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Suicide: A Legal, Constitutional, and Human Right

Adam Lamparello

ARTICLES

SUICIDE: A LEGAL, CONSTITUTIONAL, AND HUMAN RIGHT

By: Adam Lamparello[1]

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1. Visiting Professor, Mercer University College of Law. Bachelor of Arts, University of Southern California; Master of Laws, New York University.

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"Reason can't stand in for feeling."[2]

"There exists a right by which we take a man's life but none by which we take him from his death . . . ."[3]

I. INTRODUCTION

In this country, every woman can terminate a pregnancy prior to the stage of viability. Terminally-ill patients may hasten their own death by refusing medical treatment. States intentionally murder those convicted of the most serious crimes, albeit inconsistently. In each of these cases lays a common theme—the government decides when, and under what circumstances, a life, or a potential life, may be ended. There is one realm, however, the government may not regulate—the relationship between the human being and itself. That relationship bestows upon the individual the right to determine when, and under what circumstances, his life may be ended.

Every individual in this country who has reached the age of majority should have the right to commit suicide, whether he suffers from mental or physical illness or is in perfect health. The right to end one's life, at a time and in a manner of one's choosing, is not only the ultimate expression of freedom but is also a reflection of how much we value and respect life itself. Of course, this statement would be rejected by "right-to-life" proponents, whose arguments against issues such as physician-assisted suicide and the right to terminate a pregnancy are predicated precisely upon their own conceptions of the inherent "value" of life.

However, while the above statement may sound counterintuitive to right-to-life proponents, it seems this way only because there are specific, ingrained assumptions regarding the definition of "rights" and

2. ELVIS PRESLEY, *I've Lost You*, *on* THAT'S THE WAY IT IS (RCA 1970).
3. FRIEDRICH NIETZSCHE, HUMAN, ALL TOO HUMAN 48 (R.J. Hollingdale trans., Cambridge Univ. Press, 2d ed. 1996) (1886).

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the inherent "value" of life that remain unchallenged. Thus, in arguing that suicide is a right that should be unconditionally accorded to every individual—except for those not competent to make such a decision, this Article posits that the concept of rights and the value of life should be fundamentally redefined in a manner that emphasizes individual autonomy over the collective good.

When the assumptions of the current framework are challenged and a new approach to the concept of rights and the value of life is presented, the concept of suicide not only becomes palatable, but also becomes an act that represents and reinforces the most basic civil liberties of an individual in a free society. The Supreme Court has already recognized these liberties in its substantive due process jurisprudence. These liberties form the basic foundation for a cognizable right to suicide and include the autonomy to make intimate and personal decisions about one's body, one's quality of life, and when and under what circumstances one may terminate one's life. The government should not—and does not—have any right to interfere with such personal and private decisions.

Importantly, however, in order to reframe the conception of rights and the value of life, it is critical to identify and refute the basic assumptions that underlie the contemporary approach to individual decisions regarding the body, bodily integrity, and the quality of life. The first of these assumptions is predicated upon the notion of duration. Under this conception, life should be preserved and protected until it reaches its natural end. The only exception exists where an individual has drafted an advanced directive stating unambiguously that he does not want to be kept alive through artificial means, i.e., feeding tubes, which ineluctably hasten the dying process. The second assumption is based upon the concept of irrationality. The traditional presumption is that there is something wrong with people who want to commit suicide, namely, they suffer from a demonstrable medical illness such as major depressive or bi-polar disorder. This argument contends that the act of suicide can never be—and never is—the product of rational thought or deliberative decision-making. The third assumption is the *malum in se* notion. This view holds that suicide is an inherently bad act that should be proscribed by both the courts and legislature. The fourth assumption is based upon a collective, rather than individual, premise. Specifically, suicide is wrong because it would send a message that taking life is an acceptable act and would thus create a culture where those who would otherwise be deterred from committing suicide would now feel they could do so without reprisal. This can also be characterized as the slippery slope argument. The final, and most critical assumption underlying the current value of life concept is predicated upon a limited definition of individual rights and, concomitantly, an overbearing view of state's rights. Under this view, a state may simply assert a *general* interest in protecting and

preserving life itself as a means to prevent an individual from making the decision to terminate life, even where there exists no harm to third parties. Pro-life proponents would assert that these core assumptions reflect an unwavering commitment to the value of each individual's life and liberty.

These assumptions, however, do exactly the opposite. These assumptions curtail and delimit the most basic and fundamental rights that lie at the core of our constitutional guarantees: life, liberty, and privacy. There can be no greater expression of liberty than that which involves an individual's most intimate and personal decision regarding the function and integrity of the body. Guided by these core values, the Supreme Court's substantive due process jurisprudence has held that certain rights are "fundamental" to the *individual* in that the state cannot interfere with them absent a "compelling interest." In fact, the Court has specifically found that individuals have the right to make decisions regarding the termination of both potential life and life itself. For example, the state may not, under any circumstances, prevent a woman from ending a pregnancy prior to viability. Additionally, provided there is an advanced directive, the state cannot prevent a terminally-ill patient from refusing life-sustaining measures, i.e. a feeding tube. Underlying each of the Supreme Court's landmark decisions is the notion that the state may not interfere with an individual's liberty interests. These interests include the ability to make intimate decisions regarding one's body and quality of life.

The unconditional right to suicide is, at the very least, encompassed within the Court's paradigm. Implicit in the Court's opinions is a view regarding the concept of rights, as well as the value of life, that undermines the assumptions of and differs substantially from that of the traditional right-to-life proponents. First, the Court's decisions promote a notion of rights which permit the individual to claim ownership over his body and make decisions with respect thereto—provided such decisions are the product of consent and rational thought and do not infringe on the rights of third parties. In addition, the Court's holdings contemplate a value of life in a more individualized and subjective sense, that is, they make it more difficult for the state to interfere with decisions relating to a person's life, liberty, and privacy.

The fundamental right to suicide follows logically from these decisions.[4] As the foregoing discussion has demonstrated, however, the right to suicide should not simply be deemed a fundamental right. Rather, it should be deemed an *absolute* right, which can be curtailed only in the most limited circumstances, such as when an individual is not of sound mind and body, subject to abuse or coercion, or other-

4. For the purpose of clarity, this Article does not discuss physician-assisted suicide. The Article is also not limited to the suicide of those who are terminally ill. Instead, it asserts that every adult, even an individual who is perfectly healthy and rational, has a right to end his life.

wise not in a position to freely, knowingly, and unconditionally make the choice to commit suicide.

Ultimately, this Article strives to advance discussion of values and rights and thereby give greater freedom to the individual in decisions relating to life and liberty. This Article argues that the value of life is best expressed when the concept of value is given a *subjective* rather than *objective* meaning. In other words, the individual himself should determine the value of his life. A third party should not force upon that individual a determination with no understanding of an individual's private end-of-life choices. Life has value not because of how others define it, but rather because of how each individual defines it. Thus, an individual's actions in response to that assessment will vary, and those actions may include making the decision to end his life. The individual has the right to make that choice. The individual has the right to decide how to live his life, on his own terms, and in accordance with his own judgments and discretion. The Constitution protects this interest, but more importantly, the nature of human existence protects this interest.

Part II discusses the Supreme Court's substantive due process jurisprudence and why it provides the legal basis for an unconditional right to suicide. Part III provides the theoretical basis for the right to suicide. Part IV endorses the right to commit suicide and argues there should be an organization that helps individuals safely and peacefully end their lives. However, this right, based upon notions of privacy and liberty, is not absolute. There must be procedures in place to ensure the individual is of sound mind and body. In other words, it is imperative to confirm that those individuals truly desire to commit suicide and are not merely acting irrationally, as one might in the case of a temporary emotional or physical trauma.

II. SUICIDE—THE CONSTITUTIONAL AND LEGAL FOUNDATION

The Supreme Court's substantive due process jurisprudence provides the legal basis that justifies an unconditional right to suicide. The Court's jurisprudence develops the concept of liberty and privacy in a manner that protects the individual's right to make the most intimate decisions regarding his body. These holdings support the right to suicide not only in a fundamental sense but in an absolute sense as well.

A. *Substantive Due Process Jurisprudence*

1. *Meyer v. Nebraska*

In *Meyer v. Nebraska*, Nebraska enacted a law prohibiting the teaching of any subject in a language other than English.[5] The plain-

5. Meyer v. Nebraska, 262 U.S. 390, 397 (1923).

tiff, a schoolteacher, taught the subject of reading in German and was subsequently convicted under the statute.[6] In reversing the conviction pursuant to the Fourteenth Amendment, the Supreme Court held as follows:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[7]

In what is arguably the beginning of its substantive due process jurisprudence, the Court explained that "[t]he established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competence of the State to effect."[8]

2. *Pierce v. Society of Sisters*

In *Pierce v. Society of Sisters*, the State of Oregon enacted a criminal statute that required every parent, guardian, or individual responsible for the care, custody, or control of a child to send him to a public school within the district where the child resided.[9] Appellee was an organization dedicated to providing children (including orphans) with private secular and religious education, and thus did not comply with the statute's provisions.[10] In finding the statute unconstitutional, the Court held it "interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[11] The Court explained that "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State."[12] In fact, "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize

6. *Id.*

7. *Id.* at 399; *see also* William R. Musgrove, Note, *Substantive Due Process: A History of Liberty in the Due Process Clause*, 2 U. ST. THOMAS J.L. & PUB. POL'Y 125, 132 (2008) ("The notion of fundamental rights in relation to privacy began in the 1923 case of *Meyer v. Nebraska*.").

8. *Meyer*, 262 U.S. at 399–400.

9. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 530 (1925).

10. *Id.* at 531–32.

11. *Id.* at 534–35.

12. *Id.* at 535.

its children by forcing them to accept instruction from public teachers only."[13] Put differently, "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[14]

3. *Griswold v. Connecticut*

In *Griswold v. Connecticut*—a significant decision in the Court's substantive due process jurisprudence—the Court reviewed the constitutionality of a statute prohibiting the use of contraceptives by *any* person, including married couples.[15] In examining the "wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment,"[16] the Court found the statute constitutionally infirm. In so doing, the Court recognized the existence of a personal right to privacy encompassed within the Bill of Rights and the Fourteenth Amendment.[17] More specifically, the Court held that there exist fundamental rights accorded to every individual even though such rights are not explicitly mentioned in the Constitution:

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights . . . . The right to freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read, and freedom of inquiry, freedom of thought, and freedom to teach . . . . Without those peripheral rights the specific rights would be less secure.[18]

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13. *Id.*

14. *Id.*; *see also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that the forced sterilization of males who were convicted of two or more felonies involving "moral turpitude" was unconstitutional; in so holding, the Court stated "[m]arriage and procreation are fundamental to the very existence and survival of the race . . . . He is forever deprived of a basic liberty.").

15. Griswold v. Connecticut, 381 U.S. 479, 480 (1965).

16. *Id.* at 481.

17. *Id.* at 484–85; *see also* Lackland H. Bloom, Jr., *The Legacy of* Griswold, 16 OHIO N.U. L. REV. 511, 512–13 (1989) ("If *Griswold* is remembered for one thing, it is surely for having effectively given birth to the concept of an independent constitutional right of privacy . . . . [The Court] relied on the right of privacy as an aspect of the constitutional source for its abortion decisions from *Roe* onward.").

18. *Griswold*, 381 U.S. at 482–83 (citations omitted); *see also* Bloom, *supra* note 17, at 516 ("Justice Douglas then noted how the concept of privacy was implied in the third, fourth, fifth and ninth amendments, quoting language from the famous old fourth and fifth amendment case of *Boyd v. United States* and the much more recent fourth amendment case of *Mapp v. Ohio*, which referred to 'the privacies of life,' and 'the right to privacy' respectively. Justice Douglas was thus able to establish that some sort of 'right of privacy' had been recognized as a constitutional concept in a variety of contexts."); Sherry Colb, *The Qualitative Dimension of Fourth Amendment*

In other words, "[t]he foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[19] Part of that substance relates to "zones of privacy,"[20] and prohibiting the use of contraceptives to individuals "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[21] Thus, as the *Griswold* Court stated, "[w]e deal with a right of privacy older than the Bill of Rights—older than our political parties . . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[22] It is, in the most fundamental way, "an association that promotes a way of life . . . a harmony in living" and a relationship "for as noble a purpose as any involved in our prior decisions."[23]

4. *Eisenstadt v. Baird*

In *Eisenstadt v. Baird*, the State of Massachusetts enacted legislation prohibiting non-married couples from obtaining contraceptives for the purpose of preventing pregnancy.[24] In finding the Massachusetts statute unconstitutional, the Court discussed not only the notion of a right to privacy but also a liberty interest that lies at the core of the Constitutional framework:[25]

> If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. *If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person* as the decision whether to bear or beget a child.[26]

Importantly, the Court rejected the intimation that morality was a sufficient basis upon which to justify the legislation, stating, "[t]o say that contraceptives are immoral as such, and are to be forbidden to

"Reasonableness," 98 COLUM. L. REV. 1642 (1998) (discussing privacy in the Fourth Amendment context).

19. *Griswold*, 381 U.S. at 484 (emphasis omitted).

20. *Id.*

21. *Id.* at 685.

22. *Id.* at 486 (emphasis omitted).

23. *Id.*

24. Eisenstadt v. Baird, 405 U.S. 438, 440–41 (1972).

25. *Id.* at 453; *see also* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 76 (2006) (discussing the evolution of substantive due process and stating how "the contemporary Supreme Court has shifted its terminology from the 'right of privacy' to 'liberty' . . . .").

26. *Eisenstadt*, 405 U.S. at 453 (emphasis added).

unmarried persons . . . means that such persons must risk for themselves an unwanted pregnancy. . . ."[27] Indeed, "[s]uch a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights."[28] Thus, "[i]n the absence of *demonstrated harm*, we hold that it is beyond the competency of the state."[29]

5. *Roe v. Wade*

The Court's decision of *Roe v. Wade* was groundbreaking simply because it held that a woman could terminate a pregnancy during the first trimester without state interference.[30] What made *Roe* even more remarkable was that, under its substantive due process jurisprudence, the Court found within the right of *privacy* the concomitant right to make a decision with respect to the termination of *life*, or at the very least, *potential* life.[31]

In *Roe*, the petitioners challenged a Texas statute that criminalized all abortions, except those required to save the life of the mother.[32] In finding the statute unconstitutional, the Court "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[33] The Court also explained that the right to privacy was based upon, *inter alia*, "the concept of liberty guaranteed by the first section of the Fourteenth Amendment."[34] In so holding, the Court clarified its concept of "rights," stating "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy."[35] When a right is deemed "fundamental," "limiting [it] may be justified only by a 'compelling state interest.'"[36]

27. *Id.* at 452 (citing Baird v. Eisenstadt, 429 F.2d 1398, 1402 (1st Cir. 1970)).

28. *Id.* at 453 (citing *Baird*, 429 F.2d at 1402).

29. *Id.* (emphasis added); *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the basic civil rights of man, fundamental to our very existence and survival . . . . To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principles of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law . . . . Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."); Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) ("[T]he Constitution protects the sanctity of the family precisely because the institution is deeply rooted in this Nation's history and tradition.").

30. Roe v. Wade, 410 U.S. 113, 163–64 (1973).

31. *See id.* at 154.

32. *Id.* at 117–18.

33. *Id.* at 152.

34. *Id.* (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

35. *Id.* (citations omitted).

36. *Id.* at 155 (quoting Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969)).

Based upon these principles, the Court held "[t]he right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[37] Importantly, however, while "the right of personal privacy includes the abortion decision," it is not "unqualified and must be considered against important state interests in regulation."[38] Specifically, "at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant [and compelling]."[39] In determining when the mother's fundamental right to privacy is outweighed by a State's "important and legitimate interest in the health of the mother," the Court found that the "'compelling' point is at viability," which is generally thought to occur at "approximately the end of the first trimester."[40]

The Court's justification for permitting state interference at this juncture was also predicated upon concerns for the preservation of life, namely, those of the mother and fetus.[41] Specifically, because mortality rates after the first trimester were the same during the remaining parts of the pregnancy, the "State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[42] For example, the state may enact regulations concerning "the qualifications of the person who is to perform the abortion . . . the licensure of that person . . . whether it must be in a hospital or may be a clinic . . . and the like."[43] In other words, "[t]he privacy right involved . . . cannot be said to be absolute."[44]

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37. *Id.* at 153; *see also* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Societal Interests*, 81 MICH. L. REV. 463, 520 (1983) ("*Roe v. Wade*, for example, located the privacy right within the meaning of due process 'liberty,' . . . . [However,] the *Roe* majority directly repudiated an 'unlimited right' of privacy that would allow one 'to do with one's body as one pleases.'") (quoting *Roe*, 410 U.S. at 154).

38. *Roe*, 410 U.S. at 154.

39. *Id.* at 155.

40. *Id.* at 163.

41. *Id.* at 163–64.

42. *Id.* at 163.

43. *Id.*

44. *Id.* at 154. More specifically, the Court held as follows:

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. . . . The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt and Griswold, Stanley, Loving, Skinner, and Pierce and Meyer were respectively concerned . . . it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Id. at 159.

Additionally, the Court's holding also recognized the "State's important and legitimate interest in potential life," which exists at the point of "viability."[45] The Court's reasoning was predicated upon the notion that "the fetus then presumably has the capability of *meaningful* life outside the mother's womb . . . [and] State regulation protective of fetal life after viability thus has both logical and biological justification."[46] Accordingly, after the fetus is viable, the state "may go so far as to proscribe abortion . . . except when it is necessary to preserve the life or health of the mother."[47]

Therefore, *Roe* is a critical decision because it involves the Court's application of the fundamental right to privacy to decisions involving both the termination (abortion) and the commencement (viability) of life. Importantly, the Court did not explain *how* the right to terminate a potential life could properly be deduced under the privacy rubric. It did, however, provide some guidance concerning the circumstances under which a state may intervene to prevent a person from making an end-of-life decision regarding *another viable life*. The critical question, however, is whether these justifications can be applied to override the fundamental right to privacy and prevent the *individual* from making the decision to commit suicide. The reasons set forth later in this Article demonstrate that they cannot.

6. *Bowers v. Hardwick*

In *Bowers v. Hardwick*, the petitioner challenged the constitutionality of a statute that criminalized both homosexual and heterosexual sodomy.[48] In finding the statute constitutional, the Court framed the substantive due process inquiry somewhat differently than it had in its prior jurisprudence; namely, by inquiring "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[49]

In answering this question in the negative, the Court found that the right of privacy in the Fourteenth Amendment does not extend to homosexual sodomy.[50] As the Court explained, although the privacy interest of the Fourteenth Amendment created the right to child-rearing, education, procreation, marriage, contraception, and abortion, "none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy. . . ."[51] Furthermore, "[n]o connection between family,

45. *Id.* at 163.
46. *Id.*
47. *Id.* at 163–64.
48. Bowers v. Hardwick, 478 U.S. 186, 186 (1986).
49. *Id.* at 190.
50. *Id.* at 190–91.
51. *Id.*

marriage or procreation on the one hand and homosexuality on the other has been demonstrated . . . ."[52] With respect to the Fourteenth Amendment's privacy interest, the Court also held that "any claim that these cases [i.e., *Griswold*, *Roe*, *Loving*, *Meyer*, and *Pierce*, *inter alia*] . . . stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."[53]

The Court's reasoning also attacked the basic premises upon which its substantive due process jurisprudence was predicated. Specifically, the Court recognized that the "fundamental liberties" acknowledged in cases such as *Griswold* were based on freedoms "'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed.'"[54] The Court held a right to homosexual sodomy could not survive under either principle. In fact, as the Court clarified, at least one case defined the concept of fundamental rights as those "'deeply rooted in this Nation's history and tradition.'"[55] Under this formulation, there could be no recognition of a right to homosexual sodomy because "[p]roscriptions against that conduct have ancient roots."[56] Specifically, "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights."[57]

Thus, *Bowers* was an important decision because it highlighted the three lines of analysis by which the Court could recognize new rights under the Fourteenth Amendment's Due Process Clause.[58] What was

52. *Id.* at 191.
53. *Id.*
54. *Id.* at 191–92 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
55. *Id.* at 192 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977)).
56. *Id.*
57. *Id.* at 192.
58. *See* Brett J. Williamson, *The Constitutional Privacy Doctrine After* Bowers v. Hardwick: *Rethinking the Second Death of Substantive Due Process*, 62 S. CAL. L. REV. 1297, 1312 (1989) (stating that the majority's opinion in *Bowers* was based on three principles). Williamson's analysis was as follows:

> First, the Court held that the *Griswold* line of cases extended the privacy protection only to matters concerning the family, marriage, or procreation—categories into which homosexual sodomy clearly does not fit. Second, the . . . identification of a right as "fundamental" and thus worthy of protection under the due process clause depended on whether it met the tests implied by the well-worn quotes "implicit in the concept of ordered liberty" and "deeply rooted in this Nation's history and tradition." . . . Third, the majority expressed a general disapproval of expanding the universe of Court created rights, holding that "there should be . . . great resistance to expand the substantive reach of the due process clause, particularly if it requires redefining the category of rights deemed to be fundamental."

Id. *See also* Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1987) (stating that substantive due process might be headed to a second death); Michael J. Phillips, *The Nonprivacy Applications of Substantive Due Process*, 21 RUTGERS L.J. 537, 537 (1990) ("The Supreme Court's . . . decision in *Bowers v. Hardwick* sparked some commentators to speculate whether the doctrine of substantive due process was once again headed for obscurity.").

perhaps more interesting, however, was how the Court framed the inquiry, namely, whether homosexuals had the right to engage in sodomy. If, for example, the Court had framed the issue as whether consenting adults have the right to engage in private sexual conduct free from state regulation, the result might have been different. These formulations, therefore, directly impact the Court's decisions and the nature of how we conceive "rights" under the Constitution.

7. *Cruzan v. Director, Missouri Department of Health*

In *Cruzan v. Director, Missouri Department of Health*, the petitioners, the parents of co-petitioner Nancy Cruzan who sustained severe injuries in an automobile accident and was in a persistent vegetative state, sought to terminate her artificial nutrition and hydration, thus hastening her death.[59] The state of Missouri opposed this request because, pursuant to a state statute governing the withdrawal of medical treatment, there was not clear and convincing evidence from Cruzan herself that she would wish to discontinue such treatment if ever in a vegetative state.[60] The only evidence that did exist stemmed from a conversation with a friend in which Cruzan indicated that she would not wish to "continue her life" if in a vegetative state.[61] As a result, this matter presented the difficult issue of when a person's desire to refuse medical treatment (and thus hasten death) can outweigh the state's interest in preserving life.

The Court began its analysis by recognizing that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment," which could be "inferred from [the Court's] prior decisions."[62] In fact, "[i]t cannot be disputed that the Due Process Clause protects an interest . . . in refusing life-sustaining medical treatment."[63] For example, a person has a right to refuse medication, such as anti-psychotic drugs, because "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."[64] However, the determination that a person "has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interest.'"[65]

In this case, the Court found in favor of Missouri but on grounds that neither abridged nor infringed upon the fundamental right to re-

59. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 265 (1990).
60. *Id.* at 268–69.
61. *Id.* at 268.
62. *Id.* at 278; *see also* Jacobson v. Massachusetts, 197 U.S. 11, 25–27 (1905) (balancing an individual's liberty interest in refusing a small pox vaccination against the State's interest in preventing disease).
63. *Cruzan*, 497 U.S. at 281.
64. *Id.* at 278 (quoting Washington v. Harper, 494 U.S. 210, 229 (1990)).
65. *Id.* at 279 (quoting Youngsberg v. Romeo, 457 U.S. 307, 321 (1982)).

fuse medical treatment and thereby hasten death. The Court held that the "United States Constitution would grant a *competent* person a constitutionally protected right to refuse lifesaving hydration and nutrition."[66] However, because Cruzan was in a vegetative state, she was unable to "make an informed and voluntary choice to exercise her constitutional right to refuse medical treatment."[67] Consequently, "[s]uch a 'right' must be exercised for her, if at all, by some sort of surrogate," which in this case was her parents.[68]

Given the fundamental right at stake and Cruzan's inability to express her own wishes, the Court held that Missouri's statute was constitutionally permissible.[69] The Court found Missouri had an important interest in "the protection and preservation of human life" and was not required "to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death."[70] Indeed, because "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality," a state "may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements."[71]

Additionally, "a [s]tate may properly decline to make judgments about the quality of life a particular individual may enjoy and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual."[72] This interest had particular force here because Cruzan was unable to express her own wishes regarding the desire to terminate medical treatment; she had to rely upon surrogates, who would not necessarily act in the patient's best interest.[73] As the Court noted, "'[t]here will, of course, be some unfortunate situations in which family members will not act to protect the patient.'"[74] Accordingly, the

66. *Id.* (emphasis added).
67. *Id.* at 280.
68. *Id.* In finding Missouri's statute constitutional, the Court held as follows:

> An incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right .... Here, Missouri has in effect recognized that under certain circumstances a surrogate may act for the patient in electing to have hydration and nutrition withdrawn in such a way as to cause death, but it has established a procedural safeguard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent. Missouri requires that evidence of the incompetent's wishes as to the withdrawal of treatment be proved by clear and convincing evidence. The question, then, is whether the United States Constitution forbids the establishment of this procedural requirement by the State. We hold that it does not.

Id.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 282.
73. *Id.* at 281.
74. *Id.* (quoting *In re* Jobes, 529 A.2d 434, 447 (N.J. 1987)).

States "[are] entitled to guard against potential abuses in such situations."[75]

Ultimately, the Court held "Missouri has permissibly sought to advance these interests through the adoption of a 'clear and convincing evidence' standard of proof" when surrogates are seeking to exercise a patient's right to refuse unwanted, life-saving medical treatment.[76] Thus, because Cruzan's expressed wishes regarding the refusal of medical treatment did not meet this standard, her parents could not legally withdraw the life-saving treatment she was receiving.[77]

8. *Planned Parenthood v. Casey*

In *Planned Parenthood v. Casey*,[78] the Court applied the Fourteenth Amendment's liberty and privacy interests to a case involving, at the very least, potential life. Here, the petitioners challenged several provisions of a statute that placed various limitations and regulations on the ability to obtain an abortion.[79] Specifically, the statute (1) required a woman to give informed consent prior to the procedure; (2) mandated the informed consent of a parent in the event that a minor was seeking an abortion (although there was a judicial bypass procedure); (3) required a married woman seeking an abortion to obtain the consent of her husband; (4) provided a "medical emergency" exception that exempted a woman from any of the foregoing requirements; and (5) imposed "certain reporting requirements on facilities providing abortion services."[80] The Court's decision was a pivotal moment in substantive due process jurisprudence because the statute tested just how far a state could interfere with a woman's right to terminate a pregnancy prior to viability.

The Court ultimately upheld the core holding of *Roe*, as well as the privacy and liberty interests that underscored its decision.[81] The Court first recognized "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."[82] The Court further explained that "protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment . . . [and] the controlling word . . . is liberty."[83] The concept of "liberty" means, at its very core, "a promise of the Constitution that there is a realm of personal liberty which the government may not enter," and the "substantive liberties protected by the Fourteenth Amendment" are not limited to

75. *Id.*
76. *Id.* at 282.
77. *Id.* at 285–86.
78. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992).
79. *Id.* at 844.
80. *Id.*
81. *Id.* at 846–47.
82. *Id.* at 846.
83. *Id.*

"those recognized by the Bill of Rights" or those that "were protected against governmental interference . . . when the Fourteenth Amendment was ratified."[84] In other words, the liberty and privacy interests guaranteed by the Fourteenth Amendment are not limited to "those rights already guaranteed to the individual against federal interference" or to the "precise terms of the specific guarantees elsewhere provided in the Constitution."[85]

Instead, the Fourteenth Amendment protects the notions of liberty and privacy in a much broader sense that encompasses rights not explicitly referenced in the Constitution. For example, "[m]arriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause."[86] In other words, the liberty protected by the Due Process Clause "is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion . . . " rather, it is a "rational continuum which, broadly speaking, includes freedom from all substantial arbitrary impositions and purposeless restraints."[87] Ultimately, due process "has not been reduced to any formula,"[88] it instead reflects the "traditions from which it developed as well as the traditions from which it broke,"[89] and that tradition "is a living thing."[90]

It was precisely upon this basis that the core ruling of *Roe* was upheld. Crucially, however, the reasoning in *Roe* had implications far beyond its holding. The holding implicitly recognized the nature of independence that the Constitution provides to each individual. In discussing basic fundamental rights such as marriage and procreation, the Court stated, "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[91] As the Court stated, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[92] Indeed, "[b]eliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State."[93]

84. *Id.* at 847 (citing Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).
85. *Id.* at 847–48 (quoting *Poe*, 367 U.S. at 543 (Harlan, J., dissenting)).
86. *Id.*
87. *Id.* at 848 (quoting *Poe*, 367 U.S. at 543).
88. *Id.* at 840.
89. *Id.* at 850.
90. *Id.*
91. *Id.* at 851.
92. *Id.*
93. *Id.*

Thus, when reaffirming a woman's right to terminate a pregnancy—a decision that originates "within the zone of conscience and belief"—the Court was guided by these principles.[94] In addressing this complex issue, the Court recognized that abortion is "a unique act" and that "some deem [it] nothing short of an act of violence against innocent human life."[95] Significantly, however, it did "not follow that the State is entitled to proscribe it in all instances . . . because . . . the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."[96] As the Court held:

> The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by a woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[97]

Accordingly, "it was this dimension of personal liberty that *Roe* sought to protect, and its holding invoked the reasoning and the tradition of the precedents [the Court has] discussed, granting protection to substantive liberties of the person."[98] The Court reaffirmed *Roe*, invalidated certain parts of the Pennsylvania statute, and held that the state may not place an "undue burden"[99] upon a woman's right to terminate a pregnancy prior to viability.[100] The Court's holding recognized "that the urgent claims of the woman to retain the ultimate control over her destiny and her body" are claims "implicit in the meaning of liberty."[101]

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94. *Id.* at 851–52.
95. *Id.* at 852.
96. *Id.*
97. *Id.*
98. *Id.* at 853.
99. *Id.* at 876; *see also* Mary Helen Wimberly, Note, *Rethinking the Substantive Due Process Right to Privacy: Grounding Privacy in the Fourth Amendment*, 60 VAND. L. REV. 283, 304 (2007):

> Under the undue burden standard, *Casey* authorized a regulation requiring informed consent [prior to an abortion], overruling previous decisions to the contrary. *Casey* also permitted a mandatory twenty-four hour waiting period, even though this also had previously been held unconstitutional. However, the Court struck down a regulation requiring spousal notification as unduly burdensome. The only distinction between these regulations appears to be the Court's subjective determination of what constitutes an undue burden.

Id.
100. Planned Parenthood v. Casey, 505 U.S. 833, 869–70 (1992).
101. *Id.* at 869.

9. *Washington v. Glucksberg*

In *Washington v. Glucksberg*, the Court confronted the issue of whether the "liberty" interest under the Due Process Clause protects the right of assisted suicide for terminally-ill patients. The State of Washington enacted a statute providing that "[a] person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide."[102] The statute also provided that the "withholding or withdrawal of life-sustaining treatment . . . shall not, for any purpose, constitute a 'suicide' and that '[n]othing in this chapter shall be construed to condone, authorize or approve mercy killing.'"[103]

In upholding the statute, the Court held the Fourteenth Amendment does not include a fundamental right to assisted suicide.[104] The Court focused upon the notion that the Due Process Clause "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition . . . .'"[105] Using this standard, the Court explained that "[i]n almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide . . . and assisted suicide bans are . . . longstanding expressions of the States' commitment to the protection and preservation of all human life."[106] In fact, "opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal and cultural heritages."[107] Furthermore, "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide."[108] Stated simply, "[t]he history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it."[109] Accordingly, in part due to the "consistent and almost universal tradition"[110] against permitting assisted suicide, the Court concluded that assisted suicide was "not a fundamental liberty interest protected by the Due Process Clause."[111]

Finally, the *Glucksberg* Court held that a state's interest in prohibiting assisted suicide outweighed a terminally-ill patient's right to hasten death. Specifically, the Court held "[t]hose who attempt suicide—terminally ill or not—often suffer from depression or other

102. Washington v. Glucksberg, 521 U.S. 702, 707 (1997) (quoting WASH. REV. CODE § 9A.36.060(1) (1994)).
103. *Id.* at 717 (quoting WASH. REV. CODE §§ 70.122.070(1), 70.122.100 (1994)).
104. *Id.* at 751.
105. *Id.* at 720–21 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
106. *Id.* at 710.
107. *Id.* at 711.
108. *Id.*
109. *Id.* at 728.
110. *Id.* at 723.
111. *Id.* at 728.

mental disorders."[112] In addition, the Court found Washington's interest in protecting "vulnerable groups"[113] legitimate (including the poor, the elderly, and disabled persons) from "subtle coercion and undue influence in end-of-life situations."[114] Critically, however, five justices who wrote concurring opinions in *Glucksberg* suggested that, at a certain point in the future, an assisted suicide statute may be declared unconstitutional.[115]

10. *Lawrence v. Texas*

In *Lawrence v. Texas*, the Court was again faced with the constitutionality of a Texas statute criminalizing homosexual sodomy between consenting adults.[116] Extraordinarily, in *Lawrence*, the Court not only invalidated the statute and overturned *Bowers*, but it also fundamentally reframed the substantive due process analysis.[117]

First, the Court held the *Bowers* majority erred when it formulated the due process inquiry as to whether the Constitution "'confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many states that still make such conduct illegal and have done so for a very long time.'"[118] This formulation, the Court noted, failed "to appreciate the extent of the liberty at stake."[119] Specifically, "[t]he laws involved in *Bowers* and here are . . . statutes that purport to do no more than prohibit a particular sexual act," but their "penalties and purposes . . . have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, in the most private of places, the home."[120] In other words, "the statutes . . . seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of

112. *Id.* at 730.
113. *Id.* at 731.
114. *Id.* at 732.
115. *See* Jerry H. Elmer, *Physician-Assisted Suicide Controversy at the Intersection of Law and Medicine*, 46 R.I. BAR J. 13, 34 (1998). Elmer states as follows:

> Of far greater interest than Justice Rehnquist's remarkably shallow opinion for the Court in *Glucksberg*, is the fact that five justices (O'Connor, Stevens, Souter, Ginsburg and Breyer)—that is, a majority of the Court—wrote concurring opinions *expressly leaving open the possibility that assisted-suicide statutes might be declared unconstitutional in the future on substantive due process grounds.* Justice O'Connor, in her very brief concurrence, put the matter most succinctly. This case, she said, presented only a facial challenge to the Washington statute; as such, she felt constrained to uphold the facial constitutionality of the statute. Thus, Justice O'Connor said, she "sees no need to reach" the issue as to whether or not an individual has a "constitutionally cognizable interest in controlling the circumstances of his or her imminent death."

Id. (citing *Glucksberg*, 521 U.S. at 736 (Ginsburg, J., concurring)).
116. Lawrence v. Texas, 539 U.S. 558, 563 (2003).
117. *See id.* at 577–78.
118. *Id.* at 566–67 (quoting Bowers v. Hardwick, 478 U.S. 186, 190 (1986)).
119. *Id.* at 567.
120. *Id.*

persons to choose without being punished as criminals."[121] The Court found this aspect of the statutes impermissible:

> It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexuals the right to make this choice.[122]

Thus, the Court's reasoning "should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution that law protects."[123]

The Court's holding also reshaped the due process inquiry for determining whether newly asserted rights are entitled to constitutional protection. Specifically, while the Court examined the Nation's "history and tradition"[124] with respect to homosexual conduct, the Court stated that "'history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry.'"[125] Thus, while disagreeing with *Bowers* and finding, as a historical matter, that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter,"[126] the Court held that "our laws and traditions in the past half century are of most relevance here."[127] Using this new framework, the Court held "[t]hese references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[128]

The Court relied upon the language in *Planned Parenthood v. Casey* to support its holding, reiterating that matters "central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[129] Furthermore, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[130] The Court also relied upon case law from the European Court of Human Rights,[131] namely *Dudgeon v. United Kingdom*, which held that laws proscribing homo-

121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 572.
125. *Id.* (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).
126. *Id.* at 568.
127. *Id.* at 571–72.
128. *Id.* at 572.
129. *Id.* at 574 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).
130. *Id.* (quoting *Casey*, 505 U.S. at 851).
131. *Id.* at 576.

sexual conduct were invalid under the European Convention on Human Rights.[132]

It was precisely this type of private, consensual, and autonomous conduct that the Court found lay outside the purview of state regulation. As the Court explained, "[t]he present case does not involve minors," . . . "persons who might be injured or coerced," or individuals "who are situated in relationships where consent might not easily be refused."[133] It also "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[134] Rather, it involves "two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle."[135] Stated simply, "the petitioners are entitled to respect for their private lives," and the State cannot "demean their existence or control their destiny" by criminalizing their private sexual conduct.[136] The liberty interest entitles them to "engage in their conduct without intervention of the government."[137] That interest reflects the settled principle that "there is a realm of personal liberty which the government may not enter."[138]

The Court's holding, however, went further. It indicated new "fundamental rights" reflecting greater and more contemporary notions of freedom would—and should—be part of the Court's jurisprudence. As the majority stated, "[h]ad those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific."[139] However, "[t]hey did not presume to have this insight"[140] and were aware that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."[141] "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[142]

B. *The Right to Suicide—The Legal Basis*

The Supreme Court's Fourteenth Amendment jurisprudence constructs an initial framework for analyzing an unconditional right to suicide because it provides guidance concerning not only what the Constitution prohibits and permits, but also what it represents. Spe-

132. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. ¶¶ 61, 63 (1981).
133. *Lawrence*, 539 U.S. at 578.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* (quoting Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992)).
139. *Id.*
140. *Id.* at 578–79.
141. *Id.* at 579.
142. *Id.*

cifically, in cases such as *Griswold, Roe, Casey*, and *Lawrence*, the Court's decisions are based upon several recurrent themes that provide the substantive basis for recognizing individual (and fundamental) rights in a free society.

The first theme is autonomy. The Court's cases recognize that the "individual" is a fundamentally free entity. Implicit in these decisions is the notion that individual freedom is a subjective enterprise which vests in each person the right to control, direct, and decide how their life will be lived. In other words, freedom allows the individual to act according to his values and beliefs while remaining largely free from external interference. The Court's decisions recognize this intrinsic concept of freedom by identifying "liberty" and "privacy" interests that lie at the core of the Due Process Clause, which cannot be abridged by the state absent compelling interests.

The second theme is the individual's right to make decisions regarding his body, bodily integrity, quality of life, and destiny. For example, in *Roe,* the Court emphasized that a woman can terminate a pregnancy before viability because she has the right to make fundamental choices regarding her body and spiritual beliefs.[143] The woman's liberty interests outweigh the state's interest in protecting pre-natal life, even though most agree the fetus is a potential person before viability.[144] In *Cruzan*, the Court expressly recognized that a terminally-ill patient has the right to refuse unwanted end-of-life treatment and, in doing so, hasten his death.[145]

In *Casey*, the Court reaffirmed *Roe* and relied upon principles central to freedom, such as personal dignity, autonomy, and the "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[146] Of course, while the *Glucksberg* Court declined to recognize a right to assisted suicide, it did so primarily because this right was not historically accorded legal or statutory protection.[147] Importantly, however, *Lawrence* modified this approach in holding that history and tradition do not end the fundamental rights inquiry.[148] Rather, contemporary notions of freedom, liberty, and privacy are most relevant to inform this constitutional discourse.[149]

143. Roe v. Wade, 410 U.S. 113, 155, 160–61 (1973) (explaining that the right to privacy extends to abortion, and discussing that various faiths believe that life begins at conception).

144. *Id.* at 162–64 (discussing the competing interests of the woman and her physician versus those of the State).

145. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

146. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

147. Washington v. Glucksberg, 521 U.S. 702, 711, 728 (1997).

148. Lawrence v. Texas, 539 U.S. 558, 572 (2003).

149. *See id.* at 578–79.

The third theme is privacy. In holding "there is a realm of personal liberty which the government may not enter,"[150] the Court is saying the individual's body and decisions made with respect thereto (whether it is the termination of a pregnancy or refusal of medical treatment) are entitled to be made by the individual in conjunction with his conscience and subjective view regarding the quality of life. The right to make these decisions in private, therefore, is a logical expression of freedom because it ensures the individual can make decisions without undue interference or influence from the state.

The fourth theme is consent. The Court's cases have intimated that decisions regarding an individual's body are more likely to receive constitutional protection when they are the product of deliberation and rational choice. The right to terminate a pregnancy and refuse medical treatment underscores this notion. The Court's ruling in *Glucksberg* against physician assisted suicide was based, in part, on the view that an individual's end-of-life decisions could be the subject of irrationality, mental illness, or coercion.[151]

The fifth theme is specificity. When seeking to interfere with an individual's decision regarding the quality and duration of his life, the state must, or at the very least should, have a specific reason justifying the intrusion. This is true because the rights the state seeks to regulate are fundamental and "implicit in the concept of ordered liberty."[152] Ultimately, therefore, the Court's opinions support an individual's right to make decisions regarding her body, which includes the termination of both life and potential life. These rights are only restricted when an individual is incapable of consenting (*Cruzan*), incapable of making a rational choice or subject to coercion (*Glucksberg*), or when a third party is involved (*Roe* post-viability).

None of these restrictions can justify prohibiting an individual—whether they are mentally or physically ill or in perfect health—from committing suicide. As individuals, we own our bodies. That carries with it certain rights. We have the right to examine the world and define the relative concepts of meaning and purpose. That can and will inform *how* we choose to live our life, whether it is the occupation we choose or the place where we choose to live. We have the right to think for ourselves and determine whether there is a God or an afterlife, which will, in turn, affect our values and beliefs. We have the right to form relationships with other people on a variety of levels and to experience the many events that contribute to our ethical and moral constitution. Most importantly, we have the right to determine the quality of our lives. As adults, we are allowed to refuse unwanted medical care that is detrimental to our physical health. We can refuse

150. *Casey*, 505 U.S. at 847.

151. *Glucksberg*, 521 U.S. at 732.

152. Roe v. Wade, 410 U.S. 113, 152 (1973) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

medication to successfully treat mental illnesses. We can make a variety of choices that can affect the health of our bodies and our susceptibility to disease. We can make these choices because we own our bodies. These principles reflect those that lie at the core of the Court's substantive due process jurisprudence: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[153]

It could be argued that people who contemplate suicide are inherently incapable of exercising rational judgment because they suffer from a mental illness. However, this argument is problematic for multiple reasons. First, it is highly presumptuous to assume that all individuals who decide to commit suicide are mentally ill. Second, it should not matter, because those who suffer from mental illness may at some point decide their quality of life is such that they no longer wish to live. They own their bodies and are entitled to make this choice.

Crucially, however, the unconditional right to suicide is not simply based upon legal principles. As set forth below, an individual's right to end his life is predicated upon a conception of rights and a definition of values that is subjective rather than objective. The theoretical basis for suicide redefines and repositions these terms by arguing that they have no inherent meaning unless and until each individual, as a separate entity, gives them meaning. That meaning, however, has no objective validity; it is merely an expression of the individual's subjective perception of life. It is within this framework that one recognizes the right to suicide necessarily belongs to the individual and, unless an individual is not competent to exercise this right, it cannot be taken away by the state under any circumstances. Using this formulation, suicide should not only be permitted, but should also be seen as an essential expression of freedom in its purest form.

III. Suicide—The Theoretical Foundation

The unconditional right to commit suicide implicates the question of how we define individual "rights," as well as the "value" of life. These concepts have neither an objective nor fixed meaning. To the degree these concepts are portrayed as having a settled definition or as inherently prohibiting certain acts, this is so only because of prevailing political and social forces. The question of rights, where they come from, what they mean, and how they can be exercised, goes beyond the traditional sources from which we divine their existence.

Furthermore, the concept that life is objectively valuable for all individuals in all circumstances imposes upon people a condition that prevents them from living their lives freely, in accordance with their values and beliefs. In other words, our method of defining the value

153. *Casey*, 505 U.S. at 851.

of life in abstract terms—saying a state has a general interest in protecting and preserving life—actually demeans the value of life itself.

A. *Individual "Rights"*

The concept of rights implicates a variety of issues. First, how do we define a right? Where do rights come from? Are human beings entitled to rights? Even if an individual has a certain right, how and under what circumstances may that individual exercise this right? In what actions may an individual engage as a logical result of possessing a certain right? Can there ever be a limitation on the exercise of this right? Can human beings force an individual to forfeit a right, and if so, can that right be restored to the individual?

1. How is a Right Defined?

A right is not necessarily capable of a precise or universal meaning. However, a right is something that belongs to the individual. Importantly, a right, in and of itself, is not self-executing. Rather, this Article defines rights as actions reflecting the absolute and unconditional freedom inherently afforded to individuals by virtue of their very existence, which allow them to make choices for themselves concerning any matter relating to their existence. This definition is predicated upon the notion that human beings have complete ownership over their lives. Of course, such a definition does not countenance harm to third parties. As such, a right confers both conditional and unconditional status to an individual. The exercise of the right is absolute unless and until it compromises the absolute exercise of the right of another individual.

2. Where Do Rights Come From?

A right may come from a variety of sources. First, humans can create or confer a right through legislative or judicial action. However, this is the weakest source of rights because they are not automatically granted to the individual by virtue of one's existence. A written document, such as the Constitution, can also confer a right, but this is similar to rights granted through legislative or judicial decree.

Rights originate from more fundamental sources. As human beings, our existence, at its most basic level, has certain attributes. We are intelligent beings, capable of making rational choices. We have dominion over our physical and mental constitution. We have the ability to perceive and define the nature of our reality. In other words, rights originate from the very essence of our existence. We have the right to exercise all of the faculties and attributes that constitute a human being, both in the physical and cognitive realm. In this way, rights come from nature and provide human beings with two things: (1) absolute freedom; and (2) absolute ownership over their destiny.

These liberties are unconditional and can neither be interfered with nor infringed upon, provided that they do not impinge upon a third party's exercise of these same rights.

The implication, as natural rights philosopher John Locke came to admit, is that "human beings do indeed possess a right to take their own lives."[154] Based upon the definition of rights provided above, coupled with the source from which they originate, such a conclusion is unavoidable. To begin with, as John Locke believed, a "natural right is a right of every man to everything."[155] In essence, for Locke, "the foundation or ground of rights, is . . . self-ownership."[156]

Importantly, according to Locke, you cannot have self-ownership until you discover the self, which for him was "self-consciousness."[157] Indeed, self-consciousness was "the basis for unity of experience, intention and action of the person."[158] "The self in its very nature is posited as self-owning . . . [and] possessor of its own data of consciousness (*my* feelings, *my* idea, *my* experiences), always found in these experiences (that which makes them mine) . . . ."[159] Locke further explains that the "self" is the "mysterious compound of the 'I' and the 'me,' the abstract and empty ego and the contents of consciousness understood as mine, and thus me."[160]

Furthermore, "[h]uman beings are unique in that as selves they can seize on their entire lives as wholes, seeing them as unities, or potential unities spread over the dimensions of time and aiming toward happiness or misery as such."[161] In such a way, "[t]he self can give or attempt to give some shape to this life as a whole . . . life has 'meaning' for a human person in a way it has not for any other mortal being."[162] As one scholar explains:

> The self not only possesses its data of consciousness, but also its body, which is the source of most of these data of consciousness. The self appropriates the body and makes it its own—that is to say, makes it the instrument of its intentional actions in relation to its broader purposes in life. Action becomes in the full sense intentional, and the body, itself inseparable from the happiness and the misery of the "I" and thoroughly involved with intentionality, becomes the self's own.[163]

154. Michael P. Zuckert, *Do Natural Rights Derive From Natural Law?*, 20 HARV. J.L. & PUB. POL'Y 695, 725 (1997).
155. *Id.* at 723.
156. *Id.* at 727.
157. *Id.* at 728.
158. *Id.*
159. *Id.* at 728–29.
160. *Id.* at 729.
161. *Id.*
162. *Id.*
163. *Id.*

Thus, "[s]elf-ownership procures ownership of body and action."[164] The "possession by the self of itself is an exclusive claim in the nature of a property right."[165] Consequently, my "self, my happiness and misery, my body and its action are all mine in such a way that my sovereignty over them necessarily and *ipso facto* excludes similar claims to them by others."[166] Morally speaking, therefore, the individual has claims over his "body, actions and road to happiness" because it is the "possessor of [the] rights to life, liberty, and pursuit of happiness."[167]

3. Are Human Beings Inherently Entitled to Rights?

As a result, human beings are inherently entitled to rights. It can be argued, however, that some human beings' rights may be restricted. At the very least, some may argue humans are entitled only to the most basic rights—which do not include many of the far reaching rights the Supreme Court identified in its substantive due process jurisprudence or those advocated in this Article. Instead, rights are created only when they are given to humans by those who are in power and thus authorized to create them. Under this view, rights are the subject of a political system.

This argument has no merit for a variety of reasons. First, it demeans the value of human existence. To say that rights are dependent upon the decisions of other humans is to demean the very concept of a right itself. It also devalues human beings at the expense of others because it creates a power imbalance between those who create rights and those who do not. Thus, to the extent that humans are engaged in the rights-creating enterprise, it should be only in the area of regulating or limiting a right. More specifically, regulating or limiting should occur only where the exercise of a right has the potential to interfere or infringe upon the exercise of another person's right, i.e., cause mental, physical, or emotional suffering to a third party.

Every human being is entitled to various rights by virtue of being human, including the right to make independent choices regarding the body, mind, and spirit. When other human beings attempt to interfere with the rights of another, they are inherently devaluing life itself and acting contrary to the nature of our existence.

4. Under What Circumstances May an Individual Exercise a Right?

An individual's possession of and entitlement to a right does not necessarily mean the individual may exercise that right under all, or

164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*

any, circumstances. A right is designed to empower the individual. The exercise of a right implies that individuals are entitled to be free entities. Integral to that freedom is the need for control over the individual's physical and mental constitution. However, there is room for restraint and restriction when the exercise of these rights affects third parties. An individual cannot unconditionally exercise all rights because that would ultimately undermine the principle of rights itself and create inequality among those whose rights can and cannot be most effectively utilized.

5. What Actions May an Individual Engage In as a Logical Extension of a Particular Right?

In the abstract, the possession of a right means nothing unless the individual is entitled to engage in actions that are a logical outgrowth of that right. For example, an individual has the fundamental right to own his body. It follows that the individual has control over matters such as how that life is lived and when that life ends. Without these latter actions, then the right itself ceases to exist.

Some might argue that while humans should not be engaged in the granting or creating of rights themselves, they should be permitted to regulate precisely those actions that constitute the logical outgrowth of the right. However, this argument is problematic because its effect is to eviscerate the right. Without the logical outgrowth, the right itself is negatively affected. In addition, the argument removes control of the right from the individual and places it in the hands of others, who already have the same rights as the individual, thus creating a situation where one individual has "super-rights" (individual rights plus control over the exercise of others' rights), while the other has restricted rights.

6. Can There Ever Be A Limitation on the Exercise of a Right?

Rights can be both absolute and non-absolute. The exercise of a right is absolute when it is made (1) by the individual; (2) with the individual's consent; (3) without undue interference from third parties; (4) with a sound mind and mental state; and (5) in a way that does not interfere with the actions of or cause injury to third parties.

Most importantly, the state has an interest in ensuring that the individual's exercise of a right is the product of free will and rational choice.

7. Can Human Beings Force an Individual to Forfeit a Right?

A right can be forfeited when an individual materially harms another person's rights. Forfeiture depends on the severity of the harm inflicted. Physical, financial, and emotional harm are all categories within which forfeiture of the right may be effectuated. With respect

to restoration of the right, it should again be based upon the severity of the injury caused.

B. *The "Value" of Life*

The idea that other individuals or institutions have the right to impose a generalized, or even particularized, definition of value on another's life, and thus prohibit them from exercising the right to end their life, is to demean the value of life itself. Put differently, the word "value," when considered in the context of a human life, is not capable of objective meaning. Rather, the value of life is defined and determined by the individual who lives that life. Some individuals value life more than others. Some will find that life is meaningless. Others will find that life is full of opportunity and purpose. The value of life for the latter type of individual is different. He or she has the right to define value this way and act, under the conditions set forth above, according to this belief. Thus, if an individual desires to commit suicide because he does not find any value in life, he has a right to make this choice.

Consequently, if we are to promote a universal definition that all life is valuable in order to restrict individuals from exercising rights relating to their physical and emotional well being, then for those individuals life often loses its value because they cannot make life-altering decisions in accordance with their own valuations of life itself. The power is then shifted to the State, which then regulates whether the individual may make end-of-life decisions. Nothing could be more anathema to personal freedom. Individuals have a right to end their lives, regardless of whether they suffer from a physical illness, mental illness, or are in perfect health.

1. Physical Ailments

It is largely undisputed that terminally-ill patients may refuse end-of-life medical care, thereby hastening their death. These individuals often experience excruciating pain. There is little, if anything, the medical profession can do to alleviate their condition, except to ease their pain. The prognosis does not concern whether they will recover from their illness but at which point they are likely to die. The circumstances are horrible and, aside from the physical pain, the emotional anguish about death and the departure from family members and loved ones is certain to be overwhelmingly traumatic. The termination of life-sustaining medical care is a way for individuals to end their anguish and die peacefully with loved ones at their side.

However, there are many individuals without terminal medical illnesses who suffer from the same anguish, both physically and mentally. An individual may suffer from a debilitating medical condition, which restricts his movement. An individual's sensory systems may be

somewhat, if not entirely, compromised. An individual may have lost the ability to move certain, if not all, parts of his body. Another person may have suffered severe cognitive injuries that could make it impossible to engage in the type of activities that were commonplace prior to an injury. An individual may have lost certain parts of his body due to an accident. There are many physical ailments that may debilitate an individual and cause physical, mental, and emotional suffering.

Many individuals with these ailments will lead productive, meaningful, and fulfilling lives. Many will become leaders in the community. Many will realize their dreams and passions. However, some individuals will not be able to accept this condition, and will suffer daily from the fact they cannot engage in the type of daily functions and activities to which they were formerly accustomed. The emotional suffering they may feel can be horribly painful, and for those individuals, the very act of living can be a traumatic and unwelcome experience. For these people, ending their lives can become an option as a way to alleviate the physical and emotional hardships from which they suffer.

While one would hope that a person would choose to live, it is not our right to impose our views on them. Our conception of the value of life is not a substitute for the value that a person places on his life. It is not for us to determine when a person's illness is severe enough such that the ending of a life, i.e., refusal of medical treatment, is appropriate. That choice belongs entirely to the individual because it is their body. While this may be a sad and very difficult reality, it would be more difficult to ignore the physical and emotional suffering that these individuals are experiencing and force them to endure a life that resembles nothing even remotely similar to what they had envisioned. If we respect liberty and freedom, then we respect the individual choice to commit suicide, provided it is made rationally and free from coercion, abuse, or undue influence or pressure.

2. Mental Illness

Mental illness often affects individuals for the duration of their life. It can be a powerful force that affects every aspect of daily life. Whether it is depression, bi-polar disorder, schizophrenia, or others, mental illness affects an individual's ability to function, whether it is in a relationship, an occupation, or performing simple tasks affecting quality of life. Interacting with people is very difficult. It often leads to isolation. Mental illness can be physically painful and impedes a person's ability to achieve happiness and the goals he or she seeks to achieve in his or her life. Also, many people who suffer from mental illness are placed on medication, which sometimes works and sometimes does not, often coming with debilitating side effects. In other words, their existence can be more difficult, painful, and challenging.

In fact, people who suffer from mental illnesses die, on average, twenty-five years earlier than the general population.[168]

Of course, many people do recover from mental illnesses and subsequently lead happy and fulfilling lives. Unfortunately, for some people, untreated mental anguish affects every aspect of their lives. The struggle to be happy, to lead a normal life, and to find fulfilling relationships may become overwhelming and the person may no longer wish to continue living.[169] Individuals with mental illnesses—who can otherwise demonstrate that the choice to end their lives is the product of sound, rational, and informed judgment—have the right to die.

This brings up an important point. Some may object on the grounds that those who suffer from mental illnesses are inherently incapable of making rational decisions. However, aside from the fact that this represents an unwarranted prejudice against the mentally ill, it contradicts the relevant empirical evidence. Specifically, with respect to cognitive ability, "[t]he competency level of psychiatric patients has been demonstrated to be statistically indistinguishable from the competency level of normal medical patients."[170] Furthermore, "[a]cross the board, mentally ill patients demonstrated a similar ability to both comprehend information required to obtain informed consent and make rational choices regarding their medical treatment."[171] In fact, "even those patients exhibiting the most chronic levels of mental illness were able to . . . make rational decisions."[172]

Of course, this does not mean that every mentally ill patient will demonstrate the ability to make rational judgments regarding the decision to end their lives. For example, "schizophrenic patients are more likely to demonstrate lower levels of understanding of treatment disclosures than are normal medically ill patients."[173] Moreover, one scholar has argued that many mental illnesses compromise an individual's ability to process information and "engage in planned behavior."[174] Additionally, "there is ample evidence to support the

168. Marilyn Elias, *Mentally Ill Die 25 Years Earlier, on Average*, USA TODAY (May 3, 2007, 7:49 AM), http://www.usatoday.com/news/health/2007-05-03-mental-illness_N.htm.

169. *See* Joanmarie Ilaria Davoli, *No Room at the Inn: How the Federal Medicaid Program Created Inequities in Psychiatric Hospital Access for the Indigent Mentally Ill*, 29 AM. J.L. & MED. 159, 175–76 (2003) ("Having an untreated mental illness can shorten one's life expectancy. In fact, the untreated mentally ill account for a large number of deaths by suicide. 'Suicide rates in schizophrenia are almost as high as they are in depression, where they are estimated to run between 10% and 15%.'") (quoting RAEL JEAN ISAAC & VIRGINIA C. ARMAT, MADNESS IN THE STREETS 281 (1990)).

170. Maurice S. Fisher, Jr., Comment, *Psychiatric Advance Directives and the Right To Be Presumed Competent*, 25 J. CONTEMP. HEALTH L. & POL'Y 386, 403 (2009).

171. *Id.*

172. *Id.*

173. *Id.* at 404.

174. Steven K. Erickson, *The Myth of Mental Disorder: Transsubstantive Behavior and Taxometric Psychiatry*, 41 AKRON L. REV. 67, 83 (2008).

proposition that a mentally ill patient's level of competency to consent to treatment shifts as his or her condition improves through treatment."[175]

Ultimately, therefore, in those cases where individuals with mental illnesses express a desire to end their lives, we must proceed with caution. Many mentally ill patients can and do have the ability to exercise rational judgment. However, because this function can, in some cases, be compromised, it is incumbent to discuss with the individual (1) the specific mental illness that is present; (2) its severity; and (3) the amount of time since the illness was diagnosed. Using these and other factors as deemed necessary by relevant medical professionals, there can be an informed decision concerning the individual's capability for rational judgment.

3. People in Perfect Health

Individuals in perfect health have an unconditional right to commit suicide. People value life differently. For some, the world has no meaning. It is comprised of "nothingness." Everything we do, every goal we achieve, every award we obtain, ultimately has no purpose. For these people, life is artificial and everything we do to provide meaning simply hides the fact that the world has none. As a result, they may view their life as a futile enterprise. Thus, people in perfect physical and mental health may desire to end their lives because they cannot accept the feelings or emotions that accompany this worldview. These people do not need therapy. They do not suffer from a mental illness or abnormality. They are rational individuals who can make the rational choice to end their lives. Other humans are in no position to infringe upon this right because humans are free beings and exercising a right that is inherent to human existence itself, namely ownership and control over the body and its destiny.

That is precisely why suicide constitutes a right that any individual may exercise under all but the narrowest of circumstances. First, committing suicide is an act by the individual, an expression of freedom in its purest sense that neither infringes upon nor interferes with the exercise of another's rights.[176]

Second, the act of committing suicide is a logical outgrowth of the rights that are inherent in human existence itself. As humans, we are intelligent beings capable of taking actions based upon mental and cognitive processes. The physical body is the manner by which we manifest the choices we have made. In other words, we have control

175. Fisher, *supra* note 170, at 404.

176. Of course, committing suicide can have many tangible consequences, such as emotional trauma to friends and family members and increased financial obligations. This, however, misses the point. The issue is whether the individual's act of suicide infringes, directly or indirectly, upon a third parties' right to absolute ownership and freedom regarding their "natural" rights, i.e., the same right to end their lives.

over our mind and body. This logically includes the right to commit suicide, just as it includes the right to an abortion and to refuse unwanted, end-of-life medical care. Stated simply, without the right to take actions with our physical body, we do not have ownership over our destiny. Importantly, the only circumstances within which an individual may not exercise the right to commit suicide is when the decision is not the product of rational thought, is without the person's informed consent, or is the subject of abuse or coercion. Otherwise, committing suicide is a near-absolute right. As set forth below, an organization should facilitate this right, providing for the peaceful and painless termination of life.

IV. SUICIDE—MAKING IT PEACEFUL AND POSSIBLE

Some may react harshly to the notion that there should be an organization dedicated to providing individuals with a peaceful way to end their lives. However, there already exists an institution doing such work, called *Dignitas*, located in Switzerland. The purpose of *Dignitas* is to help mostly terminally-ill individuals peacefully end their lives, while ensuring this is their actual desire and not an irrational decision. Rather, this decision must be the product of a conscious and deliberative choice. While *Dignitas* does not advocate for suicide under all of the circumstances suggested in this Article, namely for a person in good health, it does provide procedures similar to those which would ensure that an individual's choice was the product of free and unbridled will.

A. *Dignitas*

Dignitas was founded on May 17, 1998 and "has helped a total of 1060 people to end their lives gently, safely, without risk and usually in the presence of family members and/or friends."[177] However, during its existence, *Dignitas* "has also helped several thousand people continue to live despite their difficult health conditions."[178] While these people initially desired to commit suicide, "it was possible to show them—usually with the assistance of doctors—an alternative to prematurely ending their life."[179] Importantly, *Dignitas* "has not limited itself to offering this help only to people who reside in Switzerland," as "a person's wish to end his or her life is a human right recognised by the Federal Supreme Court of Switzerland and protected by Article 8 of the European Human Rights Convention . . . ."[180]

177. DIGNITAS, How DIGNITAS WORKS: ON WHAT PHILOSOPHICAL PRINCIPLES ARE THE ACTIVITIES OF THIS ORGANISATION BASED? 2 (2010), *available at* http://www.dignitas.ch/images/stories/pdf/so-funktioniert-dignitas-e.pdf.

178. *Id.*

179. *Id.*

180. *Id.*

When an individual contacts *Dignitas* and expresses a desire to commit suicide, that individual is subject to a lengthy process before his wish is honored. The first step for individuals seeking assisted suicide is to complete an application for membership.[181] When the application is received, membership is awarded.[182] Prior to membership, a person may make a request for the preparation of an assisted suicide.[183] The person must state the "health matters" that are significantly affecting the quality of his life and provide medical documentation.[184] The applicant is also required to provide details about his life, including information about his "character as well as [his] family and work situations."[185] Importantly, if *Dignitas* becomes aware of a doctor in that person's "immediate" vicinity that can offer help—particularly in cases of physical pain—they are referred to such doctor before any additional action is taken.[186]

When the application is received, *Dignitas* reviews it and gives "consideration to the question of whether the applicant can be given any immediate recommendations for possible alternatives with the hope of being able to continue life under better conditions."[187] Alternatives include therapy and palliative care.[188] However, because of the severity of a patient's medical condition, these options may not be available in some cases.

After *Dignitas* considers alternatives and examines all of the relevant information, a doctor evaluates the documentation and then either approves or rejects the administration of a lethal prescription for the patient.[189] Sometimes, the doctor will give a temporary refusal contingent upon the receipt of further information or simply give a "provision green light" to prescribe the lethal medication.[190] However, before the provision green light is given, the doctor must meet with the patient twice to be sure there are no signs of "impaired or doubtful mental capacity . . . signs of pressure from a third party with regard to a premature death, or evidence of an acute depressive phase."[191]

Dignitas also informs the patient that family members are allowed to be present when the assisted suicide is consummated.[192] After this, the assisted suicide is scheduled.[193] At this point, however, *Dignitas*

181. *See id.* at 3.
182. *Id.* at 6.
183. *Id.*
184. *Id.*
185. *Id.*
186. *See id.* at 5.
187. *Id.* at 8.
188. *Id.* at 9.
189. *Id.* at 10.
190. *Id.* at 11.
191. *Id.*
192. *Id.* at 12.
193. *Id.* at 13.

does not proceed to the next step or initiate any further proceeding until the patient expresses the desire to continue with the process.[194] Should the patient indicate a desire to move forward, *Dignitas* then ensures that all medical records are up-to-date and civil documents are present.[195] Then the member must have two more consultations with the doctor, which is "necessary so that the question of writing the prescription can finally and definitively be decided upon."[196]

After these and other procedures are completed, the rules governing the suicide itself are implemented. First, "two members of the assistance team are always assigned" to assist in granting the patient's wishes.[197] Then, the patient and family members are greeted at *Dignitas*, and another meeting is held with the patient, in order to ensure that he still wishes to proceed.[198] In this meeting, the medical process is explained to the patient, and if there are any lingering doubts, the procedure is cancelled.[199] If the patient is of sound mind and wishes to proceed, a final document is prepared giving *Dignitas* authority to complete the assisted suicide.[200] After this is completed, the patient may say good-bye to his family members before the medication is administered, and they may be present in the room as the process is completed.

B. *Suicide in the United States*

Everyone has the right to commit suicide. The right, however, is not absolute. There are two instances where suicide should be prevented. First, people that are not competent to make that choice, i.e., those that are cognitively impaired, can never make such a decision. Second, those who claim they want to commit suicide—but actually do not—must be identified and prevented from completing the act. Of course, there will always be individuals that commit suicide in the privacy of their own home or in a way where the possibility of intervention is remote. Advocating for a right to suicide is highly unlikely to change this fact, nor is it likely to result in more people committing suicide because there is no evidence whatsoever that illegality acts as a deterrent for people who wish to end their lives.

For people who want to end their lives, however, there should be safeguards in place to ensure the administration of lethal medication that will result in a peaceful, painless, and dignified death.

194. *Id.*
195. *Id.* at 14.
196. *Id.*
197. *Id.* at 17.
198. *See id.* at 18–19.
199. *Id.* at 19.
200. *Id.* at 20.

1. An Organization for the Administration of Assistance with End-of-Life Decisions

There should be an organization similar to *Dignitas* that assists people who desire to end their lives. The object of such an organization would be to ensure that the individual's wishes are based upon a deliberative and contemplative choice; free from coercion, undue pressure, and influence; the product of rational thought; and made with the knowledge of available alternatives that might assist the individual in whatever capacity he or she may need.

Even though every individual has the right to commit suicide, the organization should require a statement of reasons underlying the desire to commit suicide. This statement should include information about, among other things, the individual's background, childhood, education, occupation(s), medical history, current and former relationships, existence of family members, current residence, and any prior attempts, if any, to mitigate the individual's desire to commit suicide.

There should be an intake interview. The individual should have the opportunity to provide informed consent. Put differently, the individual should be provided with any and all alternatives to suicide that may assist in changing his mental state, alleviating a medical condition, or reframing a particular disposition toward life and happiness. After the individual is provided with this information, he must sign a contract stating that he has been provided with such information and still wishes to proceed. At that point, there should be a waiting period before the suicide is consummated.

2. Consultation with a Medical Doctor

The individual should be required to see a physician before the request is honored. The physician would be required to conduct a thorough physical examination of the patient, including any relevant tests and procedures, to ensure that the patient is capable of making a rational choice to end his life. Any conditions that may have the potential to interfere with the individual's ability to make an informed judgment should result in a refusal to carry out the individual's request.

3. Consultation with a Psychiatrist

A consultation with a psychiatrist is necessary to ensure that the individual is not suffering from a medical condition that would impair his ability to reason and make informed judgments. For example, traumatic brain injuries may make it difficult for the individual to make a rational choice to commit suicide. Importantly, however, a diagnosis of a mental illness alone is not sufficient to prevent an individual from committing suicide. The only grounds for recommending

that the suicide be rejected is if the individual's cognitive capacities are impaired due to a mental abnormality or defect, or if the individual exhibits signs that he is unable to control his behavior.

4. Consultation with a Psychologist

Consultation with a psychologist is necessary because an individual's desire to commit suicide may be temporary. Such a desire may be the result of recent yet significant emotional traumas such as the death of a family member, the loss of a job, or break-up of a marriage. A psychotherapist is best positioned to assess whether the suicidal thoughts are the product of these traumas and thus best dealt with through measures other than suicide. Should the therapist determine that the suicidal desires are in fact the result of underlying emotional or physical traumas, then in no circumstance can suicide be an option.

5. Consultation with Friends and Family Members

If the individual has friends and family, he should be strongly encouraged to consult with them prior to making a decision of such finality. Often, people do not realize the type of support that exists until they reach out to others who sincerely care for them and would help them through difficult periods in their lives. Of course, the individual need not consult with anyone. The right to suicide belongs to the individual alone.

6. Consultation with Others Similarly Situated

The individual should be required to participate in multiple group therapy sessions in which participants discuss their individual decisions to end their lives, as well as the underlying reasons that motivated them to make such a decision. These discussions may be therapeutic to some or any of the individuals and may therefore deter them from completing their request to die.

7. Treatment for Physical Ailments

If the individual's suicide request is predicated upon a *curable* physical ailment, then any and all attempts should be made to persuade the individual that alternative treatments are available to remedy this ailment and allow the individual to lead a normal, fully functioning life. However, the individual has the right to reject this advice and proceed accordingly.

V. Conclusion

The idea that people should be allowed to commit suicide is very difficult to accept. It is also difficult to allow extremely unpopular, and sometimes racist, sexist, or homophobic groups to march or have demonstrations in support of their views. We may despise those who

burn the American flag or who denigrate those who serve in the armed forces. Yet, we allow this activity, however unpopular, because we believe in the freedom and autonomy of the individual. The concept of freedom lies at the core of human existence because it allows us to exercise ownership over our physical and mental capacities and to express ourselves in whatever form we deem meaningful. The most fundamental aspect of that ownership, and of freedom itself, is the right to control how we use, direct, and protect our bodies. Our life belongs to us, and that includes the right to determine the quality of how we live and the time when we decide to die. If we deny this right, we deny something more fundamental—the right to own our existence. We are the authors of our own lives—and nobody can take that away.