1996

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Is the Constitution a Suicide Pact?

Daniel Avila*

In 1985, the Duquesne Law Review published a comprehensive article ("the Original Article") reviewing the historical status of suicide under the law.1 The Original Article took "an approach grounded in history"2 to refute the claim that suicide is so rooted in the traditions of our country as to enjoy constitutional protection under a "fundamental right of privacy."3 After an exhaustive examination of the historical record, the article concluded that a judicial declaration recognizing suicide as a fundamental right "would be a use of judicial power unwarranted by history."4 The article's findings cannot, even now, be seriously challenged, though there have been occasional judicial attempts since 1985 to revise the historical record contrary to the evidence.5

Since 1985, several developments in the courts have raised new constitutional questions not fully considered in the Original Article. This article examines the recent cases and critiques the approaches taken within those cases which ignore the lessons of history.6 The article concludes that no basis exists, historical or otherwise, for converting the Constitution into a "suicide pact."7

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2. Id. at 15 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 504 n.2 (1977) (Powell, J., concurring)).
3. Id. at 14-17.
4. Id. at 147.
6. This article also expands on many of the excellent points made in James Bopp, Jr., Is Assisted Suicide Constitutionally Protected?, 3 Issues in Law & Med. 113 (1987).
I. FROM 1985 TO THE PRESENT: WHERE ARE WE NOW?

In 1990, the United States Supreme Court issued a decision in *Cruzan v. Director, Missouri Department of Health*\(^8\) recognizing in principle a person's liberty interest in refusing tube-provided food and fluids despite the inevitable consequence of death.\(^9\) In 1992, the Supreme Court refused in *Planned Parenthood of Southeastern Pennsylvania v. Casey*\(^10\) to demote abortion from its status as a constitutional right.\(^11\) In doing so, the Court opined that decisions protected by the Constitution involve "intimate and personal choices" and concern "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."\(^12\)

The *Cruzan* and *Casey* rulings have spurred several constitutional challenges against state laws banning assisted suicide in Michigan,\(^13\) Washington,\(^14\) New York,\(^15\) California\(^16\) and Florida.\(^17\) The plaintiffs in these cases have asserted that assisted suicide provides another means of hastening death and represents another intimate choice touching on the "mystery" of existence and nonexistence. As noted by one court, however, the plaintiffs "make no attempt to argue that physician assisted suicide, even in the case of terminally ill patients, has any historic recognition as a legal right."\(^18\) Instead, the plaintiffs have argued that assisted suicide should be elevated to the same con-

be more endangered if the population can have no protection from the abuses which lead to violence. No liberty is made more secure by holding that its abuses are inseparable from its enjoyment. . . . This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

9. Id. at 279.
11. Id. at 851.
stitutional status as treatment refusals and abortion regardless of its prior status in our nation’s history and legal tradition.

The claim that assisted suicide is a constitutionally protected right has been upheld by two federal appellate courts in Compassion in Dying v. Washington\(^\text{19}\) and Quill v. Vacco.\(^\text{20}\) In particular, the United States Courts of Appeal for the Ninth and Second Circuits have struck down the assisted suicide bans of Washington and New York on the grounds that the bans violated constitutional guarantees protecting the supposed right of terminally ill persons to hasten their deaths.\(^\text{21}\)

Both courts concluded that history and tradition can no longer shield laws banning assisted suicide from constitutional attack. While the Second Circuit made no attempt to justify its break from the past, the Ninth Circuit spent considerable effort to explain why it abandoned history and tradition to overturn Washington's ban. Using the opinion for Planned Parenthood of Southeastern Pennsylvania v. Casey\(^\text{22}\) as a starting point, the Compassion court insisted that federal courts could override state policies no matter how dominant the policies have been in the course of our history and tradition.\(^\text{23}\) The court also argued that history and tradition were unreliable indicators of assisted suicide's constitutional status for several reasons.

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19. Compassion in Dying, 79 F.3d at 793-94.
20. Quill, 80 F.3d at 731.
21. The Ninth Circuit concluded that Washington's ban violated the Fourteenth Amendment's guarantee of substantive due process by "bar[ring] what for many terminally ill patients is the only palatable, and only practical, way of ending their lives." Compassion in Dying, 79 F.3d at 832, 838. The Second Circuit concluded that New York violated the Fourteenth Amendment's guarantee of equal protection by "not treat[ing] equally all competent persons who are in the final stages of fatal illness and wish to hasten death"; those on life support are permitted to hasten death by withdrawing treatment while those who are not on life support are prevented from hastening death by physician assisted suicide. Quill, 80 F.3d at 727, 729.

While the Ninth Circuit's Due Process analysis is flawed, the Second Circuit's Equal Protection analysis is even more difficult to defend. A statutory scheme that uniformly bans assisted suicide, including physician-prescribed lethal overdoses but not including treatment refusals, applies equally to everyone. On one hand, both individuals on life support and individuals not on life support are permitted to refuse the initiation of new treatment and direct the removal of ongoing treatment. On the other hand, both groups of individuals are precluded from receiving physician assistance in suicide through the prescription of a lethal overdose. Moreover, all physicians are free to assist their patients by withdrawing or withholding treatment upon patient request while at the same time the physicians are subject to prosecution for dispensing lethal prescriptions to the patients. Thus, the law imposes the same burden on every individual. See New York City Transit Auth. v. Beazer, 440 U.S. 568, 587-88 (1979) (observing that a law placing "a meaningful restriction on all" persons "is one of general applicability and satisfies the equal protection principle without further inquiry"). Instead of discriminating against persons, New York has simply classified a species of actions as criminal.

23. Compassion in Dying, 79 F.3d at 805 (quoting Casey, 505 U.S. at 852).
First, the court claimed that “the relevant historical record is . . . checkered” and cited to the few known expressions in the record of the minority position favoring assisted suicide. Second, the court referred to current polling data suggesting public support for active measures to hasten death. Third, the court pointed to “the lack of enforcement” of anti-assisted suicide laws as purported proof of “widespread societal disaffection with such laws.” Fourth, the court referred to a supposedly “strong undercurrent of a time-honored but hidden practice” of assisted suicide that runs “beneath the official history of legal condemnation of physician-assisted suicide . . . .” Finally, the court contended that as a result of technological developments, “Americans frequently die with less dignity than they did in the days when ravaging diseases typically ended their lives quickly.”

Even assuming the accuracy of the Ninth Circuit court’s factual underpinnings, the line of argument outlined above, which is wholly legislative in nature, fails to respond to a critical legal issue at stake in assisted suicide: What constitutional principle forbids the states to adopt an anti-assisted suicide policy when history and tradition fully support such a policy choice? References to polling data, however current, and to aberrant criminal practices, however “time-honored”, cannot answer this question. While such extra-constitutional considerations may prompt the legislatures to initiate changes, they provide no warrant for forcing the legislatures to change venerable state policies at the behest of federal judges.

The rulings of the Ninth and Second Circuits would be easy to dismiss if the only basis was a sociological one. If banning assisted suicide is so unpopular, then it is the role of the legislatures, not the role of the courts, to respond accordingly. The Ninth and Second Circuit courts, however, argued either explicitly or implicitly that any apparent societal approval for

24. Id. at 806-10.
25. Id. at 810.
26. Id. at 811.
27. Id.
28. Compassion in Dying, 79 F.3d at 812.
29. Id. at 1449 (Trott, J., dissenting from order rejecting request for rehearing en banc by full court) (noting: “The Constitution’s explicit provisions for amendment rely on government process, not on random sampling of public opinion. Polls are for the other branches of our government, not for the judiciary.”)
30. Id. at 810 (stating: “Most Americans simply do not appear to view [acts hastening death in order to avoid pain and suffering] as constituting suicide, and there is much support in reason for that conclusion”) (citation omitted).
31. Quill, 80 F.3d at 729 (criticizing New York’s reliance on certain definitional distinctions).
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assisted suicide evidences a constitutional rule far more reasonable than that presented by history and tradition.

As a consequence, the Compassion in Dying and Quill courts have asserted that: 1) as a means of hastening death, assisted suicide cannot rationally be distinguished for definitional purposes from treatment refusals or the provision of pain relief; 2) as an "intimate and personal" choice, assisted suicide is a cognizable interest worthy of constitutional protection; and 3) any state interference with such an interest is irrational in cases involving mentally competent, terminally ill adults who desire to avoid suffering.

The following analysis examines these assertions more closely from a constitutional perspective. The analysis suggests that the assertions not only conflict with history and tradition, but also contradict the constitutional analysis employed by the United States Supreme Court in other contexts. Ultimately, this analysis illustrates that the assertions fail to present a persuasive basis for overturning state bans against assisted suicide by constitutional mandate.

II. DOES THE CONSTITUTION TAKE SIDES IN THE ETHICAL AND POLITICAL DEBATE OVER THE DEFINITION OF THE CRIME OF ASSISTED SUICIDE?

The states have defined the crime of assisted suicide in such a manner as to exclude an individual's choice to forego medical treatment and a physician's provision of pain relief, but to include physician-prescribed lethal overdoses of medication. Pursuant to claims brought by terminally ill persons seeking suicide assistance and physicians willing to provide such assistance, the Ninth and Second Circuits have concluded that this definitional approach is irrational.

In Compassion in Dying, the Ninth Circuit questioned "as a definitional matter" whether "the terms 'suicide' and 'assisted suicide' are appropriate legal descriptions" of a physician's prescription of a lethal drug overdose to a suicidal patient.32 According to the court, other actions tending to hasten death such as treatment refusals and pain relief measures are not considered forms of suicide and thus "a decision by a terminally ill patient to hasten by medical means a death that is already in process . . . should [also] not be classified as suicide."33

In Quill, the Second Circuit contradicted the Ninth Circuit's reasoning and ruled that the "ending of life by [the withdrawal of

32. Compassion in Dying, 79 F.3d at 802.
33. Id. at 824.
treatment and the administration of palliative drugs] is nothing more or less than assisted suicide." According to the Quill court, since New York law permitted these forms of "suicide," it must also permit physicians to prescribe lethal overdoses of medication at least in cases involving suicidal persons with terminal conditions.

Both the Ninth and Second Circuit courts used their own conflicting, highly contestable, and historically untenable definitions of the crime of assisted suicide. Their definitional analysis was crucial to their constitutional findings that laws against assisted suicide should not apply to physician prescribed lethal overdoses of medication. Importantly, by refusing to defer to the states' definition of the crime of assisted suicide, the courts have exceeded their constitutional authority.

A. The States Have the Exclusive Right to Define Crimes

The U.S. Supreme Court has long recognized that "[i]t is the legislature, not the Court, which is to define a crime." Moreover, the Court has noted that "the discretion to define criminal offenses and prescribe punishments resides wholly with the state legislatures." Whatever limitations the Constitution imposes on the states with respect to "the administration of criminal justice", none "concern . . . the powers of the States to define crime . . . ." Indeed, the federal courts have little constitutional basis for "second guessing" a state's criminal definition, especially when it enjoys broad "historical and contemporary acceptance." As the Supreme Court noted, "[i]n fine, history and current practices are significant indicators of what we as a people regard as fundamentally fair and rational ways of defining criminal offenses."

34. Quill, 80 F.3d at 729.
35. Id. at 729, 731.
38. Rochin, 342 U.S. at 168.
40. Id. at 642.
41. Id. at 643. See also Montana v. Egelhoff, 64 U.S.L.W. 4500, 4501 (U.S. June 13, 1996) (No. 95-566) (stating: "Preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and . . . we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual states") (internal quotation marks omitted); Id. at 4506 (Ginsburg, J., concurring) (finding that "states enjoy wide latitude in defining the elements of criminal offenses. . . ."); Id. at 4509 (O'Connor, J., dissenting on other grounds, joined by Stevens, Souter & Breyer, JJ.) (noting: "A state legislature certainly possesses the authority to define the offenses it wishes to punish. If the Montana legislature chose to redefine this
In view of these precedents, the Ninth and Second Circuits lacked the authority to interfere with the right of Washington and New York to define the crime of assisted suicide. The decision by these states to include physician prescribed lethal overdoses within the scope of the criminal offense of assisted suicide, while at the same time excluding treatment refusals and pain relief measures, by no means constituted "a freakish definition" with "no analogue in history or in the criminal law of other jurisdictions."42

Nevertheless, the Ninth Circuit pointed to "drastic changes" in recent history whereby the states have purportedly permitted "self-starvation" and "death-inducing medication . . . [with] a pain-relieving purpose."43 According to the Compassion in Dying court, these changes required the states to "explain precisely what it is about the physician's conduct in assisted suicide cases that distinguishes it from the conduct that the state has explicitly authorized."44 For its part, the Second Circuit referred to a concurring opinion by Justice Scalia in the Cruzan case45 and a student law review note46 as authoritative bases for questioning New York's definition.47

Both the Ninth and Second Circuit abandoned any pretense of assuming a deferential posture to the states and attacked each and every rationale offered by Washington and New York in defense of the states' definition of assisted suicide.48 Importantly, in doing so, the Compassion in Dying and Quill courts rejected certain definitional distinctions that the Supreme Court has employed or even found to be constitutionally mandated in other cases. As the next section explains, such precedent indicates that if the Constitution takes any position in the debate over the meaning of assisted suicide, it sides with the states.

42. Schad, 501 U.S. at 640.
43. Compassion in Dying, 79 F.3d at 822.
44. Id.
47. Quill, 80 F.3d at 729.
48. Compassion in Dying, 79 F.3d at 822-24; Quill, 80 F.3d at 729-30.
B. The Supreme Court Has Recognized and Even Mandated the Use of Many Distinctions Relied Upon by the States in Defining Assisted Suicide.

The Ninth and Second Circuit rulings opposed state reliance on a distinction between "action" and "inaction."\(^49\) The rulings also criticized any distinction between actions having a single negative effect and actions having both a positive effect and a negative "double effect."\(^50\) Finally, both Circuits failed to recognize any distinction between acts having the effect of hastening death and acts performed for the purpose of hastening death.\(^51\) For example, according to the Ninth Circuit:

[W]e see little, if any, difference for constitutional . . . purposes between providing medication with a double effect and providing medication with a single effect, as long as one of the known effects in each case is to hasten the end of the patient's life. Similarly, we see no ethical or constitutionally cognizable difference between a doctor's pulling the plug on a respirator and his prescribing drugs which will permit a terminally ill patient to end his own life. In fact, some might argue that pulling the plug is a more culpable and aggressive act on the doctor's part and provides more reason for criminal prosecution. To us, what matters most is that the death of the patient is the intended result as surely in one case as in the other.\(^52\)

The Ninth Circuit's references to "constitutional purposes" and "constitutionally cognizable differences" cannot be squared with Supreme Court precedent. In at least three lines of cases, the Supreme Court has relied upon and even mandated such distinctions.

1. DeShaney v. Winnebago County

In *DeShaney v. Winnebago County Department of Social Services*,\(^53\) the Supreme Court rejected a claim that social workers for a state child protection agency violated the Due Process Clause of the Fourteenth Amendment by failing to take into protective custody a child who eventually was severely injured by his abusive father. The evidence indicated that the social workers had received several reports of suspected abuse and either knew or should have known the risks facing the child. After briefly moving the child into protective custody, the agency returned him to his father after deeming the evidence of abuse to be insufficient. Even after several more reports of abuse occurred, the agency

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49. *Compassion in Dying*, 79 F.3d at 822; Quill, 80 F.3d at 729.
50. *Compassion in Dying*, 79 F.3d at 823, 824.
51. *Id.* at 824, 828; Quill, 80 F.3d at 730.
52. *Compassion in Dying*, 79 F.3d at 824 (emphasis added).
still did not take action. The father then beat the child, causing severe brain damage that required the child to be institutionalized, and he was subsequently convicted of abuse.\textsuperscript{54}

By a six to three majority, the Court held that the Due Process Clause of the Fourteenth Amendment imposed a limitation only "on the State's power to act," not failure to act.\textsuperscript{55} Therefore, under the circumstances of \textit{DeShaney}, the state agency's failure to intervene, its "inaction", did not affirmatively "deprive [the child] of his liberty interest in 'freedom from . . . unjustified intrusions on personal security'" because a private individual rather than the state caused the child's injuries.\textsuperscript{56}

Moreover, the Supreme Court distinguished the state agency's decision to return the child to the father, who then abused the child, from state action affirmatively depriving an individual of life, liberty or property. While the state exposed the child to a known risk by returning him to the father, the act of returning the child neither created an independent threat of harm nor left the child worse off than if the state had not taken the child into custody in the first place.\textsuperscript{57} According to the Court, "it is well to remember once again that the harm was inflicted not by the State . . . , but by [the child's] father."\textsuperscript{58}

The Court did recognize, however, that a state's failure to protect individuals from private harm may nevertheless violate the Constitution if the inaction is preceded by "the State's affirmative act of restraining the individual's freedom to act on his own behalf."\textsuperscript{59} If the state's actions is indeed preceded by such an affirmative act, a special duty arises obligating the state to extend affirmative protections to the individual. Thus, if "by the affirmative exercise of its power" the state agency in \textit{DeShaney} had so restrained the abused child's liberty that it rendered him "unable to care for himself," and failed to "provide for [the child's] basic human needs [and reasonable safety]," then the state could have been constitutionally liable for his subsequent injuries.\textsuperscript{60}

While the child's representatives in \textit{DeShaney} conceded that the child sustained his injuries while in the custody of his father and outside of the state's control, they argued that the social workers' knowledge of the risk of private harm to the child and expressions of concern for his safety provided an alternative

\textsuperscript{54} Id.
\textsuperscript{55} Id. at 195.
\textsuperscript{56} Id. (citation omitted).
\textsuperscript{57} Id. at 201.
\textsuperscript{58} \textit{Deshaney}, 489 U.S. at 203.
\textsuperscript{59} Id. at 200.
\textsuperscript{60} Id.
basis for creating a constitutional duty to protect him.\textsuperscript{61} Importantly, the Court rejected this claim because "[w]hile the State may have been aware of the dangers that [the child] faced in the free world, it played no part in their creation."\textsuperscript{62} According to the Court, under the Constitution an "affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."\textsuperscript{63}

The Supreme Court's analysis in \textit{DeShaney} both highlights the constitutional relevance of a distinction between action and inaction when defining the responsibility of state actors and bolsters the relevance of such a distinction in the assisted suicide context. Pursuant to the Supreme Court's reasoning, while state actions directly interfering with personal freedoms will always implicate a duty of non-interference, whether state inaction violates a duty to protect individuals against private interference depends on the circumstances. More simply put, the states will always be constitutionally subject to liability for injuries caused by state action, but culpability for state inaction will depend on the presence or absence of a special duty. The states are deemed to be constitutionally responsible for their own acts in every circumstance, but will not always be responsible for declining to prevent harm caused by other sources.

In the assisted suicide context, the states have imposed a duty on private individuals to refrain from helping to take others' lives and thereby established a duty analogous to the Constitution's limitation on the states' power to act. This duty applies to all actions that directly take life. Thus, the failure to refrain from directly taking life implicates the duty against taking life.\textsuperscript{64}

\textsuperscript{61} One of the social workers testified that "I just knew the phone would ring some day and Joshua would be dead." \textit{Id.} at 209 (Brennan, J., dissenting) (quoting from trial record).

\textsuperscript{62} \textit{Id.} at 201.

\textsuperscript{63} \textit{DeShaney}, 489 U.S. at 200.

\textsuperscript{64} \textsc{President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research}, \textit{Deciding to Forego Life-Sustaining Treatment: A Report on the Ethical, Medical, and Legal Issues in Treatment Decisions} 33 (1983) (providing: "The law ordinarily holds individuals liable only for the injurious consequences of their acts, not for the injurious consequences of omissions of action."); \textsc{Norman L. Cantor}, \textit{Legal Frontiers of Death and Dying} 32 (1987) (noting: "Law has traditionally refrained from imposing either criminal or civil liability on a person for failure to save or rescue a dying individual — as opposed to affirmatively acting to terminate another's existence, which is homicide."); \textsc{The New York State Task Force on Life and the Law}, \textit{When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context} 146 (1994) (hereinafter N. Y. Task Force) (stating: "Existing law prohibits assisted suicide and euthanasia in all cases. A similar ban for all decisions to stop or withhold life-sustaining treatment would be unthinkable").
The failure to save a life, however, incurs liability only if the individual violates a special duty obliging the individual to act accordingly. Thus, whether an individual will be culpable for failing to save a life depends on whether a special duty to save a life is imposed upon the individual, and whether the state requires affirmative protection from these threats of harm. Consequently, not every decision to refrain from saving life will subject an individual to liability for the death of another. This duty-related difference provides an entirely rational basis for distinguishing between lethal prescriptions as “action” and the foregoing of medical treatment as “inaction”.

In *Compassion in Dying* and *Quill*, the Ninth and Second Circuits respectively contended that the distinction between action and inaction is not constitutionally meaningful. Both Circuits stated that in most cases, removing medical/life sustaining treatment will require an act (i.e., turning off or disconnecting the machinery), and hastened death foreseeably and inevitably results from the removal of life-sustaining treatment as well as from assisted suicide. Notably, for the Supreme Court to agree with this analysis, it would have to abandon its *DeShaney* analysis which posits “a constitutional setting that distinguishes sharply between action and inaction.”

In response to the rationales set forth by the Ninth and Second Circuits, the states could reasonably adopt the language of *DeShaney* and assert that the “action” of disconnecting a respirator, for example, “place[s] a patient in no worse position than that in which the patient would have been had [the treatment not been provided] at all.” Under the *Deshaney* analysis, if an individual's actions do not interfere with the life of another, then in performing those actions the individual cannot violate the duty to refrain from interfering with life.

To hold otherwise would broaden this duty from one that encompasses only those actions which directly harm life to one

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65. Barber v. Superior Court, 195 Cal. Rptr. 484, 490 (Cal. App. 1983) (providing: “In the final analysis, since we view petitioners' conduct as that of omission rather than affirmative action, the resolution of this case turns on whether petitioners had a duty to continue to provide life sustaining treatment”).

66. *Compassion in Dying*, 79 F.3d at 822; *Quill*, 80 F.3d at 729.


68. *Id.* at 201. The Supreme Court recognized a similarly sharp action/inaction distinction in *Heckler v. Chaney*, 470 U.S. 821 (1985), by observing:

> When an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner.

*Id.* at 832.
that encompasses any action which a person performs while another individual is threatened with harm from other sources. The web of liability would spread far and wide, entangling even a nurse in the hospital corridor who knows that a patient in a nearby room is dying but walks past the room nonetheless. To prove a breach of duty, one would need only point to some action of the accused, such as the nurse’s act of walking. Not only would such a revision of the duty of non-interference implicate substantial policy questions governing principles of liability, it would place into question the right to engage in a wide range of activities which enjoy constitutional protection and which do not, under any reasonable analysis, constitute threats to life.

Withdrawing treatment may in some but not all circumstances be a culpable act. For example, if an officious or malicious interloper disconnects a patient’s life-sustaining care without establishing the necessary relationship with the patient, either that of principle and agent or ward and duly appointed surrogate, and does so without the proper authorization, then the patient’s resulting death will give rise to criminal liability.

In other circumstances, the relationship between the individual withdrawing treatment and the person in need of treatment may be marked by an affirmative duty to intervene. Certain relationships oblige individuals to provide life sustaining care or to arrange for its provision to others. This affirmative duty is breached by a decision to deny or remove such care, depending on the circumstances.69

As a result, unlike the duty of noninterference with life which pertains to all persons, duties to refrain from returning a patient to a position no worse than would occur if no treatment were provided, and to provide life-sustaining care are not uniformly applicable. With these duties, it is not the presence of an affirmative act that determines culpability, but the nature of the relationship between the actor and the injured person that counts.

Determining which relationships create certain duties involves substantive policy choices that must take into account an array of legislative evaluations that the federal courts are ill-

69. See Alan Meisel, The Right to Die 472-73 (2d ed. 1995) (listing the contractual undertaking, including the physician-patient relationship, and the voluntary assumption of responsibility often accompanied by another’s reliance as possible sources of a duty to act); State v. Mally, 366 P.2d 868, 873 (Mont. 1961) (observing that while “the large majority of homicide cases involving a failure to provide medical aid involve a parent-child relationship,” an individual could be subject to a duty to provide for an adult who “is as helpless as a newborn.” The court found that under the circumstances of this case, the husband was obliged to find medical help for his wife); In re Baby “K”, 16 F.3d 590 (4th Cir. 1994), cert. denied, 115 S. Ct. 91 (1994) (recognizing statutorily created duty of hospital to provide stabilizing treatment to patients).
equipped to make. The Supreme Court touched on an aspect of this consideration in DeShaney when it concluded that: "Framers of the Constitution were content to leave the extent of governmental obligation [ensuring that the state protected the people from each other] to the democratic political processes." 70

Nonetheless, the Ninth and Second Circuits have decided to go where even the Supreme Court has feared to tread by ruling, in effect, that whenever hastened death is a foreseeable consequence of "inaction," a duty to act arises as if a special relationship existed - regardless of the actual relationship at issue. 71 This assumption is crucial to the courts' holding that when the states authorize the withdrawal of life-sustaining treatment, they are ratifying a breach of a duty toward life no different from the breach that would occur in cases involving the direct taking of life.

According to DeShaney, the Constitution forbids federal courts from placing on state actors an affirmative duty to protect the lives of private citizens from the threat of private harm. 72 Thus the Constitution should also be construed as forbidding federal courts from positing a similarly broad duty in the withdrawal of treatment context as a means of attacking the states' definition of assisted suicide.

Creating such a broad duty by judicial fiat would interfere with the states' ability to define special duties as a matter of public policy, and do so in a manner particularly egregious in the treatment refusal context. Generally, states recognize that while a special duty to provide treatment arises from a physician-patient relationship, such a duty contains certain exceptions. 73 In particular, states may base an exception to this specific duty on a patient's right to refuse touching, which is also a cognizable right under the Due Process Clause. 74 If a patient exercises the

70. Deshaney, 489 U.S. at 196. The Framers, however, did not delegate unlimited authority in this area since a state "may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." Id. at 197 n.3.

71. These courts have thus argued that a physician removing life-sustaining treatment will breach a duty towards the patient whenever hastened death is foreseeable, regardless of any other circumstances. Compassion in Dying, 79 F.3d at 822; Quill, 80 F.3d at 729. The Second Circuit relied specifically on this argument to conclude that "[t]he ending of life by these means is nothing more nor less than assisted suicide." Quill, 80 F.3d at 729.

72. See, e.g., Deshaney, 489 U.S. at 202 (noting that while the social workers might have been subject to a duty to protect the child under state tort law, this would not support a claim of injury under the Due Process Clause, "which, as we have said many times, does not transform every tort committed by a state actor into a constitutional violation").

73. Meisel, supra note 68, at 392-93.

right to refuse bodily medical intrusions by withdrawing consent to medical treatment, then the patient's physician is released from the obligation to provide the treatment. This exception avoids the imposition of a duty upon the physician to treat the patient when such treatment directly contradicts the patient's right not to be touched. 75

The Constitution cannot reasonably be construed as recognizing for definitional purposes a duty to treat a patient in every circumstance where a physician is aware that the failure to treat will hasten the patient's death. At the same time, however, the Constitution is construed as recognizing the right of a patient not to be treated. The Supreme Court noted a similar conflict in DeShaney:

In defense of [the state functionaries] it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis of the present charge of failure to provide adequate protection. 76

The preceding discussion demonstrates the jurisprudential significance of a distinction between action and inaction. Rather than rejecting such a distinction as irrelevant, the Supreme Court in DeShaney adopted it as a workable measure of constitutional culpability. Thus, despite the Ninth Circuit's contrary claim in Compassion in Dying, the distinction is certainly not foreign to constitutional adjudication.

2. Personnel Administrator of Mass. v. Feeney

In Personnel Administrator of Massachusetts v. Feeney, 77 the Supreme Court adopted for constitutional purposes the same "double effect" reasoning rejected by the Ninth Circuit in Compassion in Dying as purportedly irrelevant to constitutional concerns. The Feeney case involved a claim that a state legislature violated the Fourteenth Amendment's Equal Protection Clause by enacting legislation which gave hiring preferences to military veterans, most of whom were men. 78

The Feeney plaintiffs conceded that the legislation was neutral and that the legislators sought to achieve the constitutionally

75. DAVID W. MEYERS, MEDICO-LEGAL IMPLICATIONS OF DEATH AND DYING 140 (1981) (providing: "Throughout the course of treatment, the patient reserves the right to discharge the physician and thereby terminate the physician-patient relationship. This is a necessary adjunct to the patient's right to refuse medical care").
76. DeShaney, 489 U.S. at 203.
77. 442 U.S. 256 (1979).
78. Id. at 259.
permissible effect of benefitting veterans generally. The plaintiffs contended that the law had a double effect, however, because it negatively impacted women in the hiring process in such a manner so as to warrant a constitutional finding that the legislature intended this disparate impact.

According to the Court:

The appellee's [plaintiff's] ultimate argument rests upon the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions. . . . "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. 79

The Court held that although a legislature's knowledge of a neutral measure's inevitable negative impact may create "a strong inference that the adverse effects were desired," . . . "in this inquiry — made as it is under the Constitution — an inference is a working tool, not a synonym for proof." 80 In fact, any presumption of discriminatory intent based on evidence that the legislature was aware of a statute's negative effect is rebuttable by evidence showing that the legislative action was taken "because of" its positive effect, and "in spite of" its negative effect.

Thus, neutral legislation designed to achieve a positive effect that happens to place a foreseeable burden upon a particular group is distinguishable as a matter of constitutional law from legislation specifically designed to burden the group. Even though in both cases a particular negative effect is foreseeable, the two forms of legislative action are not constitutionally equivalent. 81

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79. DeShaney, 489 U.S. at 278-79.
80. Id. at 279 n.25.
81. The Court applied a similar analysis in Miller v. Johnson, 115 S. Ct. 2475 (1995), a racial redistricting case. In Miller, the Court observed that a legislature will "almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process." Id. at 2488. The Court emphasized the constitutional necessity of such a distinction even while acknowledging that the "distinction between being aware of racial considerations [in redistricting plans] and being motivated by them may be difficult to make." Id. See also Bray v. Alexandria Women's Health Clinic, 113 S.Ct. 753, 760 (1993) (rejecting claim that because only women obtain abortions, opposition to abortion necessarily is either based on an intent to discriminate against women, or such a discriminatory intent can be presumed solely by reference to an activity's disparate impact against women); Id. at 763 (holding that the intent "to deprive a right" demands that the individual "do more than merely be aware of a deprivation of right that he causes, and more than merely accept it; he must act at least in part for the very purpose of producing it").

In yet another context, the Supreme Court has recognized that in cases brought under the First Amendment's Establishment Clause, laws providing an indirect benefit to
The Feeney analysis bears directly on the assisted suicide cases. In *Compassion in Dying*, for example, the Ninth Circuit contended that two classes of actions, refusing treatment or providing pain relief as one class, and lethal prescriptions as the other, were indistinguishable for definitional and "constitutional purposes... as long as one of the known effects in each case is to hasten the end of the patient's life." The Court found that, "what matters most is that the death of the patient is the intended result as surely in one case as in the other." In other words, because death is a foreseeable consequence of both classes of actions, the Court reasoned that both classes of actions constitute irrebuttable proof of an intent to cause death irrespective of the presence or absence of a dual positive effect.

This analysis both contradicts Feeney and conflicts with reason. If the Supreme Court recognizes for constitutional purposes a distinction between a statute with a known negative effect and a statute with both a similar negative effect and an additional positive effect, then the states could reasonably employ the same distinction in the assisted suicide context.

Specifically, even if treatment refusals and pain relief measures foreseeably hasten death, they enable a patient to avoid burdensome bodily intrusions and alleviate pain. Any resulting inference of an intent to cause death from the use of such refusals and measures could, therefore, be rebutted by evidence indicating that the patient chose these options "because of" their positive effects and "in spite of" their death-hastening effect.

In *Cruzan v. Director, Missouri Department of Health*, Justice Scalia asserted that "[s]tarving oneself to death is no different from putting a gun to one's own temple as far as the common law definition of suicide is concerned" because both involve "the suicide's conscious decision to 'pu[t] an end to his own existence.'" Standing alone, Scalia's remark clearly overstates the comparison. Given the different circumstances under which self-starvation may occur, not all decisions resulting in starvation would necessarily implicate to the same degree a "conscious decision" to take one's life.

82. *Compassion in Dying*, 79 F.3d at 824.
83. *Id*.
85. *Id.* at 296-97 (Scalia, J., concurring).
86. Justice Scalia's conceptual analysis in *Cruzan*, which irrebuttably presumes a lethal intent based on the death-hastening consequences of starvation, conflicts with his...
For example, a stronger inference of an intent to end life would arise if starvation is initiated by an individual who can eat without medical assistance than if an individual starves as a result of rejecting a feeding tube which provides the individual's nutrition. In the second scenario, a fact upon which a rebuttal of the inference of a suicidal intent could be based is clearly present. Specifically, the intrusion of the feeding tube may indicate that the individual's decision to "starve" was made because of a desire to live free of burdensome intrusions.87

Conversely, it may be difficult to rebut the inference of an intent to choose death when the otherwise healthy individual simply refuses to eat. Yet, in the case of an individual refusing a feeding tube such an inference may arise, but nevertheless be rebutted by evidence of an intent to avoid the feeding tube's intrusion. Moreover, a lethal prescription undeniably has the sole effect of causing death and thus constitutes strong proof of an intent to cause death. In fact, given the absence of an additional positive effect, lethal prescriptions are far more likely than treatment refusals or pain relief measures to be undertaken pursuant to a lethal intent.88

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87. According to the Michigan Supreme Court: "A close examination of the medical-treatment cases suggests that they do not establish a right to choose 'nonlife' at all, but rather a right to choose life's natural progression — a progression that, without fail, includes for everyone the process of dying." People v. Kevorkian, 527 N.W.2d 714, 728 n.44 (Mich. 1994). Thus, according to an influential group of ethicists:

Deliberately to deny food and water to . . . innocent human beings in order to bring about their deaths is homicide, for it is the adoption by choice of a proposal to kill them by starvation and dehydration. . . . However, when specific objective conditions are met, the withholding and withdrawing of various forms of treatment, including the provision of food and fluids by artificial means, do not necessarily carry out a proposal to end life. One may rightly choose to withhold or withdraw a means of preserving life if the means employed is judged either useless or excessively burdensome.


88. An individual may purposely choose death as a means of obtaining a positive effect of escaping or avoiding pain. Or an individual may purposely choose death as a means of relieving family members from the "burden" of caring for the decedent while alive. That fact that the individual is motivated by the prospect of achieving a positive effect does not alter the above-described analysis. According to one commentator:

The definition of suicide requires that one's actions be carried out for the purpose of bringing about death either as an end or as a means. The soldier who throws himself on the live grenade to save his companions, for example, is not aiming at death. That is, he does not intentionally jump on the grenade for the purpose of bringing about his death, but rather for the purpose saving his companions. This is clear if
Depending on the circumstances, therefore, the evidentiary proof of a "conscious decision" to kill one's self may be diminished and any resulting inference rebutted. This perhaps explains the reason why Justice Scalia questioned the relevance of an absolute distinction between withdrawing a feeding tube and assisted suicide, while also "readily acknowledging" that a general distinction "has some bearing upon the legislative judgment of what ought to be prevented as suicide".\textsuperscript{89} The presence of a positive effect potentially provides the necessary evidentiary basis for rebutting any inference that a negative effect was intended. However, the absence of a positive effect and the presence of a negative effect bolsters such an inference.

Especially in light of \textit{Feeney}, a definitional distinction based on the presence or absence of a positive effect is constitutionally cognizable, and thus the federal courts lack any constitutional basis for rejecting the distinction in the assisted suicide context. The states should be free to rely on the double effect distinction as a rational basis for classifying certain acts as more likely than not to be suicidal, while at the same time classifying other acts as less likely to be suicidal because the acts are based on a non-lethal intent.

\textbf{3. Sandstrom v. Montana}

Another line of Supreme Court decisions also provides constitutional support for the distinction between acts having the effect of hastening death and acts intended to hasten death. In \textit{Sandstrom v. Montana},\textsuperscript{90} for example, the Supreme Court ruled unanimously that a conclusive presumption of an intent to commit murder, based solely on proof that a victim's death was the ordinary result of the defendant's voluntary act, violated the Fourteenth Amendment's Due Process Clause.\textsuperscript{91}

The Court determined in \textit{Montana} that when intent is an element of a crime, evidence of an act's natural effects cannot be treated as irrebuttable proof of the requisite criminal intent. An irrebuttable presumption of a criminal intent based solely on the

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\textsuperscript{89} Manuel G. Velasquez, \textit{Defining Suicide}, 3 ISSUES IN LAW & MED. 37, 49 (1987) (emphasis added).
\textsuperscript{90} 442 U.S. at 510 (1979).
\textsuperscript{91} Id. at 524.
negative consequences of an act "would effectively eliminate intent as an ingredient of the offense."\textsuperscript{92} As a result, such a presumption would inappropriately relieve the prosecution of its constitutionally imposed burden of proving beyond a reasonable doubt every element of the crime.\textsuperscript{93}

While evidence "may well support an inference" of criminal intent, "the jury must remain free to consider additional evidence before accepting or rejecting the inference."\textsuperscript{94} As a matter of public policy, this approach preserves the overall presumption of innocence from evil intent and recognizes the possibility that not all actions with harmful consequences are intentionally undertaken for that purpose.

The courts have taken a similar approach in the civil context. For example, in life insurance cases involving the self-inflicted death of individuals under suspicious circumstances, courts generally presume that the death was accidental. As Gary Schuman has noted:

The presumption against suicide is based on the nearly universal characteristics of love of life and fear of death. The premise is that a person's natural instincts are to avoid injury and preserve life and that it is more reasonable than not that the insured would endeavor to protect his or her life and health. Alternatively, the presumption is based on the reasonable assumption that it is highly improbable that an individual will intentionally take his or own life or inflict injury upon himself or herself.\textsuperscript{95}

Courts have found the presumption that individuals do not normally harbor a homicidal intent to outweigh evidence of suicide, even if no evidence is offered in support of the presumption.\textsuperscript{96}

Washington and New York have established certain definitional presumptions which distinguish between decisions involving a lethal prescription and other decisions involving the refusal of life-sustaining care or the provision of pain relief measures. Such presumptions illustrate that the states presume that individuals participating in the former measures are carrying out an intent to hasten death, while persons participating in the latter are presumed to be carrying out a nonlethal, legitimate intent.

\textsuperscript{92} Morissette v. United States, 342 U.S. 246, 273-76 (1952).
\textsuperscript{93} Sandstrom, 442 U.S. at 523.
\textsuperscript{95} Gary Schuman, Suicide and the Life Insurance Contract: Was the Insured Sane or Insane? That Is the Question — Or Is It?, 28 Tort & Ins. L.J. 745, 750-51 n.33 (1993).
\textsuperscript{96} See, e.g., Wyckoff v. Mutual Life Insurance Co. of New York, 147 P.2d 227 (Or. 1944). See also Ritter v. Mutual Life Insurance Co. of New York, 169 U.S. 139 (1899) (holding that courts should not presume parties intended to authorize by contract an individual's suicide for purpose of obtaining insurance proceeds because such encouragement endangers public interests and injuriously affects the public good).
Notably, as long as the different presumptions are rebuttable, they fall well within the states' authority to make public policy in the medical treatment context.

In the context of this background, the Second and Ninth Circuits clearly erred by ruling in essence that any distinctions among acts with a death-hastening effect are irrational. Such rulings expressly provided that the only defining element of such acts is effect-based, as if an actual intent to die or hasten death is not an element of the legal definition of assisted suicide and the proof of such intent is irrelevant and unnecessary. The rulings in fact ignore the possibility that an act having the effect of hastening death may or may not be accompanied by an intent to hasten death, and that the presence or absence of such an intent indeed alters the legal nature of the act as a matter of constitutional law.

As the following section indicates, not only does "intent" matter under the Constitution with respect to assisted suicide, but a particular kind of intent that goes beyond mere knowledge of a death-hastening effect provides the essential element of any definition of this crime.

C. Distinctions Indicating the Presence or Absence of the Suicide Victim's Purposeful Intent to Shorten Life Are Necessary to the Definition of the Crime of Assisted Suicide

1. Under the Constitution, Intent Is a Critical Element of the Definition of Felonies

In the landmark decision of Morissette v. United States, the Supreme Court ruled that while the federal judiciary lacks the constitutional authority to create or define crimes, it may interpret otherwise unclear provisions of a statute in light of "accumulated . . . legal tradition and meaning of centuries of practice". At issue in Morissette was whether an individual could be convicted of a particular federal offense without proof of criminal intent given Congress' failure to expressly require criminal intent to be included as an element of the offense in question.

The Court held that in light of "the ancient requirement of a culpable state of mind", the "mere [legislative] omission . . . of any mention of intent will not be construed as eliminating that element from the crimes denounced." The Court acknowl-

98. Id. at 263.
99. Id. at 250.
100. Id. at 263.
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edged a “century-old but accelerating tendency, discernible both here and in England, to call into existence new duties and crimes which disregard any ingredient of intent”\(^{101}\) but rejected it as a guide for the interpretation of statutes codifying common law felonies or “infamous” crimes.\(^{102}\)

With respect to such crimes, the Court provided the following:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.\(^{103}\)

The Court went on to say that, “in American law ‘mens rea is not so readily constituted from any wrongful act’ as elsewhere”\(^{104}\) in order “to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.”\(^{105}\) Any proposal to eliminate intent as a necessary element of a crime would, as a constitutional matter:

radically . . . change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution’s path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.\(^{106}\)

Consequently, “the requirement of some mens rea for a crime is firmly embedded”\(^{107}\) and “offenses that require no mens rea generally are disfavored.”\(^{108}\) Absent an express legislative decision to eliminate intent as an element of a felony, none will be inferred.

The Morissette line of precedent only indirectly applies to the assisted suicide cases because most states, including Washington

\(^{101}\) Id. at 253.
\(^{102}\) Morissette, 342 U.S. at 260-62. The Court differentiated felonies and infamous crimes from what it called “public welfare offenses” which “do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals.” Id. at 255. Public welfare offenses incur strict liability and would not require proof of criminal intent because “[t]he accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.” Id. at 256.
\(^{103}\) Id. at 250.
\(^{104}\) Id. at 252 n.9 (citation omitted).
\(^{105}\) Id. at 252.
\(^{106}\) Id. at 263.
\(^{108}\) Id. (citing Liparota v. United States, 471 U.S. 419, 426 (1985)).
and New York, have expressly designated the intent of the accused as an element of assisted suicide. 109 Thus, the need for judicial interpretation is avoided. Moreover, the Ninth and Second Circuits would eliminate intent as an element of assisted suicide not to expand the scope of acts deemed criminal, but to broaden the scope of acts deemed noncriminal.

Nevertheless, Morissette and its progeny are integral to the assisted suicide definitional inquiry for several reasons. First, these Supreme Court cases highlight the fallacy of the claim that the distinction between intent and effect is constitutionally irrelevant when defining the crime of assisted suicide. Second, the cases also help to properly focus the inquiry on the element of intent and to move away from a simplistic equation of various death-hastening decisions based solely on their shared effect regardless of intent.

Finally, just as eliminating intent as a requisite criminal element "radically change[s] the weights and balances in the scales of justice" with respect to individual rights, 110 eliminating intent as a factor for determining which acts are noncriminal would upset the scales just as radically with respect to the community's right to protect lives and maintain order. If some decisions having the effect of hastening death are deemed noncriminal, then all decisions with the same effect will have to be decriminalized based solely on similarity in effect and irrespective of intent. Ultimately, a community permitting some measures that indirectly but not intentionally hasten death would be powerless to prevent any form of homicide. This extreme shift in the balance between individual and community rights heightens the constitutional significance of intent in any definitional analysis of assisted suicide.

2. What Is the Requisite Intent With Respect to Assisted Suicide?

In United States v. Bailey, 111 the Supreme Court recognized that "[f]ew areas of criminal law pose more difficulty than the proper definition of the mens rea required for any particular crime." 112 The Court endorsed a definitional "hierarchy of culpable states of mind" which includes "purpose, knowledge, recklessness, and negligence" and explained that "[p]erhaps the most significant, and most esoteric, distinction drawn by this analysis
is that between the mental states of 'purpose' and 'knowledge'.”

The Court noted that while the purpose/knowledge distinction is generally not important:

In certain narrow classes of crimes... heightened culpability has been thought to merit special attention. Thus, the statutory and common law of homicide often distinguishes either in setting the "degree" of the crime or in imposing punishment, between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another's life.¹¹⁴

The Court also adopted the following descriptions of purpose and knowledge:

[A] person who causes a particular result is said to act purposely if “he consciously desires that result, whatever the likelihood of that result happening from his conduct,” while he is said to act knowingly if he is aware “that the result is practically certain to follow from his conduct, whatever his desire may be as to that result.”¹¹⁵

Finally, the Bailey Court observed that the requisite level of intent or state of mind must be determined for each act included in an offense.¹¹⁶

What are the act-elements of assisted suicide and their corresponding mental states? According to the New York Task Force on Life and the Law, the elements of the crime of assisted suicide would consist of “engaging in the conduct of causing or aiding another person's suicide, and bringing about the result of achieving the other's death.”¹¹⁷

¹¹³. Id. at 404.

¹¹⁴. Id. Recent criminal cases involving persons who know they have AIDS and who are charged with attempted murder as a result of sexually assaulting another, thereby exposing the victim to the risk of infection, highlight the critical distinction between purpose and knowledge. See Sexual Assault: Knowledge of [AIDS] Infection Insufficient Proof of Intent To Kill, AIDS POLICY & LAW, Aug. 23, 1996, at 3 (reporting decision in Smallwood v. Maryland, No. 122 (Md. Aug. 1, 1996) which overturned conviction for attempted murder of man with HIV who pleaded guilty to sexual assault, on grounds that, in itself, evidence of his knowledge of his infectious condition was insufficient to prove a homicidal purpose; also noting that: “Had the court upheld Smallwood's conviction anyone with HIV who engaged in unprotected sex could have faced charges of attempted murder. Also, had the conviction been upheld, prosecutors in future cases could have used charges of attempted murder as leverage to get defendants to accept plea agreements for sex offenses”).


¹¹⁶. Id. at 406. (quoting the AMERICAN LAW INSTITUTE, MPC COMMENTS 123. See also Staples v. United States, 114 S. Ct. 1793, 1799 (1994) (providing: “different elements of the same offense can require different mental states”) (citations omitted).

¹¹⁷. N. Y. STATE TASK FORCE, supra note 64, at 60.
While Washington penalizes any individual who "knowingly causes or aids another person to attempt suicide,"118 New York penalizes any individual who "intentionally ... aids another person to commit [or to attempt] suicide."119 This indicates that the requisite intent of the accused must be "knowing" in Washington and "intentional" in New York.

Death, however, must be achieved or threatened as a result of the victim's completed or attempted suicide. Thus, the victim's state of mind will determine whether his or her death constitutes a suicide that renders the "knowing" or "intentional" assistance of the accused to be a crime.120

The New York Task Force on Life and the Law defined suicide as "the intentional taking of one's own life."121 Repealed penal statutes in New York and Washington defined criminal suicide and criminal attempted suicide in similar terms, as well as by referring to "homicide."122 Furthermore, in New York, "intentional" is defined by statute as referring to a "conscious objective,"123 which easily translates to the Supreme Court's definition of "purpose" as "conscious desire."124 Consequently, an individual accused of providing suicide assistance could not be convicted of the specific crime of assisted suicide if the victim did not consciously desire his or her life to be taken.

Proof of a victim's purposeful intent to take his or her own life is indeed a key element of the legal definitions of suicide and assisted suicide. Before the recent constitutional challenges muddied the analysis, both sides of the debate were in substantial agreement on this point.

For example, in a classic discussion of suicide and the refusal of treatment, Robert Byrn observed that "[f]rom the earliest times, the law of suicide dealt with cases in which an individual

119. N. Y. PENAL LAW §§ 125.15(3) & 120.30 (McKinney 1987).
120. MEISEL, supra note 69, at 455 (providing: "Before there can be liability for assisted suicide, the death of the patient must first be capable of being considered a suicide."); Barber v. Superior Court, 195 Cal. Rptr. 484, 487 (Cal. App. 1983) (stating: "Whether or not a homicide is punishable as a crime in the first instance, and the degree of punishment which is imposed in the case of a criminal homicide depends upon the mental culpability of the person causing the death").
121. N. Y. TASK FORCE, supra note 64, at 10.
122. See Marzen et al., supra note 1, at 206, 238. These criminal statutes defined suicide as "the intentional taking of one's own life," and defined "attempted suicide" as "any act dangerous to human life [committed] with intent to take [one's] own life" and also provided that, "if committed upon or towards another person ... would render the perpetrator chargeable with homicide." Id.
123. N. Y. TASK FORCE, supra note 64, at 60 (quoting N.Y. PENAL LAW § 15.15(1) (McKinney 1987)) (noting: "A person is considered to act intentionally ... 'when his conscious objective is to cause [a particular] result or to engage in [particular] conduct.'").
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(felo de se) purposefully set in motion a death-producing agent with the specific intent of effecting his own destruction or, at least, serious injury. Suicide was malum in se, the equivalent of murder. Assisted suicide advocates Karen Lebacqz and H. Tristram Engelhardt also concur that "acts of suicide . . . are done with the express intent of ending one's life and not for some other purpose. What makes an action 'suicide,' then, is the intent of the actor. If it is done in order to kill oneself, it is suicide."

The victim's purpose rather than knowledge describes the requisite intent for purposes of suicide. Consequently, a state may rationally distinguish between actions foreseeably resulting in death by ascertaining whether the person committing such actions harbored a lethal purpose for undertaking them. Clearly, some actions would evidence a lethal purpose more than others, irrespective of the fact that death or the risk of death is a known consequence of all the actions in question. For example, a person's request for a lethal dose of medication provides strong evidence that the individual harbors the purposive intent to commit suicide. Yet, an individual's refusal of a respirator or other

125. Robert M. Byrn, Compulsory Lifesaving Treatment for the Competent Adult, 44 Fordham L. Rev. 1, 16 (1975), reprinted in Death, Dying and Euthanasia 706, 721 (Dennis J. Horan & David Mall eds. 1980). See also Robert L. Barry, Breaking the Thread of Life: On Rational Suicide 1-18 (1994) (providing excellent survey of "narrow" and "broad" definitions of suicide promoted at various points in history and advocating narrower definition substantially similar to Byrn's); Velasquez, supra note 88 (same).

126. Karen Lebacqz & H. Tristram Engelhardt, Jr., Suicide, Death, Dying and Euthanasia 699, 670 (Dennis J. Horan & David Mall eds. 1977). See also id. at 701 n.2 (quoting Immanuel Kant (1873)) (providing: "A man who shortens his life by intemperance is guilty of imprudence and indirectly of his own death; but his guilt is not direct; . . . we cannot say of him that he is a suicide. What constitutes suicide is the intention to destroy oneself."); id. at 670 (quoting E. Kluge, The Practice of Death (1975) ("A suicidal act becomes suicide proper only when . . . 'the actor must engage in that action for the express purpose of bringing about (her) own death').

127. Of course, as already discussed, this is not the only element. The intent of the person providing "assistance" will also be important. Even if the assistant's intent falls short of the requisite level, lesser crimes may still be implicated by proof of other levels of a culpable state of mind, such as recklessness. See Norman L. Cantor & George C. Thomas III, Pain Relief, Acceleration of Death, and Criminal Law, 6 Kennedy Inst. Ethics J. 107 (1996).

128. A particular medication may have the legitimate effect of alleviating pain within certain dosage limits, but if a physician administers the medication in a dosage clearly exceeding the appropriate palliative limits and creating a high risk of accelerated death, then a lethal purpose will be naturally inferred. In addition, if the physician chooses a more risky method of alleviating pain when other less risky and equally effective methods are available, then "[b]y definition, the physician . . . has chosen the less safe alternative without a gain in pain relief. Indeed, . . . the physician's rejection of the safe alternative might provide a prosecutor with evidence of a purpose to kill, rather than comfort, the patient." Cantor & Thomas, supra note 127, at 117.
forms of medical intervention may present "overwhelming difficulties of proof" with respect to the existence of such a purpose.129

The definitional analysis of assisted suicide adopted by the Ninth and Second Circuits focuses solely on effect and knowledge. These courts have thereby excluded the one element that the Supreme Court regards as crucial to the definition of crimes. Nothing in the Constitution or in the Supreme Court's rulings supports such an analysis, nor mandates its application in assisted suicide.

One final definitional issue of critical importance deals with the claim that the crime of assisted suicide excludes the purposeful taking of a life of an individual who is in the final stages of death. The next section examines this issue from a historical and constitutional perspective.

D. The Victim's Expected Lifespan Is Irrelevant to the Definition of Assisted Suicide

In Compassion in Dying, the Ninth Circuit indicated that:

We are doubtful that deaths resulting from terminally ill patients taking medication prescribed by their doctors should be classified as "suicide." . . . We believe that there is a strong argument that a decision by a terminally ill patient to hasten by medical means a death that is already in process, should not be classified as suicide.130

This mirrors the argument presented to the Ninth Circuit in one of the amici briefs in the case:

Physician aid in dying is distinguishable from "suicide." Aid in dying seeks to end the dying process. Unlike the traditional "suicide," the person who seeks aid in dying does not have the primary goal of ending his life. Given the terminal nature of his condition, the patient wants to end his suffering by shortening the dying process. "In no meaningful sense of the term can a choice to hasten one's own inevitable death by the use of physician-prescribed medications be labeled a 'suicide,' . . . The terminally ill person who faces death is not 'committing suicide' by ending a life that is of indefinite duration."131

This definitional attack is not without precedent in American case law. Defendants charged with murder or manslaughter

129. Byrn, supra note 125, at 728. See also Marzen et. al, supra note 1, at 12-13 (providing: "All else being equal, it ill behooves a non-totalitarian society to police thoughts by inquiring into the motivations of all who choose a course which can be pursued for either licit or illicit reasons. Moreover, in view of the vast number and almost infinite variety of fact situations in which competent adults make choices concerning medical treatment, it would be an administrative impossibility to regulate such choices.").

130. Compassion in Dying, 79 F.3d at 824.

have raised the terminal condition of the victim as a defense in several cases. Moreover, plaintiffs with terminal conditions raised a similar argument in the Supreme Court case of United States v. Rutherford,\(^{132}\) contending that federal laws banning the interstate commerce of new drugs considered unsafe could not, by definition, apply to the terminally ill. The next two sections discuss these cases.

1. Murder/Manslaughter Cases

In what appears to be the first reported decision on the issue, the California Supreme Court in 1874 denoted the argument that "a defendant is not guilty of murder in the killing of a person who has already been mortally wounded by another" as "a doctrine which cannot be seriously contended."\(^{133}\) In 1912, the Supreme Court of Kansas rejected a similar claim, holding that irrespective of a victim's previous injuries caused by an earlier attack, "it is sufficient to say that the [victim] was alive when attacked with the corn knife. . . . Even if the previous wounds were mortal, of which there was no proof, death was hastened by the new assault, which is sufficient to sustain the charge [of murder]."\(^ {134}\)

In 1929, the Supreme Court of South Carolina upheld the conviction of a defendant charged with murder as a result of his involvement in a gang attack upon a police officer. The defendant claimed that the injuries for which he was responsible would not have caused the officer's death but for the mortal wounds inflicted by another attacker. The court rejected this claim in terms that have since come to describe the black letter law:

> But though a human body must be alive in order that it may be the subject of homicide, yet the quantity of vitality which it retains at the moment the fatal blow is given, and the length of time life would otherwise have continued, are immaterial considerations. If any life at all is left in the human body, even the least spark, the extinguishment of it is as much homicide as the killing of the most vital being.\(^ {135}\)

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133. People v. Ah Fat, 48 Cal. 61, 64 (1874) (also listing the following headnote: "What Constitutes Murder. — A person is not guiltless of murder because the one he kills has already been mortally wounded").
135. State v. Francis, 149 S.E. 348, 364 (S.C. 1929). See also State v. Sala, 169 P.2d 524, 534 (Nev. 1946) overruled 634 P.2d 1226 (1981) (quoting same language); 40 Am. Jur. 2d Homicide § 16 (1968) (providing: "The law declares that one who inflicts an injury on another and thereby accelerates his death shall be held criminally responsible therefor. It is said in this connection that if any life at all is left in a human body, even the least spark, the extinguishment of it is as much homicide as the killing of the most vital being."); 40 C.J.S. Homicide § 8 (1991) (noting: "The vitality which the victim possessed at the moment of accused's act and the fact that he would have lived for only a
Courts have also considered and rejected claims that the victim's underlying illness and resulting natural proximity to death, as opposed to injuries caused by preceding criminal acts, prevented a charge of murder. For example, in People v. Moan,\textsuperscript{136} the California Supreme Court ruled as follows:

The claim on the part of the defendant is that it was not the injury but chronic alcoholism that caused the [victim Finck's] death. There was some conflict in the evidence on this point; that the organs of the deceased, including brain, stomach, kidneys, and liver, were in a very unhealthy condition, clearly appears from the evidence, but that the immediate cause of death was the blow or blows is abundantly established.

A question is made on that portion of the charge to the jury instructing them that if the blows accelerated the death of Finck, defendant was responsible. Such we understand to be the law of homicide. If a patient is lying in the last stages of consumption, with a tenure upon life that cannot possibly continue for a day, it is homicide to administer a poison to him by which his life is ended almost immediately. So, in the case we are now considering, if Finck, by excess in indulgence in alcoholic drinks had reduced himself to a wreck, and brought his life to the verge of the grave, it was a wrongful act for the defendant to accelerate his death by violence. Perhaps blows, delivered with equal force on the head of a strong man in the enjoyment of robust health, would not have been attended by any serious consequences; but upon a life impaired as Finck's was, by self-abuse, they may have accelerated his death; and but for the blows the man would not have died — at least not at the time he did. This makes the defendant criminally responsible.\textsuperscript{137}

Likewise, the Supreme Court of Iowa in 1887 upheld a murder conviction in State v. Smith\textsuperscript{138} after stating the following:

It is claimed by counsel for the defendant that . . . there might have been three causes contributing to the death of the deceased: (1) heart disease, a natural cause; (2) intoxication and exposure to cold caused by it; and (3) the wounds inflicted by the defendant; and the argument is that, where there are three causes which may have contributed to produce death, one natural cause and two artificial causes, a charge that death proceeded from one artificial cause, and the proof is that it was only accelerated by that cause, but in fact proceeded from the other artificial cause, the evidence does not support the charge. . . .

In our opinion, the instructions complained of are correct. It surely ought not to be the law that because a person is afflicted with a mortal malady, from which he must soon die, whether his ailment be caused by natural or artificial causes, another may be excused for acts of violence which hasten or contribute to or cause death sooner than it

\textsuperscript{136} 4 P. 545 (Cal. 1884).
\textsuperscript{137} Id. at 548-49.
\textsuperscript{138} 34 N.W. 597 (Iowa 1887).
would otherwise occur. Life at best is but of short duration, and one who causes death ought not to be excused for his act because his victim was soon to die from other causes, whatever they may be, and in the case at bar we think the jury were warranted in finding that the violence of the defendant contributed to or caused or accelerated the death of his wife.  

Consistent with these precedents, the Michigan Supreme Court in People v. Kevorkian concluded that “the temporal proximity of death is irrelevant” to the definition of assisted suicide, and “the inevitability of death adds nothing to the constitutional analysis.”

If the United States Supreme Court were to adopt the contrary position and hold as a matter of constitutional law that a victim’s proximity to death is relevant to the culpability of an individual charged with assisting suicide, then the definitional ramifications would be far-reaching. As a form of homicide, assisted suicide cannot be distinguished from other forms of homicide. If the victim’s condition is deemed relevant in the assisted suicide context, then it must also be relevant in any case of homicide. As a result, potentially any defendant accused of a homicidal act would have the constitutional right to raise the victim’s debilitated condition as a defense.

Moreover, if the victim’s proximity to death is relevant to the culpability of an individual charged with assisting suicide, then all crimes against life would potentially be limited to those life-

139.  Id. at 601-02.  Accord State v. O’Brien, 46 N.W. 752, 753 (Iowa 1890) (noting: “It is suggested that the verdict is not supported by the evidence, and that it is not shown that the death of Stocum resulted from injuries inflicted by defendant. The evidence shows that decedent had not been in good health for several months. . . . The fact that he was afflicted with a disease which might have proved fatal would not justify the wrongful acts of defendant, nor constitute a defense in law.”); Gardner v. State, 73 S.W. 13, 14 (Tex. 1903) (stating: “If deceased would have shortly died from Bright’s disease, and it was an incurable malady, yet if appellant’s shot assisted in bringing about the death, he would be guilty of the homicide. An accused cannot speculate as to how long his victim may live with an incurable malady when he inflicts a shot or a wound that hastens the death or the action of the fatal disease.”); State v. Mally, 366 P.2d 868, 873-74 (Mont. 1961) (holding that husband’s failure to find medical help for seriously ill spouse who was unable to seek help herself, and who never “consciously or rationally denied medical aid,” constituted involuntary manslaughter because “[t]hough a person may be at the threshold of death, if the spark of life is extinguished by a wrongful act, it is sufficient for a conviction”); People v. Stamp, 82 Cal. Rptr. 598, 603 (Cal. App. 1970), cert. denied, 400 U.S. 819 (1970) (upholding felony-murder conviction for death of robbery victim who “was an obese, sixty-year-old man” with “an advanced case of atherosclerosis, a progressive and ultimately fatal disease,” and who died of a fatal seizure precipitated by the robbery. The court concluded that “[s]o long as life is shortened as a result of the felonious act, it does not matter that the victim might have died soon anyway . . . [because] the robber takes his victim as he finds him”).

140.  527 N.W.2d 714 (Mich. 1994).

141.  Id. at 725 n.27.

142.  Id. at 727-28 n.41.
threatening acts which imperil the healthy. Those charged with mortally attacking an individual deemed to be in the "process of dying" would avoid conviction. As the "process of dying" is an inherently expansive concept in that all persons will ultimately die, even though many die sooner than expected, the courts will be swamped with defendants' claims of a constitutional right to the "proximity to death" defense in a host of cases.

For example, such a defense will be available when a victim is seriously wounded by the defendant's partner in crime, when a victim has any type of condition rendering him or her more vulnerable to violence of any sort, and even when the victim is a member of a class of persons who on average will die sooner than the rest of the population. Accordingly, the defense may even pertain to crimes against persons in dangerous inner city neighborhoods or in risky occupations such as the military, police or firefighting, because on average such persons will die sooner than persons in the suburbs or in low risk jobs.

In addition, a "proximity to death" defense will have to be recognized as a matter of constitutional law when determining the scope of any state policy designed to protect life. Such policies by definition would apply only to the healthy in low risk circumstances. Those individuals expected to die soon would fall outside of the law's protection.

Importantly, the Supreme Court has rejected the contention that the terminally ill, because of their proximity to death, are not properly subject to the protections of the law. The next section discusses this ruling and its implications in the debate over the definition of assisted suicide.

I. United States v. Rutherford

In 1975, various cancer patients sued the Federal Food and Drug Administration ("FDA") in federal court, seeking to enjoin the FDA from restricting the interstate shipment and sale of Laetrile. The complaint alleged that the drug could potentially cure cancer, and that therefore terminally ill persons should be given access to the drug even though the FDA had not proved it to be safe or effective and the medical profession generally opposed the use of the drug. The patients specifically argued that the FDA restriction interfered with their constitutional right to privacy, which encompassed the right to choose even potentially unsafe and ineffective drugs in an attempt to cure their cancer.143

143. See infra notes 243-259 and accompanying text for discussion on the constitutional claim.
While the federal district court recognized this constitutional claim, the Tenth Circuit Court of Appeals declined to address it by ruling instead that the federal statute governing the regulation of unsafe drugs had no reasonable application to persons with terminal conditions. The court stated that, "since those patients by definition would die of cancer regardless of what may be done," there were no realistic standards against which to measure the safety and effectiveness of a drug for that class of individuals. The FDA appealed the case to the Supreme Court, which unanimously reversed the rulings of the federal district and Tenth Circuit courts.

Writing for the Court, Justice Marshall observed that: 1) the federal statute "makes no special provision for drugs used to treat terminally ill patients;" 2) nothing in the legislative history "suggests that Congress intended to protect only those persons suffering from curable diseases;" and 3) those charged with the statute's enforcement "never made exceptions for drugs used by the terminally ill."

The Court refused to read into the statute an implied exception governing ineffective or unsafe drugs on the following grounds:

Contrary to the Court of Appeals' apparent assumption, effectiveness does not necessarily denote capacity to cure. In the treatment of any illness, terminal or otherwise, a drug is effective if it fulfills, by objective indices, its sponsor's claims of prolonged life, improved physical condition, or reduced pain.

So too, the concept of safety under [the statute] is not without meaning for terminal patients. Few if any drugs are completely safe in the sense that they may be taken by all persons in all circumstances without risk. . . . For the terminally ill, as for anyone else, a drug is unsafe if its potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit. Indeed, the Court of Appeals implicitly acknowledged that safety considerations have

146. United States v. Rutherford, 442 U.S. 544, 551 (1979) (quoting Rutherford v. United States, 582 F.2d 1234, 1237 (10th Cir. 1978)). The district court registered an opinion in even stronger terms:
Defendants assert that early diagnosis and prompt treatment are critical in the management of cancer and that needless and untimely deaths will occur if laetrile is used in preference to established methods of cancer treatment. Such arguments have little applicability to that fraction of cancer patients whose lives orthodox medical science professes no capacity to preserve. To speak of laetrile as being "unsafe" for these people is bizarre.
147. Rutherford, 442 U.S. at 551.
148. Id. at 552.
149. Id. at 553.
relevance for terminal cancer patients by restricting authorized use of Laetrile to intravenous injections for persons under a doctor’s supervision.\textsuperscript{150}

Moreover, the Court found several problems with limiting such an exception to the terminally ill. First, the Court provided that, “if an individual suffering from a potentially fatal disease rejects conventional therapy in favor of a drug with no demonstrable curative properties, the consequences can be irreversible.”\textsuperscript{151} Second, the Court noted that, “it is often impossible to identify a patient as terminally ill except in retrospect. . . . Even critically ill individuals may have unexpected remissions and may respond to conventional treatment.”\textsuperscript{152} Third, the Court found that, “[t]o accept the proposition that the safety and efficacy standards of the Act have no relevance for terminal patients is to deny the [FDA’s] authority over all drugs, however toxic or ineffectual, for such individuals.”\textsuperscript{153} Fourth, as demonstrated by the historical record, the Court concluded that terminally ill individuals in desperation are particularly vulnerable to “resourceful entrepreneurs” pedalling all sorts of purported cures. Accordingly, “this historical experience” amply demonstrated “why Congress could reasonably have determined to protect the terminally ill, no less than other patients, from the vast range of self-styled panaceas that inventive minds can devise.”\textsuperscript{154}

In light of these foregoing considerations, the Court rejected the decision of the district court to carve an exception for the terminally ill into the applicable statute, stating:

Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy. . . . Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied. . . . Here, however, we have no license to depart from the plain language of the Act, for Congress could reasonably have intended to shield terminal patients from ineffectual or unsafe drugs. . . . Whether, as a policy

\begin{itemize}
  \item \textsuperscript{150} \textit{Id.} at 555-566. According to the Supreme Court, the unlimited use of Laetrile was presumably based on evidence that the drug was toxic when orally administered. \textit{Id.} at 551.
  \item \textsuperscript{151} \textit{Id.} at 556.
  \item \textsuperscript{152} \textit{Rutherford}, 442 U.S. at 556-57. The Court quoted from testimony in the record indicating that “[t]he distinction of ‘terminal’ patients may not be reliably determined and an assumption that Laetrile may be given to [‘terminal’] patients with impunity may deprive such patients of therapeutic measures which could help them.” \textit{Id.} at 556 n.14.
  \item \textsuperscript{153} \textit{Id.} at 557-58.
  \item \textsuperscript{154} \textit{Id.} at 558.
\end{itemize}
matter, an exemption should be created is a question for legislative judgment, not judicial inference.  

*Rutherford* poses a significant obstacle to any definitional analysis which takes into account the victim’s proximity to death. Certainly if providing a potentially cancer-curing, albeit risky drug to terminally ill individuals seeking to prolong their lives is deemed to be a reasonable harm which Congress sought to eliminate by enacting food and drug safety laws, then it is equally if not more reasonable for the states to include the killing of the terminally ill within their definition of the crime of assisted suicide. The parallels between the two cases cannot be ignored.

Thus, states could rely on *Rutherford* as a basis for asserting that: 1) the killing of terminally ill individuals represents a threat to life regardless of the individual’s proximity to death because all lives are in the process of dying; 2) lethal drugs or drugs ingested in lethal quantities are as unsafe for the terminally ill as for anyone else because the drugs will inflict death without any therapeutic benefit; 3) deaths caused by lethal drugs are irreversible while the diagnosis of having a terminal condition is not, thus not all persons diagnosed as being terminally ill will actually be in the process of dying but instead some

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156. One court found that “[s]uch a decision is by no means necessarily indicative of suicidal tendencies” and “that in some instances at least... cancer victims [untreated by conventional medical means] outlive treated ones.” *Rutherford*, 438 F. Supp. at 1299 n.25.

157. At least one commentator has already noted the similarities between a case involving a competent terminally ill patient seeking access to physician-dispensed Laetrile and a case involving a terminally ill patient seeking access to a physician-dispensed lethal overdose. Comment, *Laetrile: Statutory and Constitutional Limitations on the Regulation of Ineffective Drugs*, 127 U. PA. L. Rev. 233, 256-57 (1978) (recognizing that the Laetrile cases challenge the “state’s power to control... self-destructive conduct, such as suicide”).
nonterminaly ill persons will also be mistakenly included in that category; 4) to accept the proposition that states have no authority to include deaths of the terminally ill within the definition of assisted suicide is to deny the states any authority to protect the terminally ill against any harm whatsoever; and 5) the terminally ill are vulnerable not only to the vast range of purported life-extending but risky cures "that inventive minds can devise," but are also particularly vulnerable to suggestions that perhaps they are better off dead than dying.

E. Summary of Definitional Analysis

The foregoing analysis places the assisted suicide issue in a proper context by examining the definitions of relevant terms not from a philosophical perspective, but a constitutional perspective. Although the Ninth and Second Circuits have adopted certain philosophical premises that disagree with those relied upon by the states, the courts failed to tie their definitional opinions to any constitutional provision or Supreme Court precedent. Thus, the Ninth and Second Circuits intruded upon the states' right to define crimes without sufficient constitutional justification.\footnote{According to the Supreme Court, the doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States. Montana v. Egelhoff, 64 U.S.L.W. 4500, 4505 (U.S. June 13, 1996) (No. 95-566) (quoting Powell v. Texas, 392 U.S. 514, 535-36 (1968) (plurality opinion)).}

The debate over the definition of assisted suicide forms in crucial ways the substantive analysis necessary to resolving whether assisted suicide is constitutionally protected. Clearly, an understanding of what the states are preventing when they legislate against assisted suicide will assist the inquiry into the nature of the constitutional right being asserted.

III. DOES THE CONSTITUTION RECOGNIZE A RIGHT TO ASSISTED SUICIDE?

The Ninth and Second Circuits have concluded that assisted suicide is merely a cousin of other constitutionally protected interests. Each Circuit based this conclusion on two premises: 1) in protecting a right to refuse treatment or to receive pain relief in circumstances where death may thereby be hastened, either the liberty guarantee of the Fourteenth Amendment or the common and statutory law of the states recognize a right to pur-
posely hasten death;\textsuperscript{159} and 2) the interest at stake in an assisted suicide case involves an “important” and “intimate” choice which \textit{per se} warrants constitutional protection.\textsuperscript{160} Importantly, both Circuits employed a constitutional analysis that deemphasized the historical status of assisted suicide and focused on what the Ninth Circuit has claimed is a “rational continuum” between the asserted interest in assisted suicide and other recognized interests.\textsuperscript{161} In doing so, the Circuits subscribed to an approach touted by Justice Brennan in \textit{Michael H. v. Gerald D.}\textsuperscript{162} as the “better” alternative to a strictly historical analysis:

[T]o describe the issue in this case as whether the relationship existing between Michael and Victoria “has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection” is to reinvent the wheel. The better approach — indeed, the one commanded by our prior cases and by common sense — is to ask whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected to be deemed an aspect of “liberty” as well.\textsuperscript{163}

The \textit{Michael H.} case is revealing for several reasons. A plurality of the Court in the case (consisting of Justices Scalia, Rehnquist, O’Connor and Kennedy) concluded that history and tradition provided sufficient bases for rejecting the liberty claim before the Court. Thus, according to the plurality, a biological father lacked a cognizable liberty interest in seeking visitation rights to a child whom he acknowledged was his, but whose mother was married to another man both at the time the child was conceived and at the time the biological father sought visitation rights.\textsuperscript{164}

\begin{itemize}
\item \textsuperscript{159} \textit{Compassion in Dying}, 79 F.3d 790 (referring numerous times to purported liberty interest in choosing the manner and timing of death necessary for carrying out the “wish to hasten death”); \textit{Quill}, 80 F.3d at 727 (recognizing a purported state-created “right . . . to hasten death upon proper proof of [the] desire to do so”).
\item \textsuperscript{160} \textit{Compassion in Dying}, 79 F.3d at 813 (holding that a “common thread” in cases recognizing liberty interests “is that they involve decisions that are highly personal and intimate, as well as of great importance to the individual”); \textit{Id.} at 850 (Beezer, J., dissenting) (asserting that nonfundamental “liberty protects not only choices that are personal, intimate, and central to autonomy, but also that are central to personal dignity”); \textit{Quill}, 80 F.3d at 730 (referring to “right to define [one’s] own concept of existence, of meaning, of the universe, and of the mystery of human life”) (quoting \textit{Planned Parenthood v. Casey}, 505 U.S. 833, 851 (1992)); \textit{Id.} at 741 (Calabresi, J., concurring in result) (referring to interest in determining “crucial life and death choices”).
\item \textsuperscript{161} \textit{Compassion in Dying}, 79 F.3d at 800 (citing \textit{Poe v. Ullman}, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).
\item \textsuperscript{162} 491 U.S. 110 (1989).
\item \textsuperscript{163} \textit{Id.} at 142 (Brennan, J., dissenting).
\item \textsuperscript{164} \textit{Id.} at 127.
\end{itemize}
Of particular interest in the *Michael H.* case is the plurality's refusal to acknowledge a "rational continuum" between the rights of biological fathers recognized in prior cases, and the interest asserted by the biological father in *Michael H.* A concurring opinion by Justice Stevens and the dissenting opinions of Justices Brennan and White (joined by Justices Marshall and Blackmun) contended that the principles enunciated in the prior cases provided an inexorable basis for extending constitutional protection to the father's claim in that case.  

The plurality disagreed and pointed to what it considered to be a critical distinction between the *Michael H.* case and prior cases. In the *Michael H.* case, the child was already a member of a "unitary" family involving the child's mother and her husband. Both the mother and her husband were willing to provide for the child, whereas in prior cases the child's mother was unmarried. The Court found that this distinctive fact situation created a conflict of interest between the child's biological father and the wife's husband, who also desired to maintain a parental relationship consistent with the marital relationship. Pursuant to this conflict, the plurality asserted that the Constitution did not preclude the states from choosing against "an adulterous natural father" in favor of "a marital father."  

The *Michael H.* case is highly relevant to the assisted suicide cases currently before the Supreme Court. While the dissenters in *Michael H.* have since left the Court, Justice Stevens remains and the issue is whether the new members of the Court will follow the "historical approach" or the "rational continuum approach." Further, Justices O'Connor and Kennedy have expressed their discomfort with applying a purely historical analysis in all cases and have endorsed the "rational continuum" analysis in other contexts. Thus the question of whether

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165. *Id.* at 133 (Stevens, J., concurring in the judgment) (explaining that he "would not foreclose the possibility that a constitutionally protected relationship" existed in this case but finding that denial of visitation rights was justified on other grounds); *Id.* at 142-43 (Brennan, J., dissenting) (concluding that "these cases have produced a unifying theme: although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so"); *Id.* at 157-58 (White, J., dissenting) (contending that "[t]he basic principle enunciated in the Court's unwed father cases is that an unwed father who has demonstrated a sufficient commitment to his paternity by way of personal, financial, or custodial responsibilities has a protected liberty interest in a relationship with his child").

166. *Id.* at 127 (plurality opinion).


168. *See id.* at 132 (O'Connor & Kennedy, JJ., concurring) (indicating the desire not to "foreclose the unanticipated by the prior imposition of a single mode of historical analysis" and citing to Justice Harlan's reference to liberty as a "rational continuum" in *Poe v.*
assisted suicide is constitutionally protected may turn on whether a majority of the Court recognizes a constitutionally relevant distinction between assisted suicide and other rights currently protected.

Consequently, while a critique of the lower court rulings based on historical practices within the states will be necessary, standing alone this critique may not be sufficiently persuasive to the Court. In addition, the mere assertion that the Court previously declined to recognize fundamental rights beyond marriage, procreation, education, etc., fails to account for the possibility that in certain cases, a majority of the Court may be inclined to expand the scope of prior Supreme Court decisions. To uphold laws banning assisted suicide, the Court will have to be persuaded that constitutionally significant distinctions lie between assisted suicide and other constitutionally cognizable interests (whether fundamental or "non-fundamental").169 The following two sections examine the claim that a rational continuum particularly exists between assisted suicide and medical decisionmaking, and generally exists between other protected interests of an important and personal nature.

A. Is There a Rational Continuum Between Assisted Suicide and Medical Decisionmaking?

In essence, the Ninth and Second Circuits have contended that physician-assisted suicide, which incorporates the purposive intent to hasten death, is "close enough"7 to medical decisions having the effect or creating the risk of hastening death as to deserve the same constitutional protection. For example, the Ninth Circuit characterized the interest at stake in assisted suicide cases in terms of the "end and not the means" of assisted suicide.171 The court reasoned that if the end of other constitutionally cognizable interests is the fulfillment of an individual's death wish, then an interest in physician-prescribed lethal overdoses should be recognized as well, even though the means of carrying out an individual's wish to die differs from other forms of hastened death.172 Prior Supreme Court decisions recognizing an individual's interest in rejecting or accepting medical treatment, however, omit any reference to hastened death as an objec-

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169. See Compassion in Dying, 79 F.3d at 850 (rejecting claim of "fundamental" right to assisted suicide but recognizing "nonfundamental" right).
170. Michael H., 491 U.S. at 142 (Brennan, J., dissenting).
171. Compassion in Dying, 79 F.3d at 801.
172. Id.
tive, and refer to the risk of death only when describing the limits of such interests.

For example, in *Cruzan v. Director, Missouri Department of Health*, the Supreme Court characterized the right of an individual to refuse treatment as an interest in avoiding bodily intrusions. Nowhere did the majority of the Court in that case refer to death as the objective of exercising this interest. If death was an essential objective of the individual, then presumably the interest would be cognizable only in circumstances where the individual’s death would result from the removal of care. Clearly, this is not the case. Such an interest is cognizable even in circumstances where death is not at issue. If the refusal implicates “dramatic consequences” such as death, however, then this will “inform the inquiry as to whether the deprivation of that interest is constitutionally permissible,” and thereby provides the potential basis for limiting its exercise.

Moreover, in *Whalen v. Roe* the Supreme Court recognized “the right to decide independently, with the advice of [a] physician, to acquire and to use needed medication.” Yet the Court found that such a right is limited by the states’ unquestioned authority to “prohibit entirely the use of particular [dangerous] drugs.” Additionally, the Court found that the right is limited by the states’ power to impose dosage limits on the use of otherwise legitimate drugs, particularly to minimize the risk of injury or death to an individual caused by the ingestion of unsafe


174. The majority opinion in *Cruzan* referred to “[the] notion of bodily integrity”, “battery”, “assault”, “bodily invasion”, “avoiding the unwanted administration [of] drugs”, “the forcible injection of medication into a nonconsenting person’s body”, and “the forced administration of life-sustaining medical treatment” as critical elements of an interest in refusing treatment. *Id.* at 278-79. Concurring, Justice O’Connor identified similar factors: “The liberty interest in refusing medical treatment flows from decisions involving the State’s invasions into the body”; it implicates “state incursions into the body”; “imposition of medical treatment . . . necessarily involves some form of restraint and intrusion”; a person undergoing unwanted treatment may feel like a “captive of the machinery”; and feeding tubes “involve some degree of intrusion and restraint”. *Id.* at 287-89 (O’Connor, J., concurring). Even Justice Brennan in a dissent characterized the interest in similar terms: “The right to be free from unwanted medical attention is a right to evaluate the potential benefit of treatment and its possible consequences according to one’s own values and to make a personal decision whether to subject oneself to the intrusion.” *Id.* at 309 (Brennan, J., dissenting).

175. See *id.* at 278 (referring to Supreme Court cases recognizing the right of an individual to refuse the intrusive administration of antipsychotic medication and behavior modification treatment).

176. *Id.* at 279.


178. *Id.* at 603.
amounts. Far from being the goal of an interest in medical decisionmaking, the risk of injury or death instead provides the very basis for narrowing the interest.

In actuality, assisted suicide is no closer in nature to an individual’s refusal of medical treatment or acceptance of pain relief than it is to other constitutional interests that in some cases may knowingly, but not purposely, risk death. For example, the right to free speech may knowingly lead to hastened death when it is exercised by a politically unpopular minority group in a socially volatile situation. Additionally, other rights such as the right to vote (when exercised in the midst of a community’s vehement hostility towards the voter), the right to travel (when exercised by freedom riders journeying through a racially polarized district), or the right to an education (when exercised by minorities seeking access to a racially segregated school), may also implicate the same grave risks.

Under the reasoning of the Ninth and Second Circuits, the rights discussed above and others would have to be equated to assisted suicide because in certain situations exercise of these rights may have the same effect. Given the foreseeability of death caused by exercising a constitutional freedom in highly charged circumstances, one would have to impute a desire to die to a desire to speak, vote, travel and receive an education in volatile situations. This demonstrates the absurdity of such reasoning, and disproves the existence of any “rational continuum” between an interest having as its objective the taking of life and other interests that may on occasion create the risk of death but nevertheless lack a lethal purpose.

179. Id. See also Barsky v. Board of Regents, 347 U.S. 442, 449 (1954) (holding that “It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there . . . . The state’s discretion in that field extends naturally to the regulation of all professions concerned with health.”); Minnesota ex. rel. Whipple v. Martinson, 256 U.S. 41, 45 (1921) (noting: “There can be no question of the authority of the state in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs . . . .”); Robinson v. California, 370 U.S. 660, 664 (1962) (providing: “A state might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics with its borders.”); Rutherford v. United States, 616 F.2d 455, 457 (10th Cir. 1980), cert. denied, 449 U.S. 937 (1980) (asserting: “It is apparent in the context with which we are here concerned that the decision by the patient whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health”).

180. See Planned Parenthood v. Casey, 505 U.S. 833, 867 (1992) (providing: “Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence”).
B. Unlike Any Other Constitutionally Protected Decision Deemed “Intimate” or “Important” to an Individual, Assisted Suicide Purposely Expels the Victim Irretrievably From Society and Thus Lacks Any Conceivable Connection to the Purposes and Privileges of Constitutional Citizenship

Both the Ninth and Second Circuits referred to the Supreme Court’s decision in Planned Parenthood of Southeastern Pennsylvania v. Casey in support of their contention that assisted suicide must be constitutionally recognized because of its importance to an individual’s assessment of the concept of existence. Undoubtedly, the decision to take one’s own life implicates important personal concerns and, on that basis alone, might be considered identical in nature to other important personal interests already recognized under the Constitution. The Supreme Court has not, however, extended protection to every interest deemed to be intimate and personal, suggesting that these characteristics may be necessary but not sufficient conditions for constitutional recognition. For example, Justices O’Connor, Kennedy and Souter intimated in Casey that had the abortion issue come before them initially, they may have refused to recognize abortion as a protected liberty interest, notwithstanding its personal and intimate nature. Yet any apparent reservations these Justices might have had in reaffirming the constitutional status of abortion were overcome as they recognized that women had come to rely upon abortion not just as a means of avoiding the “suffering” of childbirth and motherhood, but also as a means of determining their “place in society.” According to the Justices, they could not:

[R]efuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.

182. Compassion in Dying, 79 F.3d at 801; Quill, 80 F.3d at 730.
183. Casey, 505 U.S. at 853, 851.
184. Id. at 852 (emphasis added).
185. Id. at 856 (emphasis added); see also id. at 928 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (providing: “Because motherhood has a dramatic impact on a woman’s educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life.”).
Unlike abortion, assisted suicide lacks any connection to an individual's ability to participate in society. Instead, assisted suicide purposefully extinguishes life and thereby prevents an individual from subsequently engaging in any economic or social endeavors. Assisted suicide is an attack on life rather than a way of life. In this critical respect assisted suicide differs from all other interests recognized as constitutional rights. As a result, no constitutional purpose is served by recognizing an interest so profoundly antisocial and nihilistic in character.

The following discussion asserts that the Fourteenth Amendment recognizes only those interests deemed important to the enjoyment of life within society, regardless of their importance from an individual's perspective. Constitutional freedoms thus enhance individual existence and provide an opportunity to participate within society. Constitutional freedoms have nothing to do with an individual's purposeful expulsion by death from all social interaction whatsoever.

1. The Constitution Looks to the Nexus Between the Asserted Interest and the Freedom to Participate in Society, and Not Solely to the Interest's Importance to an Individual

The Supreme Court has "reject[ed] at the outset the notion that any grievous loss visited upon a person by the State is sufficient to invoke the . . . protections of the Due Process Clause." 186 Regardless of "the 'weight' of the individual's interest" (its importance to the individual), its cognizability as a protected liberty will depend on its "nature," that is, its relation to the "'whole domain of social and economic fact'." 187 Thus, no matter how important an interest is to an individual, it will not be recognized under the Fourteenth Amendment unless it facilitates the individual's ability to "engage in any of the common occupations of life".188

188. See Roth, 408 U.S. at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). In Roth, the Supreme Court observed that "[u]ndeniably, the respondent's re-employment prospects were of major concern to him — concern that we surely cannot say was insignificant." Id. at 570. Nevertheless, the "interest in holding a teaching job at a state university, simpliciter" (Id. at 575 n.14) did not rise to the level of a constitutional right when an individual "simply is not rehired in one job but remains as free as before to seek another." Id. at 575. Similarly, in Smith, the Supreme Court held that a child's interest in avoiding "grievous loss" from the "disruption of stable relationships" with the child's foster family "does not, in and of itself, implicate the due process guarantee." Smith, 431 U.S. at 840. The Court declined to resolve the question of whether the child's
For example, the Court found in *Morrissey v. Brewer* that a parolee's interest in parole was constitutionally cognizable because:

[It] enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to *return to society* and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments to normal life.

We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others.

... [Thus] the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.

Consequently, regardless of whatever interest in death an individual may assert in the face of pain and suffering, its importance to the individual would not, under the Court's traditional analysis, guarantee its protection as a constitutional right. An interest must be connected in some way to constitutional purposes having everything to do with life and little, if anything, to do with death.

2. The "Right to Be Let Alone", "Autonomy" and "Free Choice" Must Also Be Understood in Reference to Life and Social Opportunity, Not Death

The Ninth Circuit asserted in *Compassion in Dying* that its "profound respect" for "the right to be let alone," a "noble objective" of the Constitution, led it to recognize assisted suicide as a protected interest. Similarly, the Second Circuit claimed in
Quill that New York case law recognized a "right to bring on death" supposedly based on "our system of free government [that cherishes] notions of individual autonomy and free choice" and that affords "the greatest possible protection [to one's] autonomy and freedom from unwanted interference with the furtherance of [one's] own desires". Thus these courts have suggested that assisted suicide is somehow connected to the purposes and privileges of constitutional citizenship because intentional death represents the ultimate in "being left alone" as a result of free choice.

The Original Article disputed the argument that the Constitution promotes unrestrained autonomy as a "noble objective." Of interest here is the related argument that the "right to be left alone" is so broad as to encompass the complete alienation from life and society.

A survey of constitutionally cognizable interests reveals the close relationship between each interest and the capacity to exist, move freely, and form attachments in society. Thus, "marriage and procreation are fundamental to the very existence and survival of the race." The right to raise a family encompasses "the high duty[ ] to recognize and prepare [children] for additional obligations" in life. The right of parents to train and direct their children is essential because "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." The right to an education, "where the state has undertaken to provide it," provides "the very foundation of good citizenship" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Finally, the Constitution recognizes an interest in employment because it pertains to an individual's "standing and associations in [the] community" and capacity to earn a livelihood.

In view of the nexus between these interests and one's social existence, a "right to be left alone" must be understood as an

193. Quill, 80 F.3d at 727 (quoting Rivers v. Katz, 495 N.E.2d 337, 337 (1986)).
194. Marzen, supra note 1, at 13-14.
interest in moving about freely in society without arbitrary or unjustified interference from the government, and not as an interest in precluding all social interaction whatsoever by killing one's self. Even if citizens are free to pursue a way of life "apart from the conventional 'mainstream'," thereby "isolating themselves from all worldly influences,"\(^2\) this interest is distinguishable from an interest in no life at all. The former concerns the preservation of life and freedom within society; in the case of monasticism, for example, the preservation of "important values of the civilization."\(^2\) The latter concerns only a form of alienation and self-destruction which directly opposes societal values. Thus, on the basis of this analysis, a rational continuum between assisted suicide and other constitutionally cognizable interests is nonexistent.

IV. DOES THE CONSTITUTION MANDATE A SPECIAL EXEMPTION FROM A UNIFORM CRIMINAL LAW BANNING ASSISTED SUICIDE?

Assuming for the sake of argument that the Constitution recognizes an interest in hastening one's death, a proposition clearly opposed to history and tradition, then to what extent should such an interest be protected from state interference? Neither the Ninth nor Second Circuit proposed an unlimited right to purposely hasten death or precluded the states from interfering with such an interest in at least some cases. Both courts opined that in a variety of circumstances, the states' interests in prohibiting assisted suicide as a means of hastening death may outweigh the individual interest in obtaining such assistance. However, both courts concluded that the Fourteenth Amendment required the states to exempt from criminal punishment those physicians who assist in the suicides of the terminally ill by prescribing lethal dosages of medication.\(^2\)

Does the Constitution mandate the creation of a special exemption whenever a uniform criminal ban happens to burden the exercise of a protected right? The following section examines an important Supreme Court decision addressing this question.


\(^{201}\) Id. at 223.

\(^{202}\) Compassion in Dying, 79 F.3d at 836-38; Quill, 80 F.3d at 729-31.
A. The Supreme Court Has Refused to Grant Special Exemptions From Generally Applicable Criminal Laws Even When Such Laws Burden Constitutionally Cognizable Interests

In Employment Division, Department of Human Resources of Oregon v. Smith, the Supreme Court signalled that constitutional exemptions would rarely be granted under the Fourteenth Amendment. The Court rejected the claim that the religious use of peyote should be exempted from a "neutral, generally applicable" criminal law banning the possession of dangerous drugs. According to the Court, "if prohibiting the exercise of religion... is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision", then the Constitution "has not been offended."

The Court's analysis applies with equal force to laws banning suicide assistance. If, as conceded by the Ninth and Second Circuits, such laws are constitutional as applied to suicide assistance by nonphysicians, to forms of assistance other than a lethal prescription, or to the assisted suicides of individuals who are not terminally ill, then the Constitution likewise should not be offended by the ban's application to physician-prescribed lethal overdoses to the terminally ill.

A general ban on assisted suicide has as its object the prohibition of any criminal assistance with another's suicide, regardless of whether a physician is involved, drugs are used, or the victim is already dying. Thus it does not single out the assisted suicides of the terminally ill who seek to exercise a purported interest in hastening death by requesting a physician's prescription of a lethal drug overdose. Nor is it aimed at interfering with all the means by which an interest in hastening death might be exercised, since it only encompasses assistance and does not reach self-suicide. In prohibiting all forms of suicide assistance, but not all forms of hastening death, it only incidentally burdens the limited constitutional interest created by the Ninth and Second Circuits. Thus it is no different from a uniform ban on the pos-


204. While the claim before the Court was decided on First Amendment grounds, it was brought under the Fourteenth Amendment which recognizes First Amendment claims against the states. Id. at 877-78.

205. Id. at 890.

206. Id. Justice O'Connor also rejected the claim before the Court but declined to join the Court's reasoning. Justice O'Connor favored the incorporation of a balancing test to weigh the state interests in enforcing a law across-the-board against the individual interest in a special exemption. See infra notes 215-217 and accompanying text.
session of drugs that prohibits the use of drugs for religious purposes, but does not prohibit all religious expression.

The plaintiffs in Smith argued that even if an "exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors," the Court nevertheless should follow its precedents in other religious freedom cases by weighing the state's interests in enforcing a uniform ban against the individual's motivation for violating the ban. Under such a balancing test, an exemption should be granted whenever the state interest is less than compelling and the individual interest touches on a core religious concern.

The Court rejected this approach because it would "produce here . . . a private right to ignore generally applicable laws" that "contradicts both constitutional tradition and common sense." Nor would an inquiry to determine whether the personal interest is central to one's religion meaningfully limit such a purported right. According to the Court:

It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith?

The Court doubted "that the appropriate occasions for [creating constitutional exemptions] can be discerned by the courts." As a result, while:

Leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in[,] . . . that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weight the social importance of all laws against the centrality of all religious beliefs.

In its Compassion in Dying decision, the Ninth Circuit contended that an individual's interest in suicide raises "issues of such profound spiritual importance" and "deeply affect[s a] right

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207. Id. at 882-83.
208. Smith, 494 U.S. at 883.
209. Id. at 885, 886. Thus, requiring the states to demonstrate a compelling justification for uniformly enforcing their laws whenever an individual complains of interference with religious conduct "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind". Id. at 888.
210. Id. at 886-87.
211. Id. at 890.
212. Id.
to determine [one's] own destiny".\textsuperscript{213} If that is true, then the concerns raised by the majority in \textit{Smith} are relevant to the assisted suicide context. By what criteria could a federal court distinguish between claims brought by the terminally ill, the nonterminally ill but long-suffering, the financially distressed, or the anxious beset with fears of losing control over their destiny? If an individual asserts that access to physician-assisted suicide is central to his or her personal notion of dignity, then judges have no more constitutional basis for assessing the claim's comparative merits than they would for evaluating a religious freedom claim.\textsuperscript{214}

Nevertheless, the court's rejection of a balancing test in \textit{Smith} has proven controversial and has spurred congressional legislation restoring the test to religious freedom cases.\textsuperscript{215} However, Justice O'Connor's concurrence demonstrates that even when a balancing test is applied, a favorable outcome for those seeking the exemption is far from guaranteed.

Justice O'Connor argued that generally applicable laws burdening religious interests must be subjected to a balancing test that takes into account the comparative weights of the opposing interests. She nevertheless concluded that the State's interest in policing dangerous drugs justified a uniform ban that burdened the religious use of peyote. She acknowledged that the criminal prohibition of peyote "places a severe burden on the ability of respondents to freely exercise their religion."\textsuperscript{216} Yet, she found that the State's interest in the uniform application of its drug laws outweighed any individual interest in a religious-based "selective exemption".\textsuperscript{217}

According to Justice O'Connor:

Although the question is close, I would conclude that uniform application of Oregon's criminal prohibition is "essential to accomplish" . . . its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance. Oregon's criminal prohibition represents that State's judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous. Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very

\textsuperscript{213} Compassion in Dying, 801 F.3d at 801.

\textsuperscript{214} For an excellent discussion on this point, see Thomas J. Marzen, "Out, Out Brief Candle": Constitutionally Prescribed Suicide for the Terminally Ill, 21 HASTINGS CONST. L. Q. 799 (1994).


\textsuperscript{216} Smith, 494 U.S. at 903 (O'Connor, J., concurring in the judgment).

\textsuperscript{217} Id. at 903-905.
purpose of the laws that prohibit them. . . . Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon's stated interest in preventing any possession of peyote.\textsuperscript{218}

Justice O'Connor's concurrence only bolsters the proposition that the states may choose to ban suicide assistance in all cases in response to the legitimate concern that even "a little bit" is too much. On one side of the scale, the states have no less interest in the uniform application of its homicide laws than in banning the possession of dangerous drugs. On the other side of the scale, an unenumerated interest in purposely hastening the deaths of terminally ill persons by physician-prescribed lethal overdoses would hardly be more weighty than the enumerated right to freely exercise one's religion. It would be anomalous, therefore, if uniform laws imposing a severe burden on religious practices were constitutional while uniform laws designed to protect life itself and interfering with only one means of hastening death were unconstitutional.

Regardless of the approach taken, the Court has rejected individual claims of a right to a constitutional exemption in almost every case.\textsuperscript{219} While at times the Court has employed a balancing test to exempt individuals from civil laws governing unemployment compensation or school attendance,\textsuperscript{220} it has never on this basis invalidated "an across-the-board criminal prohibition on a particular form of conduct."\textsuperscript{221}

Thus the Ninth Circuit observed with good reason that "[d]eclaring a statute unconstitutional as applied to members of a group is atypical."\textsuperscript{222} Yet this is exactly what the Ninth and Second Circuits did in the assisted suicide cases. The next section examines the courts' rationale for exempting physician-prescribed lethal overdoses from the assisted suicide bans of Washington and New York.

\textsuperscript{218} \textit{Id.} at 905-06 (citations omitted).
\textsuperscript{219} The Court has mandated religious exemptions only in cases involving civil laws which already avail procedures for granting individual exemptions on other grounds, or which give rise to "hybrid" claims of interference with both religious and other protected interests. \textit{Id.} at 881-82.
\textsuperscript{220} \textit{Id.} (citing various cases).
\textsuperscript{221} \textit{Smith}, at 884-85 (emphasis added).
\textsuperscript{222} \textit{Compassion in Dying}, 79 F.3d at 798 n.9.
B. A Special Exemption From Laws Banning Assisted Suicide Based on Personal Preference or Life Expectancy Lacks Any Constitutional Basis

The Ninth and Second Circuits asserted expressly or by implication that an exemption from uniformly enforced laws against assisted suicide is constitutionally mandated in certain cases for at least five reasons. First, the states had purportedly less interest in prohibiting consensual killing than they did in prohibiting nonconsensual killing. Second, they had purportedly less interest in preventing suicides resulting from the exercise of “competent” choices concerning the timing and manner of death than they did in preventing “irrational” suicides motivated by depression or duress. Third, they had purportedly less interest in preventing the suicides of persons desiring to avoid pain and suffering than they did in preventing suicides for other reasons. Fourth, the states had purportedly less interest in preventing suicides resulting from physician-prescribed lethal overdoses than they did in preventing suicides from other “less dignified” means. Finally, they had purportedly less interest in preventing the suicides of persons who will soon die of other causes than they did in preventing the suicides of persons who otherwise will live for a long time.

223. *Id.* at 820 (asserting that state’s interest in protecting life is “dramatically diminished” when victim does “not wish to pursue life”); *Quill*, at 833 (drawing “critical line” between voluntary and involuntary “termination” of life); *Quill* 80 F.3d at 730 (asserting that individual interest overrides state interest in protecting life when patient seeks death).

224. *Compassion in Dying*, 79 F.3d at 820 (holding that “the state has a clear interest in preventing anyone, no matter what age, from taking his own life in a fit of desperation, depression, or loneliness or as a result of any other problem, physical or psychological, which can be significantly ameliorated”); *Quill*, 80 F.3d at 730 (holding that the states “may establish rules and procedures to assure that all choices are free of [psychological] pressure [to consent to death]”).

225. *Compassion in Dying*, 79 F.3d at 800 (holding that the states had an interest in avoiding “the senseless loss of a life ended prematurely” that did not apply to persons who ended their lives “in order to avoid debilitating pain and a humiliating death” because in such circumstances “suicide is not senseless, and death does not come too early”); *Quill*, 80 F.3d at 730 (holding that the state has no “business . . . requiring the continuation of agony when the result is imminent and inevitable”).

226. Neither court expressly contrasted suicide by physician-prescribed lethal overdose with other forms of suicide such as by gunshot, hanging or jumping off a bridge, but impliedly distinguish between the two categories of suicide by emphasizing the physician’s role in assisting suicide as assuring a “dignified” suicide. *Compassion in Dying*, 79 F.3d at 832 (noting that suicides attempted without physician oversight would likely lead to miscalculation causing “even more painful and lingering death”); *Quill*, 80 F.3d at 731 n.4 (opining that states may assert an interest in assuring the competence of prescribing physicians).

227. *Compassion in Dying*, 79 F.3d at 821 (observing that while “some people who contemplate suicide can be restored to a state of physical and mental well-being” persons
Is consensual homicide different as a constitutional matter from other forms of homicide when it is chosen by a competent, terminally ill victim, and is motivated by a desire to avoid pain, suffering, and the "undignified" natural processes of dying? Nothing in the Constitution suggests this conclusion, and the Supreme Court's decisions in *Paris Adult Theatre I v. Slaton* (concerning consensual decisions based on personal preference) and *United States v. Rutherford* (concerning protection of persons with terminal conditions) provide, to the contrary, compelling bases for rejecting such an assertion.

1. Consent and Personal Preference

In *Slaton*, the Court rejected a claim that "obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only." The Court acknowledged that its prior cases recognized a compelling state interest in shielding juveniles and nonconsenting adults from pornographic exposure. These cases did not, however, establish a line of demarcation between consent and lack of consent relative to the scope or strength of the state's interest. According to the Court, "there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby." Thus not only may the state assert an interest in thwarting consensual behavior "to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition," but also a state may assert an interest in cases not involving these protected individuals. If the consensual activity "debase[s] and distort[s]" social relationships and adversely affects the "tone of society," then the activity is subject to a heightened state interest in its prevention regardless of the willingness of individuals to engage in the activity.

The *Slaton* analysis is particularly applicable to activities deemed to be criminal because the criminal law transcends individual preference. All crimes against another involve:

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with terminal conditions "cannot be cured"); *Quill*, 80 F.3d at 729-30 (holding that state has no interest "in requiring the prolongation of a life that is all but ended").

228. 413 U.S. 49 (1972).
231. *Id.* at 57-58.
232. *Id.* at 64.
233. *Id.* at 58-60.
234. *Id.* at 63.
Three parties . . . one being the state, which for its own good does not suffer the others to deal on a basis of contract with the public. It has been stated, and perhaps rightly so, that the only true consent to a criminal act is that of the community. This is so because these acts . . . , even if done in private, have an impingement (whether direct or indirect) upon the community at large in that the very doing of them may tend to encourage their repetition and so to undermine public morals . . . . To allow an otherwise criminal act to go unpunished because of the victim's consent would not only threaten the security of our society but also might tend to detract from the force of the moral principles underlying the criminal law.236

Thus, as Justice Harlan recognized in Poe v. Ullman:237

To attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. . . . If we had a case before us which required us to decide simply, and in abstraction, whether the moral judgment implicit in the application of [statutes governing euthanasia and suicide, among other subjects] was a sound one, the very controversial nature of these questions would, I think, require us to hesitate long before concluding that the Constitution precluded [the states] from choosing . . . among these various views.238

The Court in Slaton noted that the "state statute books are replete with constitutionally unchallenged laws against . . . suicide [and similar criminal activities] even though these crimes may only directly involve 'consenting adults'."239 This assertion persuaded the Court to reject the proposition "that conduct which directly involves 'consenting adults' only has, for that sole reason, a special claim to constitutional protection."240 Instead, "[t]he States have the power make a morally neutral judgment that [certain consensual activities tend] to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States' 'right . . . to maintain a decent society'."241

The parameters of the specific exemption claimed in Compassion in Dying and Quill add nothing to the analysis. An agreement by consenting adults that direct killing by physician-prescribed medication is appropriate to avoid pain, suffering and "undignified dying" rests solely on personal preference. Others may prefer to avoid long-term disability, loneliness or a host of other human experiences. Individuals may prefer to be assisted

238. Id. at 546, 547.
239. Slaton, 413 U.S. at 68 n.15.
240. Id. at 68.
241. Id. at 69 (citation omitted).
by spouse or by firing squad. Individuals may prefer death by noose, sword or gunshot. To hold as a constitutional matter that the states have less interest in preventing suicide assistance because the victim happens to prefer a physician-prescribed lethal overdose is to hold without justification that the states have less interest in preventing suicide assistance whenever the assistance provided comports with the victim's preferences.

In a different context, the Supreme Court has observed:

A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations . . . [T]he very concept of ordered liberty precludes allowing every person to make his own standards of conduct in which society as a whole has important interests. [Thus personal preference based on secular considerations will be given no constitutional weight.]

If an unrestrained "way of life" poses such a threat to ordered liberty, then the unrestrained operation of personal preferences in choosing a "way of death" poses an equal if not greater threat. In addition, as the following section indicates, when the Constitution takes life expectancy into account as a measure under the

242. In a letter to the New York Times, one individual objected to imposing gun controls in the suicide context, by stating the following:

[What if a terminally ill person decides to end his suffering privately by using a gun (as Ernest Hemingway did) instead of seeking the assistance of, say, Dr. Jack Kevorkian? Do we condemn the act merely because of the method? . . . While we all want protection from crime, do we equally want to be deprived of all control over how and when we die?


243. Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972). The Court distinguished a "way of life" based on secular preferences from one based on religious belief. Yoder, 406 U.S. at 215-16. "Philosophical and personal" choices would "not rise to the demands of the Religion Clauses". Id. at 216. While Justice Stevens has claimed that one's perspective on death depends on one's "faith," Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 343 (1990) (Stevens, J., dissenting), it would be difficult for proponents of assisted suicide to satisfy the Court's stringent test for determining whether the belief at issue is for constitutional purposes religious in nature. In Yoder, the Court found that the Amish viewpoint opposing the public education of their own children was a religious belief because it stemmed from biblical directives, was practiced for over three hundred years, and was part of the strictly enforced rules of an identifiable church community. Yoder, 406 U.S. at 216-19. Conversely, beliefs about assisted suicide most likely would fail such a test. Opinion surveys have indicated that support for assisted suicide is significantly more likely to be found among those who reject any religious affiliation or are hostile to the religious beliefs of their church on the matter, and who base their support on philosophical grounds or personal ethics. See, e.g., Ezekiel J. Emanuel et al., Euthanasia and Physician-Assisted Suicide: Attitudes and Experiences of Oncology Patients, Oncologists, and the Public, 347 LANCET 1805, 1808 (1996); Larry Seidlitz et al., Attitudes of Older People Toward Suicide and Assisted Suicide: An Analysis of Gallup Poll Findings, 43 J. AM. GERIATRICS SOC'Y 993, 995 (1995); Jerald G. Bachman et al., Attitudes of Michigan Physicians and the Public Toward Legalizing Physician-Assisted Suicide and Voluntary Euthanasia, 334 NEW ENG. J. MED. 303, 308 (1996).
law of the value of an individual’s life, the threat to ordered liberty is further increased.

2. Terminal Condition

The Supreme Court’s decision in United States v. Rutherford informs the debate over whether the Constitution mandates an exemption from assisted suicide laws for the assistance of persons with terminal conditions. The Court considered whether a statutory definition of unsafe drugs reasonably applied to drugs used by persons with terminal cancer. Although the Court declined to address the constitutional question of whether a terminally ill person’s right to privacy mandated an exemption from a law banning the interstate transfer of unsafe drugs, the Court’s definitional analysis supports the denial of such an exemption.

The Court referred to a balancing process employed by the enforcement agency to determine whether a drug was safe or unsafe. According to the Court, “the Commissioner [of the Food and Drug Administration] generally considers a drug safe when the expected therapeutic gain justifies the risk entailed by its use.” The lower courts had contended that given the inevitability of proximate death from natural causes, the quantitative significance of a drug’s risk of death to persons with terminal conditions was either inherently de minimis or at the very least difficult to assess. By implication, the drug-induced deaths of individuals expectedly near death bore a tenuous and perhaps nonexistent relationship to the “prophylactic purpose” of a law designed to protect life.

The Court rejected this line of reasoning by asserting: “For the terminally ill, as for anyone else, a drug is unsafe if its potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit.” On one hand, therefore, “safety considerations have relevance for terminal cancer patients”, while on the other hand, by implication, the natural life expectancy of a patient is irrelevant to the balance between the governmental

244. 442 U.S. 544 (1979).
245. See supra notes 146-56 and accompanying text.
246. After remanding the case to the Tenth Circuit to address the constitutional claim, which the Tenth Circuit denied, the Supreme Court refused to review the case. Rutherford v. United States, 616 F.2d 455 (10th Cir.), cert. denied, 449 U.S. 937 (1980).
247. Rutherford, 442 U.S. at 555.
249. Rutherford, 442 U.S. at 554.
250. Id. at 555-56 (emphasis added).
251. Id.
interest in preventing drug-induced deaths and the patient’s interest in taking the drug for his or her own purposes.

As a result, the prevention of drug-induced deaths among the terminally ill, as for anyone else, reasonably furthers the protective purposes of a law banning assisted suicide. The balance between state and private interests does not shift under the Constitution according to the victim’s natural life expectancy. Thus, the terminally ill are similarly situated to everyone else in relation to the states’ interest in protecting life. For the Court to hold otherwise, the Court would have to abandon its unanimous decision in *Rutherford*.

Other factors militate against a condition-based exemption as well. In the religious freedom context, “the Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause.”252 In the assisted suicide context, an exemption from criminal prosecution for homicide based on the condition of the crime victim may violate the Equal Protection Clause.

The constitutional guarantee of equal protection is offended by “considerations . . . deemed to reflect prejudice and apathy — a view that those in the burdened class are not as worthy or deserving as others.”253 Penalizing suicide assistance in cases involving nonterminally ill victims while exempting from punishment those who assist in the suicides of the terminally ill creates an egregious double standard. The law would deter those who would assist in the suicides of the nonterminally ill while it would encourage or at least not impede the suicide assistance of the terminally ill. Such an exemption would apply not because the suicide victim desires to hasten death, but because the suicide victim desiring death has a natural life expectancy of short duration. The discriminatory inference is unavoidable: The lives of the terminally ill who desire to die are not as worthy or deserving of protection under the law as the lives of the nonterminally ill who also desire to die. Assisting members of the latter group would continue to constitute a grave public offense while assisting the suicide of the former would not.

Such a constitutionally-imposed dichotomy would be unprecedented. Even African-American slaves were protected against homicide under the pre-Thirteenth and Fourteenth Amendment laws of the several states.254 The criminal law, especially the

254. *See* 80 C.J.S. *Slaves* § 8(b) (1955); Fields v. Tennessee, 10 Tenn. 156 (2 Yer. 141) (1829) (providing: “the offence of manslaughter, when a negro or mulatto slave is the
homicide code, provides the basic foundation of a free society in pursuit of ordered liberty. The criminal law thereby assumes a critical role in the preservation and protection of human life itself, and criminal law's uniform application to all persons expresses, as no other state action can, the government's recognition of the equality of lives under the law. Carving out a constitutionally-imposed exception into the homicide code based on the victim's terminal condition or any other equally irrelevant personal characteristic prohibits the uniform protection of the inalienable right to life that is fundamental to the scheme of ordered liberty. As such, a condition-based exemption to homicide conflicts with the Equal Protection Clause.

Moreover, the Court observed in *Rutherford* that "with diseases such as cancer it is often impossible to identify a patient as terminally ill except in retrospect."255 Individuals considered terminally ill "may have unexpected remissions and may respond to conventional treatment."256 Thus, an exemption will likely erroneously include "patients characterized as 'terminal' who could actually be helped by legitimate therapy."257 In addition, the Court emphasized that while the ruling below was "limited to Laetrile, its reasoning cannot be so readily confined. To accept the proposition that [the Act has] no relevance for terminal patients is to deny the Commissioner's authority over all drugs, however toxic or ineffectual, for such individuals."258 All these factors provided additional justification for "protect[ing] the terminally ill, no less than other patients."259

In the religious freedom context, the Court has disfavored the constitutional creation of religious exemptions because of the wide variety of religious preferences expressed in our society. To recognize an exemption for any one particular religious practice "would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs."260 The same concern arises in the assisted suicide context, given the

subject of it, from our criminal code, exists by the common law; because it is the unlawful killing of a human being").

256. *Id.* at 557.
257. *Id.*
258. *Id.*
259. *Id.* at 558. Though the Court did not advert to it, the inherent expansiveness of a proximity-of-death exemption also is relevant. A "limited" exemption for persons with "terminal conditions" would invite a continuous flow of court challenges seeking to expand the definition to encompass a variety of conditions. See Marzen, "Out, Out Brief Candle, supra note 214, at 814-19.
medical difficulty in accurately predicting when an individual will die from natural causes, the inherently expansive nature of the definition of "terminal condition," the infinite varieties of killing methods that an individual might deem essential to personal dignity, and the essential similarity of assisted suicide to other forms of homicide such as murder.

Consequently, a legal accommodation will be impossible to maintain between policies upholding the sanctity and equality of life and the fundamentally divergent claim to an exemption licensing the taking of life in particular cases. Neither society nor the federal courts can reasonably expect to "weigh" such profoundly opposed interests, such as to reach some stabilizing "balance," constitutional or otherwise, between the protection of life and the purposive destruction of life. Instead, a condition-based exemption to the homicide code not only courts anarchy, it embraces it.

V. CONSTITUTIONALIZING ASSISTED SUICIDE: CAN WE LIVE WITH THE CONSEQUENCES?

The Original Article predicted that numerous negative consequences would occur if the Supreme Court recognized assisted suicide as a constitutional right. Such a ruling would render the uniform, generally applicable homicide laws in every state constitutionally suspect. A constitutional right to assisted suicide would place in question the "operative presumption" in the civil law that persons desiring suicide are mentally ill. Additionally, such a right would provide the basis for subsequent rulings extending the right to minors and to persons with mentally incapacitating conditions. Its application would be difficult to limit to persons with terminal conditions or to a narrow range of motives.

A constitutional right to assisted suicide would also encourage persons who suffer from depression and other mental disorders to seek suicide assistance. It would increase the socioeconomic and internal pressures that induce suicide among certain vulnerable populations; those encountering stress from financial or occupational difficulties, those experiencing pain, suffering, physical illness, grief, prejudice or oppression, and those endur-

261. Marzen et. al, supra note 1, at 100-47.
262. Id. at 101.
263. Id.
264. Id. at 101-02.
265. Id. at 104-07.
266. Marzen et. al., supra note 1, at 107-27.
ing the ups and downs of adolescence.\textsuperscript{267} Finally, the right would render suicide more socially acceptable, thereby increasing the risk of cluster or mass suicides, and coerced or manipulated suicides.\textsuperscript{268}

The Ninth and Second Circuits dismissed such concerns after concluding that the supposed benefits of hastened death outweighed the risks.\textsuperscript{269} Both courts placed undue confidence in the capability of procedural safeguards and physicians to oversee and weed out the “good” from the tragic suicides.\textsuperscript{270} Finally, the courts even endorsed some of the undesirable consequences cited in the Original Article.\textsuperscript{271}

If the Supreme Court affirms the Ninth and Second Circuits, then it will do more than expose countless individuals to what many consider to be a terrible social policy with its attendant threats of increased harm. The Court would establish as a constitutional objective the securing of an individual’s right to the purposeful taking of life. Thus, the Court would constitutionally guarantee an individual’s access to lethal measures when necessary to avoid life of an undesired quality. Moreover, by exempting those charged with a criminal offense in cases involving a victim with a terminal diagnosis, the Court would institute a system of constitutional apartheid based on physical condition. These are consequences of a unique and unprecedented magnitude because they imperil ordered liberty itself.\textsuperscript{272}

From the time that the defining principles of our form of self-government were only ruminations in the minds of influential

\textsuperscript{267} Id. at 127-39.
\textsuperscript{268} Id. at 139-46.
\textsuperscript{269} Compassion in Dying, 79 F.3d at 836-37; Quill, 80 F.3d at 729-30.
\textsuperscript{270} Compassion in Dying, 79 F.3d at 832-34; Quill, 80 F.3d at 730.
\textsuperscript{271} For example, the Ninth Circuit considered assisted suicide to be the appropriate response to the victims’ “concern for the economic welfare of their loved ones” especially when “the costs of protracted health care can be so exorbitant.” Compassion in Dying, 79 F.3d at 826. The Ninth Circuit also concluded that “a decision of a duly appointed surrogate decisionmaker is for all legal purposes the decision of the patient himself,” (Id. at 832 n.120), and espoused assisted suicide through surrogate decision specifically for patients disabled by persistent unconsciousness. Id. at 816. The Second Circuit provided the foundation for legalizing assisted suicide in a broad range of cases by equating assisted suicide with the refusal of treatment and holding, in effect, that when the refusal of treatment is authorized by law, then assisted suicide should be authorized as well. Quill, 80 F.3d at 729.
\textsuperscript{272} As already discussed supra, the Court has never before recognized a personal interest because of its death hastening effect, but has only extended constitutional protection to those interests bearing some nexus to existence and societal participation while at the same time limiting such interests to the extent they create the risk of injury or death. In addition, the Court has refused to recognize “any constitutional guarantee of access to dwellings of a particular quality” because “the Constitution does not provide judicial remedies for every social and economic ill.” Linsey v. Normet, 405 U.S. 56, 74 (1972). A decision to affirm the Ninth and Second Circuits would reverse these precedents.
philosophers such as John Locke, the duty "not to quit [one's] station willfully" has served and continues to serve a critical function. Observing the duty of noninterference with respect to one's own life as well as the lives of others corresponds to what Locke describes as the "great and chief end" of those who "seek out and [are] willing to join in society," which is "the mutual preservation of their lives." As a result, whole segments of society have come to rely on the law's commitment to the equal protection of life. Vulnerable persons can be particularly secure knowing that authorities will treat their depression-induced request for a lethal prescription as a call for help in living and not in ending life. Vulnerable persons may also depend on the law's deterrent effect to shield them from the misguided compassion of others willing to provide suicide assistance.

The law's commitment to life assures vulnerable persons and those who care for them that the increasingly insistent "suggestions" emanating from the private sector to "get out of the way" will not be woven into the very fabric of the criminal and civil laws. It is unsettling enough that juries in prosecutions for assisted suicide have ignored the law by letting the likes of Jack Kevorkian go free based not on the lack of the defendant's culpability, but on the victim's duress-induced consent and disabling condition.

A constitutional ruling in favor of the assisted suicide claims would "occasion . . . an unprecedented upheaval" in the laws of all fifty states, in social and professional mores, and in the hearts of the vulnerable who at times have valued themselves only because the law values them. The underlying rationale of such a ruling, that the lives of some are not as worthy as the lives of others, would insinuate itself into policies at every level that happen to apply to those whose desires are suicidal or whose death is proximate. As a result, a ruling in favor of assisted

274. Id. at 350.
276. For example, authorities in San Francisco recently initiated a program to thwart suicide attempts on the Golden Gate Bridge. Rather than building additional physical barriers, the bridge's board of directors authorized anti-suicide patrols to rove the walkways and intervene in potential suicides. The patrols will be trained by the San Francisco Suicide Prevention agency in techniques for counselling people with suicidal impulses. If as a matter of constitutional law the lives of suicidal persons with terminal conditions have no value, then the suicide patrols would have no basis for preventing persons with terminal conditions from exercising their constitutional right to hasten their deaths by jumping from the bridge. See Carey Goldberg, Golden Gate Bridge to Start Patrols to Prevent Suicides, N.Y. TIMES, Feb. 25, 1996, at 10. See also Diane Gianelli, State Seeks to Deny Transplants to Death Row Inmates, AM. MED. NEWS, Feb. 26, 1996, at
suicide would be construed by the vulnerable as a constitutional invitation to end their lives.\textsuperscript{277}

For these reasons, the law should not abandon individuals to their suicidal urges under the solicitous guise of protecting individual rights. Instead:

The deliberate taking of a human life should remain a crime. This rejection of a change in the law to permit doctors to intervene to end a person's life is not just a subordination of individual well-being to social policy. It is instead, an affirmation of the supreme value of the individual, no matter how worthless and hopeless that individual may feel.\textsuperscript{278}

The rulings in \textit{Compassion in Dying} and \textit{Quill} have challenged the core values of our societal covenant by granting to physicians a license to engage in homicide. Based on theories absent in our traditional legal and social schemes, the Second and Ninth Circuits have crossed a line that previously described freedom's limits, and not its essence. These courts have called into question our historical rejection of suicide assistance and other forms of consensual killing and would, if upheld, effectively reverse numerous constitutional precedents in a range of other fields. The Supreme Court should decline the invitation to reduce the Constitution to a suicide pact. Instead, the Court should uphold the uniform bans against assisted suicide at issue in these cases because they preserve ordered liberty and affirm the equal worth of all persons under the law.

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\textsuperscript{5} (reporting on proposed legislation in state of Washington that would deny organ transplants for prisoners on death row; one supporter of the bill "maintains that it is futile to give death row inmates organ transplants 'because, if the penalty phase is carried out, you're going to execute him a couple of months later'").

\textsuperscript{277} Nat Hentoff, \textit{Disabled Group Yells We're "Not Dead Yet": Activists Worry Legalizing Assisted Suicide Spells Doom for the Handicapped}, \textit{Det. News}, July 28, 1996, at 5B (indicating that disability activists are concerned that Ninth and Second Circuit decisions will sweep persons with disabling conditions into assisted suicide by reinforcing notion that life with a terminal disability is worse than death); Mary Johnson, \textit{Voluntary Euthanasia: The Next Frontier?}, 8 \textit{ISSUES IN LAW \& MED.} 343 (1992); Paul Steven Miller, \textit{the Impact of Assisted Suicide on Persons with Disabilities — Is It a Right Without Freedom?}, 9 \textit{ISSUES IN LAW \& MED.} 47 (1993); Paul K. Longmore, \textit{Elizabeth Bouvia, Assisted Suicide and Social Prejudice}, 3 \textit{ISSUES IN LAW \& MED.} 141 (1987).
