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## Assisted Suicide: A Tough Pill to Swallow

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# Assisted Suicide: A Tough Pill to Swallow\*

## I. INTRODUCTION

My machine will take off a head in a twinkling, and the victim will feel nothing but a slight sense of refreshing coolness on the neck. We cannot make too much haste, gentlemen, to allow the nation to enjoy this advantage.

—Joseph Ignace Guillotin, French physician to the French Assembly, 1789<sup>1</sup>

The year is 1990. Dr. Jack Kevorkian<sup>2</sup> connects a diseased patient to his “modern-day guillotine.” It is not the state that is employing the device, however; rather, it was devised solely to assist the public in exercising their choice to die.<sup>3</sup> With Kevorkian’s assistance, Janet Adkins, an Alzheimer’s patient, was the first person to “enjoy the advantage” of an easy and self-determined death.<sup>4</sup> In October 1991, Dr. Kevorkian assisted two more women in exercising their choice to die.<sup>5</sup> Throughout this peri-

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\* This article is dedicated to Judith Penrose and Francine Copeland, two ladies who have exhibited courage and tenacity in the face of illness despite their continued suffering. Their perseverance served as an inspiration for this research.

1. DAVID S. SHRAGER & ELIZABETH FROST, *THE QUOTABLE LAWYER* 261 (1986).

2. See *Suicide Device Inventor Charged With Murder*, N.Y. TIMES, Feb. 6, 1992, at A21. Jack Kevorkian, a retired Michigan pathologist, first thrust himself into the public arena when he assisted Janet Adkins, an Alzheimer’s patient, in committing suicide. See also Eric Harrison, *‘Dr. Death’ Arrested In 2 Women’s Suicides*, L.A. TIMES, Feb. 6, 1992, at A15. Dr. Kevorkian devised an intravenous device that delivers a lethal dose of medication into the patient’s system. The patient controls the machine’s activation button and thereby actually causes his or her own death. *Id.* Dubbed by the media as “Dr. Death,” Kevorkian has to date “assisted” 15 people in bringing about their own deaths. See *infra* note 181 and accompanying text. Kevorkian advocates establishing a nationwide network of “suicide clinics.” See *id.*

3. E.g., Cynthia Garney, *‘Dr. Death’s’ Life Obsession*, WASH. POST, Dec. 20, 1990, at D1. Kevorkian argues that the terminally ill and chronically suicidal have a right to ask doctors for help in planning their own deaths. *Id.*

4. Joyce Price, *Prosecution Considered in 2 Suicides*, WASH. TIMES, Oct. 25, 1991, at A4. In June 1990, Dr. Kevorkian assisted Mrs. Adkins’ suicide by connecting her to his “suicide machine.” *Id.* The suicide occurred in Dr. Kevorkian’s Volkswagen van. *Id.* Reactions to this scenario in particular, as well as the overall problem of cover-ups and covert assisted suicides, is one reason so many individuals are urging for passage of an official policy offering guidance. *Id.*

5. Harrison, *supra* note 2, at A15. Interestingly, none of these three women was terminal. Janet Adkins suffered from Alzheimer’s disease; Sherry Miller, 43, suffered from multiple sclerosis; and, Marjorie Wantz, 58, suffered from intractable pelvic pain. *Id.*

od, many watched in astonishment as *Final Exit*, a how-to suicide manual written by Derek Humphry,<sup>6</sup> climbed national bestseller lists.<sup>7</sup> *Final Exit's* success, as well as Kevorkian's emergence, is evidence of society's desperate response to such crises as the AIDS epidemic and the lack of national health insurance.<sup>8</sup> Many people are crying out for a certain "quality" of life and numerous individuals are choosing to end lives that do not meet that "quality" standard.<sup>9</sup>

The moral and legal controversy surrounding abortion fueled passionate debates and protests during the 1970s and 1980s. The twenty-first century offers a new, equally disturbing ethical conflict: the right to assisted suicide. Many of the issues run parallel. Both involve the controversial question of whether biological existence constitutes life. Abortion focuses on when "life" begins and assisted suicide focuses on when life ends.<sup>10</sup> Both abortion and assisted suicide raise religious concerns and

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6. DEREK HUMPHRY, *FINAL EXIT: THE PRACTICALITIES OF SELF-DELIVERANCE AND ASSISTED SUICIDE FOR THE DYING* (1991). See Dennis L. Breo, *MD-Aided Suicide Voted Down*, 266 JAMA 2895 (1991). Humphry is the founder of the Hemlock Society, an American organization supporting the right to die. Humphry, formerly a writer for the *London Times*, euthanized his first wife with a mixture of secobarbital and codeine. *Id.* Charges were filed, but Humphry was not prosecuted. *Id.* Years later, Humphry's second wife, who was recovering from breast cancer, similarly ingested a fatal combination of secobarbital. *Id.*

7. Patricia Orwen, *This Book Is Like a Loaded Gun*, TORONTO STAR, Dec. 13, 1991, at F1. *Final Exit* has sold more than a half-million copies across North America. *Id.*

8. See BRUCE HILTON, *FIRST DO NO HARM* 134-53 (1991). Hilton points out that some 37 million Americans, or one in six, have no health insurance. *Id.* at 138. These numbers are then compared with the Canadian system of national insurance. *Id.* at 149-50. Interestingly, the national health crisis played a significant role in the 1992 presidential election. Shortly after he was elected, President Clinton formed a national health task force headed by the First Lady, Hillary Rodham Clinton. Spencer Rich, *Chamber Backs "Managed Competition."* *Business Group Moves Closer to Administration on Policy Changes*, WASH. POST, Mar. 9, 1993, at A11.

9. Michael McAteer, *Euthanasia, The Moral Issue of the 90s. The Right-to-Die Dilemma Sparks Religious Debates*, TORONTO STAR, Nov. 23, 1991, at K18. Ronald Adkins, husband of the late Janet Adkins, commented that the issue "boils down to a matter of personal choice." *Id.* In this respect, the supporters of assisted-suicide are analogous to those supporting abortion. The terms "pro-life" and "pro-choice" are as fitting in the assisted suicide debate as they are in the abortion controversy. See also HILTON, *supra* note 8, at 90. Hilton recalls the social conviction during the Karen Ann Quinlan days: "We were certain about our deaths; in rare unanimity, we all wanted to go fast. *No lingering, no suffering.*" *Id.* (emphasis added).

10. See generally *Roe v. Wade*, 410 U.S. 113, 132-61 (1973) (discussing the legal history of the debate over when life begins). Definitions of "life" will doubtlessly follow the *Roe* evolution. Unfortunately, the *Roe* Court openly avoided accepting any one definition based on the scientific, religious, and philosophical variations proffered. *Id.* at 159. Justice Blackmun, speaking for the Court, espoused avoidance by determining, "We need not resolve the difficult question of when life begins." *Id.* However,

garner theological admonishments.<sup>11</sup> Abortion is frequently a major political issue.<sup>12</sup> Candidates often win or lose a district in a certain jurisdiction based upon that candidate's abortion policy.<sup>13</sup> In the aftermath of *Webster v. Reproductive Health Services*,<sup>14</sup> legal scholars are seriously

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such a determination is critical to solidifying legal rights. As science progresses, the definition changes. Because there is no fixed, working definition, perpetual litigation ensues, continually seeking determinations as to what an individual's "rights" include. Perhaps when courts and legislatures address the assisted suicide issue they will attempt to conclusively determine when life ends. A good starting point might be *A Definition of Irreversible Coma: Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death*, 205 JAMA 337-40 (1968) (requiring all reflexes to be gone, even spinal reflexes which are present in an otherwise brain dead patient). The American Bar Association has adopted the following definition for brain death: "For all legal purposes, a human body with irreversible cessation of total brain function, according to the usual and customary standards of medical practice, shall be considered dead." Ronald E. Cranford, *Brain Death and the Persistent Vegetative State*, in LEGAL AND ETHICAL ASPECTS OF TREATING CRITICALLY AND TERMINALLY ILL PATIENTS 67 (A. Edward Doudera & J. Douglas Peters eds., 1982). Although these limited definitions do not address the extent to which the end of life can be imputed to the early stages of a degenerative disease, such as AIDS and Alzheimer's, they are a good focal points to build upon.

11. SIMON LEE, LAW AND MORALS 9 (1986). In his book, Lee characterizes the Catholic Church as the "vanguard of the 'Moral Majority.'" *Id.* Mr. Lee offers an excerpt from the Roman Catholic Archbishops' 1980 statement on "Abortion and the Right to Life," which stresses that the Catholic position on abortion is just "one aspect of our [the Catholic Church's] stand against all practices that degrade human rights and dignity." *Id.* at 10.

12. One of the questions posed to both Justice Souter and Justice Thomas during their Senate Judiciary Confirmation Hearings was where each stood on the abortion question. See Ruth Marcus, *Justices Souter, Thomas Follow Separate Paths*, WASH. POST, July 5, 1992, at A1.

13. For example, the candidates' views on abortion had an impact on the November 1992 senatorial race between Barbara Boxer and Bruce Herschensohn. George Skelton, *California Elections; Abortion, Change Cited as Key Issues for Feinstein and Boxer*, L.A. TIMES, Nov. 4, 1992, at A3.

14. 492 U.S. 490 (1989) (plurality opinion). *Webster* reversed an Eighth Circuit ruling striking down portions of Missouri's restrictive abortion statute. *Id.* at 499. Chief Justice Rehnquist, writing for the plurality, attacked the *Roe* trimester and viability elements as resulting in "a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine." *Id.* at 518. The Chief Justice further elaborated, "[W]e do not see why the State's interest in protecting potential human life should come into existence *only at the point of viability*." *Id.* at 519 (emphasis added). The case was disposed of on narrow grounds, with the Court abstaining from a reconsideration of *Roe*. *Id.* at 525 (O'Connor, J., concurring).

Although *Webster* did not overrule *Roe*, it has certainly cast a shadow of doubt

questioning the future of *Roe v. Wade*.<sup>15</sup> If *Roe* falls, absent a legislative determination on physician assisted suicide, the issue may soon replace abortion as the privacy litmus test.<sup>16</sup> As advancing medical technology enables the prolongation of life functions, a determination must be made as to where assisted suicide fits into our legal framework. Now that churches, secular organizations and the American Medical Association have taken their respective stands, the time is ripe for the government to respond.

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on *Roe*'s longevity. The dissenters, Justices Blackmun, Brennan and Marshall, claimed that *Webster* impliedly overrules *Roe*, stating that a woman's right to an abortion "survive[s], but [is] not secure." *Id.* at 537-38 (Blackmun, J., dissenting). Justice Scalia's concurrence is particularly noteworthy, because he asserts that the Court should have reevaluated *Roe*. *Id.* at 535 (Scalia, J. concurring).

15. 410 U.S. 113, 162-63 (1973). *Roe* currently remains the seminal abortion case permitting termination of a pregnancy prior to viability. The Court found the state's interest in preserving potential life and protecting the mother's health subservient to the individual's right to personal autonomy. *Id.* For a good discussion on the future effect of *Webster*, see Selina K. Hewitt, Note, *Hodgson v. Minnesota: Chipping Away at Roe v. Wade in the Aftermath of Webster*, 18 PEPP. L. REV. 955, 988-1003 (1991) (addressing the impact of Justice Souter's appointment to the Court in relation to current membership).

16. *But see* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (plurality opinion). The United States Supreme Court recently handed down a plurality opinion that qualified, but did not overturn, the Court's holding in *Roe*. *Id.* at 2812 (opinion of O'Connor, J., joined by Kennedy, and Souter, JJ.). In *Casey*, the plurality noted that *Roe* was founded not only upon the liberty interests of *Griswold v. Connecticut*, 381 U.S. 479 (1965) and its progeny, but also upon

a rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection . . . . [C]ases since *Roe* accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims.

*Casey*, 112 S. Ct. at 2810 (citing *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 278 (1990)). The plurality noted that *Roe*'s foundations remained firm and left undisturbed *Roe*'s central holding that a woman has a constitutional right to an abortion before fetal viability. *Id.* at 2811-12 (opinion of O'Connor, Kennedy, and Souter, JJ.). Justices O'Connor, Kennedy, and Souter proposed that *Roe*'s trimester framework should be rejected in favor of a more flexible "undue burden" test. *Id.* at 2816-21 (opinion of O'Connor, Kennedy, and Souter, JJ.). Thus, a provision of the law is invalid only if it imposes an "undue burden" on a woman's decision to terminate her pregnancy. *Id.* at 2820 (opinion of O'Connor, Kennedy, and Souter, JJ.). The Court defined "undue burden" as any statute or regulation which has either the purpose of placing a "substantial obstacle in the path of a woman seeking an abortion" or any law, though not purposefully placing such an obstacle, that nonetheless has the same prohibitory effect. *Id.* (opinion of O'Connor, Kennedy, & Souter, JJ.). Once the fetus is viable, the State's interest in preserving life allows the State to regulate and, in fact, even prohibit abortions, except where necessary to protect the life or health of the mother. *Id.* at 2821 (opinion of O'Connor, Kennedy, and Souter, JJ.). See also *infra* text accompanying notes 355-58 for a more thorough treatment of the *Casey* decision.

The first part of this Comment will present the historical and theological views towards suicide. This background material will be helpful in understanding present-day society's response to the assisted suicide debate by tracing many of the condemnations back through common law development. The second portion of this Comment will focus on the current status of the assisted suicide debate. Although most courts have passed on the issue<sup>17</sup> and most legislatures do not have laws addressing assisted suicide,<sup>18</sup> there is a great deal of activity shaping the legal future of this topic.<sup>19</sup> This section emphasizes the importance of key non-legal players in the assisted suicide debate and comments on two legislative attempts at legalizing euthanasia. Finally, this section closes with observations of a past euthanasia program when physicians were, in essence, "assisting" unwanted suicides. The third section of this Comment attempts to present the existing statutory and case authority analogous to assisted suicide. By focusing on the laws and cases that address the issues analogous to the right to die, the author hopes that this Comment will facilitate the formulation of a hypothesis as to where the courts and legislatures are traveling, and where they might proceed if they continue upon their current path.

## II. LAYING THE FOUNDATION

### A. *An Overview of Suicide—The Historical Perspective*

Suicide is defined as "self destruction" or "the deliberate termination of one's own existence."<sup>20</sup> Historically, suicide has been labeled every-

17. After Dr. Kevorkian performed his first assisted suicide, a Michigan judge issued a permanent injunction barring him from participating in further suicides. Tracy Shryer, 'Dr. Death' Found at Scene of Ailing Woman's Suicide, L.A. TIMES, May 16, 1992, at A25. Through January 1993, no other judicial body has addressed assisted suicide.

18. The Michigan legislature passed a law outlawing assisted suicide, effective March 30, 1993. Mike Martindale, *Quadriplegic's Mother Thanks Dr. Kevorkian*, Gannett News Serv., Dec. 22, 1992, available in LEXIS, Nexis library, Omni file. Through January 1993, no other legislative body has addressed assisted suicides.

19. Recently, two ballot initiatives regarding physician-assisted suicide have been defeated. In November 1991, Washington voters defeated Initiative 119. Warren King, *Both Sides Claim Victory in 119 Vote*, SEATTLE TIMES, Nov. 7, 1991, at A3. In November 1992, California voters rejected Proposition 161. Vlae Kershner, *California Voters Reject Nine Out of Thirteen Ballot Measures*, S.F. CHRON., Nov. 5, 1992, at A15.

20. BLACK'S LAW DICTIONARY 1434 (6th ed. 1991). See also 83 C.J.S. *Suicide* §§ 1-2 (1953) ("Suicide is the taking of one's own life, and in its technical or legal sense

thing from a sin against God and nature<sup>21</sup> to a dignified act of heroism.<sup>22</sup> In ancient Rome and Greece, suicide was acceptable in circumstances of a lengthy terminal illness or in order to avoid dishonor or ostracism.<sup>23</sup> Despite the apparent societal acceptance in these limited situations, there were many dissenting views. The religiously impassioned Pythagoreans rejected suicide on all grounds regardless of motivation.<sup>24</sup> In fact, one author credits the Pythagoreans with influencing the Hippocratic Oath, the physician's code.<sup>25</sup> Plato and Aristotle are believed to have opposed suicide.<sup>26</sup> The latter vehemently maintained that suicide was both an act of cowardice and unjustly deprived society of one of its productive members.<sup>27</sup>

In contrast, the Stoics represented a more tolerant view.<sup>28</sup> With great foresight, Seneca advocated a movement for individual rights and self-determination.<sup>29</sup> Seneca claimed, "[I]n no matter more than death should we act according to our desire . . . . Why should I endure the agonies of disease . . . , when I can emancipate myself from all my torments."<sup>30</sup> This same principle often pervades discussion of the modern issue. The Stoics offered five justifications for acceptable suicides, two of which are pertinent to the discussion at hand: (1) chronic illness and (2) loss of one's rational faculties.<sup>31</sup> What is most astounding is that these two justi-

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requires that the self destruction be intentional and by a sane person.").

21. ENCYCLOPEDIA OF RELIGION 125 (Mircea Eliade ed., 1987).

22. *Id.*

23. *Id.* at 126.

24. *Roe v. Wade*, 410 U.S. 113, 131 (1973). Interestingly, many of the historical principles espoused in the assisted suicide debate were similarly presented in the abortion controversy. The historical approaches to suicide and abortion are nearly identical. See generally *id.* at 130-41 (discussing the legal history of abortion).

25. ROBERT N. WENBERG, *TERMINAL CHOICES* 41 (1989). See also *Roe*, 410 U.S. at 131. In pertinent part, the Oath reads: "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion." *Id.* (emphasis added).

26. WENBERG, *supra* note 25, at 42. Although both men opposed suicide per se, Plato approved of euthanasia in cases of debilitating illnesses resulting in prolonged suffering. *Id.*

27. *Id.* See also *Roe*, 410 U.S. at 131 (noting that Pythagorean philosophers opposed the act of suicide).

28. WENBERG, *supra* note 25, at 42. The Stoics are considered "more representative of the Greco-Roman period" because they exhibited greater empathy for suicides and euthanasia than either Plato or Aristotle. *Id.*

29. *Id.* at 42-43. In contrasting Seneca's view with the Christian and Jewish beliefs, the author differentiates between "[t]he Stoic heritage [which] declares my life and my selfhood are my own to dispose of as I see fit," and the Judeo-Christian belief that God alone has the choice of how life and selfhood are disposed. *Id.* at 43.

30. *Id.* at 42-43. Seneca, like Socrates, exercised his avowed personal right and took his own life. ENCYCLOPEDIA OF RELIGION, *supra* note 21, at 126.

31. WENBERG, *supra* note 25, at 44. The other three justifications were: (1) if one

fications have survived nearly two thousand years of evolving legal doctrine and ethical principles. Contrary to modern practice, however, Greek and Roman physicians relied on these justifications and routinely assisted terminal patients in committing suicide.<sup>32</sup>

In England, suicide was a common law felony.<sup>33</sup> Until well into the nineteenth century, suicides resulted in the forfeiture of property and denial of a proper burial.<sup>34</sup> Traditionally, the bodies of feudal suicides were buried outside cemeteries with a stake driven through their hearts.<sup>35</sup> Modernly, neither suicide nor attempted suicide is criminal in most jurisdictions.<sup>36</sup> However, the English Commonwealth countries continue to provide penalties, at least theoretically, for aiding and abetting suicide.<sup>37</sup>

would perform a service to others, (2) if one would thereby avoid committing an unlawful deed, and (3) if one were impoverished. *Id.*

32. Timothy J. Lacey, *The Physician Can Play a Positive Role in Euthanasia*, 262 JAMA 3075 (1989). See *Roe v. Wade*, 410 U.S. 113, 132 (1973). Prior to the Christian movement, many physicians openly violated the precepts of the Hippocratic Oath, including its mandate to refrain from giving any "deadly medicine." Once Christianity became a widespread belief, the Oath became self-policing creed, garnering support in the medical community. The Hippocratic Oath quickly "became the nucleus of all medical ethics." Lacey, *supra*, at 3075.

33. Cf. *Roe*, 410 U.S. at 132-36. Here again, the assisted suicide issue parallels abortion. Although abortion prior to quickening (any movement by the fetus indicating life) was not criminal, abortion of a "quick" fetus was an offense at common law. See generally Shari O'Brien, *Facilitating Euthanatic Rational Suicide: Help Me Go Gentle Into That Good Night*, 31 ST. LOUIS U. L.J. 655 (1987) (presenting a thorough overview of the historical evolution of suicide).

34. VICTORIAN BRITAIN 770 (Sally Mitchell ed., 1988). In 1823, suicides were permitted "decent burials," but only at night without Christian rites. *Id.* It was not until 1870 that the practice of property forfeitures was wholly abandoned. *Id.* Finally, in 1882, suicides were granted daylight burials. *Id.* at 770-71.

35. NORMAN ST. JOHN-STEVAS, *LIFE, DEATH AND THE LAW* 233 (1961). The last recorded "indecent" burial (one with a stake driven through the person) occurred in 1823 and rests at the intersections of Kings Road, Eaton Street, and Grosvenor Place in London. *Id.*

36. *E.g.*, *Wackwitz v. Roy*, 418 S.E.2d 861, 864-65 (Va. 1992) (holding that because the General Assembly has not expressly decriminalized suicide, it remains a common law crime in Virginia). See generally 83 C.J.S. *Suicide* §§ 1-6 (1953 & Supp. 1992) (discussing criminal responsibility for killing or attempting to kill oneself).

37. 2 LAWS OF ENGLAND para. 443 (Lord Hailsham of St. Maryleboen 4th ed. 1990). Paragraph 443, *Complicity in Suicide*, states: "Although suicide is no longer an offence in itself, any person who *aids, abets, counsels or procures the suicide of another*, or an attempt by another to commit suicide is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding fourteen years." *Id.* (emphasis added).



## B. Religious Treatment of Suicide—The Role of Theology

Religious views recurrently play a vital role in shaping laws and societal mores.<sup>38</sup> Legislators and lobbyists have attempted to divorce religious influences in crucial legal battles, but religious undertones remain deeply imbedded in certain modern issues. The abortion controversy is replete with religious overtones, as evidenced by the Catholic Church's continued involvement in "right to life" issues.<sup>39</sup> Such influence is certain to pervade the assisted suicide debate in a similar manner.<sup>40</sup>

Traditionally, Christians have denounced suicide as self-murder, relying primarily on the Sixth Commandment's mandate: "Thou shall not kill."<sup>41</sup> Some Christian scholars have also found support against suicide in the 139th Psalm.<sup>42</sup> Yet, even Christians on occasion have found justification

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38. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated . . . the courts will be very busy indeed." *Id.*

39. See *infra* note 143 and accompanying text.

40. BURTON M. LEISER, *LIBERTY, JUSTICE, AND MORALS: CONTEMPORARY VALUE CONFLICTS* 107 (2d ed. 1979). The author presents the philosophical argument against abortion as resting on the principle that all "[h]uman life is sacred; that is, every human being has the fundamental right to live." *Id.* This principle will certainly be raised in opposition to assisted suicide, which seeks to grant every human the right to die. The author follows up this first principle with a second that states: "Everyone has a *moral duty* to respect the sanctity of human life, that is, to refrain from any act that can reasonably be expected to cause another human being's death." *Id.* (emphasis added). It is these very moral arguments that opponents of assisted suicide will raise in attempts to prevent a legalized "right to die."

41. *Exodus* 20:13 (New King James); *Deuteronomy* 5:17 (New King James). See also *ENCYCLOPEDIA OF RELIGION*, *supra* note 21, at 127; WENNBERG, *supra* note 25, at 41-43. The logic is described as follows: "You shall not kill a man. I am a man. Therefore, I shall not kill myself." *Id.* at 56. Although most interpreters agree that the Sixth Commandment apparently is not a direct mandate against suicide, the implication is that suicide is analogous to homicide, and therefore is similarly covered by the Sixth Commandment's mandate against killing. *Id.* at 56-65. Further, the motivation behind the Sixth Commandment applies with equal force to suicide. "For to kill oneself is to opt out of life's enterprise and to contravene the divine intention for human existence." *Id.* at 65.

42. *Psalms* 139:13-18 (New King James). The Psalm provides:

For you have formed my inward parts; You have covered me in my mother's womb. I will praise You, for I am fearfully and wonderfully made; Marvelous are Your works, And that my soul knows very well. My frame was not hidden from You When I was made in secret And skillfully wrought in the lowest parts of the earth. Your eyes saw my substance, being yet unformed And in Your book they all were written The days fashioned for me, When as yet there were none of them How precious also are Your thoughts to me, O God! How great is the sum of them! If I should count them, they would be more in number than the sand, When I awake, I am still with You.

and penance for certain individuals who took their own lives by differentiating between suicide (a sin) and martyrdom (a noble and heroic sacrifice).<sup>43</sup> The only New Testament depiction of suicide is Christ's betrayer, Judas Iscariot.<sup>44</sup> The allegory is simple: suicide is reserved only for the malevolent.<sup>45</sup>

As this biblical illustration amply portrays, vehement disapproval of suicide was a precept of the early Christian doctrine.<sup>46</sup> Saint Augustine's adamant antisuicide position formed the Christian foundation.<sup>47</sup> Augustine's condemnation appears in his proclamation that "suicide is not a legitimate act even in such desperate circumstances as those of a virgin seeking to protect her virtue."<sup>48</sup> This austere stand corresponds with the Christian belief in unqualified preservation of life.<sup>49</sup> Saint Augustine further demonstrated this principle through his glorification of the biblical figure Job, who tenaciously clung to life despite suffering and

*Id.* (emphasis added).

43. *E.g.*, ST. JOHN-STEVAS, *supra* note 35, at 250-51 (citing three general exceptions to the Christian prohibition of suicide: (1) suicide as a result of divine inspiration, (2) suicide as a capital punishment option under the laws of the State, and (3) altruistic suicide, done to accomplish some good result and only in a desperate situation).

44. *See Matthew 27:3-5* (New King James).

45. WENNBERG, *supra* note 25, at 74. Wennberg suggests a common denominator exists in biblical suicides: each individual was "at odds with God's purposes, and their mode of death (i.e., suicide) is inferentially implicated in the divine disfavor." *Id.*

46. *Id.* at 53.

47. *Id.* (labeling Augustine's condemnation the "single most important factor in setting the face of the Christian church firmly against acts of self-killing"). *See also* ST. JOHN-STEVAS, *supra* note 35, at 248-49. The English judiciary adopted this Augustinian view, furthering the belief that for one to kill oneself is "a greater offence than to kill another." *Id.* at 234-35.

48. ENCYCLOPEDIA OF RELIGION, *supra* note 21, at 127. *See* WENNBERG, *supra* note 25, at 53.

49. Blackstone is recorded as having labeled suicide as a twofold crime: one against God, and one against the king. ST. JOHN-STEVAS, *supra* note 35, at 235.

And also the law of England wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it; and, as the suicide is guilty of a double offence [sic]; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presences uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony committed on one's self.

*Id.*

hardship.<sup>50</sup> This view remains instilled in the minds of devout Christians who believe the body is merely a temple for God and accept suffering as part of the divine plan.<sup>51</sup>

Judaism parallels Christianity in its reverence of human life.<sup>52</sup> The Jews similarly distinguish between straight suicide and acts of martyrdom.<sup>53</sup> The Hebrew scriptures present several examples of technical suicide,<sup>54</sup> yet all occasions are condoned as martyrdom.<sup>55</sup> Though Judaism denounces suicide, those who commit suicide are permitted traditional burial rites. Victorian England lacked this cultural forgiveness as suicides were denied a respectful burial.<sup>56</sup>

Muslims, the followers of Islam, fall directly in line with their Christian and Jewish counterparts. Muslims condemn suicide, believing suicides

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50. *Job* 7:1-4 (New King James).

Is there not a time of hard service for man on earth? Are not his days also like the days of a hired man? Like a servant who earnestly desires the shade, And like a hired man who eagerly looks for his wages. So I have been allotted months of futility And wearisome nights have been appointed to me. When I lie down, I say, 'When shall I arise, And the night be ended?' For I have had my fill of tossing till dawn.

*Id.* (emphasis added). See also, WENBERG, *supra* note 25, at 53.

51. WENBERG, *supra* note 25, at 82-88.

52. Amnon Carmi, *Live Like a King, Die Like a King*, in EUTHANASIA 4 (Amnon Carmi ed., 1984). Referring to *Genesis* 9:6, the author observes that "[t]he shedding of blood is the primeval sin, and throughout the centuries ranks in Jewish law as the gravest and most reprehensible of all offenses." *Id.* at 4. An illustration follows: "If a Gentile said to a Jew: 'Kill or be killed,' let the Jew prefer death and not commit that sin." *Id.* Further, the Jewish faith similarly accepts that man is supposed to suffer as a consequence of his mortal nature. "[P]ain [and suffering are] a direct consequence of original sin, which should be stoically endured." *Id.* at 22. See also Rabbi Levi Meier, *Code and No-Code: A Psychological Analysis and the Viewpoint of Jewish Law*, in LEGAL AND ETHICAL ASPECTS OF TREATING CRITICALLY AND TERMINALLY ILL PATIENTS 94 (A. Edward Doudera & J. Douglas Peters eds., 1982). "Within Judaic tradition, life has infinite value—even a diminished life. The value of a human life is not based upon its potential usefulness to others or upon one's own well-being. It is an absolute value, even when life is accompanied by pain, suffering and mental anguish." *Id.*

53. Carmi, *supra* note 52, at 8. Several justifications exist not only enabling but demanding that a Jewish person commit suicide. They are as follows: idolatry, adultery, or murder. *Id.* The Jewish faith mandates that in each of these instances, the person "must kill himself or let himself be killed rather than commit any of these crimes." *Id.*

54. For *Black's Law Dictionary* technical definition of suicide, see *supra* note 20.

55. Carmi, *supra* note 53, at 8-9 (listing Saul and his armorbearer, Samson, Ahitophel, Jonah, the 40 Jews at Yodfat, and the 960 Jewish warriors at Mezdah). The two latter instances, at Yodfat and Mezdah, are examples of martyrdom wherein the groups chose suicide rather than capture and religious conversion. *Id.*

56. See *supra* notes 34-35 and accompanying text.

are denied Paradise and sentenced to Hell.<sup>57</sup> Modern-day Muslims remain vehemently opposed to suicide, including any type of euthanasia.<sup>58</sup>

While Jews and Muslims have not modified their views, many modern-day Christians are retreating from their previous unyielding stand.<sup>59</sup> Catholics, however, remain firm in their opposition to both suicide and assisted suicide.<sup>60</sup> They demonstrated their commitment to "life" by contributing over \$717,000, or nearly half of all funds raised to defeat Washington state's Initiative 119.<sup>61</sup> This figure seems slight compared to the over \$2.8 million raised by the Catholic community in California to defeat similar legislation.<sup>62</sup> Other denominations have seen virtue in these attempts to permit a limited degree of self-determination.<sup>63</sup> The Methodists, Lutherans, and Episcopalians all supported Washington's proposal.<sup>64</sup> These sects emphasized scriptural passages which mandate "compassion,

57. ENCYCLOPEDIA OF RELIGION, *supra* note 21, at 128.

58. Russell Chandler, *Religion Confronts Euthanasia*, L.A. TIMES, Nov. 2, 1991, at A1.

59. *Id.*

60. *Id.* at A25. This view is consistent with the Catholic view that life should be protected at conception. The Catholic Church has continuously sponsored many rallies, walks, and liturgical masses to demonstrate its concern for life. *Id.*

In apparent contrast, however, Pope Pius XII accepted the discontinuance of life-sustaining machines and medications as a matter of individual choice. He dismissed such action as not amounting to suicide. *See generally In re Quinlan*, 355 A.2d 647 (N.J.), *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976). Bishop Casey supported the Quinlan family's decision, stating that "[t]o request the discontinuance of this treatment is, according to the teachings of the Catholic Church, a morally correct decision." *Id.* at 659. The distinction made by the Catholic Church is between ordinary and extraordinary treatment. Catholic patients are not required to endure extraordinary treatment, such as cardiorespiratory "supportive measures" to sustain continuation of body functions. *Id.* at 659.

61. Chandler, *supra* note 58, at A25. *See generally Breo*, *supra* note 6.

62. Proposition 161 would have provided for physician-assisted suicide in California. *Doctor-Assisted Suicide Measure Loses in California*, Reuters, Nov. 4, 1992, available in LEXIS, Nexis library, Omni file. Supporters of Proposition 161 raised a comparatively meager \$215,000. Many sources credit the Catholic Church and its financial support for the last minute defeat of Proposition 161, which was reportedly favored in the polls. *See Paul Jacobs, Proposition 161; Outcome of Death Measure May Rest on 11th Hour Ads*, L.A. TIMES, Oct. 28, 1992, at A3.

63. Jacobs, *supra* note 62, at A3. *See also Legal Suicide Measure in California Headed for Defeat*, Reuters, Nov. 4, 1992, available in LEXIS, Nexis library, Omni file. A United Church of Christ minister reportedly took a leave of absence from his parish in order to support the Proposition 161 campaign.

64. *See Chandler*, *supra* note 58, at A25.

human dignity and worth.<sup>66</sup>

### C. Cultural Views

#### 1. A Study of Life on the Homefront

A recent *Los Angeles Times* article succinctly stated the assisted suicide dilemma: "It is immoral and dangerous to terminate a life . . . . [I]t's equally immoral and dangerous to extend the dying process. Where you draw the line is where the gray comes in."<sup>66</sup> The varied treatment accorded assisted suicide throughout the world is evidence of this "gray" area.<sup>67</sup> Even in the United States, individual states' responses to the assisted suicide question are spread out across the spectrum. Twenty-seven states maintain statutes criminalizing aiding and abetting suicide.<sup>68</sup> With the exception of Michigan, where the topic is currently embroiled in

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65. *Id.*

66. *Id.*

67. See *infra* notes 71-87 and accompanying text.

68. See MODEL PENAL CODE § 210.5 (1962) (suggesting that assisted suicide be treated as a second degree felony); ARIZ. REV. STAT. ANN. § 13-1103(A) (1985) (penalizing assisted suicide as manslaughter); CAL. PENAL CODE § 410 (West 1970) (making "aiding and abetting" suicide a unique crime, punishable as a felony); CONN. GEN. STAT. ANN. § 53(a)-56(a) (West 1985) (intentionally causing or aiding the suicide of another is manslaughter); DEL. CODE ANN. tit. 11 § 645 (1975) (establishing aiding and abetting suicide as a separate crime); FLA. STAT. ANN. § 782.02 (West 1976) (assisting "self-murder" amounts to committing manslaughter); HAW. REV. STAT. § 707-702(b) (1976) (punishing anyone who "intentionally causes another person to commit suicide"); IND. CODE ANN. § 35-42-1-2 (Burns 1985) (intentionally causing another person to commit suicide is a class B felony); KAN. STAT. ANN. § 21-3406 (1981) ("intentionally advising, encouraging, or assisting another in the taking of his own life" is a felony); MINN. STAT. ANN. § 609.215 (West 1989) (imposing up to 15 years' imprisonment or \$30,000 fine for aiding suicide and up to seven years' imprisonment or \$14,000 fine for aiding attempted suicide); MISS. CODE ANN. § 97-3-49 (1972) (aiding suicide is a felony); MONT. CODE ANN. § 45-5-105 (1991) ("aiding or soliciting suicide" is a felony carrying a penalty of up to 10 years in prison or a fine of \$50,000); NEB. REV. STAT. § 28-307 (1989) ("causing or aiding suicide" amounts to criminal homicide if achieved with force, duress, or deception; otherwise, it constitutes a separate offense); N.J. STAT. ANN. § 2C:11-6 (West 1982) (aiding suicide is an independent crime); OKLA. STAT. ANN. tit. 21, § 813-818 (West 1983) (prohibits willfully aiding suicide in any manner, i.e. advising, encouraging, abetting, assisting; also, prohibits furnishing a person with a "deadly weapon or poisonous drug" for the purpose of committing suicide); OR. REV. STAT. § 163.125(b) (1989) (intentionally causing or aiding another person to commit suicide is manslaughter); PA. CONS. STAT. ANN. 18 § 2505(a) (Purdon 1983) (aiding or soliciting suicide is a second degree felony); S.D. CODIFIED LAWS ANN. § 22-16-37 (1988) (aiding and abetting suicide amounts to a felony); TEX. PENAL CODE ANN. § 22.08 (Vernon 1989) (aiding suicide is a misdemeanor, unless death occurs, making the crime a felony); WASH. REV. CODE ANN. § 9A.36.060 (1988) (felony to promote a suicide attempt); WIS. STAT. ANN. § 940.12 (West 1982) (felony to assist a suicide).

controversy,<sup>69</sup> each remaining state presumably has some common law or case authority outlawing assisted suicide.<sup>70</sup>

## 2. The Voices from Abroad

A significant portion of America's common law ancestry stems from England. The American colonists brought with them various forms of government, many of which were modeled after the English system. Thus, American positions concerning suicide closely parallel its treatment, historically and currently, in England. Suicide is not a criminal offense in England.<sup>71</sup> Aiding and abetting suicide is a criminal offense, however, carrying a punishment of up to fourteen years' imprisonment.<sup>72</sup>

Canada, another Commonwealth country, has likewise decriminalized suicide and prohibits only aiding and abetting suicide.<sup>73</sup> In 1982, there were 3529 suicides reported in Canada, making suicide one of the top ten causes of death in Canada and the second among people under thirty-five.<sup>74</sup>

In 1992, Canadians were surprised when a Quebec court permitted a twenty-five-year-old paralytic, Nancy B., to pull the plug on her life-sustaining respirator.<sup>75</sup> Legal commentators saw this decision as a major stepping stone both in establishing a right to die and accepting assisted suicide.<sup>76</sup> The non-terminal patient suffered from Guillain-Barre syndrome, a neurological disorder. She was totally dependent on a ventilator to maintain her breathing functions.<sup>77</sup> The court's decision was especial-

69. See *supra* notes 2-5 and accompanying text. Dr. Jack Kevorkian has again been indicted for murder as a result of "assisting" two suicides. See Harrison, *supra* note 2, at A15. Michigan must, therefore, determine whether assisting suicide is a criminal offense in their particular jurisdiction.

70. Juliana Reno, *A Little Help From My Friends: The Legal Status of Assisted Suicide*, 25 CREIGHTON L. REV. 1151, 1156 (1992). See also MODEL PENAL CODE § 210.5 (1962) (prohibiting both purposefully causing another's death, even when requested, and prohibiting "aiding or soliciting" another's suicide).

71. *E.g.*, LAWS OF ENGLAND, *supra* note 37, at para. 443.

72. *Id.* Based on the Suicide Act of 1961, any person aiding, counseling or procuring the suicide of another may be tried under an indictment of murder or manslaughter. *Id.*

73. THE CANADIAN ENCYCLOPEDIA 1770 (James H. Marsh ed., 1985).

74. *Id.* at 1771.

75. *Paralyzed Canadian Woman Wins Court Ruling on Right to Die*, WASH. POST, Jan. 7, 1992, at A9.

76. *Id.*

77. *Id.*

ly significant in that the patient was aware, could speak, and faced several more years of existence at the time she requested deactivation of her respirator.<sup>78</sup> Both euthanasia and assisted suicide are illegal under Canadian federal law.<sup>79</sup> Nancy B.'s request was secured, however, under the Quebec Civil Code, which provides for the right to refuse medical treatment.<sup>80</sup> Following the defeat of Proposition 161 in California, Canadians once again took an active interest in euthanasia. Another Canadian, Sue Rodriguez, currently seeks the right of assisted suicide from the Canadian courts.<sup>81</sup> Ms. Rodriguez suffers from Lou Gerhig's disease. She indicated that, had the California legislation passed, she would have made the trip to California to receive assistance in ending her life.<sup>82</sup> Currently, however, her only hope lies in the Canadian judicial system.<sup>83</sup>

In contrast to the Commonwealth views, Japanese society openly condones suicide as an accepted way to "save face," or preserve one's dignity.<sup>84</sup> The Japanese kamikaze pilots of World War II chose to crash their planes voluntarily, rather than submit to defeat or capture.<sup>85</sup> Likewise, the renowned suicide cliffs in Okinawa saw the demise of several thousand Japanese soldiers who chose to jump instead of submitting to capture by the enemy. Suicide is currently the seventh leading cause of death in Japan.<sup>86</sup> Seventeen out of every 100,000 Japanese take their own lives.<sup>87</sup> This societal view is perhaps the most conducive to accepting a right of assisted suicide. However, the most chilling example of societal acceptance of assisted suicide was the "euthanasia program" of

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78. *Id.* Nancy B.'s doctors diagnosed her as having irreversible neurological damage. They projected she would be dependent on a respirator for the rest of her life. *Id.* Nancy echoed the feeling of many other similarly situated petitioners, both in Canada and the United States: "I do not want to live on this machine." *Id.* (emphasis added). Her plea is a poignant illustration of medical "progress." Nancy breathes only because science has provided doctors with a machine that takes over where her body has permanently shut down.

79. *Id.*

80. *Id.* These issues—right to die, euthanasia, and assisted suicide—are currently under examination in the Canadian Parliament. *Id.* In particular, a House of Commons committee is considering a bill that would grant physician immunity in cases like Nancy B.'s, in which removal of life-sustaining equipment or administration of large doses of pain medications hastens a patient's death. *Id.*

81. Frank Jones, *Euthanasia Boosters Aim To Kill Our Compassion*, TORONTO STAR, Nov. 9, 1992, at D1.

82. *Id.*

83. *Id.*

84. 10 ENCYCLOPEDIA BRITANNICA 34 (University of Chicago ed., 1977). Under Japan's constitutional system, human rights are considered to be "eternal and inviolable." *Id.* at 52.

85. *Id.*

86. See generally BRITANNICA BOOK OF THE YEAR (University of Chicago ed., 1991).

87. *Id.*

Nazi Germany.

*D. A Case Study—The Nazi “Euthanasia Program”*

Suicide is currently the fifth leading cause of death in Germany, with fifteen of 100,000 people taking their own lives.<sup>88</sup> Euthanasia is a German word that means “easy or gentle death.”<sup>89</sup> Hitler’s Nazi Germany reminds individuals of what can happen when killing and “quality of life” become an accepted part of societal decisions.<sup>90</sup> The National Socialists predicated much of their anti-Semitic activity during World War II through “euthanasia programs.”<sup>91</sup> Hitler sought a pure Volk (people), and

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88. BRITANNICA BOOK OF THE YEAR, *supra* note 86, at 603.

89. E. McClatchey, *Same Aspects of Euthanasia from the Point of View of a Family Doctor*, in EUTHANASIA 103 (Amnon Carmi ed., 1984). See also ST. JOHN-STEVAS, *supra* note 35, at 262 (noting the Greek translation is “happy death”).

90. VICTOR E. FRANKL, *MAN’S SEARCH FOR MEANING* 152 (1984). Frankl, himself a prisoner in Nazi concentration camps, presents the ironic digression that arises from a strictly utilitarian viewpoint towards life:

[T]oday’s society is characterized by achievement orientation, and consequently it adores people who are successful and happy and, in particular, it adores the young. It virtually ignores the value of all those who are otherwise, and in so doing blurs the decisive difference between being valuable in the sense of dignity and being valuable in the sense of usefulness. If one is not cognizant of this difference and holds that an individual’s value stems only from his present usefulness, then, believe me, one owes it to personal inconsistency not to plead for euthanasia along the lines of Hitler’s program, that is to say, “mercy” killing of all those who have lost their social usefulness, be it because of old age, incurable illness, mental deterioration, or whatever handicap they may suffer.

*Id.*

91. WENNBERG, *supra* note 25, at 215-16. Wennberg describes the evolution of Germany’s program:

The Nazi Euthanasia program served a preparatory function for the Nazis’ subsequent attempt to exterminate the entire Jewish population of Europe. Indeed, the administrative center for the euthanasia program subsequently assumed the task of overseeing the mass murder of the Jews. Procedures and techniques that had been employed during the euthanasia phase—procedures for gassing those assessed as having “lives unworthy of living” and disposing of the bodies—were continued when Jews were substituted for the mentally and physically handicapped. In addition, there was a carryover of personnel. And, significantly, as Gitta Sereny stresses, “The work at the euthanasia institutes . . . did ‘inure’ them to feeling and thus prepare them for the next phase.”

*Id.* at 216 (footnote omitted).



his euthanasia programs fit neatly within this Nazi ideology. Social Darwinism permitted disposing of those lives deemed "unworthy of living."<sup>92</sup> The killing of mental and physical incompetents preceded the killing of Jews, serving as a springboard for Hitler's full-scale Holocaust.<sup>93</sup>

One author explains Hitler's madness as serving two purposes: (1) purifying the Volk, and (2) freeing national resources otherwise squandered on the mental and physical dependents of the State.<sup>94</sup> Handicapped children, deemed "unworthy of life" by physicians, were the first victims of Hitler's crusade.<sup>95</sup> Later, Operation T4 expanded the so-called "euthanasia program" to include adult incompetents, who were similarly chosen by physicians.<sup>96</sup> The first concentration camp victims were not Jews, but mental incompetents executed due to their inability to contribute to the commune.<sup>97</sup> Once public outrage halted the gassing

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92. *Id.* at 218. Wennberg cites the Nazi emphasis on a pure Volk as the primary motivation behind the euthanasia program. "The Volk was pure to the degree that it was free of any non-Aryan admixture and free of mentally and physically defective 'elements', Aryan or otherwise." *Id.*

93. *Id.* Unlike Dr. Kevorkian's assisted suicides, the Nazi Euthanasia program was involuntarily inflicted upon these individuals. "In neither area and in none of the [Nazi Euthanasia] cases was death administered because of a sick or dying person's intolerable suffering or because of a patient's own feelings about the usefulness of his life. In no case did the patient ask for death." *Id.* (footnote omitted).

94. *Id.* "We should be clear that the Nazi euthanasia program was not motivated by considerations of mercy." *Id.* Instead, the goal was one of complete German domination throughout the world. Hitler proposed that this goal could only be attained if Germany were rid of impure Volk. Excerpts from a German mathematics textbook vividly illustrate the point:

*Question No. 95.* If the building of a lunatic asylum costs six million marks and it costs 15,000 marks to build each dwelling on a housing estate, how many of the latter could be built for the price of one asylum?

*Question No. 97.* Daily maintenance of an insane person costs 4 marks, of a cripple 5.5 marks and of a criminal 3.5 marks. In how many cases does an official earn daily only about 4 marks, a factory employee barely 3.5 marks and an unskilled labourer less than 2 as the head of a family? (a) Illustrate these figures graphically. According to calculations there are some 300,000 insane persons, epileptics, etc., in Germany under treatment in institutions. (b) Give the total yearly cost of such persons at the rate of 4 marks p.d. [per day]. (c) How many State marriage loans of 1,000 marks not repayable, would be issued annually from the amount now spent on insane, etc.?

*Id.* at 217-218 (footnote omitted).

95. *Id.* at 214-15.

96. *Id.* at 217-18. Over 5000 children were euthanized in this manner, without parental consent. *Id.* at 215. The death notices sent to the parents of these children listed "tumor of the brain," or some other disease, as the cause of death. *Id.* The bodies were quickly cremated, allegedly due to the threat of "an epidemic" at the Institution. *Id.* The total number killed under this program, including adults, rose to between 50,000 and 60,000 by the middle of 1941. *Id.* at 214.

97. *Id.*

of disabled patients, Hitler continued his euthanasia program with tablets, injections, or withholding of nourishment in the hospitals on these same disabled patients.<sup>98</sup>

The modern German Grundgesetz,<sup>99</sup> however, places human life as the supreme value in society.<sup>100</sup> Consistent with that view, assisted suicide is a criminal offense.<sup>101</sup> German law imposes an affirmative burden on spouses, parents, and doctors to protect life.<sup>102</sup> However, similar to American doctors, German physicians are not precluded from prescribing or administering lethal doses of pain medication in an attempt to ease a patient's suffering.<sup>103</sup> These images remain firmly imbedded in the dark pages of history. The Nazi view towards euthanasia, based partly on economic efficiency, allowed a digression to the Holocaust. Not surprisingly, many modern German citizens denounce the idea of assisted suicide. This horrible example should serve as a caution to modern legislators facing today's issue that any assisted suicide plan requires co-existing security measures.<sup>104</sup>

While the Nazi program differs dramatically from the current American proposals because no state action is involved in the latter, the analogy may still be important in certain cases. For instance, what will happen in

98. *Id.* at 214-15. Hitler's program remained active against the handicapped until the end of the war, enjoying a "quasi-legal status" authorized by the Third Reich. *Id.* This scenario demonstrates the extreme of what could happen if assisted suicide was allowed without proper restraints.

99. E. Deutsch, *Euthanasia: A German View*, in EUTHANASIA 91 (Amnon Carmi ed., 1984). The Grundgesetz is the German constitution.

100. *Id.* "Life, being the supreme value in our society, cannot be classified into categories such as 'useful' or 'useless', and must be sustained as long as possible if this is desired by the patient." *Id.* at 93. *But cf.* WENNBERG, *supra* note 25, at 217-18 (discussing Nazi Germany math textbook questions that illustrate how money spent on the insane or disabled could be better spent elsewhere).

101. E. Deutsch, *supra* note 99, at 91. Assisted suicide is prohibited even if "explicit[ly] requested [by] the victim." *Id.*

102. *Id.*

103. *Id.* at 92. *See also* James Vorenberg, *Washington State's Euthanasia Referendum*, N.Y. TIMES, Nov. 5, 1991, at A25 (briefly describing the American practice).

104. One source has expressed this very caution. *See* Arthur Hoppe, *A Matter of Life and Death*, S.F. CHRON. Oct. 25, 1992, at 1:

[I]f we allow society to control our deaths for its benefit, the Orwellian day is foreseeable when we practice euthanasia on the old, the handicapped and, yes, the terminally ill—not by request, but by fiat. Surely, ridding ourselves of these useless consumers of health care dollars would result in a far healthier citizenry and a more vigorous economy.

*Id.*

military hospitals under modern proposals? If military doctors are deemed state actors, then we may be faced with the same type of state euthanasia that Hitler so heinously abused, even if it is not taken to the same extreme. Further, if a national health insurance plan is passed,<sup>105</sup> then the state will necessarily be involved. Every doctor, as an extension of the state, will be making decisions for the state rather than in their individual capacity. Although these caveats may seem premature, no one believed Hitler was destroying an entire race of people precisely because no one dared think the unthinkable. The Netherlands, however, in becoming the first country to condone, though not legalize, euthanasia, has not encountered the nightmarish consequences of the Nazis' Euthanasia Program.

### III. TAKING CHANCES—INNOVATORS

#### A. *A Tolerance of Assisted Suicide—The Dutch Stand*<sup>106</sup>

The Dutch were the first to socially accept physician assisted suicide, although the practice remains technically illegal.<sup>107</sup> The Netherlands Penal Code states that anyone "[w]ho takes another person's life even at *his explicit and serious request*, will be punished by imprisonment of at most 12 years."<sup>108</sup> This section applies equally to physicians and non-physicians, although the courts seemingly tolerate a physician's participation in an assisted suicide provided certain conditions are met. The factors necessary to absolve a physician are as follows: (1) the patient must voluntarily consent; (2) the patient's suffering must be excruciating; (3) all possible treatment alternatives must have been attempted and exhausted; (4) a second physician must agree with the treating physician's findings; and (5) the patient's treating physician must perform the assist-

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105. Dana Priest, *Medical Price Caps Drafted for Clinton Adviser Has 3 Options for Short Term*, WASH. POST, Mar. 17, 1993, at A1. As President Clinton's national health task force suggests, major alterations in health care are certainly forthcoming. Although this Comment focuses on national price controls rather than nationalized insurance, the direction is towards securing insurance coverage for every American. See Robert Pear, *White House Expected to Back Oregon's Health-Care Rationing*, N.Y. TIMES, Mar. 18, 1993, at A1 (detailing Oregon's plan to expand Medicaid coverage by eliminating coverage for certain enumerated treatments).

106. At the time this article went to press, the Dutch legislature had proposed a statute that will further liberalize their laws on assisted suicide and give even greater protection to physicians. The law is scheduled to take effect in early 1994. See, e.g., Tamara Jones, *Netherlands Law Sets Guidelines for Euthanasia*, L.A. TIMES, Feb. 10, 1993, at A1.

107. M.A.M. de Wachter, *Active Euthanasia in the Netherlands*, 262 JAMA 3316 (1989).

108. *Id.* at 3317 (citing Netherlands Penal Code § 293) (emphasis added).

ed suicide.<sup>109</sup> The fulfillment of each of these requirements must be written and recorded.<sup>110</sup>

Any failure to follow these requirements could lead to prosecution. Thus, the figures recorded regarding physician assisted suicide are inaccurate at best.<sup>111</sup> Still, public support exceeds seventy percent, even in assisted suicides involving children.<sup>112</sup> Figures vary regarding the actual number of physician-assisted suicides, but the estimates fall between 2000 and 10,000 cases annually.<sup>113</sup> One study suggests that a similar program in the United States would result in between 33,000 and 167,000 deaths annually.<sup>114</sup>

The first recorded conviction under Section 293 of the Dutch Penal Code occurred in 1973, although the convicted doctor received rather lenient treatment: a one-week suspended jail sentence followed by a one-year probationary period.<sup>115</sup> In 1982, the Dutch established a State Commission on Euthanasia to respond to the debate and make recommendations on euthanasia legislation.<sup>116</sup> Thirteen of the fifteen commission members agreed that doctors meeting the accepted prerequisites should not be prosecuted under the existing statute.<sup>117</sup>

The fall of the coalition government in 1989 partially explains why no legislation was ever passed.<sup>118</sup> However, prior to its demise, two major legislative proposals were advanced and discussed in Parliament.<sup>119</sup> The

109. Edmund D. Pellegrino, *Ethics*, 265 JAMA 3118 (1991).

110. *Id.*

111. De Wachter, *supra* note 107, at 3317.

112. Pellegrino, *supra* note 109, at 3118.

113. *Id.* See also Paul Jacobs, *California Elections; Proposition 161; Initiative Fuels Debate Over Morality of Euthanasia*, L.A. TIMES, Oct. 31, 1992, at A20. Mr. Jacobs reports that a court-sponsored study of the Netherlands' program credited a mere 3% of the country's deaths to assisted suicides. *Id.* This figure is far lower than initial estimates. *Id.*

114. H.M. Ducharme et al., *Physician Participation in Assisted Suicide*, 263 JAMA 1197 (1990).

115. De Wachter, *supra* note 107, at 3317. The defendant, a physician, injected his mother with a lethal dose of morphine at her request.

116. De Wachter, *supra* note 107, at 3318.

117. *Id.* The criteria used to judge whether a physician acted according to accepted practices are as follows: "(1) [the assisted suicide must be] carried out by a physician; (2) it must be done within a setting of careful practice, which requires that the patient be informed about the seriousness of his or her state . . . ; and (3) the patient is in an untenable situation without prospect for improvement." *Id.*

118. *Id.*

119. *Id.*

Kohnstamm Bill would have legalized euthanasia outright, while the other bill would have continued to criminalize euthanasia with certain exemptions for physicians.<sup>120</sup> The failure of these measures left other countries with the opportunity to lead the way in legalizing euthanasia. The United States was the first country to respond.

*B. Initiative 119—Washington State Responds to the Cries for Guidance*

On November 5, 1991, Washington State voters defeated an initiative that would have legalized physician-assisted suicide. Initiative 119 provided terminally ill patients a right to obtain physician assistance in committing suicide.<sup>121</sup> Under the proposed initiative, if two doctors could

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120. *Id.* No debate or vote occurred for either of these proposals. *Id.* A third proposal, however, has been circulated throughout Amsterdam. *Id.* Developed by the health care services director, the government inspector of health, and the district attorney, the policy mandates the following standards:

1. Since active euthanasia does not allow the physician to write a death certificate mentioning natural causes, the coroner must be contacted as soon as the patient dies. The coroner examines the reasons invoked for euthanasia, as well as whether its administration was done with professional care.
2. The coroner reports directly to the district attorney.
3. The police discreetly investigate the situation of the deceased, ask the physician about the conditions under which euthanasia was administered, and report to the district attorney. Unless something unusual is discovered, the family will not be questioned.
4. The district attorney decides whether an autopsy will take place before burial or cremation.
5. The district attorney consults with the public health inspector.
6. The district attorney submits a final report to the appropriate attorney general.
7. All (five) attorneys general and the secretary general of the Ministry of Justice discuss each case and decide to prosecute or dismiss the case.

*Id.*

The Amsterdam policy's success cannot truly be measured because it is still uncertain how many physicians have complied with the proposed immunity format introduced in October 1987. See *supra* notes 108-10 and accompanying text. The Royal Dutch Medical Association has expressed fear that without solid legal guidance, physicians will be held to differing levels of care depending on the particular court. De Wachter, *supra* note 107, at 3318. It is suggested that "[o]nly a case of euthanasia tested by the [Dutch] Supreme Court could guarantee such legal certitude." *Id.*

121. Warren King, *Decisive Loss for 'Aid in Dying,'* SEATTLE TIMES, Nov. 6, 1991, at D1. Actually, two prior attempts at legalizing euthanasia occurred in the United States. ST. JOHN-STEVAS, *supra* note 35, at 266. The first state to introduce a euthanasia bill for consideration was Nebraska in 1938. *Id.* This bill was modeled after a similar English bill, which was defeated in the House of Lords. *Id.* New York also considered and similarly rejected a euthanasia bill in 1938, and again in 1941. *Id.* The 1936 English Bill is remarkably similar to Initiative 119, requiring

certify that the patient would die within six months and two disinterested witnesses could certify that the patient's choice was voluntary, then the physician could legally perform an assisted suicide.<sup>122</sup> Initiative 119 failed, fifty-four to forty-six percent.<sup>123</sup> Much information can be gathered from this mere eight-point margin. First, there is great support for assisted suicide legislation.<sup>124</sup> Further evidence of this trend is the prominence of "right to die" groups, such as the Hemlock Society and the newly formed coalition, Choice in Dying, Inc.<sup>125</sup> Second, even though there is a vocal segment of the population that supports "patient choice" in dying, many citizens remain skeptical of the desirability of full-fledged legalization.<sup>126</sup>

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that the patient . . . be twenty-one years old, of sound mind, and suffering from a fatal and incurable disease, accompanied by severe pain. A formal application is to be signed by the patient in the presence of two witnesses and submitted to the 'Euthanasia Referee', an official appointed by the Minister of Health, together with two medical certificates, one from the attendant doctor and the other from a specially qualified practitioner. The referee is to conduct a personal interview of the patient and establish that he fully understands what he is doing. Euthanasia is to be administered by a licensed practitioner in the presence of an official witness, such as a minister . . . or justice of the peace.

*Id.* at 267.

122. King, *supra* note 121, at D1. Initiative 119 also tried to clarify sections of the state's Natural Death Act, proclaiming nasogastric and water tubes to be "life supports," removable at the patient's request. *Id.*

123. Richard Knox, *Washington State Voters Reject a Proposal to Legalize Euthanasia*, BOSTON GLOBE, Nov. 7, 1991, at 15. This result is inconsistent with the 60% support ratio the Initiative received in a survey conducted only a few weeks earlier. *Id.* Of further importance is the effect of this decision on a nationwide scale. Washington state is renowned for its reverence of individual rights. Deeann Glasmer, *Right to Die: California May Be Next Test For Legalized Suicide*, USA TODAY, Nov. 7, 1991, at 3A. Washington was touted as "one of the few spots where such a measure had a chance." *Id.*

124. Knox, *supra* note 123, at 15. See Glasmer, *supra* note 123, at 3A; *National Hemlock Society Issues Statement On Defeat Of Initiative 119* [hereinafter *Hemlock Society Statement*], PR NEWswire, Nov. 6, 1991, available in LEXIS, Nexis library, PR Newswire file. Upon realizing the failed Initiative received over 600,000 votes, Derek Humphry, national executive director of the Hemlock Society, optimistically stated that "[t]he great debate of the 1990s about the right to choose to die will be settled in California next year with a much more carefully framed law." *Id.*

125. Letter from Evan R. Collins, Chairman of the Board of Directors, Choice in Dying, Inc. (Oct. 1991) (on file with the *Pepperdine Law Review*). Two previously separate organizations, the Society for the Right to Die and Concern For Dying, recently merged, boasting a combined national membership of nearly 200,000 with more than 300,000 annual contributors.

126. See Joyce Price, *Suicide Initiative Vote Shows Changing Mood*, WASH. TIMES,

Critics cited several reasons for Initiative 119's failure. Foremost among them was the lack of adequate safeguards. Derek Humphry, President and Founder of the Hemlock Society,<sup>127</sup> blamed local groups for failing to "build into the reform sufficient protections against abuse."<sup>128</sup> Nazi Germany demonstrated the worst-case scenario of inadequate safeguards.<sup>129</sup> What began as a physician-assisted program that euthanized children deemed "unworthy of living" degenerated into the horrifying, systematic execution of several thousand unwilling victims.<sup>130</sup>

Another explanation for Initiative 119's failure was the participatory role given to the medical profession.<sup>131</sup> The image of doctors interwoven with the death process, especially suicide, directly contradicts the medical profession's principles of healing.<sup>132</sup> A third reason for Initiative 119's failure may be due in part to the controversy surrounding Dr. Jack Kevorkian.<sup>133</sup> Two weeks prior to the Washington vote, Dr. Kevorkian euthanized two non-terminal patients. His conduct and criteria in determining "eligible" patients fell outside the legal parameters of Initiative 119 and would not be permitted in Washington even had the measure passed.<sup>134</sup> Response to Dr. Kevorkian's maverick euthanasia crusade fuels critics who say that legalizing physician-assisted suicide would give doctors leverage over patients that would be difficult to control.<sup>135</sup>

A final reason voters may have rejected Initiative 119 was the absence of any residency requirement.<sup>136</sup> One critic feared that Washington might become a place where doctors such as Kevorkian would "set up convenient branch offices in shopping malls."<sup>137</sup> Another commentator charged that lack of a residency requirement could result in "desperate people flocking to Washington to end their lives," resulting in

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Nov. 7, 1991, at A3. "The political mood now is swinging away from sympathy for people [who are terminally ill and want to die] to a fear that doctors will become executioners." *Id.* Burke Balch, an opponent of Initiative 119, stated that "the defeat indicates the public is beginning to realize the grave dangers of starting down the path of dealing with problems by getting rid of the people to whom problems happen." *Id.*

127. See *Breo*, *supra* note 6, at 2895.

128. See *Hemlock Society Statement*, *supra* note 124.

129. See *supra* notes 92-98 and accompanying text.

130. See *supra* notes 92-94 and accompanying text.

131. See *infra* Part IV.B. for a response from both the American Medical Association and the Nurses Association.

132. See *supra* note 25 (referring to the Hippocratic Oath).

133. See *supra* notes 2-5; see also *infra* notes 189-212 and accompanying text (discussing Dr. Jack Kevorkian and his effect on the assisted suicide debate).

134. Knox, *supra* note 123, at 15.

135. *Id.*

136. Erik Lacitis, *Bite The Ballot: Our Voters' Guide Gives You the Worst-Case Scenarios*, SEATTLE TIMES, Nov. 5, 1991, at F1.

137. *Id.*

Washington's becoming a kind of killing resort.<sup>138</sup>

Despite its shortcomings, Initiative 119 garnered a great deal of support and national attention for other states to follow. California quickly responded, becoming the next site for a similar battle.<sup>139</sup> As evidence of the push for some place of refuge legalizing assisted suicide, California voters solicited the necessary 385,000 signatures to put a similar statute on their ballot in November 1992.<sup>140</sup>

C. *Proposition 161—The Question Is Posed to California Voters*

Young lawyers are often taught that a change in jurisdiction can mean the difference between winning or losing a case. It is no secret that some areas are more receptive to innovations in the law than other, more conservative communities. Two attorneys, who formed Californians Against Human Suffering and authored the "Death with Dignity Act," hoped to exploit California's reputation as a leader in legal innovation.<sup>141</sup> What the group did not anticipate, however, was the strong opposition from the California Medical Association, the California Nurses Association, AIDS Care Los Angeles,<sup>142</sup> and the Catholic Church.<sup>143</sup> While support-

138. Knox, *supra* note 123, at 15.

139. In November 1992, California voters defeated Proposition 161 54% to 46%. Dana Parsons, *How Far Should We Open the Door When Death Knocks*, L.A. TIMES, Feb. 21, 1993, at B3. Proposition 161 would have allowed physicians to give lethal injections to patients who had no more than six months to live, had signed a request for the killing in advance, and had requested more than once to be allowed to die. Peter Steinfelds, *Help for the Helping Hands in Death*, N.Y. TIMES, Feb. 14, 1993, § 4, at 1.

140. Knox, *supra* note 123, at 15. See also *Hemlock Society Statement*, *supra* note 124. The California initiative offered three additional safeguards not present in Initiative 119: (1) there is a waiting period; (2) the family must be informed that the patient desires euthanasia, although the family will be unable to veto the request; and (3) all assisted suicide deaths must be reported to the state health agency. *Id.* A fourth possible inclusion will be a requirement that the patient undergo a psychological examination in cases where competency is questioned. *Id.*

141. John Yang, *Californians Will Decide Tuesday if Physicians Can Help Patients Die*, WASH. POST, Oct. 29, 1992, at A14. The purported impetus for this follow-up legislation after the Washington defeat was the long illness of Darlena Risley eight years earlier. Co-author Robert L. Risely, a California attorney, stated he and his wife discussed ways to end Darlena's suffering "if the pain became unbearable." *Id.* This did not occur. *Id.* Like many assisted suicide supporters, Riley distinguishes between the dying process—with which assisted suicide concerns itself—and the living process. This argument embodies the very logic that yielded the *Roe* trimester framework and the *Casey* viability standard. Much like abortion, the question boils down to what constitutes life and at what point do actions no longer affect a "living" being?

142. AIDS Care Los Angeles is the state's largest AIDS resource and support organi-



ers obtained the requisite number of signatures to place Proposition 161 on the California ballot, the opposition rallied in a last-minute advertising campaign to defeat the initiative fifty-four percent to forty-six percent. Ironically, this was the exact margin of defeat in Washington State one year earlier.<sup>144</sup>

Much like Washington's Initiative 119, Proposition 161 was criticized for its inadequate safeguards. Essentially, Proposition 161 required the following:

1. The patient must be certified as terminal (meaning a diagnosis of less than six months to live) by two physicians.<sup>145</sup>
2. The patient must be determined mentally competent, thereby excluding from consideration any patients who are comatose or in a permanent vegetative state.<sup>146</sup>
3. The patient must execute a revocable, written statement witnessed by two disinterested witnesses. This directive can be made any time prior to the request for assistance.
4. The patient must indicate an enduring desire for the "procedure." Broadly interpreted, this requirement simply means that the patient must make the request more than once. There is no requisite time period that must pass between the two requests.
5. Any licensed physician may perform the procedure and no witnesses need be present.<sup>147</sup>

The main argument against Proposition 161 was not based on moral grounds, as expected, but rather that the language was poorly drafted and provided inadequate safeguards.<sup>148</sup> The *Los Angeles Times* warned

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zation. Failure to obtain their support may have been crucial, especially because Proposition 161 was aimed at excruciating diseases like AIDS. B.D. Colen, *Campaign '92; California Is Voting On the Right to Die*, NEWSDAY, Oct. 29, 1992, at 23. Another critical opponent was the California branch of the American Cancer Society. *Id.*

143. *Id.* The Catholic Church raised almost \$1 million in an attempt to defeat Proposition 161. *Id.* The majority of these funds came from the Sunday collection plates of California area Catholic churches.

144. See *supra* note 123 and accompanying text.

145. This requirement would exclude the majority of patients that Jack Kevorkian has assisted. Patients suffering from painful and excruciating illnesses or disabilities, such as those incurred in auto accidents, or non-terminal conditions, such as Alzheimer's disease, would not have been eligible under Proposition 161.

146. The two most renowned "right to die" cases involved unconscious patients. See *infra* notes 232-42 and 309-32 and accompanying text for a discussion of the landmark cases *In re Quinlan*, 355 A.2d 647 (N.J.), *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976), and *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990), respectively.

147. For the complete text of Proposition 161, see California Official Voter's Pamphlet for the November 1992 election.

148. James Walters, *Perspective on Prop. 161*, L.A. TIMES, Oct. 18, 1993, at M5. For

against "the fact that the oral request for euthanasia need not be witnessed—just *one among several* missing safeguards—[thereby raising] the serious possibility of abuse."<sup>149</sup> Proposition 161 was further criticized because it failed to provide restrictions as to what type of physician would be eligible to perform the assisted suicide. Under the plain language of the Proposition 161, an allergist, a pediatrician, an ophthalmologist, or a dermatologist would have been able to perform the procedure.<sup>150</sup> The absence of any psychological testing requirement also caused concern. While the certifying doctor would have been obligated to recommend such an evaluation, it was not required.<sup>151</sup> Lastly, the patient would not have had to endure a stated waiting period once the decision had been made. Drawing a comparison between assisted suicide and abortion, last term in *Planned Parenthood v. Casey* the Supreme Court announced that requiring a waiting period for abortion does not present an "undue burden."<sup>152</sup> Thus, imposing a waiting period for assisted suicides may be deemed a constitutional exercise of a state's power.<sup>153</sup>

Proposition 161 failed in the jurisdiction deemed most receptive to its success. California has always been seen as an innovative and pioneering state in most areas of the law. Even in this controversial "right to die" area, it was California, not New Jersey (where the seminal *In re Quinlan* case arose), that became the first jurisdiction to pass legislation enabling citizens to refuse life-sustaining treatment.<sup>154</sup> But now, voters have spoken and Californians have refused to extend the "right to die" any further. In 1994, the issue will be raised again in at least two other states: Oregon and Washington.<sup>155</sup>

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instance, Walters cautioned against the absence of any "cooling off" period, which might lead to "hasty, rash decisions." *Id.*

149. *Twelve Statewide Ballot Measures Made Clear*, L.A. TIMES, Nov. 2, 1992, at B7 (emphasis added).

150. '*Dying with Dignity Act*' is Flawed Bioethicist Says, BUS. WIRE, Oct. 26, 1992, available in LEXIS, Nexis library, Current file [hereinafter *Dying with Dignity Act*].

151. *Id.*

152. See *supra* note 16 for an introduction to *Casey* and *infra* notes 356-59 and accompanying text for a more detailed analysis.

153. *Dying with Dignity Act*, *supra* note 150.

154. *E.g.*, Lori Olszewski, *State's Controversial Choice*, S.F. CHRON., Oct. 20, 1992, at A1.

155. *Hemlock Society U.S.A Issues Statement on California's 'Death With Dignity Act'*, NEWSWIRE, Nov. 4, 1992, available in LEXIS, Nexis library, Current file. The Hemlock Society predicts that similar referendum proposals will be forthcoming on account of the national attention the issue has received. *Id.*

The fight is far from over, and as yet no firm answer or alternative has been offered. No country or state currently permits assisted suicide.<sup>156</sup> However, at least two states besides California are proposing legislation aimed at assisted suicides.<sup>157</sup> Other states have added the right to refuse medical treatment and, consequently, included an implied right to die in their state constitutions.<sup>158</sup>

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156. See *supra* notes 68-70, 99, 105-09 and accompanying text (describing the Netherlands' practice condoning assisted suicide without legalizing the procedure).

157. Price, *supra* note 126, at A3. California voters defeated Proposition 161 in 1992. *Id.* Oregon plans to place a similar measure on its 1994 ballot. *Id.* Florida intends on proposing assisted suicide legislation at an undetermined time in the future. *Id.*

158. E.g., *Michigan Proposal Would Allow Suicide Assistance*, CHI. TRIB., Dec. 12, 1991, at 3; see also Rick Pluta, *Lawmaker Proposes Right-to-Die Referendum*, UPI, Dec. 11, 1991, available in LEXIS, Nexis library, UPI file. Representative Ted Wallace (D-Detroit) has proposed a right to die referendum which would legalize assisted suicide. *Id.* Wallace's proposal is similar to Washington's Initiative 119, but has additional safeguards. The Wallace bill places the following conditions on legal assisted suicide: (1) the physician would have to diagnose the patient as terminal; (2) the patient would have to sign a written request for suicide; (3) a psychiatrist or psychologist must diagnose the patient as mentally competent; (4) the patient must endure a two-month waiting period, and then repeat the request procedure; (5) two physicians and a review board must review the request; and (6) the physician assisting the suicide must have treated the patient for at least six months. *Id.* Even under these guidelines, Dr. Jack Kevorkian's current practices would not be permitted. Interestingly, a competing bill that would criminalize assisted suicide has successfully cleared the Senate, but has not made it past the House Judiciary Committee. *Id.* See also *Antisuicide Bill Among Recent Filings*, UPI, Jan. 6, 1992, available in LEXIS, Nexis library, UPI file. Senator Jean A. Leising of Indiana (R-Decatur) introduced antisuicide legislation which would criminalize intentional assisted suicide. If approved, the bill would carry a maximum sentence of 20 years' imprisonment and a fine of up to \$10,000. *Id.* Senator Leising introduced the bill largely in response to Dr. Jack Kevorkian and his activity in Michigan. Dr. Kevorkian has evaded prosecution due to the unsettled nature of Michigan law and Indiana wants to avoid any similar dilemma. *Id.*

For an example of possible state constitutional protection, see, e.g., ARIZ. CONST. art. II, § 8, which reads: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Arizona Supreme Court interpreted this section to encompass "an individual's right to refuse medical treatment." *Rasmussen v. Fleming*, 741 P.2d 674, 682 (Ariz. 1987). The Supreme Court stated, "[A]n individual's right to chart his or her own plan of medical treatment deserves as much, if not more, constitutionally protected privacy than does an individual's home or automobile." *Id.* (emphasis added). The United States Supreme Court similarly stressed the sacred nature of the human body in the context of the Fourth Amendment's guarantee against unreasonable searches and seizures in *Schmerber v. California*, 384 U.S. 757 (1966). In *Schmerber*, the Court upheld the defendant's conviction for driving while intoxicated, but recognized an individual's Fourth Amendment interest in protecting his person from unwanted invasions. *Id.* at 772. The Court held that removal of blood from defendant's arm in a hospital constituted a search under the Fourth Amendment. *Id.* at 759. The search was constitutional due to exi-

## D. "O For 2"—A Brief Synthesis

A thoughtful consideration of the two legislative defeats in California and Washington gives rise to the question of whether legislation is the answer at all. Perhaps these defeats should raise a deeper question: are dignity, personal autonomy, and self-determination the real issues? The solution might be much simpler, and more palatable, if the focus is placed on the inability of many Americans to receive ample medical care. The 1992 election illustrated the importance of this issue as the Democrats took control of the White House based, at least partially, on the inadequacies of medical care and the thrust for a national health care system. Too few people receive quality medical care when that care becomes necessary. As one physician recently commented, "We have spent too much money and effort on the technological aspect of medicine and not enough on comfort care. The economic incentives have encouraged us to build fancy intensive-care units rather than to develop the hospice system."<sup>159</sup>

One author emphasized the "bad timing" for both Initiative 119 and Proposition 161.<sup>160</sup> Unfortunately, medical insurance is currently considered a luxury for many people in this country. Such delicate decisions as those surrounding assisted suicide should not be made under the financial pressure of a debilitating illness. While California's Proposition 161 provided that "no patient may be pressured to make a decision to seek aid in dying because that patient is a financial, emotional or other burden

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gent circumstances because a person's blood alcohol level decreases as time passes. *Id.* at 770-71. Thus, the Court determined that the officers were justified in requiring defendant to allow a physician to take a blood sample in a hospital. *But see* *Rochin v. California*, 342 U.S. 165, 172 (1952) (requiring defendant to undergo a stomach-pumping procedure violated "shock the conscience" standard and thus constituted an unconstitutional search under the Fourth Amendment).

Other states with constitutional provisions safeguarding the right to refuse medical treatment are California, Florida, New Jersey, and Washington. Rasmussen, 741 P.2d at 682 n.10; *Bouvia v. Superior Court*, 225 Cal. Rptr. 297, 301 (Cal. Ct. App. 1986); *In re Guardianship of Barry*, 445 So.2d 365 (Fla. Dist. Ct. App. 1984); *In re Quinlan*, 355 A.2d 647 (N.J.), *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976); *In re Coyler*, 660 P.2d 738, 742 (Wash. 1983).

159. Lori Olszewski, *State's Controversial Choice*, S.F. CHRON., Oct. 20, 1992, at A1, (quoting from Dr. Leslie Blackhell, a Los Angeles physician specializing in the research of futile medical treatment).

160. Michael J. Meyer, *Bad Timing for a Difficult Decision*, THE RECORDER, Oct. 29, 1992, at 6.

to his or her family, other persons, or the state," this statement does not protect against the subtle psychological pressures inflicted on individual patients.<sup>161</sup> Psychological coercion, particularly when an illness is draining family finances, might play an improper role in the decision-making process. This problem cannot be solved merely by anti-coercive language in proposed legislation. The health care dilemma in this country is a very real and unfortunate problem.<sup>162</sup> Legislators, however, need to be sensitive to these considerations in devising effective legislation. The problem will not go away with the passage of an assisted suicide law.<sup>163</sup> The problem requires a cure, not merely an alternate form of treatment.

#### IV. THE MEDICAL PERSPECTIVE

##### A. Dr. Jack Kevorkian—One Doctor's Impact

"Death is a punishment to some, to some a gift, and to many a favor."<sup>164</sup>

Labeled everything from "Dr. Death"<sup>165</sup> to "serial mercy killer,"<sup>166</sup> "saint,"<sup>167</sup> and "hero,"<sup>168</sup> Jack Kevorkian has thrust himself into the center of the assisted suicide debate. It all began in June 1990, when Kevorkian first euthanized a Michigan woman suffering from Alzheimer's disease.<sup>169</sup> Shortly thereafter, an Oakland County Circuit Judge permanently enjoined the doctor from using his "suicide machine" again.<sup>170</sup> No formal charges were levied against the doctor, however, due largely to the uncertainty surrounding the law on assisted suicide in Michigan.<sup>171</sup> On October 23, 1991, Dr. Kevorkian defied the injunction and assisted two more patients in committing suicide.<sup>172</sup> These three cases are identi-

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161. *Id.* Mr. Meyer warned against what he terms "situational compulsion." He further stated that "[n]o one person need ever be guilty of direct, individual coercion for people to feel the necessity to 'die and get out of the way.'" *Id.*

162. *Coverage for All in Jeopardy Say Health Care Insiders*, BUS. WIRE, Feb. 5, 1993, available in LEXIS, Nexis library, Current file.

163. Jasper N. Keith, Jr., & M. Julian Du Hera, Jr., *EUTHANASIA: We don't need to resort to the taking of human life*, ATLANTA J. AND CONST., Nov. 15, 1992, at B2.

164. Lacey, *supra* note 32 (quoting Seneca).

165. Diane Culbertson, *Killing Mustn't Be Part of the Healing Art*, USA TODAY, Oct. 28, 1991, at 12A.

166. "Suicide Doctor" Reveals Why He Performs Physician Assisted Suicides, PR NEWswire, Oct. 31, 1991, available in LEXIS, Nexis library, PR Newswire file.

167. David Von Drehle, *Suicide Initiative Defeated, Not Dead; Euthanasia Seen As Gaining Acceptance in U.S.*, WASH. POST, Nov. 7, 1991, at A25.

168. *Id.*

169. See Price *supra*, note 4, at A4.

170. *Death Machine Barred By Circuit Judge*, MICH. LAW. WKLY., Feb. 11, 1991, at 3.

171. Michigan has since passed legislation outlawing Kevorkian's activities. See *infra* note 174 and accompanying text.

172. Patricia Edmonds & Carol J. Castaneda, *Debate Over Right-to-Die Rekindled*,

cal in two respects: (1) Dr. Kevorkian was not the treating physician of any of these patients, and (2) none of the three patients was terminal.<sup>173</sup> Furthermore, Dr. Kevorkian has not as yet received any legal censure for his actions.<sup>174</sup> On February 6, 1992, however, Dr. Kevorkian was charged with murder for his involvement in the deaths of these two "patients."<sup>175</sup> The Michigan coroner who performed autopsies on these two patients labeled both as homicides and not suicides.<sup>176</sup> The medical examiner ruled out suicide because "suicide is reserved for self-inflicted death, and in this situation, all the evidence indicates these deaths were brought about by another person."<sup>177</sup>

Partly in reaction to the legal passivity, and partly in response to questions about whether the medical profession condones such activity, Dr. Kevorkian's license was suspended by the Michigan Board of Medicine.<sup>178</sup> This provides a basis for the prosecution in any future assisted

USA TODAY, Oct. 25, 1991, at 1A.

173. Harrison, *supra* note 2, at A15. Janet Adkins suffered from Alzheimer's disease; Marjorie Wantz suffered from papilloma virus, a painful, chronic pelvic disorder; and Sherry Miller had multiple sclerosis. *Id.* The women were not in the latter stages of their respective diseases, but all were either in great pain or were becoming increasingly dependent on others for their care. *Id.*

174. The situation may soon change. *Kevorkian Home Probed; Man May Have Wavered in Suicide*, L.A. TIMES, Feb. 26, 1993, at A18. Michigan authorities began a homicide investigation after receiving evidence that a man who sought Kevorkian's aid in committing suicide may have changed his mind at the last minute. *Id.* A right-to-life advocate recovered a document from the garbage of a Kevorkian associate. The document is allegedly the minutes from the suicide of 70-year-old Hugh Gale on February 15, 1993. *Id.* No charges have been filed as of February 26, 1993. *Id.* Kevorkian has assisted 15 suicides since 1990; seven of these have occurred since Michigan Governor John Engler signed a ban to take effect on March 30, 1993. *Id.* On February 25, 1993, Governor Engler signed a bill that placed a ban on all assisted suicides, effective immediately. *Id.* See 1992 Mich. Legis. Serv. 270 (West) (creating Michigan commission on death and dying to recommend legislation to prohibit assisted suicide).

175. *Suicide Device Inventor Charged With Murder*, *supra* note 2, at A21.

176. *Id.* See *Examiner Rules Homicide in Two Deaths*, CHI. TRIB., Dec. 19, 1991, at 18C; *2 Doctor-Assisted Suicides Ruled Homicides*, N.Y. TIMES, Dec. 19, 1991, at A29; *Two Assisted Suicides Ruled Homicides*, L.A. TIMES, Dec. 19, 1991, at A22; *Grand Jury to Weigh Murder Charges in Suicide-Device Case*, L.A. TIMES, Dec. 20, 1991, at A24 (Dr. Kevorkian's attorney, Geoffrey Fieger, accused the prosecutor of "waging a vendetta against the doctor" because of "political pressures").

177. *Examiner Rules Homicide in Two Deaths*, *supra* note 176, at 18C.

178. *Milestones*, TIME, Dec. 2, 1991, at 87. *Time Magazine* printed the following account of the suspension of Dr. Kevorkian's license:

SUSPENDED. Jack Kevorkian, 63, the retired Michigan pathologist dubbed Dr.

suicides under the "practicing medicine without a license" prohibitions.<sup>179</sup> Currently, Kevorkian has escaped legal penalty.<sup>180</sup>

Many support Dr. Kevorkian's efforts to secure death rights for suffering patients.<sup>181</sup> His opponents, however, are many.<sup>182</sup> First, and proba-

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Death because he has helped three women commit suicide; from practicing medicine; by the State Board of Medicine; in Lansing, Mich. Kevorkian first came to the attention of authorities last year when he helped an Alzheimer's patient kill herself by hooking her up to a suicide machine he had invented. After he was charged with murder, the case was dismissed because Michigan has no law against assisted suicide. But Kevorkian was barred from helping people commit suicide in Oakland County. In October he called police to an Oakland County cabin in a recreation area north of Detroit where he had helped two women die. The county prosecutor's office is investigating their deaths.

*Id.* Currently, Dr. Kevorkian's license suspension is on appeal. *Kevorkian Charged in 2 Deaths*, CHI. TRIB., Feb. 6, 1992, at M3.

179. See MICH. COMP. LAWS § 333.16294 (West 1992) (providing that "an individual, who practices or holds himself or herself out as practicing a health profession regulated by this article, without a license . . . is guilty of a felony").

180. See *supra* note 171 and accompanying text (discussing possible criminal liability of Dr. Kevorkian for a recent assisted suicide). Oakland County Prosecutor, Richard Thompson, has been unable to find a suitable law under which Dr. Kevorkian's actions might be deemed criminal. In response, Michigan Governor John Engler and the State Legislature passed emergency legislation making assisted suicide a felony, effective March 30, 1993. *A Deep Breath*, THE ECONOMIST, Dec. 12, 1992, at 32. Dr. Kevorkian could spend as long as four years in jail if convicted under the new law. Interestingly, he could not himself be put to death because the death penalty has been outlawed in Michigan for more than 140 years. *There Goes Dr. Death Again*, TIME, Dec. 7, 1992, at 29. After the law was passed, Dr. Kevorkian assisted in seven more suicides. *Kevorkian Home Probed; Man May Have Wavered in Suicide*, *supra* note 174, at A18. As a result, Michigan passed a law banning assisted suicide effective on its signing date, February 25, 1993. *Id.*

181. As of February 26, 1993, Dr. Kevorkian had assisted 15 people in committing suicide either by lethal injection or by carbon monoxide ingestion. The list appears below:

1. Janet Adkins, 54, of Portland, Oregon. Mrs. Adkins suffered from the beginning stages of Alzheimer's disease, a non-terminal condition.
2. Marjorie Wantz, 58, of Sodus, Michigan. Mrs. Wantz suffered from intractable pelvic pain, a non-terminal condition.
3. Sherry Miller, 43, of Roseville, Michigan. Mrs. Miller suffered from multiple sclerosis, a non-terminal condition.
4. Susan Williams, 52, of Clawson, Michigan. Mrs. Williams also suffered from multiple sclerosis, a non-terminal condition.
5. Lois Hawes, 52, of Warren, Michigan. Mrs. Hawes was Kevorkian's first truly terminal patient. She suffered from lung cancer.
6. Catherine Andreyev, 45, of Pittsburgh, Pennsylvania. Ms. Andreyev had breast cancer.

Pamela Warrick, *A Legacy of Suffering*, L.A. TIMES, Dec. 6, 1992, at E8.

7. Marcella Lawrence, 67, of Mt. Clemens, Michigan. Mrs. Lawrence complained of osteoporosis, emphysema, heart problems, ulcers, cirrhosis, and arthritis.

bly not surprisingly, is the American Medical Association.<sup>183</sup> Next is a group of individual physicians that supports the right to assisted suicide, but does not agree with Dr. Kevorkian's methodology. For instance, Timothy Quill, a physician in Rochester, New York who assisted a dying cancer patient's suicide by prescribing a lethal dose of medications,<sup>184</sup> is in this second category.<sup>185</sup> Lastly, and perhaps most notably, is the op-

8. Marguerite Tate, 70, of Auburn Hills, Michigan. Mrs. Tate suffered from Lou Gehrig's disease.

Ann Rogers-Melnick, *Suicide or Murder?*, CHI. TRIB., Dec. 7, 1992, at 7.

9. Jack Elmer Miller, 53, of Huron Township, Michigan. Miller suffered from bone cancer.

10. Stanley Ball, 82, of Leland, Michigan. Ball had pancreatic cancer.

11. Mary Biernat, 73, of Crown Point, Indiana. Biernat had breast cancer.

12. Elaine Goldbaum, 47, of Southfield, Michigan. Goldbaum suffered from multiple sclerosis.

13. Hugh Gale, 70, of Roseville, Michigan. Gale suffered from emphysema and congestive heart disease.

14. Jonathon Grenz, 44, of Costa Mesa, California. Grenz had throat cancer.

15. Martha Ruwart, 41, of Cardiff, California. Ruwart had duodenal and ovarian cancer.

David Margolick, *For 'Dr. Death' It's 15 & Waiting Amid the Furor, Kevorkian Feels Need for Respite*, SAN JOSE MERCURY NEWS, Feb. 23, 1993, at 7A.

182. As one commentator recently remarked, "It's almost become obligatory for people who write or speak about [assisted suicide] to distance themselves from Kevorkian." Nancy Gibbs, *Mercy's Friend or Foe*, TIME, Dec. 28, 1992, at 36 (quoting Yale Kamisar, a University of Michigan Law Professor).

183. Knox, *supra* note 123, at 15. Former Surgeon General, Dr. C. Everett Koop, was a forceful opponent in Washington's Initiative 119 campaign. *Id.* Dr. Koop made repeated appearances on radio and television speaking out against legalizing assisted suicide. *Id.* Similarly, the American Bar Association has openly opposed assisted suicide. Gail Apperson, *Suicide Doctor Case Will Hurt Euthanasia Legislation*, REUTERS, Feb. 6, 1992, available in LEXIS, Nexis library, Omni file. Kevorkian advocates an unconditional right to die. *Id.* Many other supporters of assisted suicide propose limiting the right to persons diagnosed with terminal conditions. *Id.*

184. Vorenberg, *supra* note 103, at A25; see also Nancy Gibbs, *Dr. Death Strikes Again*, TIME, Nov. 4, 1991, at 78. Timothy Quill confessed to providing one of his leukemia patients with sufficient barbiturates to kill herself. *Id.* Dr. Quill's account appeared in the March 1991 edition of the New England Journal of Medicine. Vorenberg, *supra* note 103, at A25. The State Board of Medicine found Dr. Quill's conduct appropriate under the circumstances and cleared Dr. Quill of any alleged misconduct. Gibbs, *supra* note 182, at 78. Despite his experiences, Quill opposes Dr. Kevorkian's methodology, claiming that "[Kevorkian] certainly doesn't stand for the mainstream, [and his actions] will again muddy the water." *Id.*

185. Robert F. Weir, *The Morality of Physician-Assisted Suicide*, LAW, MED. & HEALTH CARE, Spring-Summer 1992 at 116. Dr. Quill suggested that he was merely "testing" legal boundaries. *Id.* at 119. Such "testings" illustrate the impact of judicial



position of the Hemlock Society and its founder Derek Humphry.<sup>186</sup> They also object to Kevorkian's activities because, although they feel the motive is right, the procedure is fallible.<sup>187</sup> It is the means and not the end that raises these dissenting views. Despite this opposition, Dr. Kevorkian has vowed to maintain his "practice" in the face of any legal barriers or ramifications. Kevorkian considers this his "medical duty."<sup>188</sup>

Whatever the response to Dr. Kevorkian's active role in the assisted suicide debate, his activity has drawn national attention—enough, perhaps, that a legislative or judicial answer will be forthcoming.

### B. *The Medical Profession—A Question of Association*

To cure sometimes, to relieve often, to comfort always.<sup>189</sup>

The assisted suicide debate possibly has its greatest impact within the medical community itself.<sup>190</sup> On October 16, 1991, the American Medical Association (AMA) published a review of *Final Exit*<sup>191</sup> in the Journal of the American Medical Association (JAMA).<sup>192</sup> Although the article clear-

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and legislative inactivity. A major distinction between Dr. Quill's case and Dr. Kevorkian's practices is that Dr. Quill was familiar with and currently treating "Diane" (the pseudonym given to Dr. Quill's patient). *Id.*

186. Breo, *supra* note 6, at 2895. Humphry declined to join Kevorkian and establish a "suicide clinic." *Id.* Humphry's displeasure with Kevorkian is ironic because both men advocate a patient's unqualified right to actively end his or her own life. The difference between the two is that while Humphry has offered a instructional book with "recipes" for death, Dr. Kevorkian has gone one step further and actually provided patients with the necessary combined ingredients. Humphry has emphasized that euthanasia may not be the answer to certain diseases, such as Alzheimer's. See HILTON, *supra* note 8, at 62-63.

187. *California Doctor Assisted Suicide Movement is Dead Set Against Dr. Kevorkian's Stance*, MOD. HEALTHCARE, Dec. 16, 1991, at 48. Californians Against Human Suffering (CAHS), the organization trying to establish legalized assisted suicide in California, has also condemned Kevorkian's activities. CAHS partially credited Kevorkian with the defeat of Initiative 119, and urged the doctor to "cease and desist from assisting more suicides." *Id.*

188. Gibbs, *supra* note 182, at 36. Kevorkian stated, "If my colleagues won't work with me, I will work alone." *Id.* This maverick attitude may be the very stumbling block that prevents assisted suicide legislation from being adopted. Without the support of others involved in the crusade for a right to have physicians *legally* assist in suicides, Kevorkian may remain the sole specialist in a one-man field.

189. Lace, *supra* note 32, at 3075 n.1. This inscription, a 15th-century folk saying, appears on Gutzon Borghum's statue of Dr. Edward Livingston Trudeau in Sarona Lake, New York. *Id.*

190. Samuel F. Hunter, *Active Euthanasia Violates Fundamental Principles*, 262 JAMA 3074 (1989) (presenting an interesting account of a medical student's perspective toward the growing ethical dilemma posed by assisted suicide).

191. HUMPHRY, *supra* note 6.

192. Steven H. Miles, *Books: Final Exit: The Practicalities of Self Deliverance and*

ly stated that the AMA opposes assisted suicide, the impact of Derek Humphry's book demanded the attention of the medical profession's most prestigious journal.<sup>193</sup> The review was critical, raising several concerns about physician participation in assisted suicide.<sup>194</sup> The author admonished the book's delivery of misleading information to the "me decade's inattention to good care for the chronically ill."<sup>195</sup>

The book review was but one of an ongoing series of JAMA articles published in response to this debate.<sup>196</sup> The majority of articles mechanically follow the AMA dictate against active physician participation.<sup>197</sup> The AMA believes that "[m]edicine is about taking care of sick people . . . [and it] . . . can accept nothing that threatens th[e doctor-patient] relationship by trying to make [doctors] agents of any efforts that would violate [their] duty 'to do no harm'—by asking [them] to . . . assist in suicide."<sup>198</sup>

This position is consistent with that held by the American Nurses Association (ANA), which similarly rejects medical involvement in assisted suicide.<sup>199</sup> The AMA and ANA are concerned that sanctioning assisted suicide will cast doubt on the profession's integrity.<sup>200</sup> Some physicians fear that "[a]dding death-on-demand to our armamentarium would subvert society's faith in us, which is crucial for our healing role."<sup>201</sup> The California Nurses Association also empathizes with the plight of the terminally ill, but remains firm in its opposition to assisted suicide:

It should be noted that our opposition to active voluntary euthanasia is not meant to imply that there are never situations in which an individual patient might not

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*Assisted Suicide for the Dying*, 266 JAMA 2150 (1991).

193. *Id.*

194. *Id.*

195. *Id.*

196. *E.g.*, Ducharme, *supra* note 113, at 1197; Lace, *supra* note 32, at 3075.

197. *See, e.g.*, ST. JOHN-STEVAS, *supra* note 35, at 118. "If a physician is involved, the difference in personal involvement is between providing a suicidal patient with a prescription that would be lethal if taken by the patient in certain amounts, compared with the physician personally administering a lethal injection to the patient at the patient's request." *Id.*

198. John J. Ring, *The Right Road for Medicine; Professionalism and the New American Medical Association*, 265 JAMA 1694, 1694 (1991).

199. AMERICAN NURSES ASSOCIATION, CODE FOR NURSES WITH INTERPRETIVE STATEMENTS § 1.3 (1985).

200. *See infra* note 230 and accompanying text for a discussion of how the medical profession's integrity has been recognized as a compelling state interest to be balanced against the patient's right to refuse treatment.

201. Hunter, *supra* note 190, at 3074.

actually benefit, (for example by relief of uncontrolled pain or nausea or other forms of suffering), by a hastened death . . . Rather, we strongly believe that the negative consequences for society as a whole, and for the nursing profession, are too serious to condone nurses' participation.<sup>202</sup>

Some believe physicians should never discuss the issue of assisted suicide with a patient because patients put great credence in their doctor's suggestions.<sup>203</sup> Though the doctor may be merely presenting an alternative, it is possible that the patient will receive mixed signals, either as to his or her prognosis or the physician's own feeling regarding the patient's best interests. One commentator claims that "a besieged psyche could be swayed by even cursory mention of euthanasia, especially if the suggestion were to come from a physician."<sup>204</sup> The level of trust shared between doctor and patient (or nurse and patient) makes the patient vulnerable to a doctor's influence, however unintentional it may be.<sup>205</sup>

While "[t]he relief of suffering is a primary goal" of the medical profession, assisted suicide falls outside the parameters of relief.<sup>206</sup> Assisted suicide is distinct from attempts to relieve suffering. Occasionally, a doctor's attempt to relieve suffering will result in hastened death. A typical example is where a doctor gives a patient repeated and increasing doses of morphine to curb pain but which eventually causes death.<sup>207</sup> In this case, however, hastening death is not the physician's motive. The wish to ease pain is acceptable. The desire to terminate life, even if it arises out of empathy for the patient's suffering, is not acceptable, however, and constitutes assisted suicide.<sup>208</sup>

Prescription medication and/or the progression of certain diseases can also impair a patient's judgment.<sup>209</sup> This argument is particularly persuasive in modern society. The degenerative nature of such diseases as AIDS

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202. *Position Statement on Active Euthanasia for the Terminally Ill*, CAL. NURSES ASS'N, 1991, at 2.

203. E.g., Kenneth Kipnis, *Physician Participation in Assisted Suicide*, 263 JAMA 1197 (1990) (letter to the editor).

204. Hunter, *supra* note 190, at 3074 (emphasis added) (citing David Orenlicher, *Physician Participation in Assisted Suicide*, 262 JAMA 1844 (1989)).

205. *Position Statement on Active Euthanasia for the Terminally Ill*, *supra* note 202, at 5-6.

206. *Id.* at 5.

207. See Vorenberg, *supra* note 103, at A25.

208. HILTON, *supra* note 8, at 134-53. Probably the earliest and least known example of physician-assisted suicide is Lord Dawson's lethal injection that killed King George V. *Id.* Lord Dawson's act was revealed in 1988 when his biography was published. *Id.* Dawson injected King George with three quarters of a gram of morphine and one gram of cocaine because "a lingering death would compromise the king's dignity, and it was time for him to die." *Id.* at 13.

209. Hunter, *supra* note 190, at 3074.

and Alzheimer's disease culminates in the deterioration of cognitive functions.<sup>210</sup> A patient's inability to make rational decisions undermines any voluntary consent requirement.

Further, patients who feel they are a financial burden on their family may let economic considerations cloud their judgment.<sup>211</sup> As one writer observed, Washington could have become "the first state with the ultimate in medical cost saving: kill yourself."<sup>212</sup> The AMA and ANA do not want to be put in the position of battling against economic forces. The medical field is accustomed to making medical decisions, not analyzing economics. Still, financial planning is an integral part of any health care plan and merits serious consideration.

### C. Economics—Making Sense Out of Dollars

At the rate medical costs are increasing, economics will certainly play a significant role in determining whether to legalize assisted suicide.<sup>213</sup> Legislators will find themselves weighing the costs of treatment against the prospect of recovery. Economic proportionality will enable people to place a dollar value on the "life" at issue.<sup>214</sup>

This is not a new concept. Lawyers recognize the importance of economics in nearly every decision they make.<sup>215</sup> Many cases are analyzed

210. *Id.*

211. *Id.*

212. Lacitis, *supra* note 136, at F1.

213. RUSSELL GALLOWAY, *THE RICH AND THE POOR IN SUPREME COURT HISTORY* 179 (1982). The author suggests that the United States Supreme Court was and is a political body that decides cases on the basis of socioeconomic values rather than value-neutral legal rules. *Id.*

214. *See, e.g.*, Conservatorship of Drabick, 245 Cal. Rptr. 840 (Cal. Ct. App. 1988). The court in Drabick stated:

Proportionate treatment is that which, in the view of the patient, has at least a reasonable chance of providing benefits to the patient, which benefits outweigh the burdens attendant to the treatment. Thus, even if a proposed course of treatment might be extremely painful or intrusive, it would still be proportionate treatment if the prognosis was for complete cure or significant improvement in the patient's condition. On the other hand, a treatment course which is only minimally painful or intrusive may nonetheless be considered *disproportionate to the potential benefits if the prognosis is virtually hopeless for any significant improvement in the condition.*

*Id.* at 846 (citing Barber v. Superior Court, 195 Cal. Rptr. 484, 491 (Cal. Ct. App. 1983)).

215. Patrick W. Brennan, *Economic Analysis of Law*, 55 U. CIN. L. REV. 1159, 1159

according to their economic potential.<sup>216</sup> Absent organizations like the American Civil Liberties Union (ACLU), persons with claims of little economic value or little social importance often will be turned away. Lawyers are introduced to this concept shortly after entering law school. Learned Hand's now-legendary algebraic formula<sup>217</sup> advocates taking only those preventive measures that are economically justified.<sup>218</sup> However, as common sense and morality clearly demonstrate, this "wealth maximization"<sup>219</sup> analysis fails to consider the noneconomic value of human life. The unfortunate truth is that in our legal system, economic efficiency tends to be the outer boundary of legal responsibility.<sup>220</sup>

Therefore, economics certainly will be a driving force in the movement to legalize assisted suicide. Many economic arguments support legalization. First, one must consider the medical profession's ability to artificially sustain "life," even past the point of the cessation of life functions. Machines and medicines can stimulate blood flow to the the heart, and fill the lungs with oxygen.<sup>221</sup> Second, medical resources currently available in this country are limited. Not every patient who needs treatment, such

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(1987) (book review). "There have been few developments in legal scholarship over the past two or three decades to rival the notion that principles of economics can be used to evaluate legal rules and proceedings, even when the subject has no commercial context." *Id.*

216. Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123 (1989) (characterizing the Supreme Court's criteria for due process as "the sort of cost-benefit calculus that Posner advanced").

217. *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). Judge Learned Hand adopted a  $B < PL$  formula for liability. The three factors considered are: (1) the probability (P) that harm will occur; (2) the gravity of the resulting loss (L), if harm occurs; and (3) the burden (B) of protecting against such harm. *Id.* at 173. In cases where the cost of protecting against injury outweighs the expected injury and its contemplated expense, the individual will not be required to take precautionary safety measures. *Id.* In a sense, this calculation to determine liability is analogous to the *Drabick* "proportionality" formula. *See supra* note 214.

218. *See generally* WILLIAM L. PROSSER, *THE LAW OF TORTS* § 31 (1971) (explaining the negligence standard as "balancing the risk, in light of the social interest threatened, and the probability and extent of harm, against the value of the interest which the actor is seeking to protect").

219. *See* ROBIN P. MALLOY, *LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE* 61-65 (1990) for a thorough discussion of Posner's "wealth maximization" theory. Wealth maximization is a mathematical formula, giving credence only to programs that are economically justified and, as such, fails to consider noneconomic values. *Id.*

220. Mashaw, *supra* note 216, at 123. "In all of these circumstances, economics provides substantive criteria for the application of law, describes its underlying rationale or defines its parameters for the evaluation of the law's success or failure." *Id.*

221. ARTHUR WINTER, *THE MOMENT OF DEATH* 3 (1968) (illustrating the ability of machines to maintain life functions, even to the point of successfully stopping and restarting the heart during certain surgical procedures).

as those awaiting transplants, will live to see their needs met.<sup>222</sup> Third, under the current system, funds that might otherwise be used elsewhere or distributed in the patient's estate are being used to sustain the life of a patient with a terminal disease. Lastly, prolonged treatment of terminal patients contributes to the increase in national medical costs. As insurance funds are depleted, they must be replaced, resulting in increased insurance premiums and the ensuing unavailability of insurance to a growing number of Americans.<sup>223</sup> In sheer monetary terms, assisted suicide should be a legal alternative to patients caught under the financial burden of terminal diseases. Under an economic analysis, the terminal or non-terminal nature of a disease is only relevant to the extent it relates to cost of treatment. Unquestionably, under Judge Posner's "wealth maximization" theory, assisted suicide is an economically sound principle. Economically speaking, assisted suicide merits legal recognition and acceptance.

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222. John J. Donohue III & Ian Ayers, *Posner's Symphony No. 3: Thinking About the Unthinkable*, 39 STAN. L. REV. 791 (1987) (book review). The authors illustrate the impact of Posner's economic approach:

"Suppose that pituitary extract is . . . very expensive. A poor family has a child who will be a dwarf if he does not get some of the extract, but the family cannot afford the price . . . A rich family has a child who will grow to normal height, but the extract will add a few inches more, and his parents decide to buy it for him. In the sense of value used in this book, the pituitary extract is more valuable to the rich than to the poor family, because value is measured by willingness to pay."

*Id.* at 797 (alteration in original) (emphasis added) (quoting RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 11-12 (3d ed. 1986)). See LEE, *supra* note 11, at 68. Mr. Lee describes one instance in England where the Oxfordshire Health Authority stopped one patient's kidney dialysis treatment upon concluding that "he did not have 'a sufficiently high quality of life.'" *Id.* The Authority terminated Mr. Sage's treatment in order that another patient might benefit from the procedure. *Id.* The author relies on such factors as age and intelligence to determine which patients might receive the limited resources. For instance, Lee suggests that such a system might efficiently decide against those who, "because of their advanced age[,] were prone to other health problems[,] so that society might [get apportionate number of] hours of life from however many hours of treatment were provided." *Id.*

223. Malloy, *supra* note 219, at 61-65. "[C]onservative theory tells us that individuals that are down on their luck without a job, or poor as a result of no fault of their own, are simply without a legally recognizable claim to any of society's resources." *Id.* See generally RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1983).

## V. THE LEGAL PERSPECTIVE

### A. *Looking for Guidance*

No court decision has directly addressed the issue of physician-assisted suicide.<sup>224</sup> The only doctor openly "assisting" patients, Dr. Jack Kevorkian, has to date avoided a legal determination on the criminality of assisted suicide.<sup>225</sup> Further, no patient has successfully petitioned the courts for an assisted suicide enabling order.<sup>226</sup> Therefore, the legislatures and courts will need to draw inferences from analogous decisions. The cases that will provide the most guidance are primarily the "right to refuse medical treatment" cases and the more current "right to die" cases.

Traditional tort law requires informed consent for medical treatment.<sup>227</sup> Doctors initiating treatment without informed consent, except in emergencies, are guilty of battery.<sup>228</sup> Following this rationale, patients have established a qualified "right" to refuse unwanted medical treatment, even when foregoing such treatment results in death.<sup>229</sup> Throughout these decisions, the state routinely proffers four interests to balance against the individual's qualified right: (1) preservation of human life; (2) prevention of suicide; (3) protection of innocent third parties, and (4) protection of the medical profession's ethical integrity.<sup>230</sup> The

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224. Although the issue of a constitutional "right to die" has frequently been presented to the courts, no court has yet had to determine whether the Constitution and its nebula of rights includes a right to assisted suicide.

225. See *supra* notes 174-80 and accompanying text.

226. The closest case on point is *McKay v. Bergstedt*, 801 P.2d 617 (Nev. 1990) (holding a quadriplegic patient's right to refuse medical treatment outweighed state interests, and permitting withdrawal of his respirator and administration of a sedative).

227. RESTATEMENT (SECOND) OF TORTS §§ 18-20 (1965). Comment to section 18 states: "A, a surgeon, while B is under anesthesia, makes an examination of her person to which she has not given her consent. A is subject to liability to B." *Id.* § 18, cmt. d (emphasis added). See *Cobbs v. Grant*, 502 P.2d 1 (Cal. 1972). The California Supreme Court held that "when a doctor performs an operation to which the patient has not consented, there is a battery." *Id.* at 7.

228. *Schloendorff v. Society of N.Y. Hosp.*, 105 N.E. 92 (N.Y. 1914). In an often-quoted statement, Justice Cardozo declared, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body." *Id.* at 93.

229. HILTON, *supra* note 8, at 120. The author points out that "[i]nformed consent, you see, is as much about consent as it is about informing." *Id.* In a national survey, 50% of doctors perceived the term "informed consent" to require merely informing the patient. Only 26% of the doctors responded that "informed consent" requires actually obtaining permission from the patient for a chosen course of treatment. Yet, this is their legal duty. *Id.*

230. Contrast these interests with the two asserted in the abortion cases, (1) the

second factor is, of course, most relevant to the current topic. On occasion, the state's interest has predominated over the patient's desire.<sup>231</sup>

*In re Quinlan*<sup>232</sup> was the seminal case for the right to refuse treatment and the right to die. *In re Quinlan* and its progeny expanded the individual privacy rights first enunciated in *Griswold v. Connecticut*.<sup>233</sup> Karen Ann Quinlan fell into an unresponsive coma early in 1975.<sup>234</sup> The court held that Karen was incompetent because she was diagnosed to be in a permanent vegetative state.<sup>235</sup> Her father sought a court order naming himself as guardian so that he might discontinue the respiratory care artificially sustaining her existence.<sup>236</sup> Although a free exercise claim

protection of potential life and (2) protection of the mother's health. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973).

231. See generally *United States v. George*, 239 F. Supp. 752, 754 (D.C. Conn. 1965) (dissolving temporary restraining order providing blood transfusions to Jehovah's Witness who refused consent to such treatments after his condition improved to the point where transfusions were no longer necessary); *John F. Kennedy Memorial Hosp. v. Heston*, 279 A.2d 670, 674 (N.J. 1971) (holding State's interest in preserving life overrode mother's refusal to consent to lifesaving medical treatment for her unconscious daughter, even where such refusal was made because of sincerely held religious beliefs).

232. 355 A.2d 647 (N.J.), cert. denied sub nom. *Garger v. New Jersey*, 429 U.S. 922 (1976). *In re Quinlan* was the first case to address the dilemma facing patients and their families where medical technology is artificially sustaining the patient's life. The court duly noted that

[d]evelopments in medical technology have obfuscated the use of the traditional definition of death." *Id.* at 656. The court further explained, "From ancient times down to the recent past it was clear that, when the respiration and heart stopped, the brain would die in a few minutes; so the obvious criterion of no heart beat as synonymous with death was sufficiently accurate . . . . This is no longer valid when modern resuscitative and supportive measures are used. These improved activities can now restore 'life' as judged by the ancient standards of persistent respiration and continuing heart beat. *This can be the case even when there is not the remotest possibility of an individual recovering consciousness.*

*Id.* at 656 (emphasis added) (citing *A Definition of Irreversible Coma*, 205 JAMA 337, 339 (1968)).

233. 381 U.S. 479, 485 (1965) (holding that the state could not constitutionally prohibit married couples from using or receiving counsel regarding contraceptives, thereby establishing marital privacy protections). See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-10 (2d ed. 1988).

234. *In re Quinlan*, 348 A.2d 801, 806-07 (N.J. Super. Ct. Ch. Div. 1975), modified, 355 A.2d 647 (N.J.), cert. denied sub nom. *Garger v. New Jersey*, 429 U.S. 922 (1976).

235. *Id.* at 810-13.

236. *Id.* at 813-14.



was raised,<sup>237</sup> the decision did not substantially address the issue. Rather, the court determined that had Karen been competent, she would have been undeniably permitted to exercise her right to discontinue this extraordinary treatment.<sup>238</sup> The court analogized Karen's situation to that of a competent terminal patient who could refuse medical treatment at will.<sup>239</sup> Karen's incompetency posed the greatest difficulty. The court in *In re Quinlan* held that an incompetent's parent could be granted guardianship and thereafter be permitted to exercise substituted judgment for the patient.<sup>240</sup> Karen's privacy concerns, vicariously raised by her father, were deemed sufficient to overcome any state interest in preserving life.<sup>241</sup> Many commentators were surprised by the decision, but perhaps the biggest surprise of all was Karen's unexpected survival. Karen remained alive for several years after her respirator was disconnected.<sup>242</sup>

*In re Quinlan* opened the doors to a long line of cases granting patients the right to refuse life-sustaining treatment. The United States Supreme Court addressed the right to die question for the first time in *Cruzan v. Missouri Department of Health*.<sup>243</sup> However, many cases decided in the interim demonstrated tolerance of the emerging right and, therefore, merit discussion.

*McKay v. Bergstedt*<sup>244</sup> addressed the issue of whether a court could order removal of an adult quadriplegic's respirator. Kenneth Bergstedt suffered catastrophic injuries in a childhood swimming accident.<sup>245</sup> At the age of thirty-one, Mr. Bergstedt feared the loss of his caretaking parents and sought court permission to remove a life-sustaining respirator.<sup>246</sup> The court stated the four traditionally accepted state interests: "(1) . . . preserving the sanctity of all life . . . ; (2) . . . preventing suicide; (3) . . . protecting innocent third persons who may be adversely affected by the death of the party seeking relief; and (4) . . . preserving the integrity of the medical profession."<sup>247</sup> The *Bergstedt* court also added a fifth

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237. *In re Quinlan*, 355 A.2d 647, 661 (N.J.) (briefly discussing the Free Exercise claim), *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976).

238. *Id.* at 663. In analyzing the *Griswold* privacy interest, the court stated that "[p]resumably this right is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances." *Id.*

239. *Id.* at 671.

240. TRIBE, *supra* note 233, § 15-11. *In re Quinlan* established the substituted judgment doctrine in "right to die" cases. *Id.*

241. *In re Quinlan*, 355 A.2d at 662-64.

242. HILTON, *supra* note 8, at 94.

243. 497 U.S. 261, 277 (1990).

244. 801 P.2d 617 (Nev. 1990).

245. *Id.* at 621.

246. *Id.* The court explained that "the answer is to be found in the balancing of interests between the person in extremis and the State." *Id.*

247. *Id.*

factor: "Encouraging the charitable and humane care of those whose lives may be artificially extended under conditions that have the prospect of providing at least a modicum of quality living."<sup>248</sup>

*Bergstedt* rested on principles of individual liberty<sup>249</sup> rather than treating the issue under the *Griswold*<sup>250</sup> and *Roe*<sup>251</sup> privacy decisions.<sup>252</sup> Under this liberty analysis, the right to assisted suicide is not automatically deemed a fundamental right; therefore, the state's interests<sup>253</sup> must be balanced against the individual's liberty interest.<sup>254</sup>

The court in *Bergstedt* concluded that under these facts, this patient's right to self-determination in withdrawing the respirator<sup>255</sup> outweighed the state's interest in preserving human life.<sup>256</sup> The court distinguished the facts in *Bergstedt* from assisted suicide.<sup>257</sup> It noted a "substantial difference between the attitude of a person desiring non-interference with the natural consequences of his or her condition and the individual who *desires to terminate his or her life by some deadly means either self-inflicted or through the agency of another.*"<sup>258</sup> The court limited its holding to allowing a patient to terminate extraordinary medical treatment and distinguished choosing a natural death from suicide, the affirmative desire to take one's own life.<sup>259</sup>

248. *Id.*

249. *Id.* at 621-22. The Court relied on *Cruzan* in determining *Bergstedt's* liberty interest: "Under the common law, [n]o right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, *unless by clear and unquestionable authority of law.*" *Id.* at 621 (emphasis added) (quoting *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 269 (1990)).

250. *Griswold v. Connecticut*, 381 U.S. 485, 479 (1965) (striking down Connecticut law forbidding use of contraceptives as intrusive upon the right of marital privacy).

251. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding Texas criminal abortion statute prohibiting abortion at any stage of pregnancy except to save the life of the mother an unconstitutional infringement upon a woman's right of privacy).

252. *Bergstedt*, 801 P.2d at 622 ("We do not perceive a privacy right . . . as a basis for refusing or withdrawing medical treatment and support.").

253. *See supra* note 247 and accompanying text.

254. *Bergstedt*, 801 P.2d at 622.

255. The court limited its holding to "situations involving adults who are: (1) competent; (2) irreversibly sustained or subject to being sustained by artificial life support systems or some form or heroic, radical medical treatment; and (3) enduring physical and mental pain and suffering." *Id.* at 624.

256. *Id.*

257. *Id.* at 632.

258. *Id.* at 627.

259. *Id.* at 626.

The *Bergstedt* court established guidelines for implementing its decision to allow "competent adult patients to refuse or discontinue medical treatment."<sup>260</sup> The safeguards include requiring two independent physicians to certify, after examining the patient, that (1) the patient is competent, aware of available alternatives, and informed of the likely consequences of refusing treatment; (2) the patient's condition is irreversible (though not necessarily terminal); (3) the patient's condition is not terminal, the patient is informed of care options available, and the patient's response to such information is documented.<sup>261</sup> The court determined that if these conditions are satisfied, the patient may forego treatment or have existing life support terminated.<sup>262</sup> Mr. Bergstedt died prior to disposition of the case,<sup>263</sup> rendering the issue moot and, thus, ineligible for Supreme Court review.<sup>264</sup>

### B. California Cases

In *Bouvia v. Superior Court*,<sup>265</sup> a California case analogous to *Bergstedt*, the court held that a competent, non-terminal patient had the right to refuse unwanted medical treatment, even where such treatment was necessary to sustain the patient's life.<sup>266</sup> Elizabeth Bouvia suffered from severe cerebral palsy.<sup>267</sup> Her condition required nasogastric feeding, which Ms. Bouvia resisted.<sup>268</sup> She desired removal of the feeding tube and petitioned the court for a writ of mandamus overturning the lower court's denial of a preliminary injunction.<sup>269</sup> The court issued the writ, stating that Ms. Bouvia's "mental and emotional feelings" were as "equally entitled to respect" as her "ability to tolerate physical discom-

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260. *Id.* at 630.

261. *Id.*

262. *Id.* The court in *Bergstedt* found that the patient's constitutional and common law rights of self-determination prevail over the State's interests if these requirements are met. *Id.*

263. *Id.* at 629.

264. See generally *TRIBE*, *supra* note 233, at §§ 3-7—3-14. Under Article III of the Constitution, the Supreme Court may only review "a case or controversy," i.e., an existing dispute. *Id.* Where the party dies prior to review, the case becomes moot and review will be denied. *Id.* at 3-12.

265. 225 Cal. Rptr. 297 (Cal. Ct. App. 1986).

266. A significant distinction between *Bouvia* and *Bergstedt* is that in the former case, the patient essentially asked the court to allow her to starve to death. See *id.* While Mr. Bergstedt was dependant on a respirator, Ms. Bouvia breathed on her own. *Id.*

267. *Id.* at 299.

268. *Id.* at 305. Bouvia's condition initially required she be spoonfed. Bouvia's doctor ordered her attached to a nasogastric feeding tube after she announced her intention to starve herself to death. *Id.* at 300.

269. *Id.* at 298.

fort.<sup>270</sup>

The *Bouvia* decision rested on two previous California cases, *Barber v. Superior Court*<sup>271</sup> and *Bartling v. Superior Court*,<sup>272</sup> which also addressed the right to refuse life-sustaining medical treatment. All three California cases focused on whether a competent, non-terminal patient has a protected right to refuse life sustaining treatment. The unanimous opinion was a forceful yes.

In *Bartling*, a seventy-year-old, ventilator-dependent, non-terminal patient sought an injunction against the hospital and its doctors to force them to disconnect his life-sustaining breathing machine.<sup>273</sup> Mr. Bartling's condition resulted from a lung biopsy puncture wound.<sup>274</sup> The wound caused the lung to collapse, rendering him dependent on a respirator.<sup>275</sup> Mr. Bartling felt the respirator invaded his right to privacy and requested its immediate removal.<sup>276</sup> Mr. Bartling offered a living will,<sup>277</sup> a durable power of attorney,<sup>278</sup> and a declaration stating that his living conditions were "intolerable," because he was "continuously suffering agonizing discomfort, pain and the humiliating indignity of having to have [his] every bodily need and function tended by others."<sup>279</sup>

The *Bartling* court relied on *In re Quinlan*<sup>280</sup> in holding that Mr. Bartling had a right, under both case law and the California constitution,<sup>281</sup> to refuse life-prolonging treatment, even where such refusal hastens death.<sup>282</sup> The court suggested, however, that the right to refuse treat-

270. *Id.* at 299.

271. 195 Cal. Rptr. 484, 486 (Cal. Ct. App. 1983) (issuing writ of prohibition for two doctors charged with murder for disconnecting comatose patient from life support at the family's request).

272. 209 Cal. Rptr. 220, 226 (Cal. Ct. App. 1984) (finding that competent adult patient has right to disconnect respirator, even though condition was not terminal).

273. *Id.* at 221.

274. *Id.*

275. *Id.*

276. *Id.* at 224-25.

277. Living wills are valid under California law. CAL. HEALTH & SAFETY CODE, §§ 7185-7186 & 7188 (West 1991) (providing for living wills).

278. See CAL. CIV. CODE §§ 2430-2443 (West 1991) (authorizing durable powers of attorney).

279. *Bartling*, 209 Cal. Rptr. at 222.

280. See *supra* notes 232-54 and accompanying text for a discussion of *In re Quinlan*.

281. See CAL. CONST. art. I, § 1.

282. *Bartling*, 209 Cal. Rptr. at 226-27.

ment is not absolute.<sup>283</sup> The court stated that this right must be balanced against the state's interests in "(1) the preservation of life; (2) the prevention of suicide; and (3) maintaining the ethical integrity of the medical profession."<sup>284</sup>

*Bartling* is an important reference for future decisions because it neatly catalogs much of the existing authority in the right to refuse medical treatment and the right to die line of cases. One of the most insightful distinctions the court in *Bartling* made was the difference between the state's interest in preventing suicide and a patient's right to refuse treatment that necessarily results in imminent death. The court held the latter was acceptable because

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* . . . . Furthermore, the underlying state interest in this area lies in the prevention of irrational self-destruction. What we consider here is a competent, rational decision to refuse treatment when death is inevitable and the treatment offers no hope of cure or preservation of life. There is no connection between the conduct here in issue and any State concern to prevent suicide."<sup>285</sup>

*Barber v. Superior Court*<sup>286</sup> examined the criminal liability of physicians who carry out non-treatment orders.<sup>287</sup> The family of a comatose man requested that he be taken off all life-sustaining machinery.<sup>288</sup> The doctors followed the family's request and were subsequently convicted of murder and conspiracy to commit murder.<sup>289</sup> The *Barber* court reversed the convictions, resting primarily on the rationale presented in *Bartling*<sup>290</sup> and *Bouvia*.<sup>291</sup> Prior to falling into a coma, the patient told his wife what his wishes were if he were to face this very situation.<sup>292</sup> He did not want his life to be artificially sustained.<sup>293</sup> The court deter-

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283. *Id.* at 225.

284. *Id.* In a footnote, the court mentioned that a fourth interest, the protection of innocent third parties, was not implicated under these particular facts. *Id.* at 225 n.6. The court cited Application of the President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964), as the leading case discussing this additional interest. *Bartling*, 209 Cal. Rptr. at 225 n.6.

285. *Id.* at 226 (citing Superintendent of Belchertown v. Saikewicz, 370 N.E.2d 417, 426 n.11 (Mass. 1977)) (emphasis added).

286. 195 Cal. Rptr. 484 (Cal. Ct. App. 1983).

287. *Id.* at 486.

288. *Id.*

289. *Id.* at 486-87.

290. *Id.* at 489-90. See *supra* notes 273-84 and accompanying text.

291. *Barber*, 195 Cal. Rptr. at 489-90. See *supra* notes 265-72 and accompanying text.

292. *Barber*, 195 Cal. Rptr. at 493.

293. *Id.* at 492. The court stated "the patient's interests and desires are the key

mined the physicians had conformed with existing law in terminating the unwanted treatment.<sup>294</sup> In fact, had the physicians refused to disconnect the life-systems, they could have been prosecuted for battery.<sup>295</sup>

Although no California case has directly confronted the assisted suicide issue, the most recent case to address the right to die issue was decided immediately prior to the United States Supreme Court's disposition of *Cruzan*.<sup>296</sup> *Conservatorship of Drabick*<sup>297</sup> addressed a petition very similar to the one at issue in *Cruzan*. The main distinction between the two cases was that in *Drabick*, the court permitted a significantly lower evidentiary standard to be used in deciding whether the conservatee's nasogastric feeding tube could be disconnected, while the *Cruzan* court upheld a Missouri law requiring "clear and convincing evidence."<sup>298</sup> Mr. Drabick sustained severe head injuries in a automobile accident.<sup>299</sup> He degenerated into a permanent vegetative state, with no prospect of recovery.<sup>300</sup> Mr. Drabick's brother was appointed conservator and applied for an order authorizing removal of the nasogastric tube.<sup>301</sup> Evidence as to Drabick's desires expressed before the accident were offered, and no one opposed the petition.<sup>302</sup> The superior court

ingredients of the decision making process." *Id.*

294. *Id.* at 491-92.

295. *Id.* at 489.

296. *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990).

297. 245 Cal. Rptr. 840 (Cal. Ct. App.), *cert. denied*, 488 U.S. 958 (1988).

298. *Id.* at 849-51. Under the California Probate Code, the conservator of an incompetent person has the authority to discontinue life-sustaining procedures if the patient is diagnosed as permanently comatose and the conservator considers discontinuance to be in the conservatee's best interest. CAL. PROBATE CODE § 2355 (West 1991). The standard that a conservator must meet under section 2355 is that a decided course of treatment is in the conservatee's "best interest," which can be shown through a patient's previous expressions. *Drabick*, 245 Cal. Rptr. at 849-50. Further, the conservator need not follow the conservatee's expressed preference, but only need consider such expression in good faith. Thus, a conservator lacking knowledge of any preference may discontinue life-sustaining treatment if the conservator determines such course of action is in the conservatee's best interest. *Id.*

In *Drabick*, the only evidence adduced regarding known preferences were statements Drabick made to a Ms. Gonzales, who lived with Drabick 12 years prior to the accident, indicating that he would not want to be kept alive artificially. *Id.* at 842-843. Drabick's four brothers all agreed that the conservatee would not want to continue in such a bleak condition. *Id.* at 843.

299. *Id.* at 842.

300. *Id.*

301. *Id.* at 842-43.

302. *Id.* at 843.

denied Drabick's petition, however, finding that it was in Mr. Drabick's "best interest" to continue nasogastric feeding.<sup>303</sup> The court of appeal overturned the decision primarily based on section 2355 of the California Probate Code, which gives a conservator wide latitude in exercising a conservatee's available rights.<sup>304</sup> The *Drabick* court, citing both *Barber* and *In re Quinlan*, advocated imputing the right to discontinue life-sustaining treatment of a comatose patient to the family members or, as in the instant case, to the conservator.<sup>305</sup>

The *Drabick* decision will be valuable to future courts that address right to die issues. Additionally, much of the language will be helpful in future attempts to assert a right to assisted suicide because the court accepted "quality of life" as a valid argument.<sup>306</sup> The testimony of Mr. Drabick's family is analogous to the arguments of non-comatose patients suffering from degenerative diseases.<sup>307</sup> The court found these arguments persuasive in determining the conservatee's best interests.<sup>308</sup> *Drabick*, however, was rendered prior to *Cruzan* and, therefore, must be considered in light of the Supreme Court's decision.

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303. *Id.* Because Drabick showed signs of brain wave activity, the court felt that continued feeding was in the patient's best interest. *Id.* at 842-43.

304. *Id.* at 849-50.

305. CAL. PROB. CODE § 2355 (West 1991) (this imputed right is available in California irrespective of judicial approval). The only instance that requires judicial approval is where the conservator is an interested party or where there is disagreement between the parties. *Drabick*, 245 Cal. Rptr. at 851-52.

306. A key passage was that "[u]nder California law . . . human beings are not the passive subjects of medical technology." *Id.* at 854. The court noted that

to delegate an incompetent person's right to choose inevitably runs the risk that the surrogate's choices will not be the same as the incompetent's hypothetical, subjective choices. Allowing someone to choose, however, is more respectful of an incompetent person than simply declaring that such a person has no rights.

*Id.* at 855 (footnote omitted).

307. Many of the phrases offered are identical to the arguments made in support of assisted suicide. The speaker is making a value judgment on the quality of the incapacitated individual's life. Drabick's brothers echoed many of the comments of Dr. Kevorkian's patients. For example, one brother stated that Drabick "would not view his present state as a meaningful or as acceptable existence" and "would not want to continue living in his present condition." *Id.* at 843. Janet Adkins, Marjorie Wantz, and Sherry Miller used these same words to describe their respective conditions. The distinction is that Drabick's conservator petitioned for the removal of life-sustaining nutrition, while Kevorkian's patients sought an affirmative solution to their illnesses. See *supra* notes 2-5 and accompanying text. Courts and legislatures must decide whether there is any significant difference between the two acts in a legal sense.

308. See *infra* notes 332-44 and accompanying text for a discussion of the qualified right to abortion. Although theoretically a woman has the right to seek an abortion, after a certain period of time the state's interest in preserving life with prevail over the mother's privacy rights.

C. *Cruzan v. Missouri Department of Health*<sup>309</sup>

*Cruzan* established that "a competent person has a constitutionally protected *liberty* interest in refusing unwanted medical treatment."<sup>310</sup> The United States Supreme Court also held that when a person is incompetent, the State may constitutionally impose a heightened evidentiary standard before allowing termination of artificial life support.<sup>311</sup> The Court in *Cruzan* faced the difficult question of whether to accept and extend *In re Quinlan's* "substituted judgment" doctrine.<sup>312</sup> While *In re Quinlan* involved the withdrawal of a respirator, *Cruzan* posed the more difficult dilemma of removing food and water.<sup>313</sup>

The facts of the two cases are practically identical. Early in 1983, Nancy Beth Cruzan sustained traumatic injuries in a car accident.<sup>314</sup> She suffered severe anoxia,<sup>315</sup> and consequently fell into a permanent vegetative state.<sup>316</sup> Nancy's parents petitioned the court for an order permitting removal of feeding and hydration.<sup>317</sup> The lower court found both a state and federal right to "refuse or direct the withdrawal of 'death prolonging procedures.'"<sup>318</sup> The Missouri Supreme Court reversed, finding the petitioners failed to meet the State's clear and convincing standard of

309. 497 U.S. 261 (1990).

310. *Id.* at 278 (emphasis added).

311. *Id.* at 284.

312. See *supra* notes 240-41 and accompanying text.

313. *Cruzan*, 497 U.S. at 267.

314. *Id.* at 266.

315. Anoxia is defined as a lack of oxygen, as in suffocation. *Id.* at 266 n.1 (specifically detailing Nancy's medical condition as accepted by the lower courts). Nancy "suffered anoxia of the brain resulting in a massive enlargement of the ventricles filling with cerebrospinal fluid in the area where the brain has degenerated and [her] cerebral cortical atrophy is irreversible, permanent, progressive and ongoing." *Id.*

316. *Id.* at 266. "[P]ersistent vegetative state" is defined as "a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function." *Id.* (footnote omitted). Further,

"[V]egetative state describes a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heart beat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner."

*Id.* at 266 n.1. (citation omitted).

317. *Id.* at 267.

318. *Id.* at 268.



proof.<sup>319</sup> The evidence offered consisted of testimony by Nancy's friend that Nancy had stated that she "would not wish to continue her life unless she could live at least halfway normally."<sup>320</sup> The Missouri Supreme Court agreed with the lower court's decision that a right to refuse life-sustaining medical treatment existed under the doctrine of informed consent, but simply found the evidence presented deficient under the clear and convincing standard.<sup>321</sup>

The United States Supreme Court granted certiorari, and affirmed the Missouri Supreme Court's decision.<sup>322</sup> Chief Justice Rehnquist, writing for the majority, was willing to accept the right of a competent person to refuse unwarranted medical treatment.<sup>323</sup> The Court, however, protected Missouri's use of procedural safeguards when a surrogate exercises that right for an incompetent person.<sup>324</sup> The Court considered the higher standard appropriate where "[t]he choice between life and death is . . . of obvious and overwhelming finality."<sup>325</sup> The Court explained that

[a]n erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment, at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction.<sup>326</sup>

The Court analyzed *Cruzan* under the Due Process Clause of the Fourteenth Amendment, declining to adopt a right to refuse treatment as a right of privacy.<sup>327</sup> This distinction may become crucial in future cases. It is certainly relevant in hypothesizing how the Court will analyze the assisted suicide issue. *Cruzan* referred to *Bowers v. Hardwick*,<sup>328</sup> and distinguished due process, or liberty interests, from claims under the right of privacy.<sup>329</sup> Liberty interests seem to provide greater latitude in

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319. *Id.* See generally RALPH C. CHANDLER ET AL., CONSTITUTIONAL LAW DESKBOOK, INDIVIDUAL RIGHTS 313 (1987 & Supp. 1992) (describing clear and convincing evidence as "the highest standard of evidence used in a civil proceeding").

320. *Cruzan*, 497 U.S. at 268.

321. *Id.* at 267.

322. *Id.* at 270-78.

323. *Id.* This included the right to refuse hydration and nutrition. *Id.* The quandary presented in *Cruzan* was whether surrogates have a legal right to stop undesired feeding measures for incompetent individuals. The new *Cruzan* procedure, allowing removal of nasogastric feeding for an incompetent individual, raises new ethical questions. The holding was limited, however, to protecting Missouri's heightened evidentiary standard under such circumstances. *Id.* at 284.

324. *Id.*

325. *Id.* at 281.

326. *Id.* at 283.

327. *Id.* at 279 n.7. See CHANDLER ET AL., *supra* note 319, at 317.

328. 478 U.S. 186 (1986).

329. *Cruzan*, 497 U.S. at 279 n.7. Constitutional law scholars believe footnote seven

fashioning rights dependent on the Court's notion of their historical acceptability rather than on the individual's claim to entitlement under the Constitution. The subtle distinction is that liberty claims focus on the right being asserted, while privacy claims focus on the individual asserting the right.<sup>330</sup> *Bowers* is an excellent illustration of this principle.<sup>331</sup> Thus, the assisted suicide issue, if analyzed according to *Cruzan* and *Bowers* principles, will turn on whether the Court finds the right to commit suicide historically persuasive. The treatment of suicide throughout our history will, therefore, become instrumental in accepting, or more likely, in denying a constitutional right to assisted suicide.<sup>332</sup>

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offers much insight to the Court's decision. For a critical analysis of Chief Justice Rehnquist's subtly placed dichotomy, see Dennis Cichon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 LA. L. REV. 283, 332-34 (1992). Two additional sources merit consideration due to their insightful treatment of footnote seven. See Tom Stacy, *Death, Privacy and the Free Exercise of Religion*, 77 CORNELL L. REV. 490, 546-47 (1992); Elizabeth D. McLean, Comment, *Living Will Statutes in Light of Cruzan v. Director: Insuring that a Patient's Wishes Will Prevail*, 40 EMORY L.J. 1305, 1312-13 (1991).

Chief Justice Rehnquist draws the subtle distinction between liberty and privacy in this footnote, setting the tone perhaps for cases that follow. The importance of this footnote material cannot be understated, recognizing that the decision turned on the constitutionality of an evidentiary standard rather than the merits of the "right to die." When (and if) the Court squarely faces the "right to die," this material may appear in the text of their decision.

330. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986).

331. *Id.* at 191-92. *Bowers* held that homosexual sodomy is not protected under the Constitution. *Id.* at 190-91. The court applied a historical approach and based much of its findings on the common-law and early colonial prohibitions against sodomy. *Id.* at 192-94. "It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots." *Id.* at 192 (emphasis added) (citation omitted). The applicability of *Bowers* to the assisted suicide controversy lies in the Court's willingness to extend this analysis to assisted suicide. The Court may follow the *Bowers* rationale: "Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights." *Id.* (footnote omitted). The same can be said of assisted suicide. In determining whether a liberty interest exists, Justice Powell, writing for the Court, considered whether the activity is so "deeply rooted in this Nation's history and tradition" that it warrants constitutional protection. *Id.* at 192 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

332. *Id.* at 210 (Blackmun, J., dissenting). The Court was hesitant to "expand the substantive reach of [the Due Process Clause of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental." *Id.* at 195. In contrast, the privacy line of cases authorizes protection of interests which are deemed "implicit in the concept of ordered liberty" or which

D. *Roe v. Wade*<sup>333</sup>

Many parallels can be drawn between assisted suicide and the right to die and the abortion cases, particularly *Roe v. Wade*. In determining how the courts and legislatures might handle the assisted suicide issue, *Roe* offers a solid foundation upon which to build.<sup>334</sup>

The companion case to *Roe*, *Doe v. Bolton*,<sup>335</sup> is equally significant. *Doe* challenged the constitutionality of a Georgia anti-abortion statute.<sup>336</sup> The statute provided for several restrictive procedural requirements.<sup>337</sup> *Doe* is illustrative of a seemingly protective legislative plan that fails constitutional scrutiny.<sup>338</sup> The Court found that the anti-abortion statute, requiring approval from two outside physicians other than the patient's treating physician, and compelling advance approval from a hospital abortion committee before the procedure could be performed, violated Fourteenth Amendment guarantees.<sup>339</sup>

*Doe* emphasized the private, trusting nature of a doctor-patient relationship.<sup>340</sup> "The right to seek advice on one's health and the right to

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have been accepted historically. See, e.g., *Carey v. Population Services*, 431 U.S. 678, 697 (1977) (striking down New York statute that prohibited distribution of contraceptives to those under age 16 and to anyone except by a licensed pharmacist as an unconstitutional burden on the decision of whether to bear children); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (declaring Texas statute prohibiting abortion at any stage of pregnancy except to save the life of the mother unconstitutional as an infringement on a woman's right of privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (holding that law prohibiting distribution of contraceptives to unmarried individuals violated Equal Protection Clause and was contrary to individual's right of privacy); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (voiding Virginia law outlawing interracial marriages as violating both the Equal Protection Clause and the fundamental right of marriage); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that Connecticut law forbidding use of contraceptives unconstitutionally infringed upon the right of marital privacy).

333. 410 U.S. 113 (1973). See *supra* notes 10-11 and accompanying text.

334. See *Rust v. Sullivan*, 111 S. Ct. 1759, 1772 (1991) (upholding restriction preventing Title X agencies from providing abortion counseling). In *Rust*, the Court held that receipt of federal funds can be made contingent upon compliance with such regulations. *Id.* at 1771. This case may be important in those scenarios involving Medicaid or federal insurance funds because *Rust* clearly stated the government can withhold funds from one activity, to the exclusion of others, without discriminating. *Id.* at 1772.

335. 410 U.S. 179 (1973).

336. *Id.* at 181.

337. *Id.* at 183-84. The statute provided that two independent physicians must concur in the treating physician's recommendation of the abortion and the abortion must be approved in advance by a hospital abortion committee. *Id.*

338. *Id.* at 189-91.

339. *Id.* at 201; see also *id.* at 218-19 (Douglas, J., concurring).

340. *Id.* at 198-200.

place reliance on the physician of one's choice are basic to Fourteenth Amendment values.<sup>341</sup> The Georgia statute failed in part because of its overreaching protectional safeguards.<sup>342</sup> In essence, the statute forced a doctor-patient relationship upon patients desiring abortions that was devoid of the natural trust that accompanies choice and familiarity.<sup>343</sup> *Doe* recognized that, under this statute, a non-treating physician or a committee wholly unfamiliar with the patient, could veto the attending physicians orders.<sup>344</sup> Thus, the statute permitted independent doctors and committee-persons to make health decisions for the patient, even if they contravened those that the patient and treating physician had made previously.

Assisted suicide advocates seek to implement procedural safeguards similar to those rejected in *Doe*.<sup>345</sup> These safeguards "protect" patients and physicians from freely making decisions regarding their course of treatment. Outsiders receive the power to evaluate and override the propriety of sensitive decisions.<sup>346</sup> However, as *Doe* demonstrated, such interference in the decision-making process violates due process.<sup>347</sup> While in theory such safeguards protect the individual from inadvertently acting on poor decisions, the reality is that the process strips the individual, acting on the advice of his or her personal physician, of the power to decide upon the best course of treatment.

Still, supporters of Washington's Initiative 119 and California's Proposition 161 claim these constitutionally defective safeguards would have satisfied voters desire for assurance that these decisions would not be involuntarily implemented or hastily undertaken.<sup>348</sup> The Constitution, as interpreted in *Doe*, forbids this "procedural" kind of interference in intensely personal decisions.<sup>349</sup> *Roe* and *Doe* espouse a limited right of abortion, free from state interference in the decision-making process. Assisted suicide followers will need to consider the precedential value of

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341. *Id.* at 219-20 (Douglas, J., concurring).

342. *Id.* at 189-91.

343. *Id.* at 198-200.

344. *Id.*

345. See *supra* notes 121-58 and accompanying text discussing Washington's failed Initiative 119 and California's similarly defeated Proposition 161.

346. The Wallace Bill proposed in Michigan provided that two doctors and a review board must review a request for assisted suicide. See *supra* note 158 and accompanying text.

347. *Doe*, 410 U.S. at 198-200.

348. See *Hemlock Society Statement*, *supra* note 124 and accompanying text.

349. *Doe*, 410 U.S. at 198-200.

*Doe* when devising safeguards for assisted suicide legislation. The passage of a constitutionally infirm statute would be as much a failure as Washington's Initiative 119 or California's Proposition 161, because such a statute could never take legal effect.

Assisted suicide proponents also seek to protect individuals from overreaching physicians, such as Jack Kevorkian.<sup>350</sup> The abortion controversy raised these same concerns and motivated the Georgia legislature to pass the restrictive safeguards struck down in *Doe*.<sup>351</sup> In *Doe*, Justice Douglas stressed the State's ability to pursue alternative disciplinary avenues in cases of impropriety and overreaching.<sup>352</sup> This same approach is available in assisted suicide cases.

Both abortion and assisted suicide involve a final act that cannot be rectified if improperly carried out. The only existing recourse is punishment after the fact. Nevertheless, our Constitution grants a certain amount of latitude for persons to err, choosing primarily to protect the freedom of the individual from prior restraint.<sup>353</sup> Excessive government entanglement with individual decisions is unacceptable, both as a societal command and under the Constitution.<sup>354</sup>

Recently, the Court had occasion to reconsider its position on privacy. *Webster v. Reproductive Health Services*<sup>355</sup> and *Planned Parenthood v. Casey*<sup>356</sup> offered sufficient departures from *Roe* to enable the Court to reevaluate some difficult political issues.<sup>357</sup> Both cases protected the foundation of *Roe* but suggested the Court is willing to permit further intrusion into a woman's right to obtain an abortion. After *Casey*, only those limitations that pose an "undue burden" will be struck down as unconstitutional.<sup>358</sup> Justice O'Connor, writing for the plurality, stated that a regulation will be deemed an "undue burden" only when "a state regulation has the *purpose* or *effect* of placing a substantial obstacle in

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350. See *supra* notes 165-69 and accompanying text.

351. *Doe*, 410 U.S. at 219 (Douglas, J., concurring) (discussing prior restraint in a First Amendment context).

352. *Id.* (Douglas, J., concurring).

353. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 150 (1973) (reasoning that the State's interest in preserving life does not justify broad prohibition on abortion in early stages of pregnancy); see also *TRIBE*, *supra* note 233, at §§ 12-34—12-36.

354. *Doe*, 410 U.S. at 219 (Douglas, J., concurring).

355. 492 U.S. 490 (1989).

356. 112 S. Ct. 2791 (1992).

357. See *Hewitt*, *supra* note 15, at 1009-10.

358. *Casey*, 112 S. Ct. at 2804. Although the Court retained the essential holding of *Roe*, the plurality adopted Justice O'Connor's "undue burden" test, which was first announced in *Webster*. See *Webster*, 492 U.S. at 537 (O'Connor, J., concurring in part and concurring in judgment). The *Casey* plurality found that "no change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it." *Casey*, 112 S. Ct. at 2812.

the path of a woman seeking an abortion.<sup>359</sup> State legislatures hoping to write laws passing both popular and constitutional muster apparently have several resources to study. First, Washington's failed Initiative 119 must be considered. An examination of this proposal's failure yields important information regarding society's skepticism in legalizing assisted suicide.<sup>360</sup> Secondly, California Proposition 161 must be examined.<sup>361</sup> The California proposition came after Washington's Initiative 119 but still did not sufficiently convince voters that assisted suicide is a safe or desired alternative.<sup>362</sup> Both proposed laws contained numerous loopholes and insufficient safeguards to garner the required support.<sup>363</sup> The combined failure of these measures signals a need for assisted suicide supporters to tighten their proposed requirements and include numerous safeguards.<sup>364</sup> The right, though available, should not be easy to obtain.<sup>365</sup> Due to the finality of the act, some outside evaluation should be required to protect unwilling or hesitant patients.<sup>366</sup> Yet, as *Doe* illustrates, a non-treating physician should not be given veto power without the patient retaining some method of judicial review.<sup>367</sup> One method known to be constitutional would be a procedure similar to a minor's right to a judicial determination that she is sufficiently mature to obtain an abortion.<sup>368</sup> Likewise, a wise inclusion in assisted suicide legislation would be to provide some method for a court to determine patient competency in a psychological sense.<sup>369</sup> Lastly, cases addressing analogous "rights" should be thoughtfully considered prior to proposing new laws on assisted suicide. *Roe* and *Cruzan* are starting points, but other deci-

359. *Casey*, 112 S. Ct. at 2820 (emphasis added). Justice O'Connor stated that such a statute "cannot be considered a permissible means of serving its legitimate end." *Id.* Thus, any statute imposing an "undue burden" on a woman seeking an abortion fails the requisite strict scrutiny test and is therefore unconstitutional. *Id.*

360. See *supra* notes 121-41 and accompanying text.

361. See *supra* notes 142-58 and accompanying text.

362. A 54% to 46% defeat was posted in both state elections. See Knox, *supra* note 123.

363. See, e.g., Walters, *supra* note 148.

364. See *supra* notes 159-63 and accompanying text for a discussion synthesizing the two failed efforts.

365. Walters, *supra* note 148.

366. *Id.*

367. *Doe v. Bolton*, 410 U.S. 179 (1973).

368. See *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990).

369. One of the main criticisms of California's Proposition 161 was that while a doctor could recommend a psychological evaluation, he or she was not required to do so. *Dying with Dignity Act*, *supra* note 150.

sions will certainly affect the initial determination of whether assisted suicide is a cognizable right either under a privacy analysis or as a protected liberty interest based on the common law right to refuse unwanted treatment. Until such laws exist, however, it is imperative that attorneys familiarize themselves with presently existing alternatives. To this end, such alternatives are briefly explained below.

## VI. PRESENTLY EXISTING LEGAL ALTERNATIVES

### A. *Substituted Judgment*

The doctrine of substituted judgment first appeared in an English property case.<sup>370</sup> The doctrine permitted the niece and other relatives of a lunatic to share property from the lunatic's estate.<sup>371</sup> Substituted judgment enables a conservator or guardian to make a decision for an incompetent person based upon what the conservator feels the incompetent would have decided for him or herself.<sup>372</sup> *In re Quinlan* incorporated the doctrine into the right to refuse treatment and right to die cases.<sup>373</sup> The substituted judgment doctrine was later employed in *Belchertown State School v. Saikewicz*<sup>374</sup> and remains a viable option for a conservator of an incompetent patient in seeking to assert the right to refuse medical treatment.

### B. *Living Wills and Durable Powers of Attorney*

A living will is a document that prohibits unwanted medical treatment

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370. *Ex parte* Whitbread, 35 Eng. Rep. 878 (1816).

371. *Id.* at 880.

372. EDWARD D. ROBERTSON, JR., PERSONAL AUTONOMY AND SUBSTITUTED JUDGMENT 5 (1991). Judge Robertson is the author of *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988), the case that preceded the Supreme Court's disposition in *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990).

373. 355 A.2d 647 (N.J. 1976). See also BOWEN HOSFORD, MAKING YOUR MEDICAL DECISIONS 122 (1982). Hosford illustrates what substituted judgment, a true legal fiction, would mean if literally acted out:

[Imagine Karen standing] before her father as once she had, five-feet, two-inches tall, clear-eyed, so that she could tell him her decision. Joseph [Karen's father] would place his one good arm about her shoulders and say "Look, honey, let's say that on the night of April 15 last year, you went at least a half-hour without breathing. You now lie pinned at the throat by the connection from a respirator. You are deformed and shrunken and have none of the ability to reason or communicate that makes humans human. A respirator keeps you breathing. Should it be disconnected?"

*Id.*

374. 370 N.E.2d 417, 430-32 (Mass. 1977) (applying the doctrine to an adult mental incompetent suffering from incurable leukemia).

for patients who, because of an accident or surgical complications, suddenly become incompetent.<sup>375</sup> Living wills state the individual's intent if he or she should become incompetent and dependent upon extraordinary medical treatment.<sup>376</sup> The California Natural Death Statute, the first of its kind, was enacted in 1977. The statute legalized the use of living wills in securing medical treatment directives.<sup>377</sup> The Model Bill, drafted at Yale Law School in 1978, set forth many of the same requirements in model form, including an example of the declaration format and an optional designation clause.<sup>378</sup> At least thirty-six states currently recognize living wills as enforceable advance care directives.<sup>379</sup>

Durable Powers of Attorney (DPAs) are similar to substituted judgment in that they enable another person to make decisions for an incompetent individual. DPAs are a product of agency law, requiring the individual designating the power to be competent at the time he or she executes the power.<sup>380</sup> The term "durable" refers to the directive's lasting nature, remaining in effect until specifically terminated by the individual establishing the power.<sup>381</sup> The distinction between a living will and a DPA is that the former explicitly states the individual's intentions, while the latter requires an agent of the individual to determine what the

375. HOSFORD, *supra* note 373, at 141.

376. *Id.*

377. CAL. HEALTH & SAFETY CODE § 7185 (West Supp. 1992). In pertinent part, the Act reads as follows:

- (a) The Legislature finds that an adult person has the *fundamental right* to control the decision relating to the rendering of his or her own medical care, including the decision to have life-sustaining treatment withheld or withdrawn in instances of a terminal condition or permanent unconscious condition.
- (b) The Legislature further finds that modern medical technology has made possible the artificial prolongation of human life beyond natural limits . . . .
- (d) In recognition of the dignity and privacy that a person has a right to expect, the Legislature hereby declares that the laws of the State of California shall recognize the right of an adult person to make a written declaration instructing his or her physician to withhold or withdraw life-sustaining treatment in the event of a terminal condition or permanent unconscious condition, in the event that the person is unable to make those decisions for himself or herself.

*Id.*

378. HANDBOOK OF LIVING WILLS LAWS 35-38 (Society for the Right to Die ed., 1984).

379. 22A AM. JUR. 2D *Death* § 684 (1988). See 22A AM. JUR. 2D *Death* §§ 683-707; Thomas H. Schimke, *The Natural Death Act: Protection For The Right To Die*, 47 MONT. L. REV. 379 (1986).

380. 3 AM. JUR. 2D *Agency* § 28 (1988).

381. *Id.* § 36.



individual's intentions would have been. Thus, the main flaw in DPAs are that someone other than the individual must make a binding decision on behalf of the individual without actual knowledge of what the individual would have done. A chilling example is found in the unreported New York case of Carrie Coons.<sup>382</sup> Carrie fell into a deep coma after suffering a massive stroke.<sup>383</sup> As is quite typical in the right to die cases, relatives petitioned the court for removal of her nasogastric feeding tube. The petition was granted.<sup>384</sup> Before the tube was disconnected, Carrie awoke from her coma.<sup>385</sup> Startled, her sisters and doctors attempted to explain her situation, asking if she would like the tube removed. Carrie responded that "[t]hese are difficult decisions."<sup>386</sup>

## VII. CONCLUSION

The *In re Quinlan* progeny offers valuable information regarding the Court's probable direction. The prevailing attitude favors individual autonomy in regards to medical decisions. Thus, the Court seems willing to expand the definition of what constitutes medical treatment in order to protect the rights of the individual. *In re Quinlan* advanced the notion that mechanical breathing devices constitute "treatment." Thus, the individual, or the individual's guardian, may remove a respirator as an exercise of their right to refuse unwanted medical treatment. It is doubtful the *In re Quinlan* court considered the lasting and changing effect their decision would have on individual rights. This initial departure from preserving "life" has served as a catalyst for cases like *Bergstedt*, *Bouvia*, *Barber*, and finally *Cruzan*: the most current pronouncement of what procedures amount to treatment.

Little difference exists between wanting to starve oneself to death because of a condition caused by an accident or disease and the affirmative desire to inject life-ending chemicals into the bloodstream because of this same condition. The distinction is between a negative act that is protected and an affirmative act that is not currently protected. The right to die will either become absolute, making people truly autonomous, or the right will be qualified, much as the right to an abortion under *Roe*. In this sense, *Roe* is both the beginning and ending point of reference.

*Cruzan*, though instructive, is limited to its facts and, as a result, its precedential value is limited. *Cruzan* will be instrumental in the assisted suicide debate only if the courts label assisted suicide a liberty interest,

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382. ROBERTSON, *supra* note 372, at 1.

383. *Id.*

384. *Id.*

385. *Id.*

386. Shortly thereafter, Carrie again fell into a coma. *Id.*

rather than a privacy interest. Liberty interests are only protected when the right existed historically or is so rooted in the concept of ordered liberty that it merits modern protection. Assisted suicide is unlikely to succeed under a liberty interest analysis. Suicide was a felony at common law and aiding and abetting suicide remains criminal in at least twenty-seven states. Thus, similar to the Court's analysis of homosexual sodomy in *Bowers*,<sup>387</sup> there is no historical basis to support protection of suicide as a liberty interest. However, with the analogies assisted suicide can draw from abortion, the issue more likely will be reviewed as a privacy interest.

*Roe* followed the identical historical and legal analysis present in the assisted suicide controversy. Under *Roe*'s legal framework, assisted suicide should receive no less legal protection than abortion. If there is a departure from *Roe*<sup>388</sup> and the judicial system strips women of their right to an abortion, the future of assisted suicide as a right of privacy will be clouded.

Medical advancement has blurred both the definition of life and certainty of when life ends. The fear of a long and painful death process will probably continue to yield more assisted suicide legislation. Currently, Natural Death Acts and living wills are an accepted part of modern society and offer viable alternatives to suffering patients. The right to refuse medical treatment is similarly permitted. The next logical step is to allow dying or diseased patients the right to use the same medical technology that prolongs their agony to relieve them of their suffering. Whether one supports an individual's "right" to die or opposes such free choice, assisted suicide is a topic certain to incite passion in all.

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387. See *supra* notes 330-31 and accompanying text; see also *Though It Be Asked Of Me*, WASH. TIMES, Oct. 30, 1991, at F2.

If suicide is a right, then it is one that has remained undiscovered throughout the ages by the great thinkers in law, ethics, philosophy and theology. It appears nowhere in the Bible or Koran or the Talmud. Committing suicide wasn't a right . . . 1000 years ago, and it isn't one now.

*Id.*

388. The controversy remains unresolved despite the Court's disposition of *Casey v. Planned Parenthood*, 112 S. Ct. 2791 (1992). With the possibility of a shift in the Court in the near future, this question remains "viable."

