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SUICIDE AND ASSISTING SUICIDE: A CRITIQUE OF LEGAL SANCTIONS†

by

H. Tristram Engelhardt, Jr. and Michele Malloy***

RECENT legislation and court opinions concerning the right to die make an examination of the legal sanctions against suicide and assisting suicide a timely topic. The right of an individual to take his or her own life, alone or with assistance, is engendering increasing interest.[1] This Article discusses the purposes of the law with regard to suicide and assisting suicide[2] and the current state of that law in American juris-

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1. For literature concerning the right to die, see M. BATTIN, ETHICAL ISSUES ON SUICIDE (1982); BENEFICENT EUTHANASIA (M. Kohl ed. 1975); R. BURT, TAKING CARE OF STRANGERS (1979); EUTHANASIA AND THE RIGHT TO DEATH (A. Downing ed. 1969); LAW REFORM COMM'N OF CANADA, WORKING PAPER NO. 28, EUTHANASIA, AIDING SUICIDE AND CESSATION OF TREATMENT (1982); D. MAGUIRE, DEATH BY CHOICE (1974); ON THE NATURE OF SUICIDE (E. Shneidman ed. 1969); SOCIETY FOR THE RIGHT TO DIE, HANDBOOK (1981); SUICIDE AND EUTHANASIA (S. Wallace & A. Eser eds. 1981); SUICIDE: THE PHILOSOPHICAL ISSUES (M. Battin & D. Mayo eds. 1980); SUICIDE: THEORY AND CLINICAL ASPECTS (L. Hankoff ed. 1979); R. VEATCH, DEATH, DYING AND THE BIOLOGICAL REVOLUTION (1976); Beauchamp, *An Analysis of Hume's Essay "On Suicide"*, 30 REV. METAPHYSICS 73 (1976); Beauchamp & Davidson, *The Definition of Euthanasia*, 4 J. MED. & PHIL. 294 (1979).

2. Assisting suicide as used here indicates one or more of the following acts: (1) providing another with the means to commit suicide, for example, purchasing a gun or poison for a prospective suicide; or (2) encouraging another to commit suicide. Either form of assistance involves passive assistance. Conversely, engaging in active facilitation of a suicide, such as shooting others at their request, or putting poison into their mouths at their request, is designated as active assistance of suicide. Assisting suicide does not include active assistance of suicide. Situations involving nonintervention when another is committing

dictions. Because recent legal reflections directly concerning suicide have been overshadowed by other reflections concerning the right to refuse life-saving treatment,[3] the latter is also explored insofar as it may illuminate the issues of suicide and assisting suicide. This Article then addresses the statutory and pre-1973 case law on assisting suicide in Texas as an aberrant but instructive example of current suicide law.[4] In addition, the civil and criminal liability of physicians in the context of aiding and abetting suicide is discussed. Finally, legislative recommendations are advanced with regard to suicide and assisting suicide.

Two primary arguments exist for the legalization of suicide and assisting suicide. The first is based upon considerations of an ethical principle: the state should not enforce purported duties to oneself, such as the purported duty not to take one's own life, because this enforcement infringes upon a fundamental moral right of self-determination. The second argument is based upon consequences: no evidence exists that the decriminalization of suicide or assisting suicide would have significant antisocial results. The force behind these arguments is that society must respect an individual's

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suicide are not included under the rubric of passive assistance. One should note, however, that special fiduciary relationships, such as those between a patient and a physician, may convert what in other circumstances would simply be nonintervention into abetting the suicide of another. For a discussion of the distinction between killing and simply letting one die, the active-passive distinction in ethics, see *infra* note 105. Passive assistance and aiding or abetting suicide comes within the Model Penal Code as aiding or soliciting suicide. MODEL PENAL CODE § 210.5(2) (Proposed Official Draft 1962).

3. *See* Larremore, *Suicide and the Law*, 17 HARV. L. REV. 331 (1904); Mikell, *Is Suicide Murder?*, 3 COLUM. L. REV. 379 (1903); Parry-Jones, *Criminal Law and Complicity in Suicide and Attempted Suicide*, 13 MED., SCI. & L. 110 (1973); Schwartz, *Civil Liability for Causing Suicide: A Synthesis of Law and Psychiatry*, 24 VAND. L. REV. 217 (1971); Shulman, *Suicide and Suicide Prevention: A Legal Analysis*, 54 A.B.A.J. 855 (1968); Comment, *Criminal Aspects of Suicide in the United States*, 7 N.C. CENT. L.J. 156 (1975) [hereinafter cited as Comment, *Criminal Aspects*]; Comment, *Suicide—Criminal Aspects*, 1 VILL. L. REV. 316 (1956). See also literature bearing on euthanasia and the law, much of which is helpful in considering the issue of suicide: Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228 (1973); Crofts & Sharp, *Death with Dignity: The Physician's Civil Liability*, 27 BAYLOR L. REV. 86 (1975); Foreman, *The Physician's Criminal Liability for the Practice of Euthanasia*, 27 BAYLOR L. REV. 54 (1975); Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U. PA. L. REV. 350 (1954); Thurman, *Euthanasia: The Physician's Liability*, 10 PRAC. & PROC. 148 (1976); Comment, *Unauthorized Rendition of Lifesaving Medical Treatment*, 53 CALIF. L. REV. 860 (1965).

The literature concerning suicide to date is incomplete and misleading. For example, one commentator reports Texas as having a law against attempted suicide, although he fails to note that until 1973 Texas had no law against aiding and abetting suicide, much less attempted suicide. Comment, *Criminal Aspects, supra*, at 158-63. Also, some have seen a conflict between the Texas ruling in Sanders v. State, 54 Tex. Crim. 101, 112 S.W. 68 (1908) (allowing provision of means to suicide as long as the suicide committed the last act), and Aven v. State, 102 Tex. Crim. 478, 277 S.W. 1080 (1925) (forbidding person assisting from performing last definitive act of introducing deadly agent to the suicide). Comment, *Criminal Aspects, supra*, at 158-63. This Article argues that *Sanders* and *Aven* are not in conflict. For a recent journalistic overview, see Podgers, *'Rational Suicide' Raises Patient Rights Issues*, 66 A.B.A.J. 1499 (1980). For an account of a recent assisted suicide, see D. HUMPHREY, JEAN'S WAY (1978).

4. The discussion primarily focuses upon Grace v. State, 44 Tex. Crim. 193, 68 S.W. 529 (1902), Sanders v. State, 54 Tex. Crim. 101, 112 S.W. 68 (1908), and TEX. PENAL CODE ANN. § 22.08 (Vernon 1974). *See infra* notes 80-110 and accompanying text.

freedom, even to the point of allowing persons to engage in acts that might be self-destructive or immoral, as long as this freedom does not directly and significantly injure others.[5] This Article, however, examines only the rights of competent individuals to commit suicide or to be assisted in suicide, not the withdrawal of care and protection from the incompetent. Our focus is upon those individuals who wish to commit suicide, to be assisted in committing suicide, or to assist another in committing suicide, individuals who could not be found incompetent on grounds other than simply having such a desire.[6]

I. LEGAL SANCTIONS AGAINST SUICIDE AND ASSISTING SUICIDE

A. The Purpose of the Law

Many reasons have been advanced for governmental regulation of individual affairs. These grounds for intervention have generally been reflective of global questions concerning the nature of the law and its purposes. Such rationales are arranged under three rubrics: (1) the paternalistic view, by which the state is considered the guardian of the best interests of its individual subjects; (2) the public welfare view, by which the state has the right to interfere and intervene in the individual's affairs for the sake of the public welfare and the ordering of society; and (3) the libertarian view, by which the state should function only as a protective vehicle of individual freedom.

Examples of paternalism include legislation on victimless crimes, such as drug abuse, gambling, consensual sexual relations, and suicide. Paternalistic regulation is reasoned upon the premise that the state is charged with protecting the individual from self-inflicted harm. Judicial examples

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5. The point is that (1) if the community is not to be a vehicle for the enforcement of the views of some on others, and (2) if there are wide-ranging views as to what constitutes a good life, and (3) if no definitive, rational argument establishes one such view as proper, then (4) one may only impose on others that fabric of social structure essential to the general welfare and protection of society, and (5) one may only define welfare in the most general terms, such as food and shelter, where welfare can also be refused. Nor may the state enforce duties to oneself, for the notion of duties to oneself is metaphorical. If one has a duty to oneself, then the self that has the right to the discharge of the duty can release the self that has the duty. Because these are the same selves, duties to oneself cannot strictly bind. Singer, *On Duties to Oneself*, 69 ETHICS 202, 202-04 (1959).

The state has an interest in protecting its citizens from the practices of individuals who would injure those citizens. The state, however, ought not enforce duties to oneself, because such duties fall outside the province of a secular state, unless the state arrogates to itself the role of protecting God's interests and religious moral concerns, as does the British state. Concern with enforcing duties to oneself in the absence of a religious context will have even less of a basis for common agreement than within a religious tradition, for one might presuppose some prior consent to the imposition of an orthodoxy in a community with an established religion. But even then heterodox views as to proper personal goods and goals will exist. An orthodoxy that includes duties to oneself will, as a result, lead to imposing one view of proper personal goods on all, not simply requiring one to agree to abide by jointly chosen goals for common projects.

6. *See* A HANDBOOK FOR THE STUDY OF SUICIDE (S. Perlin ed. 1975). For a discussion of the difficulties in framing a notion of mental competency and for establishing reliable tests for mental competency, see MENTAL ILLNESS: LAW AND PUBLIC POLICY (B. Brody & H. Engelhardt eds. 1980).

of this position include court-ordered blood transfusions[7] to members of religious sects that proscribe this use of blood.[8] Such legislation and court holdings are suspect when they impose upon competent, nonconsenting individuals what others hold to be in those individuals' best interests.[9] Initially, how one can determine the best interests of others is unclear. A

7. *See, e.g.*, *In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1007 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); United States v. George, 239 F. Supp. 752, 754 (D. Conn. 1965).

8. Jehovah's Witnesses and Christian Scientists are the two sects most commonly involved in treatment refusal litigation. Jehovah's Witnesses have refused transfusions on the basis of their reading of the passages in the Bible that forbid eating anything still with blood in it. Jews have traditionally applied these passages to the proper slaughtering of animals for food, not to transfusions. *See Deuteronomy* 12:22-23; *Leviticus* 19:26. Christian Scientists have categorically rejected medical treatment and have instead relied upon prayer as a means to preserve and restore health. F. Lord, CHRISTIAN SCIENCE HEALING: ITS PRINCIPLES AND PRACTICES 23 (1888).

9. Various levels of and justifications for paternalism can be established. Strong paternalism would allow intervention on behalf of the best interests of others, even against their will. In such instances respect for freedom is not recognized as a condition for a moral community. Justification for intervention may also be attempted in terms of implied consent; individuals would want others to interfere on their behalf when they would endanger their own interests. In these circumstances, paternalistic intervention would function as a form of insurance policy. *See* Dworkin, *Paternalism*, 56 MONIST 64 (1972). Respect for freedom, however, is likely to foreclose anything save weak paternalism, which would allow temporary intervention in order to establish whether the individual involved is cognizant of the actual state of affairs in which he is engaged and is competent to act. One could, however, interfere only if sufficient grounds exist to believe that the individual to be restrained was incompetent or mistaken about crucial facts. However, respecting freedom includes respecting the freedom to embrace the wrong information. A classical formulation justifying temporary limited intervention is provided by John Stuart Mill:

> Again, it is a proper office of public authority to guard against accidents. If either a public officer or any one else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river. Nevertheless, when there is not a certainty, but only a danger of mischief, no one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk; in this case, therefore (unless he is a child, or delirious, or in some state of excitement or absorption incompatible with the full use of the reflecting faculty), he ought, I conceive, to be only warned of the danger; not forcibly prevented from exposing himself to it.

J. MILL, ON LIBERTY 117 (C. Shields ed. 1956). Once warned, that is, if it is clear that the individual understands the dangers involved, he may proceed even in circumstances when danger is certain. Paternalism raises two cardinal issues: (1) respect for the freedom of individuals who may wish to act in particular ways whether or not others would hold such acts to be in the individual's best interests; and (2) who ought to be the judge of the best interests of another. Paternalistic interventions can be classified as:

A. Paternalism for incompetents. In cases of individuals who have never been competent or who, while competent, expressed no judgment as to how they should be cared for while incompetent, others have no choice but to attempt to determine as best they can what would be in the best interests of those incompetents. This form of paternalism is best exemplified in parentalism, in which parents protect the best interests of their incompetent children.

B. Fiduciary paternalism. In fiduciary paternalism a competent individual appoints another to act on his behalf. A Jehovah's Witness, knowing that he may become incompetent, might instruct another to act as his guardian to prevent all blood transfusions. Alternatively, the fiduciary may be given the prerogative to use his own discretion.

> *(1) Explicit*. Here a person gives to another the right to act as his guardian at a specified time. Some forms of the patient-physician relationship may be

judgment of another's best interests requires an ordering of the significance of benefits and banes. This ordering, however, presupposes a particular moral or evaluational sense, and is therefore irradicably subjective. For example, how does one determine when it really is or is not in a particular individual's best interests to live longer, when this judgment is dependent upon an individual's assessment of the importance, significance, and goals of his own life?

One should also note the difficulty of establishing the moral priority of any particular ordering of goods and harms. How can one establish whether it is worth a particular amount of suffering in order to achieve a certain chance of cure for a particular cancer, for example, or whether it is better simply to commit suicide and avoid further pain? Appealing to moral intuitions will not help since any particular moral intuition can be countered by a second and contrary moral intuition. Neither will an appeal to a disinterested moral observer or group of rational contractors

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of this sort; for example, "Doctor, you have my consent to decide what you think to be the best form of treatment, should such-and-such happen."

(2) Implicit. Under certain circumstances holding that individuals have impliedly agreed that others may act in their best interests may be justified, although no explicit formal agreement was actually made.

(a) Short-term implicit intervention. Minor paternalistic interventions are often justified on the following basis. A reasonable and prudent person would not mind intervention if he is about to engage in a very dangerous act, so that others can determine whether he is incompetent and whether he wishes to have relevant information concerning the dangerousness of the activity in which he is about to engage. Liberty is not significantly restricted, because competent individuals could always decline further intervention. With respect to suicide, one could at most justify under this rubric a mandatory short period in which to evaluate the competence of a would-be suicide in circumstances when reasonable grounds exist for questioning competence. Special legislation would not be required. General provisions for short-term, usually 72 hours, civil commitment for evaluation of the putatively mentally ill should suffice. For example, California's statute allows 72 hours of civil commitment for evaluation of individuals thought to be mentally ill and of danger to themselves. CAL. WELF. & INST. CODE § 5150 (West 1972 & Supp. 1982). Another provision allows for a 14-day commitment to follow the 72-hour period, however, in a context involving an imminent threat of taking one's own life. *Id.* § 5260 (West 1972).

(b) Long term implicit intervention. Some commentators have argued that citizens of a society have implicitly agreed to paternalistic interventions as social insurance policies. *See, e.g.*, Dworkin, *supra*. This argument must be qualified if one takes the freedom of the individual seriously. Competent individuals should be able to rebut such an implied presumption by stating simply that they are not interested in insurance through mandatory paternalistic interventions. Such social insurance policy justifications for intervention also presume that one can generally determine what is in the best interests of individuals without consulting those individuals. Individuals have divergent views of their own best interests, however, and no acceptable formula has been proffered for the determination of how the best interests of individuals are to be characterized.

C. Best interests paternalism. Those who support strong paternalism argue that it is more important to secure for others what third parties know to be in their best interests than it is to respect the free choice of those who are subjected to the paternalistic intervention.

For some recent discussions of paternalism, see Buchanan, *Medical Paternalism*, 7 PHIL. & PUB. AFF. 370 (1978); Cantor, *supra* note 3, at 246; Feinberg, *Legal Paternalism*, 1 CAN. J. PHIL. 105 (1971).

help. In order for an appeal to an intellectual construct of a disinterested moral observer or a group of rational contractors to substantiate a judgment that a particular ordering of benefits and banes is to be preferred, one must assign such an observer or group of moral contractors a moral sense. But how will one choose what moral sense to assign?[10] The appeal to intuitions or hypothetical choice theories presupposes that which they are to provide. Thus, the only moral order that one will be able to assign is that which is presupposed in the very undertaking of resolving moral disputes peaceably, that is, the mutual respect of freedom. One will be able to condemn unconsented-to force against the innocent (i.e., those who have not used such force) and the breach of that moral fabric, which is created by common consent, because such is presupposed in the very practice of asking ethical questions as an alternative to force.[11] The very nature of moral

10. *See* R. BRANDT, A THEORY OF THE GOOD AND THE RIGHT (1979); J. MILL, UTILITARIANISM (London 1863); J. RAWLS, A THEORY OF JUSTICE (1971). These works fail, however, to secure a crucial premise in establishing the moral priority of any ordering of goods and harms. They must first establish the moral priority of a particular moral sense or establish concrete ordering of the goods of life. This, however, would require an infinite regression to further hypothetical rational perspectives regarding what would be the rational choice among competing moral senses enlisted in the choice among moral senses, and so on forever. That is, one must enlist a higher order of moral sense to choose which moral sense to affirm. But one will then need to presuppose a yet higher order of moral sense in order to choose a second order of moral sense, the latter being necessary for the choice of the first order of moral sense. Since attempts to discover the character of the good life fail, moral worlds must be recognized as the creation of individuals disposed to choose in accord with a particular moral sense. What is common to all *moral* worlds is, as this Article shall argue, the common commitment to mutual respect of moral individuals. This is the only moral absolute, the minimum condition for the very enterprise of ethical action as an alternative to force. Any further moral principles are less basic and therefore more costly in terms of involving a commitment to a particular moral vision. They would require embracing one moral viewpoint while eschewing others. As an element of framing an actual moral world, this can only be accomplished morally with the consent of the participants, the individuals committed to the choice of that particular moral world. These choices are dependent upon historical, sociological, economic, and psychological factors; they are as much explicable by historians, sociologists, economists, and psychologists as they are by philosophers concerned with the principles of ethics. *See* Engelhardt, *Tractatus Artis Bene Moriendi Vivendique: Choosing Styles of Dying and Living*, in FRONTIERS IN MEDICAL ETHICS: APPLICATIONS IN A MEDICAL SETTING (V. Abernethy ed. 1980).

11. Thus, despite the variety of moral senses, insofar as one wishes to resolve issues peaceably, one presupposes a relative moral absolute. This presupposition discloses a necessary condition for a major element of a person's life. The endeavor of resolving moral disputes as disputes open to rational agreement, not as disputes resolvable in terms of superior force, leads to the acceptance of respect of freedom as a necessary condition for moral conduct. This acceptance results even when no definitive rational grounds exist to resolve a dispute and the dispute, instead, must be resolved by mutual agreement. The grounds for the common agreement provide a common rationale, even if these grounds are not the conclusions of definitive rational moral argument. We are offering, in short, a Kantian reconstruction of Robert Nozick's argument for freedom as a side constraint by recognizing that mutual respect of freedom is the necessary condition for ethics as an alternative practice to the use of force in resolving moral disputes. *See* R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974). As the need to accept this constraint, and this construction of its foundation, becomes clearer, the more it becomes clear that correct moral answers to moral problems are not likely to be discovered. Instead, they will need to be created by moral agents. One will have provided the grammar of moral discourse without providing its content. One will also have provided the most easily justified understanding of ethics in that this understanding does not require one to accept any particular value, even freedom, as the goal of life or the

uncertainty in pluralist secular societies shifts the core of the general fabric of morality to respect for the rights of individuals to pursue their vision of the good life with consenting others. The focus is then upon protecting the unwilling from coercion and providing refusable welfare rights, rather than supporting a particular view of the good life through governmental regulation.

This conclusion leads to a special difficulty with paternalistic interventions against unconsenting competent individuals: determining the circumstances under which an organized group of individuals, for example a state, may override the wishes of a free individual in matters that primarily concern that individual and his consenting collaborators. Insofar as one holds that individuals are the origin of governmental authority, one will not be able to recognize the government as having authority that individuals have not in fact conferred upon it. Claims of governmental authority to forbid actions done in private, alone or with consenting collaborators, should thus be viewed as suspect. This suspicion should undercut claims that forbidding the suicide of competent individuals can be justified on the basis of a right to impose upon those individuals what others would hold to be in their best interests. Such a strong form of paternalism would thus be undermined.

The public welfare rationale for intervention in individual affairs is often espoused by the judiciary. An example is a court-ordered blood transfusion, not for the sake of the ill person, but because a minor child would become a ward of the state if the mother is allowed to die.[12] Courts have used a compelling interest analysis to determine the extent of necessary state intervention.[13] In this approach the state is not portrayed as acting in the best interest of its individual subject. Instead, the state protects the public from having its just interests violated by the acts of individuals.[14] In a free society, however, arguing that individuals have assumed responsibilities to which they have not in fact agreed, or which they have

summum bonum. It requires only that one be interested in ethics as offering a mode of resolving moral disputes other than through force. Individuals may decide not to value freedom highly and, for example, to abandon their future opportunities to act freely through suicide. Those choices, including the choice not to value freedom, should be made in a context free of coercion, in order to support morality as an alternative to force. Understandings of the moral life, which more fully specify the ordering of goods, require arguments to establish the authority of a particular moral sense. These arguments do not appear sustainable.

12. *See In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1008 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *see also* Yarborough v. Yarborough, 290 U.S. 202 (1933) (Stone, J., dissenting); Geary v. Geary, 251 U.S. 535 (1919) (discussing role of state as parens patriae).

13. For a discussion of the compelling interest test, see generally Sherril v. Knight, 569 F.2d 124, 130 (D.C. Cir. 1977).

14. State interests include not letting individuals die by refusing treatment if they will leave dependent children whom society will have to support. This rule would need to be applied consistently. Would it, for example, prevent parents from putting their children up for adoption? The compelling interest of the state also includes a paternalistic concern for the welfare of citizens, in addition to viewing them as subjects of the state. For example, one might assert that the state has a compelling interest to preserve the life of its citizens, even of noncitizens within its jurisdiction, not only because the state needs individuals for its pros-

not contracted to discharge, is difficult. Individuals cannot be construed as they are under British law as subjects of the Crown who do not possess a prima facie right to the termination of their lives. Arguments for the putative state right to control the private lives of citizens are thus brought into question when one views the state as the creation of free individuals, rather than the creator of individual rights.

The third rationale for legal intervention into individual affairs is libertarian. Under this rationale the individual, not the state, is considered the supreme judge of his own best interests. The individual is held to have a right to self-determination, free choice, and autonomy. A classic, though imperfect, formulation of the libertarian view is found in John Stuart Mill's contention that "with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else."[15] Mill's argument is not that individuals have a basic right to self-determination. Rather, they are the best judges of what constitutes their own happiness, or, in later developments of this position, their own preferences.[16] This view allows individuals to make their own choices, not because they have an independent right to do so, but because they are the best judges in matters concerning themselves. A more fundamental basis for the individual's right of self-determination is found in political theories that hold that all government authority is derived from the consent of the governed who possess natural or pregovernmental rights, only some of which they delegate to the government.[17]

Recognition of the right of self-determination is the condition for the concept of a community not based on force. Such a community can be termed an ethical community in that it is grounded on rationality and peaceful manipulation rather than force. Force used to impose on others, against their wishes, what one thinks is best for them is thus not allowed. This view undergirds a peaceable accommodation to the fact that there is a pluralism of moral beliefs: although one may not be able to agree about what constitutes good life, or good death, one can agree to let each make his own choices, as long as those choices do not involve direct and significant violence against others.

Given this libertarian view of the state as affording the fabric of pluralism, a secular state exists not to enforce religious or moral laws unless those rules are commonly agreed to be to its members' direct earthly bene-

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perity, but because the state has an interest in enforcing what it believes to be the best interests of those individuals.

15. J. MILL, *On Liberty*, in UTILITARIANISM AND ON LIBERTY 202 (M. Warnock ed. 1962).

16. For a helpful discussion of the preference interpretation of utilitarianism, see R. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS 9 (1975).

17. The point is a libertarian one. Individuals have rights, including the right to self-determination, so that governments are created by individuals for those individuals' joint purposes. As a consequence, a state does not have legitimate powers over its citizens, except as agreed to by the citizens beforehand, unless the state is protecting the innocent against unconsented-to force.

fit.[18] Moreover, the presumption is generally made that individuals have not agreed to restrict their rights to engage in actions primarily bearing upon their own self-determination. Individuals should be seen as not having delegated authority to the state to prevent them from making choices primarily concerning themselves.[19] Examples of legal self-determination reflecting this libertarian view include *Roe v. Wade*.[20] In *Roe* the United States Supreme Court held that women have the freedom to engage a physician to terminate pregnancy in the first and second trimesters.[21] There have as well been changes in the laws on sexual relations of consenting adults.[22]

This Article defends the libertarian view with respect to legal sanctions regarding suicide.[23] The state exists to protect the individuals who consti-

18. *See infra* notes 83-85 and accompanying text. Recently, this view has gained even greater ground in rulings forbidding, for example, prayer in public schools. *See, e.g.*, Chamberlin v. Dade County Bd. of Pub. Instruction, 377 U.S. 402 (1964).

19. A contemporary defense of this view of the state and of the individual's right to autonomous choice has been advanced by Robert Nozick. *See* R. NOZICK, *supra* note 11. For a collection of articles analyzing Nozick's ideas, see *Symposium: Robert Nozick's Anarchy, State and Utopia*, 19 ARIZ. L. REV. 1 (1977).

20. 410 U.S. 113 (1973).

21. *Id.* at 164.

22. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965). For a discussion of the right of competent adults to consent to sexual acts in private and the role of the state as an enforcer of morals, see P. DEVLIN, THE ENFORCEMENT OF MORALS (1965). *See also* Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 643 (1966); Comment, *The Constitutionality of Sodomy Statutes*, 45 FORDHAM L. REV. 553 (1976); Comment, *Constitutional Protection of Private Sexual Conduct Among Consenting Adults: Another Look at Sodomy Statutes*, 62 IOWA L. REV. 568 (1976); Comment, *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 U.C.L.A. L. REV. 581 (1967). For a recent court ruling supporting the right of competent, consenting adults to engage in deviant sexual acts in private, see People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 935, 434 N.Y.S.2d 947 (1980). The court's reasoning on *Onofre*, in distinguishing between what may be morally or theologically objectionable and what may be forbidden by law in a secular society, could be appropriately transferred to the issue of suicide. That is, our society should allow individuals a general secular right to commit suicide, even though particular moral communities may view suicides as acting immorally:

> We express no view as to any theological, moral or psychological evaluation of consensual sodomy. These are aspects of the issue on which informed, competent authorities and individuals may and do differ. Contrary to the view expressed by the dissent, although on occasion it does serve such ends, it is not the function of the Penal Law in our governmental policy to provide either a medium for the articulation or the apparatus for the intended enforcement of moral or theological values. Thus, it has been deemed irrelevant by the United States Supreme Court that the purchase and use of contraceptives by unmarried persons would arouse moral indignation among broad segments of our community or that the viewing of pornographic materials even within the privacy of one's home would not evoke general approbation. . . . The community and its members are entirely free to employ theological teaching, moral suasion, parental advice, psychological and psychiatric counseling and other noncoercive means to condemn the practice of consensual sodomy. The narrow question before us is whether the Federal Constitution permits the use of the criminal law for that purpose.

415 N.E.2d at 940 n.3, 434 N.Y.S.2d at 951 n.3 (citations omitted).

23. We use libertarian not to indicate the viewpoints of a particular political party or of particular libertarians, but rather to indicate the moral understanding that consent of the governed is the basis of legitimate governmental authority. This approach leads to the co-

tute it and to pursue their commonly chosen goals. As a consequence, the state has no inherent moral right to proscribe victimless crimes such as suicide and assisting suicide. The state must operate as an enterprise for the realization of freedom insofar as that realization is to remain a moral endeavor, not an instrument of force against innocent individuals. The point here is a modest one. It requires recognizing only that, if definitive rational arguments are not available, political frameworks can be based either upon force or upon appeal to the respect of individual consent. The latter may be stipulated as moral. This moral view is the necessary condition for the possibility of the practice of peaceably resolving disputes concerning proper conduct. Insofar as one is asking an ethical question in seeking a convincing justification for a line of conduct, one eschews the use of unconsented-to force, though not force itself. For the state to force upon its members an unconsented-to view of what constitutes good is to violate the notion of the state as a moral enterprise, one based on mutually agreed-to views of that good; unconsented-to force makes the state an instrument for some to control the lives and opinions of others.[24] Arguments against unconsented-to force do not bear against suicide and assisted suicide, since the force is freely chosen by its recipients.

The libertarian approach recognizes the difficulty of modern public policy decisions, which are made in the absence of a general moral consensus concerning the goals of life or the concrete character of good life. These policy decisions are also made in the absence of the likelihood of discovering the moral bases for a commonly shared concrete view of what constitutes good life. Yet, some consensus is required in order to legitimate public policy choices. As a result, when answers to moral questions cannot be discovered, one will need to establish procedures for creating moral answers. The accent of ethical concern will thus shift to the process by which free individuals can together agree upon public policy decisions, a move from concrete agreement regarding the material characteristics of a common moral viewpoint to a commitment to a formal process. Since ethical legitimation of public authority will depend not upon rational arguments to establish a particular concrete moral viewpoint (since these do not appear to exist), but upon the consent of the participants in this process, the issue will be upon the areas of choice that can legitimately be held to have been transferred to the public domain. This accent upon the pro-

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rollary that when putative governmental authority cannot be traced to consent of the governed, it is illegitimate.

24. This view reflects Immanuel Kant's understanding of the moral community as one in which its members are never used as means, but always respected as free individuals. Consistently developing this view requires distinguishing between freedom as a good and freedom as a side constraint. *See* R. NOZICK, *supra* note 11, at 30-34. For example, even if one does not highly value freedom, one can still recognize respect of freedom as a necessary condition for the possibility of a moral community. Thus, a group of individuals may freely decide, without coercing each other, but still acknowledge freedom as a side constraint, a conceptual condition for the possibility of a moral community. Kant failed to draw this distinction, and consequently condemned suicide, masturbation, and organ transplantation. I. KANT, *Metaphysiche Anfangsgründe der Tugendlehre*, in 6 KANTS WERKE 421-26 (1968).

cess of decisionmaking, not the content of the decisions produced, makes the legal proscription of suicide questionable. The choice to end one's life can reasonably be argued to have been ceded to the state. One should note that this approach recognizes a moral peculiarity of the modern state requiring two tiers of moral discourse: a first tier of concrete moralities held by particular moral communities, and a second tier involving a common commitment across particular moral communities to a procedure for negotiation among, and consent from, the participants in a state. Thus holding that suicide is morally wrong from a particular religious viewpoint, while at the same time holding that no general secular grounds exist to consider suicide as wrong, would be consistent. One could conclude that although individuals have a right to commit suicide and the state and other third parties have no moral authority to stop rational suicides, suicide is wrong from a particular moral viewpoint.

These reflections have implications for the significance of moral "rights" to suicide or to assisted suicide. These rights are not to be understood as a special claim of privileges. They signal the absence of authority on the part of others who would interfere with rational individuals committing suicide or assisting in the commission of suicide. Understood in this way, moral "rights" to suicide are forwarded as reminders of the limits of the legitimate authority of the state and other third parties. Basic human rights are those prerogatives that no one can presume to have ceded to the community and therefore are prima facie successful grounds for challenging the authority of the state or of third parties to authority in such areas. To violate such a right is to have violated the minimum notion of ethics and therefore to have acted unethically in the most essential way.

B. Judicial and Statutory Approaches

The judiciary's treatment of the right to privacy and its bearing on the refusal of life-saving treatment suggest issues of importance in relation to the legal questions surrounding suicide and assisted suicide. In particular, recent rulings have tended to support a right to privacy over and above the interests of the state. As early as 1928, Justice Brandeis expressed the right to individual freedom in these terms: "The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[25] This statement articulated the then barely perceptible impulse towards the right to privacy and individual freedom and away from the previous paternalistic posturing of the state.

This movement favoring individual privacy received considerable impe-

25. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *see also* Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92, 93 (1914), holding 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."

tus with the decision in *Griswold v. Connecticut*, in which the Supreme Court upheld the use of contraceptives based on the constitutional right to privacy.[26] The Justices disagreed as to the origin of that right, whether the right was found in one or more of the amendments or in their penumbra,[27] but the right, albeit limited, was recognized by the Court. The right to privacy was expanded in *Roe v. Wade*[28] to include a qualified right to determine what is done with one's own body. *Roe* premised its findings upon a woman's right to privacy and imposed the compelling interest test, the strictest standard of judicial review, upon efforts of the state to regulate abortion.[29]

Recent judicial history has evidenced a growing number of decisions endorsing individual freedom, often on the basis of the first amendment guarantee of free exercise of religious beliefs.[30] Others have turned on a recognition of the right of individual self-determination. In 1960 the Kansas Supreme Court upheld an individual's right to refuse surgery on these grounds: "Anglo-American law starts with the premise of thorough-going self determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery . . . ." [31] This view implicitly makes refusal of life-saving treatment a fundamental right.

Despite the foregoing view, many desirous of refusing life-saving treatment have met with contrary reactions. In *In re President & Directors of Georgetown College, Inc.*[32] a patient refused a transfusion on religious grounds. The District of Columbia Circuit Court of Appeals, due to concern for the support and care of the patient's seven-month-old child, overrode the patient's religious convictions and ordered the transfusion.[33] The petition had originally been denied by the district court; a single judge of the circuit court reversed that decision,[34] and the reversal was approved by a majority of the circuit court.[35] The court reasoned that: (1) the patient was in extremis and hardly compos mentis;[36] (2) under the parens patriae theory, the state could not allow the patient to abandon her child;[37]

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26. 381 U.S. 479, 480 (1965); *see also* Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923).

27. 381 U.S. at 484-86 (right of privacy from the penumbra); *id.* at 486-87 (Goldberg, J., concurring) (from the ninth amendment); *id.* at 499 (Harlan, J., concurring) (from the due process clause of the fourteenth amendment).

28. 410 U.S. 113, 154 (1973).

29. *Id.* at 155. The compelling interest test requires the state to produce evidence of harm to such a degree as to compel the outcome desired by the state. *See, e.g.*, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627 (1969).

30. For a discussion of the right to refuse treatment on the grounds of religious beliefs alone, see *In re* Brooks' Estate, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

31. Natanson v. Kline, 186 Kan. 393, 404, 350 P.2d 1093, 1104 (1960).

32. 331 F.2d 1000, 1008 (D.C. Cir.), *cert. denied*, 337 U.S. 978 (1964).

33. 331 F.2d at 1008.

34. *Id.* at 1002.

35. *Id.* at 1010.

36. *Id.* at 1008.

37. *Id.* "The patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother." *Id.*

(3) an individual cannot refuse medical assistance without violating the statute prohibiting attempted suicide;[38] (4) the patient did not want to die, but was only trying to act in accord with her religious principles;[39] (5) the physicians and the hospital would be risking criminal and civil liability by respecting the patient's wishes;[40] (6) the patient's religious principles were not affected because the state, and not the individual, was making the decision;[41] and (7) immediate action was necessary to save the patient's life.[42] In addition, the court held that a patient could be subjected to criminal arrest if he or she refused treatment in a hospital in a jurisdiction where attempted suicide is illegal.[43] Little guidance was given, however, regarding what weight should be given to any particular point.

In response to these holdings, Judge Warren Burger, then a member of the D.C. Circuit, wrote a dissenting opinion to the denial of the petition for rehearing. In referring to Justice Brandeis's dissent in *Olmstead*, Judge Burger added:

> Nothing in this utterance suggests that Justice Brandeis thought an individual possessed these rights only as to *sensible* beliefs, *valid* thoughts, *reasonable* emotions, or *well-founded* sensations. I suggest he intended to include a great many foolish, unreasonable and even absurd ideas which do not conform, such as refusing medical treatment even at great risk.[44]

Immediately following *Georgetown*, similar issues were raised in the Illinois decision of *In re Brooks' Estate*.[45] The patient, suffering from a peptic ulcer, had repeatedly told her doctor that her religion forbade blood transfusions. She and her husband signed a release of civil liability. The doctor, despite promises to the patient to the contrary, applied to a state district court for a conservator who would have authority to consent to the transfusion. The request was granted, but the Illinois Supreme Court re-

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38. *Id.* In the course of this argument, Judge Skelly Wright explained:

> It is suggested that an individual's liberty to control himself and his life extends even to the liberty to end his life. Thus, "in those states where attempted suicide has been made lawful by statute (or the lack of one), the refusal of necessary medical aid [to one's self], whether equal to or less than attempted suicide, must be conceded to be lawful." Cawley, Criminal Liability in Faith Healing, 39 MINN. L. REV. 48, 68 (1954). And, conversely, it would follow that where attempted suicide is illegal by the common law or by statute, a person may not be allowed to refuse necessary medical assistance when death is likely to ensue without it. Only quibbles about the distinction between misfeasance and nonfeasance, or the specific intent necessary to be guilty of attempted suicide, could be raised against this latter conclusion.

Id. at 1008-09. One commentator has argued that in a jurisdiction where attempted suicide is not illegal, but where aiding suicide is a crime, a physician respecting a patient's desire to refuse life-saving treatment could be subject to criminal penalties, although his or her patient would not. *See* Comment, *Criminal Aspects, supra* note 3, at 162-63.

39. 331 F.2d at 1009.

40. *Id.*

41. *Id.*

42. *Id.* at 1009-10. Whether all the listed elements were necessary conditions for the ruling is unclear.

43. *Id.* at 1008.

44. *Id.* at 1017 (emphasis in original).

45. 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

versed.[46] The court held that the state had no compelling interest in the case that would supplant the patient's right to free exercise of religion.[47] There were no minor children in *Brooks'*, and the patient, unlike the patient in *Georgetown*, believed that her religious convictions would be compromised by the court's action.[48]

The Supreme Court of New Jersey has also addressed this issue. In *John F. Kennedy Memorial Hospital v. Heston*[49] the court held in favor of the preservation of the patient's life:

> It seems correct to say there is no constitutional right to choose to die.
>
> . . . .
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> Nor is constitutional right established by adding that one's religious faith ordains his death. Religious beliefs are absolute, but conduct in pursuance of religious beliefs is not wholly immune from governmental restraint.
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> . . . .
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> When the hospital and staff are thus involuntary hosts and their interests are pitted against the belief of the patient, we think it reasonable to resolve the problem by permitting the hospital and its staff to pursue their functions according to their professional standards. The solution sides with life, the conservation of which is, we think, a matter of State interest.[50]

The New Jersey Supreme Court altered its position in *In re Quinlan*[51] and found that the right of privacy encompasses a patient's decision, via her guardian, to decline medical treatment in certain circumstances.[52] The court reasoned that the state loses its compelling interest in the preservation of human life when no chance of the patient's regaining cognitive life exists, and the attendant bodily invasion necessitated by medical care is great.[53] In the case of Karen Quinlan no appreciable chance of her regaining cognizance existed; thus, her interests in her own life approached or reached zero. The court did not acknowledge a metaphysical or religious claim that the state has a duty simpliciter, all else being equal, to preserve life.[54] That is, one can move a step away from the view that life has a value

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46. 205 N.E.2d at 435.
47. *Id.*
48. *Id.* at 442.
49. 58 N.J. 576, 279 A.2d 670 (1971).
50. 279 A.2d at 672-73. The patient, Delores Heston, was incompetent, as was Karen Quinlan, although evidence suggested that Heston could plausibly have been restored to health.
51. 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).
52. 355 A.2d at 663.
53. *Id.* at 664.
54. *Id.* at 661. In the case of Karen Quinlan, the state did not assert a compelling interest in preserving life as such, even if the state does have an interest in preserving life on the basis of: (1) protecting the best interests of the individual involved (a paternalistic claim if the individual is competent and refusing treatment); (2) arguing that the state would sustain a loss if the individual died; or (3) asserting that death would lead to the individual's defaulting on obligations. *See also* 1, 2 IN THE MATTER OF KAREN QUINLAN: THE COMPLETE LEGAL BRIEFS, COURT PROCEEDINGS AND DECISION IN THE SUPERIOR COURT OF

in itself, and a step towards the more defensible view that life has value for the person who lives it or for others through that person's contributions to them. The court, however, weighed the interests of the state against those of the individual. Additionally, most other courts that have dealt with the refusal of life-saving treatment have agreed that the existence of minor children constitutes a compelling interest, thus tipping the balance in favor of state intervention. What other factors are to be considered in this regard is unclear.

In *Superintendent of Belchertown State School v. Saikewicz* the Massachusetts Supreme Court stressed the individual's right to be free of nonconsensual invasions of bodily integrity.[55] The court held the constitutional right of privacy encompasses "the right of a patient to preserve his or her right to privacy against unwanted infringement of bodily integrity," even if the patient is incompetent.[56] Noting a state interest in the preservation of human life,[57] the protection of third parties,[58] and the maintenance of the ethical integrity of the medical profession,[59] the court nevertheless stated:

> The constitutional right to privacy, as we conceive it, is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life. The value of life as so perceived is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice.[60]

This statement thus approximates the libertarian principle that the most crucial consideration is respect for the wishes of the person involved.[61]

NEW JERSEY (1975); Bennet, *In the Shadow of Karen Quinlan*, 12 TRIAL, Sept. 1976, at 36; Hyland & Baime, *In re Quinlan: A Synthesis of Law and Medical Technology*, 8 RUT.-CAM. L.J. 37 (1976); Note, *The Tragic Choice: Termination of Care for Patients in a Permanent Vegetative State*, 51 N.Y.U. L. REV. 285 (1976).

55. 373 Mass. 728, 370 N.E.2d 417 (1977).

56. *Id.* at 424.

57. *Id.* at 425.

58. *Id.* at 426.

59. *Id.*

60. *Id.*

61. These rulings indicate a variety of legal postures regarding the refusal of life-saving treatment, which range from protection of the state's interests in its citizens to a recognition of the right to privacy as noninterference. The literature reflecting on the right to refuse life-saving treatment is considerable. *See, e.g.*, Cantor, *supra* note 3; Evans, *The Right to Die—A Basic Constitutional Right*, 5 J. LEGAL MED., Aug. 1977, at 17; Robitscher, *The Right to Die*, 2 HASTINGS CENTER REP. 11 (1972); Note, *Unauthorized Rendition of Lifesaving Medical Treatment*, 53 CALIF. L. REV. 860 (1965); Note, *Is There a Right to a Natural Death?*, 9 NEW ENG. L. REV. 293 (1974).

Although right to refuse treatment cases have not referred to the issue of battery, protection against battery is construed as the protection against unauthorized touching, as *Saikewicz* suggests. Protection against nonconsensual provisions of life-saving treatment is thus a species of protection against unauthorized touching. Protection against battery includes protection against unauthorized benefit as well as harm. One should note, however, that the battery issue has not caused physicians difficulty; the presumption in emergency cases is in favor of treatment, such as treating minors without parental consent. *See, e.g.*, ILL. ANN. STAT. ch. 111, § 4503 (Smith-Hurd 1978). The right to be secure against battery when viewed in terms of respect of freedom expresses a right to be secure against bodily intrusions, even when such touching is in one's best interests. Since no attempt is made to ground the right to be secure from battery in an appeal to the individual as the best judge of

Saikewicz suggests a libertarian reading of the right to refuse treatment, and more generally of the right to be left alone, although the court balanced that interest against other state interests. In indicating that respect for the wishes of the individual refusing treatment is a paramount consideration, *Saikewicz* supports the moral principle that underlies the recommendation that neither suicide, nor aiding and abetting suicide, should be disciplined with legal sanctions: the state exists to protect the freedom of its members.[62]

These decisions tolerating the individual's choice to refuse life-saving treatment contrast with the traditional disapproval of suicide. English common law held that suicide was an act of immorality and thus a crime.[63] In his *Commentaries*, Blackstone stated that: "[T]he suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against *the king, who hath an interest in the preservation of all his subjects* . . . ."[64] English penalties levied against the *felo de se* included forfeiture of all land and burial in a public highway. Comparable sanctions were never adopted in this country;[65] however, at least three states still consider suicide a crime or an act of immorality.[66] In addition, other states forbid attempted suicide.[67] These laws exist now primarily as vehicles for forcing

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his or her interests, and since protection against battery recognizes a limited right to capricious refusal of touching by another, the right to be secure against battery expresses a prerogative of self-determination. Thus, protection against battery should also include protection against the imposition of unauthorized life-saving treatment for a suicide. In fact, when Texas lacked not only a law against suicide, but one against assisting suicide (absent reasonable evidence of incompetence of the parties), forcibly stopping a competent suicide probably would have constituted an instance of battery. *See* TEX. PENAL CODE ANN. app. tit. 15, art. 1138 (repealed 1973).

62. Societies can either be founded on mutual respect of their members or instead employ force in achieving agreement. The libertarian position argues that a moral society is one not based on force. A society based on mutual respect of its members' freedom can, of course, use force in self-defense, in defending the innocent, and in enforcing contracts. But as long as a society refuses to impose ideas upon its constituents, the society is compatible with the notion of a community based on mutual self-respect, a moral community.

63. *See, e.g.*, Hales v. Petit, 1 Plowden 253, 76 Eng. Rep. 387 (1562).

64. 4 W. BLACKSTONE, COMMENTARIES *189 (emphasis added).

65. *See, e.g.*, Burnett v. People, 204 Ill. 208, 68 N.E. 505, 510 (1903).

66. Alabama, Oregon, and South Carolina have each held suicide to be a crime. *See* Southern Life & Health Ins. Co. v. Wynn, 29 Ala. App. 209, 194 So. 421 (1940); Wyckoff v. Mutual Life Ins. Co., 173 Or. 592, 147 P.2d 227 (1944); State v. Levell, 13 S.E. 319 (S.C. 1891).

67. *See* Royal Circle v. Achterrach, 204 Ill. 549, 68 N.E. 492 (1903); Wallace v. State, 232 Ind. 700, 116 N.E.2d 100 (1953); State v. Carney, 69 N.J.L. 478, 55 A. 44 (1903); *cf.* D.C. CODE ANN. §§ 22-103, -2401 (1981) (provision for penalty of any attempt to commit a crime and first degree murder provision). Some District of Columbia authorities have asserted that these statutes are applied in cases of attempted suicide, but no case law is available. Massachusetts has held attempted suicide to be an unpunishable crime since suicide is not illegal. Commonwealth v. Mink, 123 Mass. 422 (1877); Commonwealth v. Dennis, 105 Mass. 162 (1870). One would presume that in states such as Alabama, Oregon, and South Carolina, where the common law presumption against suicide has not been set aside, attempted suicide could be considered a crime as well. In New Jersey a suicide attempt is a misdemeanor because suicide was a crime at common law. State v. Carney, 69 N.J.L. 478, 55 A. 44, 45 (1903).

treatment upon the would-be suicide.[68]

Criminal sanctions under case or statutory law for aiding and abetting suicide, as opposed to committing suicide, are much more widespread, and exist in the vast majority of states.[69] The illegality of aiding and abetting suicide has generally fallen into two categories. One set of jurisdictions categorizes successfully aiding a suicide as murder[70] or as manslaughter.[71] Other jurisdictions set assisting suicide apart by creating a statute sui generis[72] because of the decriminalization of the act of suicide itself in most jurisdictions. This latter structure, the predominant one, reflects a

68. William L. Parry-Jones has argued that laws against attempted suicide have functioned as inappropriate paternalistic means for imposing treatment on competent individuals. Parry-Jones, *supra* note 3.

69. ALASKA STAT. § 11.41.120 (1978); ARIZ. REV. STAT. ANN. § 13-1103 (1978); ARK. STAT. ANN. § 41-1504 (1977); CAL. PENAL CODE § 401 (West 1970); COLO. REV. STAT. § 18-3-104 (1978); CONN. GEN. STAT. § 53a-56 (1981); DEL. CODE ANN. tit. 11, § 645 (1979); FLA. STAT. ANN. § 782.08 (West 1976); HAWAII REV. STAT. § 707-702 (1976); KAN. STAT. ANN. § 21-3406 (1981); Commonwealth v. Hicks, 118 Ky. 637, 82 S.W. 265 (1904); ME. REV. STAT. ANN. tit. 17-A, § 204 (1982); Commonwealth v. Mink, 123 Mass. 422 (1877); MINN. STAT. ANN. § 609.215 (West 1964); MISS. CODE ANN. § 979-3-49 (1972); MO. ANN. STAT. § 565.021 (Vernon 1979); MONT. CODE ANN. § 45-5-105 (1981); NEB. REV. STAT. § 28-307 (1979); N.J. STAT. ANN. § 2C:11-6 (West 1981); N.M. STAT. ANN. § 30-2-4 (1978); N.Y. PENAL LAW § 120.30 (McKinney 1975); Blackburn v. State, 23 Ohio St. 146 (1872); OKLA. STAT. ANN. tit. 21, §§ 813-818 (West 1958 & Supp. 1981-1982); OR. REV. STAT. § 163.125 (1981); 18 PA. CONS. STAT. ANN. § 2505 (Purdon 1973); P.R. LAWS ANN. tit. 33, § 1385 (1969); State v. Jones, 86 S.C. 17, 67 S.E. 160 (1910); S.D. CODIFIED LAWS ANN. § 22-16-37 (1979); Turner v. State, 119 Tenn. 663, 108 S.W. 1139 (1908); TEX. PENAL CODE ANN. § 22.08 (Vernon 1974); WASH. REV. CODE ANN. § 9A.36.060 (1977); WIS. STAT. ANN. § 940.12 (West 1982).

Some states, however, have apparently not treated suicide or assisting or aiding and abetting suicide in either statutory or case law. These states could rely upon the theory that assisting suicide is the same as acting as a principal to the crime of self-murder. *See, e.g.*, McMahan v. State, 168 Ala. 70, 63 So. 89 (1910).

70. *See* Burnett v. People, 204 Ill. 208, 68 N.E. 505 (1903); People v. Roberts, 211 Mich. 187, 178 N.W. 690 (1920) (murder conviction reversed because of insufficient evidence). This classification is defined as "homicide at the request of the victim." Comment, *The Right to Die*, 7 HOUS. L. REV. 654, 656 (1970).

71. *See* ALASKA STAT. § 11.41.120 (1978); ARIZ. REV. STAT. ANN. § 13-1103 (1978); ARK. STAT. ANN. § 41-1504 (1977); COLO. REV. STAT. § 18-3-104 (1978); CONN. GEN. STAT. § 53a-56 (1981); HAWAII REV. STAT. § 707-702 (1976); OR. REV. STAT. § 163.125 (1981).

72. The phrase "sui generis," meaning "of its own kind," "unique," refers to statutes that are enacted to deal with a particular offense, rather than expanding the purview of pre-existing statutes. States that have criminalized assisting suicide as a specific offense include CAL. PENAL CODE § 401 (West 1970); CONN. GEN. STAT. § 53a-56 (West 1981); DEL. CODE ANN. tit. 11, § 645 (1979); FLA. STAT. ANN. § 782.08 (West 1976); KAN. STAT. ANN. § 21-3406 (1981); ME. REV. STAT. ANN. tit. 17-A, § 204 (1982); MINN. STAT. ANN. § 609.215 (West 1964); MISS. CODE ANN. § 97-3-49 (1972); MO. ANN. STAT. § 565.021 (Vernon 1979); MONT. CODE ANN. § 45-5-105 (1981); NEB. REV. STAT. § 28-307 (1979); N.J. STAT. ANN. § 2C:11-6 (West 1981); N.M. STAT. ANN. § 30-2-4 (1978); N.Y. PENAL LAW § 120.30 (McKinney 1975); OKLA. STAT. ANN. tit. 21, §§ 813-818 (West 1958 & Supp. 1981-1982); 18 PA. CONS. STAT. ANN. § 2505 (Purdon 1973); P.R. LAWS ANN. tit. 33, § 1385 (1969); S.D. CODIFIED LAWS ANN. § 22-16-37 (1979); TEX. PENAL CODE ANN. § 22.08 (Vernon 1974); WASH. REV. CODE ANN. § 9A.36.060 (1977); WIS. STAT. ANN. § 940.12 (West 1982).

The District of Columbia does not include assisting suicide under its homicide statutes, nor does it have a sui generis statute. Instead, it strangely refers to assisting suicide in its Natural Death Act. Following the patient's directive to withhold or withdraw life-sustaining procedures is specified as not being the "crime of assisting suicide." D.C. CODE ANN. § 6-2428(a) (Supp. VI 1982). Since no statutory or case law on assisting suicide in the District of

fundamental shift in the understanding of the law. Since public morals are no longer imposed upon the would-be suicide, the traditional rationale that would support the proscription of assisting suicide as the assistance of a crime is accordingly eroded.

C. *Policy Considerations*

Less libertarian views may also support the claim of a legal right to refuse life-saving treatment or to assist suicide.[73] Libertarians and public welfare proponents may agree on a conclusion, although they disagree on the basis for the conclusion. Additionally, in applying the compelling interest test to suicide, a court would probably be affected by the factual circumstances of the suicide. Suicide can be either the decision to die when death is not imminent, or the choice to die in the circumstances of an already fatal and severely debilitating illness. In the latter situation, the state's interest may be vastly diminished. If death is relatively certain in the near future, arguments for imposing additional suffering on the individual would at best be weak.[74] In contrast, in the suicide of a healthy contributing member of society the state's legitimate interest may be strong.[75] It may also be strong in the case of persons with dependents. In addition, the state's interest in enforcing contracts could be brought to bear upon persons with major unfulfilled obligations who desire to die. The interests of the state, however, are usually rendered less than compelling by the incapacities of terminal, debilitating illnesses.[76] In the latter circumstances both the libertarian and the defender of a compelling state interest test would find themselves in agreement: suicide should be allowed. The rationales would differ, however. The libertarian would maintain a right simpliciter to suicide while the compelling state interest protagonist would maintain that in such cases the government has insufficient interest to require intervention. Additionally, proponents of the compelling state interest test might argue that in some cases, because of the extreme circumstances of the individuals involved, such as an aged invalid's choosing suicide rather than a protracted death involving considerable costs that would be borne by the government, suicide would be in the interests of the state.

Columbia exists, the legislators may have presumed that the precedent of other jurisdictions would apply to their own.

Also of some interest is the approach taken by Indiana, which has a criminal statute on causing, rather than assisting, suicide. IND. CODE ANN. § 35-42-1-2 (Burns 1979). Finally, while Texas was criminalizing assisting suicide, two states—North Carolina and North Dakota—repealed their statutes on suicide and assisting suicide.

73. An argument has been made, for example, in favor of a right to suicide in terms of constitutional law. Sullivan, *A Constitutional Right to Suicide*, in SUICIDE: THE PHILOSOPHICAL ISSUES 229 (M. Battin & D. Mayo eds. 1980).

74. The *Quinlan* court expressly referred to this balancing of interests. "We think that the State's interest *contra* [ending treatment] weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims." *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, 664, *cert. denied*, 429 U.S. 922 (1976).

75. A libertarian would deny that simply being a healthy member of society gave society a claim over that person.

76. *See* D. HUME, *Of Suicide*, in 4 THE PHILOSOPHICAL WORKS 406-14 (1964).

The reasons that can be advanced, however, for the criminalization of suicide and aiding and abetting suicide are diverse. The state can be regarded as (1) preventing citizens from committing an offense against God; (2) rescuing citizens from choices that are imprudent albeit dangerous only to themselves; (3) protecting the state's interests in the productivity of its citizens; (4) preserving respect for life because of the utility of the social practices underlying this respect, including preserving the public against affront and distress from confrontation with disapproved and anxiety-provoking practices; and (5) protecting legal relationships undertaken by agreement. The first rationale, the concern not to offend God, is an inappropriate consideration for a pluralistic society in which divergent and irreconcilable opinions concerning the desires or the existence of a deity exist.[77] Imposing any particular religious opinion upon society would be an act of force. The second reason is, as already argued, improperly paternalistic. The third, fourth, and fifth reasons concern issues of state interest and may, in varying circumstances, be more or less compelling. Further, the third and fourth reasons bear on concerns about the public economy and social anxieties, and militate against governmental respect for the autonomy of persons in making private decisions. The last rationale focuses on relationships that have a moral claim prior to, and independent of, the institution of the state, such as oral contracts. In this circumstance the state could have an interest both in terms of general utility and concern for autonomy.[78]

II. TEXAS LAW: A CASE STUDY IN LEGALIZED SUICIDE AND AIDING AND ABETTING SUICIDE

Unlike other jurisdictions, Texas has never imposed statutory criminal sanctions for suicide. Texas forged a solitary path with an explicit, limited legitimization of assisting suicide at the beginning of the century. The

77. *See, e.g.*, the prohibition of prayer in public schools. In School Dist. v. Schempp, 374 U.S. 203, 222 (1963), the United States Supreme Court asserted:

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees.

78. The last point might suggest that only unmarried individuals without debts or dependents would be free to commit suicide, unless they were dying or severely disabled. Society, however, has allowed individuals not only the opportunity to divorce and place their children for adoption, but to establish insurance policies for legal liabilities. If societies wished to forbid suicide to those with such obligations, liability insurance with minimal payments could no doubt be developed. If the insurance were required to be in effect a number of years prior to validity, premiums would likely be reasonable as a result of the relatively low incidence of suicides. The policy would in effect insure against circumstances rational individuals would consider as grounds for suicide.

Texas Court of Criminal Appeals premised this deviation from the holdings of all other United States jurisdictions upon the legal rule that, as suicide was not illegal in Texas, it could not be a crime to aid a noncriminal act.[79]

A. The Aberrant Jurisdiction

The first Texas case dealing with the criminal issue of aiding suicide, *Grace v. State*, was heard by the court of criminal appeals in 1902.[80] In *Grace* the defendant, J.H. Grace, was charged with homicide. A married physician, Grace had allegedly been criminally intimate with a local woman. The couple had possible plans for elopement. The woman's family threatened to shoot Grace, who was rescued by his father. The woman then attempted suicide by procuring digitalis from the defendant's medical bag, but the attempt was thwarted. Grace was later warned to be armed in the event that the woman's family should again seek him out, and he accepted a pistol. Grace and his wife retired, sleeping in separate beds; the woman slept on the floor between them and next to a night stand on which Dr. Grace had placed his pistol. The woman took the pistol, shot herself in the chest, and died. Grace was later convicted of homicide.

The Texas appellate court reversed and remanded the conviction, stating that the homicide statute under which Grace had been charged required that the "victim of the accused [not be] cognizant of the intent of the accused in preparing the means for the destruction of his or her life."[81] The deceased in the instant case voluntarily shot herself and was clearly aware of the consequences of her actions. The court also pointed out that suicide was legal in Texas, and regardless of what "may have been the law in England, or whatever that law may be now with reference to suicides, and the punishment of persons connected with suicide, by furnishing the means or other agencies, it does not obtain in Texas."[82] The court by its own admission was aware of the holdings in other jurisdictions on this issue, but persisted in setting its solitary precedent.

In 1908 the Texas Court of Criminal Appeals affirmed this position in *Sanders v. State*.[83] The defendant had purchased two vials of carbolic acid, purportedly to kill screw worms in animals. Later that week, a woman friend of the defendant was found dead with two empty vials near her body. The defendant was charged with murder; the state alleged his motive was to rid himself of the deceased and her soon-to-be-born child. The defendant raised the defense, based on the *Grace* holding, that the deceased had voluntarily taken the poison. The appellate court reversed the jury's guilty verdict, but drew the distinction that suicide assistance must

79. *See* Sanders v. State, 54 Tex. Crim. 101, 102, 112 S.W. 68, 70 (1908); Grace v. State, 44 Tex. Crim. 193, 194, 69 S.W. 529, 530 (1902).
80. 44 Tex. Crim. 193, 69 S.W. 529 (1902).
81. *Id.* at 195, 69 S.W. at 530.
82. *Id.*
83. 54 Tex. Crim. 101, 112 S.W. 68 (1908).

be passive, not active, to be a defense to murder.[84] For example, shooting someone upon request would equate with active suicide assistance for which the actor would be guilty of first degree murder.[85]

A third Texas case, *Aven v. State*,[86] addressed this same issue in 1925. Aven administered arsenic to his wife, purportedly at her request. The trial court's murder conviction was affirmed on appeal, however, because of the court's adherence to the active-passive distinction: "[If the party] himself gives the medicine or poison by placing it in the mouth or other portions of the body, which would lead to the destruction of life, then it would be the act of the party giving [it] . . . ."[87]

Two further Texas cases arising out of the same fact situation clearly illustrated active assistance in suicide.[88] The deceased wished to die and was willing to pay a thousand dollars to anyone who would end his life for him. Carew introduced the deceased to Mullane and encouraged Mullane to take the assignment. Mullane, after receiving nine hundred dollars, shot the deceased twice in the head. Both Mullane and Carew were found guilty of murder, because their assistance in the suicide was active.[89]

These cases are important because they lack any moral or philosophical justifications for their position. Only in *Sanders* are such extra-legal considerations mentioned, and there they are mentioned in opposition to the court's holding:

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84. *Id.* at 105, 112 S.W. at 70.

85. *Id.* In 1920 the Michigan Supreme Court upheld a man's murder conviction for supplying poison to his wife at her request, so that she could end her sufferings due to multiple sclerosis. That court, in contrast to the Texas courts, stated: "It is beyond my comprehension how a human being of normal conditions . . . can commit such a crime as you have in this case, by placing poison within reach of your wife or giving it to your wife with the intention as you claim." People v. Roberts, 211 Mich. 187, 178 N.W. 690, 692 (1920). This case would appear to have met all the elements given in *Sanders* for legally assisting suicide. For a very helpful discussion of this case, see Francis, *Assisting Suicide: A Problem for the Criminal Law*, in SUICIDE: THE PHILOSOPHICAL ISSUES 254 (M. Battin & D. Mayo eds. 1980).

86. 102 Tex. Crim. 478, 277 S.W. 1080 (1925).

87. *Id.* at 483, 277 S.W. at 1083.

88. Mullane v. State, 475 S.W.2d 924 (Tex. Crim. App. 1972); Carew v. State, 471 S.W.2d 860 (Tex. Crim. App. 1971).

89. *Mullane*, 475 S.W.2d at 926; *Carew*, 471 S.W.2d at 861. Applying the court's holdings to a medical situation, if one physician urged another to actively aid a consenting patient in suicide, both would be guilty of murder since consent is irrelevant in homicide. One might, however, question whether an intrinsic moral difference between active and passive assistance of suicide exists. In either case, one is intending to help a competent person take his own life. Neither passive nor active assistance involves unconsented-to force against an unsuspecting person. In fact, both active and passive assistance involve respect for the individual as a free person and are thus compatible with a peaceable moral community.

This analysis suggests that the evil of murder is not the taking of another's life, but taking it without consent. Murder would then be defined as the unconsented-to killing of another. As the moral fault of robbery could be defeated by a gift of the object stolen, for example, consent of the person to be killed would defeat the moral fault of murder in active suicide assistance. Such considerations may erode the legitimacy of the legal proscription of other forms of consensual killing, such as dueling. Each practice, however, would need to be examined in detail. Extraneous reasons for drawing a legal distinction between active and passive assistance of suicide may in fact exist. This Article, however, is restricted to the issues raised by suicide and passive facilitation of suicide.

> It may be a violation of morals and ethics and reprehensible that a party may furnish another poison or pistols or guns or any other means or agency for the purpose of the suicide to take his own life, yet our law has not seen proper to punish such persons or such acts.[90]

Thus, the primary rationale in these cases was that no legal reason existed to impose criminal sanctions on behavior that facilitated noncriminal behavior.

In distinguishing between passively and actively assisted suicide, the Texas courts placed the onus of the definitive act upon the suicide. The suicide was obliged to be the last actor in the causal chain. The one assisting the suicide could not relieve the suicide of his responsibility for the last act. These reflections suggest a way in which the court might have been discouraging some precipitous suicides that could have occurred had the suicide been allowed to engage another to kill him. Moreover, by allowing passively assisted suicide as a defense to murder, factual distinctions between suicide and murder are more clearly made.

Prior to 1973, Texas law did not speak to the issue of soliciting another to commit suicide. Presumably, as long as neither physical nor psychological coercion is involved, the usual manipulations ingredient in human transactions are to be tolerated. Soliciting the commission of an act that is neither criminal nor morally forbidden to free individuals should not be a crime or an act of immorality in itself. For this purpose, the line between coercions and manipulations is drawn as the line between threatening to deprive a party of his entitlements versus offering inducements to which the party is not entitled, as long as the inducements do not overbear the party's free will.[91] Although the argument has been made that solicitation should not be allowed,[92] such a position does not take seriously the status of competent individuals. The question is not whether one person has convinced another of the merits of suicide, but whether force, deception, coercion, or some other form of overreaching has been employed. Free individuals, however, have the right to expose themselves not only to reasons, but also to freely chosen manipulations. The peaceable community must prohibit unconsented-to force, but not peaceable manipulations.

B. The Abrupt Realignment: Influence of the Model Penal Code

The position held by these cases was dramatically reversed when, in 1973, the Texas Legislature adopted the new Texas Penal Code. The Code makes aiding suicide illegal, with intent as the requisite mens rea.[93] The statute distinguishes punishment on the basis of whether the suicide has been successful, with penalties ranging from a fine not to exceed two hundred dollars[94] to imprisonment for two to ten years. A fine of up to five

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90. 54 Tex. Crim. at 105, 112 S.W. at 70.

91. For a discussion of the difference between coercion and manipulation, see Rudinow, *Manipulation*, 88 ETHICS 338 (1978).

92. Francis, *supra* note 85, at 254.

93. TEX. PENAL CODE ANN. § 22.08 (Vernon 1974).

94. *Id.* § 12.23.

thousand dollars is also possible if serious bodily injury results.[95] Other changes in the Texas Penal Code directly and indirectly affected suicide assistance liability, particularly through changes concerning assault and battery. Under the new Texas Penal Code, a person commits the offense of assault if he "intentionally or knowingly causes physical contact with another when he knows or should reasonably believe that the other will regard the contact as offensive or provocative."[96] This change again is a significant departure from prior law; previously the criminal law of assault and battery had necessitated proof of intent to injure.[97] In the practice commentary to the new code, the significance of this distinction is recognized: "Under [the new Penal Code] the victim's idiosyncracies rather than the actor's culpability can determine criminal responsibility, if the fact-finder agrees that they are not too unreasonable, with the probable result that many innocuous touchings will become the subject of criminal complaints."[98] Prior law set forth seven recognized reasons legitimizing the use of violence to the person.[99] These reasons included: "where violence is permitted to effect a lawful purpose, only that degree of force must be used which is necessary to effect such purpose."[100] Under current Texas law, however, and against this expanded protection against battery, a specific provision justifies the use of force with regard to suicide:

> (a) A person is justified in using force, but not deadly force, against another when and to the degree he reasonably believes the force is immediately necessary to prevent the other from committing suicide or inflicting serious bodily injury to himself.
>
> (b) A person is justified in using both force and deadly force against another when and to the degree he reasonably believes the force or deadly force is immediately necessary to preserve the other's life in an emergency.[101]

In short, the prospective suicide is bereft of protection against battery, a significant change from past legal attitudes in Texas.

Clearly, the Texas Legislature was strongly influenced by the Model Penal Code to change the law established by Texas courts. Approved by the American Law Institute in May of 1962, the Model Penal Code designates causing suicide by force, duress, or deception as criminal homicide. Aiding or soliciting suicide is classified as a second degree felony if the suicide

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95. *Id.* § 12.34. Other states also have differentiated punishment on the basis of the effect of the assistance. Pennsylvania has provided that the act is a second degree felony if the suicide is attempted or effected; otherwise, the act is a second degree misdemeanor. 18 PA. CONS. STAT. ANN. § 2505 (Purdon 1973). Minnesota has levied up to 15 years' imprisonment and up to a $15,000 fine for aiding a successful suicide. The penalties drop to a maximum of 7 years and $7,000 in the case of an unsuccessful attempt. MINN. STAT. ANN. § 609.215 (West 1964).

96. TEX. PENAL CODE ANN. § 22.01(a)(3) (Vernon Supp. 1982).

97. *Id.* app. § 1138 (repealed 1973).

98. *Id.* § 22.02 practice commentary (Vernon 1974).

99. *Id.* app. § 1142 (repealed 1973).

100. *Id.* § 1142(7).

101. *Id.* § 9.34 (Vernon 1974).

is undertaken and a misdemeanor if it is not.[102] The comments to the ninth tentative draft of the Model Penal Code are enlightening as to the law's rationale: "We think . . . the wiser course is to maintain the prohibition [on aiding suicide] and rely on mitigation in the sentence when the ground for it appears. The powers of the Court under the Code are adequate for such a purpose."[103] The authors of the Model Penal Code's ninth tentative draft had expressed concern over the possibility that "flagrant murders may be perpetrated by deliberately forcing or coercing self-destruction."[104] These comments point out that the lesser criminal classifications apply only when the actor passively aids the suicide; if the actor is "the agent of death, the crime is murder."[105]

The commentators to the Model Code mention motivation as an irrelevant factor:

[T]he draft is broad enough to allow a reduction of the crime to man-

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102. MODEL PENAL CODE § 210.5 (Proposed Official Draft 1962).

103. *Id.* § 201.5 comment 1 (9th Tent. Draft 1959).

104. *Id.*

105. *Id.* comment 2. These comments reflect the recurring active-passive distinction. For a discussion of the ethical significance, or lack thereof, of the distinction between active and passive complicity in the death of another, see Abrams, *Active and Passive Euthanasia*, 54 PHIL. 257 (1978); Bennett, *Whatever the Consequences*, 26 ANALYSIS 83 (1966); Dinello, *On Killing and Letting Die*, 31 ANALYSIS 83 (1970); Fitzgerald, *Acting and Refraining*, 27 ANALYSIS 133 (1967); Rachels, *Active and Passive Euthanasia*, 292 NEW ENG. J. MED. 78 (1975). With respect to the active-passive distinction, one should note that in practice it is often used to obscure a distinction between intended outcomes and foreseen outcomes. Thus, in the case of not providing treatment necessary for preserving life, the nonprovider may more persuasively claim that he has not willed to kill, but that another process has been the cause of the person's death, such as a fatal disease. Further, this mode of analysis has been used to distinguish between the merely foreseen as opposed to the foreseen and intended consequences of an act. Arguably, one need only take moral responsibility for the latter. This distinction has been followed through the theory of double effect, so that one could, for example, stop an expensive life-saving treatment that one did not owe to another. Stoppage of treatment would be justified not in order to kill the patient, but in order to use resources through which they would have a greater chance of success. What is at stake, however, is not the distinction between killing and allowing one to die, but a distinction between foreseen and intended consequences of action. Thus, the theory of double effect allows one to give a drug to a patient in severe pain in a dosage that might indeed lead to the patient's dying earlier. But as long as one does not intend to kill that patient, and there is a due proportion between the risks and benefits involved, no liability exists under double effect. Classically, the principles of double effect required that: one not directly intend the death; the good sought, the depression of pain, not follow simply from the death; the act itself not be a moral evil; and there be a proportionate good in view, that is, that the pain be severe enough to risk a quicker death. For a critical review of this theory, see DOING EVIL TO ACHIEVE GOOD: MORAL CHOICE IN CONFLICT SITUATIONS (R. McCormick & P. Ramsey eds. 1978).

These distinctions cease to be important if killing the consenting patient is not immoral and one is dealing with a competent individual. The same is true with regard to the distinction between acting and refraining. The distinction is morally significant in suicide or assisting suicide if there is a moral rule against the intention to kill another and if cases of passive assistance offer more opportunity to avoid the responsibility of directly aiding another in suicide. Passive assistance appears to many to offer such opportunities, a fact of human psychology that may lie behind the notion that allowing active facilitation of suicide is seen to have, and may indeed have, more potential for abuse than passive facilitation. Given the arguments in this Article concerning a libertarian view of the morality of suicide, the distinction between passive and active facilitation, should it have moral force, must depend upon the extrinsic properties of the distinctions, not the basic moral issue of suicide.

> slaughter when the act is done in a state of emotional distress and that it is enough beyond this to provide, as we do, that consent is a factor to be weighed against a capital sentence in a jurisdiction that employs the penalty of death.[106]

Emotional distress would, however, be arduous to prove in the case of suicide aiders other than family members. Additionally, the use of consent as mitigation only in capital sentences is an extreme limitation. The commentators finally stated that they did not believe homicide upon request should be excusable if the actor were motivated unselfishly.[107] They regarded this as a "more extreme position than the argument for tolerance of euthanasia, a movement that has scant support in the U.S."[108]

The Texas Legislature apparently accepted these rationalizations, and Texas accordingly revised its penal code. In a report requested by the Texas Legislature to determine the advisability of prohibiting assisted suicide, a committee of the state bar argued that:

> Since the present Texas law does not proscribe assisting a willing suicide the actor who participates as an accomplice or accessory will go unpunished but the actor who participates as a perpetrator in the death of a willing suicide will be indicted for murder. In both situations the antisocial result is the same. In view of the historical background, if the gap is to be bridged, then positive legislation is necessary.
>
> Situations will arise when suicide will have been aided because of unselfish motives, such as when an actor places a poison within the easy reach of a person bedridden with an agonizing terminal disease, both knowing the invalid will ingest some and die. In such a case as well as where an actor's motive is selfish, such as a 50 percent successful suicide pact, the result is the same and only the motive differs. The quantum of punishment may vary between the two cases but the conduct producing the socially undesirable result should be proscribed.[109]

In short, the report advised that permitting assisted suicide was antisocial without further elaboration or argument for that assertion. Additionally, the report offered no examples of abuse or social cost although Texas had for decades allowed assisted suicide. The report upon which the legislature acted did not demonstrate that assisted suicide should be proscribed because of an obvious and pressing need for legislative reform.[110]

C. Foreign Jurisdictions

Many other jurisdictions have considered legislation dealing with suicide and assisted suicide. One of the most extensive analyses of such changes in the law was in response to English legislation. In a survey article, William Parry-Jones outlined the criminal status and statistics of sui-

106. MODEL PENAL CODE § 201.5 comment 2 (9th Tent. Draft 1959).
107. *Id.*
108. *Id.*
109. STATE BAR OF TEXAS, TEXAS PENAL CODE REVISION PROJECT, REPORT ON AIDING SUICIDE AND RECKLESS CONDUCT 4-5 (1969).
110. *See id.* at 4.

cide and attempted suicide in Britain by reviewing the last decade of prosecutions under England's Suicide Act of 1961.[111] In that legislation attempting suicide was decriminalized, but new provisions were made for other parties' complicity in suicide. The law reflects the British concern for suicide pact cases, a concern that traditionally has not been shared by American legislators.[112] Parry-Jones addressed, in particular, the impact of this legislation. In the years 1969-1970, eighty English suicide cases were reported to the Director of Public Prosecution; criminal proceedings were instituted in twelve of these cases. Nine of the twelve cases involved suicide pacts. In one case both partners to the pact were prosecuted.[113] Twelve of the thirteen individuals pleaded guilty under the Suicide Act. Nevertheless, only one prison sentence was given,[114] despite provisions for a life sentence for an active accessory to the act.[115] The sole prison sentence handed down was suspended for three years. Sentences in the majority of the remaining cases involved either probation or admission to a psychiatric hospital.[116]

These data led Parry-Jones to the issues raised by the 1973 change in Texas law. The creation of the suicide offense in Britain violates the legal principle underpinning previous Texas law, namely that aiding of a non-crime cannot be criminal. The policy reason purportedly underlying the British statute is to afford officials the opportunity to insure compulsory mental health treatment when necessary. This motive is clearly paternalistic if the individual is legally competent, a consideration that has led some to question the extent to which this attitude is appropriate if it violates the freedom of an innocent person.[117] The motive is also suspect if the goal is to protect the incompetent, for independent means of protecting those individuals exist, such as commitment: "It cannot be right to make use of criminal proceedings merely for the purpose of providing medical and social assistance to people in distress if some other and more appropriate method of giving that assistance can be found."[118] Considering the relatively small number of people who plan and attempt suicide, Parry-Jones suggested the Mental Health Act[119] as the appropriate vehicle for endors-

111. Parry-Jones, *supra* note 3, at 112; *see* Suicide Act 1961, 9 & 10 Eliz. 2, ch. 60.

112. Where aiding and abetting suicide is a crime in the United States, being a member of a suicide pact is not a defense. Unless the survivor of a suicide pact has abandoned his purpose in the pact, and has endeavored to dissuade the suicide partner, the survivor could be held guilty of murder, at least where suicide is held to be self-murder. *See, e.g.*, McMahan v. State, 168 Ala. 70, 53 So. 89 (1910); State v. Webb, 216 Mo. 378, 115 S.W. 998 (1909). Some courts have also held that a person who unintentionally kills another while attempting suicide, but who fails to kill himself, is guilty of murder. Wallace v. State, 232 Ind. 700, 116 N.E.2d 100 (1953); State v. Campbell, 217 Iowa 848, 251 N.W. 717 (1933); Commonwealth v. Mink, 123 Mass. 422 (1877); State v. Levelle, 34 S.C. 120, 13 S.E. 319 (1891).

113. Parry-Jones, *supra* note 3, at 117-18.

114. *Id.* at 116.

115. *Id.* at 111.

116. *Id.* at 116.

117. *See* R. CROSS & P. JONES, AN INTRODUCTION TO CRIMINAL LAW 152 (6th ed. 1968).

118. 644 PARL. DEB., H.C. (5th ser.) 834 (1961) (remarks of Fletcher-Cooke).

119. Mental Health Act, 1959, 7 & 8 Eliz. 2, ch. 72.

ing needed treatment in England.[120] On the broader subject of euthanasia, the author concluded that the present moral climate still considers that act unacceptable; "there is, therefore, no alternative other than that killing by consent should render the killer liable to trial for murder, however merciful are his intentions."[121]

In spite of Parry-Jones's closing comment, several countries do allow consent to suicide to mitigate the offense statutorily from murder to a lesser crime. The India Penal Code, for example, provides that consent of a victim over the age of eighteen to suicide vitiates the murder charge;[122] the resulting punishment is thereby reduced to transportation for life or imprisonment of up to ten years.[123] Switzerland prescribes imprisonment of only up to three years when the action was at the victim's explicit request, but only when the suicide is upon the victim's "earnest and urgent request."[124] Lastly, Uruguay allows its judges to forgo any punishment whatsoever when the aider to the suicide has previously been honorable and was responding to repeated requests from the victim.[125]

III. ADDITIONAL LEGAL RAMIFICATIONS OF THE SUICIDE ISSUES

A. Criminal Liability of Physicians

No published American opinions have reported convictions of physicians for aiding, abetting, or assisting suicide.[126] This lack of reported cases is perhaps due to prosecutorial decisions not to pursue potential violators, thereby leaving no avenue for judicial comment. Even in cases of active assistance, prosecution and conviction are rare. Newspaper reports have documented acquittals of physicians who have allegedly aided a suicide. For example, Dr. Herman Sander injected a fatal air embolism into the blood vessels of a carcinoma victim, who had reputedly urged him to end her misery. He was acquitted in New Hampshire.[127] Dr. Vincent Montemarano of New York was accused of administering a lethal injection to a comatose patient. He also was found not guilty of assisting a suicide.[128]

Although society has tolerated intervention by physicians in suicide

120. Parry-Jones, *supra* note 3, at 119.
121. *Id.*
122. INDIA PEN. CODE § 300, exception 5 (1860).
123. *Id.* § 304.
124. SCHWEIZERISCHES STRAFGESETZBUCH art. 114 (1942). The Swiss Criminal Code also examines the selfishness of the motivation to determine the criminality of the action. *Id.* arts. 114, 115. Denmark's statutory treatment is quite similar. DANISH CRIMINAL CODE art. 239-40 (1958).
125. URUGUAY PENAL CODE art. 37, at 367 n.74.
126. This year an attorney was convicted for buying poison to administer to his wheelchair-bound wife. His defense was that he was acting upon her wishes, that is, assisting in her suicide. There was, however, contradictory evidence; he was sentenced to three years in prison and fined $5,000. Newsweek, Aug. 16, 1982, at 27.
127. N.Y. Times, Mar. 7, 1950, at 1, col. 1.
128. Houston Chronicle, June 22, 1973, § 4, at 10, col. 1. Courtroom observers applauded the verdict.

cases, many important utilitarian considerations can be raised, focusing upon the notion of not undermining the physician's role as protector of life, that would argue against physicians' involving themselves in the active facilitation of suicide. In contrast, passive facilitation should be seen as the means by which physicians can allow their patients, should they so choose, to end their lives. These means can usually be effected so that the physician is not explicitly the abettor of the suicide.[129] In any event, allowing physicians to contribute to the free choice by patients, through the provision of materials for the suicide of rational individuals, is unlikely to erode the role of physicians, as the history of Texas law indicates. To allow this modest participation in suicide, however, statutory amendments concerning the prescription of dangerous substances might be necessary. These statutory amendments would assure that no criminal liability would arise when the physician can foresee that the patient might employ a prescribed substance in an act of suicide.

B. Civil Liabilities for Physicians

The primary civil method of recovery against a physician for aiding and abetting a suicide is in tort under wrongful death statutes. This remedy does not exist at common law, but is governed wholly by statute. The Texas statute, for example, provides that: "When an injury causing the death of any person . . . is caused by the wrongful act, neglect, carelessness, unskillfulness, or default of another person . . . such person . . . shall be liable in damages for the injuries causing such death."[130] This statute is drawn somewhat more broadly than the majority of statutes; most statutes limit recovery to the pecuniary loss occasioned by the death. Wrongful death statutes are for the most part fashioned after Lord Campbell's Act[131] and allow compensation to the decedent's beneficiaries for lost support, services, or contributions of the deceased during what would have been the remainder of his lifetime.[132] In assisting suicide of a terminal patient, this would probably be a negligible award. The nuisance factor of these suits, however, makes avoidance desirable.[133]

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129. Suppose, for example, a physician gives to a patient dying of a painful terminal disease sufficient morphine, if taken in the prescribed dosage every 6 hours, to blunt the pain. The physician, however, notes that if the entire prescription were taken at one time, the patient would die. The physician thus maintains a neutral stance and allows the patient to act as he might choose. The Hippocratic Oath provides: "Neither will I administer poison to anyone when asked to do so, nor will I suggest such a course." *Oath*, 1 HIPPOCRATES 299 (W. Jones trans. 1923). The oath, however, also forbids the practice of surgery: "I will not use the knife, not even, verily, on sufferers from stone, but will give place to such as are craftsmen therein." *Id.* The oath, therefore, cannot be followed literally.

130. TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon Supp. 1982). Other causes of action are possible. *See* Annot., 11 A.L.R.2d 751 (1950). An important alternate action would be a charge of negligence by the physician. *See, e.g.*, Bornmann v. Great Sw. Gen. Hosp., Inc., 453 F.2d 616, 625 (5th Cir. 1971) (physician and hospital found not negligent in death of patient by drug overdose).

131. Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93.

132. *See* W. PROSSER, THE LAW OF TORTS § 127 (4th ed. 1971).

133. Wrongful death actions have been brought against physicians after individuals undergoing psychiatric treatment committed suicide. *See, e.g.*, Meier v. Ross Gen. Hosp., 69

Aside from the consensual issue, the elements usually necessary to maintain a wrongful death action are: decedent's right to sue if death had not occurred, negligence, proximate cause of death, reasonable foreseeability of death, and in the presence of a specific duty of care, the breach of that duty.[134] Factors considered in determining the duty and breach of care include the voluntariness of the patient's stay, type of hospital, necessity of hospitalization, lack of compensation by the physician, lack of special supervision of the patient, and most critically, foreseeability.[135]

While no cases have been reported that address the issue of civil liability for physicians aiding a suicide or the possibly different scope of euthanasia,[136] the position of physicians in such cases would be tenuous. In some jurisdictions consent to a criminal act does not bar civil liability.[137] Elsewhere, consent may bar liability under the doctrine of volenti non fit injuria, legal privilege stemming from consent, and the in pari delecti argument that those who have engaged in a wrongful or illegal deed cannot maintain an action in the courts.[138] That is, if the assisted suicide fails, the aspirant suicide cannot initiate a suit for recovery for damages due to the process of attempting suicide. In addition, legal doctrine provides that one individual cannot give another license to do senseless injury to that individual.[139]

Interest has been markedly lacking in the civil liability of anyone, including physicians, involved in aiding suicides. Two reasons have been suggested for this: (1) the lack of precedent due to various theories of recovery—assault, battery, intentional inflicting of mental distress—with concomitant variance in individual interests and court holdings; and (2) the dramatically uninspired nature of most civil actions, especially when compared with criminal prosecutions.[140] Nevertheless, the general issue of civil liability for causing suicide has attracted some attention.[141] A 1971 study did unfortunately, suggest imposing civil liability even in the

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Cal. 2d 420, 445 P.2d 519, 71 Cal. Rptr. 903 (1968); Vistica v. Presbyterian Hosp. & Medical Center, 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967). Since these individuals were under psychiatric treatment, one might presume incompetence and argue that these cases would not be precedent for an instance of assisting the suicide of a competent person.

Alternative causes of action involving suicide include negligence (conduct causing an irresistible impulse to commit suicide), intentional tort (willful causing of mental distress), and workers' compensation (statutorily governed compensation for work-related injuries). Physician liability is, however, generally based upon the duty of reasonable care. Howell, *Civil Liability for Suicides: An Analysis of the Causation Issue*, 1978 ARIZ. ST. L.J. 573.

134. *See* Annot., *supra* note 130.

135. *Id.* at 778-82.

136. *See* Sharp & Crofts, *Death with Dignity: The Physician's Civil Liability*, 27 BAYLOR L. REV. 86, 86 (1975).

137. *See* F. HARPER & F. JAMES, THE LAW OF TORTS § 22.5 (1956).

138. *Id.*

139. *See Matthew v. Ollerton*, in THE REPORT OF SEVERAL CASES ARGUED AND ADJUDGED IN THE COURT OF KING'S BENCH AT WESTMINSTER; FROM THE FIRST YEAR OF KING JAMES II, TO THE TENTH YEAR OF KING WILLIAM III, at 218 (R. Comberbach ed. 1724) (holding that one may not give another license to beat oneself).

140. Survey, *Euthanasia: Criminal Tort, Constitutional and Legislative Considerations*, 48 NOTRE DAME LAW. 1203, 1216-17 (1973).

141. *See, e.g.*, Schwartz, *supra* note 3.

case of assisting a rationally chosen suicide.[142] The study recognized this imposition of liability to be harsh, especially in the case of an individual with a terminal illness. The study suggests, however, that even in this circumstance civil liability should be imposed although "mitigating circumstances should be allowed to exercise their influence on the issue of damages."[143] This approach does not consider the burden of justification placed upon those who would restrict the actions of free individuals, and that such actions should be considered prima facie free of liability. Instead, the study sees these impositions as a means of solving certain social problems, a view based upon concern for the state's paternalistic interests, not upon concerns respecting the freedom of persons.[144]

C. *Natural Death Acts*

Ironically, Texas, after proscribing the right to aid or assist suicide, adopted a natural death act that, as one of its goals, allows the deaths of individuals to conform more with their wishes.[145] Natural death acts have been adopted to enable individuals to refuse life-prolonging treatment when illness has rendered them no longer competent. The acts give the individual a mechanism to refuse treatment when in a terminal state, through specific instructions against particular forms of treatment given prior to incompetence, or through the appointment of another to decide whether treatment should be refused.[146] A number of states, including Texas,[147] have followed California's example in allowing treatment refusal only when the individual is in a terminal state, the declaration being effective only after the individual has been in a terminal state for at least fourteen days.[148] Under such a statute, an individual who has had a number of

142. Schwartz, *supra* note 3.
143. *Id.* at 222.
144. *Id.* at 255.
145. TEX. REV. CIV. STAT. ANN. art. 4590h (Vernon Supp. 1982).
146. *See* Garland, *The Right to Die in California—Politics, Legislators and Natural Death*, 6 HASTINGS CENT. REP. 5 (1976); Orbon, *The "Living Will"—An Individual's Exercise of His Rights of Privacy and Self-Determination*, 7 LOY. U. CHI. L.J. 714 (1976). Right to die bills and statutes can be arranged in three groups, depending on the authority they use to allow treatment refusal. The first group allows a patient to refuse life-sustaining treatment when terminally ill; the second group allows refusal of treatment as such, and the last group authorizes physicians or others to make treatment decisions on behalf of incompetent patients. An excellent example of the first group is the California Natural Death Act, CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West Supp. 1982). A number of unpassed state bills fall into the second category, *e.g.*, H.R. 897, 1976 Alabama. An example of the third type of proposal is found in New Mexico's code, which allows the patient's family to execute a decision on behalf of an incompetent patient. N.M. STAT. ANN. § 24-7-3 (1981). There have been proposals as well to shift authority to the attending physician. H.R. 662, 158 Leg. 1st Sess., 1976 Virginia.
147. TEX. REV. CIV. STAT. ANN. art. 4590h (Vernon Supp. 1982).
148. CAL. HEALTH & SAFETY CODE § 7191 (West Supp. 1982). The following states patterned their statutes after California in their laws on natural death by requiring that the patient be in a terminal state: IDAHO CODE §§ 39-4501 to -4508 (Supp. 1982); KAN. STAT. ANN. § 65-28,101 (1980); N.M. STAT. ANN. § 24-7-3 (1981); N.C. GEN. STAT. § 90-320 to -323 (1981); OR. REV. STAT. § 97.050-.090 (1981); TEX. REV. CIV. STAT. ANN. art. 4590h (Vernon Supp. 1982); WASH. REV. CODE ANN. §§ 70.122.010-.905 (Supp. 1982).

heart attacks, for example, likely cannot establish an instrument that will prevent resuscitation after being apneic for over five minutes, even though serious but not fatal brain damage will occur, unless the individual was already suffering from terminal heart disease prior to executing the directive.[149] One cannot prevent being resuscitated only to survive in a vegetative state, although one's prior wishes may still prove influential. Other state statutes, however, provide a broader power for individuals to refuse life-saving treatment.[150]

The recent decisions and statutes supporting a right to refuse life-saving treatment suggest that our laws should not follow the traditional English view of preserving life because it is held to be owned by the Crown or by God, or because of the moral disapproval of some citizens.[151] Rather, our

149. Ironically, Texas, which historically has respected the liberty of its citizens to take their own lives, does not recognize the right to refuse life-saving treatment under such clearly definable circumstances as neocortical death. Neocortical death follows a prolonged cardiac arrest and results in the consequential loss of all hope of future sapience, but does not qualify as brain damage.

150. For a recent summary of statutes allowing the refusal of life-saving treatment, see Capron, *Death and the Law: A Decade of Change*, 63 SOUNDINGS 290, 306 (1980). As Capron indicates, although Texas and California require 14-day waiting periods, Idaho and Nevada do not require a waiting period, and Nevada does not require imminence of death. Arkansas allows others to execute a directive for an incompetent patient, and New Mexico allows a third party to execute a directive for a terminally ill minor. *See* ARK. STAT. ANN. § 82-3801 (Supp. 1981); CAL. HEALTH & SAFETY CODE § 7191 (West Supp. 1982); IDAHO CODE § 39-4502 (Supp. 1982); NEV. REV. STAT. § 449.600 (1979); N.M. STAT. ANN. § 24-7-3 (1978); TEX. REV. CIV. STAT. ANN. art. 4590h (Vernon Supp. 1982). These statutes, as well as the final *Quinlan* decision, suggest quite reasonably that life has no intrinsic value, but rather an instrumental value, primarily for the person who is living it. Life is good only if, and insofar as, it produces a good for the person living it. Moreover, the person living that life should be the judge of the life's relative worth. This view involves a shift from the metaphysical appreciation of the value of life to one grounded in the recognition of and respect for free individuals as the determiners of the significance of their own lives. It involves as well a shift from the view that God or society owns the lives of individuals to the view that individuals are the owners of their own lives, in the sense that they have prima facie authority over the disposition of their lives.

151. One might consider the justification for the state's preventing citizens from performing an act that does not directly harm but only offends those citizens. Only recently have we as a civilization agreed to protect those who disturb others by their worship of God in ways that offend those of different religious persuasion. Thus, on the one hand the law forbids religious worship as a compulsory element of existing in society, while on the other hand forms of religious worship, or the absence thereof, that may offend others and occasion moral outrage, are protected. One has the right to legal protection in the pursuit of religious goals that may be highly offensive to public morals, for example, a Satan cult.

Laws are still tolerated, however, that allow the state to use force against individuals merely because of the moral outrage that their private act occasions. Virginia deems it a felony for married couples to have oral intercourse, even in private. VA. CODE § 18.2-361 (1982). In short, the law is used to impose forcibly the opinions of some upon others. For this reason basic rights exist in democracies in order to limit the scope of majoritarian decisions. Thus, the first State Constitution of Texas made its bill of basic rights beyond majoritarian alteration, unlike the federal Constitution, which allows for alteration of the Constitution upon two-thirds approval of the Congress and three-fourths of the states, that is, by repeal of the first amendment. The Texas Bill of Rights stated: "To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate . . . ." TEX. CONST. art. I, § 21 (1845).

The determination of one's own life, including suicide and assisting suicide, is a private matter and should not be interfered with simply because it occasions public moral outrage.

laws have taken an increasingly libertarian view with regard to refusing life-saving treatment, a view more consistent with the maxim that innocents should not be forced to live without their consent.

The suggestion has been made that the right to refuse treatment should include the right of rational individuals dying of an attempted suicide to refuse life-saving treatment:

> If the patient demonstrates the requisite state of mind, however, and persists in refusal of treatment, that decision [to refuse treatment] should be respected though tantamount to suicide. The distinction between principled and unprincipled action is not strong enough to warrant a different approach toward the suicide-patient than that taken toward the religiously motivated patient when both in reality are asserting rights to bodily integrity, personal privacy, and self-determination. This position, that the patient wishing to die should be permitted to decline treatment, has distinct implications for legal approaches to suicide generally. *In effect, it means that the "serious suicide," the person whose decision to die is clearly competent, deliberate, and firm, should be permitted to die. The form of self-destruction, refusal of treatment versus slashing of wrists or whatever, should not matter.*[152]

In order to realize this goal of allowing rational individuals to refuse life-saving treatment and of protecting the right of rational suicides to complete their suicidal acts, legal changes would be required in many jurisdictions. As one scholar has argued: "In the future, states which desire to legalize euthanasia not only must release physicians from homicide liability, but also from liability extending from criminal suicide-aiding laws, in order to avoid a catastrophic conflict."[153] With these statutory changes, individuals could successfully commit suicide based upon the maxim of not forcing the innocent to live against their wishes.

Under old Texas case law, which refused to impose liability for suicide, attempted suicide, or assisted suicide, this maxim could be rephrased: One ought to protect innocent citizens from others interfering in their own life and death decisions. The change in formulation underscores the difference between valuing life in the abstract to respecting the freedom of persons and their right to decide when and under what circumstances their lives have meaning. Under present Texas law this right is acknowledged by allowing anyone, especially the terminally ill, to commit suicide without legal interference. By again recognizing the ancillary right in Texas to solicit aid in suicide and securing competent suicides and their aiders against

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Such interference would involve the use of public force by some members of the community against other members of the community. The line between proper public activities, for example, protection against unconsented violence, enforcement of contracts, and commonly chosen enterprises of public welfare, and the private sphere must in each case be drawn with care. The right to engage in suicide or to have one's suicide abetted as a private, consensual activity should thus not extend to the right to commit suicide in a public place without the consent of those who might be forced to be onlookers, nor on the property of others without their consent.

152. Cantor, *supra* note 3, at 258 (emphasis added).

153. Comment, *Criminal Aspects, supra* note 3, at 163.

liability, Texas would round out its interest in the right of individuals to rule their own lives, an interest reflected in its natural death act.

IV. FUTURE LEGAL RESPONSES

Having examined the development of the law's view of aiding and abetting suicide, the issue arises concerning what the law should be in these matters. For seventy-one years Texas permitted passive facilitation of suicide without untoward consequences. As for the state's current attitude, it is questionable to what extent Texas retains Blackstone's avowed interest of the King in preserving his subjects, or to what extent the state can be justified in imposing particular moral views on others.[154] As to the King's interest, the issue is troublesome for those who would defend laws against suicide in light of current levels of unemployment and potential overpopulation. At best, such considerations might establish a state interest in the preservation of particularly highly trained or talented subjects. This view, however, is incompatible with the tradition of individual liberties and rights of citizens developed in Texas. In any event, Americans have been reluctant to view themselves analogously as subjects of a king. Insofar as America constitutes a community bound together in terms of mutual respect of freedom, rather than in regard for coercion, its members cannot be viewed as subjects of the state or subject to the state's enforced morality. Neither is it clear that current members of any community wish the state to act paternalistically by deciding what is in their best interests, rather than by allowing them that choice, especially when the issue is as important as the termination of their own lives. If ever there be a right one would wish to reserve for oneself, it would appear to be this.

As the history of their law shows, Texans have reserved the right to choose the moment of their own deaths. Once one acknowledges the obligation to respect self-determination, concurring with the Texas Court of Criminal Appeals in its refusal to proscribe aiding and abetting suicide is easy. The fact that an absence of laws against suicide and assisting suicide did not lead to a significant number of recognized cases of self-inflicted harm or to an erosion of Texas's interests in preserving society, indicates that no justification for such laws exists. From the *Grace v. State* ruling in 1902 to the Texas adoption of the Model Penal Code in 1973 and its proscription of assisted suicide, no record of suicide abuse in Texas was established. Whatever cases of aiding and abetting suicide did occur likely took place in reasonable circumstances, not indicative of abuse nor with antisocial consequences.[155] In particular, an insignificant number of individuals appear to have enlisted the aid of others in the commission of their sui-

154. *See* 4 W. BLACKSTONE, COMMENTARIES *189.

155. A comparison of suicide rates in Texas fails to show, for example, any beneficial impact of the new law forbidding assisted suicide. The rate of suicide per 100,000 was 10.5 in 1969, 11.5 in 1970, 11.4 in 1971, 12.3 in 1972, 11.6 in 1973, 12.6 in 1974, 13.5 in 1975, 12.1 in 1976, and 14.0 in 1977. Compare further Texas's rates with those of its immediate neighbors:

cides. The seventy-one years of Texas's respect for the autonomy and self-determination of individuals did not lead to social disruptions.

One thus has a sociological and anthropological experiment of seventy-one years duration showing that the absence of a law proscribing aiding and abetting suicide does not have antisocial effects. Patients may be comforted simply to know that they are not being forced to live, although few would avail themselves of a more speedy death. Freedom is often valued in itself. Given the value we find in this freedom, indeed, given that respect of freedom is a condition for a community founded on mutual respect rather than force, the state should not intrude upon that freedom and proscribe victimless actions. Already established procedures for commitment[156] and for the right of physicians in ambiguous circumstances to act to preserve life[157] should suffice to protect the mentally infirm. That laws

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Suicides per 100,000:

	Oklahoma	Arizona	Louisiana	Texas
1970	9.6	14.7	9.3	11.5
1971	10.4	18.5	9.1	11.4
1972	12.3	17.1	10.7	12.3
1973	13.5	16.1	10.5	11.6
1974	18.8	18.4	10.9	12.6
1975	14.2	17.6	11.9	13.5
1976	12.6	17.3	11.3	12.1

2 U.S. NATIONAL CENTER FOR HEALTH STATISTICS, VITAL STATISTICS OF THE UNITED STATES, 1969, 70, 71, 72, 73, 74, 75, MORTALITY part B, tables 7-7, 7-483 (for number of suicides 1969-75); Texas Center for Health Statistics, Statistical Services, Austin, Texas (for the number of suicides in Texas 1976-77); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, POPULATION ESTIMATES AND PROJECTIONS, Series P-25, No. 727, at 7, table 2: "Annual Estimates of the Resident Populations of States 1970-1977" (July 1978).

156. Texas law provides for emergency admission to a mental hospital or a general hospital if a "person is mentally ill and *because* of his mental illness is likely to cause injury to himself." TEX. REV. CIV. STAT. ANN. art. 5547-27 (Vernon Supp. 1982) (emphasis added). One commentator has argued that:

> In light of a recent United States Supreme Court case, holding that effective treatment must be offered an involuntary mental patient in a state hospital or the patient must be released, unless he is dangerous to others, it seems a patient who has attempted suicide but shows no present suicidal threats should be released. If a patient really desires to kill himself, it is doubtful he can be halted, even in a mental hospital. Without effective treatment for those who attempt suicide, a mental hospital would be hard-pressed to justify holding a patient against his will.

Comment, *Criminal Aspects, supra* note 3, at 161 (footnote omitted).

157. Physicians are generally empowered to act to preserve life in emergency situations unless they have been clearly requested from an obviously competent patient to stop further life-saving treatment. The absence of a proscription against aiding and abetting suicide would not impede physicians from giving emergency treatment to suicides as they always have, presuming the suicide's incompetency and absent a competently executed living will applying to the situation of attempted suicide. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 5547-27 (Vernon Supp. 1982). For a more explicit discussion of a physician's powers in emergency situations, see *In re* Yetter, 62 Pa. D. & C.2d 619 (1973). One must note as well the danger of taking away under the guise of incompetency the rights to suicide and assisted suicide. Criteria for finding incompetency in order to allow treatment of a would-be or attempted suicide must be set with care, though these criteria will necessarily be more lax in emergency situations when less time is available to assess competency or to assess whether an attempted suicide was the act of a rational individual. Once it becomes clear, however,

against suicide or against aiding and abetting suicide afford significant additional protection is unlikely. Insofar as one seriously respects freedom as a condition for a moral community, the onus of proof lies upon those wishing to declare others incompetent simply in order to forbid suicide, or forbid suicide assistance, to prevent a victimless crime.

Texas, by adopting the Model Penal Code's proscription of aiding and abetting suicide, acted both against its traditions of individual liberty and against the increasingly appreciated propriety of allowing individual decisions concerning the circumstances of death. Texas should correct that error and return to a stance consistent with its traditional nonproscription of suicide, a stance in accord with its previous proper refusal to legally proscribe passively assisted suicide. This legal position would be a model for other states in their attempt to return life and death decisions to the hands of those most concerned, those who would die.

In addition to lifting sanctions against suicide and attempted suicide, Texas and other jurisdictions should adopt statutes stating that it is lawful for an individual to furnish another competent individual with the means to commit suicide, as long as the person committing suicide takes the last definite step to initiate the suicidal act. Thus, a physician or anyone else could make available to an individual the means by which to commit suicide; however, the person committing suicide would have to perform the last act. Competence of the person committing suicide in the absence of coercion would need to be recognized as a defense against civil liability for those who assist suicide. A mandatory formal declaration before witnesses prior to an assisted suicide might also be considered as a precaution against foul play masquerading as an assisted suicide.

This Article thus concludes that suicide and aiding and abetting suicide should be statutorily defined as noncriminal, just as the Texas Court of Criminal Appeals similarly held in 1902 and 1908. The purpose would be to withdraw state intrusion from an area in which experience has shown no need for intrusion and the private nature of the issues involved is such that they should be left to those most concerned with them, the principals themselves. In allowing rational individuals to commit suicide and to be aided in their suicide without fear of liability, those individuals are respected as capable decision-makers shaping their own destinies.

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that a suicide was rationally attempted, even emergency treatment should not be imposed. For an exploration of some of the difficulties involved in determining competency, see MENTAL ILLNESS: LAW AND PUBLIC POLICY (B. Brody & H. Engelhardt eds. 1980).