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Euthanasia: A Constitutionally Protected Peaceful Death

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EUTHANASIA: A CONSTITUTIONALLY PROTECTED PEACEFUL DEATH

I. INTRODUCTION

Today, people live much longer than they did in the past.[1] Advances in medical technology have enabled doctors to practice preventive medicine and cure more illnesses,[2] but a number of incurable diseases and debilitating afflictions still remain.[3] The "help" that the medical profession can extend to individuals with such diseases is limited to keeping the person alive and functioning in a sense.[4] These individuals, however, usually must endure pain, severe incapacity, and indignity.[5] As a result, more people have been choosing to "die with dignity"[6] with the active assistance of a physician.[7] This practice commonly is referred to as "euthanasia" or "mercy killing."[8] As the number of these assisted

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1. The average life expectancy of males at birth has increased from 46.3 years in 1900 to 71.8 years in 1989, while that of females has increased from 48.3 years in 1900 to 78.5 years in 1989. AMERICAN COUNCIL OF LIFE INS., 1990 LIFE INSURANCE FACT BOOK 107 (1991).

2. *See* Lawrence K. Altman, *More Physicians Broach Forbidden Subject of Euthanasia*, N.Y. TIMES, Mar. 12, 1991, at C3; Robert L. Geltzer et al., *National Conference on Birth, Death, and Law*, 29 JURIMETRICS J. 403 (1989).

3. For example, cancer, which causes a great number of deaths, is characterized by the uncontrolled multiplication of abnormal cells in the body. An involvement of a vital organ in the cancerous cells can lead to the patient's death. Poor cure success rates for a number of cancers are due to late detection. Any possible treatment for any form of cancer, however, has its disadvantages and does not always cure the disease. 2 NEW ENCYCLOPAEDIA BRITANNICA 795-96 (15th ed. 1985). Alzheimer's disease, a degenerative disease affecting the nerve cells, is thought to be the largest single cause of senile dementia. Some of its effects are speech disturbance and severe memory impairment leading to the progressive loss of mental faculties. 1 *id.* at 306. Another debilitating disease is Parkinson's disease, which produces severe physical handicaps while leaving the senses and the intellect intact. This disease, which may progress over a period of 10 to 20 years, leaves the individual helpless to care for himself/herself but with the mental capacity to understand his/her helplessness. 9 *id.* at 160.

4. *See* Altman, *supra* note 2, at C3.

5. *Id.*

6. *See* B.D. Colen, *California Is Voting on the Right to Die*, N.Y. NEWSDAY, Oct. 29, 1992, at 23.

7. *See infra* notes 80-94 and accompanying text.

8. Thomas H. Sharp, Jr. & Thomas H. Crofts, Jr., *Death With Dignity—The Physician's Civil Liability*, 27 BAYLOR L. REV. 86 (1975). Throughout this note, the terms "assisted suicide" and "euthanasia" are used interchangeably. Because "mercy

suicides increases, state legislatures and courts will be pressured to take action.[9]

The United States Supreme Court recently has taken a step toward addressing this issue with its decision in *Cruzan v. Director, Missouri Department of Health*.[10] The Court held that, under the Fourteenth Amendment, a competent adult has a constitutionally protected liberty interest in refusing unwanted medical treatment.[11] Allowing people to refuse treatment is, in effect, allowing people to choose death. This death, however, could be slow and painful. The question therefore is whether this constitutionally protected liberty interest should be extended to allow people to receive active assistance in dying.

Part II of this note begins with a brief history of euthanasia throughout the world. Part III analyzes the development of patients' rights in the United States under the common law and the U.S. Constitution. Part IV applies these rights to assisted suicide[12] and argues that the Fourteenth Amendment liberty interest protected in *Cruzan* should be broadly construed to apply to euthanasia.[13] Part IV also weighs this individual liberty interest against the four state interests identified by the Court in *Cruzan* and contends that, in some cases, the individual's liberty interest should outweigh the interests of the State so that the individual can die in the least painful way.[14] Part V suggests that to protect the States' interests, only physicians should be allowed to assist in patient suicides. In so doing, the patient's liberty interest should protect physicians against criminal charges.[15] Part VI of this note offers suggestions for the establishment of euthanasia procedures to protect the interests of both the State and the individual.

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killing" normally denotes a choice by someone other than the patient, however, this note does not use "mercy killing" interchangeably with "suicide" or "euthanasia."

9. *See, e.g.*, Michael Abramowitz, *Kevorkian Aids in 2 More Suicides: Michigan Governor Signs Bill Making Practice a Felony*, WASH. POST, Dec. 16, 1992, at A2 (discussing the Michigan legislation signed by Gov. John Engler making assisted suicide a felony punishable by up to four years in prison and a $2,000 fine); *see also* Colen, *supra* note 6, at 23 (examining the debate surrounding proposed legislation in California and Washington that would have legalized physician-assisted suicide if it had passed).

10. 497 U.S. 261 (1990).

11. *See id.* at 279 n.7.

12. *See infra* part IV.A-B.

13. *See infra* part IV.B.

14. *See infra* part IV.C.

15. *See infra* part V.

II. HISTORY OF EUTHANASIA

The concept of euthanasia,[16] in its many forms, is not confined to the present day.[17] From the ancient Greek and Roman eras to today, the attitudes of philosophers and legislators toward euthanasia have run the gamut from outright acceptance to condemnation.[18] This history establishes the backdrop for the current debate in the United States on the status of active euthanasia.[19]

Although ancient Greek and Roman philosophers generally rejected the idea of suicide,[20] euthanasia (meaning "a good death") met with wider acceptance.[21] Thus, suicide, as a means of achieving a good death, was more acceptable.[22] For example, in his *Republic*, the Greek philosopher Plato favored suicide as a remedy for unbearable pain.[23] Aristotle, another Greek philosopher, also endorsed this practice in his *Politics*.[24]

The Stoics of Rome, however, were the greatest ancient proponents of euthanasia.[25] Stoicism embraced the belief that freedom was based on never surrendering the deliberate will to passion or compulsion.[26] By committing suicide, individuals were exercising their deliberate will to control their deaths. The Stoics's philosophy justified suicide, even glorified it, because of this desire for control.[27] After the Roman

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16. Euthanasia is derived from the Greek "eu" meaning "good," and "thanatos" meaning "death." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 429 (1990) [hereinafter WEBSTER'S].

17. *See infra* notes 20-54 and accompanying text.

18. *See infra* notes 20-94 and accompanying text.

19. For a more in-depth discussion of the historical background, see Raanan Gillon, *Suicide and Voluntary Euthanasia: Historical Perspective*, *in* EUTHANASIA AND THE RIGHT TO DEATH 173 (A.B. Downing ed., 1969); Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1 (1985).

20. Gillon, *supra* note 19, at 174.

21. *Id.*

22. DEREK HUMPHRY & ANN WICKETT, THE RIGHT TO DIE 4-5 (1986).

23. 10 ENCYCLOPEDIA AMERICANA 711 (Int'l ed. 1985) [hereinafter AMERICANA].

24. *Id.* (illustrating euthanasia's long history in theory and practice).

25. Gillon, *supra* note 19, at 174-76.

26. *Id.* at 174-75.

27. *See* Marzen et al., *supra* note 19, at 25; *see also* James Gutman, *Death: Western Philosophical Thought*, *in* 1 ENCYCLOPEDIA OF BIOETHICS 235, 238-39 (1978) [hereinafter BIOETHICS] (outlining tenets of Stoicism including the Stoics' approval of suicide).

conquest of Greece, suicide acquired this exalted status throughout Greece as well.[28]

The views of the medical profession were consistent with the philosophical views of the time. For example, Roman medical history has recorded many instances in which doctors gave poison to patients who were dying in pain.[29] But the Greco-Roman philosophers' recognition of this "freedom to leave"[30] and the practices of the medical profession were inconsistent with the legal status of suicide.[31] Roman law specifically forbade suicide and imposed a penalty.[32] Notwithstanding this prohibition, Stoic attitudes toward suicide prevailed throughout Greece and Rome for the first two centuries after the death of Christ.[33]

The practice of euthanasia was not limited to the Greek and Roman cultures.[34] For example, in both India and Sardinia, a form of euthanasia was practiced.[35] Euthanasia in these societies was forced on the elderly against their will,[36] and was therefore diametrically opposed to the Greco-Roman idea of a good death. The ancient Celts, on the other hand, practiced voluntary euthanasia.[37] The prevalence of euthanasia in Celtic society was based on the belief that if a person died of old age or disease, the person would go to hell.[38] If one committed suicide before they "spoilt," however, the person would go to heaven.[39] Consequently, suicide was often committed to achieve a good death.[40]

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28. *See* Gillon, *supra* note 19, at 175.

29. *Id.* at 176.

30. Gerald J. Gruman, *Death and Dying: Euthanasia and Sustaining Life—Historical Perspectives*, *in* 1 BIOETHICS, *supra* note 27, at 261.

31. *Id.*

32. Marzen et al., *supra* note 19, at 26. Although it did not prove to be a strong deterrent, the penalty resulted in the forfeiture of the suicides' goods and in the confiscation of the suicides' estates, so that they could not pass their possessions on to their heirs. *Id.*

33. *Id.*

34. 10 AMERICANA, *supra* note 23, at 711.

35. *Id.*

36. *Id.* Euthanasia can also mean ending the lives of those no longer considered useful. This was the type of euthanasia practiced by these societies. Although in India it was customary to throw old people into a river, in ancient Sardinia old men were clubbed to death by their own sons. *Id.*

37. *See* Gillon, *supra* note 19, at 182.

38. *Id.*

39. *Id.*

40. *Id.*

The acceptance of euthanasia and suicide rapidly diminished with the spread of Christianity.[41] The major reason for this decreased acceptance was the Sixth Commandment, which orders, "Thou shalt not kill."[42] As interpreted by St. Augustine, this commandment also embodied a prohibition against suicide or self-murder.[43] As a result of this interpretation, numerous councils of the Roman Catholic Church imposed sanctions on suicide.[44] Civil penalties against suicide also existed.[45] The Church's strong stance against suicide, and the accompanying religious and civil sanctions, reduced the incidence of suicide to negligible numbers.[46]

This opposition to suicide remained strong until the seventeenth century when scattered works questioning the ban on suicide were published.[47] In the eighteenth century, the controversy over suicide escalated.[48] The Church continued to strongly oppose suicide[49] while the philosophers debated the issue.[50] Because of the penalties related to suicide, some philosophers who opposed suicide believed that coroner juries should be merciful when determining the cause of death in apparent suicide cases.[51] During the same period, physicians were focusing on alleviating pain to make death as humane and natural as possible.[52] Although religious and legal prohibitions prevented physicians from going

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41. *See* Deborah A. Wainey, Note, *Active Voluntary Euthanasia: The Ultimate Act of Care for the Dying*, 37 CLEV. ST. L. REV. 645, 648 (1989) (stating that "[t]he effect [of Christianity] on the suicide rate was immense").

42. *Exodus* 20:13.

43. *See* Marzen et al., *supra* note 19, at 27.

44. *See id.* at 28-29. "The Council of Arles (452 A.D.), for example, incorporated the Roman law's forfeiture of a suicide's estate. The Council of Braga (563 A.D.) banned religious rites for suicides. The Antisidor Council (590 A.D.) provided penalties for suicide, and the Synod of Nimes (1284 A.D.) denied suicides Christian burial." *Id.*

45. *See* Wainey, *supra* note 41, at 648.

46. *See* Marzen et al., *supra* note 19, at 29.

47. *See, e.g.*, JOHN DONNE, BIATHANATOS 36 (The Facsimile Text Society 1930) (arguing that sometimes suicide is justified and approved by God).

48. *See* Wainey, *supra* note 41, at 649.

49. *See* Marzen et al., *supra* note 19, at 39.

50. *Id.* at 38.

51. *Id.* at 39. The coroner juries were responsible for determining the cause of death. John Jortion, an opponent of suicide, believed that these juries were correct in avoiding suicide as the cause of death. *Id.*

52. *See* Wainey, *supra* note 41, at 649.

further than this in rendering assistance to dying patients,[53] the idea of an improved death prevailed throughout the nineteenth century.[54]

Today, in the United States, euthanasia is receiving varying degrees of support from both private and public groups.[55] In particular, the medical profession shows the diversity of the views on euthanasia.[56] While several physicians recently have participated in assisted suicide,[57] numerous articles and letters discussing the pros and cons of euthanasia have been published in medical journals.[58]

A number of associations strongly advocate euthanasia and assisted suicide.[59] These groups, including the National Hemlock Society, believe that terminally ill patients should have the right to decide when to die.[60] Derek Humphry, the founder of the National Hemlock Society, has published two books on the subject.[61] *Final Exit*, the second of his two books, is a suicide manual.[62] Another group, Washington Citizens for Death With Dignity, backed a recent initiative that would have legalized assisted suicide and euthanasia in the State of Washington.[63] Although the

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53. *Id.*

54. *See* Gillon, *supra* note 19, at 183.

55. *See infra* notes 56-94 and accompanying text.

56. *See, e.g.*, BRUCE HILTON, FIRST DO NO HARM 98-99 (1991) (discussing central issues surrounding bioethical dilemmas such as genetic engineering, euthanasia, the use of humans as guinea pigs, and other issues).

57. *See infra* notes 80-93 and accompanying text.

58. *See, e.g.*, Marcia Angell, *Prisoners of Technology: The Case of Nancy Cruzan*, 322 NEW ENG. J. MED. 1226 (1990); Robert W. Carton, *The Road to Euthanasia*, 263 JAMA 2221 (1990); Herbert S. Gross, Correspondence, Euthanasia Debate, 323 NEW ENG. J. MED. 1770 (1990); Peter A. Singer & Mark Siegler, *Euthanasia—A Critique*, 322 NEW ENG. J. MED. 1881 (1990); *see It's Over, Debbie*, 259 JAMA 272 (1988); *Letters on Physician Participation in Assisted Suicide*, 263 JAMA 1197 (1990); *Letters on Euthanasia*, LANCET, Feb. 17, 1990, at 414; *Letters on Euthanasia*, LANCET, Jan. 27, 1990, at 232; William Reichel & Arthur J. Dyck, *Euthanasia: A Contemporary Moral Quandary*, LANCET, Dec. 2, 1989, at 1321.

59. For example, the National Hemlock Society is a strong euthanasia supporter. Other groups include Americans Against Human Suffering and Washington Citizens for Death with Dignity. *See* ARTHUR S. BERGER & JOYCE BERGER, TO DIE OR NOT TO DIE? (1990).

60. *See* Timothy Egan, *"Her Mind Was Everything," Dead Woman's Husband Says*, N.Y. TIMES, June 6, 1990, at B6.

61. *See* DEREK HUMPHRY, FINAL EXIT (1991); DEREK HUMPHRY & ANN WICKETT, JEAN'S WAY (1992).

62. *See* Katrine Ames et al., *Last Rights*, NEWSWEEK, Aug 26, 1991, at 40.

63. *See* Isabel Wilkerson, *Opponents Weigh Action Against Doctor Who Aided Suicides*, N.Y. TIMES, Oct. 25, 1991, at A10.

initiative did not pass, it had very strong support from Washington citizens.[64]

Euthanasia is even beginning to receive some support from the general public. In a 1991 poll of 800 Americans, sixty-four percent said doctors should not be prosecuted for helping the terminally ill commit suicide.[65] News articles and editorials on euthanasia are also starting to appear in mainstream newspapers.[66]

At present, the status of euthanasia in the United States criminal-justice system is uncertain. Although suicide is not against the law,[67] assisting in a suicide is a crime in many states.[68] Assisted suicide or active euthanasia prosecutions, however, do not usually result in convictions.[69] For example, in June 1990, Bertram Harper of Loomis, Cal., traveled with his wife Virginia to Michigan so that he could assist

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64. *NBC Nightly News* (NBC television broadcast, Nov. 6, 1991). The initiative was defeated by a slim majority. Forty-six percent of the voters approved the initiative. Earl Ubell, *Should Death Be a Patient's Choice?*, PARADE MAG., Feb. 9, 1992, at 24.

65. *See* Rorie Sherman, *Bioethics Debate: Poll Reveals Attitudes on a Wide Range of Issues, from Criminal Liability for Pregnant Substance Abusers to Informing Patients of Physician's HIV Status*, NAT'L L.J., May 13, 1991, at 1.

66. *See, e.g.*, Altman, *supra* note 2; Ames et al., *supra* note 62; B.D. Colen, *Easing Towards Euthanasia*, N.Y. NEWSDAY, Nov. 5, 1991, at 61; Editorial, *Dealing Death or Mercy?*, N.Y. TIMES, Mar. 17, 1991, at E17; Yale Kasimar, *An Unraveling of Morality*, N.Y. TIMES, Nov. 5, 1991, at A25; Peter Steinfels, *Beliefs*, N.Y. TIMES, May 11, 1991, at A9; James Vorenberg, *Going Gently, with Dignity*, N.Y. TIMES, Nov. 5, 1991, at A25.

67. *See, e.g.*, KAN. STAT. ANN. § 21-3406 (1988) (reading that "[s]uicide is not now a crime in Kansas"); Catherine D. Shaffer, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 350 (1986) ("A survey of the criminal codes of the fifty states and three United States territories reveals that no jurisdiction defines suicide, by statute, as a criminal act.").

68. *See, e.g.*, ALASKA STAT. § 11.41.120 (1989); ARIZ. REV. STAT. ANN. § 13-1103 (1989); ARK. CODE ANN. § 10-104 (Michie 1987); CAL. PENAL CODE § 401 (West 1988); CONN. GEN. STAT. ANN. § 53a-56 (West 1958); DEL. CODE ANN. tit. 11, § 645 (1987 & Supp. 1990); FLA. STAT. ANN. § 782.08 (West 1992); KAN. STAT. ANN. § 21-3406 (1988); ME. REV. STAT. ANN. tit. 17-A, § 204 (West 1964); MINN. STAT. ANN. § 609.215 (West 1987); N.H. REV. STAT. ANN. § 630:4 (1986); N.J. STAT. ANN. § 2C:11-6 (West 1982); N.M. STAT. ANN. § 30-2-4 (Michie 1978); N.Y. PENAL LAW § 120.30 (McKinney 1987); OKLA. STAT. ANN. tit. 21, § 813 (West 1983); OR. REV. STAT. § 163.125 (1989); 18 PA. CONS. STAT. ANN. § 2505 (1983); P.R. LAWS ANN. tit. 33, § 4009 (1983); TEX. PENAL CODE ANN. § 22.08 (West 1989); V.I. CODE ANN. tit. 14, § 2141 (1964); WASH. REV. CODE ANN. § 9A.36.060 (West 1988); WIS. STAT. ANN. § 940.12 (West 1982).

69. *See* Timothy P. Brooks, Comment, State v. Forest: *Mercy Killing and Malice in North Carolina*, 66 N.C. L. REV. 1160, 1168-69 (1988).

her in committing suicide.[70] The Harpers chose Michigan because its law does not specifically forbid assisted suicide.[71] Virginia had been diagnosed with terminal breast and liver cancer[72] and, according to her daughter, had begun planning her suicide when her condition was first diagnosed.[73] After Virginia took tranquilizers, other medication, and alcohol, Bertram pulled a plastic bag over her head and secured it.[74] Bertram was charged with second-degree murder because the prosecution contended that Bertram crossed the line between assisting in suicide and murder when he pulled the bag over Virginia's head.[75] A jury acquitted him of all charges.[76] This leniency seems to be the current trend.[77]

Historically, judges and juries have been sympathetic to physicians involved in cases of assisted suicide.[78] Numerous cases involving doctors who have been indicted on a variety of homicide charges have resulted in acquittals due to a lack of proof of causation.[79] In June 1990, Dr. Jack Kevorkian connected his homemade suicide device[80] to a woman with Alzheimer's disease.[81] The woman, Janet Adkins, pushed a button on the

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70. *See Man Cleared of Murder in Aiding Wife's Suicide*, N.Y. TIMES, May 11, 1991, at A9 [hereinafter *Man Cleared*].

71. *Id.*

72. "Terminal illness has been defined as an illness expected to cause imminent death." Rebecca Morgan & Barbara Harty-Golder, *Constitutional Development of Judicial Criteria in Right-to-Die Cases: From Brain Dead to Persistent Vegetative State*, 23 WAKE FOREST L. REV. 721, 752 (1988).

73. *See Man Cleared*, *supra* note 70, at A9.

74. *Id.*

75. *Id.*

76. *Id.*

77. *See* Brooks, *supra* note 69, at 1168-69. Fifty-six cases of mercy-killing were reported between 1920 and 1985: 10 defendants were found guilty and imprisoned; 20 received suspended sentences; 15 were acquitted; six were dismissed; and five were never brought to trial. *Id.* at 1168.

78. *See* Vicki L. Gilbreath, *The Right of the Terminally Ill to Die, with Assistance if Necessary*, 8 CRIM. JUST. J. 403, 414 n.74 (1986).

79. *Id.* at 415 n.74. For example, in 1950, due to lack of causation, Dr. Herman Sander was acquitted of first-degree murder for injecting air into the veins of a cancer patient. *Id.* In 1973, Dr. Vincent Montemarano raised the defense of lack of causation in his murder trial for injecting potassium chloride into the veins of a comatose throat-cancer patient. *Id.*

80. *See* Lisa Belkin, *Doctor Tells of First Death Using His Suicide Device*, N.Y. TIMES, June 6, 1990, at A1.

81. *See generally* WEBSTER'S, *supra* note 16, at 76 (defining Alzheimer's disease as a degenerative disease of the central nervous system characterized especially by premature senile mental deterioration).

machine[82] causing it to send a lethal combination of chemicals into her bloodstream.[83] Although Dr. Kevorkian was charged with murder in December 1990,[84] the charges were dismissed later that month due to lack of causation.[85] Dr. Kevorkian has since assisted in several more suicides.[86]

In a recent case, Dr. Timothy Quill, a New York physician, prescribed barbiturates for a leukemia patient[87] and told her how many pills were necessary to commit suicide.[88] The woman eventually used the pills to end her life.[89] Although assisting in a suicide is a felony in New York,[90] Dr. Quill was not charged with any crime.[91] In addition, a state medical panel ruled that his actions were ethically appropriate and that no misconduct charges should be filed.[92] From these cases, it appears that physician-assisted suicide is becoming more prevalent[93] and that more doctors are beginning to make their willingness to participate known to the public.[94]

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82. *See* Belkin, *supra* note 80.

83. *See Physician Charged With Aiding Suicide*, N.Y. L.J., Dec. 4, 1990, at 2.

84. *Id.*

85. *See* Charles Edward-Anderson, *Suicide Doctor Wins Dismissal*, A.B.A. J., Feb. 1991, at 22.

86. *See, e.g., Kevorkian Asks Judge to Dismiss A Charge of Assisting in a Suicide*, N.Y. TIMES, Aug. 28, 1993, at A7 (stating that in the past three years Dr. Kevorkian has helped 17 terminally ill individuals commit suicide).

87. *See* Timothy E. Quill, *Death and Dignity: A Case of Individualized Decision Making*, 324 New ENG. J. MED. 691, 692 (1991).

88. *See id.* at 693.

89. *See id.*

90. N.Y. PENAL LAW § 120.30 (McKinney 1987).

91. *See Doctor Not Charged in Patient's Suicide*, N.Y. TIMES, Apr. 13, 1991, at 28.

92. *Doctor Assists in Two More Suicides*, N.Y. TIMES, Oct. 24, 1991, at A1 [hereinafter *Doctor Assists*].

93. *See, e.g.*, Altman, *supra* note 2, at C3 (quoting a University of Minnesota ethicist as stating that "more than a dozen doctors have confided in him about their role in responding to requests from conscious, mentally clear patients to help them die"); B.D. Colen, *Return of "Dr. Death,"* N.Y. NEWSDAY, Oct. 25, 1991, at 5 (discussing euthanasia with a Harvard University psychiatrist who has interviewed 17 physicians who have participated in euthanasia).

94. *See, e.g., It's Over, Debbie*, *supra* note 58, at 272 (describing a lethal injection being given to a cancer patient by a resident); Quill, *supra* note 87, at 693 (explaining that a leukemia patient was told the necessary number of barbiturates needed to commit suicide).

III. DEVELOPMENT OF PATIENTS' RIGHTS

A. *Common-Law Basis*

The United States Supreme Court first recognized a common-law right to refuse medical treatment in *Union Pacific Railway Co. v. Botsford*.[95] In holding that a plaintiff could not be ordered to submit to a physical examination, the Court found that "[n]o right is held more sacred, or is more carefully guarded by common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[96] The right to refuse medical treatment is drawn from the common-law doctrine of informed consent,[97] which requires a physician to inform a patient about the risks, alternatives, and possible outcomes of a suggested treatment.[98] This doctrine was recognized in *Schloendorff v. Society of the New York Hospital*,[99] in which Judge Cardozo stated that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages."[100] In the United States, courts deciding cases involving patients' rights relied on this doctrine until the New Jersey Supreme Court's decision in *In re Quinlan*.[101]

B. *Constitutional Authority*

1. Application of the Right to Privacy

Before *In re Quinlan* is examined, an analysis of constitutional authority is necessary. The United States Constitution does not expressly

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95. 141 U.S. 250 (1891).

96. *Id.* at 251.

97. *See* Patrick N. Leduc, Comment, Cruzan v. Director, Missouri Department of Health *and the Right to Die: Where Should the Line Be Drawn?*, 14 AM. J. TRIAL ADVOC. 643, 648 (1991).

98. *See id.*

99. 105 N.E. 92 (N.Y. 1914).

100. *Id.* at 93.

101. 355 A.2d 647 (N.J.), *cert. denied*, 429 U.S. 922 (1976); *see infra* notes 113-27 and accompanying text.

mention patient rights. Lower courts faced with this issue[102] have had to infer patient rights from Supreme Court decisions on related issues.

The Court's decisions that are most applicable to this issue deal with the right to privacy. For example, in 1965 the Court, in *Griswold v. Connecticut*,[103] held that the marital relationship was protected within a zone of privacy derived from the penumbra of specific guarantees in the Bill of Rights.[104] The law at issue, which forbid the use of contraceptives, was struck down for being unnecessarily broad and for invading the individual's constitutionally protected right to privacy.[105]

Seven years later in *Eisenstadt v. Baird*,[106] the Court expanded this right to privacy to single people. In *Eisenstadt*, a lecturer appealed his conviction for giving an unmarried woman a contraceptive foam.[107] The Court held that the Massachusetts law forbidding the distribution of contraceptives to unmarried persons was unconstitutional because the constitutional right of privacy inheres to the individual, not the marital couple.[108] Justice Brennan stated that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free

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102. *See, e.g.*, Bouvia v. Superior Court, 225 Cal. Rptr. 297 (Ct. App. 1986) (request for removal of nasogastric feeding tube); Bartling v. Superior Court, 209 Cal. Rptr. 220 (Ct. App. 1984) (request to disconnect respirator), *aff'd sub nom.* Bartling v. Glendale Adventist Medical Ctr., 229 Cal. Rptr. 360 (1986); Severns v. Wilmington Medical Ctr., 421 A.2d 1334 (Del. 1980) (request to terminate life-sustaining treatment); Satz v. Perlmutter, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978) (request for termination of artificial life-sustaining device), *aff'd*, 379 So. 2d 359 (Fla. 1980); State v. McAfee, 385 S.E.2d 651 (Ga. 1989) (request for removal of ventilator); Norwood Hosp. v. Munoz, 564 N.E.2d 1017 (Mass. 1991) (refusal of blood transfusion); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977) (refusal of treatment for leukemia); *In re* Farrell, 529 A.2d 404 (N.J. 1987) (request for removal of life-sustaining respirator); *In re* Conroy, 486 A.2d 1209 (N.J. 1985) (request for removal of nasogastric feeding tube); State *ex rel.* White v. Narick, 292 S.E.2d 54 (Va. 1982) (request to terminate force-feeding); *In re* Colyer, 660 P.2d 738 (Wash. 1983) (request to terminate life-sustaining treatment).

103. 381 U.S. 479 (1965). Connecticut law forbade the use of any drug, medicinal article, or instrument for the purpose of preventing conception. Two directors of Planned Parenthood League were charged with assisting married persons in committing this offense. The Court held that the Connecticut law unconstitutionally intruded upon the right of marital privacy. *See id.* at 485-86.

104. *See id.* at 484-86.

105. *See id.*

106. 405 U.S. 438 (1972).

107. *See id.* at 440.

108. *See id.* at 453-54.

from unwarranted governmental intrusion in matters so fundamentally affecting a person as the decision whether to bear or beget a child."[109]

Then, in its 1973 decision, *Roe v. Wade*,[110] the Supreme Court relied on its previous decisions regarding contraceptives to decide a case involving a medical procedure.[111] The Court held that the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[112]

Further development in privacy rights took place in the state courts. In the landmark case of *In re Quinlan*,[113] the New Jersey Supreme Court applied the right to privacy to the termination of treatment being provided to Karen Quinlan, a young woman in a persistent vegetative state.[114] The case was initiated by the woman's father so that he could be appointed her guardian, which would allow him to order the discontinuance of the extraordinary measures keeping his daughter alive.[115] Relying on past Supreme Court decisions,[116] mainly *Griswold* and *Roe*, the court recognized an implicit constitutional right to privacy, existing in the "penumbra of specific guarantees of the Bill of Rights."[117] The court also reasoned that because this right extended to a woman's decision to terminate a pregnancy, it must also extend to her decision to decline medical treatment in proper cases.[118]

Although the court briefly mentioned the "claimed interests of the State"—the preservation of life and defense of the right of a physician to administer as he or she sees fit—which were competing against the rights of Ms. Quinlan, it did not give them much weight.[119] This was evidenced in its statement that "the State's interest . . . weakens and the

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109. *Id.* at 453.

110. 410 U.S. 113 (1973).

111. *See id.* at 152-53.

112. *Id.* at 153.

113. 355 A.2d 647 (N.J.), *cert. denied*, 429 U.S. 922 (1976). Joseph Quinlan, father of Karen Ann Quinlan, sought to be appointed his daughter's guardian. Because his daughter was in a chronic persistent vegetative state, he wished to be appointed her guardian so that he could order the discontinuation of all extraordinary medical procedures sustaining her life. The New Jersey Supreme Court held that Karen Quinlan had a constitutional right to privacy and that the best way to protect her right was to appoint her father as her guardian. *Id.* at 664.

114. *See id.* at 660-64.

115. *See id.* at 651.

116. *See id.* at 663.

117. *Id.* (citing *Griswold*, 381 U.S. at 484).

118. *See id.*

119. *Id.* at 663-64.

individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately, there comes a point at which the individual's rights overcome the State interest."[120]

Since the decision in *Quinlan*, the majority of courts in the United States that have considered this issue have relied on this constitutional right to privacy to decide cases involving either the refusal of treatment or the termination of life-sustaining treatment.[121] This right, however, is not absolute; it must be balanced against the States' interests in the individual.[122] The interests most consistently relied on by the States are: (1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) the prevention of suicide; and (4) the maintenance of the ethical integrity of the medical profession.[123] Although these interests have sometimes outweighed the individual's rights,[124] in the majority of the cases, the patient's right to privacy was greater than the State's interest in the individual.[125]

Euthanasia advocates have relied on this right to privacy in their crusade.[126] They believe that since the right to privacy includes the right

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120. *Id.* at 664.

121. *See, e.g.*, cases cited *supra* note 102.

122. *See, e.g.*, Bouvia v. Superior Court, 225 Cal. Rptr. 297, 304-05 (Ct. App. 1986); Bartling v. Superior Court, 209 Cal. Rptr. 220, 224-26 (Ct. App. 1984), *aff'd sub nom.* Bartling v. Glendale Adventist Medical Ctr., 229 Cal. Rptr. 360 (1986); Severns v. Wilmington Medical Ctr., 421 A.2d 1334, 1341-42 (Del. 1980); Satz v. Perlmutter, 362 So. 2d 160, 162-64 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980); State v. McAfee, 385 S.E.2d 651, 652 (Ga. 1989); Norwood Hosp. v. Munoz, 564 N.E.2d 1017, 1022-25 (Mass. 1991); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 424-27 (Mass. 1977); *In re* Farrell, 529 A.2d 404, 410-13 (N.J. 1987); *In re* Conroy, 486 A.2d 1209, 1223-26 (N.J. 1985); State *ex rel.* White v. Narick, 292 S.E.2d 54, 56-57 (Va. 1982); *In re* Colyer, 660 P.2d 738, 743-44 (Wash. 1983).

123. *See, e.g.*, *Saikewicz*, 370 N.E.2d at 425.

124. *See Narick*, 292 S.E.2d at 54 (finding that the State's interest outweighs prisoner's right to refuse force-feeding).

125. *See, e.g.*, *Bouvia*, 225 Cal. Rptr. at 305 (finding that the State's interest in preserving life is not greater than patient's right to refuse treatment); *Satz*, 362 So. 2d at 163 (finding that the patient's rights override State's interests); *McAfee*, 385 S.E.2d at 652 (explaining that the State conceded that its interest does not outweigh the patient's rights); *Saikewicz*, 370 N.E.2d at 435 (finding that the State's interests do not outweigh patient's rights); *In re* Farrell, 529 A.2d at 412-13 (finding that the patient's rights outweigh the State's interest); *In re* Colyer, 660 P.2d at 744 (finding that the State's interests do not outweigh patient's rights).

126. *See, e.g.*, Gilbreath, *supra* note 78, at 422-23.

to refuse medical treatment, it should be extended to include the right to die.[127]

2. Impact of *Cruzan v. Director, Missouri Department of Health*

The constitutional basis for refusing treatment has recently undergone a major change.[128] In 1990, the Supreme Court addressed the termination of treatment for the first time in *Cruzan v. Director, Missouri Department of Health*.[129] In this decision, the Court did not rely on the right to privacy.[130] Instead, from its prior decisions and the Fourteenth Amendment,[131] the Court inferred that "a competent person has a constitutionally protected *liberty* interest in refusing unwanted medical treatment."[132] Expressly disapproving of the reliance of many state courts on the right to privacy,[133] the Court determined that the liberty interest was more appropriate.[134] Although the Court did not rely on the state courts' analyses regarding the right to privacy, the Court used the same state interests to balance the liberty interest.[135] The Court held that even though the State may adopt restrictions to protect its interests,[136] the individual's liberty interest still exists.[137]

Although the Court relied on the liberty interest in deciding *Cruzan*,[138] neither *Cruzan* nor any other case relying on the liberty interest[139] clarified the distinction between the scope of a liberty interest

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127. *See id.*

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

129. *Id.*

130. *See id.* at 277-78.

131. U.S. CONST. amend. XIV (providing that "nor shall any State deprive any person of life, liberty, or property without due process of law").

132. *Cruzan*, 497 U.S. at 278 (emphasis added).

133. *See id.* at 279 n.7 ("Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest.").

134. *See id.*

135. *See id.* at 280-82.

136. *See id.*

137. *See id.*

138. *See id.*

139. *See, e.g.*, DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989) (explaining the scope of the liberty interest in the context of an individual abused by a parent); Bowers v. Hardwick, 478 U.S. 186 (1986) (refusing to extend the constitutional right to privacy to homosexuals in light of a liberty interest challenge to

and the scope of a constitutional right. The Court, however, in *DeShaney v. Winnebago County Department of Social Services*,[140] did explain the conditions under which a liberty interest and its protection are applicable. In *DeShaney*, the Court found that

> [i]n the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.[141]

In the case of euthanasia, the "deprivation of liberty" occurs when the State restrains a person from acting on his or her own decision regarding his or her life and death. The liberty interest expressed by the Court in *Cruzan* should allow a person the freedom to choose a peaceful death as long as the individual's interest outweighs the State's interests.

IV. ASSISTED SUICIDE

A. *Application of the Common Law*

Although it has not been relied on, a basis for assisted suicide can be found in the common law.[142] In *Union Pacific Railway Co. v. Botsford*,[143] the United States Supreme Court held that a person has a right to the control and possession of their person: a right to self-determination.[144] Every individual has this control over their own body.[145] A person who commits suicide is simply exercising this right. Because no mechanism exists by which suicide can be controlled, the State cannot regulate suicide.[146] Moreover, because receiving assistance in a

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Georgia's sodomy statute); Santosky v. Kramer, 455 U.S. 745 (1982) (holding that the liberty interest of natural parents in care, custody, and management of their natural child prevents the State from severing the rights of parents absent clear and convincing evidence of neglect).

140. *DeShaney*, 489 U.S. at 189.

141. *Id.* at 200.

142. *See supra* notes 95-101 and accompanying text.

143. 141 U.S. 250 (1891).

144. *See id.*

145. *See id.* at 250.

146. *See* Shaffer, *supra* note 67, at 350.

suicide is only strengthening the person's control over their own body, the State should not be able to prohibit such assistance.

B. *Application of the Constitutionally Protected Liberty Interest*

The liberty interest articulated in *Cruzan* provides a strong basis for the right to assisted suicide.[147] The *Cruzan* Court held that a competent individual has a constitutionally protected liberty interest in refusing medical treatment.[148] The refusal of medical treatment will in many cases result in death.[149] In *McKay v. Bergstedt*,[150] the Nevada Supreme Court relied on the *Cruzan* liberty interest to affirm the lower court's decision to allow the removal of a respirator from a quadriplegic dependent on artificial respiration.[151] The court balanced the State's interests against the interests of Kenneth Bergstedt and determined that they did not outweigh Mr. Bergstedt's liberty interest.[152] By permitting removal of the respirator, the court allowed Mr. Bergstedt to choose his death.

Thus, the liberty interest has been used to allow a person to choose death. This interest should be broadened because the term liberty should be broadly construed.[153] This freedom to choose death should be extended to extremely ill people with incurable diseases. It should not rest on the arbitrary factors of a respirator or a feeding tube.

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147. *See supra* notes 128-37 and accompanying text.

148. *See supra* notes 131-37 and accompanying text.

149. For example, a Georgia court, relying on the right of privacy, gave Larry McAfee permission to turn off his ventilator. Because the court knew this would result in his death, the court was allowing Mr. McAfee to choose death. *See* State v. McAfee, 385 S.E.2d 651, 651 (Ga. 1989); Charles Edward-Anderson, *The Right to Choose Death*, A.B.A. J., Dec. 1989, at 18. Similarly, a California court gave a patient the freedom to have her feeding tube removed. *See* Bouvia v. Superior Court, 225 Cal. Rptr. 297 (Ct. App. 1986). Although as of 1992 she had not yet exercised this right, if she does, she will starve to death—in effect committing suicide. *See id.*; Elizabeth Bouvia, *The Reluctant Survivor*, L.A. TIMES, Sept. 13, 1992, at E1; Alan A. Stone, *The Right to Die: New Problems for Law and Medicine and Psychiatry*, 37 EMORY L.J. 627, 641 (1988).

150. 801 P.2d 617 (Nev. 1990).

151. *See id.* at 622.

152. *See id.* at 622-28.

153. *See* Roe v. Wade, 410 U.S. 113, 168 (1973) (Stewart, J., concurring) ("'there can be no doubt that the meaning of "liberty" must be broadly construed indeed.'") (quoting Board of Regents v. Roth, 408 U.S. 564, 572 (1972)); *Id.* at 169 ("In the words of Mr. Justice Frankfurter, 'Great concepts like . . . "liberty" . . . were purposely left to gather meaning from experience.'") (quoting National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

Some commentators argue that because a person on a respirator or feeding tube will be dying as the result of an underlying illness, the right to choose death is acceptable.[154] The case of Elizabeth Bouvia,[155] however, seriously undermines this argument. Ms. Bouvia wanted to escape her physical handicaps (quadriplegia and severe cerebral palsy) but had no underlying illness to which she might succumb if all life support equipment were removed.[156] To liberate herself, Ms. Bouvia chose to starve herself by refusing the assistance she required to eat.[157] Because Ms. Bouvia's feeding tube had been inserted against her will, the California Court of Appeals ordered the removal of the feeding tube.[158] This is equivalent to the right to commit suicide.[159]

Others argue that this distinction between passive euthanasia, which allows a person to die a sometimes slow and painful death, and active euthanasia, which assists the person to a more peaceful death, is hypocritical.[160] In *McKay v. Bergstedt*,[161] the Court found that the Constitution gives a person on a respirator the right to choose death.[162] This right to choose should also be extended to those who are not on a respirator.

C. *Analysis of States' Interest in Assisted Suicide*

In cases involving the right to refuse treatment, or the termination of life-sustaining treatment, the courts have identified four primary state interests that must be balanced against the individual's rights.[163] Assisted suicide would also have to be evaluated against these interests because rights and liberty interests are not absolute.[164] Courts will ensure that any state interests are accounted for before an individual can exercise a

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154. *See, e.g.*, Gilbreath, *supra* note 78, at 421-22; Steven J. Wolhandler, Note, *Voluntary Active Euthanasia for the Terminally Ill and the Constitutional Right to Privacy*, 69 CORNELL L. REV. 363, 368-69 (1984).

155. *See* Bouvia v. Superior Court, 225 Cal. Rptr. 297, 300 (Ct. App. 1986).

156. *See id.*

157. *See id.* at 299.

158. *See id.*

159. *See* Stone, *supra* note 149, at 630.

160. *See, e.g.*, Wolhandler, *supra* note 154, at 369. The result is the same regardless of whether it involves an act of omission or an act of commission. Either act will result in the person's death. *Id.*

161. 801 P.2d 617 (Nev. 1990).

162. *See id.* at 632.

163. *See supra* notes 122-25 and accompanying text.

164. *See McKay*, 801 P.2d at 626.

right or liberty interest.[165] Usually, however, to outweigh the individual's rights, the State's interests must be compelling.[166]

1. Preservation of Life

The States' main interest is in the preservation of life.[167] This interest is greatest when the individual's affliction is curable. In *Superintendent of Belchertown State School v. Saikewicz*,[168] the court noted that the State's interest in individuals with a curable affliction can be distinguished from cases in which "the issue is not whether but when, for how long, and at what cost to the individual, that life may be briefly extended."[169] In *Bouvia v. Superior Court*,[170] the individual's quality of life in the time she had remaining was also an issue.[171] In its decision, the court noted:

> Does it matter if it be 15 to 20 years, 15 to 20 months, or 15 to 20 days, if such life has been physically destroyed and its quality, dignity and purpose gone? As in all matters lines must be drawn at some point, somewhere, but that decision must ultimately belong to the one whose life is in issue.[172]

Cases involving people such as Janet Adkins,[173] Virginia Harper,[174] Diane (surname not revealed by physician),[175] Marjorie Wantz,[176] and Sherry Miller[177] should be viewed in terms of whether

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165. *Id.* at 621; *See* Bouvia v. Superior Court, 225 Cal. Rptr. 297, 304 (Ct. App. 1986).

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

167. *See* Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 425-26 (Mass. 1977) (finding that the State's interests did not outweigh the individual's rights and approving the application for guardianship that would enable the guardian to refuse medical treatment for the patient).

168. *Id.* at 417.

169. *Id.* at 426.

170. 225 Cal. Rptr. 297 (Ct. App. 1986).

171. *See id.* at 304.

172. *Id.* at 305.

173. *See supra* notes 80-85 and accompanying text.

174. *See supra* notes 70-76 and accompanying text.

175. *See* Quill, *supra* note 87.

176. *See* Colen, *supra* note 93, at 5; *Doctor Assists*, *supra* note 92, at A1; Wilkerson, *supra* note 63, at A10.

177. *See* Colen, *supra* note 93, at 5; *Doctor Assists*, *supra* note 92, at A1;

the afflictions are curable and in terms of the effects on the quality of the individuals' lives. Although some of these individuals did not have terminal diseases,[178] when applying this interest to their cases, the inquiry should focus on what the cost will be to the individual in terms of their quality of life, if their life were extended.

In *In re Quinlan*,[179] the court found that "the State's interest . . . weakens . . . as the degree of bodily invasion increases and the prognosis dims."[180] In many of these cases, there was not always a bodily invasion in the *Quinlan* sense, but the individuals' bodies or minds were being invaded by disease, and their prognosis for a normal life was dim.[181] For example, in Diane's bout with leukemia, "[b]one pain, weakness, fatigue, and fevers began to dominate [her] life" at the end.[182] For Janet Adkins, it was her mind that was being invaded by Alzheimer's disease.[183] She no longer knew things that she had known her whole life.[184]

In *McKay v. Bergstedt*,[185] which dealt with termination of treatment, the court found that "as the quality of life diminishes because of physical deterioration, the State's interest in preserving life may correspondingly decrease."[186] These women had either been subjected to physical deterioration in the past or would be subject to severe deterioration in the future.[187] For Sherry Miller, living with multiple sclerosis meant not

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Wilkerson, *supra* note 63, at A10.

178. *See* Belkin, *supra* note 80, at A1 (54-year-old Janet Adkins suffered from Alzheimer's disease); *Man Cleared*, *supra* note 70, at B11 (Virginia Harper had a "terminal illness"); Quill, *supra* note 87, at 692 (Diane had a "terminal illness"); Wilkerson, *supra* note 63, at A10 (the remaining women had physically or mentally debilitating incurable diseases).

179. 355 A.2d 647 (N.J.), *cert. denied*, 429 U.S. 922 (1976).

180. *Id.* at 664.

181. *See Doctor Assists*, *supra* note 92, at A1, B9; Karen Freifeld, *Chronic Pelvic Pain Robbed Her of Hope*, N.Y. NEWSDAY, Oct. 25, 1991, at 5; Melinda Henneberger, *Useless Limbs Led To Plea for Death*, N.Y. NEWSDAY, Oct. 25, 1991, at 5; Quill, *supra* note 87, at 692; Wilkerson, *supra* note 63, at A10.

182. Quill, *supra* note 87, at 693.

183. *See* Belkin, *supra* note 80, at A1.

184. *See id.* at B6.

185. 801 P.2d 617 (Nev. 1990).

186. *Id.* at 622.

187. *See* Colen, *supra* note 93, at 5; Freifeld, *supra* note 181 at 5; Henneberger, *supra* note 181, at 5; Wilkerson, *supra* note 63, at A10.

being able to walk or write.[188] She could barely talk and could not "function as a human being."[189]

In light of the courts' analyses of the States' preservation-of-life interest and the foregoing application to cases of assisted suicides, the State's interest in these cases should be outweighed by the individual's rights.

2. Protection of Innocent Third Parties

The State's interest in protecting innocent third parties usually applies in cases in which there are children who will suffer emotional and financial damage as a result of a parent's or guardian's death.[190] In cases that do not affect dependent children, this interest is usually not analyzed.[191] In assisted suicides, when there are no young children and all adult family members are in agreement with the individual's choice, there are no third-party interests to be protected.[192] If there are children, but the death of the individual would not result in their abandonment, the State's interest would not outweigh the individual's rights.[193]

Assisted suicides should be subject to the same guidelines because the nature of this state interest does not change when it is applied to assisted

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188. Henneberger, *supra* note 181. Sherry Miller testified at a hearing regarding the legality of a machine constructed to help the terminally ill kill themselves. Explaining her wish to die, Ms. Miller stated, "I can't walk, I can't write. It's hard for me to talk. I can't function as a human being." *Id.*

189. *Id.*; *see also* Colen, *supra* note 93, at 5 (Sherry Miller and Majorie Wantz "called upon Kevorkian to provide them with aid in dying in order to escape what they said were unbearable medical problems"); *Doctor Assists*, *supra* note 92, at A1 (Sherry Miller, 43, suffered for 12 years from multiple sclerosis and was confined to a wheelchair; Marjorie Wantz, 58, suffered from pelvic disease).

190. *See* Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 425 (Mass. 1977).

191. *See* Bartling v. Superior Court, 209 Cal. Rptr. 220 (Ct. App. 1984), *aff'd sub nom.* Bartling v. Glendale Adventist Medical Ctr., 229 Cal. Rptr. 360 (1986); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 201 A.2d 537 (N.J.), *cert. denied*, 377 U.S. 985 (1964). Although no "dependent" children were involved, this interest was analyzed because the patient was 32 weeks pregnant. The third party the State sought to protect was the fetus. *See id.* at 538.

192. *See* Satz v. Perlmutter, 379 So. 2d 359, 360 (Fla. 1980), *aff'g* 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1978); *In re* Colyer, 660 P.2d 738, 743 (Wash. 1983).

193. *See* Norwood Hosp. v. Munoz, 564 N.E.2d 1017, 1024 (Mass. 1991) (finding that the State does not have an interest in maintaining a two-parent household in the absence of compelling evidence that the child will be abandoned if left under the care of one parent).

suicide. In the case of Janet Adkins,[194] the State's interests may have outweighed Janet's rights because not all of her adult children agreed with her choice.[195] In the other cases, the individuals had the approval of their families.[196]

The regulation of assisted suicide would ensure that the State's interest in protecting innocent third parties is preserved because the third parties' interests could be reviewed before assistance is allowed. Because state legislatures are declining to regulate assisted suicide, however, the rights of third parties may not be protected, as in the case of Janet Adkins.

3. Prevention of Suicide

States have traditionally claimed a strong interest in the prevention of suicide.[197] Refusal-of-treatment cases usually did not implicate this interest, however, because the individual was dying from an underlying affliction.[198] In one right-to-refuse-treatment case, the court found that even if the patient had the intent to die, he would not be causing his own death—the disease would be.[199] In another case, a Colorado court in effect gave Hector Rodas permission to starve himself by allowing him to refuse treatment.[200] Thus, an individual refusing treatment can have the intent to die while an individual with a debilitating disease cannot.[201]

The suicide that States are interested in preventing is an irrational self-destruction,[202] and the States' interest is directed at preventing

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194. *See* Belkin, *supra* note 80, at A1.

195. *See id.*

196. *See* Colen, *supra* note 93, at 28; *Doctor Assists*, *supra* note 92, at A1, B9; Wilkerson, *supra* note 63, at A10.

197. *See* Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 425 (Mass. 1977).

198. *See id.* at 425-26; Satz v. Perlmutter, 379 So. 2d 359, 360 (Fla. 1980), *aff'g* 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1978); Bartling v. Superior Court, 209 Cal. Rptr. 220, 225 (Ct. App. 1984), *aff'd sub nom.* Bartling v. Glendale Adventist Medical Ctr., 229 Cal. Rptr. 360 (1986).

199. *See Saikewicz*, 370 N.E.2d at 426 n.11.

200. *See* G. Andrew Kirkpatrick, Rodas v. ErkenBrack, 2 ISSUES L. & MED. 481 (1987).

201. *See id.* at 482.

202. *See* Gilbreath, *supra* note 78, at 421-22.

> The patient that requests the withdrawal of life support systems, the cases say, is not seeking self-destruction . . . .
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> . . . .
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> Conversely, the terminally ill patient who has no life support systems to disconnect, but wants to die, is said to have a specific intent to die. Therefore,

"disturbed persons from rashly destroying themselves."[203] Although voluntary euthanasia is a type of suicide, it is not the type that States are interested in preventing.[204] The choices made by Janet Adkins, Virginia Harper, Marjorie Wantz, and Sherry Miller were rational well-thought-out choices.[205] They were not irrational split-second decisions.[206] Janet Adkins made her decision a year earlier when she was first diagnosed with Alzheimer's disease.[207] Virginia Harper also began planning her suicide when she was diagnosed.[208] Both Marjorie Wantz and Sherry Miller discussed suicide with their families and Dr. Kevorkian long before their suicides.[209]

Traditional suicide is related to spiritual or mental distress.[210] Euthanasia, however, by its very nature, releases the individual from the grips of a terminal or debilitating disease.[211] These women were not choosing euthanasia because they were in spiritual or mental distress;[212] they chose euthanasia to achieve inner peace.[213] For example, Diane (assisted by Dr. Quill) was examined by a psychologist.[214] The psychologist found no evidence of depression.[215] According to Dr. Quill,

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> his death is classified as self-destruction, suicide . . . . [T]his terminally ill person, instead of desiring the removal of intrusive medical procedures, desires the cessation of pain and agony . . . .

Id.

203. *Id.* at 418.

204. H. Tristam Engelhardt, Jr., *Death By Free Choice*, *in* SUICIDE AND EUTHANASIA 272-73 (Baruch A. Brody ed., 1989).

205. *See* Belkin, *supra* note 80, at A1; Freifeld, *supra* note 181, at 5; Henneberger, *supra* note 181, at 5; *Man Cleared*, *supra* note 70, at B11.

206. *See* Belkin, *supra* note 80, at A1; Freifeld, *supra* note 181, at 5; Henneberger, *supra* note 181, at 5; *Man Cleared*, *supra* note 70, at B11.

207. Belkin, *supra* note 80, at A1.

208. *Man Cleared*, *supra* note 70, at B11.

209. *See Doctor Assists*, *supra* note 92, at A1, B9.

210. Shigeru Kato, *Japanese Perspectives on Euthanasia*, *in* TO DIE OR NOT TO DIE 69 (Arthur S. Berger & Joyce Berger eds., 1990).

211. *See id.*

212. *See* Belkin, *supra* note 80, at A1; Freifeld, *supra* note 181, at 5; Henneberger, *supra* note 181, at 5; *Man Cleared*, *supra* note 70, at B11.

213. *See* Belkin, *supra* note 80, at A1; *Doctor Assists*, *supra* note 92, at A1, B9; *Man Cleared*, *supra* note 70, at B11.

214. Quill, *supra* note 87, at 692.

215. *Id.*

Diane was very peaceful in her last few months because she knew she was in control of her death.[216]

Because euthanasia is not the type of death that States are trying to prevent, each case of euthanasia must be analyzed on its facts to ensure that the decision is a rational one. If it is rational, the individual's rights should outweigh the State's interests.

4. Maintenance of the Ethical Integrity of the Medical Profession

The State also has an interest in the maintenance of the ethical integrity of the medical profession.[217] This integrity, for the most part, relies on the Hippocratic Oath, under which physicians promise to prolong and protect life.[218] But the Oath also appears to be somewhat contradictory in requiring a promise to alleviate suffering.[219] Some illnesses make it almost impossible for physicians to fulfill both promises.[220] Recent cases show that doctors often choose to alleviate suffering when faced with this paradox.[221] Patients should be empowered to make this choice when these two goals of the Oath are in conflict.[222]

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216. *See id.*

217. Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 426 (Mass. 1977).

218. *See* 10 AMERICANA, *supra* note 23, at 711 ("[M]ost Western physicians adhere [to the Hippocratic Oath] as their standard of professional ethics."). One translation of the Oath reads (in part):

> I will follow that system of regimen which, according to my ability and judgement, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to any one if asked nor suggest any such counsel, and in like manner I will not give to a woman a pessary to produce abortion. With purity and with holiness I will pass my life and practice my art. I will not cut persons laboring under the stone but will leave this to be done by men who are practitioners of this work. Into whatever houses I enter, I will go into them for the benefit of the sick and will abstain from every voluntary act of mischief and corruption, and further, from the seduction of females or males, of freemen and slaves.

14 *id.* at 218.

219. *See* 10 *id.* at 711 ("When a patient is in the last and most painful stages of a fatal disease, to prolong life violates the promise to relieve pain, but to relieve pain by killing violates the promise to prolong and protect life.").

220. 10 *id.* ("Euthanasia presents a paradox in the code of medical ethics, for it involves a contradiction within the Hippocratic Oath, to which most Western physicians adhere as their standard of professional ethics.").

221. *See, e.g.*, Altman, *supra* note 2, at C3; Colen, *supra* note 93, at 28; Quill, *supra* note 87, at 692.

222. *See* Fredrick R. Abrams, Letters to the Editor, 263 JAMA 1197 (1990).

Although many courts have mentioned this interest in their analyses, it has never completely outweighed the individual's rights.[223]

The Oath should not be heavily relied on when this interest is weighed in relation to euthanasia. Even in the ancient Greek times, doctors did not always adhere to the Oath.[224] For example, although some versions of the Oath proscribe abortion, surgical remedies, and euthanasia,[225] these procedures were fairly common in ancient Greece.[226]

The Supreme Court and modern medicine do not always comply with the requirements of the Oath. For example, even though the Oath forbids abortion,[227] the Supreme Court held that a woman has the right to terminate her pregnancy.[228] The Court did not find the Oath controlling on that issue.[229] The medical profession also does not always rely on the Oath and thus deviates from it daily.[230] Some translations of the Oath proscribe surgery,[231] yet some modern doctors perform surgery many times a day.[232]

Medical ethics are not uniformly applied by doctors.[233] For example, some doctors will perform abortions[234] while others refuse to perform this procedure.[235] From an ethical standpoint, euthanasia should be treated the same way. Doctors should be allowed to choose whether to

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223. *See In re* Colyer, 660 P.2d 738 (Wash. 1983).

224. *See* Curley Bonds, *The Hippocratic Oath: A Basis for Modern Ethical Standards*, 264 JAMA 2311 (1990).

225. *See* ALASTAIR V. CAMPBELL, MORAL DILEMMAS IN MEDICINE 167 (1987).

226. *See* Bonds, *supra* note 224.

227. *See* CAMPBELL, *supra* note 225, at 167.

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

229. *See id.* at 131-32. The Court examined the history of the Hippocratic Oath and concluded that it was not accepted by all ancient physicians. *See id.* This is the only discussion of the Oath in the Court's analysis. *See id.*

230. *See supra* notes 224-28 and accompanying text.

231. *See* CAMPBELL, *supra* note 225, at 167; 14 ENCYCLOPEDIA AMERICANA 218 (16th ed. 1988).

232. *See* THE WORLD ALMANAC AND BOOK OF FACTS 1992, at 949 (Mark S. Hoffman et al. eds., 1991) (stating that in-patient surgery was performed more than 40 million times in 1989) [hereinafter WORLD ALMANAC].

233. *See supra* notes 217-32 and accompanying text.

234. *See* WORLD ALMANAC, *supra* note 232, at 947. In 1988, for every 1000 live births, there were 325.4 abortions. *Id.*

235. *See* Roe v. Wade, 410 U.S. 113, 143 (1973) (discussing resolutions adopted by the AMA House of Delegates which read: "[n]either physician, hospital, nor hospital personnel shall be required to perform [an abortion which is] violative of personally held moral principles").

assist in a suicide. Some doctors, such as Drs. Quill and Kevorkian, believe that this is part of their duty.[236]

The medical profession would greatly benefit from the regulation of euthanasia. Doctors who want to assist in suicides would then know how to proceed so that their actions are legal. Although he has already participated in suicides, Dr. Kevorkian has called for a committee to establish guidelines for euthanasia.[237]

V. PHYSICIANS' ASSISTANCE IN SUICIDE

Individuals who have a liberty interest entitling them to euthanasia should be able to have the assistance of a physician if they desire.[238] Furthermore, the physician should be protected from prosecution by the liberty interest of the patient.[239]

An individual who is exercising his or her own constitutional right is not subject to criminal prosecution.[240] In addition, a party, such as the physician, whose assistance is necessary to assert that constitutional right traditionally is not subject to prosecution either.[241] For example, in *Barrows v. Jackson*,[242] a land seller's defense against a suit for the breach of a racially restrictive covenant was that the covenant was a violation of the equal protection rights of the prospective buyers. Because the seller's actions were necessary for the prospective buyers to assert their constitutional right, the seller was allowed to use the buyer's constitutional right as a defense.[243] Similarly, in *Eisenstadt v. Baird*, an

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236. *See* Colen, *supra* note 93, at 28; *Doctor Assists*, *supra* note 92, at A1, B9; Quill, *supra* note 87, at 694; Ubell, *supra* note 64, at 28.

237. *See NBC Nightly News*, *supra* note 64.

238. Howard Brody, *Assisted Death — A Compassionate Response to a Medical Failure*, 327 NEW ENG. J. MED. 1384 (1992) (proposing that assisted death should be allowed to let the patient die in a setting of his or her choosing, as free from pain as possible).

239. *See, e.g.*, Wolhandler, *supra* note 154, at 376 (proposing that doctors who assist patients "should be able to defend against prosecution by asserting the patient's constitutional right to self-determination.").

240. *See* Stanley v. Georgia, 394 U.S. 557, 559 (1969) (holding that private possession of obscene material is an expression of free speech protected by the First Amendment and is therefore protected from prosecution.). *See also* Gilbreath, *supra* note 78, at 423 (discussing that a terminally ill person has a fundamental right to die and is therefore not subject to criminal prosecution).

241. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Conn., 381 U.S. 479 (1965).

242. 346 U.S. 249 (1953).

243. *See id.* at 254-57.

advocate of the rights of individuals to obtain contraceptives defended against criminal prosecution by asserting the constitutional right to privacy of the other individuals.[244]

Physicians also should be able to assert the rights of the patients who desire euthanasia because the physicians are advocating their patients' rights and are assisting the patients in asserting those rights.[245] Indeed, statutes, such as Michigan's new statute,[246] which make the assister's actions a crime may not be constitutionally valid in light of the constitutional liberty interest of the patient.[247]

For many patients, exercise of their liberty interest would be impossible without the assistance of a physician.[248] To facilitate the patient's access to their liberty interest, statutes should be revised to allow physicians to assist their patients in the exercise of their rights.[249]

VI. VOLUNTARY ACTIVE EUTHANASIA: THE SOLUTION

To resolve the euthanasia debate, States should establish guidelines to protect their interests. Although a 1991 initiative to revise the Washington State Natural Death Act[250] for "aid in dying" failed in Washington,[251] this was probably the result of a backlash from Dr. Kevorkian's assistance in two suicides two weeks earlier.[252] Dr. Timothy Quill stated that Dr. Kevorkian's actions are "'going to take the focus away from the really

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244. 405 U.S. at 446.

245. *See* Wolhandler, *supra* note 154, at 376, Gilbreath, *supra* note 78, at 423-24.

246. MICH. STAT. ANN. § 28.547(127) (Callaghan 1990, Supp. 1993).

247. *See* Sharp & Crofts, *supra* note 8, at 96.

248. *See* Wolhandler, *supra* note 154, at 376.

249. *See* Morgan & Harty-Golder, *supra* note 72, at 762; H. Tristram Engelhardt, Jr. & Michele Malloy, *Suicide and Assisting Suicide: A Critique of Legal Sanctions*, 36 SW. L.J. 1003, 1030 (1982); Geltzer et al., *supra* note 2, at 432.

250. WASH. REV. CODE ANN. § 70.122 (West 1992, Supp. 1993). The initiative provides solutions for the following two problems: "1) [a]dult patients in an irreversible coma or a persistent vegetative state[; and] 2) [a]dult patients who are terminally ill and who are conscious and mentally competent." WASHINGTON CITIZENS FOR DEATH WITH DIGNITY, ABOUT INITIATIVE 119 (1991).

251. *NBC Nightly News*, *supra* note 64.

252. *See* Derek Humphry, *Tactical Errors Defeated Proposed Suicide Law*, N.Y. NEWSDAY, Nov. 13, 1991, at 99 ("[M]any people blame the defeat [of Initiative 119] on the furor over Dr. Jack Kevorkian's helping to end the lives of two women in Michigan two weeks earlier.").

meaningful progress we've made.'"[253] A psychiatrist who has interviewed a number of physicians who have assisted in suicides referred to Dr. Kevorkian as an "'irresponsible, unprofessional madman.'"[254] To ensure that both individual and state interests in euthanasia are protected, the legislatures should regulate this ongoing practice.

In drafting such legislation, the States must seek to balance their interests against the interests of the individual.[255] To protect their interest in the preservation of life, the States should enact guidelines limiting euthanasia to terminally ill and incurably ill patients who have freely chosen this course.[256] The individual's diagnosis should also be confirmed by at least two physicians to ensure that it is correct.[257]

The protection of innocent third parties should also be safeguarded by legislation.[258] Agreement among all adult family members should be required.[259] In addition, the States should ensure that the death will not result in the abandonment of young children.[260]

The States' interest in preventing suicide is substantially weakened here.[261] These individuals are making a rational choice when faced with incurable afflictions.[262] States, however, should ensure that the individual's decision was rational and freely chosen by requiring a psychologist's opinion concerning the patient's mental health.[263]

The interest in maintaining the ethical integrity of the medical profession would be better protected by direct legislation than it is at the

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253. Colen, *supra* note 93, at 28 (quoting Timothy Quill, a Rochester internist who prescribed barbiturates for a terminally ill patient knowing that she would use them to kill herself).

254. *Id.* (quoting Harvard psychiatrist, Dr. Susan Block).

255. *See* discussion *supra* part IV.C.

256. *See* discussion *supra* part IV.C.1.

257. *See* Roe v. Wade, 410 U.S. 113, 143 (1973) (discussing the AMA House of Delegates resolution that asserts that a physician should consult with other physicians before performing an abortion); Edward R. Grant & Cathleen A. Cleaver, *A Line Less Reasonable:* Cruzan *and the Looming Debate Over Active Euthanasia,* 2 MD. J. CONTEMP. LEGAL ISSUES 99, 240 (1991) (explaining Initiative 119 and its requirement that the diagnosis be confirmed by two physicians); Wainey, *supra* note 41, at 663 (discussing a Netherlands' Council that suggests that a doctor must consult with a colleague before practicing euthanasia).

258. *See supra* part IV.C.2.

259. *See id.*

260. *See id.*

261. *See supra* part IV.C.3.

262. *See supra* notes 202-16 and accompanying text.

263. *See* Quill, *supra* note 87, at 692. Dr. Quill assured himself of Diane's state of mind after she saw a psychologist and after Dr. Quill discussed the matter further with her. *See id.*

moment.[264] Presently, doctors do not know how to proceed when a patient requests assistance.[265] Regulation would help to bolster the integrity of the medical profession while giving doctors the freedom to choose whether to participate in the practice of euthanasia.

VII. CONCLUSION

Due to advances in medicine, people today live much longer than they did in the past.[266] These advances in medicine, however, are a mixed blessing.[267] Life-prolonging treatment has brought great suffering to many people.[268] Individuals should have the right to alleviate their pain and suffering and choose "death with dignity" under the liberty interest identified in *Cruzan v. Director, Missouri Department of Health*.[269] As long as the States' four interests are protected, there is no reason to unreasonably burden this constitutionally protected liberty interest. This very personal decision should be the patients' alone to make. After all, it is their life, and their death, that hangs in the balance.[270]

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264. *See supra* part IV.C.4.

265. JAMES F. CHILDRESS, WHO SHOULD CHOOSE? PATERNALISM IN HEALTH CARE 177 (1982).

266. *See supra* notes 1-2 and accompanying text.

267. *See supra* part IV.C.1.

268. Ubell, *supra* note 64, at 24-25.

269. 497 U.S. 261 (1990).

270. *See* Bouvia v. Superior Court, 225 Cal. Rptr. 297, 305 (Ct. App. 1986).