



Spring 2019

RIGHT TO DIE: 2,000 YEARS OF DEBATE

Dr. James B. Phillips

SECTION I

Introduction

Legal and ethical debates over self-killing and euthanasia have raged for more than twenty-five centuries. Section II presents original theories of natural law and its evolution through classic antiquity. The Greco-Roman era was characterized by the morality of honor—the maintenance of self-determination and honor was the purpose of life.¹ Honor trumped death.² The Roman Twelve Tables, circa 450 B.C., contain some of the earliest recorded laws in western jurisprudence regarding self-determination and end-of-life choices.³ Table IV concerns the passive euthanasia of unwanted or deformed infants.⁴ Roman citizens willing or wishing to end their lives applied for permission to the Roman Senate. If their reasons were considered sound, permission was granted and hemlock provided—free of charge.⁵ According to Cicero, "It is the appropriate action to live when most of what one has is in accordance with nature. When the opposite is the case, or is envisaged to be so, then the appropriate action is to depart from life."⁶ Section III will trace the evolution of natural law and personal autonomy through the fall of the Roman Empire in the West.

As the Middle Ages came to a close, self-determination as the benchmark for end-of-life decisions was undermined by the ascent of church legislative rule-making and judicial activism. As a result, personal autonomy became less important. Section IV discusses early modern times and the growth of personal "rights" that develop the ethical and legal bases of self-determination concerning end-of-life decisions.⁷ Section V presents an examination of the judicial history of relevant right-to-die decisions in America and presents a basis for support of the right to self-determination. In the United States, common-law judicial decisions concerning suicide were codified in 1902 when the Texas Court of Criminal Appeals officially moved to decriminalize suicide.⁸ The first U.S. Supreme Court ruling concerning the right to die was decided in 1990 in Cruzan v. Director of Missouri Dept. of Health.⁹ Significant federal legislation occurred in 1991 with the passage of the Patient Self-Determination Act.¹⁰ Oregon was the first state to pass a "death with dignity" act in 1994.¹¹ The topic of one's right to choose how to die continues to be contentious, with only six states allowing physician-assisted suicide (PAS).¹²

Section VI provides application of the thesis statement and presents legal support for PAS through the analysis of judicial actions, such as Cruzan v. Director of Missouri Dept. of Health, Washington v. Glucksburg, People v. Kevorkian, Roe v. Wade, and others. Legislative actions, such as the Establishment Clause of the First Amendment to the U.S. Constitution and the Fourteenth Amendment, will be evaluated for their effect on personal autonomy. Paternalistic viewpoints that consider the state as the guardian of the best interest of the individual will be

¹ <https://www.questia.com/read/IP3-2043375791/assisted-suicide-morality-and-why-prohibiting>

² *Id.*

³ www.crystalinks.com/romanlaw.html

⁴ *Id.*

⁵ <https://the.vintagenews.com/2017/01/23/in-ancient-rome-suicide-was-allowed-as-a-form-of-euthanasia/>

⁶ <https://www.ninrac.org/classical/cicero>

⁷ <https://www.britannica.com/print/article/345753>

⁸ Grace v State, 44 Tex.Crim. 193,194

⁹ Cruzan v. Director, Missouri Dept. of Health, 110 W. Ct. 2841, 1990

¹⁰ Patient Self-Determination Act (1991)

¹¹ Oregon Code Ann. § 127.800, Ballot Measure 16 (1994)

¹² <https://www.deathwithdignity.org/learn/death-with-dignity-acts/>

compared with liberty interests.¹³ Ethical discussion will center on the right of self-determination as a continuation of the historic natural law theory.¹⁴

Formulated in ancient Greco-Roman texts, natural law firmly established individual autonomy as a basic "right" for individuals, **regardless** of the prevailing governance. In western civilization, autonomy concerning end-of-life decisions has been systematically replaced by the authority of the state. This paper shall attempt to evaluate this progression and present legal and ethical positions advocating PAS.

SECTION II

Beginning Concepts of Individual Self-Determination in Classical Antiquity

Since pre-Socratic times, the benchmarks for debate regarding end-of-life decisions have been the application of natural law and the concept of maintaining self-determination. Evolving western legislative and judicial decisions have produced effects counter to these established standards. In order to determine this statement's validity as applied to voluntary passive euthanasia, self-killing, or physician-assisted suicide (PAS), any analysis must begin approximately three centuries ago. Nowhere in classical Greek or Roman are language terms that could be translated as connoting euthanasia or suicide.¹⁵ Originally, the description was borrowed from the Greek, but it simply meant a "good death;" i.e., "a fine and noble death."¹⁶ The initial application of euthanasia is found in the *Lives of the Twelve Caesars* by C. Suetonius Tranquillus.¹⁷ He describes the death of Emperor Augustus as "quick and without suffering in his wife's arms," possibly secondary to being administered poison by Livia.¹⁸ Ordinary Greek physicians understood that life had natural limitations and that any attempt to go beyond these limits was considered *hubris*—an invitation for the gods to strike one down. Therefore, most ancient Greek physicians helped their patients die.¹⁹ What about the Hippocratic Oath? In the case of gravely ill patients, Hippocrates encouraged passive euthanasia, as evidenced by his advice to physicians: "Refuse to treat those who are overmastered by their disease, realizing that in such cases, medicine is powerless."²⁰ Plato also advocated passive euthanasia when patients were unable to live a good life due to physical suffering.²¹

Controversy concerning voluntary euthanasia and PAS are chiefly issues of the twentieth and early twenty-first centuries. Ancient Greeks and Romans advocated ideas of moral and legal positions concerning natural law and in support of the right of self-determination.²² The earliest foundation(s) of the theory of natural law may be found in the pre-Socratic writings of Heraclitus

¹³ Engelhardt, Tristram, Jr., et al., Suicide and Assisting Suicide: A Critique of Legal Sanctions, 36 Sw L.J. 1003 (1982), Page 1005.f1

¹⁴ *Id.*, p. 1005.

¹⁵ https://link.springer.com/chapter/10.1007/978-94-015-7838->_2/

¹⁶ *Id.*, p. 16.

¹⁷ <https://www.gutenberg.org/files/6400/6400-h/6400-h.htm>

¹⁸ <https://www.lawteacher.net/free-law-essays/medical-law/euthanasia-is-ethical-and-should-be-legal-law-medical-essay.php>

¹⁹ Pence, Gregory, Medical Ethics, McGraw-Hill Educators, 2 Penn Plaza, New York, NY 10121, p. 38-39.

²⁰ Euthanasia and Suicide in Antiquity: Viewpoint of the Dramatists and Philosophers, J.R. Soc Med, 2007, 100(1) 25-28

²¹ Same as 19.

²² <https://plato.stanford.edu/entries/euthanasia-voluntary>

(535–475 B.C.) and Sophocles (497–406 B.C.).²³ Heraclitus was the first to introduce the systemic evaluation of all things, resulting in the respect for natural (eternal) laws.²⁴ In *The Women of Trachis*, Sophocles refines the concept of natural law to describe issues of justice²⁵ and assisted euthanasia.²⁶ Greco-Roman morality and law did not require the preservation of one's life at any cost, and so both states were tolerant of suicide in cases when no relief could be offered to the dying.²⁷ Possibly the earliest preserved law in western jurisprudence concerning passive euthanasia is found in the Roman Twelve Tables, circa 450 B.C.²⁸ Table IV presents law concerning passive euthanasia via exposure of infants deemed too sick or deformed to survive.²⁹ Roman law also held that individual citizens wishing to end their lives could petition the Senate. If their reasons were deemed sound, permission was given.³⁰ Hemlock was provided at no cost. Ancient societies had no established belief in the inherent value of human life, and this resulted in widespread support for voluntary death as opposed to long-term agony and despair.³¹

The Stoic school of philosophy was established in approximately 300 B.C. by Zeno of Citium.³² Although influenced by Socrates and the Cynics, Zeno taught that judgment should be based on deeds, not words.³³ Unlike other theoretical philosophical schools, Stoicism has few central teachings.³⁴ Self-determination in all areas is the primary theme, as exemplified by Epictetus: "The chief task in life is simply this: to identify and separate matters so that I can say clearly to myself which are externals not under my control, and which have to do with the choices I actually control."³⁵ By this means, the Stoic is able to enjoy a eudaimonious life: one worth living.³⁶ Common to all philosophers, the morality of death was often debated and, as Seneca stated: "Just as I choose a ship to sail in or a house to live in, so I choose a death for my passage through life."³⁷ If the eudaimonious life was no longer possible, suicide or euthanasia were acceptable options. To quote Epictetus: "If the room is smoky, if only moderately, I will stay; if there is too much smoke, I will go. Remember this, keep a firm hold on it, the door is always open."³⁸

Marcus Tullius Cicero (106–43 B.C.), a prominent Roman statesman, jurist, consul, and philosopher, may best be known for clearly presenting Aristotelian ideals supporting natural law as the foundation for universal rights.³⁹ Principles of natural law possess universal applicability and remain constant, even if the underlying values and attitudes shift.⁴⁰ While natural law is primarily a theoretical approach to morality and ethics, it contends with how legal systems acquire

²³ Whiting, Raymond, *A Natural Right to Die, Twenty-Three Centuries of Debate*, Greenwood Press, Westport, Connecticut, p. 72

²⁴ *Id.*, p. 72.

²⁵ *Id.*

²⁶ Same as 19.

²⁷ Same as 16.

²⁸ Same as 3.

²⁹ *Id.*

³⁰ Same as 5.

³¹ Historical Timeline, History of Euthanasia and Physician-Assisted Suicide, ProCon.org. 7/23/2013.

³² Same as 20.

³³ <https://www.iep.utm.edu/stoicism/>

³⁴ <https://dailystoic.com/what-is-stoicism-a-definition-3-stoic-exercises-to-get-you-started/>

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ <http://caae.phil.cmu/cavalier/Forum/euthanasia/background/Euthanasia.html>.

³⁹ <http://www.ninrac.org>. Cicero, Natural Law, Natural Rights and American Constitutionalism.

⁴⁰ www.cfpscoursweb.com/pluginfile.../classical%20natural%20Law%20Theory.pdf

and maintain legitimacy.⁴¹ Cicero's writings propose for the first time that state-made laws must conform to natural law to be valid.⁴² This idea is crucial to our Bill of Rights. Although there is not one singular position on all natural law, each theory preserves the idea that society should be structured in such a way as to optimize self-determination and man's ability to fulfill his purpose.⁴³ It follows that violence or the killing of another human being would be against natural law.⁴⁴ Cicero specifically excuses euthanasia under certain circumstances: "It is the appropriate action to live when most of what one has is in accordance with nature. When the opposite is the case, or is envisaged to be so, then the appropriate action is to depart from life."⁴⁵

It is apparent that ethical considerations concerning individual control of right-to-life issues have been debated for as long as there have been civilized societies. Early philosophers, respectful of natural law, supported ideals of self-determination and the option of passive euthanasia. Withholding medical treatment in selected cases was considered both humane and reasonable. Viewpoints of personal autonomy in end-of-life decisions are evolutionary, as shall be presented in the following sections.

SECTION III

Evolution of Self-Determination from the Middle Ages to Modern Times

The Middle Ages began in Europe around the collapse of the Roman Empire in the West—approximately the fifth century. One of the numerous factors that influenced the fall of the western empire was the rise of Christianity.⁴⁶ The Christian belief in a monotheistic god undermined the authority of the emperor; consequently, the Catholic Church gradually expanded its sphere of influence, eventually replacing Rome as the authority on natural and canon law.⁴⁷

The expansion of self-determination and personal rights was incremental (at best) in the Middle Ages but may be characterized by a) "the adaptation of stoicism into Christianity and Roman law; b) combining nature and law, *physis* and *nomos*; and c) the role of autonomy."⁴⁸ As a result, the medieval church became the mediator of both earthly (natural) and divine laws. As stated by Whitshire: "stoicism was ready for a baptism."⁴⁹ Many of the early church fathers advocated adherence to natural law, as exemplified by St. Isidore of Seville, who stated: "*Ius naturale* is what is common to all peoples, and is observed everywhere by the instinct of nature rather than by any ordinance."⁵⁰ St. Ambrose (ca. 337/40–397 A.D.) and St. Augustine of Hippo (13 Nov. 354 A.D.–28 August 430 A.D.) gradually influenced the conversion from the natural law of Cicero to Catholic doctrine.⁵¹ This revision reduced the impact of natural law, as it became

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Same as 6.

⁴⁶ <http://www.ushistory.org/civ/6f.asp>

⁴⁷ Same as 22, p. 81.

⁴⁸ Susan Ford Wiltshire, Greece, Rome and the Bill of Rights, The University of Oklahoma Press, Norman, Oklahoma, 1992, p. 31.

⁴⁹ *Id.*, p. 32

⁵⁰ <https://ecclesiaepatres.blogspot/2016/st-Isidore-of-seville-natural-moral-law.html>

⁵¹ Same as 48.

identical to the doctrine of the church and thus lost much of its ethical authority. Nevertheless, Stoic influence remained a part of Christian doctrine throughout the tenth and eleventh centuries.⁵²

Decretum Gratiani is a collection of canon law that represents the earliest statement of church law.⁵³ This work was studied in the School of Law at the University of Bologna and, much later, in other European universities.⁵⁴ The collection is the first Christian document to confirm the existence of natural law, stating: "Mankind is ruled by two laws: Natural Law and Custom. Natural law is that which is contained in the Scriptures and Gospel. Divine laws are based upon nature, human laws on custom."⁵⁵

As the power, infallibility, and influence of the Catholic Church began to be questioned, St. Thomas Aquinas undertook the redefinition of natural law to be more commensurate with its original philosophical intent through *lex naturalis*, *jus natural*, and *jus positivum* in the *Summa Theologiae*.⁵⁶ His interpretation of justice (*jus*) was based on the intersection of natural and positive laws and was grounded in the classic concepts of Aristotle, Cicero, and Stoic philosophy. St. Thomas maintained that, although natural law should be the primary source of maintaining justice, this source alone was not sufficient for maintaining a Christian state.⁵⁷ Later analysis of *justitia* is defined in English translations as "rights."⁵⁸ This was one of the first links between natural law and the theory of human rights in western political theory. St. Thomas further contended that natural law is unchanging between various cultures, societies, and religions.⁵⁹ Unjust societies are those that violate natural law.⁶⁰ The rights of the individual (even vices) should not be legislated against unless they occasion to harm others.⁶¹ St. Thomas defines the quality of justice: "It is proper to justice, in comparison with the other virtues, to direct human persons in their relations with others; this is appropriate because justice denotes a kind of equality."⁶²

As a result, St. Thomas maintained that the proper division of law could be grouped as follows: a) eternal, b) divine, c) natural, and d) positive (state/church-made) law.⁶³ This position theoretically restricts the positive law doctrine and opens the avenue for the establishment of individual rights.⁶⁴ In practice, the medieval church granted no individual rights.⁶⁵ In fact, even property rights were nonexistent because all ownership was assigned to God the Creator and only the church could act with God's authority.⁶⁶ St. Thomas, as a devout Catholic, was not a vocal proponent of individual rights, but his teachings would be based upon human beings as an instance

⁵² Same as 47, p 35.

⁵³ <https://wdl.org/en/item/14708/>

⁵⁴ *Id.*

⁵⁵ Same as 51.

⁵⁶ <https://www.theguardian.com/commentisfree/believ/2012/mar/05/thomas-aquinas-natural-law>

⁵⁷ *Id.* at 55.

⁵⁸ Anthony J. Lisska, Human Rights Theory Rooted in the Writings of Thomas Aquinas, *Diametros* 38 (2013); page 134-152.

⁵⁹ *Id.*, p 1.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Thomas Aquinas, *Summa Theologiae*, IIa-IIae. Q. 57, a.1.

⁶³ Same as 22, p 83.

⁶⁴ Same as 22, p 84.

⁶⁵ Same as 22, p 84.

⁶⁶ Same as 22, p 85.

of a natural kind and would provide the foundation for later development of more specific individual rights.⁶⁷

Delineation of individual rights was the subject of one of the most significant documents ever produced. The Magna Carta, issued in 1215 A.D. by King John of England, was the first governmental decree to establish that all individuals were equally subject to law.⁶⁸ Several of the natural rights and legal protections seen in the United States Bill of Rights are derived from this document.⁶⁹ The Magna Carta represents, perhaps, the initial incorporation of centuries of theoretical individual rights into statutory law.

As the predominant authority in the Middle Ages, the Church also influenced the delivery of medical care. Physicians in classic antiquity were not expected to provide care to terminally ill patients. As Christianity spread, however, physicians began to feel a moral obligation to care for and cure as many patients as possible.⁷⁰ As a result, the first medieval hospitals were founded as religious institutions where the doctor, priest, and family formed a consortium that aided the dying, who would ascend (hopefully) to a higher life.⁷¹ This process included last rite sacraments that would allow the patient to atone for past transgressions and die a "good death" according to guidelines established in *ars moriendi*.⁷² It was thought that those individuals suffering end-of-life pain were being punished for past sins; however, this physical pain and suffering reportedly had redemptive properties.⁷³ As a result of this end-of-life theater, the physician was forbidden to intervene in any way that might interfere with the spiritual journey of the patient.⁷⁴ Thus, by the end of the medieval period, euthanasia and assisted suicide were strictly forbidden.⁷⁵

SECTION IV

Early Modern Times and the Beginnings of Individual "Rights"

The early fifteenth century was marked by a gradual decrease in the authority of the Catholic Church and the rise of national monarchies in Spain, France, and England.⁷⁶ It might be expected, through the upsurge of intellectual curiosity, exploration, scientific progress, and economic expansion, that the Enlightenment would bring a change in Christian morality with respect to euthanasia.⁷⁷ Changing opinions of autonomy can be seen in the sentiment of Pica Della Mirandola: "We have made thee neither of heaven nor of earth, neither mortal nor immortal, so that with freedom of choice and with honor, as though the maker and molder of thyself, thou mayest fashion thyself in whatever shape thou shalt prefer."⁷⁸ However, the central Christian

⁶⁷ Susan Ford Wiltshire, Greece, Rome, and the Bill of Rights, The University of Oklahoma Press, Norman, Oklahoma, 1992, p. 37.

⁶⁸ <https://www.thoughtco.com/why-magna-carta-key-document-usa-104638>

⁶⁹ *Id.*

⁷⁰ Ian Dowbiggin, A Concise History of Euthanasia, Life, Death, God, and Medicine, Rowman & Littlefield Publishers, Inc., 4501 Forbes Boulevard, Suite 200, Lanham, Maryland, 20706, 2005, p. 19.

⁷¹ *Id.* p 18.

⁷² <http://soundideas.pugetsound.edu/book.collecting.essays/4>

⁷³ Same as 63, p 18.

⁷⁴ Same as 63, p 19.

⁷⁵ Same as 63, p 19.

⁷⁶ Same as 65, p 20.

⁷⁷ Same as 65, p 20.

⁷⁸ <https://www.dovepress.com/euthanasia-and-assisted-suicide-a-physiciansquos-and-ethicistrosquos-p-peer-reviewed-fulltext-article-MB>

doctrine concerning the sanctity of life continued to dominate early modern philosophy, medicine, and law.⁷⁹ Renaissance scholasticism advocating individual human rights theories emerged, but only gradually. Significant advances in advocating for individual rights were made through the University of Salamanca in Spain and, more specifically, through Jesuit Francisco Suarez.⁸⁰

Through *De Legibus et de Deo Legislatore*, Suarez fortifies his position as one of the preeminent legal scholars of the age, emphasizing natural law and obedience to just and right law.⁸¹ He stresses the rights of persons and the rights of self-determination.⁸² In Book Three of *De Legibus*, he discusses whether the state can command and punish an internal act such as euthanasia.⁸³ Suarez answers with a profound "no." His explanation is that "by its very nature the inner sphere of the person is closed to the state." Thus, the foundations of autonomy through natural law became viable legal doctrine.⁸⁴

The taboo of suicide was specifically addressed by two notable period authors: Thomas More and Francis Bacon.⁸⁵ More (1487–1535), a lawyer at Lincoln's Inn and apprentice at London Charthouse monastery, authored *Utopia*, a revolutionary text condemning the domination of the aristocracy at the expense of the majority.⁸⁶ *Utopia* characterizes a fictional realm where individuals "unequal to life's duties or a burden to himself and others" are exhorted to "free himself (sic) from this bitter life as from prison, or else voluntarily to permit others to free him."⁸⁷ Although considered a landmark book challenging conventional society, this fictional work is unclear about the author's personal sentiments concerning suicide.

Bacon (1561–1626) served as the attorney general and Lord Chancellor of England.⁸⁸ The importance of Bacon's legacy cannot be overstated. His ideas represent a bridge between classic Aristotelian philosophy and an empirical approach present in all modern scientific research.⁸⁹ In *De Dignitate et Organum Scientiarum*, he invokes the requirement that doctors should alleviate the pain and suffering of terminally ill patients.⁹⁰ Thus, he becomes the second philosopher since Suetonius to use the term euthanasia.⁹¹

This "rebirth" and continuation of attitudes toward euthanasia developed in the fifth through first centuries B.C. is, perhaps, not Bacon's greatest legacy. As the primary author of the Declaration of Independence and the United States Constitution, Thomas Jefferson was greatly influenced by Bacon's writings.⁹² His contributions helped shape the beginnings of a new nation with a historically unique emphasis on the role of individual autonomy, thus extending the bridge between classical antiquity and modern times.

John Locke (1632–1704) was an English philosopher whose writings provided the foundation for modern empiricism and greatly influenced not only the European Enlightenment

⁷⁹ Same as 65, p 21

⁸⁰ Same as 58.

⁸¹ Same as 58.

⁸² Same as 58.

⁸³ Same as 58.

⁸⁴ Same as 58.

⁸⁵ Same as 65, p 22.

⁸⁶ <https://www.theohtray.com/2010/10/12/book-review-utopia-by-thomas-more/>

⁸⁷ Same as 64, p 22.

⁸⁸ <https://www.lep.utm.edu/bacon/>

⁸⁹ *Id.*

⁹⁰ https://www.researchgate.net/publication/290570233_Francis_bacon_euthanasia_or_palliative_care

⁹¹ Same as 64, p 23.

⁹² Jamal Davis, [Francis Bacon and his Influence on Thomas Jefferson](https://www.middlebury.edu/community/article/francis-bacon-and-his-influence-on-thomas-jefferson), Community. Middlebury.edu.

but also the United States Constitution.⁹³ Locke believed that a social contract existed between citizens and the government wherein certain limited rights were relinquished to ensure harmony for all.⁹⁴ Locke argued that people should be "free to do those things which we both will to do and are physically capable to do."⁹⁵ Locke would certainly have advocated that as long as people are capable of making end-of-life decisions, they should be free to do so.

Born of the natural law philosophy of the fifth century B.C., the United States of America was built on foundations of this law and the critical importance of autonomy and self-determination, as evidenced in the Declaration of Independence: "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the **consent** of the governed.[emphasis added]"⁹⁶

Advocates of euthanasia and physician-assisted dying rely on the principles of the Georgetown Mantra of Bioethics, which strongly supports the principle of autonomy in health care decisions.⁹⁷ Subsequent analysis will show how government has limited and/or eliminated these unalienable rights with respect to personal autonomy concerning end-of-life decisions.

SECTION V

Assessment of Significant Cases of "Dying with Dignity" and Physician-Assisted Suicide in the American Legal System (1900–present)

The earliest American legal attempt to limit patient access to PAS was enacted by the New York State Legislature in 1824.⁹⁸ This legislation made it a criminal offense to furnish another person with any deadly weapon or poisonous drug intended to end one's own life.⁹⁹ Later court rulings established different precedents.

In Grace v. State, a lower Texas court ruled that the defendant murdered an acquaintance, Mollie Lane, by placing a pistol where she could inflict a self-administered shot to the chest, thus producing instant death.¹⁰⁰ The court of appeals reversed the decision, commenting that "So far as the law is concerned, the suicide is innocent therefore the party who furnished the means to the suicide must also be innocent of violating the law."¹⁰¹

A similar case is reported in Sanders v. State. A.J. Sanders was convicted of homicide in the death of Pearl Baxter after he provided her with carbolic acid.¹⁰² He was convicted under Tex. Penal Code arts. 648, 649, and 64, which state that in order for the accused to violate, there must

⁹³ <https://www.Britannica.com/print/article/345753>

⁹⁴ <https://hewactivist.com/en.articles/flacks-newsactivist-winter-2015-complementary-course/euthanasia-john-locke-perspective>

⁹⁵ *Id.*

⁹⁶ United States Declaration of Independence

⁹⁷ Same as 78.

⁹⁸ New York Act of December 10, 1828, ch. 20, §1828 N.Y. Laws 19

⁹⁹ *Id.*

¹⁰⁰ Grace v State, 69 S.W. 529 (Tex. Crim. App. 1902)

¹⁰¹ *Id.*

¹⁰² Sanders v State, 54 Tex. Crim. 101 (1908)

be intent to injure.¹⁰³ The appeals court overturned the ruling, reasoning that if the deceased took the poison voluntarily, her death did not constitute culpable homicide.¹⁰⁴

Although not specifically applicable to PAS, Griswold v. Connecticut is of importance because the U.S. Supreme Court ruled on a previously unknown "right" to reproductive privacy under the Fourteenth Amendment.¹⁰⁵ This ruling opened the door for other "rights" not specifically revealed in the Constitution.

In 1973, Justice Harry Blackmun wrote for the majority in Roe v. Wade, stating that individuals have a "zone of privacy" within which abortion falls; thus, this fundamental right is protected in the Constitution from regulation by the states.¹⁰⁶ As shall be seen, the privacy question will be substantial in the discussion of end-of-life decisions.

Karen Ann Quinlan was an American woman whose death, and the legal action that followed, affected the practices of medicine and law around the globe.¹⁰⁷ At age 21, Quinlan attended a friend's birthday party at the Falconer's Lackawanna Inn, where she reportedly drank a few gin and tonics and took Valium.¹⁰⁸ She stated that she felt faint and was immediately taken home, where she experienced respiratory arrest.¹⁰⁹ She was taken by ambulance to Newton Memorial Hospital and was later transferred to Saint Clare's Hospital.¹¹⁰ Having suffered irreversible brain damage as a result of respiratory failure, Quinlan entered into a persistent vegetative state.¹¹¹

In August 1975, Joseph and Julia Quinlan requested that doctors remove Karen's respirator.¹¹² This request was denied by Saint Clare's Hospital attorneys.¹¹³ The Quinlans filed suit to have the respirator removed.¹¹⁴ The lawsuit argued that Karen Ann Quinlan's right to make a private decision concerning her right to die superseded the state's right to intervene.¹¹⁵ The request was denied by the New Jersey Superior Court, citing a violation of New Jersey homicide statutes.¹¹⁶ The Quinlans appealed this decision to the New Jersey supreme court, which granted their request on March 31, 1976, holding that the appellant's religious freedoms and privacy rights were weightier than the state's interest in the preservation of life.¹¹⁷

The case of Nancy Beth Cruzan is similar to that of Quinlan. In 1983, Cruzan lost control of her automobile as she was driving in Jasper County, Missouri.¹¹⁸ The car overturned, and she was discovered in a ditch without pulse or spontaneous respirations.¹¹⁹ After inpatient stabilization, she was transferred to a Missouri state hospital in a persistent vegetative state.¹²⁰

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Griswold v. Connecticut, 381 U.S. 479 (1965)

¹⁰⁶ Roe v Wade, 410 U.S. 113 (1973)

¹⁰⁷ <https://archives.law.virginia.edu/dengrove/writeup/karen-ann-quinlan-and-right-die>

¹⁰⁸ <https://hehavenet.com/karen-ann-quinlan>

¹⁰⁹ *Id.*

¹¹⁰ https://poststar.com/lifestyles/karen-ann-quinlan-timeline/article_00317a2-abc1-57d0-b24a-b1fe2aaa1c5c.html

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ In re Quinlan, 355 A.2d 647

¹¹⁸ <https://www.law.cornell.edu/supremecourt/text/497/261>

¹¹⁹ *Id.*

¹²⁰ *Id.*

Hospital officials refused her parents' wishes to terminate life support without court approval.¹²¹ The Missouri supreme court ruled in favor of the state's informed consent policy over Cruzan's right to refuse treatment.¹²² The United States Supreme Court ruled in support of the Missouri supreme court decision, stating the absence of "clear and convincing" evidence that Cruzan would desire treatment to be withdrawn.¹²³

A constitutional right to die was the subject of People v. Jack Kevorkian, (1994).¹²⁴ Dr. Kevorkian advocated the patient's right to die via PAS.¹²⁵ The Michigan Court of Appeals held that no such right existed under the Michigan state constitution and upheld his conviction.¹²⁶ One of the most recognizable legal precedents concerning PAS is found in Washington v. Glucksberg.¹²⁷ Dr. Harold Glucksberg and four other Washington State physicians challenged the state's ban on assisted suicide.¹²⁸ While a state district court agreed with the doctors, the state appealed this ruling to the full Ninth Circuit Court of Appeals, which also supported the doctors.¹²⁹ The state then appealed to the U.S. Supreme Court, which held that there was no constitutional right to assisted suicide and granted the state certiorari.¹³⁰

A similar case is presented in Vacco v. Quill. Several New York State physicians and three of their terminally ill patients sued concerning the state's ban on PAS.¹³¹ The U.S. Supreme Court heard arguments on January 8, 1997 and ruled that there is no violation of the Equal Protection Clause when a state criminalizes assisted suicide.¹³²

Adverse PAS rulings generally fall into several categories: 1) the state's compelling interest in preserving and protecting life, 2) preventing suicide, 3) avoiding the involvement of third parties' influence, 4) protecting family members, 5) protecting the integrity of the medical profession, 6) following prevailing moral and religious viewpoints, and 7) avoiding a possible future "slippery slope" of euthanasia.¹³³ Omitted from this discussion is the fact that "if a person has a right to a particular action, those things necessary for the commission of that act cannot be governmentally forbidden without a functional removal of that right."¹³⁴

SECTION VI

Do Established Legal Decisions Counter the Standard of Natural Law, Autonomy, and the Right to Choose Death?

As discussed in previous sections, natural law precedes Greek law, which precedes Roman law, which in turn precedes English common law. This evolution has resulted in self-

¹²¹ <https://www.oyez.org/cases/1989/88-1503>

¹²² *Id.*

¹²³ Cruzan v Director Missouri Department of Health, 497 U.S. 261 (1990)

¹²⁴ People v Kevorkian, 447 Mich. 436, 527 N.W. 2d 714 (1994)

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Washington v Glucksberg, 521 U.S. 702 (1997)

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Vacco v. Quill, 521 U.S. 793 (1997)

¹³² *Id.*

¹³³ <http://repository.law.mich.edu/mlr/vol106/iss8/2>

¹³⁴ Same as 23, p. 158.

determination becoming an essential part of America's judicial history.¹³⁵ Integration of natural law concepts into American jurisprudence is tri-phasic: 1) compatibility with Locke's social contract that government has a right to discover and protect rights inherent to the individual,¹³⁶ 2) Thomas Jefferson's inclusion of natural law concepts espoused by Bacon and Locke in the Constitution and Bill of Rights,¹³⁷ and 3) that the Constitution identifies the courts as the interpreter of that fundamental law.¹³⁸ The concept of natural rights has thus become a judicial, rather than a political, construct. The integration of natural rights and constitutional theory places the individual in the position to ultimately decide what rights are dictated by natural law, and thus not to be limited by the authority of any government.¹³⁹ Contemporary legislative and judicial decisions counter to this standard are of significant concern.

Attitudes concerning suicide are era-specific and have transitioned from positive approbation in early Greek and Roman times, to outright opposition during the rise of power of the Catholic Church, to very limited state approval, to approval by the vast majority of Americans.¹⁴⁰ With limited exceptions, western law has tended to oppose the application of personal autonomy regarding end-of-life decisions. Throughout this slow historical transition concerning the morality of assisted suicide, American jurisprudence has overwhelmingly supported one side of the assisted suicide debate, and that side aligns with the Christian religion. Consequently, those laws violate the Establishment Clause of the First Amendment to the United States Constitution and represent a challenge to natural law and self-determination.¹⁴¹

Separation of church and state must comprise a definition of religion that is contextualized within the history of that society.¹⁴² Section I references the secular Roman position that suicide was "euthanasia"—good death—however, this secular argument is absent in contemporary America, with the opposition primarily of a religious nature.¹⁴³

Since laws against PAS are coercive by favoring the religiously motivated position of those who may have alternative positions, the primary distinction to be made is whether laws against PAS have a sufficient secular purpose that would prevent them from violating the Establishment Clause.¹⁴⁴ Chief Justice Warren Burger developed the Lemon test to determine when a law has the effect of establishment of religion.¹⁴⁵ The Court ruled that there are three determinations for government concerning religion: 1) the government's action must have a secular legislative purpose, 2) the government's action must not have the primary effect of either advancing or inhibiting religion, and 3) the government's action must not result in "an excessive government entanglement" with religion.¹⁴⁶ The violation of any one of the provisions results in the entire action being unconstitutional.¹⁴⁷

Neither the second nor the third determinant above constitutes violation of the Lemon test within the context of this discussion. An examination of the first determinant is crucial in

¹³⁵ Same as 23, page 126.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Same as 23, page 127.

¹³⁹ Same as 23, page 137.

¹⁴⁰ <https://news.gallup.com/poll/211928/majority-american-remain-supportive-euthanasia.aspx>

¹⁴¹ <https://www.questia.com/read/1P3-2043375791/assisted-suicide-moralilty-and-law-why-prohibiting>

¹⁴² *Id.*, page 22.

¹⁴³ *Id.*, page 23.

¹⁴⁴ *Id.*, page 24.

¹⁴⁵ Lemon v. Kurtzman, 411 U.S. 192 (1973)

¹⁴⁶ <https://definitions.uslegal.com/l/lemon-test/>

¹⁴⁷ Same as 139, page 25.

evaluating intent, but a secular purpose can be difficult to define. A common secular justification for preserving life would seem to be applicable to the population in general—protecting citizens from harm by criminals or foreign powers.¹⁴⁸ State protection for individuals who no longer wish to live is an entirely differently matter, however.¹⁴⁹ Even if the state offers valid legislation for protecting life, it cannot overcome the individual right to be free from religiously based coercion.¹⁵⁰ Is it acceptable under the First Amendment to craft laws that advance a particular religious viewpoint with no evident secular purpose?¹⁵¹ In Lee v. Weisman, the Supreme Court offered a resounding "no."¹⁵²

Also at issue with the presumption that laws against PAS have a strictly secular purpose is that suicide itself is legal.¹⁵³ As noted earlier: "if a person has a right to a particular action, those things necessary for the commission of that act cannot be governmentally forbidden without a fundamental removal of that right."¹⁵⁴ If society desires protection for PAS, ensuring that only competent individuals give consent, well-established systems are in place for regulating what is, in essence, a medical procedure.

Some opponents of PAS question the patient's right of consent.¹⁵⁵ The argument is made that, perhaps, the individual does not actually desire to terminate his/her life. Questions of consent are intrinsic to the American legal system, whether regarding theft of one's property or rape. As a result, extensive mechanisms are available for establishing consent.¹⁵⁶ For many years, Oregon's PAS laws have effectively provided consent for those wishing to die with dignity.¹⁵⁷ A more specific question returns to the secular nature of judicial decisions. In Cruzan, the state maintained it had a compelling interest in the patient's consent to die.¹⁵⁸ Perhaps there was a general legitimate government interest; however, religious exemption rules require courts to apply strict scrutiny when determining that the state has a compelling interest that overrules the patient's right to die.

The Establishment Clause, lacking a purely secular basis, should be interpreted as prohibiting the state from favoring one religious view over competing perspectives.¹⁵⁹ Laws applied to PAS have no such secular basis.¹⁶⁰ The significance of this First Amendment argument is that this coercive action supports the thesis statement that current legislation purposefully negates those rights.

There are numerous examples of judicial and/or legislative efforts to criminalize free speech discussions of assisted suicide that further encroach on self-determination. In 1994, the State of Georgia enacted OCGA §16-5-5(b), which stated that any person "who publicly advertises, offers, or holds himself or herself out as offering that he or she will intentionally and actively assist another person in the commission of suicide and commits any overt act to further

¹⁴⁸ Same as 139, page 25.

¹⁴⁹ Peter Singer, Practical Ethics, Cambridge University Press, CB2 8BS, United Kingdom, 1980

¹⁵⁰ Same as 139, page 26.

¹⁵¹ Same as 139, p. 28.

¹⁵² Lee v. Weisman, 505, U.S. 577

¹⁵³ Same as 98, Grace v. State

¹⁵⁴ Same as 23, page 158.

¹⁵⁵ Kamisar, Yale, "When Is There a Constitutional 'Right to Die'? When Is There No Constitutional Right to Live?" Ga. L. Rev.25 (1991): 1203-42.

¹⁵⁶ Same as 139, page 26.

¹⁵⁷ Oregon Measure 16: Death with Dignity Act. §127.800-§127.890.

¹⁵⁸ Same as 121.

¹⁵⁹ Same as 139, p. 33.

¹⁶⁰ Same as 139, p. 33.

that purpose is guilty of a felony."¹⁶¹ This obvious violation of the First Amendment free speech clause was subsequently overturned by the state supreme court.¹⁶²

In Massachusetts, a young woman's texts to her boyfriend coercing him to commit suicide were adjudicated under the First Amendment free speech clause.¹⁶³ The state held that it had a compelling interest in deterring speech that had a direct causal link to a specific victim's death.¹⁶⁴ This common-law decision established that individual-specific speech advocating suicide is not factually unconstitutional under the First Amendment.¹⁶⁵ The decision survived strict scrutiny and trumped the defendant's right to free speech.¹⁶⁶

In Minnesota, a lower court ruling was remanded to the state supreme court in a similar case of texting to encourage suicide.¹⁶⁷ A male nurse instituted a web forum offering advice to those who desired to kill themselves.¹⁶⁸ The court struck down a portion of the decision; however, left intact was the possibility that words alone would be sufficient to enable suicide.¹⁶⁹ On remand, the lower court convicted Milchert-Dinkel on the basis of his web forum instructions as to how to hang oneself.¹⁷⁰

In Mahorner v. Florida, the court held that the state's ban on assisted suicide did not violate the Fourteenth Amendment.¹⁷¹ The plaintiff, an attorney who suffered from a series of mini-strokes that had resulted in vastly reduced mental status, asked for judgment and relief from Fla. Stat. Ann. § 782.08. His argument, again, centered upon the Fourteenth Amendment Due Process, but with the additional suggestion that the court had a chauvinistic viewpoint: he argue that he was being denied control over his body, while women were given the "right to choose" the death of another.¹⁷²

What do these cases have in common, and what possible connection do they have to the thesis topic? Regardless of circumstance, each case removed autonomy concerning end-of-life decisions from patients and yielded to the state's compelling interest.

A brief introduction to the state's compelling interest may prove useful. A compelling governmental interest is part of the strict scrutiny test wherein courts conduct judicial review of legislative and executive decisions to determine their effects on constitutional rights.¹⁷³ This strict scrutiny test requires the government to use the **least restrictive** means to achieve an interest that is compelling. Prior to 1938, the Supreme Court predominantly ruled in favor of protecting property rights.¹⁷⁴ In United States v. Carolene Products Company, the Court began shifting to the protection of individual rights.¹⁷⁵ Justice Harlan Fiske Stone noted, in footnote number four of United States v. Carolene Products Company, 304 U.S. 144 (1938), that the Court would

¹⁶¹ Final Exit Network, Inc., et al v. State of Georgia, No. S11A1960

¹⁶² *Id.*

¹⁶³ <http://cases.justia.com/Massachusetts/supreme-court/2016-sjc-12043.pdf?ts=1467383517>

¹⁶⁴ *Id.*

¹⁶⁵ <https://advancelexis.com/document/teaserdocument/?pdmfid=1000516&crd=04cdb95a-97e4-420-98e-0937a3f8a1e6&8a1e6&pddocfullpath=%Fshared>, p.23.

¹⁶⁶ *Id.*

¹⁶⁷ State v. Melchert-Dinkel, 844 N.W.2d, 42 Media L. Rep (BNA) 1555, 96 A.L.R. 6th 755 (Minn. 2014)

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Mahorner v. Floride, 2008 WL 2756481 (M.D. Fla. 2008)

¹⁷² *Id.*

¹⁷³ <https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest>

¹⁷⁴ <https://www.mtsu.edu/first-amendment/article/5/carolene-products-footnote-four>

¹⁷⁵ *Id.*, page 1

continue to utilize heightened (strict) scrutiny in all laws or statutes that conflicted with the Bill of Rights.¹⁷⁶ This action defined and advanced the Court's role in protecting numerous individual rights.¹⁷⁷

To further compelling interest arguments, courts have attempted to distinguish between active euthanasia (acts that actively hasten death by providing a life-ending agent) and passive euthanasia (acts that hasten death by withholding life-sustaining agents).¹⁷⁸ In *Vacco v. Quill*, Dr. Timothy E. Quill and other physicians challenged the constitutionality of New York State's PAS ban.¹⁷⁹ The Supreme Court ruled in a 9–0 decision that the New York law did not violate any fundamental right.¹⁸⁰ The Court distinguished between the refusal of life-extending treatment and physician-assisted dying.¹⁸¹ Obviously, the difference is purely semantic—both actions have the intent to end life. There is, apparently, a right to PAS for any patient who is on artificial life support, but terminal patients not on life support are denied this right.¹⁸² This discrimination based upon semantics unequally distributes choice and directly violates the Fourteenth Amendment.¹⁸³

The Oxford Companion to Philosophy describes paternalism as "the power or authority one person or institution exercises over another to confer benefits or prevent harm for the latter regardless of the latter's informed consent."¹⁸⁴ While most courts continue to argue that history and tradition provide the foundation for declining the open-ended right to assisted suicide, this represents the characteristic paternalistic viewpoint of the state and is completely at odds with contemporary personal autonomy.¹⁸⁵ Often, legal rulings advance a state's compelling interest in the welfare of individuals, completely overshadowing centuries of evolution regarding personal rights and self-determination as expressively presented in the United States Constitution and Bill of Rights.

For many, the First Amendment is the heart of the Bill of Rights and the key to protecting the individual against the paternalism of the state. The Bill of Rights is a uniquely American development that represents "a high point of the transformation of natural law theory to a doctrine of natural rights."¹⁸⁶ Indeed, protection of man's natural rights was one of the primary reasons Mason, Henry, Jefferson, and Virginia Governor Randolph advanced inclusion of a Bill of Rights.¹⁸⁷ But what determines a "right," and why has the U.S. Supreme Court ruled that other rights not specifically enumerated in the Constitution are valid while a right to die with dignity does not exist?¹⁸⁸

In western society, any attempt to define "rights" is an attempt to hit an elusive target. According to Aristotle's political philosophy, "rights" are teleological; i.e., a definition requires

¹⁷⁶ *Id.*, page 1

¹⁷⁷ *Id.*, page 2.

¹⁷⁸ The Right to Choose How to Die: A Constitutional Analysis of State Laws Prohibiting Physician-Assisted Suicide, 48 *Stan. L. Rev.* 937 (1996)

¹⁷⁹ <https://www.oyez.org/cases/1996/95-1858>

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Erwin Chemerinski, *Washington v. Glucksberg Was Tragically Wrong*, 106 *Mich. L. Rev.* 1501 (2008), p. 1507.

¹⁸³ Kathryn L. Tucker, David J. Burman, *Physician Aid in dying: A Humane Option, A Constitutionally Protected Choice*, *Seattle Univ. L.R.*, vol. 18:495, p. 506.

¹⁸⁴ The Oxford Companion to Philosophy, Oxford University Press, Oxford, New York, 1995, p. 648

¹⁸⁵ Same as 163, p. 23.

¹⁸⁶ Same as 48, p. 95.

¹⁸⁷ Same as 23, p 127.

¹⁸⁸ Same as 125.

knowledge of the *telos* (or purpose) of the social practice in question.¹⁸⁹ Most individuals do not consider Aristotelian philosophy when defining "rights." More commonly, the notion is of an absolute claim to free action with the state forcing compliance.¹⁹⁰ When evaluating the existence of a right to die with dignity through *telos*, the creation of such "rights" creates a duty in another party.¹⁹¹ This is not a specific individual "right"; rather, it is a generalized protection against actions of a second party.¹⁹² Establishment of this "right," then, mandates that the second party (the state) acknowledges the duty created and the obligation not to interfere in another's freedom of action.¹⁹³

One can appreciate the evolution of new "rights" in Griswold v. Connecticut.¹⁹⁴ In a case seemingly unrelated to the current topic, the Court ruled in a 7–2 decision that there was a **right to marital privacy** previously not enumerated in the Constitution.¹⁹⁵ The State of Connecticut banned the use of contraceptives or the encouragement to use such (Conn. Gen. Stat. § 54-196).¹⁹⁶ Justice William O. Douglas, writing for the majority, ruled Connecticut's statute unconstitutional, asserting that the Bill of Rights is not specific and finite but, rather, has "penumbras," or "gray areas where logic and principle falter."¹⁹⁷ This term was initially coined by Justice Stephen J. Field in Montgomery v. Bevens and was employed to describe the most outer bounds of authority emanating from a law.¹⁹⁸ Thus, the Connecticut law violated the "spirit" of the First Amendment (free speech), Third Amendment (prohibition of the forced quartering of troops), Fourth Amendment (freedom from searches and seizures), Fifth Amendment (freedom from self-incrimination), Ninth Amendment (other not specified rights), and, as applied against the states, the Fourteenth Amendment.¹⁹⁹ Taken together, this "penumbra" of the Amendments creates a fundamental and substantive right to privacy.²⁰⁰ As a result, adverse actions affecting the right of privacy must be compelling and pass the strict scrutiny test.²⁰¹ The Court had previously **rejected** (in Hotel v. Parrish, 1937) this exact argument—specifically, that the government protects certain rights not explicitly mentioned in the Constitution.²⁰² In Griswold, however, the Court reversed and established the right of privacy as a substantive right.²⁰³ The development of a right to privacy would be critical in Roe v. Wade.²⁰⁴

Roe v. Wade was a landmark ruling in which the Supreme Court (7–2 majority vote) deemed abortion a fundamental right of women within the guarantee of personal privacy.²⁰⁵ The importance of Roe in the current context is the Court's creation of a totally new "right" outside the

¹⁸⁹ Michael J. Sandel, Justice, What's the Right Thing to Do? Farrar, Straus and Giroux, 18 West 18th Street, New York, New York, 2009, p. 186.

¹⁹⁰ Same as 23, p. 49.

¹⁹¹ Same as 23, p. 50.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Griswold v. Connecticut, 381 U.S. 479 (1965)

¹⁹⁵ https://www.thirteen.org/wnet/supremecourt/rights/landmark_griswold.html

¹⁹⁶ *Id.*

¹⁹⁷ 178 Mass. 472, 476, 59 N.E. 1033, 1034 (1901)

¹⁹⁸ Montgomery v. Bevens, 17 F.Cas.628 (9th C.C.D. Cal)

¹⁹⁹ Same as 188, p. 2.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Roe v. Wade, 410 U.S. 113 (1973)

penumbra of common law. This decision has not enjoyed unqualified support, as Yale Professor John Hart Ely cautioned that "this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure."²⁰⁶ In other words, Roe is United States v. Carolene Products taken to its logical end.

Contextually, Casey v. Planned Parenthood is, perhaps, the more relevant legal decision, stating: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."²⁰⁷ In addition, the Justices stated: "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."²⁰⁸ There appears no sound reasoning that would remove end-of-life decisions from the reasoning evidenced in Roe or Casey.

The Court has considered right-to-die issues in numerous cases, such as In re Karen Ann Quinlan, Cruzan v. Missouri Department of Health, and People v. Kevorkian. Only in Washington v. Glucksberg has the Court absolutely denied a right to assisted suicide.

In 1994, the United States Court of Appeals for the Ninth Circuit ruled that the right to privacy included a right to PAS.²⁰⁹ At approximately the same time, in Vacco v. Quill, the Court of Appeals for the Second Circuit reversed a district court ruling that the New York statute prohibiting assisted suicide violated equal protection.²¹⁰ One year later, the Supreme Court unanimously reversed both of these decisions and denied a constitutional right to assisted suicide.²¹¹

The Supreme Court got it wrong. First, the Court was in error in finding that the laws prohibiting assisted suicide do not fundamentally infringe upon the right to privacy.²¹² Second, the Court failed to prove that a prohibition of assisted death meets a compelling government interest.²¹³

Conservative courts systematically maintain that there is no specific mention of privacy rights in the Constitution; therefore, a right to assisted suicide cannot infringe upon privacy.²¹⁴ However, long before the Court ruled upon assisted suicide, it held that privacy is protected as a fundamental right.²¹⁵ Some of these judicially recognized fundamental rights are the "right to marry, the right to custody of one's children, the right to keep a family together, the right to control the upbringing of one's children, the right to procreate, the right to purchase and use contraceptives and the right to abortion."²¹⁶ Government interference in a fundamental right must pass strict scrutiny. Unless it desired to overturn all of these decisions, it is evident that, at the time of Glucksberg, the Court had been consistent in including these aspects of personal autonomy.

²⁰⁶ 82 Yale L.J. 936 1972-1973, p. 935-936

²⁰⁷ Same as 181, p. 500.

²⁰⁸ *Id.*, p. 499.

²⁰⁹ Compassion in Dying v. State of Wash., 850 F. Supp. 1454 (W.D. Wash. 1994)

²¹⁰ Vacco v. Quill, 80 F.3d 716 (2d Circ. 1995)

²¹¹ Washington v. Glucksberg, 521 U.S. 702 (1997)

²¹² Same as 180, p. 1502.

²¹³ *Id.*, p. 1502.

²¹⁴ *Id.*

²¹⁵ *Id.* p. 1503.

²¹⁶ *Id.* p. 1504.

In Glucksberg, Chief Justice Rehnquist, writing for the unanimous decision, seemed to justify an approach to fundamental rights that is at odds with prior holdings.²¹⁷ The Chief Justice described the legal and moral history of assisted death in the United States as applying a disproportionate weight to "fundamental rights that are deeply rooted in the Nation's history and tradition."²¹⁸ This is a rather quaint concept when compared with recent Supreme Court decisions concerning same-sex marriage, transgender rights, and other newly discovered fundamental rights of individuals. Application of this argument fails to address whether due process protects only those fundamental rights that are "deeply rooted in the Nation's history and tradition."²¹⁹ In Lawrence v. Texas, the Court invalidated long-standing laws prohibiting consensual homosexual activity, even though this right is nowhere to be found in the Constitution, the framers' intent, or tradition.²²⁰ Oliver Wendell Holmes cautioned against this reasoning: "It is interesting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."²²¹ This restrictive view of fundamental personhood rights cannot be sustained under the Due Process Clause.²²²

If the courts have previously protected privacy rights under multiple Amendments, should PAS be considered a fundamental right?²²³ In striking down the Washington State statute on aiding in suicide, the Ninth Circuit cited centuries-old reasoning to explain its ruling to overturn: "The Constitution stands as a bulwark between individual freedom and arbitrary and intrusive governmental power," providing relief from those that would "force their views, their religious convictions, or their philosophies on all the other members of a democratic society, and to compel those whose values differ with theirs to die painful, protracted, and agonizing deaths."²²⁴ The Supreme Court's adverse approach to physician-assisted dying cannot be reconciled with other decisions supporting unremunerated rights as fundamental.²²⁵

Once it has been established that a fundamental right to privacy includes assisted dying, does the government have a demonstrable compelling interest in prohibiting PAS that will pass the strict scrutiny test?²²⁶ Perhaps prevailing state and federal laws serve primarily to deny individuals' constitutionally guaranteed rights of self-determination.

The United States Supreme Court and the courts in Quill and Glucksberg address several specific areas of interest concerning assisted suicide: (1) preserving life, (2) preventing suicide, (3) avoiding the involvement of third parties, (4) protecting family members and loved ones, (5) protecting the medical profession, and (6) avoiding the "slippery slope" of euthanasia.²²⁷ When each of these categories is evaluated, the laws of Washington and New York fail strict scrutiny.²²⁸

As discussed previously, preserving life is a compelling government interest only in a general context. Our question, then, is whether the government has a compelling interest in

²¹⁷ *Id.*

²¹⁸ Same as 204.

²¹⁹ Same as 207, p. 1505.

²²⁰ Lawrence v. Texas, 539 U.S. 558 (2003).

²²¹ O.W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, P. 469 (1897)

²²² Same as 207, p. 1506.

²²³ *Id.*

²²⁴ Same as 205.

²²⁵ Same as 180, p. 1507.

²²⁶ Same as 180, p. 1508.

²²⁷ Same as 180, p. 1509.

²²⁸ Same as 180, p. 1509.

prolonging the lives of terminally ill patients who desire to die.²²⁹ Context is essential. The Supreme Court, Washington, and New York had previously established that the interest of the state in preserving life was not sufficient to prevent individuals from ending their lives through refusal of medical treatment.²³⁰ What possible compelling interest might the state have to prolong the suffering of a terminally ill patient?²³¹

The second area of interest stressed by the Court was the prevention of suicide. Again, as a very general consideration, the state has an interest in preserving life.²³² Focusing on the thesis topic, does the state have a compelling interest in preventing terminally ill patients from being assisted in their death?²³³ Without question, the state has a heightened interest in preventing suicide in patients who are not terminally ill.²³⁴ In Washington v. Glucksberg, the issue is quantitatively and qualitatively different in that the patient has no reasonable expectation that extending life would yield additional days of acceptable quality of life.²³⁵ Judge Richard Posner suggested that permitting the option of assisted suicide might actually reduce that option by returning a measure of control to the patient.²³⁶ The Ninth Circuit stated: "assuring such individuals that they would be able to end their lives later if they wished to, even if they became totally physically incapacitated would deter them from committing suicide now and would also give such people a renewed peace of mind."²³⁷ There is no credible proof of a state's compelling interest in forcing a terminally ill patient to continue to suffer.

Chief Justice Rehnquist referred to "protecting the integrity of the medical profession" as an essential goal of denying terminal ill patients the right to assisted suicide.²³⁸ If the fundamental right to assisted suicide was recognized by state and federal jurisdictions, no physician would be forced to participate.²³⁹ There is a constitutionally protected right to abortion; however, no physician is required to perform abortions.²⁴⁰ History records that Hippocrates understood and advocated physician-assisted dying when no healing can be done.²⁴¹ Chief Justice Rehnquist was unable to clarify why the integrity of the medical profession rises to the level of a compelling government interest.²⁴²

The Court also indicated that the decision in Washington v. Glucksberg would protect vulnerable individuals from being pressured into ending their lives sooner than they wished; the "slippery slope" of euthanasia.²⁴³ While this is certainly a substantial concern, the question remains: does the government have a compelling interest in depriving terminally ill individuals of access to PAS simply because a few may be pressured into this choice?²⁴⁴ The Supreme Court has granted a fundamental right to abortion; however, the court also recognizes the right of each

²²⁹ *Id.*

²³⁰ Same as 180, p. 1509.

²³¹ Same as 180, p. 1509.

²³² Same as 180, p. 1509.

²³³ Same as 180, p. 1510.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Compassion in Dying, 79 F.3d at 824 n. 98

²³⁷ *Id.*

²³⁸ Same as 209.

²³⁹ Same as 180, p.1511.

²⁴⁰ *Id.*

²⁴¹ Same as 20.

²⁴² Same as 180, p. 1511.

²⁴³ Same as 180, p. 1512.

²⁴⁴ *Id.*

woman to decide against having an abortion.²⁴⁵ Terminally ill individuals should not be denied the fundamental right to assisted suicide because there is a chance that other individuals will be forced to make similar choices under duress.²⁴⁶

The Court's concern about the "slippery slope" of euthanasia fails predictably, as do other arguments denying "rights" because they may be abused.²⁴⁷ Recognizing a fundamental right to PAS in a competent, terminally ill patient does not automatically extend that right to others.²⁴⁸ A common argument against PAS is reflected in a statement from John Kelly, a regional director of Not Yet Dead: "assisted suicide laws inevitably take the lives of innocent people through misdiagnosis and elder abuse."²⁴⁹ Evaluation of Oregon's experience with PAS repudiates the "slippery slope" argument by prescribing a number of steps designed to minimize abuse.²⁵⁰ Before receiving a prescription for a lethal medication, the patient must be: 1) an adult, (greater than 18 years of age), 2) a resident of Oregon, 3) capable of making their own health care decisions, and 4) diagnosed with a terminal illness that could be expected to cause death within six months.²⁵¹ If the patient is approved to obtain a lethal prescription, the following steps must be fulfilled: 1) the patient must make two oral requests to his or her physician, separated by at least 15 days, 2) the patient must provide a written request to his or her physician, signed in the presence of two witnesses, 3) the prescribing physician and a consulting physician must confirm the diagnosis and prognosis, 4) the prescribing physician and a consulting physician determine whether the patient is capable, 5) if either physician believes the patient's judgment is impaired by a psychiatric or psychological disorder, the patient must be referred for a psychological examination, 6) the prescribing physician must inform the patient of feasible alternatives to dying with dignity, including comfort care, hospice care, and pain control, and 7) the prescribing physician must request, but may not require, the patient to notify his or her next of kin of the prescription request.²⁵² Since implementation of the Death with Dignity Act in 1998, 1,275 terminally ill patients have used prescriptions to end their lives.²⁵³ In 2018, as in previous years, the analysis shows that most patients: 1) were over 65 years old (80.4%), 2) had cancer (76.9%), 3) were in hospice care at the time of death (90.9%), and 4) died at home (90.2%).^{254/255} Other studies have shown that, although individuals had access to PAS, only a very small percentage actually took advantage of this option.²⁵⁶ Studies in the Netherlands showed that somatic pain was the greatest impetus to request PAS, followed closely by emotional unbearableness.²⁵⁷ Numerous other studies have shown that a patient's perceived dignity at the end of life is directly related to autonomy and the patient's ability to have personal direction over immediate treatment goals and options.²⁵⁸

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Same as 180, p. 1513.

²⁴⁸ Same as 180, p. 1513.

²⁴⁹ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5250524/>

²⁵⁰ Same as 180, p. 1514.

²⁵¹ The Death with Dignity Act (DWDA)

²⁵² *Id.*

²⁵³ <https://www.deathwithdignity.org/oregon-death-with-dignity-act-annual-reports/>

²⁵⁴ *Id.*, page 1.

²⁵⁵ <https://jamanetwork.com/journals/jama/article-abstract/2532018>

²⁵⁶ Attitudes and Desires Related to Euthanasia and Physician-Assisted Suicide Among Terminally Ill Patients and Their Caregivers, Ezekiel J. Emanuel, MD, PhD, Diane I. Fairclough, DPM, Linda L. Emanuel, MD, PhD, JAMA, November 15, 2000, Vol 284, p. 2460-2468.

²⁵⁷ <https://www.tandfonline.com/doi/abs/10.1080/15524250902822366>

²⁵⁸ <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0151435>

Oregon's experience over the past twenty years illustrates that safeguards can be put in place to eliminate the abuses that concerned the Court in *Glucksberg*.²⁵⁹ "Put in the language of strict scrutiny, prohibiting **all** physician-assisted dying is not necessary in order to prevent abuses."²⁶⁰

The Supreme Court has recognized the constitutional right of individuals to choose how to live one's life. Legislation and judicial review that deny the fundamental right of a competent, terminally ill adult to hasten death is a significant barrier to exercising fundamental choices.

SECTION VII

Summary

At 6'5" and 260 pounds, Thomas D. Phillips was a big man. His athleticism earned him a football scholarship to the University of Kentucky. Like so many other Americans, his education was interrupted by World War II. Tom joined the Army Air Force with dreams of being a fighter pilot. Unfortunately, his size precluded a comfortable fit in a Grumman F6F Hellcat, and thus he was trained to pilot a B29 bomber. On his third mission over Nazi Germany, First Lieutenant Phillips' plane was shot down and he became *kriegsgefangener*, #5735 Kgflgd.L.W.3.

Wounded during the crash, Tom sustained injuries to the lower third of his face and lip that received no medical attention during his two years of incarceration. Unfortunately, one of the only "pleasures" afforded the prisoners was German cigarettes. The combination of unhealed oral wounds and nicotine would be of immense significance in his future.

After being repatriated to the United States, Tom began rebuilding his life: marrying, graduating from the University of Tennessee, beginning a career, and fathering a son. Years later, he developed cancer of the mandible secondary to his service injuries that required multiple facial surgeries. He was diagnosed with metastasis to the brain in 1964.

In his final days, Tom was cared for at home with the assistance of his physician brother-in-law, an internationally renowned trauma surgeon. In those days, physicians commonly carried a "doctor's bag" complete with appropriate emergency supplies—including pain relievers. Although fully lucid, Tom endured intense and unremitting pain from the brain metastasis that necessitated morphine as needed. He died of respiratory failure at age 47, only 24 hours before his only son graduated from high school. Had Tom been at a VA or other hospital, his intense suffering would have continued unabated since the state did not recognize the right of a competent, terminally ill adult to die with dignity.

Since pre-Socratic times, the benchmarks for debate regarding end-of-life decisions have been the application of natural law and the concept of maintaining self-determination. Evolving western legislative and judicial decisions have produced effects counter to these established standards. The legitimacy of any government is established by those that are governed—a concept founded in early classical antiquity, codified in the Magna Carta, and enshrined in the United States Constitution and Bill of Rights through the writings of Thomas Jefferson. These truths are self-evident.

Perhaps John Stuart Mill applied the theory of justice most accurately when he wrote, "The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice. He who does anything because it is the custom, makes no choice. He gains no practice either in discerning or in desiring what is best. The mental

²⁵⁹ Same as 180, p. 1514.

²⁶⁰ Same as 180, p. 1515.

and moral, like the muscular powers, are improved only by being used...He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties."²⁶¹

²⁶¹ John Stuart Mill, On Liberty (1859), Stefan Collini, ed. (Cambridge University Press, 1989), ch. 1.