (on file with authors). Certainly there are other harmful consequences to the family and community of a suicide victim apart from the economic impact.

merely as the combatants' personal and private choice. They would come to view life as expendable. The expectation of civility and trust in our personal relationships would be lost.²⁷

To take an example relevant to our subject, patients know they can confide in and trust their doctors because their doctors are healers and not killers. If physicians were permitted to kill, the trust patients currently place in them would dissipate. How could one be assured, for instance, that one's doctor held no professional bias in favor of killing rather than exploring treatment alternatives, or even had sufficient familiarity with those alternatives? Patients in such a world would have to be quite careful of what they say to their treating physician lest their unscreened medical complaints come to be perceived as pleas for ending life.

The autonomy argument cuts a wide path in another sense as well: It is not, and logically cannot be, limited to any particular class of persons. If individual autonomy is grounds for intentionally taking one's life, then only the individual's values are relevant to that decision. Those arguing in favor of assisted suicide on the basis of autonomy, if they are to be consistent, cannot be satisfied with a law restricting the availability of assisted suicide to the terminally ill; if personal choice and autonomy are the only criteria, then the patient's medical condition and motive for suicide are irrelevant.²⁸ A twenty-one-year-old distressed over a failed romance would have as much right to commit suicide under the autonomy argument as the seventy-year-old with incurable cancer. This, however, is *not* the way we respond as a rule to people who contemplate or attempt suicide. "It is commonplace for the police and other citizens, often at great risk to themselves, to use force or stratagem to defeat efforts at suicide, and it could hardly be said that thus to save someone from himself violated a right."²⁹ When faced with a suicidal relative or friend, one's thoughts do not turn naturally to how one can be of assistance in committing the suicide. It follows that a right to assisted suicide, if such a right were to exist, could not rest merely on autonomy, but would have to be

27 The proliferation of firearms and the depiction of violence in film and on the airwaves provide instructive examples of how the public's recognition of the sanctity of life can be dulled by policies and practices that do not protect it.

28 "[I]f one sustains an autonomy-based right to suicide, then one's motives for exercising this right are not within the scope of proper inquiry, any more than one's motives for attending a particular church would be." Gerald D. Coleman, *Assisted Suicide: An Ethical Perspective*, 3 ISSUES L. & MED. 267, 269 (Winter 1987).

29 John F. Kennedy Memorial Hosp. v. Heston, 279 A.2d 670, 672 (N.J. 1971).

based on some objective value or norm.

The need to ground any asserted right to assisted suicide in an objective norm is apparent when one contrasts it with other equally personal but socially prohibited conduct. Dueling, selling oneself into slavery, and taking hallucinogenic drugs are no less personal and concern the body no less directly than committing suicide. Proponents of a right to assisted suicide, in order not to concede the permissibility of these equally personal acts, must argue that suicide is different because it is in some objective sense reasonable to leave that decision, but not others, to personal choice. This, however, is a very different kind of claim because it does not rest on the assertion that an individual can do with his body as he or she chooses (the autonomist argument), but rather on the claim that there is a range of decisions affecting one's body which are *reasonably* left to individual choice. Significantly, the claim that certain decisions are reasonably left to individual choice is an appeal to an objective or public value, not mere personal wishes. It suggests that a line must be drawn between legitimate and illegitimate choices. Even to frame the process as distinguishing choices based on "legitimacy" concedes much to one's opponents.

An example may help to illustrate this. Our society leaves to the individual the choice of a career. We may think it entirely unreasonable for someone (with or without the aptitude) to pursue a career as a lawyer. However, in the choice of a career, we let people make their own mistakes. It is possible for the individual to correct his career choice later if it turns out to have been the wrong choice. The consequences of letting society rather than the individual decide the choice of a career would be disastrous for both the individual and society.³⁰ Dueling is different. First,

30 Complete state domination of such decisions would radically subject the goals and aspirations of individuals to the ends of the state, the very definition of a totalitarian regime. See SHANNON M. JORDAN, *DECISION MAKING FOR INCOMPETENT PERSONS: THE LAW AND MORALITY OF WHO SHALL DECIDE* 128-30 (Charles C. Thomas ed., 1985). The opposite extreme, an unrestrained and excessive individualism, is inconsistent with a correct understanding of the human person and equally destructive of individual dignity. Jordan writes:

A theory of individualism which seeks to affirm the self as an isolated and atomistic unit of society ultimately fails because such a self is empty [T]he circumstances of birth, nurture, and life within a community of shared values are constitutive of the person, for without these the person is a shell consisting only of rights and duties, but not of moral commitment.

Id. at 128.

although it is sometimes reasonable for someone to enter the practice of law, it is never reasonable to settle personal disputes by dueling. Second, the deadly result of a duel cannot be undone or corrected later by the participants. Third, the consequences of prohibiting dueling are not disastrous to the individual or society, but beneficial to both.

Suicide is more analogous to dueling than it is to the choice of a career: (1) it is not a reasonable answer to a human problem or need, (2) it cannot be corrected by a later decision, and (3) the consequences of not helping someone commit suicide are not disastrous but beneficial to the individual and society. No one, of course, can dispute that an act of suicide is incapable of correction by a later decision.³¹ But why is it that suicide is never reasonable or beneficial?

Among the many possible reasons that one might articulate, it can be said that suicide is never reasonable because the rational response to any human need or problem precipitating a wish to kill oneself is to address the need or problem, not to destroy the subject. Suicide can never be beneficial because it takes away the one good—life itself—that makes all other goods possible. The act of suicide is as ill-suited to human needs and problems as the act of razing one's home would be if it were the proffered solution to saving the home from a fire. Furthermore, if (as most will agree) human self-preservation is good, and if virtue is understood as that which disposes us to what is good, then self-destruction can never be an act of virtue even if it is rooted in a desire to escape hardship. We have on this point the counsel of one of the greatest thinkers of antiquity:

To kill oneself to escape from poverty or love or anything else that is distressing is not courageous but rather the act of a coward, because it shows weakness of character to run away from hardships, and the suicide endures death not because it is a fine thing to do but in order to escape from suffering.³²

These are surely not the only means of demonstrating that

31 See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 283 (1990) (an erroneous and effectuated decision to cease providing life-sustaining medical treatment "is not susceptible of correction" but is "final and irrevocable"); *Lee v. Oregon*, No. 94-6467, 1994 WL 728858, at *10 (D. Or. Dec. 27, 1994), *appeal docketed*, No. 95-35031 (9th Cir. Jan. 11, 1995) ("Death is overwhelmingly final and not subject to reversal, mitigation or correction").

32 ARISTOTLE, *NICHOMACHEAN ETHICS* 130 (J. Thompson trans. 1977).

suicide is an irrational act. For example, one could cite numerous studies showing that well over ninety percent of suicides—even among those who are seriously ill—are committed in a state of mental illness.³³ But the burden of proof concerning a value as fundamental as human life itself should be borne by those who are trying to demonstrate the rationality of self-destruction. They bear the burden of proving why generations of men and women have been mistaken in believing that suicide is morally and civilly wrong.

At this point, those favoring a “right” to commit suicide will typically argue that this decision is best left to some *class* of individuals because suicide is objectively reasonable or beneficial *in some cases*. When forced to defend the right to commit suicide on the basis of an objective norm, proponents of assisted suicide typically assert that the suicidal act is reasonable for a class of patients such as the terminally ill. Helping such a patient kill himself, they argue, benefits him because it ends his suffering.

However, even if proponents of assisted suicide are motivated by compassion and empathy for human pain and suffering, as many may be, allowing terminally ill people to commit suicide would not reasonably address their pain and suffering any more than killing the unemployed would answer the problem of unemployment. The terminally ill would no more derive a benefit from self-destruction than would those who suffer from the recent loss of a close family member or those who struggle with alcoholism. All of these groups—the unemployed, the bereaved, the addicted—need the care and compassion of our communities, and all of them happen to have high suicide rates.³⁴ That the taking of human life is not an answer to terminal illness is as true of the terminally ill as it is of the unemployed, recently widowed, and addicted. Observes Dutch physician Karel Gunning, “[i]n a civilized

33 See *infra* notes 53-54 and accompanying text.

34 Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 4 (1985). The New York State Task Force on Life and the Law writes:

No matter how carefully any guidelines are framed, assisted suicide and euthanasia will be practiced through the prism of social inequality and bias that characterizes the delivery of services in all segments of our society, including health care. The practices will pose the greatest risks to those who are poor, elderly, members of a minority group, or without access to good medical care.

THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT xii (1994) [hereinafter WHEN DEATH IS SOUGHT].

country, you kill the pain, not the patient."³⁵

Singling out the terminally ill as a class of people who "deserve" to have their suicidal impulses respected, moreover, is logically incoherent unless one presupposes that, in some objective sense, their life is not worth living. But, as a civilized society, we make no such claim with respect to *any* human being. A rule permitting a person "to assist the suicide of another because the person killed has a certain condition or status, [such as a terminal illness,] would create a glaring anomaly in the law."³⁶ It would mean that persons with terminal illnesses are *not* entitled to protection from their suicidal impulses, *even though other people are*. Asserting that the terminally ill should not be protected from their suicidal impulses leads inescapably to the position that, objectively, their lives are not worth protecting, that they are (as the fictional George Bailey believed of himself) better off dead than alive. With that kind of assertion, one surrenders any claim to being a defender of individual liberty, and instead becomes the arbiter of whose life is worthy of being lived and whose is not.

It would still be true that the needs of terminally ill persons are not solved by their death even if we had no means of relieving their pain and suffering. In fact, today there *are* other means of relieving pain, which should completely foreclose any public policy argument that the terminally ill should be helped to kill themselves to end their pain. In the vast majority of cases, it is possible to bring pain associated with terminal illness within manageable limits.³⁷ Requests for assistance in committing suicide of-

³⁵ *The Issue is the Issue, Not the Man: Dying with Dignity Must be Separated From the Kevorkian Controversy*, L.A. TIMES, Dec. 20, 1993, at B6.

³⁶ James Bopp, Jr., *Is Assisted Suicide Constitutionally Protected?*, 3 ISSUES L. & MED. 113, 116 (1987).

³⁷ See Leon R. Kass, M.D., *Neither for Love nor Money: Why Doctors Must Not Kill*, THE PUB. INTEREST, Winter 1989, at 25, 32-33 (stating that "[a]dequate analgesia is apparently possible in the vast majority of cases, provided that the physician and patient are willing to use strong enough medicines in adequate dosages and with proper timing."); D. Alan Shewmon, M.D., *Active Voluntary Euthanasia: A Needless Pandora's Box*, 3 ISSUES L. & MED. 219, 220 (1987), *citing* PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 275-97 (1983) ("[E]xcessive pain, discomfort and anxiety are nearly always examples of inadequate treatment, not inadequate ethics."); see also Don Colburn, *Assisted Suicide: Doctors, Ethicists Examine the Issues of Pain Control, Comfort Care and Ending Life*, WASH. POST, Sept. 14, 1993, at Z7 (reporting that "95 percent of all pain is controllable with medication").

Nor is pain the motivation in most cases of physician-assisted suicide. A 1990 study showed that in the Netherlands, the only Western nation currently to permit euthanasia,

ten dissipate when pain is adequately managed.³⁸ The ethics chairman of the Academy of Hospice Physicians emphatically writes:

As a doctor who has been involved in hospice care for more than 14 years, I can state without equivocation that the physical sources of suffering associated with dying all can be controlled. Most often, such symptoms as pain, shortness of breath and nausea, yield to routine evaluation and straightforward interventions. Even the pain of end-stage cancer commonly can be managed with oral medications. In a small percentage of cases, pain or other bothersome symptoms do require advanced interventions. Rarely, sedation is required to effectively alleviate pain, breathlessness or terminal agitation.

Symptom management is not always easy. Effective therapy may require the efforts of a physician with special interest in palliative medicine and a team of hospice-trained nurses, consultant pharmacists and others. Yet I want to state again clearly that in *all* cases the physical distress of the dying can be controlled.³⁹

One should also contemplate the likely practical consequences of a social practice of helping terminally ill persons kill themselves. Public and private attention would be diverted from the application of protocols to bring pain within tolerable limits to finding ways of simply stopping the pain by killing the patient. Were assisted suicide to become an accepted practice, some portion of private and public health care funds and resources which could have been used to identify and apply medical plans for alleviating pain and suffering will be used instead to end the patient's life.⁴⁰ This has especially serious implications in an age

pain alone was the reason for requesting euthanasia in only *ten* of 187 cases. Tamara Jones, *Setting a Date for Death: By Legally Sanctioning Mercy Killing, the Netherlands Has Become an International Model for the Practice*, L.A. TIMES, Mar. 14, 1993, at A1.

38 Kathleen M. Foley, *The Relationship of Pain and Symptom Management to Patient Requests for Physician-Assisted Suicide*, 6 J. PAIN & SYMPTOM MGMT. 289, 290, 296 (July 1991). Foley concludes: "Any debate that focuses on options for termination of life for patients with far-advanced disease should first focus on assessing the availability of continuing care for such patients." *Id.* at 296.

39 Ira R. Byock, *Kevorkian: Right Problem, Wrong Solution*, WASH. POST, Jan. 17, 1994, at A23.

40 If this concern seems speculative, one need only observe that the legalization of assisted suicide in Oregon was followed almost immediately by an announcement that the State will now reimburse the cost of suicide pills for its Medicaid patients. The lethal doses will rank very high on the priority list which guides Oregon's Medicaid rationing plan because they will be reimbursed under the code for "comfort care." Diane M. Gianelli, *Oregon Doctors Fear Fallout From Assisted Suicide*, AMERICAN MED. NEWS, Jan. 23-30,

of health care rationing.⁴¹ Our present incentive to provide social support and compassionate care for the dying will erode if we can simply rid ourselves of the dying:

Once one removes the presumption that doctors should preserve life until its natural end, . . . one reduces the social incentives to treat the terminally ill with respect. When suicide becomes an acceptable medical option, the question asked at every stage of treatment will not be "How can we make the patient's remaining life more livable?" but "Wouldn't it be better for the patient to die now?"⁴²

This does not mean that people in the final stages of a terminal illness must be subjected to aggressive medical intervention. Neither the law nor good medicine requires that every available medical procedure be used to keep dying patients alive. In recognizing a right to refuse treatment, our courts have maintained a distinction between refusing treatment on the one hand, and direct killing on the other. Courts have been nearly unanimous in holding that states have a legitimate interest in preventing the latter.⁴³ Decisions to refuse treatment are "legally and ethically

1995, at 1, 27 (Oregon's acting health officer says he "expect[s] the procedure to be covered under the state's controversial Medicaid plan"); Associated Press Wire Story (untitled), Nov. 11, 1994 (the chairman of the Oregon Health Services Commission says he believes prescribing lethal drugs "is covered under the state's health care plan's provision for 'comfort care' for the terminally ill"); Jennifer Dixon, *The Treatment Stops Here, Doctors Told: The Priorities of Health Care Rationing Have Been Brought Out Into the Open in Oregon*, LONDON TIMES, Apr. 27, 1993, at 17 (showing that comfort care under the Oregon plan is ranked 151 out of 688 medical treatments).

41 Dr. Byock writes:

What happens if assisted suicide and euthanasia become legal in today's environment? I submit that in the absence of adequately funded palliative care programs and residential hospice settings, it will become our responsibility to recommend assisted suicide to those who lack basic financial or family resources. What a horrific way for society to respond to the needs of the destitute and dying.

Byock, *supra* note 39, at A23.

42 John West, *Initiative 119 Won't Let You Take Back A Suicide Wish*, THE NEWS, Oct. 23, 1991, at A2, quoted by Evan J. Kemp, Jr., Chairman, Equal Employment Opportunity Commission, *Paternalism, Disability, and the Right to Die*, Remarks before the National Right to Life Convention (June 12, 1992), reprinted in 9 ISSUES L. & MED. 73, 75 (1993).

Certainly, the human consequences of assisted suicide are primary, but there are some adverse economic consequences as well. Under the Oregon Act, an insurance company could not refuse to pay life insurance benefits in cases of suicide. If life insurers were unable in Oregon to exclude payment of benefits in cases of suicide, "prices for much-needed life insurance will increase and could become unaffordable for many Oregonians." Letter from John Mangan of the Standard Insurance Company to Phil Keisling, Oregon Secretary of State (Jan. 10, 1994) (on file with the Secretary).

43 See, e.g., *Donaldson v. Lungren*, 4 Cal. Rptr. 2d 59 (Cal. Ct. App. 1992) ("Here

distinct from . . . decisions to inject a lethal agent with the intentional purpose of terminating life."⁴⁴ Assisted suicide "involves not *letting* the patient die, but *making* the patient die . . ."⁴⁵ A law permitting assisted suicide would eliminate this widely recognized distinction.

there are no life-prolonging measures to be discontinued. Instead, a third person will simply kill [the plaintiff] . . ."); *Bouvia v. Superior Court*, 225 Cal. Rptr. 297, 306 (Cal. Ct. App. 1986) (a "decision to allow nature to take its course is not equivalent to an election to commit suicide with . . . parties aiding and abetting therein"); *Bartling v. Superior Court*, 209 Cal. Rptr. 220, 225-26 (Cal. Ct. App. 1984) (suicide is distinguishable from death from natural causes which results from disconnecting the respirator of a comatose, terminally ill patient); *Barber v. Superior Court*, 195 Cal. Rptr. 484, 487 (Cal. Ct. App. 1983) ("Euthanasia, of course, is neither justifiable nor excusable in California."); *Brophy v. New England Sinai Hosp.*, 497 N.E.2d 626, 635 n.29 (Mass. 1986) ("[T]he law does not permit suicide," which is distinguishable from the decision to remove life-sustaining treatment from a patient who is in a persistent vegetative state and unlikely to regain cognitive functioning); *Superintendent of Belchertown v. Saikewicz*, 370 N.E.2d 417, 426 n.11 (Mass. 1977) (distinguishing a "competent, rational decision to refuse treatment when death is inevitable" from an act of intentional self-destruction); *In re Conroy*, 486 A.2d 1209, 1224 (N.J. 1985) (deciding life-sustaining medical treatment is distinguishable from suicide because it "merely allows the disease to take its natural course; if death were eventually to occur, it would be the result, primarily, of the underlying disease, and not the result of a self-inflicted injury."); *In re Quinlan*, 355 A.2d 647, 665 (N.J. 1976) ("We would see . . . a real distinction between the self-infliction of deadly harm and a self-determination against artificial life support . . . in the face of irreversible, painful and certain imminent death."); *In re Storar*, 420 N.E.2d 64, 71 n.6 (N.Y. 1981) (distinguishing a natural death from self-inflicted killing). *But see Bouvia*, 225 Cal. Rptr. at 307-08 (Compton, J., concurring) (endorsing a right to assistance in committing suicide for a quadriplegic, bedridden patient).

44 ABA's Commission on Legal Problems of the Elderly, *supra* note 17, at 118.

45 STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 236 (1993). This is not to say that an omission could *never* be tantamount to suicide:

It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing. Even as a legislative matter, in other words, the intelligent line does not fall between action and inaction but between those forms of inaction that consist of abstaining from "ordinary" care and those that consist of abstaining from "excessive" or "heroic" measures.

Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 296 (1990) (Scalia, J., concurring).

Any difficulty in distinguishing between omissions in care which are permissible and those which are impermissible because they are equivalent to suicide should not deter us from placing suicide to one side of the line. In common parlance, two wrongs do not make a right. The issue of how one determines whether an omission is tantamount to suicide lies beyond the scope of the present article, which is concerned primarily with the illegitimacy of assisting someone to take his own life through some active means such as a lethal injection.

B. *The Issue of Voluntariness*

Suicide, like selling oneself into slavery, is a renunciation of freedom because it circumscribes (and, in the case of suicide, completely eliminates) one's prospective freedom to act. A decision "not to be free" or "not to be" does not place one on the doorstep of liberty, but rather pushes one out the door and over the precipice. Indeed, even assuming *arguendo* that one could conceive of a situation in which the only option were suicide, that choice strictly speaking would no longer be free. If an individual were so severely distressed and depressed that he saw suicide literally as his *only* remaining option, this would appear to be *prima facie* proof that he was unable to adequately evaluate all his options.⁴⁶ Furthermore, health professionals tell us that, in the real world, talk of suicide is often not a genuine expression of the individual's wishes at all, but a cry for help.⁴⁷

However, setting these objections aside and assuming again *arguendo* that an act of suicide could in principle be viewed as an exercise of freedom rather than a renunciation of life and liberty, it would be virtually impossible in practice to assure that a suicide was wholly free or voluntary. The inability to verify the person's consent leads perhaps to the most pernicious aspect of laws suggested by proponents of a right to assisted suicide: They do not (and for various reasons cannot) ensure that a request for suicide is intelligently and voluntarily made. Indeed, the measures proposed by advocates of assisted suicide, including the recently enacted Oregon Act, do a great deal to *prevent* an assessment of whether a request to be killed is knowing and voluntary.

For example, under the Oregon Act no psychiatric evaluation is required unless the patient's attending physician believes that the patient has "a psychiatric or psychological disorder, or depres-

46 Edward D. Pellegrino, M.D., *Doctors Must Not Kill*, in 3 J. CLINICAL ETHICS 95 (Summer 1992). Dr. Pellegrino writes:

When a patient opts for euthanasia, he uses his freedom to give up his freedom. In the name of autonomy, the patient chooses to eradicate life and consciousness, the indispensable conditions for the operation of autonomy. He loses control over a whole set of options, all of which cannot be foreseen and many of which would be of importance if life—the basis of freedom—had not been forgone. Moreover, if suffering is so intense that it limits all other options, and euthanasia is the only choice, then that choice is really not free.

Id. at 96.

47 See *infra* notes 53-54 and accompanying text.

sion causing impaired judgment."⁴⁸ General practitioners, however, are seldom adept at recognizing depression. A significant number of suicides occur shortly *after* the decedent has been seen by his general physician.⁴⁹ Indeed, there is nothing in the Oregon measure to prevent suicide "assistance" from becoming the practice of a select group of doctors predisposed toward facilitating suicide, particularly when many other physicians will object to assisting a suicide under any circumstances. Any patient can shop around until he or she finds an obliging physician.⁵⁰ And that same physician will determine whether a psychological evaluation is done.

The Oregon Act does not even require that family members, those most likely to be acquainted with and concerned about the patient, be consulted or notified of a patient's suicidal wish.⁵¹ What a frightening prospect for the relatives of a terminally ill person to know that he received "help" in killing himself while they, with the law's complicity, were kept at bay. Among the many serious questions a federal judge found sufficient to warrant enjoining enforcement of the Oregon law was the question of whether family notification may be significant "(a) in diagnosing the severity of a patient's depression, (b) in providing emotional support that may be lacking and lead the patient to decide to live, [and] (c) in assisting a trained professional to determine whether the patient is being unduly influenced."⁵²

The problem of voluntariness, from a psychiatric standpoint, is inherent in the very request to have oneself killed. One cannot ask whether a decision to commit suicide is knowing and voluntary

48 Oregon Act, *supra* note 5, at § 3.03.

49 David C. Clarke, "Rational" Suicide and People with Terminal Conditions or Disabilities, 8 ISSUES L. & MED. 147, 151 (1992) (reporting that "50% of suicide victims have seen a physician within a month of their death, and 80% within six months. Few of these physician contacts were actual health professionals").

50 Even when the patient is referred for counseling, psychotherapy, which under other circumstances could lead to treatment of the pathology underlying the suicidal wish, is severely compromised from the start because the patient then enters therapy with the sole intention of securing certification that he is "fit" to commit suicide, thereby eliminating any incentive to address the underlying problem. See, e.g., Herbert Hendin, *Seduced by Death: Doctors, Patients, and the Dutch Cure*, 10 ISSUES L. & MED. 123, 150-51 (1994).

51 The attending physician need only "ask" the patient to notify next of kin; the patient who declines "shall not have his or her request [for assistance in committing suicide] denied for that reason." Oregon Act, *supra* note 5, at § 3.05.

52 *Lee v. Oregon*, No. 94-6467, 1994 WL 728858, at *12 n.2 (D. Or. Dec. 27, 1994), appeal docketed, No. 95-35031 (9th Cir. Jan. 11, 1995).

without treading upon terrain in which the patient's freedom is already greatly circumscribed. Studies show that ninety-five percent of those who commit suicide have "a major psychiatric illness at the time of death."⁵³ One physician, reporting significant psychiatric morbidity among a majority of patients requesting assistance in committing suicide, concludes that "[r]ational suicide is an oxymoronic statement."⁵⁴ Anyone contemplating putting an end to his or her own life is clearly and obviously vulnerable.

Another indication of the difficulty in assessing the intelligibility and voluntariness of a wish to be killed is that, as illustrated in *Bouvia v. Superior Court*,⁵⁵ the wish can be transient. Terminally ill patients expressing suicidal thoughts "usually abandon the wish to commit suicide" after their depression has been treated,⁵⁶ or after receiving appropriate treatment for pain:

[C]ancer patients admitted to hospices sometimes gain a new lease on life once their pain has been appropriately treated, and discharge themselves in order to seek more aggressive medical therapy. When a patient is depressed about a chronic or terminal illness, it is really quite impossible to determine whether he or she is mentally competent to make such a monumental, irreversible, once-in-a-lifetime decision as suicide. This is why the law has traditionally erred on the side of regarding attempted suicide as an intrinsically irrational decision⁵⁷

Curiously, in other areas of law, we do not allow persons to relinquish their interests without carefully scrutinizing their wishes. It is ironic, for example, that defendants in criminal proceedings receive more protection in ensuring knowing and voluntary choices under the law than patients would receive under measures permitting assisted suicide. A defendant may not relinquish his

53 WHEN DEATH IS SOUGHT, *supra* note 34, at 126.

54 Foley, *supra* note 38, at 295.

55 Bouvia was a twenty-eight-year-old woman with cerebral palsy who sought removal of her feeding tube. See *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127 (Cal. Ct. App. 1986). She changed her mind about starving to death after she won her lawsuit. Shewmon, *supra* note 37, at 230. We offer the Bouvia case only by way of example. Removal of a feeding tube presents a number of issues requiring separate treatment which lie outside the scope of this article. For a nuanced discussion of some of the moral issues entailed in a decision whether to continue or withhold artificially administered nutrition or hydration, see generally U.S. BISHOPS' COMMITTEE FOR PRO-LIFE ACTIVITIES, NUTRITION AND HYDRATION: MORAL AND PASTORAL REFLECTIONS, *reprinted in* 21 ORIGINS 705 (1991).

56 WHEN DEATH IS SOUGHT, *supra* note 34, at x.

57 Shewmon, *supra* note 37, at 231.

liberty by pleading guilty to a criminal charge unless a court has satisfied itself, after a hearing, that the plea is entered knowingly, intelligently and voluntarily.⁵⁸ The defendant whose guilty plea is accepted can later challenge his conviction on appeal if he can prove that the hearing was conducted improperly, or that his plea was not truly voluntary, or that he was inadequately informed of the consequences of entering a guilty plea.⁵⁹ Under current proposals to legalize assisted suicide, there are no comparable safeguards or opportunities to argue later that the patient was ill-informed, depressed, or even incompetent.

Many assisted suicide laws, like one recently proposed by euthanasia proponent Derek Humphry,⁶⁰ would require no significant period of reflection or counseling, even though such requirements are often imposed in other areas of the law for major life decisions. Medicaid regulations, for example, require a thirty-day waiting period before a patient may be sterilized.⁶¹ Consumer protection laws often give purchasers a period of days or even years to cancel a transaction.⁶² Even if one endorsed a "right" to end one's life, it would be anomalous to subject the exercise of that right, which is irreversible and eliminates all other choices, to less advance reflection than that required for decisions affecting lesser interests.

Euthanasia advocates will respond that too much due process interferes with the right to a quick, painless death. But therein lies the contradiction. They pursue "a goal which is *inherently inconsistent*: a procedure for death which *both* (1) provides ample safeguards against abuse and mistake; and (2) is 'quick' and 'easy' in operation."⁶³ The impossibility of providing ample safeguards

58 *Godinez v. Moran*, 113 S. Ct. 2680, 2687 (1993); *Parke v. Raley*, 113 S. Ct. 517, 523 (1992). A judge accepting a guilty plea must personally inquire of the defendant whether he or she understands the charge and the consequences of a guilty plea, and whether the admitted conduct constitutes the offense with which the defendant is charged. *McCarthy v. United States*, 394 U.S. 459, 464-67 (1969).

59 *McCarthy*, 394 U.S. at 466; *Machibroda v. United States*, 368 U.S. 487, 493 (1962).

60 See DEREK HUMPHRY, *LAWFUL EXIT: THE LIMITS OF FREEDOM FOR HELP IN DYING* 133-52 (1993).

61 42 C.F.R. §§ 441.253, 441.257, 441.258 (1993).

62 15 U.S.C. § 1635 (1982 & Supp. 1994) (giving consumers three business days to rescind any consumer credit transaction in which the lender retains or acquires a security interest in the consumer's principal dwelling, or three years if the lender does not make the requisite disclosures); 12 C.F.R. § 226.15 (1994) (same); 17 AM. JUR. 2D *Consumer Protection* § 277 (1990) (state laws giving consumers a right of rescission).

63 Yale Kamisar, *Some Non-religious Views Against Proposed 'Mercy-Killing' Legislation*, 42 MINN. L. REV. 969, 981-82 (1958).

against abuse and mistake counsels *against* any effort to codify a "right" to have oneself killed quickly and easily.

Although "coercing" someone to kill himself would be unlawful under both the Oregon and Humphry measures,⁶⁴ a person contemplating suicide will likely be susceptible to the most subtle influences and the perceived reactions of others. For example, the prospect of relieving family members of the emotional and financial burden of continued care may be just the added inducement one needs to take his life, particularly if the law were to make such a killing an acceptable option. In such cases, it might not be the *patient's* suffering that finally disposes of the issue, but the expectation that his loved ones (perhaps by their own behavior or implied suggestions) will be relieved emotionally and financially. This danger is aggravated by the fact that not everyone currently has equal access to health care: "[T]hose without adequate care options . . . may be subtly or not so subtly encouraged to 'opt out' of life via aid in dying precisely because they lack decent care alternatives or because they may become serious financial burdens on their families."⁶⁵

Professor Kamisar, in words that are as applicable today as when he wrote them decades ago, asks:

Is this the kind of choice, assuming that it can be made in a fixed and rational manner, that we want to offer a gravely ill person? Will we not sweep up, in the process, some who are not really tired of life, but think others are tired of them; some who do not really want to die, but who feel they should not live on, because to do so when there looms the legal alternative of euthanasia is to do a selfish or a cowardly act? Will not some feel an obligation to have themselves "eliminated" in order that funds allocated for their terminal care might be better used by their families or, financial worries aside, in order to relieve their families of the emotional strain involved?⁶⁶

64 Oregon Act, *supra* note 5, § 4.02; HUMPHRY, *supra* note 60, at 144.

65 ABA's Commission on Legal Problems of the Elderly, *supra* note 17, at 121.

66 Kamisar, *supra* note 63, at 990. Along the same lines, Peter McGough, a Seattle physician and chair of the Washington State Medical Association's legislative committee, stated that if the Washington euthanasia initiative proposed there had passed, "many poor and elderly patients would have turned the 'right to die' into a 'duty to die' to avoid being a burden to their families [T]here would have been court challenges to extend the right of assisted suicide to the mentally incompetent as well as the competent" Dennis L. Breo, *MD-Aided Suicide Voted Down; Both Sides Say Debate to Continue*, 266 JAMA 2895 (1991) (quoting Dr. McGough).

There has been publicity in recent years over suicides attributable to mimicking characters in films or to the influence of particular lyrics to songs. Impressionability has often been cited as a factor contributing to suicides. For example,

[i]n 1933 a twenty-four year old student, Mieko Ueki, committed suicide by leaping into the crater of a volcano named Mount Mihara on the island of Oshima, Japan. Another student who learned of her suicide followed her example. The suicide caught the attention of the Japanese press. Others began to jump into the volcano. Soon, five to six persons were committing suicide there daily "By the end of 1933, Mihara had claimed a total of 143 known suicides. By the end of 1934, the police had forcibly prevented a staggering total of 1,200 persons from ending their lives in Mihara's pit But despite the best efforts of police, at least 167 persons leaped in Mihara during 1934. In addition, 29 of those who had been saved at the crater's edge fulfilled their intention by leaping from the boat taking them back to Tokyo In 1936, 619 persons leaped to their deaths inside Mihara, bringing it the dubious renown of luring more suicides than any other spot on earth."

Much of the attractiveness of committing suicide at Mihara evidently came from the attention and sanction of society. Although there was official disapproval and there were attempts to prevent suicides both by the public authorities and volunteer private agencies, in the end, the public attention amounted to a glorification of self-destruction in the volcano.⁶⁷

The phenomenon of suicide clusters is not confined to Japan. In the month after Marilyn Monroe's death by an apparent suicide, suicides in the United States increased by twelve percent.⁶⁸ More recently, in 1984 six teenage suicides occurred in a suburban Dallas high school within a six-month period; the same year, a cluster of sixteen teenage suicides occurred in another Dallas suburb within a two-month period.⁶⁹ The publication of Derek

67 Marzen et al., *supra* note 34, at 141-42, quoting E. ELLIS & G. ALLEN, *THE TRAITOR WITHIN: OUR SUICIDE PROBLEM* 89, 95-96, 98 (1961).

68 Marzen et al., *supra* note 34, at 140, citing David P. Phillips, *The Influence of Suggestion on Suicide: Substantive and Theoretical Implications of the Werther Effect*, 39 AM. SOC. REV. 340, 350-51 (1974). The Werther of the title is the suicidal hero of Goethe's eighteenth century romantic novel *The Sorrows of Werther*, which likewise "stimulated a rash of suicides." Marzen et al., *supra* note 34, at 141. "Copies of the novel were found on many corpses." *Id.*

69 *Id.* at 139, citing *Teenagers in Crisis: Hearing Before the Select Committee on Children, Youth and Families, House of Representatives*, 98th Cong., 1st Sess. 56 (1983) (discussing the

Humphry's "how to" manual for suicide⁷⁰ has been linked to many suicides using the methods he describes—most often among people who are not terminally ill.⁷¹ Is it any less likely, if suicide comes to be ensconced in law as an acceptable option for dealing with human suffering, that many will begin to contemplate it who might otherwise have never considered it? We should be very careful what practices we sanction legally because the law is a teacher.⁷² The tendency to accept on a moral level practices that are sanctioned by the law counsels against enshrining in law a practice that encourages people to confront (or rather, flee from) their problems by taking their own lives.

Legal and social rules, because they teach, do more than merely assure a minimally tolerable world; they allow a society *to see* a particular good. Social rules, in other words, provide an insight into the nature of the world and our own humanity that one might never learn without these rules.⁷³ One example of the "seeing" value of a social rule is a fictional short story entitled "The Lottery."⁷⁴ In that story, all the members of a community voluntarily take part in a lottery. The "winner" is stoned to death. It is entirely consensual; even the prospective winner agrees in advance to be bound by the terms of the lottery. To have grown up in such a society would mean growing accustomed to a deadly and barbaric ritual. It would mean accepting as normative a practice that cuts against time-honored notions about the value and dignity of human life. Children brought into such a society would be inculcated to see human life as cheap and dispensable, instead of valuable and worthy of preservation. Recognition of the value and dignity of human life would be lost in a world whose citizens

Dallas Suicide and Crisis Center).

70 DEREK HUMPHRY, *FINAL EXIT: THE PRACTICALITIES OF SELF-DELIVERANCE AND ASSISTED SUICIDE FOR THE DYING* (1991).

71 Peter M. Marzuk et al., *Increase in Suicide by Asphyxiation in New York City After the Publication of Final Exit*, 329 *NEW ENG. J. MED.* 1508 (1993).

72 THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. 1, Q. 92, art. 1 (the proper effect of a law is to make those for whom it is promulgated good).

73 The New York State Task Force on Life and the Law writes:

If assisted suicide and euthanasia are legalized, it will blunt our perception of what it means for one individual to assist another to commit suicide or to take another person's life. Over time, as the practices are incorporated into the standard arsenal of medical treatments, the sense of gravity about the practice would dissipate.

WHEN DEATH IS SOUGHT, *supra* note 34, at xiv.

74 SHIRLEY JACKSON, *THE LOTTERY AND OTHER STORIES* 291-302 (1991).

ceased to foster an appreciation for it.

C. *The Slippery Slope*

If a law were enacted creating a right to assisted suicide for a particular class of patients such as the terminally ill, it would be difficult, if not impossible, to restrict the availability of assisted suicide only to those within this class. The Oregon Act⁷⁵ makes assisted suicide available to any person with a "terminal disease," which is defined as "an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months."⁷⁶ The Humphry measure similarly would make euthanasia available for a person with "an incurable or irreversible condition which will, in the opinion of two certifying physicians exercising reasonable medical judgment, result in death within six months."⁷⁷

An immediate textual problem with such proposals is that they define life expectancy without reference to medical intervention. For example, a person with an indefinite or high life expectancy *with* medical treatment (*e.g.*, insulin treatment for a diabetic) but with less than six months life expectancy *without* such treatment would presumably qualify for euthanasia. Thus, *in practice* the measures actually proposed would not limit qualified candidates to incurable, dying patients. Second, the measures only require a judgment by two physicians (even nonspecialists will do),⁷⁸ not certainty or even a medical probability that the patient will die within six months. There is a serious risk of error in making such predictions. One physician observed that "prognoses for survival

⁷⁵ Oregon Act, *supra* note 5.

⁷⁶ *Id.* § 1.01.

⁷⁷ HUMPHRY, *supra* note 60, at 135.

⁷⁸ Interestingly, the Hemlock Society's own newsletter has published a nurse's article explaining that "second physician" requirements for the diagnosis of terminal illness are ineffective as safeguards against abuse. Lauraine Thomas, *Living Will Could Let You Down*, HEMLOCK Q., Jan., 1992, at 10. Thomas writes:

The notion that the patient is safeguarded by . . . requir[ing] a similar diagnosis and opinion by two or three "uninvolved" physicians or medical experts is at once naive and tragic. The fact is that such "consultations" are extraordinarily easy to come by.

There is much truth in the concept of an "old boys club" among physicians. I have yet to know of *any* consulting physician disagreeing with any other physician who requests such a consultation. The motions are gone through and the outcome always is the same—total agreement with the attending physician.

are never that accurate; about 10% of patients admitted to hospices to die end up being discharged home because of either remission or inappropriate diagnosis."⁷⁹

Furthermore, under a law like the one proposed in Oregon, the certifying physician's opinion would likely be tainted by the very definition upon which the right depends. A doctor would be tempted to "fudge," especially in marginal cases, and to certify that a person has only six months to live, especially if the doctor was predisposed to allowing the patient to kill himself. Prosecutors would be hard pressed to uncover abuses when the victim already is dead from euthanasia. Indeed, the authorities would have little opportunity to scrutinize requests to be killed because those decisions would be made privately.

Even if a class of patients could be adequately defined⁸⁰ and enforcement could be assured—both unlikely assumptions—it is reasonable to expect that any law permitting assisted suicide for *some* class of patients, such as the terminally ill, will evolve within time to permit or even require euthanasia for other patients, even those who are not competent. Many euthanasia advocates themselves have acknowledged that once they acquire support for a right to euthanasia for some terminally ill patients, it will be easier for them to secure support for a more expansive euthanasia law.⁸¹ The first expected point of expansion from the Oregon

79 Shewmon, *supra* note 37, at 223; see also Jean-Pierre Bédos et al., *Early Predictors of Outcome for HIV Patients With Neurological Failure*, 273 JAMA 35 (1995) (showing that death within a certain number of months is difficult to predict even in such a universally fatal disease as AIDS).

80 "[S]eventeen years of experience with State Living Will statutes that have used 'terminal condition' as a prerequisite to patient directives have demonstrated that 'terminal' lacks any truly objective, operational definition. The terminal requirement is an . . . unworkable requirement . . ." ABA's Commission on Legal Problems of the Elderly, *supra* note 17, at 120.

81 Derek Humphry, founder of the Hemlock Society, has stated:

The public is demanding [surrogate decision making in euthanasia], but I have conceded the question in the interest of securing legislation for terminal illness first. But there is no question in my mind that after physician-assisted suicide is lawful, there are two questions that we must go on to address: (1) how incompetent people may be helped to die by their own advance directives and (2) the question of elderly suicide.

Derek Humphry *Discusses Death With Dignity with Thomasine Kushner*, 2 CAMBRIDGE Q. HEALTHCARE ETHICS 57, 59 (1993).

In an interview with a state official, Jack Kevorkian expressed his desire in the future to assist those patients in their late twenties and thirties who do "not want to live anymore and [have] felt this way since a very early age." *Michigan v. Kevorkian*, No. 90-390963-AZ (Mich. Cir. Ct. Feb. 5, 1991) (Gilbert, J.), *reprinted in* 7 ISSUES L. & MED. 107,

and Humphry measures will likely be the six-month time limit. "Regardless of where the time limit is placed [e.g., three months, six months, or one year], there will be patients just beyond it who will demand their 'right' to euthanasia"82 Why, it will be argued, should the right to euthanasia be limited to those whose life expectancy is less than six months when others face the prospect of suffering for an even *longer* period of time? The right to euthanasia would likewise be asserted on behalf of those who are not terminally ill but only disabled.

Why, its proponents would claim, should euthanasia only be available to the dying, forcing others to endure a lifetime of suffering? After this, the next likely group to be targeted would be the incompetent:

If the underlying purpose of the recommendation is to alleviate unreasonable pain and suffering of dying persons, why should the person who is suffering, but not competent, be denied relief? Are the demented or mentally retarded or mentally ill less entitled to relief from suffering than the competent? Do they suffer less for being incompetent? Yet, if they are equally entitled to this relief, have we not arrived at state-sanctioned, selective death?⁸³

As Justice Cardozo observed, any principle tends "to expand itself to the limit of its logic"84 Once *any* right to euthanasia is conceded for a class of persons, it will be difficult to confine the right to that class. Since all medical conditions can be placed on a continuum, any distinction will simply be challenged as arbitrary. For example, what criteria will be used to distinguish the eighty-year-old dying of cancer from the seventy-year-old with Alzheimer's disease, the sixty-year-old with severe depression and advanced leukemia, or the fifty-year-old depressed over an unsuccessful business venture or the loss of a spouse? Anyone who doubts the reality of this slippery slope should consider the Netherlands, where over a thousand people a year are *involuntarily* euthanized.⁸⁵ The literature of the right-to-die movement suggests

111 (1991).

82 Shewmon, *supra* note 37, at 223.

83 ABA's Commission on Legal Problems of the Elderly, *supra* note 17, at 120.

84 BENJAMIN N. CARDOZO, NATURE OF THE JUDICIAL PROCESS 51 (1949).

85 Nat Hentoff, *The Slippery Slope of Euthanasia*, WASH. POST, Oct. 3, 1992, at A21. Hentoff writes:

[T]he September 1991 official government Rimmelinck Report on euthanasia in the Netherlands revealed that at least 1,040 people die every year [in that

that obtaining a right for the terminally ill is merely the opening salvo.⁸⁶

Having reviewed the policy reasons why legislators and the electorate should reject calls to legalize assisted suicide, we consider next the question whether the United States Constitution creates or protects a right to assisted suicide.

III. IS THERE A FEDERAL CONSTITUTIONAL RIGHT TO ASSISTED SUICIDE?

A. *Substantive Due Process and the Need for Judicial Restraint*

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."⁸⁷ The Supreme Court has held that, in addition to ensuring procedural fairness by the government, the Due Process Clause safeguards certain liberties of which the government can deprive no citizen under even the fairest of procedures.⁸⁸ Even a fair trial

country] from involuntary euthanasia. Their physicians were so consumed with compassion that they decided not to disturb the patients by asking their opinion on the matter. Now the slope has become more slippery in the Netherlands. The Dutch Pediatric Association's panel on neonatal ethics has asked the government to permit euthanasia for infants so damaged that their "quality of life" is low. Says Dr. Zier Versluys, chairman of the group: "It's not always good to prolong someone else's life, because life is not always good.

Id.; see also Cor Spreeuwenberg, *The Story of Laurens*, 2 CAMBRIDGE Q. HEALTHCARE ETHICS 261-64 (Summer 1993) (a Netherlands physician's account of how his own brain-damaged infant son was euthanized).

86 See, e.g., Shewmon, *supra* note 37, at 223-25. Comparisons with the abortion right are apt. What began as an asserted right to abortion to protect a woman's life and health evolved into a generalized right to abortion on demand at any stage of pregnancy and for virtually any reason, or no reason at all. See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 783-84 (1986) (Burger, C.J., dissenting) ("We have apparently already passed the point at which abortion is available merely on demand"). For a description of the process by which the Court expanded, and later contracted, the abortion right, see generally Mark E. Chopko, Webster v. Reproductive Health Services: A Path to Constitutional Equilibrium, 12 CAMPBELL L. REV. 181 (1990).

87 U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment, by its own terms, is a limitation on the power of states. The Due Process Clause of the Fifth Amendment places a comparable limitation on the power of the federal government.

88 See, e.g., Planned Parenthood v. Casey, 112 S. Ct. 2791, 2804 (1992), in which the Court wrote:

Although a literal reading of the [Due Process] Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, at least since *Mugler v. Kansas*, 123 U.S. 623, 660-661 (1887), the Clause has been understood to contain a substantive component as well, one

would not save from constitutional invalidation a law that made it a criminal offense to view a sunset, plant a tree, or spend an afternoon with one's children, to use ludicrous examples.

The Supreme Court's treatment of substantive due process has a complex history,⁸⁹ making casual generalization hazardous for any commentator. Nevertheless, as a general rule the Court has resorted to one of two tests when deciding whether legislation complies with the substantive component of due process.⁹⁰ Under the first test, legislation bearing no reasonable relationship to any legitimate governmental objective is unconstitutional.⁹¹ A second, more rigorous test of constitutionality applies to those interests that the Court deems "fundamental."⁹² Laws affecting fundamental interests will be strictly scrutinized. Generally, under this more rigorous test, government may not substantially interfere with a fundamental right except by a law narrowly tailored to accomplish a compelling, governmental objective.

As is well known, the differences in application between rational relation review and strict scrutiny are significant. Rational relation scrutiny is not rigorous. It has traditionally been very difficult to obtain a judicial declaration that a law does not satisfy this minimal standard.⁹³ The same cannot be said of strict scrutiny, and laws subjected to such scrutiny are almost always invalidated.

At present it must be admitted that this two-story structure does not rest on an altogether sturdy foundation. First, there has been and continues to be considerable debate among judges and scholars regarding how appropriate it is to read into the Constitution rights not explicitly mentioned there.⁹⁴ Second, the opinions themselves are not always uniform or even clear regarding the analytical framework for deciding substantive due process claims.

"barring certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

Id. at 2804 (parallel citations omitted).

89 See generally JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW ch. 13 (1978) (providing a readable historical overview).

90 *Id.* at 410.

91 See, e.g., *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978) (setting out minimum rationality standard).

92 See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973).

93 NOWAK ET AL., *supra* note 89, at 410 ("As long as there is any conceivable basis for finding such a rational relationship the law will be upheld. Only when a law is a totally arbitrary deprivation of liberty will it violate the substantive due process guarantee" under the rational relationship test).

94 Debate among the justices themselves began as early as 1798 in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

One could infer from the text of a number of Supreme Court decisions, for example, that *only* those interests that can be deemed fundamental are protected under the substantive component of the Due Process Clause.⁹⁵ Justice Scalia most recently has suggested that it is the Equal Protection Clause, not the Due Process Clause, that protects persons from substantively unreasonable laws:

[W]hat protects us . . . from being assessed a tax of 100% of our income above the subsistence level, from being forbidden to drive cars, or from being required to send our children to school for 10 hours a day, none of which horrors is categorically prohibited by the Constitution. Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves . . . what they impose on you and me.⁹⁶

When the Court first began to consider which guarantees of the Bill of Rights applied to the states through the substantive component of the Fourteenth Amendment's Due Process Clause, the applicable test was whether or not the affected interest was fundamental.⁹⁷ Nevertheless, many of the Court's decisions today would be inexplicable if the Due Process Clause protected only those substantive interests that are fundamental.⁹⁸ Therefore, an

95 *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion) ("in an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest demonstrated as a 'liberty' be 'fundamental' . . . but also that it be an interest traditionally protected by our society"); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (rights are not incorporated into the Due Process Clause unless they are "implicit in the concept of ordered liberty" and "so rooted in the traditions and conscience of our people as to be ranked as fundamental") (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)); *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("[I]t is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states").

96 *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). See also *Tax Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, (1993), in which Justice Scalia writes:

I am willing to accept the proposition that the Due Process Clause . . . incorporates certain substantive guarantees specified in the Bill of Rights; but I do not accept the proposition that it is the secret repository of all sorts of other unenumerated, substantive rights.

Id. at 2726-27 (Scalia, J., concurring).

97 *Palko*, 302 U.S. at 325; *Snyder*, 291 U.S. at 105.

98 *Foucha v. Louisiana*, 112 S. Ct. 1780, 1805 (1992) (Thomas, J., dissenting) ("a liberty interest *per se* is not the same thing as a fundamental right"); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 520 (1989) (plurality opinion holding that abortion

insufficient basis exists to conclude that the Court has razed its two-story building.

Indeed, the Court may have added a few side rooms to the existing two-story structure. In its latest pronouncement in the two-decade-old abortion controversy, *Planned Parenthood v. Casey*,⁹⁹ a majority of justices refused to categorize abortion as a fundamental right triggering strict scrutiny, thereby abandoning a major tenet of the Court's first abortion case, *Roe v. Wade*.¹⁰⁰ Nevertheless, four justices in *Casey* held that the Constitution forbids a state to pass a law that may unduly burden a woman's right to an abortion before viability.¹⁰¹ Justice Blackmun would have applied the higher strict scrutiny standard.¹⁰² Thus, at least five justices—a majority of the Court—would invalidate any abortion law that unduly burdened a woman's right to an abortion before viability. The Court holds such a burden to exist if the challenged law imposes "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."¹⁰³ Consequently, the current stan-

is not a "fundamental right" but a "liberty interest"); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 789-90 (1986) (White, J., dissenting) (stating that the abortion decision is "a species of 'liberty' . . . subject to the general protections of the Due Process Clause," but is not a "fundamental" right); *Roe v. Wade*, 410 U.S. 113, 171-74 (1973) (Rehnquist, J., dissenting) (criticizing the majority for applying strict scrutiny to abortion regulations and urging use of the rational relation test); see also *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278-61 (1990) ("the principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions").

99 112 S. Ct. 2791 (1992).

100 Indeed, *Casey* established an entirely different analytical framework for reviewing abortion legislation. As Chief Justice Rehnquist wrote in the case:

Roe decided that a woman had a fundamental right to an abortion. The joint opinion [of Justices O'Connor, Kennedy, and Souter in *Casey*] rejects that view. *Roe* decided that abortion regulations were to be subjected to "strict scrutiny" and could be justified only in the light of "compelling state interests." The joint opinion rejects that view *Roe* analyzed abortion regulation under a rigid trimester framework, a framework which has guided this Court's decisionmaking for 19 years. The joint opinion rejects that framework.

Id. at 2860 (Rehnquist, C.J., concurring in part and dissenting in part).

101 *Id.* at 2819-20 (O'Connor, Kennedy, Souter, JJ.); *id.* at 2842-43 (Stevens, J., concurring in part and dissenting in part).

102 *Id.* at 2845-46 (Blackmun, J., concurring in part and dissenting in part).

103 *Id.* at 2820. Lower courts in subsequent abortion cases have not consistently applied the undue burden test. Compare *Casey v. Planned Parenthood*, 14 F.3d 848, 863 n.21 (3d Cir. 1994) (stating that abortion regulations are unconstitutional if they impose an undue burden in a large fraction of cases), with *Barnes v. Moore*, 970 F.2d 12 (5th Cir.) (stating that abortion regulations are unconstitutional if they impose an undue burden in all circumstances), *cert. denied*, 113 S. Ct. 656 (1992), and with *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526 (8th Cir. 1994) (applying both tests).

dard of judicial review for abortion appears to be more rigorous than the rational relation test, yet less rigorous than the strict scrutiny test.

Significantly, the three justices who explicitly endorsed the undue burden standard in the abortion context justified their selection of that test only by citing the concurring opinions of prior abortion cases. This underscores all the more that abortion now appears to occupy its own jurisprudential island, with no readily explainable relation to the remainder of the Court's substantive due process cases.

Indeed, much of the principal opinion in *Casey* attempts to justify the Court's treatment of abortion not as a matter of first impression, but rather on the basis of *stare decisis*.¹⁰⁴ The explicit condemnation of *Roe v. Wade* by four justices, and the reticence of three others to defend it on its original grounds, suggests that a majority of the Court no longer believes that *Roe* was correctly decided. This in turn means that *Roe* and subsequent abortion cases have at best limited precedential value today in dealing with any issue except abortion.

Another difficulty in the Court's substantive due process jurisprudence arises in connection with so-called "liberty interests." Upon finding such an interest, the Court either applies the rational relation test,¹⁰⁵ or balances "the liberty of the individual" and

104 *Casey*, 112 S. Ct. at 2817:

We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability The matter is not before us in the first instance

See also *id.* at 2808 ("[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*."); *id.* at 2814 ("decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided").

By thus declining to state that *Roe* was correctly decided, the *Casey* opinion "leaves a reader . . . with the nagging sense that a majority of the Court reaffirmed *Roe*, even though a differently constituted majority (the four dissenters plus one or more of the authors of the Joint Opinion) believed *Roe* to have been wrongly decided." Paul B. Linton, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 19 (1993).

105 *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 790 (1986) (White, J., dissenting) (because abortion decision is not a fundamental right but a liberty interest, restrictions upon it do not "call into play anything more than the most minimal judicial scrutiny"); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (assuming a liberty interest exists in regulating one's own personal appearance, regulations limiting police officers' hair length was rationally related to the promotion of safety).

the "relevant state interests."¹⁰⁶ Whether these are intended by the Court as two distinct tests is unclear. Balancing an individual's liberty against the demands of an organized society would appear to be a somewhat more stringent standard than merely asking whether challenged legislation is reasonably related to a legitimate governmental objective. However, if a balancing test is to be applied to mere "liberty interests," then to what sort of interests does the rational relationship test apply? Unless a particular interest qualifies as "liberty," it would not appear to come under the protection of the liberty component of the Fourteenth Amendment at all.¹⁰⁷ In other words, unless there is a deprivation of some liberty, then a plaintiff would not have suffered any injury for which protection could be sought under the liberty component of the Due Process Clause. We see no way of wholly resolving these analytical difficulties at present, and their ultimate resolution will likely require further guidance from the Supreme Court.

This brief outline of how the Court addresses substantive due process claims as yet leaves at least one question of major importance unanswered: How does the Court determine whether a particular interest is a fundamental right warranting heightened judicial protection, some other type of interest entitled to lesser scrutiny, or no constitutionally protected interest at all? This question warrants special attention because fundamental rights, once implicated, are virtually assured of trumping any asserted state interest. The ease with which laws are judicially invalidated if found to interfere with fundamental rights also implicates the notions of judicial restraint, federalism, and separation of powers—all vital to

106 *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) (in determining whether the state constitutionally may require clear and convincing evidence of an incompetent patient's wishes before terminating artificial administered nutrition and hydration, the Court must weigh the patient's presumed "liberty interests" against the "relevant state interests"); *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982) (in determining whether an involuntarily committed, mentally retarded individual's liberty interest in safety and freedom from constraint has been violated, it is necessary to balance individuals' "liberty interests" against "relevant state interests").

107 Thus, we disagree with the conclusion of the New York State Task Force on Life and the Law that laws *not* infringing "on either fundamental rights or constitutionally protected liberty interests receive only minimal judicial scrutiny, and will be upheld as long as they are 'rationally related' to a legitimate governmental goal." *WHEN DEATH IS SOUGHT*, *supra* note 34, at 68-69 (emphasis added). If an interest does not infringe upon some "species of 'liberty,'" *Thornburgh*, 476 U.S. at 790 (White, J., dissenting), *overruled by Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2816 (1992), then one could not invoke the Due Process Clause at all (unless one could predicate a violation of the clause based on deprivation of life or property, which are also protected under the Due Process Clause).

our system of government.

It is important to remember that the Due Process Clause is written in the most general terms; the Framers of that provision did not define the term "liberty." The potential breadth of such an open-ended concept as liberty therefore quite naturally gives rise to concerns about the proper distribution of power in resolving pressing social questions between the federal judiciary, on the one hand, and federal and state legislatures on the other hand.

Individual justices, to be sure, have at times written of constitutionally protected "liberty" in philosophical,¹⁰⁸ even poetic terms that seem to reflect a rugged individualism and antipathy towards government.¹⁰⁹ Yet, in describing their role, the justices have also recognized that they are interpreters, not Platonic guardians, of the Constitution.¹¹⁰ Thus, in deciding whether an interest is entitled to substantive due process protection under any standard, the Court has made clear that "judges are not left at large to decide cases in light of their personal and private notions."¹¹¹ Judicial restraint, the Court has acknowledged, is necessary if our

108 "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992).

109 Justice Brandeis wrote:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Justice Brennan wrote:

We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncracies In a community such as ours, "liberty" must include the freedom not to conform.

Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

110 *See, e.g., City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 453 (1983) ("Irrespective of what we may believe is wise or prudent policy in this difficult area, the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense'") (O'Connor, J., dissenting) (internal punctuation omitted), *overruled in part by Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2816-17 (1992).

111 *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring).

nation is to remain one of laws and not people,¹¹² for such restraint ensures that the people, through their elected officials, will remain free to debate and resolve the problems that confront the nation. As Justice White has observed:

[Judicial] decisions that find in the Constitution principles or values that cannot fairly be read into that document *usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation.*¹¹³

Elsewhere, Justice White writes:

The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipations of the Framers . . . , the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare.¹¹⁴

Because a law subjected to strict scrutiny faces an especially difficult chance of passing constitutional muster, leading very easily to the invalidation of laws having the support of political majorities, the methodology that the Court uses for identifying fundamental rights is critical. It is therefore appropriate, before inquiring whether or how suicide or assisted suicide fit into the framework of substantive due process, to pose some preliminary questions about how the Court in practice determines whether an interest is fundamental.

112 See generally James Bopp, Jr. & Richard E. Coleson, *Webster and the Future of Substantive Due Process*, 28 DUQ. L. REV. 271, 281 n.54 (1990) ("[The] danger is not only to the integrity of the court making the decision but also to the principle of the rule of law itself").

113 *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 787 (1986) (White, J., dissenting) (emphasis added). Justice White has further cautioned that when the Judiciary announces rights not securely grounded in the Constitution, "it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority." *Moore v. City of E. Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting), quoted in *Michael H.*, 491 U.S. at 122.

114 *Moore*, 431 U.S. at 544.

B. Two Methodological Principles for Identifying Fundamental Rights

To ensure judicial restraint and to prevent the Supreme Court's substantive due process jurisprudence from becoming simply a product of "the predilections of those who happen at the time to be Members of [the] Court,"¹¹⁵ two methodological principles for identifying fundamental rights have emerged from the Court's decisions. First, the Court has defined fundamental rights by reference to an *objective* standard. Second, the Court has recognized that fundamental rights must be identified with specificity and with an eye toward the factual context in which the interest is asserted.

Only brief reflection is necessary to assure oneself of the need for an objective standard since its absence would necessarily plunge the Court headlong into adjudication by precisely those subjective predilections that it has conceded it must avoid in construing the Constitution. The Court has usually expressed this objective standard by asking whether the interest for which constitutional protection is sought is one recognized in our nation's history and traditions,¹¹⁶ or is so fundamental that it can be said to lie at the very foundation of our civil and political institutions¹¹⁷ such that ordered liberty can scarcely be imagined were it eliminated.¹¹⁸

The Supreme Court's substantive due process decisions support the inference that even when the Court has misread history—as it did in *Roe v. Wade*¹¹⁹—history nonetheless has remained the guiding principle for determining whether a particular interest

115 *Id.* at 502.

116 *Id.* at 501-02 (the test is whether a particular interest is "deeply rooted in this Nation's history and tradition") (plurality opinion).

117 *Palko v. Connecticut*, 302 U.S. 319, 325-28 (1937) (those rights are guaranteed which are found among the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" and which are "implicit" in the very "concept of ordered liberty"); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (due process protects those liberties "so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (the Court has "continual[ly] insist[ed] upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society") (Harlan, J., concurring in judgment); see also *Michael H.*, 491 U.S. at 122-23.

118 Liberty extends to those interests that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Palko*, 302 U.S. at 325-26.

119 See *infra* note 142 and accompanying text.

ranks as fundamental. Early in this century, the Supreme Court in *Meyer v. Nebraska*¹²⁰ struck down a Nebraska law that forbade children from being taught a foreign language. The Nebraska law, the Court ruled, unreasonably infringed upon the liberty protected by the Due Process Clause because it interfered with a student's right to acquire knowledge, a teacher's right to engage in his or her profession, and the parents' right to direct the upbringing and education of their children. The Court relied upon our nation's historic recognition of the value of education¹²¹ and the right and duty of parents to educate their children.¹²² Later, in *Pierce v. Society of Sisters*,¹²³ the Court struck down an Oregon law that forbade parents from sending their children to private schools. In that case, the Court relied in part on the *Meyer* Court's recognition two years earlier of the parents' right to direct the upbringing of their child.¹²⁴

From the outset, the identification of fundamental rights seems to have been predicated on the Court's recognition that certain personal relationships are so critical to how we order ourselves as a society that they are entitled to a high level of protection from government interference. The *Meyer* and *Pierce* Courts, for example, acted to protect the sanctity of the relationship between parent and child. The same relational principle was invoked again in the Court's first contraception case, *Griswold v. Connecticut*.¹²⁵

In that case, the Court relied upon the historic sanctity of the marital relationship to overturn the conviction of a physician for giving a married couple information and advice about contraceptives. The Connecticut law "operat[ed] directly on an intimate relation of husband and wife,"¹²⁶ having "a maximum destructive

120 262 U.S. 390 (1923).

121 The Court cited the Ordinance of 1787 as support for the proposition that "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted." *Meyer*, 262 U.S. at 400.

122 "[I]t is the natural duty of the parent to give his children education." *Id.*

123 268 U.S. 510 (1925).

124 While these two opinions rely more on a rational relation rather than a compelling interest test, they nonetheless have come to stand for the protection of rights that the Court has deemed fundamental and therefore entitled to greater scrutiny. *E.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 190-94 (1986).

125 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

126 *Id.* at 482. The Court did not rely strictly on the Due Process Clause, but upon "the zone of privacy created by several fundamental constitutional guarantees." *Id.* at 485. Among these guarantees were the freedom to educate one's children protected under the Fourteenth Amendment, *id.* at 482, the right of association protected under the First

impact" upon that relationship.¹²⁷ The Court asked rhetorically:

Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights - older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred . . . [I]t is an association for as noble a purpose as any involved in our prior decisions.¹²⁸

In a concurring opinion, Justice Goldberg emphasized that the Connecticut law threatened the marital or family relationship. The law, he wrote, "disrupt[ed] the traditional relation of the family—a relation as old and as fundamental as our entire civilization . . ."¹²⁹ Not all sexual relations were constitutionally protected, Justice Goldberg noted, but the conjugal relations of husband and wife were.¹³⁰

Reliance upon history and tradition has been equally dispositive in identifying rights triggering heightened judicial scrutiny under the Equal Protection Clause.¹³¹ In *Loving v. Virginia*,¹³² for example, in striking down a Virginia law that forbade inter-

Amendment, *id.* at 483, and the right to be free of governmental intrusion into the home protected under the Third and Fourth Amendments. *Id.* at 484.

127 *Id.* at 485.

128 *Id.* at 485-86.

129 *Id.* at 486, 495-96 (Goldberg, J., concurring).

130 Justice Goldberg wrote:

Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.

Id. at 499 (Goldberg, J., concurring), quoting *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting).

131 The Equal Protection Clause of the Fourteenth Amendment provides that no state may "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. In general, the Equal Protection Clause prevents state legislatures from treating different classes of people differently if there is no reasonable basis for the classification. For example, a state could not pass a law providing that only married people could purchase eyeglasses because there would be no rational basis in such a case for treating married and unmarried people differently. In general, the Court has subjected laws involving racial classification, like the one in *Loving v. Virginia*, 388 U.S. 1 (1967), to strict scrutiny.

132 388 U.S. 1 (1967).

racial marriages on equal protection and due process grounds, the Court observed that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."¹³³

Again, in *Skinner v. Oklahoma*,¹³⁴ the Court invalidated on equal protection grounds an Oklahoma law that required habitual criminals to be sterilized, stating: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the [human] race."¹³⁵

In 1972, a wrinkle appeared in the Supreme Court's substantive due process jurisprudence. In *Eisenstadt v. Baird*,¹³⁶ the Court relied upon *Griswold*, a case based on the sanctity of the marital relationship, to invalidate a Massachusetts law that made it a felony to distribute contraceptives to unmarried persons.¹³⁷ The Court concluded that the Massachusetts law violated the Equal Protection Clause because the state had proffered no rational basis for treating married and unmarried persons differently. In its analysis, the Court fell back upon a more general characterization of what it thought was at issue; namely, a right "to bear or beget a child."¹³⁸

Moreover, the Court developed the issue without any inquiry as to whether our history and traditions have recognized such a right outside the marital relationship. Thus, the guiding concern in the Court's substantive due process jurisprudence for protecting certain *relationships* essential to ordered liberty was obscured in *Eisenstadt* by the Court's willingness to protect individual *decisions* about childbearing. Yet this protection was crafted without careful regard for the changed factual context in which the affected right was now asserted.¹³⁹ The subtle, unannounced shift in emphasis

133 *Id.* at 12.

134 316 U.S. 535 (1942).

135 *Id.* at 541.

136 405 U.S. 438 (1972).

137 The law did not prevent distribution of contraceptives to either unmarried or married persons to prevent the spread of disease; it did so only to prevent pregnancy. *See id.* at 442.

138 *Id.* at 453.

139 This shift from a decision made within the confines of a protected relationship (as in *Griswold*) to one involving individualized decisions by a single person (as in *Eisenstadt*) should not be passed over lightly. *Griswold* recognized that marriage is a protected relationship and sought to ensure that it would be up to a married couple to decide whether to have children. *Eisenstadt* disregards the necessarily relational nature of child-bearing decisions, placing a couple in separate decision-making compartments as

was unaccompanied by any principled explanation of how, aside from the lessons of history, the Court would determine for purposes of future cases what types of personal decisions were entitled to constitutional protection.

Supreme Court cases decided after *Eisenstadt* have continued to insist that history is the operative principle for determining whether an interest is a fundamental right. Only one year after *Eisenstadt*, the Court issued its opinion in *Roe v. Wade*.¹⁴⁰ Half of the majority opinion in *Roe* is devoted to a review of ancient, medieval and modern attitudes toward abortion. Based on this review, a majority of the Court concluded that statutes banning abortion were "of relatively recent vintage," deriving from "statutory changes effected, for the most part, in the latter half of the 19th century."¹⁴¹ Although this version of history has been soundly repudiated,¹⁴² the Court's extended treatment of history suggests its continued reliance upon history in identifying those rights which are entitled to heightened protection under the substantive component of the Due Process Clause. To this day, history re-

though one could decide on his or her own whether to have children. Such a fiction fails to recognize the natural sociality of human beings and leaves the individual isolated in his or her privacy. See Jordan, *supra* note 30, at 132-33.

The Court, some have suggested, may have decided *Eisenstadt* in anticipation of *Roe v. Wade*. JOHN T. NOONAN, A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 21 (1979). That is a telling suggestion. While *Roe* purported not to leave a woman isolated in her privacy, 428 U.S. at 154, subsequent Supreme Court opinions drove a constitutional wedge between the pregnant woman and her spouse, and between the pregnant unmarried minor and her parents. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2826-32 (1992) (holding that a state constitutionally may not even condition the availability of abortion upon spousal notification); *Planned Parenthood v. Danforth*, 428 U.S. 52, 69-75 (1976) (holding that a state constitutionally may not condition the availability of abortion upon spousal or parental consent).

These unfortunate developments at least partly result from methodological errors. In *Eisenstadt*, for example, it were as if the Court had asked what business the state had in regulating the conduct at issue. The Court instead should have engaged in an historical analysis of the relational interests implicated by that case, as it has in other cases. Cf. *Michael H. v. Gerald D.*, 491 U.S. 110, 123-27 (1989); *Bowers v. Hardwick*, 478 U.S. 186, 192-95 (1986). Its failure to do so leaves it open to the charge that its jurisprudence has to some extent been driven by the desired result of a particular case.

140 410 U.S. 113 (1973).

141 *Id.* at 129.

142 *Id.* See Robert A. Destro, *Abortion and the Constitution: The Need for a Life Protective Amendment*, 63 CAL. L. REV. 1250, 1267-92 (1975); Joseph W. Dellapenna, *The History of Abortion: Technology, Morality and the Law*, 40 U. PITT. L. REV. 359, 379-89 (1979). See generally Dennis J. Horan & Thomas J. Balch, *Roe v. Wade: No Justification in History, Law or Logic*, in ABORTION AND THE CONSTITUTION 57 (Dennis J. Horan et al. eds., 1987); John R. Connery, S.J., *The Ancients and the Medievals on Abortion: The Consensus the Court Ignored*, in *id.* at 123; Martin Arbagi, *Roe and the Hippocratic Oath*, in *id.* at 159.

mains one of two methodological principles grounding the Court's substantive due process cases.¹⁴³

Proponents of a right to assisted suicide often cite *Planned Parenthood v. Casey* to support their claim that the Supreme Court no longer adheres to an historical test when considering substantive due process claims.¹⁴⁴ This contention is not supported by the text of *Casey* or subsequent Supreme Court opinions. If the Court in *Casey* had intended to craft an entirely new test for determining whether interests are protected by the substantive component of the Due Process Clause, it surely would have announced this intention. In fact, the principal opinion in *Casey*, offered by assisted suicide advocates as the source of the putative new test, itself continues to invoke tradition as the touchstone for determining whether an interest is entitled to substantive due process protection.¹⁴⁵ Although the opinion notes that tradition is "living" rather than static, is not susceptible to a simple formula, and that judges should exercise "reasoned judgment,"¹⁴⁶ it leaves unaltered the Court's framework for identifying substantive due process rights. Moreover, the Court's reliance upon history and tradition in substantive due process cases decided after *Casey* would defy explanation if the Court had abandoned that test in *Casey*.¹⁴⁷

143 See *Casey*, 112 S. Ct. at 2806 (quoting Justice Harlan for the observation that while due process cannot be reduced to a formula, neither can it ignore "what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke"); *Michael H. v. Gerald D.*, 491 U.S. 110, 121-23 (1989) (interests for which substantive due process protection is sought must be "rooted in history and tradition"); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition"); *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Supreme Court precedent reflects "continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society . . .").

144 E.g., *People v. Kevorkian*, No. 93-11482, 1993 WL 603212, at *13 (Mich. Cir. Ct. Dec. 13, 1993) (Kaufman, J.), *rev'd sub nom. Hobbins v. Attorney Gen.*, 518 N.W.2d 487 (Mich. Ct. App. 1994), *aff'd in part and rev'd in part*, *People v. Kevorkian*, Nos. 99591, 99674, 99752, 99758, 99759, 1994 WL 700448 (Mich. Dec. 13, 1994) (consolidated cases).

145 *Casey*, 112 S. Ct. at 2806 (reiterating that the Court must construe the Due Process Clause with "regard to what history teaches are the traditions from which [the nation] developed as well as the traditions from which it broke"), quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

146 *Casey*, 112 S. Ct. at 2806 ("[t]radition is a living thing"), quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting from dismissal on jurisdictional grounds). See also *People v. Kevorkian*, Nos. 99591, 99674, 99752, 99758, 99759, 1994 WL 700448, at *12 (Mich. Dec. 13, 1994) ("[W]e must determine whether the asserted right to commit suicide arises from a rational evolution of tradition or whether recognition of such a right would be a radical departure from historical precepts").

147 In *Herrera v. Collins*, 113 S. Ct. 853 (1993), Justice Blackmun, joined by Justices

This, of course, is not to deny that one can find poetic language about the beauty and nature of personal liberty in Supreme Court opinions. For example, Justice Brandeis is often cited for his statement in *Olmstead v. United States*¹⁴⁸ that "the right to be let alone" is the most cherished of personal liberties.¹⁴⁹ In *Casey*,¹⁵⁰ as another example, the Court characterizes liberty in terms of "intimate and personal choices," "personal dignity and autonomy," "one's own concept of existence," "the universe," and "the mystery of human life."¹⁵¹

However majestic or inspiring such language may be, the Court has not yet signalled a readiness to derive constitutional rights out of such ethereal categories as "the mystery of human life." If the Court invented new rights on such grounds, it would no longer be interpreting a constitution. Rather, continued reliance upon history and tradition prevents substantive due process jurisprudence from becoming little more than the unrestrained and subjective "predilections of those who happen at the time to be Members of [the] Court."¹⁵² Even those justices who have been critical of the historical standard as itself lacking sufficient objectivity have not offered a more objective alternative.¹⁵³

A second methodological feature of the Court's due process jurisprudence is its recognition that interests for which heightened constitutional protection is sought cannot be described merely at the level of philosophic abstraction, but instead must be identified with specificity and with an eye toward the factual context in which that interest is asserted. In other words, whether a state can constitutionally forbid or command certain conduct cannot be an-

Stevens and Souter, wrote:

So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952) [a case that relied upon the tests of tradition and ordered liberty], or interferes with rights "implicit in the concept of ordered liberty."

Id. at 879 (Blackmun, J., dissenting) (parallel citations omitted). *See also* *Reno v. Flores*, 113 S. Ct. 1439, 1447 (1993) (noting that the rights asserted by petitioners "cannot be considered 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'").

148 277 U.S. 438 (1928).

149 *Id.* at 478 (referring to the "right to be let alone" as "the most comprehensive of rights and the right most valued by civilized men").

150 112 S. Ct. 2791 (1992).

151 *Id.* at 2807.

152 *Moore v. City of E. Cleveland*, 431 U.S. 494, 544 (1977).

153 *See* *Michael H. v. Gerald D.*, 491 U.S. 110, 126 (1989) (Brennan, J., dissenting).

swered by merely formulating the conduct in its most abstract terms. This becomes immediately apparent when one juxtaposes the Court's various due process decisions.

For example, states may not forbid individuals of different races from marrying,¹⁵⁴ but they can and obviously do prohibit marriages between members of the same immediate family.¹⁵⁵ Likewise, a state may not prevent parents from sending their children to private schools¹⁵⁶ or from providing them instruction in a foreign language,¹⁵⁷ but it can require that they attend school and receive instruction in English.¹⁵⁸ Thus, whether interracial and incestuous unions are protected liberties cannot be answered merely by framing the conduct at issue as an exercise of the "right to marry," just as the constitutionality of a law concerning education cannot be ascertained by merely invoking a parental right to control the upbringing of one's child.

Individual justices have disagreed about the precise *level* of specificity with which a particular interest must be characterized,¹⁵⁹ but the impossibility of reconciling the Court's various due process decisions based on mere recitation of such abstract rights as the "right to marry" or "right to control the

154 *Loving v. Virginia*, 388 U.S. 1 (1967).

155 52 AM. JUR. 2D *Marriage* §§ 62-63 (1970) (noting that the prohibition against marriages between closely related persons is universal). The deleterious health consequences of such unions is well known. See *Consanguinity*, 3 THE NEW ENCYCLOPEDIA BRITANNICA 550 (1987).

156 *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

157 *Meyer v. Nebraska*, 262 U.S. 390 (1923).

158 *Id.* at 402 (dictum) ("The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned."); *Pierce*, 268 U.S. at 534 (dictum) ("No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.").

159 Compare *Michael H. v. Gerald D.*, 491 U.S. 110, 118-30 (1989) (Scalia, J.) (considering a father's interest in asserting parental rights over a child whose mother was at all times married to another man) *with id.* at 132 (O'Connor, J., concurring in part) (stating that "the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available," and that she would refrain from imposing a "single mode of historical analysis"), and *with id.* at 136 (Brennan, J., dissenting) (stating that fathers have a constitutionally protected interest in their relationship with their children). See also *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805 (1992) (rejecting the view that due process "protects only those practices, defined at the most specific level, that were protected against government interference . . . when the Fourteenth Amendment was ratified").

upbringing of one's child" demonstrates rather conclusively that some degree of specificity in locating the precise interest under consideration is necessary.

C. *The Constitutional Status of Assisted Suicide*

Since two levels of analysis have generally been used in deciding substantive due process claims, whether suicide or assisted suicide is a constitutional right depends upon the answers to two questions: (1) is suicide a fundamental right entitled to heightened judicial scrutiny, and (2) if not, is it a liberty interest entitled to lesser protection? We will treat these questions separately.

Suicide or assisted suicide is not a fundamental right warranting strict scrutiny unless it is recognized in our nation's history and traditions, or is so fundamental as to lie at the very foundation of our civil and political institutions such that ordered liberty could scarcely be imagined were it eliminated.¹⁶⁰ Merely to state the question is to answer it. One looks in vain for a national tradition of suicide or assisted suicide. Most Americans, we suspect, would be quite shocked to find that liberty itself would be threatened if they were to be restrained from killing themselves; the tragic consequences of suicide for both the deceased and those whose who survive him or her make the absurdity of such a proposition painfully evident. The American legal system generally has not recognized *any* claim that non-existence is preferable to life,¹⁶¹ and, having found no such right at all, it most certainly has not found that such a right lies at the base of our civil and political institutions or is rooted in our nation's history and traditions.

The most exhaustive historical and constitutional analysis of suicide available, after reviewing societal attitudes about suicide for the last two millennia, concludes:

[T]here is no significant support for the claim that a right to

160 See *supra* Part III.B.

161 See, e.g., *Elliott v. Brown*, 361 So. 2d 546, 548 (Ala. 1978) ("[T]here is no legal right not to be born . . . Upon what legal foundation is the court to determine that it is better not to have been born than to be born with deformities? . . . We decline to pronounce judgment in the imponderable area of nonexistence"); *Lininger v. Eisenbaum*, 764 P.2d 1202, 1212 (Colo. 1988) ("[L]ife, however impaired and regardless of any attendant expenses, cannot rationally be said to be a detriment . . . when measured against the alternative of . . . not having existed at all."); *Azzolino v. Dingfelder*, 337 S.E.2d 528, 534 (N.C. 1985) ("[W]e are unwilling to say that life, even life with severe defects, may ever amount to a legal injury."), *cert. denied*, 479 U.S. 835 (1986).

suicide is so rooted in our tradition that it may be deemed "fundamental" or "implicit in the concept of ordered liberty." Indeed, the weight of authority in the United States, from colonial days through at least the 1970s has demonstrated that the predominant attitude of society and the law has been one of opposition to suicide. It follows that courts should not hold suicide or its assistance to be a protected right under the United States Constitution.¹⁶²

Relying in part on this important study, Justice Scalia, in *Cruzan v. Director, Mo. Dep't of Health*,¹⁶³ stated unequivocally that a right to suicide could not "possibly be established" on the record of that case:

At common law in England, a suicide . . . was criminally liable. Although the States abolished the penalties imposed by the common law (i.e., forfeiture and ignominious burial), they did so to spare the innocent family and not to legitimize the act. Case law at the time of the adoption of the Fourteenth Amendment generally held that assisting suicide was a criminal offense. The System of Penal Law presented to the House of Representatives by Representative Livingston in 1828 would have criminalized assisted suicide. The Field Penal Code, adopted by the Dakota Territory in 1877, proscribed attempted suicide and assisted suicide. And most States that did not explicitly prohibit assisted suicide in 1868 recognized, when the issue arose in the 50 years following the Fourteenth Amendment's ratification, that assisted and (in some cases) attempted suicide were unlawful. Thus, there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed "fundamental" or "implicit in the concept of ordered liberty."¹⁶⁴

Two courts confronted directly with the claim that assisted suicide has constitutional status—the Michigan Supreme Court in *People v. Kevorkian*,¹⁶⁵ and the United States District Court for the

162 Marzen et al., *supra* note 34, at 100. Constitutional scholar Yale Kamisar has referred to the Marzen article as "the most comprehensive and most heavily documented law review article ever written on the subject" of suicide from a constitutional standpoint. Yale Kamisar, *Are Laws Against Assisted Suicide Unconstitutional?*, HASTINGS CENTER REP., May-June 1993, at 32.

163 497 U.S. 261 (1990).

164 *Id.* at 294-95 (citations and internal punctuation omitted).

165 *People v. Kevorkian*, Nos. 99591, 99674, 99752, 99758, 99759, 1994 WL 700448 (Mich. Dec. 13, 1994) (five consolidated appeals).

Southern District of New York in *Quill v. Koppell*¹⁶⁶—have concluded, independent of each other, that there is no historical support for a right to suicide or assisted suicide. Their separate analyses of the historical record substantially parallel each other. In both opinions, each court observes that suicide was a crime under the common law punishable by forfeiture of property and ignominious burial.¹⁶⁷ Eventually, these penalties were abandoned “to spare the innocent family and not to legitimize the act.”¹⁶⁸ Most states today make assisted suicide a crime, as did the majority of states existing at the time of the Fourteenth Amendment’s ratification.¹⁶⁹ The Model Penal Code of the American Law Institute likewise provides that assisting a suicide is a crime.¹⁷⁰

On this basis, Michigan’s highest court concluded that “[i]t would be an impermissibly radical departure from existing tradition, and from the principles that underlie that tradition, to declare that there is . . . a fundamental right [to commit suicide] protected by the Due Process Clause.”¹⁷¹ In *Quill*, Chief Judge Griesa pointedly observes that assisted suicide advocates in that case “have pointed to *nothing* in the historical record to indicate that . . . assisted suicide has been given any kind of sanction in our legal history which would help establish it as a constitutional right.”¹⁷²

If suicide or assisted suicide is not a fundamental right, then the first question is settled, and a law prohibiting assisted suicide would not be subject to heightened judicial scrutiny. The next question is whether such a ban impinges on a liberty interest and is therefore subject to some less rigorous level of judicial review. *Kevoorkian* and *Quill* both seem to conflate these two questions into one.¹⁷³ Each court, upon concluding that suicide is not a funda-

166 No. 94 Civ. 5321, 1994 WL 702800 (S.D.N.Y. Dec. 15, 1994).

167 *Kevoorkian*, 1994 WL 700448, at *13 n.49; *Quill*, 1994 WL 702800, at *7.

168 *Quill*, 1994 WL 702800, at *7 (quoting *Cruzan*, 497 U.S. at 294 (Scalia, J., concurring)); see *Kevoorkian*, 1994 WL 700448, at *13 (lawmakers “recognized the futility of punishment and the harshness of property forfeiture”).

169 *Kevoorkian*, 1994 WL 700448, at *13.

170 *Id.*; *Quill*, 1994 WL 702800, at *7.

171 *Kevoorkian*, 1994 WL 700448, at *14.

172 *Quill*, 1994 WL 702800, at *7 (emphasis added).

173 See *Kevoorkian*, 1994 WL 700448, at *8 (advocates of assisted suicide “argue that the right to end one’s own life is a fundamental liberty interest”); *id.* at *9 (the theories advanced by plaintiffs “assume a fundamental liberty interest in suicide”); *id.* at *12 (*Cruzan* “does not portend that the United States Supreme Court would find a fundamental liberty interest in suicide, let alone assisted suicide”); *Quill*, 1994 WL 702800, at *7 (holding

mental right, ends its analysis.¹⁷⁴ Nevertheless, while not separately setting out the question about liberty interests, both decisions articulate reasons why suicide is not a liberty interest. They do so by distinguishing *Casey* and *Cruzan*.

Both *Quill* and *Kevoorkian* recognize that *Casey* does not support a constitutional right to suicide. As Judge Griesa notes, "[t]he Supreme Court has been careful to explain that the abortion cases, and other related decisions on procreation and child rearing, are not intended to lead automatically to the recognition of other fundamental rights on different subjects."¹⁷⁵ The Michigan Supreme Court makes the additional observation that the United States Supreme Court in *Casey* "was not directly concerned with the establishment of a new right, but rather with whether the Court should retreat from the right previously recognized in *Roe v. Wade*."¹⁷⁶

Nor does *Cruzan* support a constitutional right to suicide. In that case, the Supreme Court concluded that a state may require clear and convincing proof of the wishes of a patient in a persistent vegetative state before discontinuing artificially provided nutrition and hydration.¹⁷⁷ As recognized in *Quill* and *Kevoorkian*,¹⁷⁸ *Cruzan* merely assumed, but did not actually hold, that the discontinuation of such treatment was a liberty interest.¹⁷⁹ Having made that assumption, the Supreme Court in *Cruzan* upheld the state's interest in preserving the patient's life.¹⁸⁰ In any event, there is a difference between declining medical treatment and committing suicide.¹⁸¹ The court in *Kevoorkian* elaborates on this important distinction:

[W]hereas suicide involves an affirmative act to end a life, the

that physician assisted suicide "does not involve a fundamental liberty interest protected by the Due Process Clause").

174 *Kevoorkian*, 1994 WL 700448, at *14; *Quill*, 1994 WL 702800, at *7.

175 *Quill*, 1994 WL 702800, at *6 (citing *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 & n.15 (1973)).

176 *Kevoorkian*, 1994 WL 700448, at *12.

177 *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 110, 261 (1990).

178 *Kevoorkian*, 1994 WL 700448, at *9; *Quill*, 1994 WL 702800, at *6.

179 *Cruzan*, 497 at 279. Four justices assumed it was a liberty interest. *Id.* at 279. A fifth justice asserted that it was. *Id.* at 287 (O'Connor, J. concurring).

180 *Id.* at 279.

181 *Kevoorkian*, 1994 WL 700448, at *11 (distinguishing *Cruzan* and recognizing a distinction between the omission of medical treatment and an affirmative act of suicide); *Quill*, 1994 WL 702800, at *6 ("suicide has a sufficiently different legal significance from requesting withdrawal of treatment so that a fundamental right to suicide cannot be implied from *Cruzan*").

refusal or cessation of life-sustaining medical treatment simply permits life to run its course, unencumbered by contrived intervention. Put another way, suicide frustrates the natural course by introducing an outside agent to accelerate death, whereas the refusal or withdrawal of life-sustaining medical treatment allows nature to proceed, i.e., death occurs because of the underlying condition.

. . . . There is a difference between choosing a natural death summoned by an uninvited illness or calamity, and deliberately seeking to terminate one's life by resorting to death-inducing measures unrelated to the natural process of dying.¹⁸²

To this, one might add the observations of the New York State Task Force on Life and the Law:

As . . . courts have recognized, the fact that the refusal of treatment and suicide may both lead to death does not mean that they implicate identical constitutional concerns. The imposition of life-sustaining medical treatment against a patient's will requires a direct invasion of bodily integrity and, in some cases, the use of physical restraints, both of which are flatly inconsistent with society's basic conception of personal dignity It is this right against intrusion — not a general right to control the timing and manner of death — that forms the basis of the constitutional right to refuse life-sustaining treatment. Restrictions on suicide, by contrast, entail no such intrusion, but simply prevent individuals from intervening in the natural process of dying.¹⁸³

182 *Kevoorkian*, 1994 WL 700448, at *11.

183 WHEN DEATH IS SOUGHT, *supra* note 34, at 71. The American Medical Association also recognizes a "fundamental difference between refusing life-sustaining treatment and demanding a life-ending treatment." AMA Council on Ethical and Judicial Affairs, Report No. I-93-8, at 2. The Council writes:

When a life-sustaining treatment is declined, the patient dies primarily because of an underlying disease. The illness is simply allowed to take its course. With assisted suicide, however, death is hastened by the taking of a lethal drug or other agent. Although a physician cannot force a patient to accept a treatment against the patient's will, even if the treatment is life-sustaining, it does not follow that a physician ought to provide a lethal agent to the patient. The inability of physicians to prevent death does not imply that physicians are free to help cause death.

Id. This view is consistent with a survey of hospital physicians and nurses showing 87% in agreement with the statement that "to allow patients to die by foregoing or stopping treatment is ethically different from assisting in their suicide." Solomon et al., *Decisions Near the End of Life: Professional Views on Life-Sustaining Treatment*, 83 AM. J. PUB. HEALTH 14, 17 (Jan. 1993).

The origin of the right to refuse unwanted medical treatment illustrates how different it is from an affirmative act of homicide or suicide. The right to refuse medical treatment is rooted in the common law right to be free of unwanted bodily contact, and even that right is not absolute.¹⁸⁴ By contrast, the common law has never recognized a right deliberately to take one's own life or to have one's life taken by others. Indeed, the Due Process Clause, which is framed as a guarantee against the *deprivation* of life as well as liberty, would be turned on its head were it construed to require the state to permit an individual to *abandon* his or her life and liberty. The law has never required the state to permit an individual completely to relinquish such interests even if that is what the individual wanted.

American law, for example, does not recognize under any circumstances a transaction to sell oneself into involuntary servitude.¹⁸⁵ A host of far less serious interests, and even statutory interests like the right to be paid a minimum wage, are nonwaivable.¹⁸⁶ Similarly, the law will not enforce an unconscionable bargain or a contract that violates public policy, even if the parties freely agreed to it.¹⁸⁷ If the law can prohibit waiver of these lesser interests, it would be inexplicable if the state were constitutionally required to stand idle while an individual, alone or with assistance, renounced the one interest upon which all others depend. Finding a liberty interest in deliberately taking one's own life, or in having another person's assistance in committing suicide, undermines both the Constitution's explicit protection of life

184 The government, for example, may compel vaccinations over an individual's objections. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). See also *Roe v. Wade*, 410 U.S. 113, 154 (1973) (noting that the Court has refused to recognize "an unlimited right to do with one's body as one pleases").

185 *City of Memphis v. Greene*, 451 U.S. 100, 120 (1981) (The Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States" (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1883))).

186 *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945) (minimum wage and overtime protections are non-waivable).

187 *E.g.*, *Freedman Truck Ctr., Inc. v. General Motors Corp.*, 784 F. Supp. 167, 178 (D.N.J. 1992) (observing that a "contract may be set aside where its purpose is contrary to the common good or . . . contains unconscionable terms"); *American Home Assurance Co. v. Cohen*, 815 F. Supp. 365, 370 (W.D. Wash. 1993) (noting that a court will not enforce contracts that "tend clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel" (quoting *LaPoint v. Richards*, 403 P.2d 889, 895 (Wash. 1965))).

and the traditional recognition that other, lesser interests cannot be waived.

An analysis of two recent trial court decisions finding a constitutional right to assisted suicide further illustrates the jurisprudential errors in such a theory. The first decision, *People v. Kevorkian*¹⁸⁸—later reversed on appeal¹⁸⁹—invalidated Michigan's statutory ban on assisted suicide. The trial judge in *Kevorkian* held that the Michigan statute, in violation of the United States Constitution, infringes upon the liberty of persons who decide to commit a "rational" suicide because such an action is "an intimate and personal choice" which is "implicated in the concept of ordered liberty."¹⁹⁰

The second decision, *Compassion in Dying v. Washington*,¹⁹¹ issued by a federal district judge sitting in Seattle, held that the State of Washington cannot constitutionally prohibit mentally competent, terminally ill persons from obtaining a physician's assistance in committing suicide provided they act knowingly, voluntarily, and without undue influence. The two decisions together provide a springboard for studying the jurisprudential errors to be avoided in considering whether assisted suicide is a fundamental or otherwise constitutionally protected right.

1. The *Kevorkian* Case

Retired pathologist Jack Kevorkian, after highly publicized incidents in which he admitted to using a homemade suicide machine to help several people kill themselves, was charged in Wayne County Circuit Court with violation of the Michigan law that makes it a felony to assist another person in committing suicide.¹⁹² Kevorkian claimed that the law violated the Due Process Clause of the Fourteenth Amendment by depriving persons of the fundamental right to end their lives.

188 *People v. Kevorkian*, No. 93-11482, 1993 WL 603212 at *20 (Mich. Cir. Ct. Dec. 13, 1993) (Kaufman, J.), *rev'd sub nom. Hobbins v. Attorney Gen.*, 518 N.W.2d 487 (Mich. Ct. App. 1994), *aff'd in part and rev'd in part*, *People v. Kevorkian*, Nos. 99591, 99674, 99752, 99758, 99759, 1994 WL 700448 (Mich. Dec. 13, 1994) (consolidated cases).

189. *See Hobbins v. Attorney Gen.*, 518 N.W.2d 487 (Mich. Ct. App. 1994), *aff'd in part and rev'd in part*, *People v. Kevorkian*, Nos. 99591, 99674, 99752, 99758, 99759, 1994 WL 700448 (Mich. Dec. 13, 1994) (consolidated cases).

190 *Kevorkian*, 1993 WL 603212, at *14.

191 *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994), *appeal docketed*, No. 94-35534 (9th Cir. June 3, 1994).

192 *See MICH. COMP. LAWS* § 752.1027 (1993).

The trial court found "significant support in our traditions and history for the view approving suicide or attempted suicide," but concluded that the historical record was too "murky" to provide sufficient grounds for disposing of Kevorkian's constitutional claim.¹⁹³ Like the decisions relating to marriage, procreation, child rearing, and abortion, the decision to take one's own life was "an intimate and personal choice,"¹⁹⁴ a "deeply personal decision of obvious and overwhelming finality."¹⁹⁵ For these reasons, the court concluded that "the decision to commit suicide, at least under some circumstances, can be deemed to be implicated in the concept of ordered liberty."¹⁹⁶

The trial court acknowledged that the state has a legitimate interest in preserving life. Indeed, the state's interest is "certainly a sufficient justification for the state to proscribe attempted suicide *under many, if not most, circumstances.*"¹⁹⁷ There were other circumstances, however, when "all reasonably objective observers would, at a minimum, sympathize with [the] person's desire to end [his or her] life."¹⁹⁸ Quoting extensively from a single article by a proponent of assisted suicide, the court concluded that in some cases, suicide is "rational."¹⁹⁹ A suicide, the court elaborated, was "rational" whenever all of the following factors were present:

[A] person's quality of life is significantly impaired by a medical condition and the medical condition is extremely unlikely to improve, and that person's decision to commit suicide is a reasonable response to the condition causing the quality of life to be significantly impaired, and the decision to end one's life is freely made without undue influence.²⁰⁰

The Michigan law, the court concluded, violated the Due Process Clause because it banned even such "rational" suicides.

193 *Kevorkian*, 1993 WL 603212, at *13 ("An appeal to history and tradition . . . cannot determine the result of this constitutional question").

194 *Id.* at *13 (quoting *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992)).

195 *Id.* at *14 (quoting *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 281 (1990)).

196 *Id.* at *14.

197 *Id.* (emphasis added).

198 *Id.*

199 *Id.* at *16-17 (quoting Richard B. Brandt, *The Rationality of Suicide*, in *SUICIDE: THE PHILOSOPHICAL ISSUES* 117-32 (M. Pabst Battin & David J. Mayo eds., 1980)).

200 *Kevorkian*, 1993 WL 603212, at *19. This definition of "rational suicide" is tautologous because it defines that notion in terms of a response to a medical condition which must in turn be "reasonable."

(a) *Failure To Recognize And Defer To Our Nation's History And Traditions.*—The first sign that the trial court in *Kevoorkian* substituted personal for constitutional notions of liberty is its departure from history. History and tradition, the court wrote, were only *one* test of the scope of the Due Process Clause. The other test was whether the claimed right was “implicit in the concept of ordered liberty.” Each test, the Michigan court concluded, was related to each other, but “distinct.”²⁰¹ The United States Supreme Court, however, has never held that historical grounding and “implicit[ness] in the concept of ordered liberty” are severable requirements. On the contrary, the Court has “insisted not merely that the interest denominated as a ‘liberty’ be ‘fundamental’ (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.”²⁰²

Indeed, it is difficult to understand how these requirements could be severed. How can an interest be “implicit in the concept of ordered liberty” if it has no basis in our institutions and traditions? Whether a claimed right is implicit in the concept of ordered liberty is not an *alternative* vehicle for finding it to be protected under the Due Process Clause when the history and traditions of our nation otherwise accord it no protection or recognition. Rather, that a right must be fundamental, at the base of our political and social institutions, or implicit in the very concept of ordered liberty are further qualifications as to *which* rights within our nation's history and tradition are considered to be so vital as to be assured protection under the Constitution.

The dangerous consequence of severing “ordered liberty” from history is evident when one considers the balance of the Michigan trial court's analysis. The court cast aside the fact that suicide has long been prohibited under both American and English common and statutory law, turning instead to one particular (and skewed) reading of ancient and medieval attitudes toward suicide. On the basis of the historical account of a single author sympathetic to assisted suicide, the trial court concludes that in

201 *Id.* at *8.

202 *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion). *See also Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (“Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful ‘respect for the teachings of history [and] solid recognition of the basic values that underlie our society.’”).

many circumstances suicide was acceptable in ancient Greek and Roman society and was not always condemned by the early Christian church.²⁰³ This reading of history is highly misleading. Ancient attitudes to suicide appear not to have been uniform, but there certainly is a tradition within Greek and Roman thought which condemned the practice.²⁰⁴ Likewise, Christianity has steadily condemned suicide.²⁰⁵

Even if the court had accurately interpreted the historical record, its decision would remain methodologically flawed. First, a constitutionally protected right surely cannot encompass conduct *expressly* prohibited throughout our nation's history. Protection of a particular interest "need not take the form of an explicit constitutional provision or statutory guarantee [to warrant protection under the Due Process Clause] but it must at least exclude . . . a societal tradition of enacting laws *denying* that interest."²⁰⁶ A court can hardly be charged with deferring to history and tradition when it elevates conduct that has been long condemned under our laws to the status of a constitutional right.²⁰⁷

Second, to identify an interest as a fundamental right because it may have been practiced in some parts of the ancient world, particularly when the same practice has been steadily condemned throughout our own nation's history, disregards our specifically American traditions and institutions. No one would seriously contend that parents can slaughter their children if weak or deformed, but the practice existed in ancient Greece. In some regions of Greece, a father could "expose his children on the moun-

203 *Kevorkian*, 1993 WL 603212, at *11.

204 Marzen et al., *supra* note 34, at 20-26.

205 Darrel W. Amundsen, *Suicide and Early Christian Values*, in *SUICIDE AND EUTHANASIA: HISTORICAL AND CONTEMPORARY THEMES* 77-153 (Baruch A. Brody ed., 1989).

206 *Michael H.*, 491 U.S. at 123 n.2; *see also* *Bowers v. Hardwick*, 478 U.S. 186, 192-95 (1986) (in light of longstanding proscriptions against homosexual sodomy, any claim that "such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious").

207 Laws requiring racial discrimination are a notable exception. The Fourteenth Amendment was enacted with the specific intent of uprooting racial discrimination. Such discrimination had become endemic in our nation's laws and traditions, so clearly the fact that some laws which furthered racial discrimination were on the books would not prevent one from finding such laws unconstitutional. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967). The practice of slavery and racial discrimination are precisely examples of "traditions from which [our nation] . . . broke." *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2806 (1992) (quoting Justice Harlan). In *Loving*, the Court again grounded its decision in history when it observed that the freedom to marry "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12.

taintops to die, or slaughter them on the altars of the thirsty gods."²⁰⁸ In Sparta, a child "that appeared defective was thrown from a cliff . . ."²⁰⁹ The existence of such a practice in antiquity obviously does not establish infanticide as a constitutional right. Indeed, the Court has rejected ancient attitudes when based on ideas that are inconsistent with those upon which our institutions rest.²¹⁰

The Michigan court's reliance upon *Cruzan* to find that suicide is implicit in the concept of ordered liberty is especially misplaced.²¹¹ *Cruzan* concluded that a state may require clear and convincing proof of the wishes of a patient in a persistent vegetative state before discontinuing artificially provided nutrition and hydration.²¹² The Court assumed only for the sake of disposing of that case that the discontinuation of such treatment was a liberty interest.²¹³ *Cruzan* is distinguishable from the *Kevorkian* case because the *Cruzan* court (a) involved the discontinuation of an allegedly intrusive and burdensome treatment, (b) upheld the state's interest in preserving the patient's life, and (c) assumed that discontinuation of treatment was at most a liberty interest, not a fundamental right.²¹⁴

It is also not clear what standard of judicial review the Michigan court actually applied in *Kevorkian*. At one stage, the court couches the issue in terms of fundamental rights,²¹⁵ and the court in fact uses the compelling interest test in concluding that a state could constitutionally enact a law outlawing suicide where no underlying objective illness was present.²¹⁶ At another stage of its analysis, however, the Michigan court, citing *Cruzan*, indicates that the state's interest in preserving life must "be weighed against the

208 WILL DURANT, *THE LIFE OF GREECE* 50 (1939).

209 *Id.* at 81.

210 Ancient Greek notions of child rearing, for example, were based on ideas about the relation between the individual and state which are "wholly different from those upon which our institutions rest," and no legislature could impose comparable restrictions upon our people "without doing violence to both letter and spirit of the Constitution." *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923).

211 *People v. Kevorkian*, No. 93-11482, 1993 WL 603212 at *14 (Mich. Cir. Ct. Dec. 13, 1993) (Kaufman, J.), *rev'd sub nom. Hobbins v. Attorney Gen.*, 518 N.W.2d 487 (Mich. Ct. App. 1994), *aff'd in part and rev'd in part*, *People v. Kevorkian*, Nos. 99591, 99674, 99752, 99758, 99759, 1994 WL 700448 (Mich. Dec. 13, 1994) (consolidated cases).

212 *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 284 (1990).

213 *Id.* at 279.

214 *Id.* at 279, 287.

215 *Kevorkian*, 1993 WL 603212, at *13.

216 *Id.* at *18.

constitutionally protected interests of the individual.”²¹⁷ Finally, the court invokes *Casey* to determine whether a blanket proscription on assisted suicide would “unduly burden” a person’s right to commit assisted suicide.²¹⁸ These are different standards of review, yet the Michigan court fails to adhere to or justify its selection of any *single* standard.

The fog thickens when the trial court attempts to apply these standards to the facts. In particular, the court’s conclusion that *rational* suicide is constitutionally protected appears to be based on an incorrect application of the rational relation test. The court concludes that the act of suicide (a) can sometimes be rational, (b) is a personal act, and therefore (c) is, whenever rational, entitled to constitutional protection. This reasoning ignores the real evidence which belies such a conclusion.²¹⁹

Moreover, traditional judicial review requires a court to determine whether the challenged *law* bears a rational relationship to a legitimate state objective, not whether the individual’s *conduct* is rational under particular circumstances. Otherwise, *any* reasonable act, provided it could be characterized as “personal” or “intimate,” would be beyond the state’s power to regulate. In such a bizarre world, laws would be felled right and left by the constitutional axe upon a simple articulation of some rational basis for engaging in prohibited activity, activity that few would dispute is within the authority of state legislatures to regulate and even to proscribe. Thus, the Michigan court’s error leaves great room for mischief. For if conduct need only be personal and rational to qualify for constitutional protection, then vast areas of private conduct will lie beyond the scope of legislation—all by virtue of a judicial interpretation that increasingly loses sight of the “order” in “ordered liberty.”²²⁰

217 *Id.* at *14.

218 *Id.* at *19.

219 *See supra* Part II.B.

220 The court’s conclusion that the state’s interest in preserving life has a “qualitative component” that must take account of the rationality or irrationality of the particular suicide is also ill-founded. The Michigan court cites *Cruzan* and *Buck v. Bell*, 274 U.S. 200 (1927). *Cruzan* held that states may assert an unqualified interest in preserving life, so it supports a conclusion opposite to that reached by the court. *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 282 (1990) (“[W]e think a State may properly decline to make judgments about the ‘quality’ of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual.”). *Buck* upheld the forced sterilization of retarded persons and is now universally discredited.

The Michigan Court of Appeals reversed the judgment of the trial court. Recognizing that certain activities relating to marriage, procreation, contraception, family relationships, and child bearing have been accorded due process protection, the intermediate appellate court concluded that a right to terminate one's life is not a logical extension of this catalog of rights. The Michigan Supreme Court agreed. "It would be an impermissibly radical departure from existing tradition," the Supreme Court wrote, "and from the principles that underlie that tradition, to declare that there is . . . a fundamental right [to suicide] protected by the Due Process Clause."²²¹

(b) *Failure To Identify With Specificity The Interest For Which Constitutional Protection is Sought.*—The Michigan trial court also erred in ranking assisted suicide as a fundamental right merely because of the personal nature of a decision to commit suicide. When it finally came time to state precisely why "rational" suicide is a "right," the court wrote:

[T]here can be little doubt that the decision to commit suicide involves an intimate and personal choice, and given the nature of the decision certainly ranks among the most important that a person may make concerning one's own being. As succinctly put by the Court in *Cruzan*, . . . the choice between life and death is a deeply personal decision of obvious and overwhelming finality. In this Court's view, therefore, the decision to commit suicide, at least under some circumstances, can be deemed to be implicated in the concept of ordered liberty.²²²

The fact that a choice is "intimate and personal" is not a principled reason for concluding that it is a constitutionally protected liberty. One must look to the specific conduct at issue. Presumably, the decision to engage in a duel or marry a sibling is intimate and personal. Yet there is no constitutional right to engage in such conduct.²²³ Thus, the fact that a decision may be intimate and personal is hardly grounds for holding that it is a constitutionally protected right.

(c) *The Tendency To Legislate.*—The Michigan trial court com-

221 *People v. Kevorkian*, Nos. 99591, 99674, 99752, 99758, 99759, 1994 WL 700448, at *14 (Mich. Dec. 13, 1994).

222 *Kevorkian*, 1993 WL 603212, at *14.

223 *See supra* Part III.A.

mits a third jurisprudential error. In deciding when suicide is "rational" and when it is not, the court makes the sort of fine-tuned distinctions that are more characteristic of a legislature than a court. The court reaches the rather difficult-to-parse conclusion that

when a person's quality of life is significantly impaired by a medical condition *and* the medical condition is extremely unlikely to improve, *and* that person's decision to commit suicide is a reasonable response to the condition causing the quality of life to be significantly impaired, *and* the decision to end one's life is freely made without undue influence, such a person has a constitutionally protected right to commit suicide.²²⁴

Of course, whether and when these conditions are *ever* present requires the type of inquiry that counsels *against* any legislative judgment to permit suicide. One need only note, for example, that enforcing the court's decision requires one to define such terms as "significantly impaired," "extremely unlikely to improve," "reasonable response," "quality of life," "significant impairment," and "undue influence." In essence, the court's holding calls for line-drawing as complex as any statute or regulation, a tell-tale sign that the court has left the province of the judiciary and entered the province of the legislature.²²⁵ Does the Due Process Clause, a provision itself cast in highly general terms, really mandate such fine-tuned distinctions when a state decides to prevent suicide?

Moreover, if the fact that a choice is "intimate and personal" is enough to guarantee its protection under the Due Process Clause, one wonders why the intimate and personal decision to commit suicide in principle should be limited only to those cases where all of the cited conditions are present. A decision to commit suicide because of a business failing or family tragedy seems just as intimate and personal as a decision to commit suicide based on other reasons or no reason.

Nor is there any principled way to limit the exercise of a judicially announced right to suicide only to those conditions specified in the trial court's opinion.²²⁶ As we have seen, judicial

224 *Kevoorkian*, 1993 WL 603212, at *19 (emphasis added).

225 *See, e.g., Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2860 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) ("We believe that the sort of constitutionally imposed abortion code of the type illustrated by our decisions following *Roe* is inconsistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does.") (internal quotation marks omitted).

226 *See, e.g., Kevoorkian*, 1994 WL 700448, at *39 n.41 (holding that there is no right

rules tend to expand to (and even beyond) the limits of their own logic.²²⁷ Parallels to federal and state court abortion decisions are especially apposite.

Beginning in *Roe*, the Supreme Court announced a rule that it claimed was not absolute. A woman, it insisted, was not isolated in her privacy.²²⁸ The Court then proceeded in subsequent decisions to make the abortion decision precisely all it had disclaimed. Thus, no person, not even the father of the woman's child, could prevent the child's destruction; nor could the state even require that the mother consult with the child's father before having the abortion.²²⁹ The state was also proscribed from providing the woman with information about her unborn child that might tend to encourage childbirth rather than abortion.²³⁰ The slippery slope continued: if adult women had the right, so did minors.²³¹ If women and minors had the right, so did incompetents.²³² One state court has even held that the right to destroy fertilized embryos outside the uterus resides with the father seeking their destruction; in other words, when the mother wants to preserve her fertilized extra-uterine eggs, the father can compel their destruction.²³³ What began as a right to control one's "intimate and personal choices" with respect to abortion has expanded (or deteriorated) into an ethos in which any person's decision to destroy or take life trumps all other interests.

2. The *Compassion In Dying* Case

(a) *Likening Suicide To Abortion*.—Similar jurisprudential errors mark a federal district court's decision on Washington's criminal

to suicide, and noting that "there would be no principled basis for restricting a right to commit suicide to the terminally ill").

227 The experience in the Netherlands attests to the reality of the slippery slope. See Hentoff, *supra* note 85. For an analogous discussion of the slippery slope in the abortion context, see generally Chopko, *supra* note 86.

228 *Roe v. Wade*, 410 U.S. 113, 153-54 (1973).

229 See, e.g., *Casey*, 112 S. Ct. at 2791 (state may not require a woman seeking an abortion to notify her husband); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (state may not require a woman seeking an abortion to obtain the consent of her husband).

230 *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), *overruled in part by Casey*, 112 S. Ct. at 2868.

231 See generally *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *H. L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979).

232 See Larry Lange, *Judge Approves Abortion for Retarded Rape Victim*, SEATTLE POST-INTELLIGENCER, Dec. 1, 1993, at A1.

233 *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 113 S. Ct. 1259 (1993).

ban on assisted suicide. The court in *Compassion in Dying v. Washington*²³⁴ held that the State of Washington could not legally bar competent, terminally ill adults from obtaining assistance in committing suicide.²³⁵ The decision is distinguishable in some ways from the trial court decision in *Kevorkian* because the court restricts its due process analysis to a consideration of whether assisted suicide is a liberty interest.²³⁶ Thus, the court does not inquire whether suicide is a fundamental right, and engages in no historical analysis of the asserted interest in taking one's own life.

Nevertheless, like the trial court in *Kevorkian*, the court in *Compassion in Dying* concludes that because the decision to commit suicide involves "the most intimate and personal choices a person may make in a lifetime," that choice is a liberty interest.²³⁷ The court relies heavily on *Casey*, which is not particularly helpful precedent because it depended so heavily upon *stare decisis*. As noted earlier, seven justices believe that *Roe* was either incorrectly decided or have sufficient doubt about its correctness to refrain from affirming it on its original grounds.²³⁸ Thus, the abortion right, standing as it does on tenuous grounds, is hardly persuasive precedent for the identification of other interests for which expectations have not already become settled.²³⁹

Likewise, the trial court's application of the undue burden standard—the standard that a plurality now applies to abortion—is difficult to square with *Cruzan*. Refusing life-sustaining treatment is different than suicide,²⁴⁰ but suicide and refusing treatment seem to bear greater resemblance to each other than suicide does to abortion. Yet in *Cruzan* the Court did *not* apply the undue burden standard. It applied a balancing test.²⁴¹ Why the district court in *Compassion in Dying* decided upon the undue burden standard, and not the balancing test used in *Cruzan*, is even more puzzling given the fact that the district court, for purposes of its constitu-

234 850 F. Supp. 1454 (W.D. Wash. 1994), *appeal docketed*, No. 94-35534 (9th Cir. June 3, 1994).

235 *Id.* at 1462.

236 *Id.* at 1459-62.

237 *Id.* at 1459-60, 1462.

238 *See supra* notes 99-104 and accompanying text.

239 *See supra* notes 175-76 and accompanying text.

240 *See supra* notes 181-84 and accompanying text.

241 *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) ("whether . . . [Nancy Cruzan's] constitutional rights have been violated must be determined by balancing . . . [her] liberty interests against the relevant state interests" (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982))).

tional analysis, elsewhere finds no constitutionally relevant distinction between refusal of treatment and suicide.²⁴²

Any claimed similarity between suicide and abortion merely underscores the fact that the Supreme Court has never adequately explained why the Constitution would ban any law prohibiting the taking of *any* human life. That the Supreme Court has erected such a constitutional barrier for unborn children is not a justification for now extending the barrier to the terminally ill. It is especially unpersuasive given the Supreme Court's inclination to defend *Roe* on grounds of *stare decisis* rather than upon any principle of constitutional adjudication.

In any event, to deny that there is any constitutionally *permissible* distinction between abortion and suicide is astonishing and wrong. Suicide alone amounts to a complete and irrevocable renunciation of the agent's life and liberty. Indeed, apart from the fact that it is a personal decision of grave importance, the district court in *Compassion in Dying* simply fails to articulate any grounds for likening suicide to abortion. Yet, if a decision need only be "personal" to qualify as a liberty interest, then the number of interests entitled to constitutional protection (and thus beyond the scope of state regulation) would be large indeed. The decision to use a hallucinogenic drug or engage in any number of other equally personal activities is subject to regulation and, in some cases, an outright ban depending on the precise nature of the activity. The personal nature of suicide proves nothing because it proves too much.

(b) *The Distinction Between Suicide And Refusing Medical Treatment.*—*Compassion in Dying* turns *Cruzan* on its head. After acknowledging *Cruzan's* assumption that a competent person has a protected liberty interest in refusing unwanted medical treatment, the district court in *Compassion in Dying* goes on to conclude that (a) the Supreme Court would, if confronted with the issue, decide that refusing unwanted medical treatment is a liberty interest, and (b) there is no constitutional basis for distinguishing between refusing unwanted medical treatment and suicide.²⁴³ The latter conclusion is expressed in no more than a single paragraph. The court writes:

242 *Compassion in Dying*, 850 F. Supp. at 1461.

243 *Id.*

The liberty interest protected by the Fourteenth Amendment is the freedom to make choices according to one's individual conscience about those matters which are essential to personal autonomy and basic human dignity. There is no more profoundly personal decision, nor one which is closer to the heart of personal liberty, than the choice which a terminally ill person makes to end his or her suffering and hasten an inevitable death. From a constitutional perspective, the court does not believe that a distinction can be drawn between refusing life-sustaining medical treatment and physician-assisted suicide by an uncoerced, mentally competent, terminally ill adult.²⁴⁴

The personal nature of suicide therefore forms the basis of the court's conclusion not only that suicide is a protected liberty but that it is indistinguishable from refusing unwanted medical treatment. This conclusion seems to rest on the kind of narrow utilitarian ethic that looks only to the immediate consequences of an action. The law simply does not operate that way. The legality of conduct quite often turns upon the intention of the actor and the circumstances.²⁴⁵

Moreover, the court fails to consider the adverse consequences of suicide to the deceased, to the decedent's family, or to others who may be contemplating suicide. Without analysis or comment, the court also disregards a long line of cases that have drawn a distinction between the refusal of life-sustaining treatment and suicide.²⁴⁶ It was this distinction that led courts to conclude in the first place that under some circumstances an individual could refuse life-sustaining treatment. The underlying presumption was that states always have and always can proscribe an affirmative act of homicide or suicide. Incredibly, this presumption was cast aside in *Compassion in Dying* with no recognition of the long-recognized distinction between refusing treatment and suicide. What is worse, it was cast aside not as a legislative judgment, but *as a matter of constitutional law*. Why the Constitution should command states to treat the refusal of treatment just as it treats suicide is nowhere justified in the court's decision.

244 *Id.*

245 *See, e.g.*, 21 AM. JUR. 2D *Criminal Law* §§ 129-57.

246 *Compassion in Dying*, 850 F. Supp. at 1461; *see also supra* notes 43-45 and accompanying text (discussing cases recognizing the distinction).

IV. CONCLUSION

Responsibility for answering the pressing questions of the day, including the issue of suicide, ultimately resides with the people of our nation and communities. That is the very essence of a democracy. Requiring that the answers be devised within constitutional limits does not undermine democracy. The Constitution itself is a consensual document, representing the will of our people. But if our Constitution becomes simply a font into which our courts pour their own values in disregard of the traditions and history that have shaped our nation, they will be disregarding the will of the nation that holds to the Constitution as its charter.²⁴⁷ We will then cease to be a nation of constitutional and democratic government, and will be ruled instead by judicial fiat.

The *Quill* decision reminds us that “[u]nder the United States Constitution and the federal system it establishes, the resolution of [the] issue [of assisted suicide] is left to the normal democratic processes within the State.”²⁴⁸ The question “is appropriately left to the citizenry for resolution.”²⁴⁹ However, there is another dimension to the problem which we have not discussed. If, as we have argued, states are not constitutionally *required* to permit assisted suicide, are they constitutionally *prohibited* from exempting some special class of persons (such as the terminally ill) from the usual protections that citizens enjoy against their own suicidal wishes? This question, deemed serious enough to justify the issuance of a preliminary injunction of the Oregon Act, still remains to be answered.

The consequences of ignoring history and tradition in either

²⁴⁷ One justice writes:

Because the Constitution itself is ordained and established by the people of the United States, constitutional adjudication by this Court does not, in theory at any rate, frustrate the authority of the people to govern themselves through institutions of their own devising and in accordance with principles of their own choosing. But decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation.

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 787 (1986) (White, J., dissenting).

²⁴⁸ Quill v. Koppell, No. 94 Civ. 5321, 1994 WL 702800, at *8 (S.D.N.Y. Dec. 15, 1994).

²⁴⁹ People v. Kevorkian, Nos. 99591, 99674, 99752, 99758, 99759, 1994 WL 700448, at *14 (Mich. Dec. 13, 1994) (consolidated cases).

the judicial or legislative forum are serious. A nation, like a person, can lose its moral compass if it disengages itself from the traditions from which it was born. Those traditions, enshrined in and protected by law, shape us as a nation and as local communities. Our nation and local communities in turn shape personal character, which makes moral understanding of any kind possible. The content of our laws is therefore critical to who we become. The law must take into account not just the legal status of the individual, but a proper understanding of the common good. As Mary Ann Glendon has pointed out,²⁵⁰ Americans have a rich vocabulary for describing individual rights and a remarkably impoverished vocabulary for describing communitarian interests. The prevailing ethic, sadly, seems to be to preserve at any cost the individual even to the extent of isolating him from the human community altogether. Many (including us) would say that this isolation has already taken place in the case of abortion, and it threatens to happen again in the case of assisted suicide.

A recent reflection on the consequences of an ethos in which personal choice trumps all other interests is a fitting conclusion to this study on assisted suicide:

The contention that there is no objective or universal truth has achieved a measure of official status among us by fiat of the Supreme Court. In *Planned Parenthood v. Casey*, . . . [it] declared that it is up to each individual to determine "the concept of existence, of meaning, of the universe, and of the mystery of human life" When truth itself is democratized—when truth is no more than the will of each individual or a majority of individuals—democracy, deprived of the claim to truth, stands naked to its enemies. Thus does freedom, when it is not "ordered to truth," undo freedom.²⁵¹

Much the same can be said of assisted suicide. As a society, we have never permitted an individual to give up all his rights and liberties, and we should not begin now to permit the exercise of a "freedom" that amounts to a renunciation of freedom. We should stand firm against this last claimed "choice," lest we surrender the value upon which all our liberty rests.

250 See generally MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

251 Richard Neuhaus, *The Splendor of Truth: A Symposium*, FIRST THINGS, Jan. 1994, at 15.