

Physician-assisted Death: an Essay on Constitutional Rights and Remedies

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Articles

PHYSICIAN-ASSISTED DEATH: AN ESSAY ON CONSTITUTIONAL RIGHTS AND REMEDIES

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This Article addresses two important issues of constitutional law. First, as a matter of substantive constitutional law, do statutes criminalizing assisted suicide violate the liberty or privacy rights of terminally ill people who seek physician assistance in hastening death? Second, if criminal laws against physician-assisted suicide violate the constitutional rights of some, but not all, of the people they affect, when and how should courts remedy this violation?

Part I considers the substantive constitutional question of whether assisted suicide should ever be regarded as an aspect of constitutionally protected liberty and privacy. It concludes that, while in many situations state criminal bans on assisted suicide are defensible, in some circumstances criminal laws that punish those who help others to hasten death violate liberty and privacy interests of people who seek help in dying.

Part II considers the ways in which these issues come before the courts, including as defenses to criminal prosecution, individual claims, and class actions. It argues that defenses to criminal prosecution and individual claims for declaratory and injunctive relief are inadequate to protect the constitutional liberties articulated in Part I.

Part III addresses the remedial choices that confront a judge who is persuaded by the reasoning of Parts I and II: that a law banning assisted suicide is unconstitutional as applied, and that defenses to criminal prosecution or individual claims for declaratory and injunctive relief are inadequate to protect the constitutional liberty interest.

The challenge of providing effective remedies to protect constitutional rights is a common problem in constitutional law, not particular to assisted suicide. Part III demonstrates how remedial concerns shape the definition of substantive rights and concepts of justiciability. It explores the available remedial choices and suggests factors judges should consider in fashioning remedies.

I. THE CONSTITUTIONALITY OF CRIMINAL LAWS PROHIBITING
PHYSICIAN-ASSISTED DEATH FOR THE TERMINALLY ILL

In 1994 Dr. Jane Roe of Seattle was dying. She wanted her doctor to help her die more quickly. Washington state law made it a crime for her physician to help her.¹ She, and others, filed suit in federal court arguing that the criminal penalty against assisted suicide is unconstitutional as applied to physicians helping adults who are mentally competent, terminally ill, and acting under no undue influence to voluntarily hasten their death.²

The court described Dr. Roe as follows:

[She] is a 69-year-old retired pediatrician who has suffered since 1988 from cancer which has now metastasized throughout her skeleton. Although she tried and benefitted temporarily from various treatments including chemotherapy and radiation, she is now in the terminal phase of her disease. . . .

[She] has been almost completely bedridden since June of 1993 and experiences constant pain, which becomes especially sharp and severe when she moves. The only medical treatment available to her . . . cannot fully alleviate her pain. . . .

[She] is mentally competent and wishes to hasten her death by taking prescribed drugs with the help of plaintiff Compassion in Dying.³

Compassion in Dying, the group that sought to help Dr. Roe, provides support, counseling, and assistance to mentally competent, terminally ill adults considering actions to hasten death.⁴ The group provides free services to individuals who meet its strict eligibility requirements.⁵

1. Washington has no law prohibiting suicide or attempted suicide. However, Washington bans aiding or causing the suicide of another: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." WASH. REV. CODE. ANN. § 9A.36.060 (West 1995). Promoting a suicide attempt is a class C felony, *id.*, punishable by imprisonment for a maximum of five years and a fine of up to \$10,000, *id.* § 9A.20.020. This is the pattern common in most U.S. jurisdictions. See, e.g., THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 59-60 (1994) [hereinafter TASK FORCE].

2. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1456 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir.), *reh'g granted en banc*, 62 F.3d 299 (9th Cir. 1995), *rev'd*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996) (*en banc*); see also *infra* notes 45, 178 (discussing the Ninth Circuit's *en banc* decision).

3. *Id.*

4. *Id.* at 1458.

5. *Id.* *Compassion in Dying* limits its services to terminally ill patients capable of understanding their own decisions. *Id.* It will not help patients who request assisted suicide as a result of emotional distress or mental illness, lack of adequate health insurance or

Dr. Roe and Compassion in Dying are two of the many voices that, in recent years, have sought recognition of the powerful interests that terminally ill people have in controlling the circumstances of their own death. Many people with Acquired Immune Deficiency Syndrome (AIDS) intentionally hasten death, and even more consider it and talk openly about it.⁶ In 1991 the prestigious *New England Journal of Medicine* published an article by Dr. Timothy Quill describing cases in which he had helped terminally ill patients to die.⁷ Also in 1991, Derek Humphry, founder of the Hemlock Society, published *Final Exit*, providing detailed information about how to commit suicide.⁸ Within a week the book rose to the top of the *New York Times* best

other economic concerns, inadequate comfort or care, or clinical depression. *Id.* The patient must request assistance

personally, in writing or on videotape, and [the request] must be repeated three times, with an interval of at least 48 hours between the second and third requests. Requests may not be made through advance directives or by a health care surrogate, attorney-in-fact, or any other person. . . . Compassion in Dying will not assist anyone . . . who expresses any ambivalence or uncertainty. If the patient has immediate family members or other close personal friends, their approval must be obtained. If any members of the immediate family express disapproval, Compassion in Dying will not provide assistance with suicide.

Id. A consulting physician must verify the patient's terminal prognosis, decision-making capability, and optimal management of pain and depression. *Id.*

6. Another plaintiff in *Compassion in Dying* was a 44-year-old artist in the terminal phase of his struggle with AIDS. *Id.* at 1456. See generally Jody B. Gabel, *Release from Terminal Suffering?: The Impact of AIDS on Medically Assisted Suicide Legislation*, 22 FLA. ST. U. L. REV. 369, 431 (1994) (summarizing data on Human Immuno-Deficiency Virus (HIV) and suicide and supporting a Model Death with Dignity Act that would "ensure that societal pressure is not exerted upon people suffering from terminal illnesses to opt for medically assisted suicide based merely upon their medical diagnosis or financial situation, rather than their personal choice"). People working with AIDS patients report that most consider controlling the circumstances of their death, and begin gathering lethal drugs at the time they are diagnosed. Lisa Belkin, *Doctors Debate Helping the Terminally Ill Die*, N.Y. TIMES, May 24, 1989, at A1; Leslie Knowlton, *A Time for Dying? Rather Than Face a Horrible, Lingering Death, Some AIDS Patients Say They Plan to End Their Lives. For Them, It's a Way of Keeping Control*, L.A. TIMES, July 19, 1994, at E1; Gina Kolata, *AIDS Patients Seek Solace in Suicide but Many Risk Added Pain in Failure*, N.Y. TIMES, June 14, 1994, at C1.

7. Timothy E. Quill, *Death and Dignity: A Case of Individualized Decision Making*, 324 NEW ENG. J. MED. 691 (1991) [hereinafter Quill, *Death and Dignity*]. New York authorities declined to bring disciplinary proceedings because the doctor could not "know with certainty" that his patient would use the drugs he prescribed to take her own life. "Dr. Timothy Quill," Determination of the New York State Board for Professional Medical Conduct, Aug. 16, 1991, at 2, as reported in TASK FORCE, *supra* note 1, at 66-67. In a subsequent article, Dr. Quill explored his motivations, recognizing that "intent" is complex and multi-layered. Timothy E. Quill, *The Ambiguity of Clinical Intentions*, 329 NEW ENG. J. MED. 1039 (1993) [hereinafter Quill, *The Ambiguity of Clinical Intentions*]. Dr. Quill subsequently filed an affirmative challenge to New York's ban on assisted suicide. See *infra* note 126.

8. DEREK HUMPHRY, *FINAL EXIT* (1991).

seller list for how-to books.⁹ In 1994 *Connecticut Magazine* published a story about William Meyer III, age sixty-five, describing how he had helped his eighty-eight-year-old, terminally ill father to die.¹⁰ In 1994 Oregon voters approved a referendum authorizing physician-assisted suicide for the terminally ill, under standards similar to those applied by Compassion in Dying.¹¹ In 1995 the *New Yorker* published Andrew Solomon's powerful and sympathetic story of how he, his brother, and father helped his mother to die.¹²

Dr. Roe's claim that the Washington ban on assisted suicide violates her constitutional right to hasten her death depends on the analysis of two questions. First, are Dr. Roe's decision and her actions a constitutionally protected form of liberty or privacy? Second, assuming that Dr. Roe's choice is an aspect of personal liberty, does the State of Washington have sufficient reason to restrict her choice and action? These are the core issues that courts address in every case in

9. Humphry commented that the success of his book "legitimized everything by making money." Andrew Solomon, *A Death of One's Own*, *NEW YORKER*, May 22, 1995, at 54, 59.

10. *Son's Story Prompts Examination of Death*, *PLAIN DEALER* (Cleveland), Sept. 17, 1994, at 16A. The father, suffering from cancer, attempted suicide on his own and failed, and then asked his son to help him. *Id.* The son held his father's arms as the father struggled to remove a plastic bag that he had placed over his own head. *Id.* Mr. Meyer was prosecuted for second-degree manslaughter. *Id.* Although the crime charged carried a 10-year prison sentence, Mr. Meyer was released on two years' probation after he promised not to assist any other suicides and to donate \$1000 in his father's name to a prison youth program. *Man Put on Probation for Aiding Dad's Suicide*, *MIAMI HERALD*, Dec. 16, 1994, at 11A.

11. The Oregon Death with Dignity Act provides that

An adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner in accordance with this Act.

1995 OR. LAWS ch. 2, § 2.01. The Act requires that the patient make 2 requests, at least 15 days apart. *Id.* § 3.06. Unlike Compassion in Dying's standards, the Oregon Act does not demand that the patient's pain be untreatable. *Id.* § 3.01. It does, however, require doctors to determine "that the person is not suffering from a psychiatric or psychological disorder, or depression causing impaired judgment." *Id.* § 3.03. On December 27, 1994, a federal court issued a preliminary injunction against the referendum. *Lee v. Oregon*, 869 F. Supp. 1491, 1503 (D. Or. 1994).

12. Solomon, *supra* note 9, at 54. When Mr. Solomon's mother was diagnosed with cancer, she made it plain that she thought she would choose death at some point. *Id.* at 56. Like Dr. Roe, she did not act quickly, but underwent months of aggressive treatment. *Id.* "[H]er hair was gone, her skin was allergic to any makeup, her body was emaciated, and her eyes were ringed with perpetual exhaustion." *Id.* at 58. Nonetheless she continued to struggle to live, saying,

As long as there is even a remote chance of my getting well, I'll go on with treatments. When they say that they are keeping me alive but without any chance of recovery, then I'll stop. When it's time, we'll all know. I won't do anything before then. Meanwhile, I plan to enjoy whatever time there is left.

Id.

which an individual claims that a state policy unconstitutionally restricts or burdens individual liberty.¹³

A. *Physician-Assisted Death as a Constitutionally Protected Liberty*

Since the end of World War II, the Supreme Court has drawn distinctions between individual liberty or privacy rights that can be identified as "fundamental" and those that can be defined as opportunities for social or economic advantage. If the individual liberty is "fundamental," the state must demonstrate strong and precise, or "compelling," justification for restricting it.¹⁴ By contrast, the state may restrict the exercise of ordinary, nonfundamental liberties if it can assert some rational basis to support the restriction, or if the court can construct a hypothetical application that would make the law reasonable.¹⁵ This traditional approach has eroded in recent years. In *Planned Parenthood v. Casey*, the Court recognized the right to choose abortion as fundamental,¹⁶ but allowed state restrictions in the ab-

13. In many cases, courts also consider the nature of the burden imposed on the individual liberty. A law that makes it more difficult or costly to exercise a protected liberty might be upheld even though a law that prohibited exercise of the claimed liberty would be unconstitutional. The issue is whether the burden is undue. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992) (affirming that a criminal prohibition against abortion violates women's constitutionally protected liberty, but holding that state regulations are permissible so long as the burdens imposed thereby are not undue); see also *infra* notes 217, 220.

Because *Dr. Roe and Compassion in Dying* challenge a criminal law that prohibits assisted death in all circumstances, there is no dispute that the law imposes a significant burden. Were courts or legislatures to recognize a basic right to choose to hasten death, it would be necessary to confront a second generation of problems. It is easy to imagine circumstances in which the *Compassion in Dying* criteria, *supra* note 5, would seem irrationally restrictive. For example, *Compassion in Dying* demands consensus among "immediate family members" and "close personal friends." See *supra* note 5. Although the impulse to require participation and dialogue among those who love the dying person seems wise, serious problems arise when one member of the immediate family or one close personal friend holds views in conflict with those of the dying person and all the others who love her. Should that person be given a veto power? In *Casey*, the Supreme Court considered, and rejected, Pennsylvania's rule that husbands should be guaranteed the opportunity to participate in their wife's decision whether to have an abortion. 112 S. Ct. at 2826-33. This Article does not address these second-generation issues.

14. Both "fundamental liberty" and "compelling state interests" are terms of art in American constitutional jurisprudence. Fundamental liberties include the rights to free speech, religious expression, travel, marriage, family formation, procreation, and use of contraceptives. Compelling state interests are those of such pressing import that they may encroach on an individual's fundamental liberty, if pursued by the most narrowly tailored means. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 11-2 to -5, at 772-84 (2d ed. 1988).

15. *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955) (upholding a law restricting the practice of optometry).

16. 112 S. Ct. at 2804.

sence of a compelling state interest, so long as no undue burden is imposed on the exercise of the liberty.¹⁷

This dichotomy between fundamental individual rights of privacy and liberty, on the one hand, and state authority over social and economic relations, on the other, reflects the common understanding of major historic developments of the twentieth century. Judicial deference to democratic regulation of economic relations evolved from the social, political, and constitutional rejection of the Supreme Court's effort to use the Constitution to block the New Deal legislative reforms.¹⁸ Judicial affirmation of fundamental personal rights of liberty and privacy reflects our collective human understanding that the atrocities authorized by the "law" of the Hitler and Stalin regimes violated fundamental human rights.¹⁹ Yet one cannot easily distinguish between fundamental individual rights of privacy and liberty, which the state may not deny without powerful justification, and ordinary economic and social self-interest, over which the state has broad regulatory power.²⁰

Dr. Roe and others in her situation present considerations that touch upon many aspects of human liberty and privacy. First, the core of this dilemma is the individual's desire to retain control over his or her body and life. As Ronald Dworkin explains,

Death has dominion because it is not only the start of nothing but the end of everything, and how we think and talk about dying—the emphasis we put on dying with “dignity”—shows how important it is that life ends *appropriately*, that death keeps faith with the way we want to have lived.²¹

Second, the right to *choice* is valuable, however that choice is exercised.²² The dying patient has lost control of most significant aspects of his or her life. The assurance that assisted death is an option provides a measure of autonomy and control, however that autonomy is

17. *Id.* at 2821.

18. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1055 (1984).

19. Edward V. Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984).

20. See *supra* notes 14-18 and accompanying text.

21. RONALD DWORKIN, *LIFE'S DOMINION* 199 (1993).

22. As an abortion rights litigator, I have known women who sought an abortion, became plaintiffs challenging state restrictions, obtained temporary injunctive relief allowing access to abortion, yet decided to continue the pregnancy. Whatever course the woman chooses, an important right is vindicated by the affirmation that the choice is hers.

exercised.²³ Indeed, evidence from medical practice suggests that frank recognition and discussion of the suicide option sometimes leads depressed patients to reject it.²⁴

Third, prohibitions on physician-assisted dying enforce individual isolation and prevent individuals from seeking the help and companionship of others at a critical time.²⁵ Andrew Solomon reports that his mother

considered doing the whole thing on her own but had thought that the shock would be worse than the memories of having been with her for this experience. As for us, we wanted to be there. My mother's life was in other people, and we all hated the idea of her dying alone. It was important that in my mother's last months on earth we all feel connected, that none of us be left with a sense of secrets kept and intentions hidden.²⁶

When suicide is allowed,²⁷ but help in dying is prohibited, the state denies important associational interests.

Fourth, it is not easy to hasten death in a private, non-violent way. Bans on physician assistance, therefore, aggravate the suffering of people such as Dr. Jane Roe. Solomon reports,

23. Andrew Solomon reports, "Everything that had been intolerable to my mother was made tolerable when she got those pills, by the sure knowledge that when life became unlivable it would stop." Solomon, *supra* note 9, at 58; see also Franklin G. Miller & John C. Fletcher, *The Case for Legalized Euthanasia*, 36 PERSP. IN BIOLOGY & MED. 159, 164 (1993); Timothy E. Quill et al., *Care of the Hopelessly Ill: Proposed Clinical Criteria for Physician-Assisted Suicide*, 327 NEW ENG. J. MED. 1380, 1382 (1992).

24. TASK FORCE, *supra* note 1, at 26; see also Quill et al., *supra* note 23, at 1382.

25. Raymond Duff and August Hollingshead, in their classic Yale–New Haven Hospital study, report that while affluent white men were routinely informed when their condition was terminal so that they could settle affairs and communicate with loved ones, non-whites, women, and the less affluent were left to face death on their own. RAYMOND DUFF & AUGUST HOLLINGSHEAD, *SICKNESS AND SOCIETY* 314-18 (1968).

26. Solomon, *supra* note 9, at 64. Similarly, Dr. Timothy Quill offers this reflection on the death of Diane, the long-term patient to whom he had provided barbiturates:

I did not want her to have to face this final moment alone. Had she asked me to be with her, and had I complied, the legal risk of my participation would have increased substantially. She died alone as a final altruistic act to protect both her family and me from potential prosecution. She researched the law in the state of New York and rightly discovered that the legal risk of the assisters increases dramatically if they are present at the time of death. I hope I would have had the courage to be there with her had she requested my presence, for no one should feel forced to die alone.

Quill, *The Ambiguity of Clinical Intentions*, *supra* note 7, at 1040.

27. See *infra* text accompanying note 53 (noting that suicide and attempted suicide are no longer crimes in any jurisdiction).

If you have never tried it or helped someone else through it, you cannot begin to imagine how difficult it is to kill yourself. . . . Having been through the whole business, I would put the infrequency of suicide down more to the difficulty of it than to the undesirability of its objective.²⁸

It is, of course, possible to jump off a tall building or to leap in front of an oncoming train.²⁹ But most terminally ill patients seek a death that is both more private and less violent.³⁰ Patients who unsuccessfully attempt to hasten death are often subjected to serious indignity.³¹

Do these individual interests constitute a liberty protected by the Constitution? The process of determining whether an asserted liberty is constitutionally protected is complex. Generally, the Court looks to our history and traditions to determine the contours of the protected liberty. Justice Harlan provided a classic statement of this principle, in arguing that the Constitution protects the right of married people to use contraceptives.

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built on postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. . . . No formula could serve as a substitute, in this area, for judgment and restraint.³²

28. Solomon, *supra* note 9, at 64; *see also* Kolata, *supra* note 6, at C4.

29. Professor Seth F. Kreimer observes that "as long as guns, plastic bags, and tall buildings are freely available, most people have the practical capacity to kill themselves." Seth F. Kreimer, *Does Pro-Choice Mean Kevoorkian? An Essay on Roe, Casey and the Right to Die*, 44 AM. U. L. REV. 803, 818 (1995). While true, Professor Kreimer's observation may unduly devalue the interests, and physical infirmities, of people like Dr. Jane Roe and Andrew Solomon's mother.

30. Solomon, *supra* note 9, at 57.

31. Some people must repeat their farewells a second time to the same group of intimates. In some cases irreplaceable pills are regurgitated. One woman said, My husband had to just eat his vomit. He was that determined. But then he threw up again. We waited about an hour, then he downed it all again and I put a plastic bag over his head so he would suffocate before he got sick, and he finally died.

Solomon, *supra* note 9, at 57.

32. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

Justice Powell has endorsed the historical approach in affirming that a grandmother's right to maintain a home for her grandchildren is a constitutionally protected liberty that cannot be sacrificed to local zoning concerns. Arguing in response to Justice White's concern that such an approach would prove too expansive and would overly broaden the scope of the Due Process Clause, Justice Powell wrote, "To the contrary, an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula" ³³

By contrast, Justice Scalia believes that claims of constitutional liberty should be resolved by reference "to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."³⁴ However, Justice Scalia's narrow approach to the identification of fundamental liberties has been rejected by the Court.³⁵

The Court has recognized many fundamental liberties not explicitly mentioned in the Constitution. For example, the Court has recognized a right of parents to assume primary responsibility for child-rearing, because this "is now established beyond debate as an enduring American tradition."³⁶ Similarly, the citizen's right to travel from state to state,³⁷ or to travel abroad,³⁸ the right to marry,³⁹ free access to the voting booth,⁴⁰ and rights of procreational choice⁴¹ have all been recognized as constitutionally protected liberties, although not explicitly mentioned in the Constitution.

Whether Dr. Roe's decision to hasten her death with the help of her physician is a liberty that the state may not deny without powerful

33. *Moore v. City of East Cleveland*, 431 U.S. 494, 504 n.12 (1977).

34. *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989).

35. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804-07 (1992).

36. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); see also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking a law that required parents to send their children to public school); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (affirming a parent's right to teach his or her child in a foreign language).

37. See *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding it unconstitutional for a state to deny welfare benefits to new residents); *Memorial Hosp. v. Maricopa*, 415 U.S. 250 (1974) (declaring state denial of nonemergency medical care to indigent new residents unconstitutional).

38. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

39. *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking a law that prohibited people from marrying if they had not met their child-support obligations).

40. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (finding a state poll tax unconstitutional).

41. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (forced sterilization); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (abortion).

justification depends on the interpretation of general constitutional law principles, and an analysis of the similarities and differences between the right asserted here and those recognized in prior cases. Two prior cases are most probative in evaluating Dr. Roe's claim of constitutionally protected liberty—*Planned Parenthood v. Casey*, affirming the constitutional protection of the right to choose abortion;⁴² and *Cruzan v. Director, Missouri Department of Health*, recognizing "that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."⁴³

In *Planned Parenthood v. Casey*, the Court explained:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁴⁴

In *Compassion in Dying*, the district court relied on the reasoning in *Casey* in concluding that "the suffering of a terminally ill person cannot be deemed any less intimate or personal, or any less deserving of protection from unwarranted governmental interference, than that of a pregnant woman."⁴⁵ The *Compassion in Dying* court found that

42. *Casey*, 112 S. Ct. at 2791.

43. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279 (1990). In his majority opinion, Chief Justice Rehnquist assumed that such a right exists for the purposes of the case before the Court. He acknowledged that this principle "may be inferred from our prior decisions," *id.* at 278, and that "the logic of the cases . . . would embrace such a liberty interest," *id.* at 279. Because the majority did not see the right as "fundamental," it was willing to defer to the state's requirement of a heightened standard of proof, denying the right to refuse life-supporting treatment unless the comatose patient's choice to do so is supported by "clear and convincing" evidence. *Id.* at 285-87.

The four dissenting Justices, Brennan, Blackmun, Marshall, and Stevens, took issue with the majority's refusal to characterize the liberty as "fundamental." *Id.* at 302-05 (Brennan, J., dissenting). Because they characterized the choice as fundamental, they would allow state restrictions only where such restrictions promote important state interests. *Id.* at 303. If accuracy in determining the patient's wishes is the primary concern, a preponderance-of-the-evidence standard is more likely to produce accurate decisions about the patient's wishes. *Id.* at 315-26.

44. *Casey*, 112 S. Ct. at 2807.

45. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1460 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586, 591 (9th Cir.), *reh'g granted en banc*, 62 F.3d 299 (9th Cir. 1995), *rev'd*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996) (en banc). As this Article went to press, the Ninth Circuit en banc upheld the decision of the district court and reversed the deci-

"[t]here is no more profoundly personal decision, nor one which is closer to the heart of personal liberty, than the choice which a terminally ill person makes to end his or her suffering and hasten an inevitable death."⁴⁶

Similarly, in *Cruzan*, Justice O'Connor's pivotal concurrence recognizes that

[r]equiring a competent adult to endure [artificial feeding] against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment. Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water.⁴⁷

The Supreme Court's reasoning in *Cruzan* also supports the distinction, implicit in Dr. Roe's claim, between the liberty interests of the healthy and the interests of those suffering from an irreversible, and imminently terminal, illness. The *Cruzan* Court observed, "We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death."⁴⁸

A claim that terminally ill individuals have a liberty interest in access to physician assistance in hastening death is, of course, distinguishable from all the other liberties that previously have been recog-

sion of the three judge circuit court panel. *Compassion in Dying*, No. 94-35534, 1996 WL 94848. Judge Reinhardt wrote the opinion for eight judges and three judges dissented. The court found that both *Casey* and *Cruzan* support the claim that physician assistance in dying is a form of fundamental liberty and that none of the interests asserted by the state were sufficiently strong to justify a criminal prohibition on such physician assistance. *Id.* at *37-39.

The Second Circuit also recently struck down New York's criminal statute prohibiting assisted suicide on Equal Protection grounds, holding that the state had no rational basis for distinguishing between competent, terminally ill patients who may legally refuse medical treatment and patients who choose to end their lives by self-administration of drugs prescribed by their physicians. *Quill v. Vacco*, No. 60, 95-7028, 1996 WL 148605, at *11, *14-17 (2d Cir. April 2, 1996).

After the Ninth Circuit panel's initial decision, a U.S. District Court found that a constitutional right to privacy protects patient choice regarding physician assistance in dying. *Kevoorkian v. Arnett*, No. CV 94-6089, CBM, at 22 (C.D. Cal. 1995). The *Kevoorkian* court, recognizing that it was bound by the Ninth Circuit's holding that physician-assisted suicide was not a constitutionally protected liberty, nonetheless found that a constitutional right of privacy protects patient choice. *Id.* at 21-22. The court seems to believe that labeling the claim as one of "privacy" rather than "liberty" makes critical constitutional difference. I am not convinced.

46. 850 F. Supp. at 1461.

47. 497 U.S. at 289 (O'Connor, J., concurring).

48. *Id.* at 280.

nized as deserving constitutional protection, just as all the liberties recognized in prior cases are distinguishable from one another. The relevant question is whether, as a matter of constitutional principle, these distinctions should make a difference. There are two primary arguments that distinguish the terminally ill patient's claimed right to choose assistance in hastening death from the patient's right to refuse essential medical care. First, our history and traditions do not support the decisions of terminally ill people who seek actively to hasten death; and second, the affirmative actions involved are significantly different from the rejection of essential medical care.

Our history and traditions provide much stronger support for the individual's right to refuse essential medical treatment than for the individual's right to physician-assisted dying.⁴⁹ In *Cruzan*, the Court relied on the long-standing, common-law tradition of protecting the individual's right to refuse medical treatment to conclude that the Constitution also protects the individual's right to refuse essential medical care.⁵⁰ The Court, however, has not adopted a static view of our history and traditions in determining the content of constitutionally protected personal liberties.⁵¹ Often, constitutional liberties are recognized despite the state's denial of the claimed liberty; for example, the constitutional right to choose abortion has been protected despite persistent state efforts to deny it.⁵²

49. The Ninth Circuit panel that originally reversed the Washington District Court decision, noted, "In the two hundred and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction." *Compassion in Dying*, 49 F.3d at 591.

50. *Cruzan*, 497 U.S. at 269-78.

51. See *supra* text accompanying notes 36-41 and accompanying text.

52. For a discussion of the history of the abortion controversy, see *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2810-12 (1992). But see *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986) (5-4 decision) (relying on a static view of history and the meaning of constitutional liberty to reject a challenge to the Georgia sodomy statute). The reasoning of *Bowers* has been widely condemned. See RICHARD POSNER, *SEX AND REASON* 291-23 (1992); Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073 (1988); Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1745-70 (1993); Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531 (1992); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 747-50 (1989); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1989); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1461-67 (1992). Justice Powell, the critical swing vote in *Bowers*, has indicated that he believes the case was wrongly decided. Linda Greenhouse, *Washington Talk: When Second Thoughts in Case Come Too Late*, N.Y. TIMES, Nov. 5, 1990, at A14.

Furthermore, our history and traditions do not reflect a consistent condemnation of suicide. Suicide and attempted suicide are not crimes today in any jurisdiction, and have not been for most of this century.⁵³ This suggests that the continued condemnation of physician-assisted dying reflects a concern about the risk of abuse, rather than a moral consensus that suicide is always wrong. In addition, it is not clear that physician-assisted dying, even though criminally prohibited, is inconsistent with our history and traditions. For obvious reasons, it is impossible to know how widespread the practice is, but evidence suggests that doctors have long helped to hasten the death of terminally ill patients.⁵⁴

The second argument distinguishing the claim of a constitutionally protected right to physician-assisted dying from *Cruzan's* recognition of the right to refuse necessary medical treatment rests on the difference between asserting autonomy and resisting intrusion. Justice O'Connor's concurrence in *Cruzan* characterizes the right as one against "invasions into the body" and "restraint and intrusion."⁵⁵ For people such as Dr. Roe, the state's proscription is not itself a physical intrusion on their bodily integrity, but instead bars the individual from permitting a lethal intrusion as a final assertion of that integrity.

While the "invasion" paradigm governs *Cruzan*, *Casey* recognizes a broader right of "personal autonomy and bodily integrity" that is not limited to a right to resist state-mandated intrusions.⁵⁶ In the context of this broader right, a prohibition of assisted dying might be characterized as an infringement on personal autonomy in conflict with the requirement that states respect self-determination in matters of core identity.⁵⁷

This distinction between resisting intrusion and asserting autonomy is also captured by the claim that the right to refuse necessary

Nonetheless, the court in *Quill v. Koppell*, 870 F. Supp. 78, 83 (S.D.N.Y. 1994) relied on *Bowers* in rejecting the plaintiffs' claim that constitutionally protected liberty encompasses the right to physician-assisted suicide. *Id.* at 85.

53. TASK FORCE, *supra* note 1, at 54-55.

54. See Julia Pugliese, *Don't Ask—Don't Tell: The Secret Practice of Physician-Assisted Suicide*, 44 HASTINGS L.J. 1291, 1297-99 (1993); Quill, *Death and Dignity*, *supra* note 7, at 694. "Doctors readily concede that they are deliberately helping their patients to die when they write prescriptions for lethal doses of Seconal, but then they ask not to be quoted by name." Solomon, *supra* note 9, at 68.

55. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 287 (1990) (O'Connor, J., concurring).

56. *Casey*, 112 S. Ct. at 2798.

57. Justice O'Connor's *Cruzan* concurrence gives some support to this notion as well. She writes that "our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination." 497 U.S. at 287.

medical treatment is passive, while right-to-die claims involve affirmative action to hasten death. The active/passive distinction has widespread appeal to notions of common sense, as well as to legal and philosophical theories.⁵⁸ At the same time, it has been widely criticized as irrational, unseemly, suspect, and eccentric.⁵⁹

In sum, Dr. Roe can make a very strong claim that her liberty interest in physician-assisted dying deserves constitutional protection. The existence of a liberty interest or fundamental right does not, however, imply that the state may never place constraints on its exercise.⁶⁰ It does demand that the state explain why the individual liberty must be restricted. The next section evaluates the state concerns that might

58. The active/passive distinction forms the basis for the classic no-duty tort law principle. See *Hurley v. Eddingfield*, 59 N.E. 1058 (Ind. 1901).

59. See, e.g., JAMES RACHELS, *THE END OF LIFE: EUTHANASIA AND MORALITY* 92-105 (1986) (challenging the traditional medical distinction between killing and letting one die, and arguing for an equivalence based on the lack of moral difference between the two); Leslie Bender, *A Feminist Analysis of Physician-Assisted Dying and Voluntary Active Euthanasia*, 59 TENN. L. REV. 519, 531 (1992) ("It is unseemly for the legal system's analysis to turn on whether the physician's role was active or passive . . ."); Sanford H. Kadish, *Letting Patients Die: Legal and Moral Reflections*, 80 CAL. L. REV. 857, 864-65 (1992) (arguing that application of the act/omission distinction is "suspect" and "eccentric at best"); Kreimer, *supra* note 29, at 839 (noting that "[t]he active/passive distinction is, at best, problematic"). For early criticism of the no duty principle in the tort context, see Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908).

60. See *supra* text accompanying notes 14-17. My colleague, Professor Thomas Nagel, has suggested to me in conversations that it is confusing and inappropriate to characterize the claimed right as one to "physician-assisted dying" or "intentionally hastened death" rather than a more general right to commit suicide. His point is that even healthy young people might assert a liberty interest in choosing whether or not to live. As I understand his argument, the fact that a state interest in denying the claimed individual liberty might differ in various cases does not make the claim of individual liberty fundamentally different.

Two reasons persuade me to reject Professor Nagel's construction of the problem. First, terminally ill people who protest laws that prohibit them from defining the circumstances of their own death do not define their claim as one that encompasses every individual's right to commit suicide. Indeed, they struggle with the question of appropriate limits. As a plaintiffs' lawyer, I am influenced by clients' definitions of issues. Second, every liberty/privacy case considered by the Supreme Court has been cast in less than universal terms. *Griswold v. Connecticut*, 381 U.S. 479 (1965), considered whether the state could prohibit doctors from prescribing contraceptives to married couples. *Id.* at 480-81. The plaintiffs' claim in *Griswold* could have been cast as one challenging any state restriction on sexual behavior, whether the people involved were married or single, heterosexual or homosexual. Our common-law/constitutional methodology allows consideration of liberty claims one step at a time.

Professor Nagel would characterize this right as the right to "commit suicide." Activists in the right-to-die movement prefer "physician-assisted dying" or "intentionally hastened death." I have adopted the plaintiffs' language, except where context makes clear that the claim is a broader one.

justify denying Dr. Roe the liberty to seek her doctor's help in hastening her death.

B. State Interests in Banning Physician-Assisted Dying

Three arguments support state prohibitions of physician-assisted dying: (1) to protect vulnerable individuals from coercion; (2) to promote individuals' best interests; and (3) to affirm the sanctity of life.

1. *Coercion.*—The ban on assisted dying protects people who might be coerced to “choose” death against their own authentic wishes. Andrew Solomon's eloquent argument in support of legalizing assisted death recognizes that, “There is no question that if euthanasia is legalized it will be abused. Some people will kill themselves because of family pressure to do so. Some will kill themselves in depression. Some will kill themselves too soon, and lose precious time on earth.”⁶¹ The prestigious New York Task Force on Life and the Law recommended against legalizing physician-assisted dying:

The risk of harm is greatest for the many individuals in our society whose autonomy and well-being are already compromised by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized social group. The risks of legalizing assisted suicide and euthanasia for these individuals, in a health care system and society that cannot effectively protect against the impact of inadequate resources and ingrained social disadvantages, would be extraordinary.⁶²

The role of the medical profession in legitimating the decision to hasten death is a matter of particular concern. The Ninth Circuit panel initially rejected Dr. Roe's constitutional claim, in part, because “[o]nce the physician suggests suicide or euthanasia, some patients will feel that they have few, if any alternatives, but to accept the recommendation.”⁶³

Some of the most well-known proponents of physician-assisted dying act in ways that confirm these concerns. In 1988 the *Journal of the American Medical Association* published an anonymous article by a gynecological resident who described giving a lethal injection to a twenty-

61. Solomon, *supra* note 9, at 68.

62. TASK FORCE, *supra* note 1, at 120.

63. Compassion in Dying v. Washington, 49 F.3d 586, 592 (9th Cir.) (quoting TASK FORCE, *supra* note 1, at 122), *reh'g granted en banc*, 62 F.3d 299 (9th Cir. 1995), *rev'd*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996) (*en banc*); *see also supra* note 45 (discussing the Ninth Circuit's *en banc* decision).

year-old woman named Debbie who was dying of ovarian cancer.⁶⁴ He was called to her bedside in the middle of the night because she was in great pain.⁶⁵ He had never before met the patient.⁶⁶ She said, "Let's get this over with."⁶⁷ The resident administered a lethal morphine injection.⁶⁸ The column generated over 150 responses that ran four to one against the actions of the physician and three to one against the *Journal* for publishing the piece.⁶⁹ Examples of these arguments include: The doctor did not know the patient. She may have felt the same way the next morning, or perhaps not. The doctor does not assure us that he had done all that was possible to deal with her symptoms. Neither the Compassion in Dying guidelines⁷⁰ nor the Oregon law would have authorized the actions of this physician.⁷¹

Dr. Jack Kevorkian is the best known proponent of physician-assisted dying and a source of deep disquiet to the organized movement that seeks social and constitutional acceptance of this right.⁷² In response to Dr. Kevorkian,⁷³ the Michigan legislature passed a law prohibiting assisted suicide.⁷⁴ The Michigan Supreme Court upheld that law and the U.S. Supreme Court denied review.⁷⁵ Even though his conduct has been defined as criminal,⁷⁶ Dr. Kevorkian has remained free and has persisted in helping people to die.⁷⁷ In 1991 the state sought an injunction to prevent him from assisting patients to

64. *It's Over, Debbie*, 259 JAMA 272 (1988).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. George D. Lundberg, '*It's Over, Debbie*' and the Euthanasia Debate, 259 JAMA 2142 (1988).

70. *See supra* note 5.

71. *See supra* note 11.

72. Solomon, *supra* note 9, at 62.

Though he is to outsiders [of the right to die movement] the highest-profile figure in the right-to-die movement, his behavior is so erratic and his personality so bizarre that most other members of the movement go to considerable lengths to distance themselves from him. "He speaks to the American need for a quick fix," Unlike most advocates of aid-in-dying, Kevorkian flouts the law like a showman.

Id.

73. *The Assisted-Suicide Debate*, DET. FREE PRESS, June 3, 1995, at 6A.

74. MICH. COMP. LAWS ANN. § 752.1027 (West Supp. 1995).

75. *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994), *cert. denied sub nom. Hobbins v. Kelley*, 115 S. Ct. 1795 (1995).

76. *Id.* at 716.

77. Michael Betzold & Matt Davis, *Kevorkian Cases May Reopen*, DET. FREE PRESS, Dec. 15, 1994, at 1B.

commit suicide.⁷⁸ The court entered the injunction in response to Dr. Kevorkian's actions in helping Janet Adkins to hasten her death.⁷⁹ Ms. Adkins had been diagnosed with Alzheimer's disease.⁸⁰ However, it is interesting that the court relied on the specific circumstances of Dr. Kevorkian's actions, rather than on the abstract principle that the state is free to deny people the right to physician-assisted dying. The Michigan Court of Appeals stated:

[The] defendant is by education and training a retired pathologist without any experience or any knowledge in the fields of internal medicine, geriatric medicine, psychiatry, neurology, or other areas that might be helpful in diagnosing and managing Alzheimer's disease. . . . [D]efendant was not professionally qualified to evaluate the physical or emotional status of Ms. Adkins. . . . [D]efendant made no attempt to take a comprehensive medical history, conduct a physical examination, order any tests, assess Ms. Adkins' medical status, or consult with experts. . . . Ms. Adkins, who was fifty-four years old, was neither imminently terminally ill nor suffering from pain. . . . [S]he had played tennis within days of her death. . . . [D]efendant made no real effort to discover whether Ms. Adkins wished to end her life, relying largely on the statements of her husband and a few limited responses from Ms. Adkins.⁸¹

As Professor Seth Kreimer argues, pro-choice does not necessarily imply support for Dr. Kevorkian.⁸² Compassion in Dying and most other supporters of repealing the ban on physician-assisted suicide are uncomfortable with his practices.⁸³

While the concerns about coercion are powerful, they are strongly and precisely addressed by the policies of Compassion in Dying⁸⁴ and the Oregon law.⁸⁵ The question becomes whether a *ban* on assisted dying is a necessary or appropriate means of assuring that these decisions are not motivated by lack of treatment for pain or depression, or other factors that undermine individual autonomy. If there were no other, more precisely tailored, means of avoiding abuse, this argument would have force. But that does not seem to be

78. *People ex rel. Oakland County Prosecuting Attorney v. Kevorkian*, 534 N.W.2d 172, 173 (Mich. Ct. App. 1995).

79. *Id.* at 173-74.

80. *Id.* at 173.

81. *Id.* at 174.

82. *See supra* note 29.

83. *See supra* note 72 and accompanying text.

84. *See supra* note 5.

85. *See supra* note 11.

the case. Rather, it seems plausible that the practical concerns about coercion and abuse might better be addressed by legalizing physician-assisted dying and regulating it through policies like those of Compassion in Dying, or the Oregon Death with Dignity Act,⁸⁶ rather than allowing it to continue illicitly and without institutional safeguards.⁸⁷

The argument that if a physician is legally free to help a terminally ill patient hasten death, patients will feel compelled to choose this course⁸⁸ reflects an appalling view of the doctor-patient relationship, inconsistent with the core ethical and legal premises of informed consent.⁸⁹ Doctors should not "suggest" answers to basic life decisions. They should not "suggest" hastened death, or abortion, or indeed, having a baby or enlarging one's breasts.⁹⁰ These are choices for the patient. Even if the patient "suggests" hastened death, Compassion in Dying's guidelines require that the physician ensure that the "choice" is not driven by treatable depression or pain, or other forms of coercion.⁹¹

Problems of coercion are particularly pressing in the case of people who are mentally incompetent. The Compassion in Dying guidelines and the Oregon statute both provide that mentally incompetent people may not be allowed to choose physician-assisted dying.⁹² Mentally disabled people, and those who work with them, have often opposed legalization of physician-assisted dying on the grounds that the mentally incompetent are at particular risk of abuse, and that laws distinguishing between the competent and incompetent draw invidious distinctions.⁹³ Other advocates for the mentally disabled argue that if there is a general right to physician-assisted dying, it is unfair and demeaning to deny it to the mentally incompetent, at least in the case of once-competent individuals who made their wishes plainly

86. See *supra* notes 5, 11.

87. The current status of physician-assisted dying parallels, in many ways, that of prelegalization abortion. Abortions were performed, but because they were illegal, they were costly, clandestine, and often of poor quality. Many doctors came to support the movement to legalize abortion because they saw and had to treat the consequences of unsafe, unsanitary, and poorly performed abortions. See, e.g., KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* chs. 2-4 (1984).

88. *Compassion in Dying v. Washington*, 49 F.3d 586, 592 (9th Cir.), *reh'g granted en banc*, 62 F.3d 299 (9th Cir. 1995), *rev'd*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996) (en banc).

89. See Sylvia A. Law, *Silent No More: Physicians' Legal and Ethical Obligations to Patients Seeking Abortions*, 21 N.Y.U. REV. L. & SOC. CHANGE 279, 285-88 (1995).

90. For my discussion of these issues in the abortion context, see generally *id.*

91. See *supra* note 5.

92. See *supra* notes 5, 11.

93. See Daniel Avila, *Medical Treatment Rights of Older Persons and Persons with Disabilities: 1993-94 Developments*, 10 ISSUES L. & MED. 385 (1995).

known prior to the onset of a debilitating condition such as Alzheimer's disease.⁹⁴

The law has confronted similar problems in relation to the sterilization of people with mental disabilities.⁹⁵ On the one hand, the risks of abuse are enormous; on the other hand, some people with mental disabilities might honestly see sterilization as in their best interests, if able to evaluate and express those interests.⁹⁶ However, in the sterilization context no one suggests that competent people must be denied this choice because of the difficulty of determining whether and when people with mental disabilities may be sterilized. Protection of those with mental disabilities presents a weak justification for denying the autonomy and choice of competent people.

2. *Best Interests, Individual and Social.*—Defenders of the ban also argue that even when terminally ill individuals authentically choose to hasten death, it is not necessarily in their best interests, or in the more general interests of society, to allow them to act on that choice. The classic argument against suicide is that it violates the duty that a citizen owes to the community.⁹⁷ This argument has power in the case of healthy young people who are temporarily depressed. Many people have life experiences that make it seem that life is not worth living. Others believe that they have been done a wrong so painful that only self destruction will generate bad feeling sufficient to punish the person who has hurt them. Most people do not act on these self-destructive impulses and live to enjoy life. These experiences generate a perfectly legitimate paternalistic instinct that urges others to weather emotional crises.

94. John W. Dalbey Donahue, *Physician-Assisted Suicide: A 'Right' Reserved for Only the Competent?*, 19 VT. L. REV. 795 (1995).

95. See, e.g., *In re Hayes*, 608 P.2d 635, 641-42 (Wash. 1980) (en banc) (denying mother's petition to have mentally retarded daughter sterilized); *In re Moe*, 432 N.E.2d 712 (Mass. 1982) (holding that the state court has authority to grant mother's request to sterilize mentally retarded daughter); *In re C.D.M.*, 627 P.2d 607, 613 (Alaska 1981) (holding that the state court has authority to grant parents' petition to sterilize 19-year-old daughter with Down's Syndrome).

96. The California Supreme Court, over a powerful dissent by Chief Justice Rose Bird, held that a law prohibiting the sterilization of persons under conservatorship infringed the constitutional rights of developmentally disabled people seeking sterilization. *In re Valerie N.*, 707 P.2d 760, 771-72 (Cal. 1985).

97. See Thomas J. Marzen et. al., *Suicide, A Constitutional Right?*, 24 DUQ. L. REV. 1, 20-50 (1985). Opponents of suicide from Plato and Aristotle, to Aquinas and Rousseau have argued that suicide violates the duty the citizen owes to the state. *Id.* John Locke argued that human life is the property not of the person living that life, but of God. *Id.* at 41-44. Suicide is thus a kind of theft or embezzlement. Euthanasia, like abortion, can be seen as an insult to God's gift of life. See DWORKIN, *supra* note 21, at 195.

Some defenders of the ban on physician-assisted dying for the terminally ill, including Judge Noonan for the Ninth Circuit, argue that the ban is necessary to discourage suicide among those who are not ill.⁹⁸ Judge Noonan has asserted that it is impossible to distinguish Dr. Roe from "the depressed 21 year old, the romantically-devastated 28 year old, the alcoholic 40 year old who choose suicide."⁹⁹ This "slippery slope" argument underestimates the law's capacity to distinguish cases. The depressed twenty-year-old or alcoholic forty-year-old needs no assistance and is not constrained by legal prohibition.¹⁰⁰ The argument illogically suggests that people in emotional pain will relate their situation to that of someone close to death. It seems unlikely that these emotionally distraught individuals are thinking about people in Dr. Roe's situation, or extracting some sort of justification for their suicide, or even for suicide in general. The concerns are tenuous and speculative.

Defenders of the ban also argue that, even if some terminally ill patients authentically choose death, the legal ban on physician-assisted dying must be preserved to protect the integrity of the medical profession.¹⁰¹ The first reason that Judge Noonan offered in support of Washington's ban is "[t]he interest in not having physicians in the role of killers of their patients."¹⁰² Judge Noonan observed:

"Physician-assisted suicide is fundamentally incompatible with the physician's role as healer," [according to] the American Medical Association's *Code of Medical Ethics*. From the Hippocratic Oath with its promise "to do no harm," to the AMA's code, the ethics of the medical profession have proscribed killing. . . . Not only would the self-understanding of physicians be affected by removal of the state's support for their professional stance; the physician's constant search for ways to combat disease would be affected, if killing were as acceptable an option for the physician as curing. The physician's commitment to curing is the medical profession's commitment to medical progress.¹⁰³

Certainly the views of organized medicine deserve a measure of respect. At the same time, many doctors do not see physician-assisted

98. *Compassion in Dying v. Washington*, 49 F.3d 586, 590-91 (9th Cir.), *reh'g granted en banc*, 62 F.3d 299 (9th Cir. 1995), *rev'd*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996) (*en banc*).

99. *Id.*

100. *See supra* text accompanying note 53.

101. *Compassion in Dying*, 49 F.3d at 592.

102. *Id.*

103. *Id.* (citations omitted).

dying as “killing,” and thereby inconsistent with a commitment to curing and caring.¹⁰⁴ Rather, they believe that it is better to accept that in some cases cure is impossible, and that caring requires respect for the patient’s desire to hasten death.¹⁰⁵ The core principle of the doctrine of informed patient consent, recognized as constitutionally grounded in *Cruzan*, is that patients are entitled to disagree with dominant medical opinion about their best interests.¹⁰⁶

Strong constitutional deference to the views of organized medicine disregards the teachings of history. The American Medical Association was the principle supporter of the nineteenth-century laws criminalizing abortion.¹⁰⁷ Furthermore, organized medicine sought the abortion ban primarily to further parochial, self-serving interests in consolidating control over healing, despite the devastating costs to pregnant women.¹⁰⁸

While few doctors actively oppose organized medicine’s resistance to physician-assisted dying, the significance of this relative silence is unclear. As a practical matter it is very easy for a doctor to hasten the death of the terminally ill patient who wishes to die. As we have seen, the practice indeed may be both long-standing and common.¹⁰⁹ Most doctors engaging in physician-assisted dying have no reason either to publicize their actions or to challenge the formal legal and professional ban on physician-assisted dying.¹¹⁰ Indeed, responsible doctors who help patients to hasten death have enormous disincentives against openly challenging the formal rule.¹¹¹ Those who receive public attention by openly challenging the ban often have not acted in accordance with the protective standards of Compassion in Dying or the Oregon Death with Dignity statute.¹¹² These considerations caution skepticism about the depth of organized medicine’s opposi-

104. A majority of doctors believe that the law should not prohibit physician-assisted dying and the choice to hasten death is sometimes legitimate, freely chosen, and in the patient’s best interest. See Jonathan S. Cohen et al., *Attitudes Toward Assisted Suicide and Euthanasia Among Physicians in Washington State*, 331 NEW ENG. J. MED. 89 (1994).

105. See Quill et al., *supra* note 23, at 1381-82.

106. *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 277 (1990).

107. JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 1800–1900 passim* (1978).

108. See Brief of American Historians as Amici Curiae in Support of Planned Parenthood of Southeastern Pennsylvania at 11, *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (Nos. 91-744 & 91-902).

109. See *supra* note 54 and accompanying text.

110. See Quill et al., *supra* note 23, at 1381.

111. These disincentives include fear of detection and prosecution. *Id.*

112. See, e.g., *Son’s Story Prompts Examination of Death*, *supra* note 10, at 16A (relating the story of William Meyer); *supra* note 72 and accompanying text (discussing the controversy over the actions of Dr. Jack Kevorkian).

tion to physician-assisted dying and the weight that it should be afforded.

Defenders of the ban on physician-assisted dying express concern about the poor and vulnerable.¹¹³ John H. Pickering, senior counsel to the firm of Wilmer, Cutler & Pickering, and former senior advisor to the American Bar Association's Commission on Legal Problems of the Elderly, recently offered a ringing defense of state bans on physician-assisted dying, relying principally on the need to protect "the most vulnerable segments of our society—the elderly, the poor and the persons with disabilities."¹¹⁴ Quite curiously, however, he concludes, "At the same time I selfishly reserve my right to do in private what my family, my doctor and pastor and I, in loving consultation, voluntarily agree is best."¹¹⁵ While his candor is refreshing, it may be wiser to enact legal principles that are applicable to all. Formal rules, justified to protect the vulnerable and then ignored by the powerful, are apt to be unfair to all, and most especially to those they purport to protect.

3. *Sanctity of Life*.—Finally, many believe that suicide is intrinsically wrong, even if it is authentically sought by the individual and does not demonstrably violate the best interests of the individual or society.¹¹⁶ In *Cruzan*, Chief Justice Rehnquist and Justice Scalia embrace the view that the state may limit individuals' right to reject necessary medical care, even if the state thereby undermines individuals' autonomy and best interests, in order to protect human life itself.¹¹⁷ The distinction between the intrinsic value of life and its personal value for the individual explains why many believe that assisted dying is wrong in all circumstances.

Religious groups stand on both sides of the physician-assisted-death debate. As a practical matter, the Roman Catholic Church is the major source of leadership and financial resources opposing the

113. TASK FORCE, *supra* note 1, at 100; *Compassion in Dying v. Washington*, 49 F.3d 586, 592 (9th Cir.), *reh'g granted en banc*, 62 F.3d 299 (9th Cir. 1995), *rev'd*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996) (*en banc*).

114. John H. Pickering, *The Continuing Debate Over Active Euthanasia*, 3 A.B.A. BIOETHICS BULL. 1, 15 (1994).

115. *Id.*

116. See DWORKIN, *supra* note 21, at 195.

117. See *supra* note 43; *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 299-300 (1990) (Scalia, J., concurring). Justice Scalia noted that many states have adopted the view that a person's decision to commit suicide is none of the state's business. *Id.* at 300. "This is a view that some societies have held, and that our States are free to adopt if they wish. But it is not a view imposed by our constitutional traditions, in which the power of the State to prohibit suicide is unquestionable." *Id.*

legalization of physician-assisted dying.¹¹⁸ Many Jewish groups and many Protestant groups also oppose assisted death.¹¹⁹ Judaism, however, also recognizes that "to prolong life is a *mitzvah* [or commandment from God], [but] to prolong dying is not."¹²⁰ Unitarian Universalists and the United Church of Christ are at the forefront of religious support for physician-assisted dying.¹²¹ The Presbyterian Book of Common Worship includes a set of prayers to be said when a life-support system is withdrawn. They begin "God of compassion and love, you have breathed into us the breath of life and have given us the exercise of our minds and wills."¹²²

Casey dramatically underscores that the state may not justify a denial of individual liberty by adopting one view of a contested moral issue.¹²³ The fact that suicide and attempted suicide are no longer legally prohibited¹²⁴ suggests that the basis of the opposition to physi-

118. Solomon, *supra* note 9, at 59. The challenge to Oregon's referendum was mounted by an anti-abortion organization supported by the Catholic Church. *Id.* The Catholic Church sees assisted suicide, abortion, and contraception as categorically wrong in all circumstances. See POPE JOHN PAUL II, THE GOSPEL OF LIFE [EVANGELIUM VITAE] 115-24 (1995) (official English translation of Encyclical Letter given in Rome on March 25, 1995).

119. TASK FORCE, *supra* note 1, at 91.

120. Solomon, *supra* note 9, at 60.

121. Elisabeth Rosenthal, *In Matters of Life and Death, the Dying Take Control*, N.Y. TIMES, Aug. 18, 1991, at D1. In 1988 the Unitarian Universalist General Assembly issued a statement supporting "the right of self determination in dying." See THE PARK RIDGE CENTER, ACTIVE EUTHANASIA, RELIGION, AND THE PUBLIC DEBATE 67-68 (Ron Hamel ed., 1991).

In the Ninth Circuit, the groups that filed briefs in support of Compassion in Dying included: Americans for Death with Dignity; Ten Surviving Family Members; Washington State Legislators; American Civil Liberties Union (ACLU) of Washington; Northwest Women's Law Center; Lambda Legal Defense and Education Fund, Inc.; AIDS Action Council; Northwest AIDS Foundation; Seattle AIDS Support Group; Gray Panthers Project Fund; Older Women's League; Seattle Chapter of the National Organization for Women; American Humanists Association; National Lawyers Guild; Local 6 of Service Employees International Union; Temple De Hirsch Sinai; Unitarian Universalist Association; Seattle Chapter and the Pacific Northwest District Council of the Japanese American Citizens League. *Compassion in Dying v. Washington*, 49 F.3d 586, 586-88 (9th Cir.), *reh'g granted en banc*, 62 F.3d 299 (9th Cir. 1995), *rev'd*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996) (*en banc*).

Among the groups that defended the state ban before the Ninth Circuit were: United States Catholic Conference; American Medical Association; Americans United for Life, on behalf of certain Washington State Legislators; National Legal Center for the Medically Dependent and Disabled, Inc.; Washington State Hospital Association; Catholic Health Association of the United States; International Anti-Euthanasia Task Force. *Id.*

122. Solomon, *supra* note 9, at 59.

123. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2839 (1992) (Stevens, J., concurring in part and dissenting in part) ("[I]n order to be legitimate, the State's interest must be secular; consistent with the First Amendment the State may not promote a theological or sectarian interest.")

124. TASK FORCE, *supra* note 1, at 55.

cian-assisted dying rests upon practical, paternalistic concerns, rather than moral ones.

As Justice Stevens explained in *Cruzan*, "Choices about death touch the core of liberty. Our duty, and concomitant freedom, to come to terms with the conditions of our own mortality . . . are essential incidents of the unalienable rights to life and liberty endowed us by our Creator."¹²⁵

In sum, the question of whether a state ban on physician-assisted death violates the rights of Dr. Roe and others in her situation presents a close constitutional question. Her claims of liberty and privacy are strong. The secular, practical, and paternalistic justifications offered by the state could be served as well, and probably better, through more precisely drafted protections. The state's moral interests in the ultimate value of life cannot be refuted or proven. While the conclusion is not clear, a judge could reasonably decide that Dr. Roe's constitutional rights have been violated.

II. THE JUSTICIABILITY OF CHALLENGES TO STATE POLICIES ALLEGED TO VIOLATE THE CONSTITUTIONALLY PROTECTED RIGHTS OF SOME, BUT NOT ALL, OF THOSE TO WHOM THEY APPLY

Claims of constitutional protection for assisted dying, refusal of medical treatment, or abortion are presented to courts in many ways. This section considers the justiciability of these claims. It addresses the question of when courts may or must resolve the conflicts presented in these situations.

These three human conflicts—abortion, refusal of life-saving treatment, and physician-assisted dying—come to courts in three contexts. First, claims may be raised in defense to a criminal prosecution or other affirmative state effort to enforce the law. Second, individuals such as Dr. Roe can seek a declaration that application of general criminal sanctions is unconstitutional on the particular facts of her case. Third, a class of individuals can assert that the restrictive law is unconstitutional, on its face, or as applied to a defined class.

A. *Defense to Criminal Prosecution*

Defense to criminal prosecution is a necessary, but wholly insufficient, means of vindicating constitutional liberty in each of these con-

125. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 343 (1990) (Stevens, J., dissenting).

texts.¹²⁶ Each of the claimed rights considered involves professional medical services. Doctors are, quite understandably, rarely willing to risk criminal prosecution to vindicate the rights of their patients.¹²⁷

Connecticut's ban on prescription contraceptives for married people eluded constitutional scrutiny for decades because doctors were unwilling to risk criminal prosecution in order to raise those claims.¹²⁸ For the doctor, the risk is not simply the criminal prosecution, but also public and professional sanction.¹²⁹ *Griswold v. Connecticut*¹³⁰ recognized that defense to a criminal prosecution does not provide an effective means of vindicating constitutional claims of rights in these situations.¹³¹

B. Affirmative Individual Claims

A second method of raising these claims is through individual petitions seeking orders that the application of the general criminal prohibition on murder, assisted suicide, or abortion would be unconstitutional on the facts of each case. Cases involving patients who seek to terminate medical treatment have, for the most part, arisen this way.¹³² In those cases, a patient (or the patient's guardian) seeks to

126. *Quill v. Koppell*, 870 F. Supp. 78 (S.D.N.Y. 1994). The court rejected the state's argument that a challenge to a ban on physician-assisted death may only be raised in the context of a defense to a criminal prosecution. *Id.* at 81. Some constitutional challenges to bans on assisted death have been raised in the context of defense to a criminal prosecution. In *Hobbins v. Attorney Gen.*, 518 N.W.2d 487 (Mich. Ct. App.), *aff'd in part and rev'd in part sub nom.* *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994), *cert. denied sub nom.* *Hobbins v. Kelley*, 115 S. Ct. 1795 (1995), the court reviewed three consolidated prosecutions of Dr. Jack Kevorkian. *Id.* at 487. The Michigan Court of Appeals invalidated a statute criminalizing assisted suicide on state constitutional grounds, but rejected a federal due process challenge, holding that there is no constitutional right to commit suicide. *Id.* at 489-94. On appeal, a divided court rejected state and federal constitutional objections to Michigan's assisted suicide statutes and remanded the murder prosecutions against Kevorkian for further proceeding under a new state statutory standard. *Kevorkian*, 527 N.W.2d at 739-40.

127. See *Quill et al.*, *supra* note 23, at 1381.

128. DAVID GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF Roe v. Wade*, chs. 1-3 (1993); see also *Poe v. Ullman*, 367 U.S. 497, 501 (1961) (citing only one prosecution for violation of the statute in 75 years).

129. See *Quill et al.*, *supra* note 23, at 1381.

130. 381 U.S. 479 (1965).

131. *Id.* at 481.

132. See, e.g., *Tune v. Walter Reed Army Med. Hosp.*, 602 F. Supp. 1452 (D.D.C. 1985) (granting a competent adult the right to have life-support systems removed); *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977) (allowing a patient to refuse medical treatment); *In re Quinlan*, 355 A.2d 647 (N.J.) (giving a father decision-making authority over termination of life support), *cert. denied*, 429 U.S. 922 (1976); *In re Meyers*, 610 N.E.2d 663 (Ohio 1993) (allowing cessation of life-sustaining treatment; see also Note, *Physician-Assisted Suicide and the Right to Die with Assistance*, 105

terminate treatment, and the doctor, hospital, or family member disagrees. Alternatively, in some cases, no one opposes the termination of treatment, but judicial approval is sought for the action proposed.¹³³ Courts generally decide these cases as issues of common-law guardianship,¹³⁴ or constitutional law.¹³⁵ While the state courts have applied diverse standards for determining when treatment can be terminated, almost all have provided strong respect for individual choice.¹³⁶

HARV. L. REV. 2021 (1992) (asserting that the constitutional right to physician-assisted suicide should develop in the context of individual claims requesting judicial authorization of physician-assisted suicide).

133. See, e.g., *In re Lawrance*, 579 N.E.2d 32 (Ind. 1991).

134. See, e.g., *Saikewicz*, 370 N.E.2d at 417. Many state courts have rested their decisions on common-law or statutory grounds, e.g. *In re Estate of Longeway*, 549 N.E.2d 292, 296-97 (Ill. 1989), or have just assumed that there is a constitutional right without specifically deciding the issue, e.g., *Severns v. Wilmington Medical Ctr., Inc.*, 421 A.2d 1334 (Del. 1980). At least one state supreme court has declined to rule on the constitutional questions because of a lack of state action. *In re Lawrance*, 579 N.E.2d at 41-42 n.8 ("The existence of the statute [establishing substitute decisionmakers for incompetents] does not convert family decisions into state action within the meaning of the fourteenth amendment to the U.S. Constitution, and thus the due process clause does not apply to them.").

135. See, e.g., *Quinlan*, 355 A.2d at 662-64. At least eight other state supreme courts have decided the issue of removing life-support systems on the basis of constitutional rights or liberty interests. See *Rasmussen v. Fleming*, 741 P.2d 674, 681-82 (Ariz. 1987) (basing the decision on a right to privacy); *In re Browning*, 568 So. 2d 4, 9-12 (Fla. 1990) (same); *Satz v. Perlmutter*, 379 So. 2d 359 (Fla. 1980) (recognizing a constitutional privacy right to discontinue extraordinary medical treatment, but limiting the holding to the particular facts of the case); *In re L.H.R.*, 321 S.E.2d 716, 722 (Ga. 1984) (basing the decision on a right to privacy); *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626, 633 (Mass. 1986) (same); *In re Spring*, 405 N.E.2d 115, 119 (Mass. 1980) (recognizing that preventing "unwanted infringements of bodily integrity" is encompassed in the constitutional right to privacy); *In re Torres*, 357 N.W.2d 332, 339-40 (Minn. 1984) (basing the decision on a right to privacy); *McKay v. Bergstedt*, 801 P.2d 617, 622 (Nev. 1990) (finding liberty interest implicated in requests to discontinue life-sustaining medical treatment); *In re Colyer*, 660 P.2d 738, 742 (Wash. 1983) (basing the decision on a right to privacy); *In re L.W.*, 482 N.W.2d 60, 66-67 (Wis. 1992) (deciding that the right to refuse unwanted medical treatment is constitutionally protected).

136. New York and Missouri are the exceptions. New York law does not permit the withdrawal or withholding of life-sustaining treatment from an incapacitated adult patient who has neither created a health care proxy nor left written or oral treatment instructions presenting clear and convincing evidence of a desire to refuse treatment. *In re Storar*, 420 N.E.2d 64, 73-74 (N.Y.), cert. denied, 454 U.S. 458 (1981). In *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990), the Supreme Court held that Missouri's requirement for clear and convincing evidence of an incapacitated patient's wish to forgo life-sustaining treatment does not violate the patient's constitutional rights. Only New York and Missouri condition withdrawal or withholding of life-sustaining treatment on clear and convincing evidence of the patient's wishes. TASK FORCE, *supra* note 1, at 53. In *Mack v. Mack*, 618 A.2d 744 (Md. 1993), the Maryland Court of Appeals held that life-sustaining treatment could not be withdrawn or withheld from an incapacitated patient absent clear and convincing evidence of the patient's wishes. *Id.* at 759. Almost immediately, the Maryland legislature enacted the Health Care Decisions Act, which authorizes family members and

Significant benefits arise from adjudicating constitutional claims in the context of the concrete facts of a particular case. The whole law of justiciability, and indeed the common-law method of decision-making, reflect, among other things, the understanding that legal principles are apt to be developed more wisely in richly contextualized and concrete disputes.¹³⁷

Dr. Jane Roe plainly had standing to challenge Washington's ban on physician-assisted death. Traditional requirements demand that she allege that she "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, . . . that the injury 'fairly can be traced to the challenged action' and [that the injury] 'is likely to be redressed by a favorable decision.'"¹³⁸ Dr. Roe met all of these requirements. She was dying and sought to control that process. Her doctor was willing to help her, but was deterred by the threat of criminal prosecution. The court could provide an effective remedy by holding that it would be unconstitutional to apply the criminal ban on assisted suicide to Dr. Roe or Dr. Roe's physician. Dr. Roe did not raise "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared."¹³⁹ Her claim did not rest on "the legal rights or interests of third parties" rather than on her own.¹⁴⁰

By the time the federal district court decided her claim, she failed to meet traditional standing requirements in one respect. She died

other interested individuals, in a listed order of priority, to act as surrogate decisionmakers for incapacitated patients who have not executed advance directives. MD. CODE ANN., HEALTH-GEN. §§ 5-601 to -618 (Supp. 1993).

137. *TRIBE*, *supra* note 14, at 67-134. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978) provides a dramatic example of the dangers that arise when the Court relaxes requirements of justiciability and decides cases in a hypothetical form. Plaintiffs in *Duke Power* challenged the constitutionality of the federal Price-Anderson Act, 42 U.S.C.A. § 2210 (1994), which placed sharp limits on the right to pursue state tort claims for injuries resulting from accidents at nuclear power plants. The Court relaxed traditional requirements of standing and ripeness to allow plaintiffs to sue. *Duke Power*, 438 U.S. at 80-81. Relying on the defendant's assertion that the risk of such accidents was "extremely remote," the Court affirmed the federal limits on liability. *Id.* at 86-93. Nine months later, the accident at Three-Mile Island proved the defendant's assertions wrong. *In re TMI Litigation Cases Consolidated I*, 940 F.2d 832, 836 (3d Cir. 1991). Subsequent interpretations of the federal limits on liability for accidents in nuclear power plants have largely eviscerated *Duke Power's* hasty decision on the merits of plaintiffs' claim. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

138. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Gladstone v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)); *see also Allen v. Wright*, 468 U.S. 737, 751 (1984) (citing the *Valley Forge* standing requirements).

139. *Valley Forge*, 454 U.S. at 475 (citations omitted).

140. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

while the case was pending and the state could thus argue that her claim was moot.¹⁴¹ Despite the mootness concern, traditional concepts of standing and justiciability allow plaintiffs to continue to litigate where: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again."¹⁴² In *Roe v. Wade*¹⁴³ the Supreme Court held that, although the named plaintiffs were no longer pregnant, the case was not moot because "[p]regnancy often comes more than once to the same woman" and hence was a classic case in which an issue was "capable of repetition, yet evading review."¹⁴⁴ Dr. Roe cannot assert that she might be subject to the same action again.¹⁴⁵ The mootness problem can be avoided in two ways, however. First, plaintiffs' attorneys can add new named plaintiffs when the initial named plaintiffs die during the course of litigation. Second, if named plaintiffs' claims are live at the point the case is filed, the court may certify a class of similarly situated individuals.¹⁴⁶ In any case, it seems wrong to avoid deciding the claims of dying patients solely because the plaintiff died while the courts considered claims that were live and legitimate when presented.¹⁴⁷

141. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1456 n.2 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir.), *reh'g granted en banc*, 62 F.3d 299 (9th Cir. 1995), *rev'd*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996) (en banc).

142. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam) (holding that inmate's suit against parole board decision was moot because inmate had since been released and there was "no demonstrated probability" that the inmate would ever come before the board again).

143. 410 U.S. 113 (1973).

144. *Id.* at 125.

145. A good example of the application of the future-individual-impact requirement is found in *DeFunis v. Odegaard*, 416 U.S. 312 (1974). Plaintiff, an unsuccessful applicant to the University of Washington Law School, challenged the school's admission policies. During the litigation, the applicant was admitted, and by the time the Supreme Court heard the case, was in his final semester of law school. *Id.* at 314-15. Because his suit was not cast as a class action and the only requested relief was injunctive, the Court held that his case was moot. *Id.* at 317-20; *see also* *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988) (holding that plaintiff must show a "reasonable expectation" of future impact, not a "demonstrated probability").

146. *Cf. DeFunis*, 416 U.S. at 317. Mr. DeFunis could not seek class certification because the class of people denied admission to law school was very large—much larger than the total number of students admitted to the school in any year. Because he sought personal relief, relief to the entire class of which he was a part would not provide him a practical benefit.

147. In all these cases—right to refuse treatment, abortion, and right to physician-assisted suicide—courts have uniformly rejected mootness claims.

C. *Affirmative Class Claims*

While there are real benefits in deciding difficult issues in the context of a concrete individual case, individual determinations often impose undue burdens on both individual rights and the judiciary. The choice between individual and general remedies appears influenced by two factors. First, if there is a need for a speedy decision, the judicial process is probably inadequate in individual case-by-case determinations. Second, if there are large numbers of cases, courts have powerful and legitimate reasons to delegate final decision-making authority.

In the cases involving the right to refuse medical treatment, courts have not limited remedies to the adjudication of individual claims. For example, *In re Quinlan* was litigated as a claim about withdrawing life support from an individual patient.¹⁴⁸ After determining the principles and processes that should be used to decide when treatment could be terminated, the New Jersey Supreme Court stated that "a practice of applying to a court to confirm such decisions would generally be inappropriate, not only because that would be a gratuitous encroachment upon the medical profession's field of competence, but because it would be impossibly cumbersome."¹⁴⁹

In Massachusetts, the Supreme Judicial Court initially suggested that decisions to discontinue or deny treatment to incompetent people ordinarily should be reviewed by the courts.¹⁵⁰ This aspect of the Massachusetts decision was sharply criticized,¹⁵¹ and the Massachusetts court subsequently ruled that there was no requirement of prior judicial review in refusal of treatment cases.¹⁵² In sum, the courts have determined that it is not appropriate to adjudicate common-law and

148. *In re Quinlan*, 355 A.2d 647 (N.J. 1976).

149. *Id.* at 669.

150. In *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977), the court stated that

questions of life and death seem to us to require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created. Achieving this ideal is our responsibility and that of the lower court, and is not to be entrusted to any other group purporting to represent the "morality and conscience of our society," no matter how highly motivated or impressively constituted.

Id. at 435.

151. See William J. Curran, *Law Medicine Notes: The Saikewicz Decision*, 298 NEW ENG. J. MED. 499, 500 (1978) (criticizing the procedure advanced in *Saikewicz*); Arnold S. Relman, *The Saikewicz Decision: Judges and Physicians*, 298 NEW ENG. J. MED. 508 (1978) (noting the "immediate disruptive consequences of the Saikewicz ruling").

152. *In re Spring*, 405 N.E.2d 115 (Mass. 1980).

constitutional refusal of treatment claims solely in the context of individual cases.

Sole reliance on individual claims to vindicate constitutional rights is even less appropriate in the context of abortion than in the context of decisions to terminate necessary medical treatment. Typically, people seeking to terminate necessary medical treatment may be maintained on life-support systems for a long period of time, allowing full adjudication of individual claims. By contrast, pregnancy lasts only nine months. The period in which abortion is a realistic option is much shorter, and the risks and costs of abortion increase dramatically with each passing week.¹⁵³ Furthermore, thousands of women seek abortions for every individual who seeks to terminate life-sustaining medical treatment.¹⁵⁴ If courts have concluded that it is unrealistically cumbersome to demand judicial review of individual decisions to reject essential medical treatment, then, a fortiori, such an individualized approach is inappropriate in the context of abortion.¹⁵⁵

In claims of right to assisted death, as in abortion cases, the time factor is more pressing than it is for patients refusing necessary medical life support. As in the abortion context, a competent, terminally ill patient's claim of right to hasten death will, by definition, quickly become moot. The Ninth Circuit panel that initially considered *Com-*

153. The Center for Disease Control reported that the risks of complications from abortion increase 20% for each week abortion is delayed, and that the death risk increases 50% for each week of delay. These statistics were discussed in *McRae v. Califano*, 491 F. Supp. 630, 656 (E.D.N.Y.), *rev'd sub nom. Harris v. McRae*, 448 U.S. 297 (1980) (holding that exclusion of medically necessary abortions from the otherwise comprehensive Medicaid program does not violate equal protection).

154. In 1992, 1,529,000 abortions were performed in the United States. ECONOMICS & STATISTICS ADMIN., U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACTS OF THE UNITED STATES 1994, tbl. 111, *Abortions—Number, Rate, and Ratio, by Race: 1975 to 1992*, (Bureau of the Census, 114th ed. 1994). The most widely accepted figures for the number of patients in a persistent vegetative state come from a report of the 1982 Presidential Commission for the Study of Ethical Problems in Medicine. The report estimates that there are 5000 to 10,000 such patients. Brian McCormick, 4 AM. MED. NEWS 23 n.1 (Jan. 7, 1991).

155. In one subset of cases, the Supreme Court has approved state laws demanding individual judicial determinations for women seeking an abortion. The Court has upheld requirements that minors notify their parents, but only where the statute provides an opportunity for a prompt judicial determination that the minor is sufficiently mature to consent for herself, without parental consultation, or that parental notification would not be in her best interest. See *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990). The dissenting opinions in these cases document the harms that the requirement of individual judicial determinations impose on minors and the burdens that it imposes on the courts. *Hodgson*, 497 U.S. at 497-501 (Kennedy, J., concurring in part and dissenting in part); *Akron Ctr. for Reprod. Health*, 497 U.S. at 526-29 (Blackmun, J., dissenting).

passion in Dying noted that all of the named patients challenging the Washington law had died—without physician assistance—while the case was being litigated.¹⁵⁶ The panel inconsistently suggested that the claim is, therefore, moot and nonjusticiable, while also holding that no right of the now-deceased patients was violated.¹⁵⁷

It is less clear how the number of terminally ill individuals seeking the right to choose physician-assisted dying compares to the number of those seeking abortion or termination of necessary medical life support.¹⁵⁸ In evaluating whether individual remedies are an adequate and preferable alternative to class relief, numbers matter. At first blush it seems that the number of women seeking abortion must be vastly greater than the number of individuals seeking the right to choose physician-assisted dying.¹⁵⁹ But, if we account for the liberty and autonomy claims of those who *reject* assisted suicide, as well as those who seek it,¹⁶⁰ the class of individuals affected by the ban on assisted suicide is very large. Indeed, the class of people affected by physician-assisted suicide laws might include *everyone*, except those who die without any prior notice and those who have no physicians. Similarly the availability of abortion directly impacts all women of child-bearing age, and not too indirectly impacts all women. Certainly, the number of people who seek the right to reject essential medical treatment is smaller than the number seeking either abortion or physician-assisted death. If individual judicial determination is unduly cumbersome and necessitates class remedies in the refusal of treatment cases, then, a fortiori, class remedies are essential to vindicate rights to choose abortion or physician-assisted death.

In sum, conflicts between individual claims of liberty and privacy, and state concerns cannot be resolved practically in the framework of individual disputes. In each context the disputes must be addressed at

156. *Compassion in Dying v. Washington*, 49 F.3d 586, 588-89 (9th Cir.), *reh'g granted en banc*, 62 F.3d 299 (9th Cir. 1995), *rev'd*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996) (en banc).

157. *Id.* at 593; *see also supra* notes 45, 137.

158. While it is difficult to predict how many people might seek physician-assisted death, one can deduce that the numbers are not insignificant. In 1991 approximately 123,000 people over the age of 75 committed suicide (the suicide rate in this group was 47.5 per 100,000 population). ECONOMICS & STATISTICS ADMIN., U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACTS OF THE UNITED STATES 1994, tbl. 136, *Suicide Rates, by Sex, Race, and Age Group: 1980 to 1991* (Bureau of the Census, 114th ed., 1994). The elderly have the highest suicide rates of all Americans. Patrick J. Meehan et al., *Suicides Among Older United States Residents: Epidemiologic Characteristics and Trends*, 81 AM. J. PUB. HEALTH 1196, 1198 (1991).

159. *Compare supra* notes 154 (abortion statistics) and 158 (suicide statistics).

160. *See supra* notes 22-24 and accompanying text.

a higher level of abstraction by considering the remedial principles and processes applicable to classes of affected individuals.

III. DEVISING JUDICIAL REMEDIES FOR LAWS THAT VIOLATE THE CONSTITUTIONAL RIGHTS OF SOME, BUT NOT ALL, OF THOSE TO WHOM THEY APPLY

Courts often confront the problem of determining the appropriate remedy when a state policy violates the constitutional rights of some, but not all, of the people affected. While the problem is common, the principles for resolving it are remarkably unclear, indeed, often incoherent.¹⁶¹ Two important values clash. On the one hand, courts must provide an effective remedy for all individuals whose constitutional rights are jeopardized by state law. On the other hand, courts should, to the extent feasible, respect and support democratic choice and state discretion.

Courts have used many strategies to resolve these remedial conflicts. The narrowest principle is to reject the substantive constitutional challenge unless the law is invalid in every conceivable circumstance. As I argue below, this "principle" is wrong and inconsis-

161. See Barry Freidman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735 (1992).

Without an available and enforceable remedy, a right may be nothing more than a nice idea. Any meaningful discussion of rights, therefore, must focus on remedies available to implement the rights.

This realist insight is particularly potent, and yet often neglected, in the area of constitutional law. Constitutional rights are the subject of a vibrant scholarly and popular debate, alongside which the writings on constitutional remedies are noticeably sparse.

Id. at 735-36. The discussion that does exist focuses largely on the difficult problems that arise when the Constitution demands large organizational change from reluctant defendants. For a summary of the literature on constitutional remedies, see *id.* at 736 n.4. While organizational upheaval is an important problem, it is not the only one and is not addressed in this Article.

The literature most closely related to the issues addressed here considers whether a party to whom a law may constitutionally be applied may argue that the law is unconstitutional on its face because it would be impermissible to apply it to others. See, e.g., Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994); Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1; Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991); Note, *First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). The challenge of devising appropriate remedies, however, is not limited to the situation in which parties concede that their conduct could be prohibited constitutionally under more precisely drawn laws. Even when the challenged law is unconstitutional as applied to the named plaintiffs or defendants, courts must consider what form of remedy is appropriate.

My colleagues at a NYU Brown Bag Workshop initially challenged my assertion that there was no scholarly discussion of the precise question addressed in this section. However, after a search of their minds and the literature, no one could find such a discussion.

tent with the whole of our constitutional tradition.¹⁶² A second narrow principle would provide relief only if a substantial proportion of those affected by the law are denied constitutional liberty. While this approach is sometimes defensible in cases in which laws are challenged by parties to whom they may be constitutionally applied, it is not defensible in cases in which the parties establish that the state has violated their constitutionally protected right.¹⁶³ Three other remedial approaches have been widely and legitimately used: provide relief only to named plaintiffs; strike the law as unconstitutional and allow the legislature to fashion a new approach to the problem; and fashion an order that defines and prohibits unconstitutional enforcement of the law while allowing other applications.

A. *The Salerno Rule: The Stealth Destruction of Constitutional Liberty*

In March 1986 Anthony Salerno and Vincent Cafaro were arrested and charged in a twenty-nine-count indictment alleging various violations in connection with their work with the Genovese crime family, La Cosa Nostra.¹⁶⁴ At their arraignment, the government asked to have them detained pursuant to a provision of the Bail Reform Act of 1984¹⁶⁵ that allows accused people to be detained if "no condition or combination of conditions will reasonably assure . . . the safety of any other person and the community."¹⁶⁶ They were detained and filed suit challenging the constitutionality of the Act under the Due Process Clause of the Fifth Amendment and the Excessive Bail Clause of the Eighth Amendment.¹⁶⁷ In October, Cafaro became a cooperating witness and was released to do covert work for the federal government.¹⁶⁸ In November, while the case was pending before the Supreme Court, Salerno was convicted on unrelated charges and sentenced to 100 years imprisonment.¹⁶⁹ These developments suggested that the defendants lacked standing to challenge the preventive detention provisions of the Bail Reform Act; Salerno was in jail for the rest of his life and Cafaro was on the street working for the government.¹⁷⁰ None-

162. See *infra* notes 172-201 and accompanying text.

163. See *infra* notes 202-222 and accompanying text.

164. *United States v. Salerno*, 481 U.S. 739, 743 (1987).

165. 18 U.S.C. §§ 3141-3156 (1994).

166. *Id.* § 3142(e).

167. *Salerno*, 481 U.S. at 746.

168. *Id.* at 757-58 (Marshall, J., dissenting).

169. *Id.* at 756.

170. *Id.* at 757-58.

theless, the Supreme Court considered and rejected Salerno and Cafaro's challenge to the Bail Reform Act.¹⁷¹

United States v. Salerno asserts that a statute may not be held unconstitutional on its face unless challengers demonstrate that "no set of circumstances exists under which the [law] would be valid."¹⁷² On the facts of the case, this language is at least dicta—a passing comment not essential to the decision of the case. The Court had at least two narrower grounds on which it could have dismissed Salerno and Cafaro's claim. First, it could have held, as the dissenters urged, that their claim was moot.¹⁷³ Second, it could have held that, as applied to Salerno and Cafaro, the law was constitutional and left open the possibility that the constitutionality of the law could be challenged in a subsequent case. Rather, the Court used this occasion of a moot claim, by defendants to whom the law legitimately could be applied, to announce a broad new rule of constitutional right and remedy. The *Salerno* holding is more accurately characterized as the Court speaking as "roving commissions assigned to pass judgment on the validity of the Nation's laws."¹⁷⁴ The Court reached out to declare a rule that was in no way essential to the decision of the case. The Court offered *no* precedent, authority, or reasoning to support this extraordinary proposition. The *Salerno* rule simply restates the rule, traditionally applied to constitutional challenges to state economic legislation, that a law must be upheld if any state of facts can be imagined in which it would be constitutional.¹⁷⁵ Typically, however, when the Court holds a statute unconstitutional, it is possible to imagine circumstances in which the rule might be validly and constitutionally applied.¹⁷⁶ Sa-

171. *Id.* at 745-55. Justices Marshall and Brennan, dissenting, argued that the claim was moot and that the Bail Act was unconstitutional. *Id.* at 755-67. For an application of the *Salerno* rule, see *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994), which held, in the alternative, that the plaintiff lacked standing to challenge military rules penalizing homosexuals, that the rules are constitutional, and that, under *Salerno*, the rules must be upheld because there are circumstances under which they could be constitutionally applied. *Id.* at 697. Judge Ginsburg, concurring and dissenting, would have held that if the plaintiff lacks standing the court should not consider the claim. *Id.* at 700-01 (Ginsburg, J., concurring in part and dissenting in part).

172. *Salerno*, 481 U.S. at 745.

173. *Id.* at 756 (Marshall, J., dissenting).

174. *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973) (holding that a state statute regulating certain political activities of state employees was not substantially overbroad or vague).

175. *Salerno*, 481 U.S. at 745.

176. For example, in *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), the Court struck down the poll tax as facially unconstitutional, without asking whether it might fairly be applied to a wealthy person, or even whether Mr. Harper was rich or poor. *Id.* at 666-67. In *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court struck the statute prohibiting marriage licenses for people with outstanding child support obligations, without in-

lermo extends the substantive rule of deference to state discretion to regulate economic affairs to cases in which the court has found that the law burdens a fundamental personal liberty without strong justification. The *Salerno* rule uses the remedial phase of constitutional adjudication to enshrine substantive constitutional principles wholly deferential to state power. The Ninth Circuit panel in *Compassion in Dying* initially relied on *Salerno* in reversing the district court's holding that Washington's ban on assisted suicide was unconstitutional.¹⁷⁷ After rehearing the case en banc, however, the Ninth Circuit reversed the panel's decision and rejected the *Salerno* test as being inappropriate for adjudicating the plaintiffs' constitutional challenge to Washington's statute.¹⁷⁸

quiring into the particular circumstances of the named plaintiff and without concluding that the statute could never be constitutionally applied. *Id.* at 388-91.

177. *Compassion in Dying v. Washington*, 49 F.3d 586, 591 (9th Cir.), *reh'g granted en banc*, 62 F.3d 299 (9th Cir. 1995), *rev'd*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996) (en banc); *see also supra* note 45 (discussing the Ninth Circuit's en banc decision). "The district court indeed conceded that there were circumstances in which the statute could operate constitutionally, for example to deter suicide by teenagers or to prevent fraud upon the elderly." *Id.*

178. *Compassion in Dying*, No. 94-35534, 1996 WL 94848, at *54 n.9. The Ninth Circuit en banc held that the provision of the Washington statute prohibiting the aiding of another person in attempting suicide was unconstitutional. *Id.* at *5. This provision, "as applied to the prescription of life-ending medication for use by terminally ill, competent adult patients who wish to hasten their deaths, violates the Due Process Clause of the Fourteenth Amendment." *Id.* In a footnote, the court further explained:

Declaring a statute unconstitutional as applied to members of a group is atypical but not uncommon. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (holding that state law permitting police officers to use deadly force to prevent the escape of felony suspects was unconstitutional as applied to suspects who pose no immediate threat to officers or others); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding Wisconsin's mandatory attendance law unconstitutional but only as applied to Amish children who have graduated from eight grade). Although the Court did not explicitly use the term "as applied," it did explicitly affirm the judgment of the Wisconsin Supreme Court, *id.* at 207, which struck down the statute only as applied to Amish children who had graduated from the eighth grade. *Wisconsin v. Yoder*, 182 N.W.2d 539 (Wis. 1971). Because we are not deciding the facial validity of [the Washington statute], there can be no question that the exacting test for adjudicating claims of facial invalidity announced in *United States v. Salerno*, 481 U.S. 739 (1987), is inapplicable here. . . . For that reason alone, we would reject Washington's suggestion that we use the *Salerno* test for adjudicating plaintiffs' constitutional challenge. Moreover, not only is there strong evidence that the Court does not generally apply the *Salerno* test, *see Michael C. Dorf, Facial Challenges to State and Federal Statutes*, 46 *Stan. L. Rev.* 235 (1994), but it is clear that it has applied a different test for judging the constitutionality of statutes restricting a woman's right to secure an abortion. *Casey*, 112 S. Ct. at 2829-30. Since the claimed liberty issue in this case is in many respects similar to the liberty issue involved in *Casey*, . . . we believe that the *Salerno* test would not in any event be the appropriate one for adjudicating a facial challenge to Washington's prohibition on assisted suicide.

No contemporaneous reaction to *Salerno* recognized this dramatic change in constitutional law. Rather, reaction to the case focused on the substantive holdings on due process and excessive bail and ignored the Court's articulation of a dramatic new rule of constitutional remedy.¹⁷⁹

Justice Scalia has subsequently affirmed his commitment to the *Salerno* rule that a law can be held unconstitutional only if "there exists no set of circumstances in which the . . . [law] can constitutionally be applied."¹⁸⁰ Guam adopted a law that prohibited all abortions except when two doctors confirm that the pregnancy would endanger the woman's life or seriously impair her health.¹⁸¹ The law was plainly unconstitutional under both *Roe v. Wade*¹⁸² and *Planned Parenthood v. Casey*,¹⁸³ and the lower courts so held.¹⁸⁴ The Supreme Court declined review.¹⁸⁵ Justice Scalia, joined by Chief Justice Rehnquist and Justice White, dissented, arguing that because the Guam statute could be constitutionally applied in some circumstances, such as to a woman seeking an abortion after the fetus was viable, the *Salerno* rule required that the statute be upheld against facial challenge.¹⁸⁶ Apart from *Sa-*

Id. at *54 n.9.

179. See, e.g., *The Supreme Court, 1986 Term: Leading Cases*, 101 HARV. L. REV. 119, 169-79 (1987) (arguing that *Salerno* was wrongly decided on the merits). Betsy K. Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 YALE L.J. 320 (1987) (discussing the *Salerno* Court's finding that the preventive detention sections of the Bail Reform Act of 1984 did not violate either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment).

180. *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 113 S. Ct. 633, 633 (1992) (mem.) (Scalia, J., dissenting).

181. *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1367 (9th Cir.) (citing Guam Pub. L. No. 20-134 (1990)), *withdrawn*, 1992 U.S. App. LEXIS 7599 (9th Cir.), *and amended*, 1992 U.S. App. LEXIS 13, 490 (9th Cir.), *cert. denied*, 113 S. Ct. 633 (1992).

182. 410 U.S. 113 (1973).

183. 112 S. Ct. 2791 (1992); see *supra* note 13.

184. See *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422 (D. Guam App. Div. 1990), *aff'd*, 962 F.2d 1366, 1369 (9th Cir.) ("The district court held that *Roe v. Wade* applied, and granted summary judgment for the plaintiffs, permanently enjoining enforcement of the Act. We Affirm."), *withdrawn*, 1992 U.S. App. LEXIS 7599 (9th Cir.), *and amended*, 1992 U.S. App. LEXIS 13, 490 (9th Cir.), *cert. denied*, 113 S. Ct. 633 (1992).

185. *Ada*, 113 S. Ct. at 633.

186. *Id.* at 633-34 (Scalia, J., dissenting). Chief Justice Rehnquist and Justices White, Scalia, and Thomas had opposed the reaffirmance of *Roe* in *Casey*. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2855 (1992) (Rehnquist, C.J., concurring in part and dissenting in part). Justice Thomas was the only *Casey* dissenter who did not join the *Ada* dissent. *Ada*, 113 S. Ct. at 633. His failure to join the dissent may have been a tactical maneuver rather than indicative of his true views. Had he joined the *Ada* dissent, the Court would have

lermo itself, the dissenters could offer little authority for this extraordinary rule.¹⁸⁷

The *Salerno* rule has most often been discussed in lower court decisions considering post-*Casey* challenges to laws restricting access to abortion.¹⁸⁸ In these cases, states argue that legal restrictions on abortion may be held unconstitutional on their face only if “no set of circumstances exists under which the Act would be valid.”¹⁸⁹ The challengers, on the other hand, argue that, under *Casey*, an abortion law is unconstitutional on its face if, “in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.”¹⁹⁰ Only the Fifth Circuit has applied the *Salerno* rule in these cases, while the Third and Eighth Circuits have held that laws must be held invalid on their face if they are unconstitutional in a large fraction of cases.¹⁹¹ Similarly, a majority of the Supreme Court, while not squarely resolving the issue, has strongly suggested that a law restricting access to abortion is invalid on its face if, “in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.”¹⁹²

The implications of the *Salerno* rule are breathtaking. Petitioners in *Chemical Waste Management, Inc. v. Environmental Protection Agency*¹⁹³ challenged government rules that allowed the Environmental Protection Agency (EPA) to close down a Superfund waste site, without providing notice of the charges or an opportunity to contest the finding.¹⁹⁴ The court conceded that “petitioners certainly raise seri-

heard the case and, presumably, affirmed the lower court decisions striking the Guam law as unconstitutional.

187. *Ada*, 113 S. Ct. at 634. Justice Scalia cited *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), in which Justice O’Connor used *Salerno* as an alternative basis for upholding the constitutionality of a state law prohibiting public hospitals from allowing performance of abortions. *Ada*, 113 S. Ct. at 634 (citing *Webster*, 492 U.S. at 524 (O’Connor, J., concurring)). Justice Scalia’s citation of O’Connor’s opinion in *Webster* is questionable on this point. Because she held that the law challenged in *Webster* violated no constitutional right, the principle of *Salerno* was not necessary to her conclusion.

188. *See, e.g.*, *Planned Parenthood v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995); *Casey v. Planned Parenthood*, 14 F.3d 848, 863 n.21 (3d Cir. 1994); *Barnes v. Moore*, 970 F.2d 12, 14 & n.2 (5th Cir.), *cert. denied*, 113 S. Ct. 656 (1992).

189. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

190. *Casey*, 112 S. Ct. at 2830; *see also* *Miller*, 63 F.3d. at 1456-58 (characterizing this dispute and summarizing cases).

191. *See supra* note 188.

192. *Fargo Women’s Health Org. v. Schafer*, 113 S. Ct. 1668, 1669 (1993) (O’Connor, Souter, JJ., concurring in the denial of a stay pending appeal); *see* discussion *infra* text accompanying note 220.

193. 56 F.3d 1434 (D.C. Cir. 1995).

194. *Id.* at 1434.

ous—indeed grave—questions as to the adequacy of these procedures.”¹⁹⁵ Nonetheless, the court denied relief.¹⁹⁶ Recognizing that *Salerno* required that plaintiffs “establish that no set of circumstances exists under which the Act would be valid,”¹⁹⁷ the Court stated:

We discern at least one scenario where the off-site rule would be procedurally valid. The rule suffers no procedural infirmities where a facility does not dispute the initial finding of unacceptability. Under such circumstances, the procedural safeguards petitioners allege are lacking become unnecessary for the simple reason that the facility is not challenging the finding in any respect.¹⁹⁸

This conclusion underscores the absurdity of *Salerno*. The fact that some people accept that a state determination adverse to them is just and reasonable does not deny the legitimacy of the due process claims of those who believe that the government has made a mistake. Procedural due process is all about cases in which the government makes a mistake. The fact that the government sometimes acts fairly does not obviate the individual’s interest in an opportunity to protest errors. In *Goldberg v. Kelly*,¹⁹⁹ the record showed that less than two percent of the welfare recipients whose benefits were terminated requested a hearing to protest.²⁰⁰ The Court nonetheless held that the Constitution required hearings for those few people who believed that the state acted in error.²⁰¹

In sum, the *Salerno* rule represents a radical and unwise departure from established constitutional law. The government’s legitimate reason to restrict or ban suicide in some situations does not answer Dr. Roe’s constitutional claims.

195. *Id.* at 1437.

196. *Id.* at 1438.

197. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

198. *Chemical Waste Management*, 56 F.3d at 1437.

199. 397 U.S. 254 (1970).

200. See Brief for Appellee at 57, *Goldberg v. Kelly*, 397 U.S. 254 (1970). From January 20, 1969, to May 30, 1969, New York City terminated aid to 60,000 families; just over a thousand of these people requested a prior hearing available to them under the district court’s injunction. *Id.* Over half of these persons prevailed in the pretermination hearing. *Id.*

201. *Goldberg*, 397 U.S. at 267.

B. Refuse Relief Unless the Challenged Law Denies the Constitutional Rights of Most People It Affects

Bedrock principles of American constitutional and common law require that courts only decide live controversies.²⁰² American constitutional law recognizes two important exceptions to this principle. First, where state policies inflict harms that resolve themselves quickly, courts do not deny review. State-inflicted harms “capable of repetition yet evading review” are reviewable where challengers presented live claims when the suit was filed.²⁰³ Second, and more controversial, people asserting First Amendment rights can sometimes challenge laws that broadly deter exercise of those rights.²⁰⁴ The First Amendment overbreadth doctrine is an exception to the general rule that individuals may not litigate the rights of third parties. As the Court explained,

an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.²⁰⁵

The notion that parties who lack personal standing can enlist a court to strike a statute as facially unconstitutional is “strong medicine.”²⁰⁶ *Broadrick v. Oklahoma* limited the rights of parties, not personally affected by a law, to challenge it as unconstitutional on its face, by holding that a law may not be struck down as unconstitutional on its face unless its unconstitutional applications are “not only . . . real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”²⁰⁷

202. See *supra* note 137 and accompanying text.

203. See *supra* notes 142-144 and accompanying text.

204. See *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (striking down a statute prohibiting all picketing because it banned peaceful picketing protected by the First Amendment); *Board of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) (unanimously invalidating a rule proscribing all “First Amendment activities” in an airport terminal). See generally *supra* note 161.

205. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985) (holding that, because obscenity is unprotected expression under the First Amendment, a state may enact regulations that outlaw pornographic movie theaters as moral nuisances); see also *NAACP v. Button*, 371 U.S. 415, 432 (1963) (holding that a ban on barratry is invalid because it may prohibit exercise of First Amendment rights “whether or not . . . the petitioner has engaged in privileged conduct”).

206. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); see *supra* note 174.

207. 413 U.S. at 615.

Plaintiffs in *Broadrick* were state employees who challenged a law prohibiting civil servants from engaging in political activity.²⁰⁸ The Court found that the plaintiffs had not been prevented from engaging in constitutionally protected activity.²⁰⁹ It rejected their claim that the law should be held invalid on its face because it was potentially applicable to constitutionally protected activity.²¹⁰ In effect, the Court held that the plaintiffs were not entitled to raise the claims of third parties, people who had been disciplined for engaging in constitutionally protected activities, who were not among the named plaintiffs. Similarly, the Court has refused to strike down trespass, breach of the peace, or other ordinary criminal laws where the number of instances in which these laws may be applied to suppress protected expression is small in comparison to the laws' legitimate targets of unprotected behavior.²¹¹

Reasonable people disagree about whether this principle of "substantial overbreadth" is justifiable where parties do not allege state violation of rights personal to them. On the one hand, some argue that people have the right to be judged under a constitutionally valid law.²¹² On the other hand, as the Court has recognized, if the law is valid as applied to the party in litigation, it should not be held unconstitutional, even if it is possible to imagine other circumstances in which it could not be applied constitutionally.²¹³

In *Planned Parenthood v. Casey*,²¹⁴ the Court extended the "substantial overbreadth" requirement to situations in which the actual parties demonstrated violation of their own rights.²¹⁵ Plaintiffs challenged a law requiring that women seeking abortions listen to a doctor recite a state mandated anti-abortion message twenty-four hours

208. *Id.* at 602.

209. *Id.* at 617-18.

210. *Id.* at 618.

211. *Cox v. Louisiana*, 379 U.S. 559 (1965) (upholding statute prohibiting picketing "near" courthouse against First Amendment challenge and describing the law as a "precise, narrowly drawn" regulation, but holding that prosecution was unconstitutional as applied to a demonstration that police officials had indicated was permissible).

212. *See Monaghan, supra* note 161, at 3; *see also Dorf, supra* note 161, at 238, 245-48.

213. The Supreme Court has long declined to hold laws unconstitutional simply because they are capable of unconstitutional application. *Yazoo & M.V.R.R. v. Jackson Vingar Co.*, 226 U.S. 217 (1912), is the classic case. The railroad challenged the constitutionality of a law requiring them to promptly settle all claims for lost or damaged goods. *Id.* at 217. It argued that the statute was invalid as applied to fraudulent or frivolous claims, but did not contest the validity of the claim against it. *Id.* at 217-19. The Court rejected the facial challenge, stating, "It suffices . . . to hold that, as applied in cases like the present, the statute is valid." *Id.* at 219-20.

214. 112 S. Ct. 2791 (1992).

215. *Id.* at 2825-26.

before receiving an abortion.²¹⁶ Plaintiffs demonstrated that the law imposed a substantial burden on their ability to obtain an abortion, and was designed and intended to do so.²¹⁷ The Court acknowledged that these findings were "troubling," but concluded that the facts had not demonstrated "that the waiting period constitutes an undue burden."²¹⁸

Where individual parties demonstrate that a state law is unconstitutional as applied to them, it seems wrong to demand that they demonstrate that the law is unconstitutional as applied to most of those whom it affects. In *Casey*, the Court rejected the state's argument that Pennsylvania's highly tailored requirement of spousal notification of a proposed abortion would be constitutional as applied to ninety-nine percent of the women affected. The Court held that "the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."²¹⁹ If the law is unconstitutional as applied to *any* women affected by it, it is unconstitutional on its face.

In subsequent cases, the Court has made plain that a law restricting access to abortion must be held unconstitutional on its face if it is invalid "in a large fraction of the cases" to which it applies.²²⁰ This approach wisely rejects the *Salerno* rule. But, at the same time, it

216. *Id.* at 2803.

217. The Supreme Court accepted the trial court's finding that

because of the distances many women must travel to reach an abortion provider, the practical effect will often be a delay of more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor. The District Court also found that in many instances this will increase the exposure of women seeking abortions to "the harassment and hostility of anti-abortion protestors demonstrating outside a clinic." . . . [T]he District Court found that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be "particularly burdensome."

Id. at 2825.

218. *Id.*

219. *Id.* at 2799.

220. On remand, the Third Circuit held that a provision should be struck as unconstitutional if the "plaintiff show[s] an abortion regulation would be an undue burden 'in a large fraction of the cases.'" *Casey v. Planned Parenthood*, 14 F.3d 848, 863 n.21 (3d Cir.), *stay denied*, 114 S. Ct. 909 (1994). In denying an application for a stay of the Third Circuit's mandate, Justice Souter noted that the Third Circuit "Court of Appeals's construction of the opinion and mandate . . . is the correct one." *Casey*, 114 S. Ct. at 911. Similarly, in *Fargo Women's Health Org. v. Schafer*, 113 S. Ct. 1668, 1669 (1993) (O'Connor, J., concurring), the Court denied an application for a stay. Justice O'Connor stated that "a law restricting abortions constitutes an undue burden, and hence is invalid, if, 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.'" *Id.*

seems wrong to deny individual constitutional rights unless the affected individual can demonstrate that the law, unconstitutional as applied to her, is also unconstitutional in most cases to which it applies.

The Court in *Casey* sought to craft a compromise on the controversial constitutional issue of state restrictions on access to abortion. The impulse to seek compromise is common, understandable, and, indeed, admirable.²²¹ Nonetheless, where the parties to the litigation demonstrate that the law is unconstitutional as applied to them, it is difficult to understand why they should be denied relief. It is disturbing that courts would uphold a law denying the constitutionally protected liberty of parties to the litigation simply because the law could validly be applied in a significant number of cases.

The trial court in *Compassion in Dying* adopted this numerical approach in holding that the Washington ban on assisted suicide was unconstitutional on its face.²²² It is not clear that this conclusion was correct. As Part I argues, the court's substantive conclusion that the ban on physician-assisted death is unconstitutional as applied to Dr. Roe, and others served by *Compassion in Dying*, seems correct. The ban on assisted suicide, however, also protects many other people in different situations. For example, it protects those who are not terminally ill, or who seek death because of untreated pain or depression. It is not clear that the ban on assisted suicide is unconstitutional "in a large fraction of the cases" to which it applies. Certainly, there is no evidence in the court's decision to support this conclusion.

More important, if Dr. Roe's constitutional rights were infringed upon by Washington's ban on assisted suicide, whether or not the law is constitutional in most of its applications should be irrelevant.

C. *Limit Remedies to Named Parties*

Another narrow remedy for constitutional violation holds that a challenged state policy is unconstitutional as applied to the facts of a particular case. This approach respects state discretion and, at the same time, protects the individual liberty of the litigating party. The Court followed this approach in *Cleburne v. Cleburne Living Center*,

221. Sylvia A. Law, *Abortion Compromise: Inevitable and Impossible*, 1992 U. ILL. L. REV. 921 (expressing doubt about the possibility and desirability of a compromise on the abortion issue).

222. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1463 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir.), *reh'g granted en banc*, 62 F.3d 299 (9th Cir. 1995), *rev'd*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996) (*en banc*); *see also supra* notes 45, 178 (discussing the Ninth Circuit's *en banc* decision).

Inc.,²²³ in finding that a zoning ordinance that excluded a "hospital for the feeble-minded" was irrational as applied to the particular group home for the mentally retarded that challenged the ordinance.²²⁴

Often, however, a holding that a policy is invalid as applied to particular individuals is inadequate to protect constitutional rights. The dissenters in *Cleburne* argued powerfully that it is wrong to "leave standing a legislative Act resting on 'irrational prejudice' . . . , thereby forcing individuals in the group discriminated against to continue to run the Act's gauntlet."²²⁵ The preceding discussion of justiciability argues that individually applied remedies are not adequate to protect constitutional rights in relation to state bans on abortion, refusal of necessary medical treatment, or physician-assisted suicide.²²⁶

This is not to say that individually applied remedies are never appropriate. For example, a zoning ordinance that requires permission for all group living arrangements is not unconstitutional on its face, simply because it could be applied unconstitutionally to deny a permit to a group home for the mentally retarded, in a neighborhood where fraternity houses are allowed. Similarly, Michael Dorf discusses a hypothetical mandatory Second Opinion Act, requiring the concurrence

223. 473 U.S. 432 (1984).

224. *Id.* at 450. The Court explained:

We inquire first whether requiring a special use permit for the Featherston home in the circumstances here deprives respondents of the equal protection of the laws. If it does, there will be no occasion to decide whether the special use permit provision is facially invalid where the mentally retarded are involved, or to put it another way, whether the city may never insist on a special use permit for a home for the mentally retarded in an R-3 zone. This is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments.

Id. at 447.

225. *Id.* at 474 (Marshall, J., dissenting); *see also* *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (holding a provision disenfranchising various felons unconstitutional on its face because it was motivated, in part, by a desire to disenfranchise African-Americans; the legislature remained free to disenfranchise some felons through a statute motivated by some purpose other than racial discrimination); *see* *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (rejecting the view that the constitutional violation could be remedied by extending the franchise to the named plaintiffs or to the class of African-American felons). In many cases the Court has held rules facially unconstitutional because they are unconstitutional as applied to the named plaintiff, even though they might be valid as applied to others whom they affect. *See, e.g.*, *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (declaring as unconstitutional a law that denied unwed fathers the right to refuse consent to adoption, even though many, perhaps most, unwed fathers might legally be denied the right to protest adoption); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647-48 (1974) (holding that a law requiring pregnant teachers to quit their jobs was unconstitutional, even though there might be legitimate reasons to require some to leave).

226. *See supra* notes 126-160 and accompanying text.

of two doctors for all major nonemergency surgery.²²⁷ I agree with his conclusion that such a law would be constitutional on its face, and unconstitutional as applied to women seeking abortions. A general murder statute is not unconstitutional on its face because it is unconstitutional as applied to a person like Dr. Roe's physician who assists her in dying.

In sum, Part III of this Article has sought to demonstrate that the *Salerno* rule—that a law can never be held unconstitutional unless it is unconstitutional in every conceivable application—is wrong. Second, it has sought to show that where named plaintiffs demonstrate that a law is unconstitutional as applied to them, it is wrong to deny them relief simply because it would be constitutional as applied in some or even many cases. Third, while individually applied remedies are sometimes appropriate for an unconstitutional law, sometimes such remedies are inadequate. The final two sections address the legitimate choices confronting a court that concludes that a law is unconstitutional as applied to the party before it, but constitutional in some of its applications, and where individually applied remedies are not effective to protect constitutional liberty.

D. Strike the Unconstitutional Law and Let the Legislature Try Again

The broadest remedy for a state policy that is unconstitutional as applied to some individuals is to hold the policy unconstitutional on its face. The trial court in *Compassion in Dying* used this remedy in holding that the prohibition on assisted suicide was unconstitutional on its face.²²⁸

At the most obvious level, a judicial determination that a law is unconstitutional on its face represents a substantial infringement on governmental discretion and democratic choice. From a more searching perspective, a holding that a government policy is facially uncon-

227. Dorf, *supra* note 161, at 275-76.

228. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1467 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir.), *reh'g granted en banc*, 62 F.3d 299 (9th Cir. 1995), *rev'd*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996) (en banc).

The court declares RCW 9A.36.060 unconstitutional because it places an undue burden on the exercise of a protected Fourteenth Amendment liberty interest . . . [and] because it violates the right to equal protection under the Fourteenth Amendment by prohibiting physician-assisted suicide while permitting the refusal or withdrawal of life support systems for terminally ill individuals.

Id. On rehearing en banc, the Ninth Circuit declined to hold the statute facially invalid, but rather held the statute unconstitutional "as applied to the prescription of life-ending medication for use by terminally ill, competent adult patients who wish to hasten their deaths." No. 94-35534, 1996 WL 94848, at *5; *see also supra* note 178 (discussing the Ninth Circuit's en banc holding).

stitutional can be viewed as respecting democratic choice by inviting lawmakers to reformulate their policy in narrower terms, free from judicial predetermination of the constitutionality of alternative approaches.

The Washington legislature could respond to the invalidation of its blanket ban on assisted suicide by adopting a new, more carefully tailored and limited statute. The new statute would then be subject to further judicial review. Washington has not done so, and indeed it appears that there has been little public debate on these issues in that state since the federal court's decision. Perhaps the lack of public or legislative response reflects the fact that the case was appealed.²²⁹ Lawmakers may have hoped that the appellate courts would save them from the need to address a politically controversial issue.

E. Explain Why the Law Is Unconstitutional and Enjoin Unconstitutional Applications

While striking a law as unconstitutional on its face is sometimes appropriate, in many cases it is not. To take a dramatic example, if the only Washington law that interfered with Dr. Roe's ability to seek her physician's help in dying was the criminal prohibition against murder, it would plainly be inappropriate to redress her constitutional claim by invalidating that statute.²³⁰ However, to say that facial invalidity is an inappropriate remedy when most of the applications of the law are constitutionally permissible is not the same as saying, as the *Casey* Court did, that the plaintiff, to whom the law may not constitutionally be applied, has no remedy unless she can demonstrate that the law is unconstitutional in most of its applications.²³¹

Finally, when a court determines that a law is unconstitutional as applied to some, but not all, of the situations that it governs, it can attempt to explain what is and what is not constitutional. For example, rather than issue a broad holding striking the ban as facially invalid, or a narrow holding finding it unconstitutional only as applied to the named plaintiffs, the *Compassion in Dying* court could have declared it unconstitutional to prosecute people who provide assisted dying in the circumstances specified in the *Compassion in Dying* guidelines.

229. *Compassion in Dying*, 49 F.3d at 586 (9th Cir.), *reh'g granted en banc*, 62 F.3d 299 (9th Cir. 1995), *rev'd*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996) (*en banc*).

230. I am indebted to Professor Lewis Kornhouser for this obvious, but important, observation.

231. *See supra* notes 214-219 and accompanying text.

The difficulty with this approach is that it places the court in a highly legislative role. Nonetheless, it is an approach that the Supreme Court has often taken. For example, a major criticism of *Roe v. Wade*²³² rests on the observation that the Court provided state legislatures with too much guidance about what sorts of restrictions on access to abortion would be constitutionally permissible and what sorts would not.²³³ While these problems are serious, this remedial alternative is often preferable to the other approaches available.

Consider, for example, the classic case, *New York Times Co. v. Sullivan*.²³⁴ Having reached the substantive conclusion that a damage judgment against the *New York Times* violated the First Amendment,²³⁵ the Court could simply have held that application of the libel law was unconstitutional on the particular facts of the case.²³⁶ Alternatively, the Court could have held that the entire common law of libel was unconstitutional on its face and invited legislatures to formulate liability rules that both respected First Amendment values and provided protection from defamation.²³⁷ The Court rejected both of these approaches and, rather, sought to explain, in some detail, the circumstances in which libel actions against public officials were constitutionally permissible.²³⁸

Similarly, in *Bellotti v. Baird*,²³⁹ the Court considered a state law requiring that parents consent to their daughter's abortion.²⁴⁰ The

232. 410 U.S. 113 (1973).

233. Archibald Cox, for example, wrote:

My criticism of *Roe v. Wade* is that the Court failed to establish the legitimacy of the decision by not articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment based upon the evidence currently available from the medical, physical, and social sciences. [The opinion is] like a set of hospital rules and regulations, whose validity [will] be destroyed with new statistics upon the medical risks of childbirth and abortion or new advances in providing for the separate existence of a foetus. Neither historian, layman, nor lawyer will be persuaded that all the details prescribed in *Roe* [are] part [of] the Constitution.

ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 113-14 (1974).

234. 376 U.S. 254 (1964).

235. U.S. CONST. amend. I. The First Amendment reads in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." *Id.*

236. *Sullivan*, 376 U.S. at 283-92. Such a holding would be analogous to the approach adopted by the Court in *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1984), *see supra* note 224.

237. That approach would be comparable to the one adopted by the Court in *Thornhill v. Alabama*, 310 U.S. 88 (1940), *see supra* note 204.

238. *Sullivan*, 376 U.S. at 283-92.

239. 443 U.S. 622 (1979).

240. *Id.* at 625-26 (citing MASS. GEN. LAWS ANN., ch. 112, §§ 12Q, 12T, 12U (West Supp. 1979)).

Court found the law unconstitutional and could have just said so.²⁴¹ Instead, the Court offered a rather detailed statement of the conditions under which a state might constitutionally involve parents in a young woman's decision to have an abortion.²⁴² So, too, in *Regents of the University of California v. Bakke*,²⁴³ the Court could have ended its opinion with its conclusion that the defendants' policy was unconstitutional.²⁴⁴ Rather, Justice Powell offered a detailed explanation of his understanding of constitutionally acceptable affirmative action programs.²⁴⁵

Justice Harlan, concurring in *Welsh v. United States*,²⁴⁶ provided a wise discussion of these issues.²⁴⁷ *Welsh* was a conscientious objector, whose objections to war did not rest on religious grounds.²⁴⁸ The Universal Military Training and Service Act provided exemption from mandatory military service for any person

who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.²⁴⁹

The majority of the Court read the statute to exempt from military service "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."²⁵⁰ Justice Harlan did not believe that the congressional words could bear the meaning that the Court attributed to them and hence confronted the constitutional claim.²⁵¹ He concluded that limiting the draft exemption "to those opposed to war in general because of theistic be-

241. *Id.* at 651.

242. *Id.* at 643-44.

243. 438 U.S. 265 (1978).

244. *Id.* at 320.

245. *Id.* at 291-300.

246. 398 U.S. 333, 344 (1970) (Harlan, J., concurring).

247. I am indebted to Professor Larry Kramer for pointing me to this discussion.

248. 398 U.S. at 341.

249. *Id.* at 336 (quoting the Universal Military Training and Service Act of 1948, § 6(j), 62 Stat. 612, 50 U.S.C. App. § 456(j) (repealed 1973)).

250. 398 U.S. at 344; *see also* *United States v. Seeger*, 380 U.S. 163, 173-80 (1965) (holding that the test of religious belief under the Universal Military Training and Service Act is whether it is a sincere and meaningful belief parallel to belief in God).

251. 398 U.S. at 345 (Harlan, J., concurring).

liefs runs afoul of the religious clauses of the First Amendment,²⁵² and particularly the requirement that the government must be neutral between religious and nonreligious beliefs.²⁵³

Having concluded that the statute was unconstitutional as applied to some, including Welsh, but not all of those affected by it, Justice Harlan then confronted the remedial question.²⁵⁴ "[T]here exist two remedial alternatives: a court may either declare [the exemption] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion."²⁵⁵

His conclusion that the exemption should be extended to Welsh was based largely on practical considerations, including the "intensity of commitment" to the policy reflected in the exemption and "the degree of potential disruption of the statutory scheme."²⁵⁶ And, having decided that the exemption should be extended to protect Welsh, he adopted, as a constitutional norm, a standard identical to that fashioned by the majority as a matter of statutory construction.²⁵⁷

The decisions in *Welsh v. United States*, *New York Times Co. v. Sullivan*, *Roe v. Wade*, *Bellotti v. Baird*, and *Regents of the University of California v. Bakke* are all legislative. Reasonable people have challenged the particular rules articulated in each case. At the same time, no one argues that the Court should have simply declared any of these laws unconstitutional without saying more. Despite our formal and real respect for democratic process and majority rule, we appreciate guidance, and recognize that courts have broad discretion in the remedial phase of constitutional litigation.

An alternative approach to these remedial issues is to allow the plaintiffs to specify the scope of the remedy in their definition of the class affected.²⁵⁸ As a functional matter, this empowers plaintiffs to write the law. On the one hand, this might be seen as giving plaintiffs

252. *Id.*

253. *Id.* at 356-57.

254. *Id.* at 361.

255. *Id.*

256. *Id.* at 365. Justice Harlan also relied on Justice Brandeis's decision in *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931), in which the Court held that the state denied petitioner the equal protection of the law by taxing him more heavily than his competitors. *Welsh*, 398 U.S. at 361-62 & n.15. Equality could be achieved either by decreasing the petitioner's taxes or increasing the taxes of his competitors. *Bennett*, 284 U.S. at 247. Based on the impracticality of collecting increased taxes from competitors, the Court held that petitioner was entitled to recover the overpayment. *Id.*

257. *Welsh*, 398 U.S. at 366-67.

258. This alternative was not explicitly considered in *Compassion in Dying* because the plaintiff never sought class certification. See *Compassion in Dying v. Washington*, 49 F.3d

undue power to define the scope of constitutional right, and to enlist courts in overriding legislative judgment. On the other hand, plaintiffs will have powerful incentives to define the affected class narrowly so as to enhance the power of their substantive claims. Plaintiffs who define a class broadly to include individuals with weak claims run the risk that all relief will be denied. People left unprotected by plaintiffs' narrow and cautious definition of class and remedy always remain free to assert broader claims in subsequent cases.²⁵⁹

In sum, where a court finds that a law violates the constitutional rights of the parties before it, but may be applied legitimately to others, it has three legitimate remedial choices. First, it may issue an order protecting the named parties and the class they represent. Second, it may hold the statute unconstitutional on its face. Third, it may describe the constitutionally permissible circumstances in which the objectives of the law may be pursued. If a challenged law violates the constitutional rights of the parties before it, courts should not deny relief on the grounds that it is possible to conceive of constitutional applications of the law, or even if most applications of the law are constitutional. The question of whether or not most applications of the challenged law are constitutional is relevant only to inform a court's choice of whether to provide an individually applied or a facial remedy. A broad range of factors can legitimately influence whether a court should simply strike a law as unconstitutional on its face, or seek to explain the limits of constitutional authority. Once a constitutional violation has been demonstrated, therefore, courts have broad authority to fashion appropriate remedies.²⁶⁰

CONCLUSION

Dr. Roe and other people in circumstances described by the Compassion in Dying guidelines have a powerful liberty and privacy interest in seeking physician assistance in hastening death. The justifications for state interference with individual autonomy are weak.

586 (9th Cir.), *reh'g granted en banc*, 62 F.3d 299 (9th Cir. 1995), *rev'd*, No. 94-35534, 1996 WL 94848 (9th Cir. Mar. 6, 1996) (*en banc*).

259. For example, Compassion in Dying's guidelines deny assisted suicide to patients whose friends and family members object. *See supra* note 5. A class certification that incorporated the Compassion in Dying guidelines would not protect an individual who sought physician help to hasten dying over the objection of friends and family. *See supra* note 5. Such an individual, or class of individuals could challenge that exclusion.

260. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31-32 (1971) (holding that in the absence of *de jure* segregation, a school board is not required to change the racial composition of the student body).

However, there are other situations in which state interests in prohibiting assisted suicide are much stronger.

In these circumstances, courts should not refuse to vindicate Dr. Roe's constitutional liberty simply because the law might validly be applied to others. At a minimum, courts should provide prompt relief to named parties whose rights are violated. In addition, in these circumstances courts should provide more general relief in one of two ways. The law that is unconstitutional as applied to some, but not all, of those it affects, may be struck down as unconstitutional on its face, inviting legislative revision. Alternatively, the court, with the assistance of the parties before it, may define the circumstances in which it would be unconstitutional to apply the law and forbid application in such cases. The choice between these alternatives is a matter of sound judicial discretion, informed by respect for democratic processes and vigilance in protecting individual constitutional liberty.