STATE OF MICHIGAN

IN THE COURT OF APPEALS

TERESA HOBBINS; MARIE DeFORD; KENNETH A. SHAPIRO, KENNETH WEINBERGER, M.D.; WILLIAM DRAKE, Pharm. D.; ELLIOTT D. LUBY, M.D.; NORMAN BOLTON, M.D.; KENNETH TUCKER, M.D.; KATHRYN UPTON, M.D.; AND B. ELLIOT GRYSON, M.D., J.D.,

Plaintiffs-Appellees,

v.

ATTORNEY-GENERAL OF MICHIGAN,

Defendant-Appellant.

Court of Appeals
No. 164963

Wayne County Circuit
No. 93-306178-AZ

BRIEF AMICUS CURIAE ON BEHALF OF CERTAIN MICHIGAN STATE SENATORS AND REPRESENTATIVES IN SUPPORT OF APPELLANT ATTORNEY GENERAL OF MICHIGAN

ORAL ARGUMENT NOT REQUESTED BY AMICI

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Question Presented for Review

WHETHER THERE IS A RIGHT, EITHER UNDER THE LIBERTY LANGUAGE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, OR UNDER THE DUE PROCESS LANGUAGE OF ART. I, § 17 OF THE 1963 MICHIGAN CONSTITUTION, TO COMMIT SUICIDE OR TO THE ASSISTANCE OF OTHERS IN COMMITTING SUICIDE.

Amici curiae answer, "No."

The Circuit Court said, "Yes."

List of Amici

Sen. Douglas Carl (9th Dist.)
Sen. George Z. Hart (10th Dist.)
Sen. Jack Welborn (13th Dist.)
Sen. Paul Wartner (21st Dist.)
Sen. William Van Regenmorter (23rd Dist.)
Sen. Gilbert J. DiNello (26th Dist.)
Sen. Dick Posthumus (31st Dist.)
Senate Majority Leader
Sen. Joanne G. Emmons (36th Dist.)
Sen. George McManus, Jr. (37th Dist.)

Rep. Al Kukuk (33rd Dist.)
Rep. Dale L. Shugars (61st Dist.)
Rep. Jack Horton (73rd Dist.)
Rep. Richard A. Bandstra (75th Dist.)
Rep. Clark A. Harder (85th Dist.)
Rep. Jessie F. Dalman (90th Dist.)
Rep. Michael J. Goschka (94th Dist.)
Rep. John T. Llewellyn (100th Dist.)

Interest of the Amici

Amici curiae are a bipartisan group of Michigan state senators and representatives who voted in favor of 1992 PA 270, as amended by 1993 PA 3, and who vigorously oppose efforts to legalize assisted suicide, whether in the legislature or in the courts. At the outset, it must be noted that the prohibition of assisted suicide simply fills a gap in the existing structure of the law. No State accepts the consent of the victim as a defense to homicide or benevolent motive as an excuse. Public Act 270 reaffirms these well-established principles of criminal law and applies them to anyone who, knowing "that another person intends to commit or attempt to commit suicide," intentionally "provides the physical means" or "participates in a physical act" by which the other person attempts or commits suicide. Id. § 7(1). The purpose of PA 270 is to make clear that deliberately assisting another person in ending his life is criminal, regardless of whether the one who assists could be charged with homicide.

Amici firmly believe that there is no social, economic or personal need to legalize assisted suicide. Assisted suicide proposals are driven by fear--fear of pain, fear of isolation, fear of dependence and loss of control, fear of impoverishment. All of these fears can and should be addressed, but that is not what advocates of assisted suicide propose. Their intention is not to lower these fears through creative responses to human suffering but to heighten them by professing powerlessness and despair. Their message is a simple one--that pain cannot be

controlled, that illness inevitably brings loneliness, that medical treatment is mandatory and that hospitalization is unavoidable and ruinous. Having stated the problem in such stark, bleak terms, their solution, that the law should sanction lethal choices, comes as no surprise. But this represents a failure of imagination and is a confession of moral bankruptcy.

Amici note that with rare exceptions, physical pain can be managed by aggressive drug therapy. Psychological dimensions of pain must be considered as well as physical ones. The isolation of illness can be reduced through the support of families and the community, as well as the creation of a caring environment in which one is treated. The sense of dependence and loss of control that so often accompany hospitalization can be lessened through an awareness that medical treatment is optional and may be refused. In enacting the durable power of attorney for health care act, Mich. Comp. Laws Ann. § 700.496 (West 1992 Supp.) [Mich. Stat. Ann. § 27.5496 (1992)], amici and other state legislators have provided a method by which persons may exercise their right to refuse medical treatment in the event that they become incompetent. Public Act 270 does not affect exercise of that right. Id. § 7(2). No one is required to endure heroic efforts to save his life--one can die a dignified natural death. The expense of hospitalization can be alleviated by a variety of alternatives, including hospice care and home care, where appropriate, and by requiring life insurance carriers to offer pre-death payments in case of terminal illness, as some already

do. The fears that fuel the drive toward legalized suicide can be alleviated in constructive, not destructive, ways.

Notwithstanding intense pressure by advocates of assisted suicide to persuade the public, state legislatures and the media that deliberately-induced death should be a legal option, no State has yet succumbed to such proposals. Assisted suicide initiatives were defeated in public referenda in California and Washington in the last two years. And efforts to place such initiatives on the ballot fell short in several other States. Having failed in the legislatures, suicide advocates have turned to the courts, in the hope that the courts will grant what the legislatures did not. Suicide advocates, however, should fare no better in the courts for there is no basis on which one may postulate a constitutional right to suicide or assistance in committing suicide. In ruling otherwise, the Circuit Court confused the long-standing common law right to refuse medical treatment with a heretofore unrecognized constitutional right to assisted suicide.

Statement of Facts[1]

Plaintiffs, seven health care professionals, two terminally ill persons and one of their friends, brought an action seeking declaratory and injunctive relief against enforcement of 1992 PA 270, as amended by 1993 PA 3, the law banning assisted suicide. In an amended opinion and order entered on May 24, 1993, the

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[1] Amici curiae generally adopt the Statement of Facts as set forth in the Brief of the Attorney General.

Circuit Court held that PA 270 violated Art. IV, § 24, of the Michigan Constitution in two respects: First, PA 270 had a title which did not relate to its object and, second, it was changed from its original purpose.

The court's ruling on Art. IV, § 24 "obviate[d] the need for an injunction." Op. at 14. As an alternative basis for blocking immediate enforcement of PA 270, the court opined that the "right of self determination" rooted in the Due Process Clause of the Fourteenth Amendment of the United States Constitution and in Art. I, § 17, of the 1963 Michigan Constitution "includes the rights [sic] to choose to cease living." Op. at 18. No cases construing the Michigan Constitution were cited in support of this novel holding which appears to be based almost entirely upon an egregious misreading of the United States Supreme Court's decision in Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 281 (1990), and a conspicuous failure to distinguish between refusing medical treatment, which may result in death from natural causes, and causing death by a direct act.

The Circuit Court acknowledged that this "right to die" had to be balanced against countervailing state interests, Op. at 20-21, but, borrowing the "undue burden" test from Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992), stated that Michigan could not place "an undue burden or restriction on that right." Op. at 21. Without a developed record, the court declined to decide whether P.A. 270 imposes such a burden upon the plaintiffs in this case. Nevertheless,

the court indicated that it would have enjoined enforcement of the law had not its decision on the Art. IV, § 24 issues made ruling on the request for injunctive relief unnecessary.

In their Brief to this Court, amici dispute the Circuit Court's suggestion that there is a constitutional "right[] to choose to cease living," i.e., a right to suicide or assistance in its commission. For discussion of other issues, they rely upon the Briefs of the Attorney General and supporting amici.

SUMMARY OF ARGUMENT

"The life of every human being is under the protection of the law, and cannot be lawfully taken by himself, or by another with his consent, except by legal authority." Commonwealth v. Mink, 123 Mass. 422, 425 (1877).

In holding that there is a "right to cease living" the Circuit Court failed to grasp an essential distinction which every other court and all state legislatures have understood: that there is a critical difference between passively allowing death to occur by withholding or withdrawing life-sustaining medical treatment, and actively causing death (one's own or another's) by an act that ends life. All States, by statute or case law, recognize the right of a person or his agent acting on his behalf to refuse unwanted medical treatment but no State permits mercy-killing, euthanasia or assisted suicide. Indeed, the very same statutes that authorize living wills and durable powers of attorney expressly condemn assisted suicide. The distinction, throughout the law, is one of causation. Generally, an act that is intended to cause death, and which causes death, is homicidal or suicidal; normally, an omission that results in

death due to natural causes is not. The failure to understand this essential distinction underlies the Circuit Court's erroneous view that there is a constitutional right to suicide or to assistance in its commission. There is no such right.

The uniform condemnation of suicide and assisted suicide at common law and under state statutes strongly suggests that there is no constitutionally protected liberty interest in either committing or assisting suicide. The decriminalization of suicide reflected compassion for survivors of suicide, not approval of the act of suicide. As the United States Supreme Court has recognized, States have "an unqualified interest in the preservation of human life" and in the prevention of suicide. Cruzan v. Director, 497 U.S. at 282. That interest is manifested in laws prohibiting assisted suicide, allowing nondeadly force to be used to prevent suicide, and providing for the involuntary commitment of those who attempt suicide. There is no "right" to commit suicide, with or without the assistance of others.

Whether assisted suicide should remain illegal presents a question for the legislature, not the judiciary, to answer. That issue will be considered by a special commission authorized by the law. But the Michigan Legislature has determined that assisted suicide will be criminal while the entire matter of suicide is being reviewed. That determination is not invalid. The prohibition of assisted suicide in PA 270 is constitutional. Accordingly, amici respectfully request that the judgment below be reversed in its entirety.

ARGUMENT

I. THE PURPOSE OF PA 270 IS TO MAKE CLEAR THAT ASSISTED SUICIDE IS A CRIMINAL OFFENSE, REGARDLESS OF WHETHER THE ONE WHO ASSISTS COULD BE CHARGED WITH HOMICIDE.

Under well-established principles, the law does not accept the consent of the victim as a defense to a charge of homicide[2] or benevolent motive as an excuse.[3] The courts of several States, including Michigan, have held that deliberately assisting another person in killing himself is homicide, even though the deceased performed the act causing death.[4] But the line between

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[2] State v. Cobb, 229 Kan. 522, 524-26, 625 P.2d 1133, 1135-36 (1981); State v. Ludwig, 70 Mo. 412, 415 (1879); State v. Fuller, 203 Neb. 233, 241, 278 N.W.2d 756, 761 (1979); Turner v. State, 119 Tenn. 663, 670-71, 108 S.W. 1139, 1141 (1907); Martin v. Commonwealth, 184 Va. 1009, 1018-19, 37 S.E.2d 43, 47 (1946).

[3] Gilbert v. State, 487 So.2d 1185, 1190 (Fla. Dist. Ct. App. 1986), review denied, 494 So.2d 1150 (Fla. 1986); Eichner v. Dillon, 73 A.D. 2d 431, 450, 426 N.Y.S.2d 517, 533 (1980), aff'd as modified sub nom. In re Storar, 52 N.Y.2d 363, 438 N.Y.S. 266, 420 N.E.2d 64 (1981), cert. denied, 454 U.S. 858 (1981).

[4] See People v. Roberts, 211 Mich. 187, 195-98, 178 N.W. 690, 692-93 (1920) (defendant, at the request of his incurably-ill wife, mixed a poison and placed it within her reach; she took it and died); McMahan v. State, 168 Ala. 70, 73-76, 53 So. 89, 90-91 (1910) (pursuant to suicide pact, deceased shot himself in presence of defendant who did not shoot himself; since suicide is self-murder, defendant, who encouraged and was present, was guilty of self-murder); Burnett v. Illinois, 204 Ill. 208, 218-25, 68 N.E. 505, 509-11 (1903) (paramour, in stupefied condition, prepared poisoned drink for himself and his mistress which they both drank; only the mistress died); State v. Marti, 290 N.W.2d 570, 580-81 (Iowa 1980) (defendant provided gun to deceased who shot and killed herself, knowing that she was suicidal); Commonwealth v. Hicks, 188 Ky. 637, 640-43, 82 S.W. 265, 266-67 (1904) (ruling that it is murder to aid another to commit suicide, as by furnishing him the poison, though the abettor is not present when the suicide kills himself); Commonwealth v. Bowen, 13 Mass. 356, 358-60 (1816) (defendant, a prison inmate, advised a fellow prisoner, who was to be executed the next day, to commit suicide and "cheat the hangman" and witnesses to the execution; court instructed jury that if the advice persuaded the

assisted suicide and homicide is not always clear. See State v. Marti, 290 N.W.2d 570, 580-81 (Iowa 1980). Other courts have held that only one who performs, or assists in performing, the act causing death is guilty of homicide. In State v. Bouse, 199 Or. 676, 264 P.2d 800 (1953), the court distinguished assisted suicide from homicide by focusing on who actually caused death:

> [T]he [assisted suicide] statute does not contemplate active participation by one in the overt act directly causing death. It contemplates some participation in the events leading up to the commission of the final overt act, such as furnishing the means for bringing about death,--the gun, the knife, the poison, or providing the water, for the use of the person who himself commits the act of self-murder. But where a person actually performs, or actively assists in performing, the overt act resulting in death, such as shooting or stabbing the victim, administering the poison or holding one under water until death takes place by drowning, his act constitutes murder, and it is wholly immaterial whether this act is committed pursuant to an agreement with the victim, such as a mutual suicide pact.

Id. at 702-03, 264 P.2d at 812. Accord: People v. Matlock, 51 Cal.2d 682, 693-94, 336 P.2d 505, 510-11 (1959); State v. Cobb, 229 Kan. 522, 524-26, 625 P.2d 1133, 1135-36 (1981); State v.

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fellow-prisoner, it would be murder); Blackburn v. State, 23 Ohio St. 146, 162-64 (1872) (furnishing poison to a suicide with intent that she should take it, by one who agrees but fails to join in the suicide, is murder, though suicide is no crime), but see State v. Sage, 31 Ohio St. 3d 173, 175-79, 510 N.E.2d 343, 348-49 (1987) (contra); State v. Jones, 86 S.C. 17, 21-22, 67 S.E. 160, 165 (1910) (approving jury instruction that one who persuades another to commit suicide is guilty of murder, if the persuasion is an inducing cause of the suicide). But see Sanders v. State, 54 Tex. Crim. Rep. 101, 104-05, 112 S.W. 68, 70 (1908), overruled on other grounds, Aven v. State, 102 Tex. Crim. 478, 277 S.W. 1080 (1925) (furnishing the means for committing suicide, knowing the end to which they will be placed, is no crime). This view has been described by two leading criminal law authorities as "most certainly unsound." See 2 LaFave and Scott, Substantive Criminal Law, § 7.8(c) at 249 (1986).

Fuller, 203 Neb. 233, 241, 278 N.W.2d 756, 761 (1979).

The Michigan Supreme Court's decision in Roberts was called into question by the Court of Appeals in People v. Campbell, 124 Mich. App. 333, 335 N.W.2d 27 (1983), leave to appeal denied, 418 Mich. 905 (1984), where the court held that incitement to commit suicide was not criminal. Based on Campbell, homicide charges against Dr. Jack Kevorkian were dismissed because he did not set the death-causing process in motion. Public Act 270 was enacted in response to these judicial developments. The purpose of PA 270 is to make clear that deliberately assisting another person in committing suicide is criminal, regardless of whether the one who assists could be charged with homicide under Michigan law.

II. ONLY FUNDAMENTAL RIGHTS, IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY AND HISTORICALLY AND TRADITIONALLY CONSIDERED BEYOND THE PROPER SCOPE OF GOVERNMENT REGULATION, ARE PROTECTED BY THE LIBERTY LANGUAGE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The United States Supreme Court has recognized that certain fundamental rights are protected by the Due Process Clause of the Fourteenth Amendment. Due process protects those rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), or which are "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937). For any right to be considered fundamental, it must be grounded in the history and traditions of our society and be basic to our civil and political institutions. See Palko, 302 U.S. at 328, and Meyer v. Nebraska, 262 U.S. 390, 400-02 (1923). In Duncan v.

Louisiana, 391 U.S. 145 (1968), for example, the Court, in holding that the right to jury trial is fundamental, emphasized the historical role of jury trials in the "Anglo-American regime of ordered liberty." Id. at 149 n.14.

In Bowers v. Hardwick, 478 U.S. 186 (1986), the Supreme Court forcefully reiterated these principles of constitutional analysis in rejecting the claim that the Constitution confers a fundamental right upon homosexuals to engage in sodomy. The Court noted that "the Due Process Clauses of the Fifth and Fourteenth Amendments . . . have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription." Id. at 191. Some of these cases recognized "rights that have little or no textual support in the constitutional language." Id. To guard against the danger of "the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection." Id.

Thus, in Palko v. Connecticut, 302 U.S. at 325, 326, the Court stated that this category of rights includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A broader formulation of fundamental liberties was set forth in Justice Powell's opinion in Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (opinion of Powell, J.), where they are characterized as those

liberties that are "deeply rooted in this Nation's history and tradition." Id. at 503 (Powell, J.). In Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court acknowledged that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." Id. at 152.

In rejecting the argument that homosexuals have a fundamental right to engage in acts of consensual sodomy, the Court in Bowers noted that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights." The Court noted further that in 1868, when the Fourteenth Amendment was ratified, "all but 5 of the 37 States in the Union had criminal sodomy laws." Finally, the Court pointed out that until 1961, "all 50 States outlawed sodomy, and today, 25 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults." In light of the law's longstanding prohibition of sodomy, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." 478 U.S. at 192-94.[5]

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[5] The Court has continued to rely upon historical traditions in evaluating asserted claims of constitutional right not based upon an explicit constitutional text. See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 122 n.2, 120-29 (1989) (natural father of child conceived in adulterous relationship lacked protected liberty interest in asserting parental rights over the child).

In Bowers, the Court declined to take a more expansive view of its authority "to discover new fundamental rights imbedded in the Due Process Clause." 478 U.S. at 194.

> The Court is 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 design of the Constitution. . . . There should be . . . great resistance to expand the substantive reach of those Clauses, particularly if it requires the category of rights deemed to be fundamental. Otherwise, the Judiciary takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Id. at 194-95.

When these well-established principles of constitutional analysis are applied to the question of suicide, it is readily apparent that the Circuit Court's alternative holding for its decision, i.e., that the Due Process Clause of the Fourteenth Amendment protects a right to suicide or assistance in its commission, is wrong and its judgment must be reversed.[6]

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[6] The due process language of Art. I, § 17 of the 1963 Michigan Constitution and the due process language of § 1 of the Fourteenth Amendment are essentially the same. This similarity in language calls for a common construction. See State of Michigan, Constitutional Convention Official Record (1961) at 739-52; Doe v. Dep't of Social Services, 439 Mich. 650, 674 n.30, 487 N.W.2d 166, 176 n.30 (1992) ("in certain cases where textual similarities and historical considerations have pointed to a common meaning, this Court has seen fit to adopt a construction given by the United States Supreme Court to a parallel provision in the federal constitution in the absence of compelling reason to impose a different interpretation"). This legal equivalence has also been noted by the Court of Appeals. See Grieb v. Alpine Valley, 155 Mich.App. 484, 487, 400 N.W.2d 653, 655 (1986) ("[t]he Michigan Constitution secures the same right of equal protection (Const. 1963, art. 1, §2) and due process (Const. 1963, Art. 1, §17) as does its counterpart in the United States Constitution (US Const, Am XIV)"). As shown later in this Brief, the Supreme Court has indicated that laws against assisted

III. THE COMMON LAW OF ENGLAND, AS RECEIVED BY THE AMERICAN COLONIES, PROHIBITED SUICIDE AND ATTEMPTED SUICIDE.

An understanding of the development of the common law crime of suicide in England is essential to any analysis of the status of suicide in American colonial law.[7] This history is also germane to evaluating Michigan's attitude toward suicide because from its earliest days as a territory, this State adopted the common law of crimes. See Cass Code of 1816, Crimes § 58, reprinted in 1 Mich. Terr. Laws 132-33 (1871). The thirteenth century commentator Bracton wrote that "[j]ust as a man may commit felony by slaying another so he may do so by slaying himself, the felony is said to be done to himself [felo de se], ..." 2 H. de Bracton (c. 1250), On the Laws and Customs of England (S. Thorne trans. 1968) 423. If the suicide was committed to avoid punishment for a crime he had committed, all of his property--real and personal--was forfeited to the King. Id. at 366. If, however, "a man slays himself in weariness of life or because he is unwilling to endure further bodily pain . . . he may have a successor, but his movable goods are confiscated. He does not lose his inheritance, only his movable goods." Id. at 424. His heirs could inherit his realty but his personalty was confiscated by the Crown. Thus, "[t]he principle that

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suicide are constitutional. Thus, such laws do not offend the Michigan Constitution, either.

[7] Much of what follows in this and the following argument is drawn upon the research and analysis set forth in T. Marzen, et al., Suicide: A Constitutional Right?, 24 Duquesne L. Rev. 1 (1986) (hereinafter Marzen).

suicide of a sane person, for whatever reason, was a punishable felony was thus introduced into English common law." Marzen at 59. No penalty applied to the suicide of one who was not sane. "[A] madman bereft of reason[,] . . . . the deranged, the delirious and the mentally retarded . . . . or . . . one labouring under a high fever" do not commit felony de se "nor do such persons forfeit their inheritances or their chattels, since they are without sense or reason and can no more commit an injuria or a felony than a brute animal." Bracton at 424.

At least two of Bracton's contemporaries agreed that suicide was a crime at common law. The commentator known to posterity as Britton wrote in his treatise that "[w]here a man is felon of himself, his chattels shall be adjudged ours [the King's], as the chattels of a felon, but his inheritance shall descend entire to his heirs." I Britton, Bk. I, ch. VIII (F. Nicols trans. 1865) (reprinted 1983, W.W. Gaunt) 39. Fleta, writing around the year 1290, provided a fuller treatment of the subject:

> Just as a man may commit felony in slaying another, so he may in slaying himself; for if one who has lately slain a man or has committed some like act whence felonies arise, conscious of his crime and in fear of judgment, slay himself in any fashion, his goods accrue to the Crown nor may he have any other heir than the lord of the fee. But should anyone slay himself in weariness of life or because he is unable to support some bodily pain, he shall have his son for his heir, but his movable goods will be confiscate. Those, too, who cast themselves down from a height or drown themselves likewise have heirs, provided they have committed no felony. Similarly, madmen and those who are frenzied, childish, deranged or are suffering from high fever, although they kill themselves, do not commit felony or forfeit their inheritances or chattels, because they lack sense and reason. Their wives, moreover, should receive their dowers.

Fleta (c. 1290), Bk. I, ch. XXXIV, "Of Suicides", Publications of the Selden Society, Vol. 72, p. 89 (1955). What is striking about the common law prohibition of suicide is that it anticipated so many of the contemporary reasons offered to justify suicide and yet found none of them to be adequate.

In 1644, Sir Edward Coke published his Third Institute, which dealt with criminal offenses. Coke classified suicide as a form of murder. "Felo de se is a man or woman, which being Compos mentis, of sound memory, and of the age of discretion, killeth himself, which being lawfully found by the oath of twelve men, all the goods and chattels of the party so offending are forfeited." E. Coke, Third Institute of the Laws of England 54 (1644). Like his predecessors, Coke noted an exception for persons who had killed themselves while insane: "If a man lose his memory by the rage of sickness or infirmity, or otherwise, and kill himself while he is not compos mentis, he is not Felo de se: for as he cannot commit murder upon another, so in that case he cannot commit murder upon himself." Id. According to Coke, a felo de se forfeited only his goods and chattels. Id. at 55.

In 1716, the first edition of William Hawkins' A Treatise of the Pleas of the Crown was published. Noting that "our laws have always had . . . an Abhorrence of this Crime [suicide]," 1 W. Hawkins, A Treatise of the Pleas of the Crown (1716) 68, Hawkins' analysis of "Homicide against a Man's own Life", id. at 67, largely followed Coke. He rejected the prevailing "Notion" that "every one who kills himself must be Non compos of course; for it

is said to be impossible, That a Man in his Senses should do a Thing so contrary to Nature and all Sense and Reason." Id.

> If this Argument be good, Self-Murder can be no Crime, for a Madman can be guilty of none: But it is wonderful that the Repugnancy to Nature and Reason, which is the highest Aggravation of this Offense, should be thought to make it impossible to be any Crime at all, which is the necessary Consequence of this Position, That none but a Madman can be guilty of it. May it not with as much reason be argued, That the Murder of a Child or of a Parent is against Nature and Reason, and consequently that no Man in his Senses can commit it? But has Man therefore no Use of his Reason, because he acts against right Reason? Why may not the Passions of Grief and Discontent tempt a Man knowingly to act against the Principles of Nature and Reason in this Case, as those of Love, Hatred and Revenge, and such like, are too well known to do in others?

Id. Hawkins also condemned the killing of another person with his consent or at his request, as well as suicide pacts:

> He who kills another upon his Desire or Command, is in the Judgment of the Law as much a Murderer, as if he had done it merely of his own Head, and the Person killed is not looked upon as a Felo de se, inasmuch as his Assent was merely void, as being against the Laws of God and Man: But where two Persons agree to die together, and one of them at the Persuasion of the other buys Ratsbane [a poison], and mixes it in a Potion, survives by using proper Remedies, and the other dies, perhaps it is the better Opinion, That he who dies shall be adjudged a Felo de se, because all that happened was originally owing to his own wicked Purpose, and the other only put it in his Power to execute it in that particular Manner.

Id. at 68.

In 1736, Sir Matthew Hale's work, History of the Pleas of the Crown, was published. Like Hawkins, Hale reflected Coke's views on the criminality of suicide. M. Hale, 1 History of the Pleas of the Crown, Ch. XXXI, "Concerning homicide and first of self-killing or felo de se," (1736) at 411-12.

In accord with earlier commentators, Hale stated that "[i]f he lose his memory by sickness, infirmity, or accident, and kills himself he is not felo de se neither can he be said to commit murder upon himself or any other." Id. at 412. But as with Hawkins, Hale questioned whether every suicide could be treated as the act of an insane person:

> It is not every melancholy or hypochondrical distemper, that denominates a man non compos, for there are few, who commit this offense, but are under such infirmities, but it must be such an alienation of mind, that renders them to be madmen or frantic, or destitute of the use of reason: a lunatic killing himself in the fit of lunacy is not felo de se, otherwise it is, if it be at another time.

Id.

Finally, Sir William Blackstone summed up the law of felo de se in his famous Commentaries on the Laws of England. Blackstone characterized suicide as "[s]elf-murder, the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not had the fortitude to endure . . . ." 4 Blackstone Commentaries on the Laws of England 189 (1769). Closely following Hale, Blackstone reiterated the common law's condemnation of suicide. Id.

The prohibition of suicide extended to one who "deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death." Id. Like Hawkins and Hale, Blackstone criticized the tendency of coroner's juries to find "that the very act of suicide is an evidence of insanity; as if every man who acts contrary to reason, had no reason at all: for the same argument would prove

every other criminal non compos, as well as the self-murderer." Id.

> The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong; which is necessary . . . to form a legal excuse. And therefore, if a real lunatic kills himself in a lucid interval, he is a felo de se as much as another man.

Id.

The punishment for suicide at common law was forfeiture of all of the suicide's personal property and ignominious burial in the public way. Id. at 190. Blackstone explained that these punishments were threatened in the hope that a potential suicide's "care for either his own reputation, or the welfare of his family, would be some motive to restrain him from so desperate and wicked an act." Id. Nevertheless, Blackstone recommended that the severity of the law be tempered by the power of the sovereign "to execute mercy in judgment." Id.

The condemnation of suicide at common law was not limited to the writings of the commentators. It was also expressed by the courts. See Hales v. Petit, 1 Plowd. 253, 261, 75 Eng.Rep. 387, 399-400 (Queen's Bench 1561-1562). Under English common law, attempted suicide was a misdemeanor, punishable by fine and imprisonment. Rex v. Mann, 2 K.B. 107, 83 L.J.K.B. 648 (1914); Regina v. Burgess, 9 Cox Crim. Cas. 247 (1862); Regina v. Doody, 6 Cox. Crim. Cas. 463 (1854). This was also the law in colonial America.

The sparse records available indicate that at least nine of the original thirteen colonies prohibited, and in some cases

punished, suicide and attempted suicide,[8] though the common law penalties generally were abolished after the Revolution. Marzen at 67. The penalties were abolished not because society no longer regarded suicide as a wrong (much less as a right), but because of an awareness that punishment could not reach the suicide and a moral sense that it was unfair to punish the suicide's innocent survivors. Zephaniah Swift, later Chief Justice of the Connecticut Supreme Court, wrote in a treatise published in 1796:

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[8] Connecticut: 2 Z. Swift, A System of Laws of the State of Connecticut 304 (n.p. 1795) (noting instances of ignominious burial); Booth, Woodruff, Mather, Baldwin & Turrill, Preface to Conn. Gen. Stat. at vi (1875) (noting State's adoption of common law of England, except where common law was regarded as obsolete or a contrary rule was substituted by statute); Georgia: Life Ass'n of America v. Waller, 57 Ga. 533, 536 (1876) (suicide "a species of crime or wickedness--something wrong; a kind of self-murder" at common law); Maryland: Pope v. State, 284 Md. 309, 339-43, 396 A.2d 1054, 1072-74 (1978) (adoption of common law); Note, Criminal Liability of Participants in Suicide: State v. Williams, 5 Md. L. Rev. 324, 325-26 (1941) (reporting unappealed trial court decision treating suicide as a common law crime); Massachusetts: The General Laws and Liberties of Massachusetts Colony (1672), reprinted in The Colonial Laws of Massachusetts 137 (W. Whitmore ed. 1887) (statute mandating ignominious burial for suicide); North Carolina: State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961) (suicide a criminal act at common law, attempt suicide punishable as a misdemeanor); Pennsylvania: Connecticut Mut. Life Ins. Co. v. Groom, 5 Pa. 92, 97 (1878) (describing suicide as "self-murder"); Commonwealth v. Wright, 11 Pa. D. 144 (Ct. Quarter Sess., Philadelphia County 1902) (criticizing practice of indicting persons "for the common law offence of attempting to commit suicide"); Elwood v. New England Mut. Life Ins. Co., 305 Pa. 505, 512, 158 A. 257, 259 (1931) (classifying attempted suicide as "a crime infamous at common law," and a successful suicide as "a species of felony"); Rhode Island: The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations, 1647-1719, at 19 (J. Cushing ed. 1977) (adopting common law punishments for suicide); South Carolina: 1 The Earliest Printed Laws of South Carolina, 1692-1734, at 192 (J. Cushing ed. 1978) (recognizing criminality of suicide at common law); Virginia: A. Scott, Criminal Law in Colonial Virginia 108 n.198, 198-99 nn.15-16 (1930) (noting instances of ignominious burial and forfeiture of property).

> There can be no act more contemptible, than to attempt to punish an offender for a crime, by exercising a mean act of revenge upon lifeless clay, that is insensible of the punishment. There can be no greater cruelty, than the inflicting a punishment, as the forfeiture of goods, which must fall solely on the innocent offspring of the offender. This odious practice has been attempted to be justified upon the principle, that such forfeiture will tend to deter mankind from the commission of such crimes, from a regard to their families. But it is evident that where a person is so destitute of affection for his family, and regardless of the pleasures of life, as to wish to put an end to his existence, that he will not be deterred by a consideration of their future subsistence. Indeed, this crime is so abhorrent to the feelings of mankind, and that strong love of life which is implanted in the human heart, that it cannot be so frequently committed, as to become dangerous to society. There can of course be no necessity of any punishment. This principle has been adopted in this state, and no instances have happened of a forfeiture of estate, and none lately of an ignominious burial.

Z. Swift, A System of Laws of the State of Connecticut 304 (n.p. 1795).

A review of English and early American legal history reveals that there was no "liberty interest" in ending one's life by suicide at the common law. Suicide, as well as attempted suicide, was a crime and was regarded with repugnance by society in both England and America.

IV. ALTHOUGH THE PENALTIES FOR SUICIDE AND ATTEMPTED SUICIDE ULTIMATELY FELL INTO DISFAVOR IN AMERICAN LAW, THE STATES HAVE RETAINED A STRONG AND COMPELLING INTEREST IN THE PRESERVATION OF HUMAN LIFE AND IN THE PREVENTION OF SUICIDE. THAT INTEREST IS REFLECTED IN LAWS PROHIBITING ASSISTED SUICIDE, LAWS ALLOWING NONDEADLY FORCE TO BE USED TO PREVENT SUICIDE, AND LAWS PROVIDING FOR THE INVOLUNTARY COMMITMENT OF THOSE WHO ATTEMPT SUICIDE.

Although the common law penalties for suicide were abandoned after the Revolutionary War, and attempted suicide was seldom

prohibited[9] and more rarely punished,[10] suicide was regarded as malum in se and often referred to as a "crime" even though it was no longer punishable.[11] What is of greater significance for

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[9] At one time or another, eight States have prohibited attempted suicide: Minnesota: Minn. Penal Code, §§ 143, 147 (1885), codified at Minn. Gen. Stat. §§ 6428, 6432 (1894), recodified as Minn. Rev. Laws, § 4870, repealed by an Act of Apr. 20, 1911, ch. 293, § 1, 1911 Minn. Laws 409, 409; Nevada: Crimes & Punishments Act of 1911, § 115, codified at Nev. Rev. Laws § 6380 (1912), repealed by an Act of Mar. 25, 1913, ch. 238, § 1, 1913 Nev. Stat. 362, 362; Act of Mar. 4, 1957, ch. 35, § 1, 1956-57, Nev. Stat. 59, 59-60, repealed by an Act of Mar. 31, 1961, ch. 256, § 1, 1961 Nev. Stat. 416, 416; New Jersey: Act of May 9, 1957, ch. 34, § 1, 1 N.J. Laws 63, 67 (1957), codified at N.J. Rev. Stat. § 2A:170-25.6 (Supp. 1967), repealed by an Act of Feb. 16, 1972, ch. 450, § 3, 1971 N.J. Laws 1934; New York: Act of July 26, 1881, ch. 676, §§ 174, 178, 1881 N.Y. Laws (Vol. 3 Penal Code) at 42-43, repealed by an Act of May 5, 1919, ch. 414, § 1, 1919 N.Y. Laws 1193, 1193; North Dakota: G. Hand, Rev. Codes of the Territory of Dakota, Penal Code §§ 230, 236 (1877), repealed by an Act of Mar. 4, 1967, ch. 108, § 1, 1967 N.D. Sess. Laws 215, 300; Oklahoma: Okla. Terr. Stat. 2076 (1890), repealed by an Act of Jan. 30, 1976, ch. 6, § 2 1976 Okla. Sess. Laws 7; South Dakota: G. Hand, Rev. Codes of the Territory of Dakota, Penal Code §§ 230, 236 (1877), recodified at S.D. Code, § 13.1903 (1939), repealed by an Act of Feb. 17, 1968, ch. 31, § 1, § 13.1901, 1968 S.D. Sess. Laws 47, 47; Washington: Crim. Code, ch. 249, § 134, 1909 Wash. Laws 11th Sess. 890, 929, codified at Rem. & Bal. Code § 2386 (1910), repealed Wash. Crim. Code, 1975, ch. 260, § 9A.92.010(213)-(217) Wash. Laws 817, 866, codified at Rev. Wash. Code § 9A.92.010(213)-(217) (1977).

[10] Although no prosecutions were reported under any of the statutes prohibiting attempted suicide, three courts held that attempted suicide could be charged as a common law offense. See State v. Carney, 69 N.J.L. 478, 55 A. 44 (Sup. Ct. 1903); State v. Lafayette, 117 N.J.L. 442, 188 A. 918 (C.P. 1937); State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

[11] See, e.g., McMahan v. State, 168 Ala. 70, 73, 53 So. 89, 90 (1910); Pennsylvania Mut. Life Ins. Co. v. Cobbs, 23 Ala. App. 205, 208, 123 So. 94, 97 (1929); Blackwood v. Jones, 111 Fla. 528, 532-33, 149 So. 660, 601 (1933); Life Ass'n of America v. Waller, 57 Ga. 533, 536 (1876); Dickerson v. Northwestern Mut. Life Ins. Co., 200 Ill. 270, 274-75, 65 N.E. 694, 696 (1902); Wallace v. State, 232 Ind. 700, 701, 116 N.E.2d 100, 101 (1953); Brown v. Metropolitan Life Ins. Co., 233 Iowa 5, 10, 7 N.W.2d 21, 24 (1943); Commonwealth v. Mink, 123 Mass. 422, 428-29 (1877);

purposes of determining legal and societal attitudes toward suicide, however, is that most States prohibited assisted suicide. By the time the Fourteenth Amendment was approved in 1868, at least twenty-one of the then thirty-seven States, including eighteen of the thirty ratifying States, prohibited assisted suicide, either as a statutory[12] or common law offense.[13]

Hale v. Life Indemnity & Investment Co., 61 Minn. 516, 519, 63 N.W.2d 1108, 1108 (1895); Shipman v. Protected Home Circle, 174 N.Y. 398, 406, 67 N.E. 83, 85 (1903); Benard v. Protected Home Circle, 161 A.D. 59, 62-63, 146 N.Y.S. 232, 235 (1914); State v. Willis, 255 N.C. 473, 475-77, 121 S.E.2d 854, 855-57 (1961); Wyckoff v. Mut. Life Ins. Co. of N.Y., 173 Or. 592, 595-96, 147 P.2d 227, 229 (1944); Elwood v. New England Mut. Life Ins. Co., 305 Pa. 505, 512-13, 158 A. 257, 258-59 (1931); State v. Levelle, 34 S.C. 120, 13 S.E. 319 (1910); Phadenhauer v. Germania Life Ins. Co., 54 Tenn. (7 Heisk.) 567, 576 (1872); Plunkett v. Supreme Conclave, Improved Order of Heptasophs, 105 Va. 643, 55 S.E. 9 (1906); Patterson v. Natural Premium Mut. Life Ins. Co., 100 Wis. 118, 122, 75 N.W. 980, 983 (1898).

[12] Arkansas: Act of Feb. 16, 1838, printed as Ark. Rev. Stat. ch. XLIV, div. III, art. II, § 4, at 240 (1838); Florida: Act of Aug. 6, 1868, ch. 1637 (No. 13), subchap. 3, § 9, 1868 Fla. Laws 61, 64; Kansas: Kan Terr. Stat. ch. 48, § 8 (1855); Minnesota: Minn. Terr. Rev. Stat. ch. 100, § 9, at 493 (1851); Mississippi: Act of Feb. 15, 1839, ch. 66, tit. 3, § 7, 1839 Miss. Laws 102, 112, codified at Miss. Code ch. 64, art. 12, tit. 3, § 7, at 958 (Hutchinson 1849); Missouri: Act of Mar. 20, 1835, art. II, codified at Mo. Rev. Stat. Crimes & Punishments, art. II, § 8 at 168 (1835); New York: 2 N.Y. Rev. Stat. pt. IV, ch. I, tit. I, art. 1, § 7 at 661 (1829); Oregon: Or. Gen. Laws 1845-1864 (Deady 1866), Code of Crim. Proc. § 508 at 528; Wisconsin: Revised Stat. of the State of Wis. ch. 133, § 9 (Albany, N.Y. 1849), codified at Rev. Stat. of Wis. ch. 164, § 9 (1858). To this list must be added South Carolina, which had a statute condemning suicide as a felony and which maintained the common law of crimes. See 1 The Earliest Printed Laws of South Carolina 1629-1734, at 190 (J. Cushing ed. 1978) (referring to "Felony, whether of his own [suicide] or another"). Presumably, if suicide was regarded as a felony, assisted suicide was also.

[13] Alabama: Alabama statutes adopted the common law of crimes, including the law of homicide. Ala. Digest, tit. 17, ch. 1, § 45, at 214 (H. Toulmin ed. 1823); Penal Code, No. 138, ch. 3, § 2, 1840-41 Ala. Acts 122 (codified as Supplement to Aiken's

Digest Penal Code, ch. 3, § 2, at 210 (A. Meek ed. 1836-41)). Since "[e]very murder at common law is murder under our statutes," McMahan v. State, 168 Ala. 70, 73, 53 So. 89, 90 (1910), suicide was a felony even though no punishment could be attached. Id., 53 So. at 90. Accordingly, assisted suicide would have been criminal as well. Connecticut: Connecticut also adopted the common law of crimes. See Booth, Woodruff, Mather, Baldwin & Turrill, Preface to Conn. Gen. Stat. at vi (1875). Persuading, provoking or counseling another to commit suicide was treated as murder. 2 Z. Swift, A Digest of the Laws of the State of Connecticut 270 (New Haven 1823). Georgia: A Post-Reconstruction case referred to suicide as "something more than self-sought and self-inflicted death. It is a species of crime or wickedness--something wrong; a kind of self-murder." Life Ass'n of America v. Waller, 57 Ga. 533, 536 (1876). This language strongly suggests that assisted suicide would have been criminal. Kentucky: In 1904, the Kentucky Court of Appeals held that suicide was a common law felony in the State and that one could be charged and convicted for advising or assisting in the commission of a suicide. Commonwealth v. Hicks, 118 Ky. 637, 82 S.W. 265 (1904). Maryland: From its earliest days, Maryland adopted the common law of crimes. See Pope v. State, 284 Md. 309, 339-43, 396 A.2d 1054, 1072-74 (1978). An unappealed trial court decision in 1940 upheld the conviction of the survivor of a suicide pact for second degree murder, essentially holding that active assistance in committing suicide is a form of homicide. See Note, Criminal Liability of Participants in Suicide: State v. Williams, 5 Md. L. Rev. 324 (1941). Massachusetts: Commonwealth v. Mink, 123 Mass. 422 (1877) (reviewing cases on assisted suicide). Michigan: From its earliest days as a territory, Michigan adopted the common law of crimes, in addition to particular statutory crimes. See Cass Code of 1816, Crimes § 58, reprinted in 1 Mich. Terr. Laws 132-33 (1871). In the famous Roberts case, the Michigan Supreme Court upheld the murder conviction of a man who provided poison to his wife. People v. Roberts, 211 Mich. 187, 178 N.W. 690 (1920). North Carolina: In 1961, the North Carolina Supreme Court, noting that the State had adopted the common law of crimes, held that attempted suicide was an indictable misdemeanor. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961). The court expressly held that one who "aids and abets another in . . . self-murder is amenable to the law." Id. at 477, 121 S.E.2d at 857. Pennsylvania: In 1878, the Pennsylvania Supreme Court defined suicide as "self-murder" in "legal acceptation and in popular use." Connecticut Mut. Life Ins. Co. v. Groom, 5 Pa. 92, 97 (1878). As a jurisdiction that adopted the common law of crimes, assisting suicide would have been a criminal offense. Tennessee: Tennessee adopted the common law of crimes. See State v. Alley, 594 S.W.2d 382, 382 (Tenn. 1980). In 1872, four years after the Fourteenth Amendment was ratified, the Tennessee Supreme Court referred to suicide "a

Regardless of the rationale for prohibiting suicide at common law, the States have retained a strong interest in protecting the lives of their citizens. That interest is manifested in several ways. First, an overwhelming majority of States forbid assisted suicide, either by statute[14] or case law.[15] Second, at least twelve States allow the use of

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crime of the highest grade." Phadenhauer v. Germania Life Ins. Co., 54 Tenn. (7 Heisk.) 567, 576 (1872). Thus, assisted suicide also would have been unlawful. Virginia: Virginia adopted the common law of crimes. See A. Scott, Criminal Law in Colonial Virginia 27 (1930); Va. Code §18.2-16 (1988); Plunkett v. Supreme Conclave, Improved Order of Heptasophs, 105 Va. 643, 646, 55 S.E. 9, 11 (1906) (referring to suicide as a "crime").

[14]. Thirty States expressly ban assisted suicide by statute. Alaska Stat. § 11.41.120(a)(2) (1989); Ariz. Rev. Stat. Ann. § 13-1103(A)(3) (1989); Ark. Code Ann. § 5-10-104(a)(2) (1987); Cal. Penal Code § 401 (West 1988); Colo. Rev. Stat. § 18-3-104(1)(b) (1990); Conn. Gen. Stat. Ann. § 53a-56(a)(2) (West 1993 sup.); Del. Code Ann. tit. 11, § 645 (1987); Fla. Stat. Ann. § 782.08 (West 1992); H.B. 819, 88th Ill. Gen. Assembly (signed by the Governor on August 20, 1993); 1993 Ind. Acts 246; Kan. Stat. Ann. § 21-3406 (1988); Me. Rev. Stat. Ann. tit. 17-A, § 204 (1983); Mich. Comp. Laws Ann. § 752.1027 (West 1993) [Mich. Stat. Ann. § 28.547(127) (1992)]; Minn. Stat. Ann. § 609.215 (West 1987); Miss. Code Ann. § 97-3-49 (1973); Mont. Code Ann. § 45-5-10 (1991); Neb. Rev. Stat. § 28-307 (1989); N.H. Rev. Stat. Ann. § 630.4 (1986); N.J. Stat. Ann. § 2C:11-6 (West 1982); N.M. Stat. Ann. § 30-2-4 (1984); N.Y. Penal Law § 125.15(3) (McKinney 1987); N.D. Cent. Code § 12.1-16-04 (1991); Okla. Stat. Ann. tit. 21, §§ 813, 814, 815 (West 1983); Or. Rev. Stat. § 163.125(1)(B) (1991); 18 Pa. Cons. Stat. Ann. § 2505(b) (Purdon 1983); S.D. Codified Laws Ann. § 22-16-37 (1988); 1993 Tenn. Pub. Acts 405; Tex. Penal Code Ann. § 22.08 (Vernon 1988); Wash. Rev. Code Ann. § 9A.36.060 (1988); Wis. Stat. Ann. § 940.12 (West 1982).

[15]. In addition to the thirty States that expressly prohibit assisted suicide by statute, at least five other States forbid assisted suicide by adopting the common law, either by statute or case law. See the Maryland, Massachusetts and Virginia authorities cited in n.13, supra. Ohio: Blackburn v. State, 23 Ohio St. 146 (1872) (man convicted of murder for preparing poisonous concoction and giving it to his wife who drank it, intending to kill herself). West Virginia: State v. General Daniel Morgan Post No. 548, 144 W.Va. 137, 139, 107 S.E.2d 353,

nondeadly force to thwart suicide attempts.[16] Third, all States provide for the involuntary commitment of individuals who, as a result of mental illness, may harm themselves.[17] In light of this legislative and judicial consensus, it cannot reasonably be argued that a right to commit suicide (or to assistance in committing suicide) is deeply "rooted in the traditions and conscience of our people", Snyder v. Massachusetts, 291 U.S. at 105, or that it is "implicit in the concept of ordered liberty", Palko v. Connecticut, 302 U.S. at 319.

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357 (1959) (recognizing applicability of common law of crimes).

[16] See Alaska Stat. § 11.81.430(a)(4) (1983); Ark. Code Ann. §5-2-605(4) (1987); Colo. Rev. Stat. § 18-1-703(1)(d) (1986); Haw. Rev. Stat. § 703-308(1) (1985); Ky. Rev. Stat. §503.100(1)(a) (1985); Mo. Ann. Stat. § 563.016(5) (Vernon 1979); N.H. Rev. Stat. § 627:6(vi) (1986); N.J. Stat. Ann. § 2C:3-7(e) (West 1982); N.Y. Penal Law § 35.10(4) (McKinney 1987); Or. Rev. Stat. § 161.209 (Repl. 1983);18 Pa. Cons. Stat. Ann. § 508(d) (Purdon 1983); Wis. Stat. Ann. § 939.48 (5) (West 1982).

In a case decided in 1975, the Minnesota Supreme Court reversed a conviction for false imprisonment where the trial court denied a jury instruction offered by the defendant that a motive of preventing suicide was a defense. The court said that "there can be no doubt that a bona fide attempt to prevent a suicide is not a crime in any jurisdiction, even where it involves the detention, against her will, of the person planning to kill herself." State v. Hembd, 305 Minn. 120, 126, 232 N.W.2d 872, 878 (1975).

[17] See, e.g., Mich. Comp. Laws Ann. §§ 330.1401(a), 330.1468(2) (West 1992) [Mich. Stat. Ann. §§ 14.800(401)(a), 14.800(468)(2) (1992)]; Cal. Welf. & Inst. Code, §§ 5150, 5200, 5206, 5213, 5250(a), 5256.6, 5260 (West 1982). See also O'Connor v. Donaldson, 422 U.S. 563, 566-67 n.2 (1975) (noting Florida law allowing involuntary commitment of persons who intentionally harm or threaten to harm themselves).

V. THE CIRCUIT COURT ERRED IN EQUATING SUICIDE (OR ASSISTED SUICIDE) WITH THE REFUSAL OF MEDICAL TREATMENT. BOTH THE INTENT OF THE ACTOR (TO CAUSE DEATH) AND THE CHARACTER OF THE ACT (CAUSING DEATH BY AN AFFIRMATIVE ACT) DISTINGUISH SUICIDE (OR ASSISTED SUICIDE) FROM WITHHOLDING OR WITHDRAWING LIFE-SUSTAINING MEDICAL TREATMENT WHERE DEATH IS NOT INTENDED AND RESULTS FROM NATURAL CAUSES.

The central error in the Circuit Court's alternative holding was to equate suicide (or assisted suicide) with the refusal of life-sustaining medical care. Virtually without exception, state legislators and courts have recognized the distinction between directly causing death by an affirmative act ending life and allowing death to occur by withholding or withdrawing life-sustaining medical treatment. This recognition appears in both statutory law and case law. Forty-four States and the District of Columbia expressly disapprove of mercy killing, suicide, or assisted suicide in either their natural death/living will statutes,[18] or their durable power of attorney for health care

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[18]. Ala. Code § 22-8A-10 (1990); Alaska Stat. § 18.12.080(f) (1992); Ariz. Rev. Stat. Ann. § 36-3210 (1992); Ark. Code Ann. § 20-17-210(g) (1991); Cal. Health & Safety Code § 7191.5(g) (West 1993); Colo. Rev. Stat. § 15-18-112(1) (1989); D.C. Code Ann. § 6-2430 (1989); Fla. Stat. Ann. § 765.309(1) (West 1993); Ga. Code Ann. § 88-4111(b) (Michie 1986); Haw. Rev. Stat. § 327D-13 (1992); Ill. Comp. Stat. Ann. ch. 755, ¶ 35/9(f) (Smith-Hurd 1992); Ind. Code Ann. § 16-8-11-20 (Burns 1990), see also § 16-8-12-12; Iowa Code Ann. § 144A.11.6 (West 1989); Kan. Stat. Ann. §§ 65-28, 109 (1992); Ky. Rev. Stat. Ann. § 311.636 (Michie/Bobbs-Merill 1992); La. Rev. Stat. Ann. tit. 40 § 1299.58.10(a) (West 1992); Me. Rev. Stat. Ann. tit. 18A § 5-711(g) (1992); Md. Health-Gen Code Ann. § -610(3) (1990); Minn. Stat. Ann. § 145B.14 (1993); Miss. Code Ann. § 41-41-117 (1992); Mo. Ann. Stat. § 459.055(5) (Vernon 1992); Mont. Code Ann. § 50-9-205(7) (1991); Neb. Rev. Stat. § 20-412(7) (1992); Nev. Rev. Stat. Ann. § 449.670 (Michie 1987); N.H. Rev. Stat. Ann. § 137-H:10(II) (1992); N.C. Gen. Stat. §90-320(b) (Michie 1990); N.D. Cent. Code § 23-06.4-1 (1991); Ohio Rev. Code Ann. § 2133.12(d) (Anderson 1992); Okla. Stat. Ann. tit. 63, § 3101.12(g) (1993); Or. Rev. Stat. § 127.645(1) (1991); 20 Pa. Cons. Stat. Ann. § 5402(b)

acts,[19] or both.[20] The language in the Illinois Living Will Act is typical: "Nothing in this Act shall be construed to condone, authorize or approve of mercy killing or to permit any affirmative or deliberate act or omission to end life other than to permit the natural process of dying as permitted by this Act." Ill. Comp. Stat. Ann. ch. 755, § 35/9(f) (Smith-Hurd 1992). And almost every state court recognizing a right to refuse medical treatment--whether on constitutional, statutory or common law grounds--has distinguished removal of life support from suicide.

In In re Rosebush, 195 Mich.App. 675, 491 N.W.2d 633 (1992), this Court authorized surrogates to remove life-support from incompetent patients. In so ruling, the Court was careful to note the distinction between allowing death and causing death.

(Purdon 1992); R.I. Gen. Laws § 23-4.11-10(f) (1992); S.C. Code Ann. § 44-77-130 (Law. Co-op. 1992); S.D. Codified Laws Ann. § 34-12D-20 (1993); Tex. Health & Safety Code Ann. § 672.020 (Vernon 1992); Utah Code Ann. § 75-2-1118 (1993); Va. Code Ann. § 54.1-2990 (1993); Wash. Rev. Code Ann. § 70.122.100 (1993); W. Va. Code § 16-30-10 (1991); Wis. Stat. Ann. § 154.11(6) (West 1989); Wyo. Stat. § 35-22-109 (1988).

[19]. 63 Del. Laws, ch. 386, § 3 ("[n]othing in this act [authorizing durable powers of attorney for health care] shall be construed to condone, authorize or approve of mercy-killing [or] be construed to permit any affirmative or deliberate act or omission to end life other than to permit the natural process of dying"); D.C. Code Ann. § 21-2212 (1989); Ill. Comp. Stat. Ann. ch. 755, § 40/50 (Smith-Hurd 1992); Ind. Code Ann. § 30-5-5-17(b) (Burns 1992); Iowa Code Ann. § 144B.12.2 (West 1993); Mass. Ann. Laws, ch. 201D, § 12 (1993 Supp.); N.Y. Pub. Health Law § 2989(3) (McKinney 1993); N.D. Cent. Code § 23-06.5-01 (1991); R.I. Gen. Laws § 23-410-9(f) (1992); Wyo. Stat. § 3-5-211 (1992).

[20]. See notes 18 and 19, supra. See also Conn. Gen. Stat. Ann. § 19a-575 (form declaration) ("I do not intend any direct taking of my life, but only that my dying not be unreasonably prolonged") (1993 Supp.).

Citing an American Law Report article on the subject, the Court said, "'the state's interest in the prevention of suicide has been seen as inapplicable or insignificant where there was no intent to die and where death would be the result of natural processes.'" Id. at 681 n.2, 491 N.W.2d at 636 n.2 (quoting Note, Judicial Power to order discontinuance of life-sustaining treatment, 48 A.L.R.4th 67, 73 (1986)). Later in its opinion, the Court restated this distinction in its own words:

> [T]he implementation of a decision to terminate life-support treatment is not the cause of the patient's subsequent death. Instead, the discontinuance of life-support measures merely allows the patient's injury or illness to take its natural and inevitable course.

Id. at 692, 491 N.W.2d at 641.

Many other courts have relied upon this vital distinction. For example, in In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), cert. denied sub nom. Garger v. New Jersey, 429 U.S. 922 (1976), the landmark "right-to-die" case, the New Jersey Supreme Court, in authorizing the parents of Karen Ann Quinlan to remove her from a ventilator, was careful to distinguish withdrawal of life-support from homicide and suicide. "We would see," the court noted, "a real distinction between the self-infliction of deadly harm and a self-determination against artificial life support or radical surgery, in the face of irreversible, painful and certain imminent death." Id. at 43, 355 A.2d at 665. The court noted further that "there would be no criminal homicide" in removing the ventilator explaining that "the ensuing death would not be homicide but rather expiration from existing natural causes."

Id. at 51, 355 A.2d at 669-70. In Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977), the Supreme Judicial Court of Massachusetts concurred:

> The interest in protecting against suicide seems to require little if any discussion. In the case of the competent adult's refusing medical treatment such an act does not necessarily constitute suicide since (1) in refusing treatment the patient may not have the specific intent to die, and (2) even if he did, to the extent that the cause of death was from natural causes, the patient did not set the death producing agent in motion with the intent of causing his own death.

Id. at 743 n.11, 370 N.E.2d at 426 n.11. Again in Leach v. Akron General Medical Center, 68 Ohio Misc. 1, 22 O.O.3d 49, 426 N.E.2d 809 (1980), an Ohio trial court addressed concerns that refusal of life-support constituted a suicide:

> Suicide requires a specific intent to die. Withdrawal of a respirator evinces only an intent to forego extraordinary measures, and allows the processes of nature to run their course. This court does not consider the facts of the case before it to present a realistic or prosecutable case of suicide.

Id. at 10, 22 O.O.3d at 55, 426 N.E.2d at 815. In In re Conroy, 98 N.J. 321, 486 A.2d 1209 (1985), the New Jersey Supreme Court reiterated what it had said nine years earlier in the Quinlan case regarding the withdrawal of medical treatment:

> [D]eclining life-sustaining medical treatment may not properly be viewed as an attempt to commit suicide. Refusing medical intervention 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.

Id. at 350-51, 486 A.2d at 1224.

Rejecting the argument that the refusal of artificially administered nutrition and hydration actively causes death by

starvation, the Washington Supreme Court, in In re Guardianship of Grant, 109 Wash.2d 545, 747 P.2d 445 (1987), modified, 757 P.2d 534 (1988), said that "[t]his approach misconceives the plight of patients such as Barbara Grant."

> She is suffering from a disease which may eventually cause her to lose the ability to swallow if she has not died before the onset of that complication. In other words, a vital bodily function may have to be performed by artificial means--most likely by nasogastric tube or intravenous infusion. It is much the same if she should suffer cardiac arrest or respiratory arrest. In the former instance, a defibrillator may be required to sustain her life; in the latter instance an artificial respirator may be necessary. Yet in none of these cases can the withholding of life sustaining devices be deemed the cause of Barbara's death. The cause of her death will be Batten's disease. As stated in [In re] Colyer, 99 Wash.2d [114] at 123, 660 P.2d 738, "[a] death which occurs after the removal of life sustaining systems is from natural causes, neither set in motion nor intended by the patient." The fact that here, artificial feeding devices are to be withheld rather than removed, does not alter the analysis.

Id. at 563-64, 747 P.2d at 455.[21] The Maine Supreme Court also rejected the argument that refusal of tube-feeding was tantamount to committing suicide:

> [Joseph] Gardner's decision to live without artificial life-sustaining procedures would not constitute suicide since the grievous injuries resulting in his present condition were not self-inflicted. He in no sense has decided to kill himself. Gardner did not suffer his injuries by intentionally placing himself in such a position that his continued biological existence would depend upon the provision of life-sustaining procedures. Accident has brought him to that state. Following his mishap, Gardner is simply exercising his right to control the course of his

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[21] On modification, one of the justices formerly in the majority switched her vote and joined one of the two dissenting opinions. See 757 P.2d 534 (1988). The effect of this change was to create a 5-4 majority denying the guardian authority to withhold tube-feeding from her ward.

> medical care. Because of the unfortunate condition into which his 1985 accident put him, his refusal of all artificial feeding will be followed by death. Yet this coupling of his treatment decision and his ultimate death should not mask the obvious point that the cause of his death will not be his refusal of care but rather his accident and his resulting medical condition, including his inability to ingest food and water. [Citation]. Forcing upon him the life-sustaining procedures he has decided to refuse would only prolong the ultimate moment of his death. His decision not to receive such procedure, far from constituting suicide, is a choice to allow to take its course the natural dying process set in motion by his physiological inability to chew or swallow.

In re Gardner, 534 A.2d 947, 955-56 (Me. 1987). Accord, In re Estate of Longeway, 133 Ill.2d 33, 42, 549 N.E.2d 292, 296 (1989) ("[t]ermination of these intrusive measures [nasogastric tubes, gastrostomies, or intravenous infusions] does not deprive the patient of life; rather, the inability of the patient to chew or swallow as a result of his illness, is viewed as the ultimate agent of death").

In In re L.W., 167 Wis.2d 53, 482 N.W.2d 60 (1992), the Wisconsin Supreme Court held that removal of life-sustaining treatment would not be the cause of death of a patient who could not live on his own:

> [W]e do not view the withdrawal of life-sustaining treatment as depriving the patient of life; rather it "allows the disease to take its natural course." [Citation omitted] . . . No one can dispute that the withdrawal of treatment, especially artificial feeding, will result in the death of the patient. However, it is equally indisputable that the result is the natural death of the body, as contrasted to the unnatural prolongation of, in this case, a vegetative state. The state does not deprive an individual of life by failing to ensure that every possible technological medical procedure will be used to maintain that life.

Id. at 83, 482 N.W.2d at 71.

Most recently, the California Supreme Court has held that a prisoner serving a life sentence who sustained injuries in a fall rendering him a quadriplegic has the right to refuse being fed via a gastrostomy tube. With respect to the state interest in preventing suicide, the court said:

> Judicial authority . . . uniformly rejects the contention that acquiescence in the decision to forego a life-sustaining procedure subjects the physician to liability for aiding and abetting suicide. . . . [A] distinction exists between a person suffering from a life-threatening disease or debilitating injury who rejects medical intervention that only prolongs but never cures the affliction and an individual who deliberately sets in motion a course of events aimed at his or her demise and attempts to enlist the assistance of others.

Thor v. Superior Court, ___Cal.3d___, ___Cal. Rptr. 2d ___, ___P.2d___, No. S026393 (July 26, 1993), 62 U.S.L.W. 2071 (Aug. 10, 1993).

Virtually every court decision dealing with the refusal of medical treatment has distinguished between allowing death to occur by passive means (withholding or withdrawing life-sustaining treatment) and causing death by active means (killing the patient by a direct act that ends his life).[22] And although

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[22] In addition to the cases quoted in the text, see also Satz v. Perlmutter, 362 So.2d 160, 162 (Fla. Dist. Ct. App. 1978), aff'd, 379 So.2d 160 (Fla. 1980) ("[t]he disconnecting of [a respirator], far from causing his death by means of a 'death producing agent' in fact will merely result in his death, if at all, from natural causes"); In re Eichner, 102 Misc.2d 184, 205, 423 N.Y.S.2d 580, 594 (Sup. Ct. Sp. Term 1979), aff'd as modified sub nom. Eichner v. Dillon, 73 A.D.2d 431, 466-67, 426 N.Y.S.2d 517, 544 (1980), aff'd as modified sub nom. In re Storar, 52 N.Y.2d 363, 377-78 n.6, 438 N.Y.S. 266, 273 n.6, 420 N.E.2d 64, 71 n.6 (1981), cert. denied, 454 U.S. 858 (1981) (decision to remove patient from respirator could not be regarded as suicide which requires that individual "'purposefully set in motion a

many courts have applied this distinction to permit persons who

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death-producing agent with the specific intent of effecting his own destruction, or, at least, serious injury'") (quoting R. Byrn, Compulsory Lifesaving Treatment for the Competent Adult, 44 Fordham L. Rev. 1, 16 (1975)); In re P.V.W., 424 So.2d 1015, 1022 (La. 1982) ("[t]hese extraordinary means of preserving a person's 'existence' in an irreversible vegetative coma have little to do with the continuation or the ending of 'life', and removal of such systems under highly restricted circumstances cannot reasonably be construed as violative of the [state] constitutional prohibition against euthanasia"); Barber v. Superior Court, 147 Cal.App.3d 1006, 1012, 195 Cal.Rptr. 484, 487 (1983) (commenting, in context of tube-feeding case, that "[e]uthanasia . . . is neither justifiable nor excusable in California"); In re Colyer, 99 Wash.2d 114, 123, 660 P.2d 738, 743 (1983) ("[a] death which occurs after the removal of life sustaining systems is from natural causes, neither set in motion nor intended by the patient"); Foody v. Manchester Memorial Hospital, 40 Conn. Supp. 127, 137, 482 A.2d 713, 720 (1984) ("[a]n individual's determination to cease medical treatment pursuant to his right of privacy does not constitute suicide"); Bartling v. Superior Court, 163 Cal.App.3d Supp. 186, 196, 209 Cal.Rptr. 220, 225 (1984) ("[t]his is not a case . . . where . . . parties would have brought about [the patient's] death by unnatural means by disconnecting the ventilator. Rather, they would merely have hastened his inevitable death by natural causes"); Bouvia v. Superior Court, 179 Cal.App.3d 1127, 1144-45, 225 Cal.Rptr. 297, 306 (1986) (quadriplegic's "decision to let nature take its course [by refusing naso-gastric feeding] is not equivalent to an election to commit suicide with real parties aiding and abetting therein"); Brophy v. New England Sinai Hospital, Inc., 398 Mass. 417, 439, 497 N.E.2d 626, 638 (1986) (same); In re Farrell, 108 N.J. 335, 350, 529 A.2d 404, 411 (1987) ("refusal of life-supporting treatment does not amount to an attempt to commit suicide"); Rasmussen v. Fleming, 154 Ariz. 207, 218, 741 P.2d 674, 685 (Ariz. 1987) ("[a]sserting the right to refuse medical treatment is not tantamount to committing suicide"); In re Estate of Longeway, 133 Ill.2d 33, 47, 549 N.E.2d 292, 298 (1989) ("we wish to state emphatically that we do not condone suicide or active euthanasia in this State"); In re Estate of Browning, 568 So.2d 4, 14 (Fla. 1990) ("suicide is not an issue when . . . the discontinuance of life support 'in fact will merely result in [her] death, if at all, from natural causes'") (citation omitted); In re Lawrence, 579 N.E.2d 32, 40 n.4 (Ind. 1991) (distinguishing cessation of tube feeding from euthanasia); Guardianship of Doe, 411 Mass. 512, 522, 583 N.E.2d 1263, 1270 (1992) ("[i]t is well settled that withdrawing or refusing life-sustaining medical treatment is not equivalent to attempting suicide . . . . Absent an intent to die, there can be no suicide").

cannot feed themselves (or be fed orally) to refuse artificially-administered nutrition and hydration,[23] other courts, including the United States Supreme Court, have held that a person who is able to feed himself does not have a right to starve himself to death.[24]

As the foregoing cases demonstrate, suicide cannot be equated in a simplistic fashion with the refusal of medical treatment. They are different in two key respects: First, in the case of withholding or withdrawing life-sustaining treatment, there is no intent to end life deliberately. Second, regardless of whether there is an intent to end life, the removal of life-support is not the actual cause of death--death results from natural causes. A natural death, however, is not what plaintiffs

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[23] In re Drabick, 200 Cal.App.3d 185, 245 Cal.Rptr. 840, cert. denied, 488 U.S. 958 (1988); Bouvia v. Superior Court, 179 Cal.App.3d 1127, 225 Cal.Rptr. 297 (1986); Barber v. Superior Court, 147 Cal.App.2d 1006, 195 Cal.Rptr. 484 (1983); McConnell v. Beverly Enterprises-Connecticut, Inc., 209 Conn. 692, 553 A.2d 596 (1989); In re Browning, 568 So.2d 4 (Fla. 1990); Corbett v. D'Allessandro, 487 So.2d 368 (Fla.Dist.Ct.App. 1986); In re Estate of Longeway, 133 Ill.2d 33, 549 N.E.2d 292 (1989); In re Lawrence, 579 N.E.2d 32 (Ind. 1991); In re Gardner, 534 A.2d 947 (Me. 1987); Guardianship of Doe, 411 Mass. 512, 583 N.E.2d 1263 (1992); Brophy v. New England Sinai Hospital, Inc., 398 Mass. 417, 497 N.E.2d 626 (1986); In re Jobes, 108 N.J. 394, 529 A.2d 434 (1987); In re Peter, 108 N.J. 365, 529 A.2d 419 (1987); In re Conroy, 98 N.J. 321, 486 A.2d 1209 (1985); In re L.W., 167 Wis.2d 53, 482 N.W.2d 60 (1992).

[24] Cruzan v. Director, 497 U.S. 261, 280 (1990) ("[w]e do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death") (dictum); In re Caulk, 125 N.H. 226, 480 A.2d 93 (1984) (prisoner had no right to starve himself to death); Van Holden v. Chapman, 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982) (same); State ex rel. White v. Narick, 170 W.Va. 195, 292 S.E.2d 54 (1982) (same). But see Zant v. Prevatte, 248 Geo. 832, 286 S.E.2d 715 (1982) (contra).

propose. Rather, they seek judicial authorization to seek the assistance of others in ending their lives.

It is important to note that most courts that have recognized a right to refuse medical treatment, even those basing their decisions on constitutional principles, have readily acknowledged that the entire subject is more appropriate for the legislature, than the judiciary, to address.[25] Indeed, in her concurring opinion in Cruzan, Justice O'Connor said that "the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interest [in refusing medical treatment] is entrusted to the 'laboratory' of the States, . . . in the first instance." 497 U.S. at 292 (O'Connor, J., concurring). This certainly suggests that assisted suicide, which is fundamentally different from the refusal of medical treatment, is also within the control of the state legislatures.

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[25] See, e.g., Rasmussen v. Fleming, 154 Ariz. 207, 224-25, 741 P.2d 674, 692 (1987); Barber v. Superior Court, 147 Cal.App.3d 1006, 1014, 195 Cal.Rptr. 484, 488-49 (1983); Severns v. Wilmington Medical Center, 421 A.2d 1334, 1346 (Del. 1980); Satz v. Perlmutter, 379 So.2d 359, 360 (Fla. 1980); In re Estate of Longeway, 133 Ill.2d 33, 52-53, 549 N.E.2d 292, 301-02 (1989); In re P.V.W., 424 So.2d 1015 (La. 1982); Conservatorship of Torres, 357 N.W.2d 332, 340 (Minn. 1984); Cruzan by Cruzan v. Harmon, 760 S.W.2d 408, 426 (Mo. 1988), aff'd sub nom. Cruzan v. Director, 497 U.S. 261 (1990); In re Farrell, 108 N.J. 335, 341-42, 529 A.2d 404, 407-08 (1987); In re Conroy, 98 N.J. 321, 344-45, 486 A.2d 1209, 1220-21 (1985); In re Storar, 52 N.Y.2d 363, 382, 438 N.Y.S.2d 266, 276, 420 N.E.2d 64, 74 (1981), cert. denied, 454 U.S. 858 (1981); In re Guardianship of Hamlin, 102 Wash.2d 810, 821-22, 689 P.2d 1372, 1379 (1984).

VI. THERE IS NO CONSTITUTIONAL RIGHT TO COMMIT SUICIDE OR TO ASSISTANCE IN COMMITTING SUICIDE.

In view of the long-standing condemnation of suicide in English and American common law, the adoption of anti-assisted suicide statutes in the majority of States, and the absence of any judicial authority recognizing a right to assistance in committing suicide, there is no historical or legal basis for concluding that the liberty language of the Due Process Clause of the Fourteenth Amendment or Art. I, § 17 of the Michigan Constitution encompasses a right to commit suicide or to assistance in its commission. Moreover, the right to refuse unwanted medical treatment, which is based on constitutional, common law and statutory principles, cannot be transformed by some strange legal alchemy into a right to assisted suicide. Both state legislatures, in their living will and durable power of attorney for health care laws, and state courts, in their decisions recognizing a right to refuse medical care, have uniformly condemned suicide, euthanasia and mercy-killing, and have carefully distinguished between passively allowing death to occur naturally by the withholding or withdrawing of life-sustaining medical treatment and actively causing death by a direct act that ends life. In the case of the former, there is no intent to cause death which occurs as the result of natural processes which the patient himself did not initiate. In the case of the latter, there is an intent to end life immediately by not waiting for natural conditions to result in death.

The Supreme Court has strongly indicated that there is no

right to commit suicide. In Roe v. Wade, 410 U.S. 113, the Court rejected the claim that "one has an unlimited right to do with one's body as one pleases" as inconsistent with "the right of privacy previously articulated in the Court's decisions." Id. at 154. In Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), decided after Roe, the Court stated, "for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take." Id. at 68. In a footnote to this statement, the Court identified a variety of areas in which it considered such conduct within the power of the State to prohibit. Among them it included "constitutionally unchallenged laws against . . . suicide . . . ." Id. at 68 n.15.

Most recently, in Cruzan v. Director, 497 U.S. 261 (1990), the Court again sanctioned laws against assisted suicide. In Cruzan, the Court held that a competent adult has a liberty interest in rejecting unwanted medical care. Id. at 278-79. For purposes of deciding the case (whether the parents of a woman who was in a persistent vegetative state had the right to stop her tube-feeding), the Court assumed, but did not decide, that "the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." Id. at 279. The Court, however, cautioned that "the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible." Id. The Court, in

effect, recognized that even in the case of a competent adult, the State might have the authority to require tube feeding.

Acknowledging Missouri's "interest in the protection and preservation of human life," the Court said:

> As a general matter, the States--indeed, all civilized nations--demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide. We do not think that the State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.

Id. at 280.

This passage, expressing the opinion of the Court, is, as Professor Kamisar and others have noted, a clear sign that there is no "right" to commit suicide.[26] Contrary to the understanding of the Circuit Court, there is nothing in the Cruzan opinion equating the right to refuse medical treatment with a right to commit suicide. The Court, very obviously, took pains to distinguish the two concepts. The clear implication of the majority opinion in Cruzan is that laws against assisted suicide are constitutional.

The Circuit Court's holding that there is a constitutional "right to choose to cease living," i.e., a right to commit suicide or to assistance in committing suicide, is unique. With the exception of two state court decisions, one of which was

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[26] See materials included in Appendix to this Brief.

later discredited and rejected,[27] no American court has held that there is a "right" to commit suicide, and no court at any time has held that there is a right to assistance in committing suicide. Indeed, the authorities are to the contrary.[28]

In Donaldson v. Van de Kamp, 2 Cal.App.4th 1614, 4 Cal. Rptr. 2d 59 (1992), a man suffering from an incurable brain tumor sought to placed in "suspended animation" until a cure could be

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[27] See Zant v. Prevatte, 248 Ga. 832, 286 S.E.2d 715 (1982) (prisoner who wanted to starve himself could not be force-fed against his will); Campbell v. Supreme Conclave Improved Order Heptasophs, 66 N.J.L. 274, 282-83, 49 A. 550, 553 (1901) (recognizing right to commit suicide in certain situations), criticized, State v. Carney, 69 N.J.L. 478, 55 A. 44 (Sup. Ct. 1903); Potts v. Barret Div., Allied Chem. & Dye Corp., 48 N.J. Super. 554, 564, 138 A.2d 574, 580 (1958).

[28] See In re Caulk, 125 N.H. 226, 480 A.2d 93 (1984) (prisoner had no right to starve himself to death); Van Holden v. Chapman, 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982) (same); State ex rel. White v. Narick, 170 W.Va. 195, 292 S.E.2d 54 (1982) (same); Blackwood v. Jones, 111 Fla. 528, 532-33, 149 So. 600, 601 (1933) ("[n]o sophistry is tolerated in consideration of legal problems which seek to justify self-destruction as commendable or even a matter of personal right"); John F. Kennedy Memorial Hospital v. Heston, 58 N.J. 576, 580, 279 A.2d 670, 672 (1971) ("[i]t is common place 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 of his under the constitution subjecting the rescuer to civil or penal consequences), overruled on other grounds, In re Conroy, 98 N.J. 321, 351, 486 A.2d 1209, 1224 (1985).

In Penney v. Municipal Court of Cherry Hill, Township of Cherry Hill, State of New Jersey, 312 F.Supp. 938 (D. N.J. 1970), a federal court refused to rule on the constitutionality of a state law, later repealed, that banned attempted suicide. The court held, inter alia, that the challenge failed to present a substantial federal question. Id. at 940-41. The court cited with approval a law journal article in which the author concluded that "Surely, self-murder falls within the province of the law." Id. at 941-42, "Suicide and Suicide Prevention: A Legal Analysis," 54 A.B.A.J. 855, 857 (1968).

found for his brain cancer. Following the procedure, he would suffer "irreversible cessation or circulatory and respiratory function and irreversible cessation of all brain function," i.e., death under California law. He brought an action seeking legal authority for the procedure and to prevent those who cooperated from being charged with assisted suicide. Refusing to grant the relief requested, the court of appeals determined that what was being sought was tantamount to assisted suicide, illegal under California law, and was clearly distinguishable from the decision to forego life-sustaining treatment. The court held that an individual's right to personal autonomy did not preclude the State from legislating against assisted suicide, explaining:

> A majority of states . . . impose criminal penalties upon one who assists another to commit suicide. [Citations omitted.] One reason for the existence of criminal sanctions for those who aid a suicide is to discourage those who might encourage a suicide to advance personal motives. [Citation omitted.] Another reason is the belief that the sanctity of life is threatened by one who is willing to participate in taking the life of another, even at the victim's request. [Citation omitted.] A third justification is that, although the suicide victim may be mentally ill in wishing his demise, the aider is not necessarily mentally ill. [Citation omitted.]
>
> These reasons justify a criminal statute punishing the aiding and encouraging of suicide, although suicide itself is not illegal. The state's interest in such a situation involves more than just a general commitment to the preservation of human life . . . . Third parties, even family members, do not always act to protect the person whose life will end.

Id. at 1624, 4 Cal. Rptr. 2d at 64-65.

"The policy of the law is to protect human life, even the life of a person who wishes to destroy his own." Commonwealth v.

Root, 191 Pa. Super. 238, 244, 156 A.2d 895, 900 (1959), rev'd on other grounds, 403 Pa. 571, 170 A.2d 310 (1961). That policy, embodied in PA 270, is constitutional. Accordingly, the judgment of the Circuit Court must be reversed.

CONCLUSION

For the foregoing reasons, amici curiae, Members of the Michigan Legislature, respectfully request that this Honorable Court reverse the judgment and opinion of the Circuit Court of Wayne County and remand the case with directions to dismiss the complaint.

Respectfully submitted,

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Appendix

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ARTICLES

FEATURES

DEPARTMENTS

Are Laws against Assisted Suicide Unconstitutional?

by Yale Kamisar

The Supreme Court, reluctant to find constitutional rights in areas marked by divisive social and legal debate, is not likely to constitutionalize a right to assisted suicide. The Court should cleave to the tradition of discouraging suicide and criminalizing its assistance.

On 15 February of this year, shortly after the number of people Dr. Jack Kevorkian had helped to commit suicide swelled to fifteen, the Michigan legislature passed a law, effective that very day, making assisted suicide a felony punishable by up to four years in prison. The law, which is automatically repealed six months after a newly established commission on death and dying recommends permanent legislation, prohibits anyone with knowledge that another person intends to commit suicide from "intentionally providing the physical means" by which that other person does so or from "intentionally participat[ing] in a physical act" by which she does so.[1]

A two-thirds majority of each house was needed to give the new Michigan law immediate effect, but that requirement was easily met. The governor applauded the legislature and signed the law the same day. But this is not the end of the story. A week later, the American Civil Liberties Union of Michigan brought a lawsuit on behalf of two cancer patients and several health care professionals who specialize in the care of the terminally ill, attacking the law's constitutionality. The essence of the challenge is that insofar as the law prohibits a health professional, family member, or friend from assisting a competent, terminally ill person who wishes to hasten her death, the law violates the due process clauses of the state and federal constitutions and the "Right to Privacy Guarantee" of the state constitution.

If the Michigan Supreme Court overturns the prohibition against assisted suicide on state constitutional grounds, this particular lawsuit will come to an end. If, however, as I think likely, the state supreme court upholds the prohibition, the U.S. Supreme Court may decide to review the matter. Since approximately twenty-five states expressly prohibit assisted suicide by statute and another ten or twelve make some types of assisted suicide a form of murder or manslaughter,[2] the Supreme Court is likely to address the question in some case from some state, whether Michigan or another, in the near future.

In this article I shall only discuss *federal* constitutional arguments for invalidating laws against suicide. I shall also discuss various reasons why I believe these arguments will (and should) fail.

Is There a "Right" to Commit Suicide?

So far as I know, no state law makes either suicide or attempted suicide a crime. Why is this so? And what follows from this?

According to Dan Brock, who supports both physician-assisted suicide and voluntary active euthanasia, the fact "that suicide or attempted suicide is no longer a criminal offense in virtually all states indicates an *acceptance* of individual self-determination in the taking of one's own life analogous to that required for voluntary active euthanasia."[3] I am not sure what Professor Brock means by "acceptance"; it is an ambiguous term. In context, however, he seems to be viewing the fact that we no longer punish suicide or attempted suicide as *approval* of these acts or at least as *recognition* that self-determination or autonomy extends this far—namely, that taking one's life is a valid application or aspect of individual self-determination. If this is what he means, he is quite mistaken.

As the most comprehensive and most heavily documented law review article ever written on the subject makes clear, abolition of such "punishments" as ignominious burial for suicide and then the decriminalization of both suicide and attempted suicide did not come about because suicide was deemed a "human right" or even because it was no longer considered reprehensible. These changes occurred, rather, because punishment was seen as unfair to innocent relatives of the suicide and because those who committed or attempted to commit the act were thought to be prompted by mental illness.[4]

Some of this thinking is reflected in the comments to the American Law Institute's Model Penal Code. The code does criminalize aiding or soliciting another to commit suicide, but not suicide itself or attempted suicide. Why not? "There is a certain moral extravagance in imposing criminal punishment on a person who has sought his own self-destruction . . . and who more properly requires medical or psychiatric attention."[5]

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Yale Kamisar, "Are Laws against Assisted Suicide Unconstitutional?" *Hastings Center Report* 23, no. 3 (1993): 32-41.

Sympathy and pity for the individual who attempts suicide "emphatically did not mean approval of the act." From colonial days through at least the 1970s, "the predominant attitude of society and the law has been one of opposition to suicide."[6]

The Model Penal Code's judgment that "there is no form of criminal punishment that is acceptable for a completed suicide and that criminal punishment is singularly inefficacious to deter attempts to commit suicide" (p. 94) does not mean that there is a "right" to commit the act. As Leon Kass has pointed out, the *capacity* to take one's life—"I have inclination, means, reasons, opportunity, and you cannot stop me, and it is not against the law"—does not establish the *right* to do so. Nor does it mean that one has "a *justified* claim against others that they act in a fitting manner."[7] As a practical matter, at least so long as they do not resort to physical violence, parents are "free" to treat their children unkindly, even cruelly. But few, if any, would say that a mother or father has a "right" to be a bad parent.

Society *can* do something about those who aid *another* to commit suicide—and it has. Throughout our history we have directed the force of the criminal law against aiding or assisting suicide. The commentary to the Model Penal Code notes that the fact that penal sanctions will not deter the suicide itself

> does not mean that the criminal law is equally powerless to influence the behavior of those who would aid or induce another to take his own life. Moreover, in principle it would seem that the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim (p. 100).

Another word about the Model Penal Code. In the memorable dictum of Oliver Wendell Holmes, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[8] The quickest way to refute the belief not a few may hold that the reason for the criminal prohibition against assisted suicide falls into Holmes's category is to point to the position taken by the code. Its final "Official Draft" was the product of many years of research, deliberation, drafting, and revising by the most eminent criminal law scholars of the 1950s and 60s, led by Herbert Wechsler of Columbia University and Louis B. Schwartz of the University of Pennsylvania. To quote a leading scholar of the present day, the code "has become the principal text in criminal law teaching, the point of departure for criminal law scholarship, and the greatest single influence on the many new state codes that have followed in its wake."[9]

The Model Code's reporters considered the argument that the criminality of assisted suicide should turn upon "the presence of a selfish motive" (a position supported by one of its special consultants, England's Glanville Williams), but concluded that "the wiser course is to maintain the prohibition and rely on mitigation in the sentence when the ground for it appears."[10] With the stimulus of the Model Code, in the next decade and a half, eight states passed new laws specifically prohibiting assisted suicide and eleven other jurisdictions revised their existing statutes.[11]

Does the "Right to Die" Include the Right to Assisted Suicide?

As a rallying cry, the "right to die" is hard to beat. But it is much easier to chant a slogan than to apply it to specific situations. Most would consider the refusal of lifesaving medical procedures under certain circumstances (such as terminal illness and severe pain) an apt illustration of the "right to die." But the term has also been used loosely and broadly to embrace such claims as the right to another's help in committing suicide and the right to authorize another to engage in active euthanasia.

Many proponents of the "right to die" are quick to point out that the "sanctity of life" is not an absolute or unqualified value (and they are right), but they are slow to realize that the same is true of the "right to die."

There is no absolute or general "right to die." The only right or liberty that the *Karen Ann Quinlan* case and subsequent so-called "right to die" rulings have established is the right under certain circumstances to be disconnected from artificial life support systems or, as many have called it, the right to die *a natural death*. And the new Michigan ban against assisted suicide recognizes that right by explicitly excluding "withholding or withdrawing medical treatment" from its coverage. (It also exempts "prescribing, dispensing or administering" medication or treatment designed "to relieve pain or discomfort and not to cause death, even if the medication or procedure may hasten or increase the risk of death.")

In the 1970s, the *Quinlan* case brought the "right to die" issue to national prominence and set the tone for the developments in law and bioethics that followed. But the *Quinlan* court specifically distinguished between committing or assisting in a suicide and what it called "the ending of artificial life support systems"—the only issue presented.[12]

As one of the leading commentators in this field, Rutgers Law School's Norman Cantor, recently observed: "The assertion that rejection of life-saving medical treatment by competent patients constitutes suicide has been uniformly rejected—usually based on a distinction between letting nature take its course and initiating external death-causing agents."[13]

The distinction between euthanasia (or, I believe, assisted suicide as well) and "letting die" is elucidated in *The Troubled Dream of Life*, a soon-to-be-published book by Daniel Callahan. "As a reality of nature," observes Dr. Callahan, "killing and letting die are causally different. . . . There must be an underlying fatal pathology if allowing to die is even possible. Killing, by contrast, provides its own fatal pathology. Nothing but the action of the doctor giving the lethal injection is necessary to bring about death."[14]

Since the reasons usually advanced to distinguish persons terminating life support from "ordinary" suicides do not strike Jeb Rubenfeld as "altogether persuasive" (nor me either), Professor Rubenfeld has suggested

another answer to "this painful riddle":

> For right-to-die patients, being forced to live is in fact to be forced into a particular, all-consuming, totally dependent, and indeed rigidly standardized life: the life of one confined to a hospital bed, attached to medical machinery, and tended to by medical professionals. It is a life almost totally occupied. . . .
>
> In contrast, the "ordinary" suicide suffers no such total occupation of his life or affirmative use of his body. An avenue of escape is foreclosed to him [but the prohibition of suicide] does not, as a rule, direct lives into a particular, narrowly confined course.[15]

This is a thoughtful answer and an interesting one. But still more interesting, I believe, is that this commentator, who has a strong commitment to the right to privacy and who usually interprets it expansively, evidently feels a deep need (as I do) to draw a boundary somehow between the withholding or withdrawal of life-sustaining medical treatment and what he calls "'ordinary' suicide."

The one "right to die" case that rivals *Quinlan* for prominence is the 1990 *Nancy Beth Cruzan* decision, the only case on death, dying, and the "right of privacy" ever decided by the U.S. Supreme Court. As did *Quinlan*, the *Cruzan* case involved the right to end artificial life support, and it too provides no comfort to proponents of a constitutional right to assisted suicide.

The *Cruzan* Court sustained a state's power to keep alive, over her family's objections, an incompetent patient who had not left clear instructions for ending life-sustaining treatment. In the course of rejecting the efforts of Ms. Cruzan's parents to terminate her artificial feeding, Chief Justice Rehnquist, who spoke for five members of the Court, pointed out that a state has an undeniable interest in the protection and preservation of human life—even the life of a person in a persistent vegetative state. The chief justice supported this assertion by noting that "the majority of states in this country have laws imposing criminal penalties on one who assists another to commit suicide."[16]

If a majority of the Supreme Court meant to suggest that laws against assisted suicide are constitutionally suspect, it chose a strange way of doing so.

The chief justice "assumed for purposes of this case" that a competent person does have "a constitutionally protected right to refuse lifesaving hydration and nutrition." But he declined to characterize it as a "fundamental right," a designation that requires a state to offer a compelling justification for a right's restriction (a test the state can rarely satisfy). He called the right instead a Fourteenth Amendment liberty interest: "Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest."

"By avoiding 'fundamental right' language," comments John Robertson, "the Court may implicitly allow states to restrict the 'liberty interest' upon a lesser showing of need than it would require if that interest were characterized as a fundamental right." Perhaps "any reasonable state interest" would justify state interference with that liberty "or at least one which did not impose an 'undue burden.'"[17]

Of course, the Court did not suggest that one has even so much as "a Fourteenth Amendment liberty interest" in assisted suicide, and I cannot believe that it will do so in the foreseeable future. If I am right, a Court assessing the constitutionality of a ban against assisted suicide would give great deference to the state legislature; if it furthered some coherent conception of the public good, that would probably suffice.

The *Cruzan* case is hardly the Court's last word on death, dying, termination of life support, assisted suicide, and euthanasia. The principles lurking in this area will be brought into sharper focus only by new prodding of the facts of new cases and by taking a fresh look, each time, at the overall problem. If *Cruzan* demonstrates anything, however, I think it signals the reluctance of the High Court to "constitutionalize" an area marked by divisive social and legal debate and its inclination to defer instead to the states' judgments in this difficult field.[18] A Court that refused to "constitutionalize" a "right to die" broad enough to uphold the claims of the Cruzan family is hardly likely to "constitutionalize" a right to assisted suicide.

Justice Scalia's Opinion

We should not forget that there was one justice in the *Cruzan* case who did equate the termination of life support with "ordinary" suicide—Antonin Scalia. Although his lone concurring opinion was more or less ignored by the other justices, it should not go unnoticed.

Justice Scalia maintained that for constitutional purposes "there is nothing distinctive about accepting death through the refusal of 'medical treatment,' as opposed to accepting it through the refusal of [natural] food, or through the failure to shut off the engine and get out of the car after parking in one's garage after work." As he viewed the case, the request of Nancy Cruzan's parents to terminate their daughter's artificial feeding and hydration was, in effect, the assertion of a "right to suicide."

But Justice Scalia is well aware that "on the question you ask depends the answer you get." A principal reason, surely, why he framed the question the way he did was his confidence that there was no way a majority of the Court would recognize a constitutional right to commit suicide. And nothing any of the other eight justices said suggests that Scalia's confidence was unfounded.

In fact, the other justices did not *say* anything about a "right to suicide." None of them disputed Scalia's point "that American law has always accorded the State the power to prevent, by force if necessary, suicide." Nor did any of them disagree that "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.'" As Louis Seidman remarks, the *Cruzan* dissenters "carefully avoid any claim

that state suicide statutes are unconstitutional—a reticence that Justice Scalia powerfully exploits in his concurring opinion."[19] This is a reticence, I might add, that does not bode well for proponents of a constitutional right to assisted suicide.

Although none of Justice Scalia's colleagues responded in so many words to his argument that the termination of lifesaving medical treatment constitutes suicide, they responded nevertheless. They all framed the question in terms of a right to refuse or to be free from "unwanted medical treatment" or, more specifically, "unwanted artificial nutrition and hydration."

As a matter of logic, I think there is a good deal to be said for analogizing a patient's termination of life-sustaining medical treatment to "ordinary" suicide. But law is not entirely a syllogism.

It may be helpful to view the *Cruzan* case as involving two competing traditions.[20] One is the common-law right to refuse medical treatment, even lifesaving surgery—in the language of the Court, "the logical corollary of the doctrine of informed consent," a doctrine "firmly entrenched in American tort law," is the right *not* to consent, that is, to reject treatment. The other tradition, which has continued to exist alongside the first one, is the antisuicide tradition, as evidenced by society's discouragement of suicide and attempted suicide and by the many criminal laws against assisted suicide.

In *Cruzan* a majority, perhaps as many as eight justices, evidently decided that the termination of artificial nutrition and hydration was more consistent with the rationale of the cases upholding the right to refuse treatment; so far as we can tell, only Justice Scalia believed it implicated the concerns underlying the antisuicide tradition.

Assisted Suicide vs. Active Voluntary Euthanasia

The line between doctor-assisted suicide and physician-administered voluntary euthanasia is a fine one that is often blurred. Voluntary euthanasia "has been variously described as 'assisted suicide' or 'within the knife's edge between suicide and murder,'" and suicide has sometimes been called "self-administered euthanasia."[21]

Doctor-assisted suicide is not quite active voluntary euthanasia for, unlike euthanasia, the final act, the one that brings on death, is performed by the patient herself, not her doctor. But suppose that a person is unable to swallow the barbiturates that will bring about death or lacks the physical capacity to trigger a suicide machine? If the right to control the time and manner of one's death—the right to shape one's death in the most humane and dignified manner one chooses—is well founded, how can it be denied to someone simply because she is unable to perform the final act by herself? Although there is a "mechanical" distinction between assisted suicide and euthanasia, is it not a distinction without a difference?

Yes, answered the late Joseph Fletcher, who advocated active euthanasia for some fifty years. As he viewed the matter, "It is impossible to separate [active voluntary euthanasia] from suicide; it is indeed, a form of suicide" and the case for active voluntary euthanasia "depends upon the case for the righteousness of suicide." James Rachels, author of a famous assault on the distinction between "killing" and "letting die," similarly maintains that "the permissibility of euthanasia follows from the permissibility of suicide—a result that probably will not surprise any thoughtful person."[22]

That may be, but it is a result some thoughtful persons have strongly resisted. Thus, in his new book, Dr. Timothy Quill comes out in favor of physician-assisted suicide but balks at active voluntary euthanasia. He does not support euthanasia because of the "potential for abuse" and because "it puts the physician in a very powerful position," whereas in the case of doctor-assisted suicide "the balance of power between doctor and patient is more nearly equal."[23]

I find this reasoning more conclusory than explanatory. Dr. Quill would require many safeguards for doctor-assisted suicide (the patient must freely, clearly, and repeatedly ask to die; her judgment must not be distorted; the physician must make sure that the patient's suffering and request are not the product of inadequate comfort care). If, as he believes, these safeguards would greatly reduce the risk of abuse and render the balance of power between doctor and patient relatively equal, why would they not achieve the same results for voluntary euthanasia? Conversely, if, even when all the safeguards Quill proposes are in place, it would still be imprudent to legalize active voluntary euthanasia, why is it safe to sanction assisted suicide?

Voluntary euthanasia would receive *very* serious consideration once assisted suicide were legalized or as soon as the Supreme Court established a constitutional right to commit "rational" suicide.

Quill recognizes that "access to medical care in the United States is too inequitable and many doctor-patient relationships too impersonal to tolerate the risks of condoning active voluntary euthanasia" (p. 160). But why can't the very same thing be said about tolerating the risks of condoning assisted suicide?

I find it difficult to avoid the conclusion that Dr. Quill's position is colored by the fact, as he notes, that "unlike assisted suicide, where the legal implications have yet to be fully clarified, euthanasia is illegal in all states in the United States and likely to be vigorously prosecuted" (p. 142). Dr. Quill and I disagree about a number of things. But I venture to say we are in agreement on one: the uniform ban against active euthanasia is not going to be struck down on the ground that it violates the "right to

die." Therefore, a proponent of the right to assisted suicide is understandably likely to put as much distance as possible between that concept and euthanasia.

Although he would not legalize voluntary euthanasia, at least not at this time, Dr. Quill does consider it "an area worthy of our serious consideration, since it would allow patients who have exhausted all other reasonable options to choose death rather than continue suffering" (p. 143). I make bold to say that voluntary euthanasia would receive *very* serious consideration once assisted suicide were legalized or as soon as the Supreme Court established a constitutional right to commit "rational" suicide.

Although I am opposed to both assisted suicide and voluntary euthanasia, I find the position of Professor Brock (who supports both practices) more coherent and more principled than Dr. Quill's:

> In both [assisted suicide and voluntary euthanasia], the choice rests fully with the patient. In both [cases] the patient acts last in the sense of the right to change his or her mind until the point at which the lethal process becomes irreversible. . . .
>
> If there is no significant, intrinsic moral difference between the two, it is difficult to see why public or legal policy should permit one but not the other; worries about abuse or about giving anyone dominion over the lives of others apply equally well to either.[24]

The fine distinction between assisted suicide and voluntary euthanasia was blurred by the hard-fought campaigns in Washington (1991) and California (1992) to legalize "aid-in-dying," a label covering *both* assisted suicide *and* voluntary euthanasia. I watched both campaigns very closely and came away with the distinct impression that few, if any, understood the distinction between the two practices, paid any attention to it, or cared one whit about it.

The inability of the media, the public, and even members of the medical profession to grasp this fine distinction is powerfully illustrated by a two-hour presentation, "Choosing Death," a program shown on most PBS stations about the time this article was going to press.

Although the program was billed as a "debate about euthanasia," it soon became clear that it was a debate about assisted suicide as well. Very early in the program the moderator, Roger Mudd, announced: "The issue is doctor-assisted suicide and euthanasia." At another point he asked Professor Margaret Battin whether there was any way "other than euthanasia or physician-assisted suicide . . . to end suffering." Still later, he asked a physician affiliated with Harlem Hospital "whether you think euthanasia—physician-assisted suicide—poses any dangers to America's minorities."[25] And although Dr. Jack Kevorkian has been careful never to practice active voluntary euthanasia (all the people he helped die by suicide performed "the last act" themselves), he appeared in the opening segment.

It is difficult to fault the moderator for treating assisted suicide and voluntary euthanasia interchangeably. After all, none of the physicians or bioethicists who appeared on the program saw the need or, at any rate, took the trouble to draw any distinction between the two concepts. At one point Dr. Howard Brody maintained that "we can find other alternatives that don't require physician-assisted suicide or euthanasia." And at another point Professor Dan Brock pointed out that "we ought to be doing our best to improve all dying patients' care, whatever one's view about assisted suicide, or euthanasia, is." (As mentioned earlier, Professor Brock doesn't see any real distinction between the two concepts. Is this also true of all the others who appeared on the program?)

Can the Right to Assisted Suicide be Confined to the Terminally Ill?

No doubt the ACLU, in challenging the constitutionality of the Michigan prohibition against assisted suicide, will frame the issue narrowly; it will emphasize that it is only asserting the rights of the *terminally ill* who may desire death by suicide. But is there any principled way so to limit the right?

Of course, it is good advocacy to frame the issue in terms of the rights of the "dying" or "terminally ill," but what reason (other than those of tactics) can be advanced for this position? If the merciful termination of suffering (or termination of an unendurable existence) is the basis for this right, why limit it to those who are terminally ill? As Professor Robert Wennberg has asked:

> Why . . . should the non-terminal nature of one's suffering exclude one from qualifying or make it more difficult for one to qualify as a fitting subject for suicide? To be sure, the person with a non-terminal illness has longer to live, and should that person choose to commit suicide, he or she would be eliminating a greater span of future existence. . . . But [such a] person is also eliminating a proportionately greater quantum of pain and suffering, and if the smaller quantum justifies the elimination of the shorter span of life, then the greater quantum might justify the elimination of the longer span.[26]

Alan Sullivan, who has presented one of the best arguments for a constitutional right to suicide, makes plain that he would not limit such a right to the terminally ill. "Surely," he observes, "under a variety of circumstances life may be unendurable to a reasonable person, even though he does not face the prospect of immediate and painful death."[27]

It is interesting to note that, although he carefully circumscribes the right to assisted suicide in many respects, Dr. Quill would not limit it to the terminally ill. "The patient must have a condition," Quill tells us, "that is incurable, and associated with severe, unrelenting suffering." Though he anticipates that most people who desire physician-assisted suicide "will be imminently terminal," Quill does "not want to arbitrarily exclude persons with incurable, but not imminently terminal, progressive illnesses such as ALS or multiple sclerosis."[28] But is it any less arbitrary to exclude the quadriplegic? The victim of a paralytic stroke? The mangled survivor of a road accident? A person afflicted with severe arthritis?

Why stop there? If a competent person comes to the unhappy conclusion that his existence is unbearable and freely, clearly, and repeatedly requests assisted suicide, why should he be rebuffed because he does not "qualify" under somebody else's standards? Isn't *this* an arbitrary limitation of self-determination and personal autonomy? "How," asks Daniel Callahan, "can self-determination have any limits? Why are not the person's desires or motives, whatever they be, sufficient?"[29]

As I understand the position of those advocating a constitutional right to suicide and to assisted suicide, a person who "qualifies" should have the same right to enlist the aid of others to die by suicide as one now has to withhold or withdraw life-sustaining medical treatment.[30] If so, it is fairly clear that once established, the right to assisted suicide will not be restricted to the terminally ill. For as demonstrated by such decisions as *Elizabeth Bouvia*, a case involving a young woman with severe cerebral palsy who was not terminally ill, and *Larry McAfee*, a case involving a quadriplegic who apparently had a long life expectancy, the right to terminate life support has not been so limited. Indeed, the view that life support cannot be stopped unless a patient is terminally ill—a notion that may have originated in pre-*Quinlan* cases involving the refusal of blood transfusions by Jehovah's Witnesses—is one of the "myths" that Professor Alan Meisel has recently dispelled.[31]

Upholding the Prohibition

I share the view that before a state can punish its citizens for their actions, "it must do more than assert that the choice they have made is an 'abominable crime not fit to be named among Christians.'" I agree, too, that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[32] But I believe that any state that prohibits assisted suicide can advance justifications for its legislation that go well beyond the law's conformity to religious doctrine or "morality." And I think these justifications are sufficiently strong to withstand constitutional attack.

I am well aware that the reasons I shall set forth for upholding the new Michigan law and similar laws were not the *original* reasons for condemning suicide and assisted suicide. But the new "good reasons" people give for old rules and policies "do influence the development of these policies" and "the 'good reasons' professed by our fathers yesterday are among the real reasons of the life of today." Assigning better reasons for the ban against assisted suicide than the old religious taboo against touching the gates of life and death may be dismissed by some as a process of rationalization, "but the seeking for good reasons . . . plays a leading role in the life of civilization."[33]

Any state that prohibits assisted suicide can advance justifications for its legislation that go well beyond the law's conformity to religious doctrine or "morality."

After all, that the criminal law arose to fill the need to regulate self-help and to obviate private vengeance does not render deterrence, incapacitation, and rehabilitation any less of a "real reason" for drafting new criminal codes or revising old ones.

Philosophers have spent much time and effort addressing such questions as, When, if ever, is it "rational" for a person to want to commit suicide? Is there a moral right to commit "rational" suicide? But I think a legislator considering the desirability of a law prohibiting assisted suicide and a judge determining the constitutionality of such a law could ask more relevant questions, such as:

So far as we can tell, how common or rare is "rational" suicide? How often does suicide occur in the absence of a psychiatric disorder? How often do primary care physicians fail to recognize treatable depression in their patients, especially elderly patients? How often is the failure of a primary care physician to take an aggressive approach to pain management or a failure to recognize or adequately to treat depressive illness influenced by prejudice against and stereotypes about elderly people? How likely is it that the social sanctioning of "rational" suicide and assisted suicide will lead to an increase in "irrational" suicide and assisted suicide? In a suicide-permissive society, how often will the "right" to commit suicide and the "right" to enlist the assistance of others in this enterprise be interpreted, especially by the most vulnerable, as the "duty" to do so? In a suicide-permissive society, how often will a burdensome, elderly relative not otherwise desirous of death be "helped along" or pressured or "manipulated" into suicide?

At one point in his argument for a constitutional right to suicide (and for the corollary right to enjoin government agents from taking steps to prevent suicide), Alan Sullivan disposes of a possible objection to his position—"that one suicide might encourage other suicides and ought, for that reason, to be proscribed"—on the ground that "it rests upon psychological assumptions about the suicidal character that are beyond the scope of this essay."[34]

When writing about various subjects I too have put some issues "beyond the scope of this essay." After all, there is only so much time and space to explore a difficult problem (or a cluster of problems). So Mr. Sullivan's decision is understandable, especially when one keeps in mind that suicide is a complicated subject that cuts across many disciplines. But a court assessing the constitutionality of a criminal prohibition against assisted suicide does not have the same luxury. It cannot put psychological assumptions and insights and "psychological autopsy" studies of persons who die by suicide "beyond the scope" of their inquiries.

Such a court must do more, much more, than simply reason by analogy from the relevant precedents on the books. And such a court must keep in mind that it is doing something quite different from simply judging a debate among philosophers. As Professor Philip Devine has observed:

> If philosophers have something to say to the law, so also has the law something to say to philosophers. Attention to the working, or the possible working, of any institution or principle may well give us insight into weaknesses which remain concealed so long as it is posed in sufficiently abstract terms.[35]

The Dangers of Establishing a "Right" to Assisted Suicide

Suicide is a problem of considerable magnitude. Although it once ranked twenty-second on the list of causes of death in the United States, it now ranks (depending on the particular year) eighth or ninth. Every year there are between 25,000 and 30,000 reported cases of suicide (and the number of cases is probably grossly underreported both because of the social stigma that attaches and because of the possible loss of life insurance benefits). Moreover, it is estimated that every year in this country several hundred thousand people attempt suicide and that about 10 percent of that group go on to kill themselves within a ten-year period. Although suicide occurs at an alarming rate among young people—adolescent suicide in this country increased 300 percent in the twenty years between 1955 and 1975, while suicides in the fifteen-to-twenty-four age group now constitute about one-fifth of all reported suicides—the highest suicide rates and the greatest number of suicides are found among people over the age of fifty. Indeed, for American white males, from childhood on, the risk of suicide rises linearly with age until the eighth decade of life. Suicides by people over the age of sixty account for about 25 percent of all suicides.[36]

No doubt the higher rate of suicide among the elderly has led advocates of the right to "rational" suicide and to assisted suicide to focus on this age group, especially on elderly people who are terminally ill. But the problem of suicide is a good deal more complicated. Consider the views of Herbert Hendin, a professor of psychiatry and a leading suicidologist, who is opposed to the legalization of doctor-assisted suicide. He concedes that it is sometimes "rational" for a person with a painful terminal illness to wish to end his life. Indeed, "that is precisely why supporters of the 'right to suicide' or 'death control' position are constantly presenting the case of a patient suffering from incurable, painful cancer as the case on which they based their argument." But Dr. Hendin is quick to add:

> In reality . . . such understandable cases form only a small percentage of all suicides, or potential suicides. The majority of suicides confront us with the problem of understanding people whose situation does not seem, from an outsider's viewpoint, hopeless or often even critical. The knowledge that there are more suicides by people who wrongly believe themselves to be suffering from cancer than there are suicides by those who actually have cancer puts the problem in some perspective.[37]

According to suicidologist David Clark, "the major studies all agree in showing that the fraction of suicide victims struggling with terminal illness at the time of their death is in the range of 2% to 4%." Two-thirds of those who died by suicide when they were in their late sixties, seventies, and eighties "were in relatively good physical health."[38]

To ask another relevant question, how often does suicide occur in the absence of a major psychiatric illness? It would not be surprising if the answer to this question were affected by what one thought about the "right" to commit suicide. Some believe that virtually every person who wishes to die by suicide is "mentally ill." Others maintain that such a person is simply called mentally ill so that his behavior may be controlled.

Nevertheless, one cannot ignore the studies that do seem to bear on this question. And when one dips into the relevant literature one discovers considerable authority for the view that a suicide rarely occurs in the absence of a major psychiatric disorder.

Two of Timothy Quill's colleagues on the University of Rochester medical faculty, Yeates Conwell and Eric Caine, geriatric psychiatrists who "work with suicidal people every day," warn that "notably lacking" from the debate about rational suicide and physician-assisted suicide is "attention to the effects of psychiatric illness on rational decision making." They point to suicide study findings that "90 to 100 percent of the victims die while they have a diagnosable psychiatric illness, an observation that is equally true in suicides among the elderly."[39] A number of other commentators use similarly high figures.

The most commonly cited disorders associated with suicide are depressive affective disorders, also called "depressive illness" or "major depression," a verifiable and diagnosable condition that is usually responsive to prompt treatment. One aspect of major depression, that of hopelessness (which is transient and likely to respond to treatment), appears to be the most probable and frequent source of the impairment that often leads to suicide.

More significant for our purposes, I think, than the prevalence of depressive illness among people who die by suicide is the inability of depressed persons to recognize the severity of their own symptoms and the failure of primary physicians to detect major depression in their patients, especially elderly patients. As Conwell and Caine emphasize:

> [M]any doctors on the front lines, who would be responsible for implementing any policy that allowed assisted suicide, are ill equipped to assess the presence and effect of depressive illness in older patients. In the absence of that sophisticated understanding, the determination of a suicidal patient's "rationality" can be no more than speculation, subject to the influence of personal biases about aging, old age, and the psychological effects of chronic disease.[40]

"Ageism"—the prejudices and stereotypes applied to the elderly solely on the basis of their age—may manifest itself in a failure to recognize treatable depression, a refusal to take an aggressive approach to pain management, the view that an elderly person's desire to commit suicide is more "rational" than a younger patient's would be. As sociologist Menno Boldt has observed, "Suicidal persons are succumbing to what they experience as an overpowering and unrelenting coercion in their environment to cease living. This sense of coercion takes many familiar forms: fear, isolation, abuse, uselessness, and so on."[41]

Will these pressures intensify in a society that sanctions assisted suicide (and thereby suicide as well)? In a suicide-permissive society, will family members so inclined be more likely to alter or manipulate a sick, elderly person's circumstances (for example, by providing shoddy or even hostile care) so that suicide becomes a reasonable, even an attractive choice?

In a climate in which suicide is the "rational" thing to do, or at least a "reasonable" option, will it become the unreasonable thing *not* to do? The noble thing *to* do?[42] In a suicide-permissive society plagued by shortages of various kinds and a growing population of "nonproductive" people, how likely is it that an old or ill person will be encouraged to spare both herself and her family the agony of a slow decline, even though she would not have considered suicide on her own?

The best discussion of both circumstantial manipulation and ideological manipulation appears in a famous essay by the philosopher Margaret Battin who, ironically, is a proponent of rational suicide. In an all-too-rare display of openminded, balanced scholarship, Professor Battin presents a strong case against her own ultimate position. She conscientiously spells out how acceptance of her views would open the way for both individual and societal manipulation of vulnerable people into choosing death by suicide when they would not otherwise have done so. She concludes, nevertheless, that "on moral grounds we must accept, not reject, the notion of rational suicide."[43]

A state legislature is free to agree with Professor Battin, but must it? Is it constitutionally required to do so? I hardly think so. I believe a legislature is free to give Battin's insights about the dangers of "manipulated suicide" more weight than she herself seems willing to do; that is one of the risks, if one may call it that, one takes when one produces the kind of high-quality scholarship she does.

In a climate in which suicide is the "rational" thing to do, or at least a "reasonable" option, will it become the unreasonable thing *not* to do?

Professor Battin may be saying something else: she may be conceding that the dangers of "manipulated suicide" *are* quite substantial, but they are *trumped* by one's "fundamental right" to die by suicide. At one point she maintains that we cannot deny "individuals in intolerable and irremediable circumstances their *fundamental right* to die." Whether there *is* a "fundamental right" is the question, not the answer. I don't know how those of us who are not religious can get an authoritative ruling on whether *morally* there is a "fundamental right" to choose death by suicide. But I think I do know that *legally* there is no such right. As we have seen, a decade after Professor Battin wrote her provocative essay, the *Cruzan* Court declined to accord the much less controversial liberty to terminate life-sustaining treatment "fundamental right" status.

Although she is painfully aware of "the moral quicksand" into which the notion of rational suicide "threatens to lead us," Professor Battin voices the hope that if we accept that concept "perhaps then we may discover a path around" the quicksand. Perhaps. Perhaps not. In any event, I submit, the Constitution does not prevent a legislature from reaching the conclusion that there is no safe path around.

Some Final Thoughts

What has been said of voluntary active euthanasia applies as well, I believe, to assisted suicide. As Martin Marty and Ron Hamel have pointed out, "We are not merely a collection of isolated, self-determining individuals." It is unrealistic to think that we can sanction assisted suicide by individuals without having an impact upon "the various communities of which they are a part, and even society as a whole."[44]

I am willing to concede that the line between withholding or withdrawing life-sustaining medical treatment (what many have called passive euthanasia) and "ordinary" suicide and assisted suicide is not a neat, logical line. But what line is? Surely not the line between assisted suicide and voluntary active euthanasia. Nor the line between the right of a terminally ill person to enlist the assistance of others in committing suicide and the right of a quadriplegic to seek similar assistance, or the right of a person who finds her inability even to shift position in her wheelchair intolerable, or the right of a person with a progressive illness.

I cannot believe that any court will recognize a constitutional right to suicide on request. But unless we carry the principle of self-determination or personal autonomy to its logical extreme—assisted suicide by any competent person who clearly and repeatedly requests it for *any* reason *she* deems appropriate—we have to find a "stopping point" somewhere along the way. Any such stopping point will be somewhat illogical, somewhat arbitrary. So why not maintain the line we have now?

Albert Alschuler, my counterpart at the University of Chicago Law School, recently declared: "[T]he strongest argument for the action-inaction line is that, despite its indeterminacy and imprecision, we need it. We have no other line, and without it we sense no limits." Professor Alschuler may have overstated the

case, but not, I think, by very much. Why step across "the historic divide" only to draw another somewhat illogical, somewhat arbitrary line somewhere else? "[I]t is easier to move further down the slope than to climb back up."[45]

In this article I have been focusing on the constitutional dimensions of the right to shape one's death. Thus, I do not have to argue that a state ought not cross the historic divide (although I would); I need only argue that it is not constitutionally compelled to do so. Consider the modern history of our attitudes and beliefs concerning death and dying:

> Recent court decisions have rejected many of the distinctions commentators have proposed in earlier discussions about the right to die: not only the distinction between ordinary and extraordinary . . . treatment, but also the distinction between actively hastening death by terminating treatment and passively allowing a person to die of a disease, between withholding and withdrawing life-sustaining treatment, and between the termination of artificial feedings and the termination of other forms of life-sustaining treatment.[46]

If, as has well been said, "the history of our activities and beliefs concerning the ethics of death and dying is a history of lost distinctions of former significance,"[47] what reason is there to think that that history will come to an end when we sanction assisted suicide for the terminally ill? What reason is there to doubt that in the not-too-distant future the distinction between assisted suicide and voluntary euthanasia or the distinction between the terminally ill and other seriously ill people would become still other "lost distinctions of former significance"?

I can hear the cries of protest: "slippery slope" arguments are a common debating tactic. Yes they are—about as common as the technique of overcoming opposition to a desired goal by proceeding step by step.

Acknowledgments

I am grateful to my colleagues Larry Kramer and Richard Pildes, and University of Michigan law student Marc Spindelman for helpful comments.

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THE DETROIT NEWS/MARCH 07, 1993

Comment

Assisted suicide ban constitutionally sound

By Yale Kamisar

On Feb. 25, the Michigan Legislature voted overwhelmingly to make a new law against assisted suicide go into effect immediately. The governor cheered the Legislature and signed the measure the same day. But that is hardly the end of the story.

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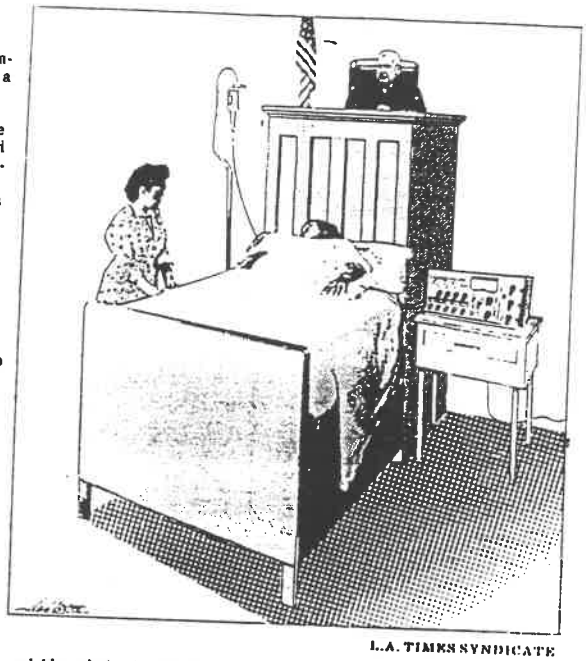
The Michigan chapter of the ACLU has launched a constitutional attack on the new law. Judging from news reports, lawyers for the ACLU, as well as those for Dr. Jack Kevorkian (who is not directly involved in the ACLU lawsuit), are fairly confident that the assisted suicide ban will be struck down. I am equally confident that it will not be — and should not be.

In the weeks and months ahead much will be heard of self-determination, personal autonomy, the right to privacy and — above all — that catchy phrase, the "right to die." As a rallying cry, the "right to die" is hard to beat, but it is much easier to chant a slogan than to apply it to specific situations.

Many proponents of the "right to die" are quick to point out that the "sanctity of life" is not an absolute or unqualified value (and they are right), but they are slow to realize that the same is true of the "right to die." There is no absolute or general "right to die." The only right or liberty that the Karen Ann Quinlan case and the subsequent "right to die" rulings established is the right to die a natural death, that is, the right under certain circumstances to refuse life-sustaining medical treatment. And the new Michigan ban against assisted suicide recognizes that right by explicitly excluding "withholding or withdrawing medical treatment" from its coverage. It also exempts medical treatment designed "to relieve pain or discomfort and not to cause death, even if the medication or procedure may hasten or increase the risk of death."

In the 1970s, the Quinlan case brought the "right to die" issue to national prominence and set the tone for the developments in law and bioethics that followed. But the Quinlan court specifically distinguished between committing or assisting in a suicide and what it called "the ending of artificial life support systems" — the only issue presented.



L.A. TIMES SYNDICATE

As one of the leading commentators in this field, Rutgers Law School's Norman Cantor recently observed: "The assertion that rejection of life-saving medical treatment by competent patients constitutes suicide has been uniformly rejected — usually based on a distinction between letting nature take its course and initiating external death-causing agents."

The one "right to die" case that rivals Quinlan for prominence is the 1990 Nancy Beth Cruzan decision, the only case on death, dying and the "right of privacy" ever decided by the U.S. Supreme Court. As did Quinlan, the Cruzan case involved the right to end artificial life support and it, too, provides no comfort to proponents of a constitutional right to assisted suicide.

The Cruzan court sustained a state's power to keep alive, over her family's objections, an incompetent patient who had not left clear instructions for ending life-sustaining treatment. Speaking for five members of the court, Chief Justice William Rehnquist observed that a state has an undeniable interest in the protection and preservation of all human life. He supported this assertion by noting that "the majority of states in this country have laws imposing criminal penalties on one who assists another to commit suicide."

If a majority of the Supreme Court meant to suggest that laws against assisted suicide are constitutionally suspect, it chose a strange way of doing so.

If the Cruzan case demonstrates anything, it signals the reluctance of the high court to "constitutionalize" an area marked by divisive social and moral debate and its inclination to defer instead to the states' judgments in this difficult field. A court that refused to "constitutionalize" a "right to die" broad enough to uphold the claims of the Cruzan family is hardly likely to "constitutionalize" a right to doctor-assisted suicide.

I do not deny that the argument for assisted suicide (and for active euthanasia) has a certain logical appeal. After all, if one can bring about death by declining medical treatment why can't one achieve the same result by enlisting the aid of others in committing suicide? Isn't that the next logical step?

But why stop there? Doctor-assisted suicide is not quite active euthanasia because the final act is performed by the patient herself, not by another. And there is always the possibility that the patient may not carry out the final act. Suppose, however, that a person cannot swallow a lethal dose of pills or trigger a suicide machine or is otherwise unable to perform the final act by herself? Isn't the *next* logical step, and a short step at that, the right to authorize others to engage in euthanasia?

But doctor-administered euthanasia is the direct, intentional killing of an innocent person. And the criminal laws of every state prohibit that — regardless of the consent of the person killed or the motive of the killer. Are all these laws to be struck down, too, insofar as they violate the "right to die"?

The "right to die" is a sound principle in certain settings. But it is also a vague, unruly concept. (If there really is a broad "right to die," why should it be limited to the terminally ill or even the seriously ill? Why should we set any limits on the right to decide the time and manner of one's death?) An astute constitutional law scholar, the late Paul Freund, used to admonish us that we cannot deal with the complexities of life by a "single supreme simplicity." The same may be said for the complexities of death and dying.

The "right to die" principle should not be carried to the point where it collides with other principles rubbing against it from the other direction — such as the principle that the law protects all human life regardless of the worth or value of a person.

The "right to die" should be confined to the right to decline or to terminate life-sustaining treatment. A state that so limits the right may act somewhat illogically but — considering our history and our culture — it does not act unconstitutionally.

■ A version of this article appears in this week's Legal Times.

The right to die — with help?

Assisted suicide ban properly addresses a troubling issu

A new Michigan law that makes assisted suicide a felony, punishable by as much as four years in prison, has been widely and harshly assailed. I believe much of the criticism is misleading or unfounded.

YALE KAMISAR

Five arguments commonly are made against the ban on assisted suicide. Each can be refuted.

■ *The law is an overreaction to one person, Dr. Jack Kevorkian.*

The criminal proceedings brought against Kevorkian demonstrated that Michigan had no law specifically prohibiting or endorsing assisted suicide. To many people, Kevorkian's entanglement with the law dramatized the need for new legislation.

The state ban on assisted suicide was inspired by Kevorkian, but it is not aimed simply at him. It is a serious effort to deal with an issue that has divided the medical profession as well as the public.

The Michigan law against assisted suicide is hardly aberrational: 35 other states also have criminal laws prohibiting assisted suicide. Surely those laws cannot be dismissed or disparaged on the ground that they were responses to the provocation of Kevorkian or people like him.

■ *If there is a "right" to commit suicide, it follows that there is a right to enlist the assistance of others in committing suicide.*

One has the capacity to commit suicide, but not the "right" to do so. Suicide and attempted suicide are no longer crimes in this country. But these developments did not come about because suicide was deemed a "right," or even because it was no longer considered reprehensible.

The Michigan law against assisted suicide is hardly aberrational: 35 other states also have laws prohibiting assisted suicide. Surely those laws cannot be dismissed or disparaged on the ground that they were responses to the provocation of Kevorkian or people like him.

They occurred, rather, because criminal punishment was seen as unfair to innocent relatives of the suicide, and because it was generally assumed that those who attempted suicide required medical or psychiatric help, not criminal punishment.

But the fact that there is no form of punishment acceptable for a completed suicide, nor any punishment likely to deter attempts to commit suicide, does not mean that criminal law is powerless to influence the behavior of those who assist another to commit suicide.

This, at least, is the judgment of the eminent scholars who drafted the American Law Institute's Model Penal Code in the 1950s and '60s. The code is widely regarded as the greatest criminal law reform project of this century: it criminalizes aiding or soliciting another to commit suicide, but not suicide itself or attempted suicide.

■ *The "right to die" includes the right to assisted suicide.*

There is no absolute or general "right to die." The only right or liberty that the Karen Ann Quinlan case and subsequent rulings have established is the right under certain circumstances to be disconnected from artificial life-support systems — or, as many have called it, the right to die a natural death.

The judicial opinion in the Quinlan case distinguishes that right from committing or assisting in a suicide, which is not permitted. The new Michigan ban on assisted suicide recognizes this distinction, by explicitly excluding from its coverage "withholding or withdrawing medical treatment."

■ *The new Michigan law exerts a "chilling effect" on physicians: it inhibits them from treating pain aggressively and compassionately.*

Although one would gain no inkling of this from most of the attacks, the state law banning assisted suicide specifically exempts "prescribing, dispensing or administering medications or procedures" designed to "relieve pain or discomfort and not to cause death."

This is so "even if the medication or procedure may hasten death or increase the risk of death." If this provision does not assure Michigan physicians that they are free to engage in aggressive and compassionate pain management, I do not know what statutory language would do so.

The Michigan law does not permit physicians to use medication or treatment with "the intent" to cause death, rather than to relieve pain or discomfort. But the use of medication for the purpose of causing death would be nothing less than active voluntary euthanasia — a practice generally regarded as more objectionable than assisted suicide, and one that is outlawed in every jurisdiction in America. In an assisted suicide, the final act that brings death is performed by the patient, not the doctor.

■ *Those opposed to assisted suicide are indifferent to the pain suffered by the gravely ill.*

Quite the contrary. The many physicians, lawyers and bioethicists who are opposed to the legalization of assisted suicide are well aware that health professionals must bring hospice care into mainstream medicine. They also must make use of new advances in pain-relief management.

We must rid ourselves of the unfounded fear that the medicinal use of morphine and other drugs causes addiction. Patients must assert their right to adequate pain relief; this often means around-the-clock relief, not simply relief "as needed."

Unless we do these things, our society — to quote an eminent bioethicist, George Annas — "will ultimately embrace the Kevorkians of this world."

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TIM BRINTON/Scripps to the Free Press

Jack Kevorkian

Ruling on assisted suicide flawed

By Yale Kamisar

Last week, Wayne County Circuit Judge Cynthia Stephens invalidated Michigan's three-month-old law against assisted suicide on the basis of a rather technical state constitutional provision relating to the objects and changes of purpose of state law. Many in the media reported that that was all the judge had done. But it was not.

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Judge Stephens made it clear that if the state constitutional ground for striking down the new law had not been available, she would have enjoined its enforcement on the basis of a so-called due process right to assisted suicide. This portion of her opinion has not received the close attention the underlying issue merits. When given such attention, Judge Stephens' analysis falls apart.

How did Judge Stephens go awry? The principal reason, I believe, is that she made frequent and excessive use of such broad, ambiguous terms (and slogans) as "the right to choose to cease living," "the right to end one's life," "self-determination" and the "right to die." Unfortunately, these fuzzy concepts have been used loosely by many people to embrace three different rights:

- The right to reject or to terminate unwanted medical procedures, including life-saving treatment (the issue presented in the famous cases involving Karen Ann Quinlan and Nancy Beth Cruzan).
- The right to assisted suicide, that is, the right to another's help in committing suicide.
- The right to active voluntary euthanasia, that is, the right to authorize another person to kill you.

L.A. TIMES SYNDICATE

Each of these three rights should be kept separate and distinct. But Judge Stephens lumped them all together under the rubric of "self-determination" or "right to die."

Although one unfamiliar with the precedents in this area would never know it from her opinion, neither the Cruzan case — the only case involving death, dying and the "right of privacy" ever decided by the U.S. Supreme Court — nor any other case mentioned by Judge Stephens establishes an unqualified right to end one's life in the manner one sees fit. The only right the so-called "right to die" cases establish is the right under certain circumstances to reject or to be disconnected from artificial life support systems or, as many commentators have called it, the right to die a *natural death*.

Judge Stephens' reliance on Chief Justice William Rehnquist's majority opinion in the Cruzan case is baffling. There is not the slightest hint in the chief justice's opinion that the high court would recognize a due process right to assisted suicide. If anything, Cruzan suggests the court would reject such a claim.

In the course of upholding the state's power to keep Nancy Cruzan alive, over her family's objections, because Nancy had not left clear instructions for ending life-sustaining treatment, the chief justice pointed out that a state has an undeniable interest in the protection and preservation of human life — even the life of a person in a persistent vegetative state. He supported this assertion by noting that "the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide." He added that "We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death."

I share the view of a leading constitutional law scholar, Georgetown Law School's Louis Michael Seidman, that this language amounts to an endorsement of laws prohibiting assisted suicide and laws permitting state intervention to prevent suicide. Remarkably, Judge Stephens relied on this decision to reach the conclusion that such assisted suicide laws violate the U.S. Constitution!

Judge Stephens also found solace in Justice Antonin Scalia's concurring opinion in Cruzan. Justice Scalia did equate the termination of life support with ordinary suicide, as Judge Stephens noted. But the judge neglected to point out that Justice Scalia was the only member of the Supreme Court to do so — his lone concurring opinion was pretty much ignored by the other eight justices. They were all careful to frame the issue before the court in terms of a right to refuse or to be free from "unwanted medical treatment" or, more specifically, "unwanted artificial nutrition and hydration."

No member of the court disputed Scalia's point that "American law has always accorded the State the power to prevent, by force if necessary, suicide." Nor did any of the other justices challenge Scalia's assertion that there is no significant support for the claim that "a right to suicide is so rooted in our tradition" that it is entitled to due process protection.

Judge Stephens turned Scalia's opinion on its head. He had argued that a state should be allowed to prevent the termination of artificial life-support because it was not essentially different from ordinary suicide. Judge Stephens used Scalia's separate opinion as authority for the view that a state should not be allowed to prevent suicide or assisted suicide because it is no different than the termination of unwanted life-support.

Most jolting of all, Judge Stephens referred to a recent article of mine and stated that in that article I had "recognize[d] the Supreme Court's articulation of a constitutional right to die." I did no such thing. I did not even use the term "right to die." What I did say was that in the Cruzan case the chief justice assumed that "a competent person does have a 'constitutionally protected right to refuse life-saving hydration and nutrition.'"

In a passage that Judge Stephens seems to have overlooked, I went on to say: "Of course, the Court did not suggest that one has so much as 'a Fourteenth Amendment liberty interest' in assisted suicide and I cannot believe that it will do so in the foreseeable future."

Shortly after Judge Stephens handed down her ruling, Elizabeth Gleicher, an attorney for the ACLU of Michigan, which had challenged the law, told the press that the judge had written "a magnificent opinion." Well, if you are the winning lawyer in a case and the judge writes an opinion buying almost every argument you made, you are likely to say nice things about that opinion. But I doubt that many other lawyers familiar with the precedents in this area would concur in Ms. Gleicher's appraisal.

'RIGHT TO DIE' CAN'T BE THE LAST WORD

BY YALE KAMISAR

On Feb. 25, shortly after Dr. Jack Kevorkian had accelerated his activities and the number of people he had helped to commit suicide had reached 15, Michigan enacted a law, effective that very day, making assisted suicide a felony punishable by up to four years in prison. The law prohibits anyone with knowledge that another person intends to commit suicide from either "intentionally providing the physical means" or "intentionally participat[ing] in a physical act" by which that other person dies by suicide.

This anti assisted-suicide law contains a number of exceptions. It recognizes the right to reject unwanted medical treatment, even life-sustaining procedures, by specifically excluding "withholding or withdrawing medical treatment" from its coverage. It also recognizes the principle of "double effect"—that there is a morally relevant distinction between the intended effects of one's actions and the unintended though foreseen effects. It does so by exempting "prescribing, dispensing or administering" medication or treatment designed "to relieve pain or discomfort and not to cause death, even if the medication or procedure may hasten or increase the risk of death."

These provisions led an eminent authority on legal issues in medicine, Boston University's George Annas, to say in a recent issue of the *New England Journal of Medicine*: "The [new Michigan law] has been attacked as unconstitutionally interfering with the right of privacy, but given its exceptions, the challenge is unlikely to succeed." I would have put it even more strongly.

On May 20, however, in *Hobbins v. Attorney General of Michigan* (now on appeal), Judge Cynthia Stephens of Wayne County Circuit Court struck down the three-month-old law. Her decision knocked law-enforcement officials and state legislators off balance. And they weren't the only ones surprised.

Because Judge Stephens' opinion was distributed late in the day and reporters had little time to meet tight deadlines (and probably because they relied too heavily on the judge's own summary of her opinion), many in the media reported that Stephens had not addressed the underlying basic question of whether there is a due-process right to assisted suicide. They told their readers and listeners instead that Stephens had invalidated the law on the basis of a rather technical Michigan constitutional provision relating to the objects and changes of purpose of state laws. It wasn't until I obtained a copy of her opinion that I realized that the judge had indeed addressed the underlying due-process issue.

In what some would call an advisory opinion and others an alternative holding, Judge Stephens made it clear that if she had not been able to invalidate the law on the ground that it violated state constitutional procedural requirements, she would have issued a preliminary injunction against its enforcement on the basis of a due-process right to assisted suicide.

Some 35 states criminalize assisted suicide (most by specific legislation, but a few by making assisted suicide a form of murder or manslaughter). Are all these laws now constitutionally vulnerable?

I think not. I venture to say that Judge Stephens reached an unprecedented and unsound conclusion on the basis of confused reasoning.

If I am right, how did the judge go wrong? The principal reason, I believe, is that she made frequent and excessive use of such broad, ambiguous terms (and slogans) as "the right to choose to cease living," "the right to end one's life," "self-determination," and "the right to die." Unfortunately, these fuzzy concepts have been used loosely by many people to embrace three different rights:

(a) the right to reject or to terminate unwanted medical procedures, including life-saving treatment (the issue presented in the famous cases involving Karen Ann Quinlan and Nancy Beth Cruzan);

(b) the right to assisted suicide, that is, the right to obtain another's help in committing suicide; and

(c) the right to active voluntary euthanasia, that is, the right to authorize another person to kill you.

Each of these three rights should be kept separate and distinct. But Judge Stephens lumped them all together under the rubrics "self-determination," "right to die," and the like.

Although one unfamiliar with the precedents in this area would never know it from her opinion, neither *Cruzan v. Director, Missouri Department of Health* (1990)—the only case involving death, dying, and the "right of privacy" ever decided by the U.S. Supreme Court—nor any other case mentioned by Judge Stephens establishes an unqualified right to end one's life in the manner one sees fit, or an absolute or general right to die.

The *only* right the so-called right-to-die cases establish is the right under certain circumstances to reject or to be disconnected from artificial life-support systems or, as many commentators have called it, the right to die *a natural death*. In *Cruzan*, for example, Chief Justice William Rehnquist wrote only that a competent person has "a constitutionally protected right to refuse lifesaving hydration and nutrition."

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A Limited Right

So Judge Stephens' reliance on Rehnquist's majority opinion in *Cruzan* is baffling. There is not the slightest hint in the opinion that the Supreme Court would recognize a due-process right to assisted suicide. If anything, *Cruzan* suggests that the Court would reject such a claim.

In the course of upholding the state's power to keep Nancy Cruzan alive over her family's objections, because Nancy had not left clear instructions for ending life-sustaining treatment, the chief justice pointed out that a state has an undeniable interest in the protection and preservation of human life, even the life of a person in a persistent vegetative state. He supported this assertion by noting that "the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide."

"We do not think," added the chief justice, that "a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death."

I share the view of a leading constitutional law scholar, Georgetown University Law Center's Louis Michael Seidman, that the language quoted above amounts to an endorsement of laws prohibiting assisted suicide and laws permitting state intervention to prevent suicide.

So, remarkably, Judge Stephens relied on a Supreme Court opinion that seems to approve laws against assisted suicide to reach the conclusion that such laws violate the U.S. Constitution!

Making Analogies

Stephens also found solace in Justice Antonin Scalia's concurring opinion in *Cruzan*. Scalia did equate the termination of life support with ordinary suicide. But Stephens turned that opinion on its head. Scalia had argued that a state should be allowed to prevent the termination of artificial life support because it is essentially no different than ordinary suicide. Stephens used Scalia's opinion as authority for the view that a state may not prevent suicide or assisted suicide because it is no different than the termination of unwanted life support.

Suicide Ruling Missed Point

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Moreover, Judge Stephens neglected to point out that Scalia was the only member of the Supreme Court even to make the analogy: His lone concurring opinion was pretty much ignored by the other eight justices. The others were all careful to frame the issue before the Court in terms of a right to refuse or to be free from "unwanted medical treatment" or, more specifically, "unwanted artificial nutrition and hydration."

No member of the Court disputed Scalia's point that "American law has always accorded the State the power to prevent, by force if necessary, suicide." Nor did any of the other justices challenge Scalia's assertion that there is no significant support for the claim that "a right to suicide is so rooted in our tradition" that it is entitled to due-process protection. The other justices simply rejected Scalia's view that the request of Nancy Cruzan's parents to terminate her life support should be regarded as "the assertion of a 'right to suicide.' "

Justice Scalia is well aware that, as Justice Felix Frankfurter was fond of saying, the answer you get depends on the question you ask. Surely a principal reason why Scalia framed the question presented in *Cruzan* the way he did was his confidence that there was no way a majority of the Court would recognize a constitutional right to commit suicide. And nothing any of his colleagues said suggests that Scalia's confidence was unfounded.

Most jolting of all, Judge Stephens referred to an article that I had written in the current issue of the *Hastings Center Report*, stating that in that article I "recognize[d] the Supreme Court's articulation of a constitutional right to die."

I did no such thing. First, I did not use the term "right to die." For reasons indicated above, I emphatically rejected that phrase because its use is conducive to sloppy analysis. I merely noted Chief Justice Rehnquist's statement in *Cruzan* that a competent person has a constitutional right to refuse hydration and nutrition.

In a passage that Judge Stephens seems to have overlooked, I went on to say: "Of course, the Court did not suggest that one has so much as 'a Fourteenth Amendment liberty interest' in assisted suicide and I cannot believe that it will do so in the foreseeable future."

Shortly after Stephens handed down her ruling last month, an attorney for the American Civil Liberties Union of Michigan, which had challenged the anti-assisted-suicide law, told the press that the judge had written "a magnificent opinion." Well, if you are the winning lawyer in a case and the judge writes an opinion buying almost every argument you made, you are likely to say nice things about that opinion. But I am confident that the great majority of lawyers familiar with the precedents and the professional literature in this area would dissent strongly from the Michigan ACLU's assessment. □

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